

Constitutions, Oaths, and the Heritage of English Law

A response to Justice Champ Lyons, Jr.

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Originally published on Vision Forum Ministries' web site on June 28, 2004. Reprinted with permission.

I recently acquired a copy of *His Monument, My Oath, and the Rule of Law* by Champ Lyons, Jr., an Associate Justice of the Alabama Supreme Court. In his paper, Justice Lyons goes into considerable detail to explain the rationale behind his vote to remove the Ten Commandments monument from the Alabama Judicial Building in the summer of 2003.

I am personally grateful to Justice Lyons for taking the trouble to explain his position, because it represents an important dichotomy within the field of Constitutional law.

Justice Lyons is a confessing Christian who sincerely believes that his actions with respect to removing the Ten Commandments monument were consistent with keeping his oath of office to support the Constitution of the United States.

However, my belief is that Justice Lyons' positions as presented are based on several erroneous presuppositions about the Constitution, oaths, and English law in general.

Constitutional Presuppositions (Prescribed vs. Implied Powers)

The Constitution of the United States is the oldest *written* constitution still in use by a government. The Constitution's Framers came from a society which had existed for over 1,000

years under the unwritten constitution of Great Britain. However, those 1,000 years had been marked by much turbulence between the various civil powers governing the British Commonwealth. Kings had quarreled and warred with Parliament; the judiciary had sought to usurp the authority of the People's House; local magistrates had set themselves up as mini-kings, etc.

In an effort to restrain the evil tendency of unchecked power, America's Framers designed their federal government to be separated into three branches, each with delegated powers from a *written* Constitution. In other words, unless the power was specifically prescribed in the Constitutional document itself, it was not given to the federal government. This principle was highlighted in the 9th and 10th Amendments to the Bill of Rights:

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

First, notice that the 9th Amendment *does not* say that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained *by necessary inference to the federal courts.*"

Secondly, the specific language in the 10th Amendment makes clear that the only *implied* rights and powers in the Constitution are those that are retained by the states or the people. This is a critical point, because Justice Lyons' entire position is based on what he

believes to be “implied powers” of the United States Supreme Court. But, according to the plain text of the Constitution, no branch of the federal government can have implied powers; otherwise a written Constitution would be pointless.

Throughout his treatise, Justice Lyons refers to the “implied powers” of judicial review (the view that the U.S. Supreme Court is the final arbiter in determining the Constitutional validity of a federal or state law or action). Justice Lyons admits that such powers are not prescribed to the courts, but he believes they are necessary to preserve our system of government:

“I have come to the view that such authority is necessarily *implied* so as to avoid the anarchy that would exist otherwise if there were no final authority on issues of constitutional interpretation, thereby causing the failure of the very governments that such documents sought to create.”[\[1\]](#) (Emphasis added)

In addition to saying what the Constitution is, Lyons believes the Supreme Court has the power to “enforce the Constitution.”[\[2\]](#) But the Constitution is very clear that it is the president, not the courts, who is charged with seeing that the Constitution and all laws made in pursuance thereof be “faithfully executed.”[\[3\]](#)

Article III of the Constitution sets forth the powers of the Federal Judiciary, and it nowhere contains the concept of “judicial review” as understood and practiced by our Supreme Court today. Justice Lyons candidly admits this fact:

“Neither the Alabama Constitution nor the United States Constitution, by express terms, confers authority upon judges of the court of last resort created by such documents to issue binding determinations on the meaning of the Constitution.”[\[4\]](#) (Emphasis in the original)

Anarchy vs. Interposition (Were our Founding Fathers Anarchists?)

The necessity of “implied powers” of judicial review stems from an erroneous view of the nature of our federal union. Justice Lyons stated in more than one place that people may not like judicial review and what judges have done with it, but the alternative is “anarchy.”^[5] This belief is simply absurd.

The basic definition of anarchy is “absence of any form of political authority.” If a constitutionally elected public official violates a court order because he believes it to be unlawful, his action is anything but “anarchy.” What Lyons calls “anarchy,” our Founding Fathers called “checks and balances.” Under Lyons’ definition of “anarchy,” George Washington, Patrick Henry, and James Madison were all anarchists.

Our Founding Fathers were constitutionally elected public officials. However, when they were faced with having to enforce the illegal orders of King George III and Parliament, they resisted the orders and interposed themselves between the English government and their constituents back home.

In the same manner, Chief Justice Roy Moore did not engage in “anarchy” by resisting what he believed to be an unlawful order from Federal Judge Myron Thompson. Rather, Moore interposed himself between the federal courts and the rights of the people he represented and the Constitution that he had sworn an oath to defend.^[6]

But according to Justice Lyons, *every* final decision by a federal court is the “Law of the Land,” and *every* public official is oath-bound to obey:

“Once the power of judicial review is acknowledged, the United States Supreme Court’s opinions on constitutional issues become as binding as if written into the Constitution, regardless of one’s personal views favoring a different interpretation of the Constitution.” [7] (Emphasis added)

“That the Supreme Court of the United States, or, for that matter, the highest court of any state must be endowed with the power of judicial review cannot responsibly be questioned.” [8]

“My oath of office to support the Constitution compels me to abide by what the United States Supreme Court announces as the rule of law even when it construes the United States Constitution in a manner with which I personally disagree.” [9]

“...the Constitution is not violated when the United States Supreme Court exercises the power of judicial review, even in a manner with which the litigant disagrees.” [10]

Above, we see Justice Lyons blatantly stating that the Constitution is whatever the Supreme Court says it is. Lyons even admits that his oath to the Constitution is actually an oath to the opinions of five judges presently sitting on the U.S. Supreme Court:

“The arguments advanced in favor of former Chief Justice Moore’s appeal of his removal from office suffer from the pervasive defect of the failure to recognize the validity of the Court’s authority, implied as a matter of necessity from the Constitution, to exercise the power of judicial review... the Special Supreme Court acknowledged the former Chief Justice’s position as follows: *‘Chief Justice Moore states that the judgment of the Court of the Judiciary has in effect created an “oath transfer” rule—that an oath taken by a public official is no longer to a constitution but to a court’s opinion, even one contrary to the constitution.’*” [11] (Emphasis added)

Evidently Justice Lyons has never visited Constitution Corner at West Point Military Academy, where cadets are taught that their oath of allegiance is to the Constitution alone, and that America is unique as a nation because it *does not* require an oath to individual rulers – or judges.

Justice Lyons has gone one step past the doctrine of “judicial review” and embraced the concept of “judicial infallibility.” His view on the rule of law might constitute judicial orthodoxy by modern standards, but it is the same kind of constitutional *heresy* that formed the basis and justification for our Founding Fathers’ rebellion against the “Divine Right of Kings” in 1776.

The Nature of Oaths Presupposes the Acknowledgment of God

Justice Lyons stated that his oath of office required him to enforce an order to remove the Ten Commandments from the Alabama Judicial Building:

“...such oath carries with it the obligation, no matter how distasteful, to support the Constitution as interpreted by the United States Supreme Court...”[\[12\]](#)

However, in the manner concerning former Chief Justice Roy Moore, the central issue leading to the federal order to remove the Ten Commandments Monument was whether or not a state can acknowledge God. Federal Judge Myron Thompson candidly said “No.” Chief Justice Moore replied that he could not be faithful to his oath of office if he refused to acknowledge God. Moore recognizes the inherently religious nature of oath-taking that Justice Lyons simply misses.

When Justice Lyons took his oath, he placed his hand on a Bible and swore before Almighty God that he would “support the

Constitution....” If a federal judge rules that a state cannot acknowledge the God to whom all public officials swear their oaths, how can those same public officials claim to be upholding their oaths by enforcing an order to disallow the acknowledgement of God?

Oaths are oaths because they are given under the witness and judgment of Almighty God. When a witness in court takes an oath to tell the truth, he’s not merely acknowledging the penalty of perjury if he lies. He is acknowledging that the God Who knows the inner thoughts of man is a witness for the truth of his statements. Regardless of whether a lying witness is caught or not, the real judgment for violating an oath is with the Almighty, not an earthly judge.

The only reason the Ten Commandments monument was removed was because it acknowledged the God of the Bible as being the ultimate source of our laws and liberties. That’s what the federal judge said. And Justice Lyons says that he had to remove the acknowledgement of God from his courthouse because of the obligations of the oath that he had given before God! But you can’t have it both ways. Lyons cannot remove an acknowledgement of God (which is exactly what removing the Ten Commandments monument was, according to the federal judge) and in the same breath claim to be honoring an oath made before that same God.

But perhaps it is wrong, as Justice Lyons suggests, to charge the Alabama Supreme Court with lacking “moral courage” in its handling of the Ten Commandments case. It appears from Justice Lyons’ own statements that he and his colleagues on the court were not acting as moral cowards, but as *moral hypocrites*.

“You hypocrites! Isaiah was right when he prophesied about you: ‘These people honor me with their lips, but their hearts are far

from me. They worship me in vain; their teachings are but rules taught by men.”[\[13\]](#)

The Heritage of English Common Law

As was stated in the outset, it is my opinion that Justice Lyons has reached his positions based on erroneous presuppositions about the Constitution, oaths, and English law in general.

I believe it has been shown that Lyons’ incorrect views of the Constitution have led him to elevate the U.S. Supreme Court to nearly divine status in matters of our government, thereby undermining the very point of written constitutions and the separation of powers.

But the fundamental problem behind Justice Lyons’ views is an erroneous understanding of English law in general. Lyons evidently does not subscribe to the same understanding of law as our Founding Fathers. Rather, Lyons holds to the prevalent “positive law” theory that was absent from English Common Law until the late 19th and early 20th centuries.

The positive law theory essentially grew from combining the philosophy of Hegel (i.e. “The State is God walking on earth”) and Darwin’s view of origins.

According to the great English jurist, Sir William Blackstone, municipal laws enacted by governments were “rules of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”[\[14\]](#) But according to Hegel, laws were simply rules of civil conduct prescribed by the supreme power in a state. The issue of right and wrong was irrelevant to Hegel. Might makes right. When Hegel’s views met Social Darwinism, the result was a view of law as nothing more than evolving standards of society, not fixed to any moral concept

of right and wrong. Judges became the directors of this evolving standard.[\[15\]](#)

As a consequence of the positive law theory, the erroneous “living document” view of the Constitution was adopted by most law school professors in the early 20th century, and they raised a generation of jurists who believed the Constitution meant whatever judges directing the evolving standards of law said it meant. The Rule of Law was exchanged for the Rule of *Lawyers*.

This new view of law and the Constitution also influenced the way judges interpreted previous court decisions issued before the advent of positive law. For instance, Chief Justice Marshall declared in *Marbury vs. Madison* (1803) that the judiciary has the right to “say what the law is.” Positive law jurists read that statement through the lens of their own presuppositions and interpret it to mean the Supreme Court can create law through interpretation and, according to Justice Lyons, “enforce” the law as well.

But in reading Marshall’s opinion in the proper, historical context, he emphatically held that the judiciary, as well as every other branch of government, was bound by the Constitution:

“...a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”[\[16\]](#)

Nowhere in his decision did Marshall say or imply that all Supreme Court opinions about the Constitution hold as much weight “as if written into the Constitution,” as Justice Lyons declares.

Justice Lyons may consider himself to be a “strict constructionist” judge (i.e. the Constitution means what the Framers said it means), but his dogged commitment to the “Divine Right of the Judiciary”

makes his personal convictions irrelevant unless they are blessed by the U.S. Supreme Court.

Justice Lyons doesn't like what federal judges have done with the power they have assumed, but his answer is to ratify a new constitutional amendment to fix the problem. However, his proposed amendment suffers from the same disease that plagues his opinions on the Constitution in general: the presumption of judicial supremacy.

For all his concern about "anarchy," Lyons doesn't realize that our nation has never been in danger of anarchy. Rather, we have seen an ever-increasing power of our government for the last 140 years.

For 38 pages, Justice Lyons attacks the view of "one man determining for himself what is law," but for 38 pages, he implicitly advocates giving that same power to one justice on the U.S. Supreme Court.

"We cannot permit a single individual, be he or she merely a private citizen or the chief justice of the highest court in a state, to disregard the rule of law based upon his or her personal interpretation of the United States Constitution, regardless of how sincerely considered or prayerfully derived."[\[17\]](#)

According to Justice Lyons, if one man appointed for life on the U.S. Supreme Court disregards the rule of law in favor of his own personal interpretation of the United States Constitution, he could cast a tie-breaking vote, and all our oaths would compel us to kiss his ring. In trying to prevent anarchy, Justice Lyons' views would sooner make us *slaves*.

The answer to the problem of judicial activism is not to appoint strict-constructionist dictators to the federal bench, but to denounce the constitutional heresy of judicial supremacy and its venomous

side-kick, positive law theory. Congress, the president, and especially state officials, must exercise the powers the Constitution reserves to them and tell activist judges to “pound sand” when they issue opinions that are clearly in contempt of the Constitution.

Although sincere and well meaning, Justice Lyons’ views are repugnant to the plain text of our Constitution, totally inconsistent with the views of nearly all of our Founding Fathers, contemptible towards the powers and rights reserved to the states and to the people, and out of line with over 1,000 years of English Common Law precedent.

I earnestly hope that Justice Lyons will return once more to the “ancient paths where the good way is”^[18] and fulfill his oath to support the Constitution of the United States and the State of Alabama by rejecting the dangerous doctrine of Judicial Supremacy.

Footnotes: _____

[1] Lyons, Champ, *His Monument, My Oath, and the Rule of Law*, May 12th, 2004, page 3.

[2] Ibid. Page 13.

[3] See Article II, Section 3 of the Constitution of the United States.

[4] Lyons. Page 3

[5] Ibid. see pages 3, 12, 20, and 37.

[6] See Eidsmoe’s “A Call to Stand with Chief Justice Moore” for more info on the ancient doctrine of Interposition. <http://www.morallaw.org/Text/eidsmoe.html>

[7] Lyons. Page 16

[8] Ibid. Page 26

[9] Ibid. Page 37

[10] Ibid. Page 7

[11] Ibid. Page 16

[12] Ibid. Page 13

[13] Matthew 15: 7-9. (NIV)

[14] Blackstone, Sir William. *Commentaries on the Laws of England*. “Of the Nature of Laws in General.”

[15] For an excellent analysis of the influence of the Positive Law theory, consult Dr. John Eidesmoe’s Institute on the Constitution video series, lecture #11 “From Biblical Absolutes to Evolutionary Humanism.”

[16] *Marbury v. Madison*, 5 U.S. 137.

[17] Lyons. Page 26

[18] Jeremiah 6:16 and 18:15