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## **Taking Back the Constitution - Part 15 – Which laws are constitutional?**

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**“Are you serious? Are you serious?”**

I have had occasion to cringe when I hear sub-literate answers many US senators and representatives give when they’re asked “what is the constitutional justification for a law?”

When asked about her justification for the healthcare bill, Speaker Nancy Pelosi said “Are you serious? Are you serious?”, and turned to another question without answering.<sup>1</sup> Representative Pelosi obviously does not intend to consider the Constitution in her lawmaking.

Sen. Roland Burris (D-Ill.) claims the “general welfare” language in the preamble of the Constitution gives Congress the authority to require every American to purchase health insurance, as mandated in the health care bill.<sup>ii</sup> Apparently Senator Burris understands neither the function of a preamble nor the purpose of all the specifics that follow.

Representative Carol Shea-Porter (D-NH-1) justified the health bill with the statement, “So, the Constitution did not cover everything.”<sup>iii</sup> Representative Shea-Porter does not appear to understand that the basic purpose of a written constitution is to *limit* the powers of government.

Senator Merkley (D-OR) claimed, “The very first enumerated power gives the power to provide for the common defense and the general welfare. So it’s right on, right on the front end.”<sup>iv</sup> Senator Merkley, with one sweeping statement, tosses all the following enumerated powers that follow this clause, and over 200 years of jurisprudence, in the trash.

Not all our Congressmen are so ill-informed about the fundamental laws they swear to protect. However, even a few displaying this level of ignorance begs the question of “who is minding the fort?”

## What were these congressmen thinking?

The text of the Constitution starts with:

**We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.**

We can see exactly the clause to which Senator Burris referred. Except, he apparently does not understand that the function of a preamble is to describe in very general terms the objectives of a document; not lay out actual rules. The specific actual rules of the Constitution are delineated in its seven articles and 27 amendments -- that follow the preamble.

Senator Merkley also needs a bit of review. The laws valid under the Constitution are primarily found in:

**Article 1. Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.**

The 17 clauses that follow describe the specific functions the federal government may address.

Our federal lawmakers should read Article 1, Section 8 every week as it, specifically defines the scope of federal law. Few federal lawmakers consider its narrow scope before enacting law.

## **Congress refuses to identify its Constitutional reasoning.**

In every session between 1994 and 2010, Congressman John Shadegg (R-AZ-3) has introduced the same bill into Congress (H.R.450 in 2010). This bill would require *every bill* Congress writes to identify the specific, enumerated Article and paragraph (or Amendment) in the Constitution that *allows* it to impose that law on U.S. citizens. Every session saw that bill go down to early defeat.

It is apparent that most current Congressmen have no intention of following the Constitution they swore to uphold. They have grabbed power that, by any plain reading of the Constitution, they should not have.

It appears that the President is also ignoring his oath to defend the Constitution and passing the buck to the Supreme Court.

Some of the Supreme Court justices take the Constitution seriously. Others make decisions based on how they would personally like to see a case to be resolved, and then look for justification.

## **The role of the States.**

Our Constitution was created when the people of nine of the then 13 states ratified it in conventions. It may be viewed as an agreement by all the ratifying people, or as a compact between the people in 13 states. I will view it as a compact between the states, even though the arguments for the other view have reasonable supporting evidence.<sup>v</sup>

We have added many states, but the Constitution applies equally to all. Only the states may alter the Constitution.<sup>vi</sup> I will suggest that in the absence of a designated referee, the parties to that compact must be its ultimate source of interpretation.

Many people think the Supreme Court has the last word on the Constitution. That leaves the states in the weakened position of pleaders before an arm of the federal government. A state disputing the legal powers of the federal government is entitled to an impartial judge. Thus the entire Court must recuse itself. In this case only the peers authoring the Constitution have the right to resolve its interpretation.<sup>vii</sup>

The states have often been derelict in defending their prerogatives under the Constitution, but they still, alone, have the original authority.<sup>viii</sup>

Except before the Civil War era, states have seldom exercised their right to question the validity of a federal law and claim it is not constitutional. States have the power to nullify unconstitutional federal laws within their own territories, but have often found it easier to just ignore them.

When one looks at the penalties and rewards to states that exhibit acquiescent behavior, ignoring Constitutional violations is easy. The federal government, by handing out cash, essentially

bribes states to ignore its overreaching. The federal government often includes cash or subsidy that is only available if state accepts certain rules.

One example is the 2009 “stimulus” program that was expected to bring nearly a billion dollars to Alaska. That its cost to Alaska citizens will ultimately be about 2.2 billion dollars is seldom mentioned. There was considerable pressure to accept every penny of the money, even if it was misguided and whole program unconstitutional. Failure to accept the money would have had Alaskans paying money to other states with no benefit to themselves.

In the few cases where nullification has been threatened, the federal response has generally been to remove the law or ruling. This happened with the Alien and Sedition laws in 1802, the embargo in 1809, the discriminatory tariff of 1828, and the Wisconsin nullification of 1859.

A state also may propose a Constitutional amendment to clarify or further restrict the federal government. They must get 2/3 of the states to agree to call a constitutional convention. This process has not been used for any amendments.

### **That pesky commerce clause.**

Article 1, section 8, includes the clause that allows the federal government the power:

**To regulate commerce with foreign Nations, and among the several states, and with the Indian tribes.**

At the time the Constitution was written, the word “regulate,” meant to “make regular.” It was intended to permit ordinary trade without interference by the states. We would now say “regularize.” It did not mean interference in commerce within a state that could affect trade. The intent of this provision was to establish a “free trade zone.”

Congress has perverted this provision intended to prevent states from restricting trade with other states, into a myriad of laws that specify how production may be done, the conditions of workers, and a host of trying and duplicative rules even within individual states.

This seemingly minor clause has been interpreted to justify the expansion of the federal government into many areas that were intended to be the sole prerogative of the states. It has become the clause that may obliterate our Republic by creating a unitary government with tyrannical powers.

### **To whom should the Supreme Court defer?**

In order to be very generally applicable the Constitution often uses broad general language which is intentionally imprecise. Inquiry into the original meaning and interpretation may not result in a rule to be applied to a particular case. When the Constitution does not speak on a point in dispute, and more guidance is needed, the Supreme Court can supplement the law by constitutional construction. Construction refers to rules the Supreme Court creates to fill in gaps

in the text and meaning of the Constitution. It is expected to stay within the limits of the original meaning.<sup>ix</sup>

In its efforts to create a workable standard for construction the Supreme Court has chosen to defer to the legislative branch by making a presumption of constitutionality for their acts. Randy Barnett's book (referenced in the footnote above) is a great discussion of the dangers this has led to, including evisceration of the 9<sup>th</sup> Amendment.<sup>x</sup> He suggests and provides a convincing argument for substituting a presumption of liberty. While this short article cannot begin to touch on the points of his detailed treatment, I have adopted his suggestion below.

### **A bit of clarifying language.**

Our current 50 states are the source of much innovation and experiment. We all benefit from the ideas they implement. To further destroy their sovereignty would be to diminish the range of ideas in our experimental form of government and make us all less free and independent.

To clarify the meaning of these clauses in the original Constitution, I suggest the following:

**Amendment Number \_\_\_\_\_**

**Laws passed in the Congress of the United States shall identify their specific constitutional authority or have no effect.**

**The regulation of commerce as it pertains to the States shall only be used by the United States government to permit open unrestricted trade between the citizens of the various states.**

**The constitutional authority of Congress can be challenged by the President using the veto, and by the Supreme Court. When the constitutionality of a law is not clear, the courts shall defer to the liberties of the individual first, the prerogatives of the States second, followed by the intent of Congress.**

**States asserting constitutional violations can nullify a law in their own territory.**

**Should a constitutional amendment on this point be confirmed by three quarters of the states any nullifying states shall comply.**

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<sup>i</sup> The exchange with Speaker Pelosi in October 2009 occurred as follows:

CNSNews.com: "Madam Speaker, where specifically does the Constitution grant Congress the authority to enact an individual health insurance mandate?"

Pelosi: "Are you serious? Are you serious?"

CNSNews.com: "Yes, yes I am."

Pelosi then shook her head before taking a question from another reporter.

Her press spokesman, Nadeam Elshami, then told CNSNews.com that asking the speaker of the House where the Constitution authorized Congress to mandated that individual Americans buy health insurance as not a "serious question."

"You can put this on the record," said Elshami. "That is not a serious question. That is not a serious question."

Pelosi's press secretary later responded to written follow-up questions from CNSNews.com by emailing CNSNews.com a press release on the "Constitutionality of Health Insurance Reform," that argues that Congress

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derives the authority to mandate that people purchase health insurance from its constitutional power to regulate interstate commerce.

<sup>ii</sup> <http://www.cnsnews.com/news/article/56629>

<sup>iii</sup> Her further answer show she is totally unfamiliar with the document she is sworn to protect.

<http://hotair.com/archives/2009/08/26/audio-shea-porter-says-constitution-didnt-cover-everything/>

<sup>iv</sup> <http://www.cnsnews.com/news/article/56968>

<sup>v</sup> Roger Pilon, Ph.D., J.D., Director, Center for Constitutional Studies at the Cato Institute holds this view and supports it very well (private communication 12/22/11).

<sup>vi</sup> The Civil War was fought when a group of states sought to withdraw from the agreement without using the Article V amendment process. This adds serious weight to the anti-compact view. It does not however prevent using the compact construct to form suggestions for valid constitutional amendments.

<sup>vii</sup> I cover this point in more detail in the next column in this series on the Constitution.

<sup>viii</sup> Thomas E. Wood, Jr.'s 2010 book *Nullification* provides a thorough description of this state power and further provides copies of long out-of-print discussions of the reasons for it. His inclusion of Judge Abel P. Upshur's 1833 letter series, "Nullification: Why the Critics Are all Wrong," provides the clearest 32-page explanation I have read. It is worth the price of the whole book.

<sup>ix</sup> Randy E. Barnett in his *Restoring the Lost Constitution: The Presumption of Liberty*, Princeton University Press, 2004, has a great Chapter 5 on construction.

<sup>x</sup> The 9<sup>th</sup> amendment states; "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."