How States can Man-up and Stop Abortion

By Publius Huldah, June 30, 2019
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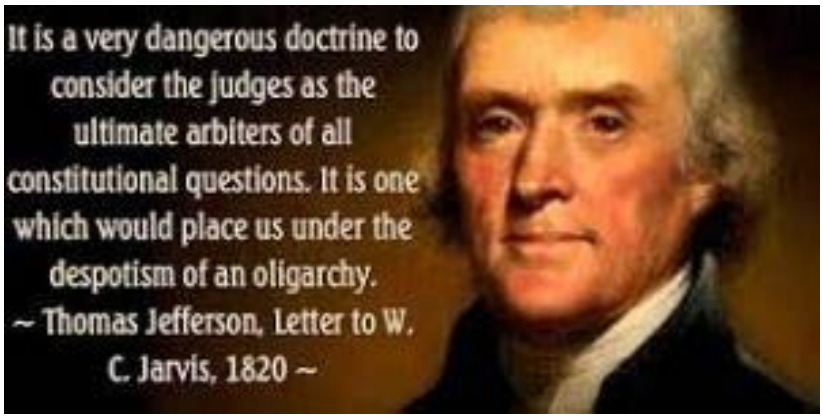

If the American People [and American lawyers] had been properly educated, they would know that our federal Constitution created a federal government of enumerated powers only; and that most of the powers delegated to Congress over the Country at Large are listed at Art. I, §8, clauses 1-16, US Constitution.

"Abortion" is not listed among the enumerated powers. Therefore, Congress has no power to make any laws about abortion for the Country at Large.[1] And since "abortion" isn't "expressly contained" in the Constitution, it doesn't "arise under" the Constitution; and since state laws restricting abortion don't fit within any of the other categories of cases the federal courts are authorized by Art. III, §2, cl. 1 to hear, the federal courts also have no power over this issue.

So from the beginning of our Constitutional Republic until 1973, everyone understood that *abortion is a State matter*. Accordingly, many State Legislatures enacted statutes restricting abortion within their borders.

But in 1973, the US Supreme Court issued its opinion in Roe v. Wade and made the absurd claim that Section 1 of the 14th Amendment contains a "right" to abortion. In Why Supreme Court opinions are not the 'Law of the Land,' and how to put federal judges in their place, I showed why the Supreme Court's opinion in *Roe* is unconstitutional.

But Americans have long been conditioned to believe that the Constitution means whatever the Supreme Court says it means.[2] Accordingly, for close to 50 years, American lawyers and federal judges have mindlessly chanted the absurd refrain that "*Roe v. Wade* is the Law of the Land"; State governments slavishly submitted; and 60 million babies died.

So who has the lawful authority to stop abortion?

1. *Congress* has constitutional authority to ban abortion in federal enclaves and military hospitals

Over the federal enclaves, Congress has constitutional authority to ban abortion: Pursuant to Article I, §8, next to last clause, Congress is granted "exclusive Legislation" over the District of Columbia, military bases, dock-Yards, and other places purchased with the consent of the State Legislatures (to carry out the enumerated powers).[3] Article I, §8, cl.14 grants to Congress the power to make Rules for the government and regulation of the Military Forces. Accordingly, for the specific geographical areas described at Article I, §8, next to last clause, and in US military hospitals everywhere, Congress has the power to make laws banning abortion.

2. But *federal courts* have no constitutional authority over abortion

Article III, §2, cl. 1 lists the ten categories of cases federal courts have authority to hear. They may hear *only* cases:

♦"Arising under" the Constitution, or the Laws of the United States, or Treaties made under the Authority of the United States ["federal question" jurisdiction];

♦Affecting Ambassadors, other public Ministers & Consuls; cases of admiralty & maritime Jurisdiction; or cases in which the U.S. is a Party ["status of the parties" jurisdiction];

♦Between two or more States; between a State & Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States; and between a State (or Citizens thereof) & foreign States, Citizens or Subjects ["diversity" jurisdiction].[4]

*These are **the only** cases federal courts have authority to hear.* Alexander Hamilton wrote in Federalist No. 83 (8th para):

"…the judicial authority of the federal judicatures 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**, because the objects of their cognizance being enumerated, the specification would be nugatory if it did not exclude all ideas of more extensive authority." [boldface added]

Obviously, State laws restricting abortion don't fall within "status of the parties" or "diversity" jurisdiction; and federal courts haven't claimed jurisdiction on those grounds. Instead, they have asserted that abortion cases "arise under" the US Constitution!

But in Federalist No. 80 (2nd para), Hamilton states that **cases "arising under the Constitution" concern**

"…the execution of the provisions **expressly contained** in the articles of Union [the US Constitution]…" [5] [boldface added]

Obviously, "abortion" is not "expressly contained" in the Constitution. So it doesn't "arise under" the Constitution. In *Roe v. Wade*, the Supreme Court had to ***redefine*** the word**,** "liberty", which appears in §1 of the 14th Amendment, in order to claim that "abortion" "arises under" the Constitution.

Section 1 of the 14th Amendment says:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, **liberty**, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [boldface added] [6]

*Do **you** see where it says that pregnant women have the "right" to abortion?* It isn't there! So this is what the Supreme Court did in *Roe v. Wade* to legalize killing babies: They said "liberty" means "privacy" and "privacy" means state laws banning abortion are unconstitutional. *And American lawyers and judges have slavishly gone along with this evil absurdity ever since!*

3. States must *reclaim* their traditionally recognized ***reserved power*** to restrict abortion!

Since "abortion" is a power reserved by the States or the People, State Legislatures should reenact State Statutes restricting abortion.

When a lawsuit is filed in Federal District Court alleging that the State Statute violates the US Constitution, the State Attorney General should file a motion in the Court to dismiss for lack of subject matter jurisdiction. He should point out that the Court has no constitutional authority to hear the case; **that *Roe v. Wade* is *void* for lack of subject matter jurisdiction**; that "abortion" is one of the many powers reserved by the States; and that the State Legislature properly exercised its retained sovereign power when it re-enacted the Statue restricting abortion.

The State Attorney General should also advise the Court that if the Court denies the Motion to Dismiss, the State will not participate in the litigation and will not submit to any pretended Orders or Judgments issued by the Court.

Now! Here is an interesting fact which everyone would already know if they had had a proper education in civics: **Federal courts have no power to enforce their own Judgments and Orders**. They must depend on the Executive Branch of the federal government to enforce their Judgments and Orders.[7]

Since President Trump has proclaimed his opposition to abortion, who believes that he would send in the National Guard to force the State to allow physicians to kill more babies within the State? **Please understand**: An opinion or ruling from a federal court means *nothing* unless the Executive Branch chooses to enforce it.[8] THIS IS THE EXECUTIVE BRANCH'S "CHECK" ON THE JUDICIAL BRANCH! If the President, in the exercise of his independent judgment,

thinks that an Order or Judgment of a federal court is unconstitutional, it is his duty imposed by his Oath of Office [9] to refuse to enforce it.

4. The modern day approach to dealing with absurd Supreme Court Opinions

But most pro-life lawyers will tell you we should proceed as follows: That we need to get a number of States to pass "heartbeat laws". Pro-abortion forces will then file lawsuits in federal district courts alleging that the heartbeat laws violate *Roe v. Wade* and are "unconstitutional". Most States will lose in the federal district courts. But they can appeal to one of the 13 US Circuit Courts of Appeal. Most of the States will also lose in the Circuit Court. But if just one Circuit Court rules in favor of the heartbeat law, then there will be "conflict" among the Circuits and the US Supreme Court is likely to hear the issue. This will give the US Supreme Court the opportunity [years from now] to revisit *Roe v. Wade*, and they *might* overrule it!

But I suggest, dear Reader, that we must purge our thinking of the assumption that we can't have a moral and constitutional government unless Five Judges on the Supreme Court say we can have it. Since it is clear that federal courts have no constitutional authority over abortion, why do we go along with the pretense that they do? Why not just man-up and tell them, "*You have no jurisdiction over this issue*"?

Our Framers would be proud of you.

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Endnotes:

[1] Accordingly, the federal Heartbeat Bill and the Pain-Capable Unborn Child Protection Act, to the extent they purport to apply outside federal enclaves and military hospitals, are unconstitutional as outside the scope of powers delegated to Congress over the Country at Large.

[2] The Supreme Court was *created* by Art. III, §1, US Constitution, and is completely subject to its terms. As a mere "creature", it may not re-write the document under which it holds its existence.

[3] In Federalist No. 43 at 2., James Madison explains why Congress must have complete lawmaking authority over the District of Columbia and the federal enclaves.

[4] The 11th Amendment reduced the jurisdiction of federal courts by taking from them the power to hear cases filed by a Citizen of one State against another State.

[5] Federalist No. 80 (3rd & 13th paras) illustrates what "arising under the Constitution" means: Hamilton points to the restrictions on the power of the States listed at Art. I, §10 and shows that if a State exercises any of those powers, and the fed. gov't sues the State, the federal courts have authority to hear the case.

[6] "Privileges and immunities" and "due process" are ancient Principles of English Jurisprudence well-known to earlier generations of American lawyers. "Equal protection" within §1 of the 14th Amd't means that with respect to the rights recognized by these ancient Principles, States were now required to treat black people the same as white people. See Raoul Berger, Government by Judiciary The Transformation of the Fourteenth Amendment.

[7] In Federalist No. 78 (6th para), Hamilton shows why federal courts have no power to enforce their orders and judgments – they must rely on the Executive Branch to enforce them:

"… the judiciary… will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. **The judiciary,** on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and **must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.**" [caps are Hamilton's; boldface added]

[8] During the Eisenhower administration, a federal court ordered the State of Arkansas to desegregate their public schools. **But the Governor of Arkansas refused to comply with the federal court orders. So President Eisenhower sent in the National Guard to force Arkansas to admit black students to a public school.** See this archived article from the New York Times.

Here, Eisenhower chose to enforce the Court's Order. But if he had decided that he would NOT enforce it, the schools would have remained segregated. *Federal courts are dependent on the Executive Branch of the fed. gov't to enforce their Orders*! *This* is what Hamilton is talking about in Federalist No. 78.

[9] The President's Oath is to "…preserve, protect and defend the Constitution of the United States" (Art. II, §1, last clause). It is not to obey the Judicial Branch of the fed. gov't.

Jefferson's letter of September 28, 1820 to William Charles Jarvis may be read HERE at page 161. The Works of Thomas Jefferson, ed. Paul Leicester Ford, Vol. XII.

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