Written by **Steven J. DuBord** on February 18, 2009

Dangers of "Judicial Supremacy"

"Judicial supremacy" is a radical over-extension — indeed, perversion — of the legitimate doctrines of "judicial review" and *stare decisis* ("to stand by matters that have been settled"). "Judicial review" posits simply that the Supreme Court has the authority to — and as a practical matter often must — construe the Constitution in the course of deciding what the Constitution describes as "Cases" and "Controversies" that come before the court. An opinion of the Supreme Court on a constitutional issue ascertains and applies the meaning of the Constitution on that particular point of law, under the peculiar facts of that case or controversy, as against the actual parties then before the court — but generally affects no one else. *Stare decisis* is merely the judicial policy that courts, in order to promote predictability and stability in the law, should abide by their previous decisions in future cases that raise the selfsame legal issues under substantially equivalent sets of facts — unless sound reasons exist for departing from those rulings.

"Judicial supremacy" further claims, however, that an opinion of the Supreme Court determines and fixes the meaning of the Constitution as to the issue then under dispute, not simply as against the actual parties before the court, with respect to the specific facts of their case, but in principle as against everyone in the world similarly situated in all other imaginable cases — and, in particular, as against Congress, the president, the states, and even "We the People." That is, upon its mere enunciation *the opinion itself* becomes "the supreme Law of the Land" on that point of law, which everyone else, everywhere, is required to accept and follow.

Moreover, "judicial supremacy" asserts that: (i) a point of constitutional law decided in an opinion of the Supreme Court can be overruled or otherwise modified only by a later opinion of the Supreme Court or by a formal amendment of the Constitution (the meaning of which the court itself will decide under "judicial supremacy"); and (ii) nothing ought to, or even can, be done to the justices of the Supreme Court, individually or collectively, as a consequence of any opinion they hand down on an issue of constitutional law, no matter how obviously erroneous, politically motivated, economically or socially destructive, or even knowingly and willfully false and fraudulent it may be. Thus, under "judicial supremacy" the Supreme Court perverts "judicial review" and *stare decisis* into mechanisms for supervising, revising, reversing, and precluding the acts of all other branches of government — including the states and their subdivisions, the General Government, and even "We the People"

themselves.

"Judicial supremacy" contradicts the Declaration of Independence's overarching principle of popular sovereignty — that "Governments are instituted among Men, deriving their just powers from the consent of the governed" — which mandates a government (as Abraham Lincoln correctly described it) "of the people, by the people, and for the people," not arbitrary rule by judicial (or any other) elitists responsible to no one but themselves. The Constitution's Preamble itself declares that "We the People" — *not* "we the judges" — "do ordain and establish this Constitution for the United States of America." The Supreme Court itself has recognized that the power to enact "carries with it final authority to declare the meaning of the legislation." *Propper v. Clark*, 337 U.S. 472, 484 (1949). And Sir William Blackstone, the Founding Fathers' legal mentor, emphasized that "whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself: there is not upon earth any other tribunal to resort to." *Commentaries on the Laws of England* (American Edition, 1771), Volume 1, at 212.

"Judicial supremacy" nonsensically assumes that the meaning of the Constitution's provisions are (i) largely unknown, or even unknowable, unless and until each provision becomes the subject of some opinion of the Supreme Court, and (ii) politically plastic, in that the meaning of those provisions can, and even should, change from era to era as the Supreme Court deems advisable.

First, each and every provision of the Constitution in 1788 and the Bill of Rights in 1791 had to have meanings known to, or at least knowable by, the people who ratified them at those times. Otherwise, as a matter of law, neither the Constitution nor the Bill of Rights ever became "laws" at all. For "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Company*, 269 U.S. 385, 391 (1926). Except in the minds of inmates of mental institutions, "the supreme Law of the Land" cannot violate "the first essential of due process of law." And if, because of their supposed vagueness, various provisions of the Constitution and the Bill of Rights had not became "laws" at their inceptions, none of them could ever have been magically transformed into "laws" later on, simply because some majority among the justices of the Supreme Court purported to discover what those provisions supposedly meant for the first time at that subsequent date.

In practice, too, the meaning of the Constitution and the Bill of Rights could never have depended upon judicial interpretations. After all, the Supreme Court did not even exist when the Constitution was ratified. No judicial decisions interpreting the Bill of Rights were extant when those first 10 Amendments were ratified, either. And from then until the present day, potential constitutional issues in untold numbers have yet to arise in judicial cases or controversies. Nonetheless, from ratification of the Constitution onward, public officeholders have been "bound by Oath or Affirmation, to support th[e] Constitution" — or, in the case of the president of the United States, to "preserve, protect and defend the Constitution." Article VI, Clause 3 and Article II, Section 1, Clause 7. None of these individuals could honestly have taken such an "Oath or Affirmation" if they did not know, or did not think they knew, what the Constitution and the Bill of Rights, in their entireties, actually meant at that moment in time — or if they believed that what the Constitution and the Bill of Rights mean can be derived only from, and may unexpectedly change with, decisions of different majorities of justices of the Supreme Court as their opinions are handed down in some distant and uncertain future.

Self-evidently, because at the very beginning, even without the intermediation of courts, "We the

People" had to know what the Constitution and the Bill of Rights meant, "We the People" today must be equally capable of discerning those meanings independently of any judicial decisions. For, contrary to the apologists for "judicial supremacy," the Constitution most emphatically is *not* simply and arbitrarily "what the judges say it is" from time to time. The Constitution is what *it* says it is, both then and now. And that alone is what judges are "bound by [their] Oath[s] or Affirmation[s]" to say that it is. No judicial opinion can judge or control the Constitution — instead, *the Constitution judges and controls all judicial opinions*.

What the Constitution says it is has been called its "original intent." Actually, the term "original intent" is somewhat misleading, because the Constitution's "*original* intent" is also its *present* intent, unless an amendment has supervened, in which case the "original intent" of the amendment becomes its present intent. In any event, "original intent" most obviously takes in words or phrases that the Constitution actually defines, such as "Treason." Article III, Section 3, Clause 1. It also embraces words and phrases that, although not explicitly defined, can be defined by reference to those portions of English common law adopted in America, to the laws of the Colonies and independent states, and to the Articles of Confederation — for example, "Militia of the several States" and a "well regulated Militia" in Article II, Section 2, Clause 1 and the Second Amendment, which neither the Constitution nor the Bill of Rights defines, but the meanings of which appear in numerous Militia statutes the Colonies and independent states enacted from the 1600s through the War of Independence. And "original intent" looks as well to the common usages of other words and phrases at the time the Constitution and the Bill of Rights were ratified, particularly in the light of American legal and political history and philosophy.

Second, contrary to apologists for "judicial supremacy," "original intent" cannot be superseded by their doctrine of "the living Constitution." In historical context, "the living Constitution" is nonsensical. "We the People" having "ordain[ed] and establish[ed]" the Constitution in the manner most obviously understandable by themselves — that is, by committing its words and phrases to paper; and "We the People" having authorized no one to "interpret" the Constitution in any manner other than by imparting to its words and phrases their legal or common meanings, as understood by the people themselves at that time; and, in fact, no other method having been available to "We the People" for construing their Constitution when they ratified it; therefore, "*original intent*" *was then and remains today the one and only practical and legitimate means for interpreting the Constitution*.

As a matter of constitutional structure, too, "the living Constitution" is a mishmash. After all, "the living Constitution" holds that the Constitution can, in effect, be amended simply by judicial decree. Article V of the Constitution, however, expressly provides a complex mechanism for amendments. If "the living Constitution" is available to bring about amendments by the simple expedient of litigation, this

mechanism is supererogatory. But it "cannot be presumed that any clause of the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). And even if "We the People" do amend the Constitution as it explicitly provides, under "the living Constitution" the Supreme Court can then tell them what their amendment supposedly means, perhaps defeating its true purpose altogether — thus potentially rendering the process of amendment itself a nullity, or at least a snare and delusion. But because all of the Constitution's provisions are of "equal dignity," one cannot "be so enforced as to nullify or substantially impair [any] other." *Dick v. United States*, 208 U.S. 340, 353 (1908). *Accord, South Dakota v. North Carolina*, 192 U.S. 286, 328 (1904) (White, J., dissenting). Therefore, the Constitution cannot possibly countenance "the living Constitution" as an aspect of the "judicial Power" in Article III, because to do so subverts or even destroys Article V.

Were this not enough, "judicial supremacy" is an implausible — indeed, in certain aspects ridiculous — process on which to rely for construing the Constitution. Under "judicial supremacy," the promulgation of constitutional "law" is always unpredictable. Many potential constitutional questions the Supreme Court has never decided, and perhaps never will decide. And those it has addressed cannot be said to be settled with finality, because the court often changes its collective mind. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 827-830 & note 1 (1991).

Moreover, nothing guarantees that the Supreme Court's actual consideration of some case or controversy will result in the correct constitutional question being answered — or even asked. For one reason, the court indulges a policy of *avoiding* constitutional questions if at all possible. See, e.g., *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345 (1936) (opinion of Brandeis, J.). To this end, it may dismiss a litigant's case because of an ostensible lack of "standing" (as the recent cases challenging Barack Obama's eligibility for the office of president have been handled), or because the complainant supposedly seeks nothing but an "advisory opinion" or raises only a nonjusticiable "political question." Inasmuch, though, as ignorance and uncertainty as to the meaning of "the supreme Law of the Land" equate with vagueness, this doctrine plainly promotes lawlessness because it renders the meanings of large portions of the Constitution, or their applications in particular circumstances, *unknown* for *indefinite* periods of time, no matter what the consequences for individuals or even the country as a whole. The constitutionally correct approach should be along the lines described by Justice Stephen Field:

> The law of Congress being of a public nature, affecting the interests of the whole community, and attacked for its unconstitutionality in certain particulars, may be considered with reference to other unconstitutional provisions called to our attention upon examining the law, though not specifically noticed in the objections taken in the records or briefs of counsel, that the Constitution may not be violated from the carelessness or oversight of counsel in any particular. [*Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429, 604 (1895) (separate opinion).]

But the court has never adopted Justice Field's admonition as its institutional policy.

For another reason, even where a constitutional issue is not avoided, the likelihood of its being presented and settled in a definitive manner is not high — precisely because of the many serious practical shortcomings of litigation. For example:

• The identity, character, and peculiar special interests of the particular litigant may have a significant bearing on what issues may be raised, when, how, and to what extent. For example, litigants defending a statute banning so-called assault weapons will surely refrain from informing the Supreme Court that "the right of the people to keep and bear Arms" ultimately relates to Americans' service in "well

regulated Militia," the members of which *must be supplied with personal firearms at least equivalent to what the regular armed forces employ*. If the opponents of the statute fail to emphasize this point (as almost all "gun-rights" advocates invariably do), and if the court itself fails to perform independent research (as it quite often does), the case will be decided from an angle decidedly skewed against a proper constitutional result.

• The economic, political, and social circumstances in which the litigation arises may predispose or prejudice the judges toward a decision not in keeping with what the Constitution demands — the old saw, "the Supreme Court follows the election returns," having more than a little cut to it.

• Counsel on one side or both may not be competent in constitutional law, in general trial litigation (particularly with respect to the use of expert witnesses), or in appellate practice.

• Through the insouciance or blunders of counsel, or the inadvertence or even malevolence of the trial judge, the full factual record necessary to frame the constitutional issue properly may not be prepared.

• In the Supreme Court itself, the decision may very well turn upon the historical quirk of which particular justices happen to hear the case. "The living Constitution," after all, depends upon who is then living: a John Marshall's grasp of the Constitution may be expected to be quite different from a Thurgood Marshall's — and increasingly so these days,

• The Court's decision may very well turn on the quality of the legal research and advice proffered to the justices by their law clerks, fresh from the establishment's leading law schools where professors have filled their heads with the latest legalistic fads and folderol.

Worse yet, "judicial supremacy" has proven to be disastrous in the most important instances in which it has been employed. Today in particular one calls to mind the Supreme Court's egregiously erroneous decisions in *Knox v. Lee*, 79 U.S. (12 Wallace) 457 (1871), *Juilliard v. Greenman*, 110 U.S. 421 (1884), and the *Gold Clause Cases*, 294 U.S. 240 (1935), which set the stage for the looming economic catastrophe that has arisen out of the General Government's foisting on the American people a national paper currency, irredeemable in silver or gold. Then, in relation to the constitutionally protected right to "keep and bear Arms," one thinks immediately of the Supreme Court's 2008 decision on the Second Amendment in *District of Columbia v. Heller* (reported in volume 554 of the *United States Reports*), the grotesque errors of which were dissected in "Gun Rights on Trial," *The New American* (September 1, 2008). If the Supreme Court could not construe the Constitution correctly with respect to its two most important powers, the Power of the Purse and the Power of the Sword, what value can "judicial supremacy" have across the board?

"Judiciary supremacy" thus challenges "We the People" to reassert *their own* control over the power of construing *their own* Constitution, before an arrant and errant judiciary damages "the supreme Law of the Land" beyond repair.

The Supreme Court was fundamentally in error to opine that "it is emphatically the province of the judiciary to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The judiciary interprets and applies the laws in specific cases and controversies. But its decisions are not themselves "laws" or conclusive proof of what the "laws" are, but only judges' opinions about the "laws" – opinions which may be correct or *incorrect*. It is the province of "We the People" — and "We the People" alone — to say what "the supreme Law of the Land" *actually is*. And it is the province of Congress — in which We the People have "vested" "All legislative Powers … granted [in the Constitution in Article I, Section 1]" — to enact statutory "laws" for the United States.

"We the People" control interpretation of the Constitution by vigilantly observing how elected representatives exercise their law-making power, and carefully comparing the results to constitutional requirements. If "We the People" find those results faulty, they can change the composition of Congress and the identity of the president through the electoral process. And if "We the People" find the behavior of the judiciary below the constitutional standard of "good Behaviour" in Article III, Section 1, they can expect Congress and the president to change the composition of the courts by impeachments, convictions, and removals from office of bad judges, and appointments of better ones in their stead.

Between elections, "We the People" can exercise the authority to interpret the Constitution by invoking the "right … peaceably to assemble, and to petition the Government for a redress of grievances" as individuals and *ad hoc* groups — as the First Amendment guarantees — and to even greater effect as "the Militia of the several States," which the Second Amendment declares to be "necessary to the security of a free State." Self-evidently, nothing could be more "necessary to the security of a free State" than strict control over interpretation and application of "the supreme Law of the Land," upon which all rights depend in the first stance.

Admittedly, "We the People" are having a hard time controlling Congress and the president, let alone the judiciary, today. This is because all too many Americans have forgotten that self-government requires self-reliance and self-assertion. But once the people recognize that *they* are the masters of their own Constitution, that the Constitution provides them with efficacious means to assert that mastery, and that those means must be put into effect in order to make them meaningful, things will change for the better very quickly.

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