The Not So Supreme Court

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As one man's conscience cannot properly be deputy for another man's conscience, so neither can an inferior judge, as a judge, be deputy [to another].

Samuel Rutherford, Lex, Rex, Q.XX.

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We find ourselves living at a time when a correct interpretation of and fidelity to the American Constitution is tantamount to treason[1] against the United States. The very nature of a written constitution presupposes a power that governs

[1] It is not without a sense of irony that "treason" is a crime constitutionally defined and nearly impossible to convict due to the witness requirements, rights to confront the accuser and the right against self-incrimination of the accused. Notwithstanding, so often one is besmirched with this moniker for long enough to justify summary execution for resisting arrest.

the governing class and on paper at least, "We the People"[2] have that power. State constitutions throughout the union acknowledge the Protestant doctrine that governments obtain their legitimacy by the consent of the people and it is for those people said governments exist. My own state, Maryland, acknowledges those who are vested with magisterial authority are "Trustees of the Public" Md. Const. Art. 6. Practically speaking, no one vested with magisterial or judicial authority really believes this anymore. In the halls of the legislatures, executive mansions or judicial buildings, a new version of the Divine Rights of Kings prevails, which is usually grounded in some distorted phrase from the Constitution interpreted in light of other phrases not within the document, then compounded with myth and legend whereby the usurpers of our rights claim long-standing tradition and interpretation of the ever so revered, but never actually read or followed, Constitution. I can think of no better example than the oft-repeated bastardization of Thomas Jefferson's letter calling for a "separation of church and state" being read back into the First Amendment for the purpose of depriving the American people their freedom of religious expression. Using Thomas Jefferson's letter gives the air of tradition to the hellish[3] and petulant doctrine of civil government unaccountable to God.

As with the First Amendment, in which the words "separation," "church" or "state" cannot be found but we are told stands for the proposition of a wall of separation of church and state, the Supremacy Clause of the United States Constitution has taken on an interpretation that is impossible, without the aid of a criminal mind, to read from the document itself.[4] That same criminal mind reads the supremacy clause as "the federal government is supreme." This proposition

[2] The phrase "We the people" is used herein for the proposition that someone or thing is granted certain, and by implication limited, powers to the federal government. By this phrase, I am not adopting the view that the U.S. government is a general government receiving its authority directly from the people.

[3] "The great antichrist's masterpiece was, in the first place, to hamstring civil powers from having anything to do in the matters of religion." Thomas Cobbett, The Civil Magistrate's Power, (Sprinkle Publications, 2008) (first printed in London, 1652/3). xi.

[4] I cannot help but think of the exchange between Clover and Murial in Orwell's Animal Farm. Clover, upon learning the governing animals were sleeping in beds, inquires of one of the governors about whether there was a law against sleeping in beds (The 4th Commandment was "No animal shall sleep in a bed."). Murial, in an ever so judicial display, adds to the Commandment, "No animal shall sleep in a bed *with sheets*." The power to read, and read into, the governing document causes the deprivation of rights of the governed.

grew out of the myth[5] of judicial review. Under the doctrine of judicial review, all government offices are bound by the opinions of the Supreme Court and lawyers fawn over the latest ruling of the Court to update their understanding of the law.

But the history of the supremacy clause, as well as its first interpretation made by the Supreme Court, betrays the myth. Lawyers and judges are not beholden to each other, nor collectively bound by the latest Supreme Court opinion. Instead, we are individually bound by oath to the Constitution, not the judiciary nor its interpretations of the Constitution. Just as an associate lawyer cannot hide behind the unethical instructions of his superior,[6] subordinate lawyers and judges should learn to resist long-standing traditions of men that run against the will of a righteous people as expressed in the United States Constitution. Through this action, lawyers and judges, within their respective spheres, adopt the "Doctrine of the Lesser Magistrate" and refuse compliance with the ungodly and unconstitutional opinions of men.

The Supremacy Clause

> *This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.* U.S. Const. Art. 6, s.2.

The Supreme Court, notwithstanding its name, is not the supreme authority of the United States. The so-called "supremacy clause" of the Constitution[7] places the Constitution above the laws and treaties of the United States, and subordinates every judge in every state to the U.S. Constitution.

As the supremacy clause was originally suggested to the Constitutional Convention on July 17, 1787, "the Legislative Acts of the U.S. made by virtue & in

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[5] See Michael Stokes Paulsen, "The Irrepressible Myth of Marbury v. Madison", *Michigan Law Review*, Vol. 101, No. 8, Aug. 2003.

[6] *Model Rules of Professional Conduc*t 5.2, "A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."

[7] The phrase "supremacy clause" is not actually in the Constitution.

pursuance of the articles of the Union … shall be the supreme law of the respective States."[8] By August 6th, "Legislative Acts" had been converted to "Acts of the Legislature."[9] On August 23, the Legislature was supplanted by "this Constitution, and & laws of the U.S."[10] To be understood correctly, we must recognize the significance of making the words on a piece of paper, as opposed to a legislative body, the President or the Court, the "supreme law of the land." The fundamental character of the U.S. Constitution is to govern the government.[11] Accordingly, when the Supreme Court acts outside the parameters of the Constitution it is incumbent on the lesser magistrates, within their spheres of authority, to maintain allegiance to the Constitution and no other.[12]

It is not the Constitution, the supremacy clause, nor even Marbury v. Madison that caused the Courts to storm the beach, like Athena springing from Zeus's head armed and ready for world domination. Sixteen years after Judge Marshall ruled the Court was bound by the Constitution, Marshall contorted the supremacy clause[13] to stand for the dual proposition that the U.S. government can take powers not specifically delegated to it (making banks) and that said acts could not be resisted by the states. To claim the states had any right to resist unconstitutional acts of the federal government "would transfer the supremacy, in fact, to the states."[14]

This new found supremacy was immediately embraced by Joseph Story, a preeminent Supreme Court Justice from 1811 to 1845. He wrote in his Commentaries on the Constitution, "The propriety of this clause would seem to result from the very nature of the constitution. If it was to establish a national

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[8] James Madison, *Notes of debates in the Federal Convention of 1787*, (W.W. Norton & Co., New York) 305-306 (Bicentennial Edition, 1966).

[9] *Notes*, at 390.

[10] *Notes*, at 517.

[11] Marbury v. Madison,1 Cranch 137 (1803) at 180, holding "that *courts*, as well as other departments, are bound by [the Constitution]."

[12] It is worthy of note that the Court was not named in any iteration of the supremacy clause during the debates at the Constitutional convention.

[13] In a sad twist of irony, Luther Martin was arguing the losing side in this case, where Judge Marshall turned Luther Martin's contribution to the Constitution on its head, effectively confirming all the Anti-Federalist warnings about consolidated government and the end of state governments. Bill Kauffman, Forgotten Founder, Drunken Prophet: The Life of Luther Martin, (ISI Books, Wilmington, DE, 2008) at 161.

[14] McCullouch v. Maryland, 17 U.S. 432 (1819).

government, *that government* ought … be supreme."[15] Story's understanding of the "nature of the constitution," as a general government[16] with the judiciary as the highest branch of that government, and the Supreme Court at its apex,[17] permitted him to make the dastardly shift of supremacy of the Constitution to supremacy of the federal government. The U.S. government transitioned from a government for the benefit of the governed to a government for the benefit of itself. Story reworded, but in every way reinstated, the English doctrine of "Divine Right of Kings," declaring the judiciary king.

Uncritical acceptance of their legal education is what handicaps most lawyers from being true lawyers, faithful to their oath to the Constitution. My oath, as lawyer, was not to pay obeisance to every whim of a judge, including a Supreme Court Judge. There was no asterisk or caveat in my oath[18] declaring "*except as otherwise overruled or interpreted differently by a judge."[19] I am not alone in my oath. Every judge and lawyer has taken an oath to the Constitution, which mandates our non-compliance with unlawful judicial decisions.[20] If this were not the case, written constitutions are futile attempts to "limit a power [which is by] nature illimitable."[21]

Story, along with the 200 year tradition of judicial supremacy, is wrong, unconstitutional, and must be resisted by lawyers and judges alike. When left making a decision between a regular act of government or the Constitution, the Constitution must prevail.[22] In the earlier words of the Supreme Court, "it is also

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[15] Story Commentaries, at s.965 *emphasis* added.

[16] Story Commentaries, ch. 3.

[17] Id. at ch. 4.

[18] "I do solemnly (swear) (affirm) that I will at all times demean myself fairly and honorably as an attorney and practitioner at law; that I will bear true allegiance to the State of Maryland, and support the laws and Constitution thereof, and that I will bear true allegiance to the United States, and that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land; any law, or ordinance of this or any state to the contrary notwithstanding."

[19] Granted, judges never actually overturn the Constitution. Instead, they add words or read concepts into it. For example, the Maryland Declaration of Rights guarantees in criminal cases, the jury will judge both the law, and the facts. Md. Const. Declaration of Rights, Art.23. This is "our" declaration of our rights, beyond which the government cannot step. Notwithstanding, the Supreme Court, in denying a Maryland citizen this right, found this Article "does not mean precisely what it seems to say." Brady v. Maryland, 373 U.S. 83, 89 (1963).

[20] In the reasoning of Marbury at 180, why take an Oath to the Constitution if one is prohibited in considering the Constitution in his official government acts?

[21] Marbury, 177.

[22] Marbury at 177.

not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but only those which shall be made in *pursuance* of the constitution."[23] Marbury's fundamental holding, only U.S. governmental acts in conformity with the U.S. Constitution have any legal significance,[24] requires we acknowledge every unconstitutional court determination is but a vapor.[25]

The Constitution provides for an amendment process, which has not been used to confer supremacy to the Courts. No ordinary act of government, including the Court's changing opinions, can change the Constitution. Accordingly, the Constitution is still the supreme law of the land, notwithstanding what any Court has said to the contrary. The Oath of Office of every magistrate, lawyer and judge is to the Constitution,[26] and by implication its supremacy clause. When a judge follows unconstitutional precedent upholding 200 years of encroachment, that judge is guilty of perjury or infidelity and is unworthy of the title and honor he carries.[27]

Since lawyers, which judges generally are, are loathe to act without authority, I proffer there is legal authority, precedent even, for disregarding judicial tradition in the name of following the law. This precedent flows out of common law and is called *Stare Decisis*. *Stare Decisis* is a policy to stand by precedent and not disturb settled points of law.[28] Thus, step number one for the modern jurist[29] is to recognize *Stare Decisis* is policy, not doctrine of law. It is a policy decision for the purposes of promoting consistency and order within our chaotic world. But policies require reconsideration every now and then.[30] In a rather ironic way,

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[23] Marbury at 180.

[24] James McClellan, Liberty, Order and Justice: An Introduction to the Constitutional Principles of American Government, (Liberty Fund, Indianapolis, Indiana), 307 (3d Edition, 2000).

[25] Marbury,at 177 noting acts of the legislature in violation of the Constitution are void.

[26] U.S. Const. Art. IV.3.

[27] For a more extended discussion on the implication of the habitual refusal to regard one's oath, see Author's article, "The Perjured Nation," *The Christian Statesman*, vol. 148, No. 4 (2005).

[28] *Blacks Law Dictionary* (Sixth Edition) at 1406.

[29] That's a larger term than judge lawyer or judge. A Jurist can be either, but many lawyers are not judges and some judges are not lawyers

[30] Just pick your *cause celeb* and insert your own story here. Refusal to accept judicial or legislative policy has lead to significant changes in American jurisprudence concerning slavery, abortion, drugs and alcohol, homosexual rights, homeschooling, gun control, voting, and busing, among other things.

Marbury mandates those who worship at the altar of precedent disregard judicial opinions that run contrary to the Constitution.[31]

Moreover, a lawyer remains within his ethical duty when advocating beyond the scope of the recognized laws of the land provided he is making a good faith argument for a change under the current schema.[32] So too does a Judge, any judge who took an Oath of Office to the Constitution, abide by the Judicial Canon when he rules according to the supremacy clause.[33] Blackstone noted inferior judges ruling this way were not making "new law." Instead, judges ruling this way "vindicate the old one from misrepresentation."[34]

In the context of the conversation at hand, upholding the Supremacy Clause and striking down every federal encroachment, including judicial encroachments from the Supreme Court, protects that judge's court from the misrepresentation of law. The chief judge of any court has no authority to compel an associate judge to make a specific decision.[35] Otherwise, inferior judges would take oaths to the chief judge and devolve to the status of "mere law clerks or potted plants."[36]

Moreover, the State Courts were not subordinated to the Federal Courts by the supremacy clause, rather the State Courts were subordinated to the Constitution. Thus, for a local judge to abide by his Oath of Office, he must disregard the precedents that raised the Courts above the law, or the Federal Courts above the State, or the Supreme Court above all others. The Supreme Court is not the exclusive arbiter of law in America. Even within the language of Marbury, "it is emphatically the province and duty of the judicial department to say what the law is." Well, state judge -- you are a judge -- say what the law is. It is the "very essence of judicial duty" to weigh conflicts of law and determine which governs. To compel a lower judge to the wrong and unconstitutional opinions of a higher judge "would subvert the very foundation of all written constitutions."[37]

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[31] See "Irrepressible Myth of Marbury" at 628.

[32] *Model Rules of Professional Conduc*t, Rule 3.1.

[33] Canon 1, *Model Code of Judicial Conduct*, Rule 1.1.

[34] Blackstone Commentaries at 70.

[35] "The conscience of the inferior judges are … under immediate subjection to the King of kings." Rutherford, Lex, Rex, Q.III.

[36] "Irrepressible Myth of Marbury," at 628.

[37] Marbury at 177.

There will be Anarchy![38]

Marshall's reasoning, that all governmental departments are subject to the Constitution, recognized a plurality of subordinate authorities under, as opposed to one supreme interpreter over, the Constitution, which was the expressed will of "the people."[39] Accordingly, the "separation of powers" doctrine presumes that lesser magistrates and judges will take their independent oaths to the Constitution seriously and refuse compliance with any unconstitutional decision, order or law. This multiplicity of voices is not the equivalent of chaos, nor is decentralization of power synonymous with treason to the Union. It simply means that certain political issues ought not be settled by fiat declaration of men. There are too many unsettled opinions within the American psyche that will not be changed by a court ruling. Roe v. Wade did not make a nation of abortion supporters. Brown v. Board did not improve race relations. Lawrence v. Texas did not make a nation of supporters of homosexual rights. Capital punishment, state sponsored health care, legalization of pot, copyrighting GMO seed, etc. are political issues that cannot be solved with the drop of a gavel. When judges overstep their bounds[40] on matters that are political in nature, the Court becomes the agent of disorder and chaos[41] as well as an enemy to the Constitution and the people to whom it is beholden.

Thus, to protect the Constitution and the people for whose benefit judges are appointed, we must embrace the Doctrine of the Lesser Magistrate as it applies to inferior judges. Every state and federal judge (and lawyer) takes an oath to the United States Constitution. To prohibit a man of good conscience from contemplating the obligations of his oath or the document he is oath-bound to enforce and defend, and rather bind him to interpretations of other men or

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[38] Again, if this section sounds too similar to "Irrepressible Myth of Marbury" at 633ff., I can't help it. Michael Paulsen's reasoning either so strongly influenced mine when I read his article ten years ago, or these thoughts are original to me and parallel to his. Thus, I either footnote every parallel argument, or cite this article generally as a "second witness" for the rightness of the propositions asserted herein.

[39] "Irrepressible Myth of Marbury" at 634.

[40] Hosea 5.10.

[41] A judge hears only "cases and controversies," but does not set policy. When an attorney is looking to discourage a judge from overstepping, the judge is accused of being an activist judge "legislating from the bench." Not surprisingly the proponents of the change do not accuse the judge of being activist when the judge discovers a new right buried deep in the penumbras and emanations of an amendment.

traditions is "worse than solemn mockery."[42] Either every judge and lawyer has the authority of independent review of the Constitution, or it is a crime to take the oath. Id. Moreover, for a judge or attorney to rely on flawed and unconstitutional opinions makes him accomplice in the Court's crime.[43]

By the efforts of Luther Martin, Maryland's first attorney general, signer of the Declaration, delegate to the Constitutional convention and opponent to ratification of the Constitution, a clause on a piece of parchment was added by which the Constitution was made the highest law of the land. By unrelenting attack, the meaning of the words on the paper were perverted, while giving the Constitution the appearance of remaining intact. Like all inanimate objects, the Constitution has no power to resist the usurpation of its authority. Thus, after 200 years of federal and state encroachment on our liberties, "We the People" are left with this question: Has the passage of time mitigated the crime whereby the unfaithful are no longer beholden to the people they govern?[44]

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To learn more about this important doctrine, obtain the book *The Doctrine of the Lesser Magistrates: A Proper Response to Tyranny and A Repudiation of Unlimited Obedience to Civil Government*. The book is available through Amazon.com or at LesserMagistrate.com. The doctrine - which is found in Scripture and history - has been employed by men for thousands of years and has proven successful at reining in tyranny.

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[42] Marbury at 180.

[43] "Irrepressible Myth of Marbury," at 629.

[44] C.f. Samuel Rutherford, Lex, Rex: The Law and the Prince, Question XII; and "Stephanus Junius Brutus, the Celt," Vindicae, Contra Tyrannos: Concerning the Legitimate Power of a Prince Over the People and of the People Over the Prince, Question 3: "Whether prescription is an impediment"