

# Constitution In 10 Lessons

## Lesson 9

# 19 Exclusive & Concurrent Jurisdiction  
Explained

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United States

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# Exclusive & Concurrent Jurisdiction Explained

## The Supremacy Clause of the Constitution

“This Constitution, and the Laws of the United States which shall be made **in Pursuance thereof**...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Things in the Constitution of Laws of any State **to the Contrary** notwithstanding.”

Article VI, clause 2



# In Joining the federation

Each member State gave up certain privileges and/or rights:

- The ability to print currency/coin money,
- The ability to make treaties or issue letters of marque and reprisal,
- Make any thing but gold or silver coin a Tender in Payment of Debts,
- To pass any Bill of Attainder, ex post facto law, or Law impairing the obligation of contracts.

See Article 1, Section 10 for all restrictions.

## But under the Constitution, what powers are Exclusive

- To the Federal Government and to the State,
- And which are ***Concurrent*** to both the Federal and the State?

# In This Paper

- We are examining the recent (2010) Supreme Court Ruling regarding Arizona's State Border Control Law.

**And, our question is:**

- Is border security an ***exclusive*** or a ***concurrent*** function of constitutional jurisdiction?

# The Key to understanding Jurisdiction is the phrase “*Pursuant to the Constitution*”

We must learn that only Laws made by  
Congress which are *pursuant to the  
Constitution* qualify as part of the  
supreme Law of the Land.



# Federalist Paper 27 - Hamilton

...That the laws of the Confederacy, as to the **ENUMERATED** and **LEGITIMATE** objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, *will be bound by the sanctity of an oath*. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government AS FAR AS ITS JUST AND CONSTITUTIONAL AUTHORITY EXTENDS; and will be rendered auxiliary to the enforcement of its laws.

# Federalist Paper 33 - Hamilton

“But it will not follow from this doctrine that acts of the large society which are NOT PURSUANT to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such.”



# Only State Laws contrary to the Constitution must fall.

- States may make whatever laws they wish (consistent with their State Constitutions) except as **prohibited** by the US Constitution. Laws specifically prohibited to the States are listed at Article 1, Section 10.
- States also may not properly make laws which **contradict** the Constitution.

# Therefore...

When a State Law is  
***not contrary*** to the Constitution,  
**it remains in full force and  
effect,**  
and is not affected one jot  
by the “supremacy clause.”

# Exclusive Jurisdiction

- Are those very few matters in which the federal government has sole authority to act.
- As those authorities are bestowed by the Constitution upon the Federal Government, then any State Law ***to the contrary*** would fall.

# Federalist Paper 32 - Hamilton

“But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, EXCLUSIVELY delegated to the United States.”

# Federalist 32 - Hamilton

Hamilton then describes the three cases where the Constitution grants to the federal government exclusive authority to act:

# Federalist 32 - Hamilton

- a) Where the Constitution expressly grants and exclusive authority to the federal government; as in Article 1, Sec. 8, next to last clause, which grants to Congress the power to “exercise *exclusive* Legislation in all Cases whatsoever,” over the District of Columbia, Forts, dock-Yards, and other needful Buildings.

# Federalist 32 - Hamilton

- b) Where it grants an authority to the federal government, and prohibits the States from exercising that same authority; as in Art. 1, Sec. 8, clause 1, which authorizes Congress “To lay and collect Taxes, Duties, Imposts and Excises”; and Art. 1, Sec 10, clause 2, which declares that, “No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports...”

# Federalist 32 - Hamilton

- c) Where it grants an authority to the federal government, to which a similar authority in the States would be absolutely & totally **CONTRADICTORY** and **REPUGNANT**; as in Art. 1, Sec. 8, clause 4, which declares that Congress shall have power to “to establish an **UNIFORM RULE** of naturalization throughout the United States.” This must necessarily be exclusive; because if each State had power to prescribe a **DISTINCT RULE**, there could not be a **UNIFORM RULE**.



# According to Federalist 32

The Federal Government has  
**EXCLUSIVE** Authority only in those 3  
cases.

In **ALL** other matters within the  
**ENUMERATED** powers, the Federal  
and State governments have  
**“Concurrent Jurisdiction”**.

# Concurrent Jurisdiction

Cases where the Constitution authorizes the federal government to act and does not prohibit the States from acting on the same matter.

In these cases, the federal government and the States have a “**concurrent and coequal authority**” (Federalist 32 - 3rd para.)

# Federalist 32 - Hamilton

“A case which may perhaps be thought to resemble the latter, but which is in fact widely different, affects the question immediately under consideration. I mean **the power of imposing taxes on all articles other than exports and imports**. *This, I contend, is manifestly a **concurrent and coequal authority** in the United States and in the individual States. There is plainly no expression in the granting clause which makes that power EXCLUSIVE in the Union.*

# Federalist 32 - Hamilton

“There is no independent clause or sentence which prohibits the States from exercising it. So far is this from being the case, that a plain and conclusive argument to the contrary is to be deduced from the restraint laid upon the States in relation to duties on imports and exports. This restriction implies an admission that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes, the authority of the States remains undiminished.”

# Federalist 32 - Hamilton

“In any other view it would be both unnecessary and dangerous; it would be unnecessary, because if the grant to the Union of the power of laying such duties implied the exclusion of the States, or even their subordination in this particular, there could be no need of such a restriction; it would be dangerous, because the introduction of it leads directly to the conclusion which has been mentioned, and which, if the reasoning of the objectors be just, could not have been intended; I mean that the States, in all cases to which the restriction did not apply, would have a concurrent power of taxation with the Union.”

# Federalist 32 - Hamilton

“The restriction in question amounts to what lawyers call a **NEGATIVE PREGNANT** that is, a **NEGATION** of one thing, and an **AFFIRMANCE** of another; a negation of the authority of the States to impose taxes on imports and exports, and an affirmance of their authority to impose them on all other articles. It would be mere sophistry to argue that it was meant to exclude them **ABSOLUTELY** from the imposition of taxes of the former kind, and to leave them at liberty to lay others **SUBJECT TO THE CONTROL** of the national legislature.



# Federalist 32 - Hamilton

“The restraining or prohibitory clause only says, that they shall not, **WITHOUT THE CONSENT OF CONGRESS**, lay such duties; and if we are to understand this in the sense last mentioned, the Constitution would then be made to introduce a formal provision for the sake of a very absurd conclusion; which is, that the States, **WITH THE CONSENT** of the national legislature, might tax imports and exports; and that they might tax every other article, **UNLESS CONTROLLED** by the same body.

# Federalist 32 - Hamilton

“If this was the intention, why not leave it, in the first instance, to what is alleged to be the natural operation of the original clause, conferring a general power of taxation upon the Union? It is evident that this could not have been the intention, and that it will not bear a construction of the kind.”



# Federalist 32 - Hamilton

“It is not...a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional; repugnancy that can...alienate and extinguish a pre-existing right of sovereignty [in the States].”

4th paragraph

## Federalist 32 - Hamilton

**“The necessity of a concurrent jurisdiction in certain cases results from the division of the sovereign power; and the rule that all authorities, of which the States are not explicitly divested in favor of the Union, remain with them in full vigor...[This] is...clearly admitted by the whole tenor of the...proposed Constitution.**

## Federalist 32 - Hamilton

“We there find that, notwithstanding the...grants of ...authorities [to the federal government], **there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States**, to insert negative clauses prohibiting the exercise of them by the States...[Art. 1 Sec.10] consists altogether of such provisions. This circumstance is a clear indication of the sense of the convention, and furnishes a rule of interpretation out of the body of the ...[proposed Constitution], which...refutes every hypothesis to the contrary.”



# Conclusion:

Even where the Constitution delegates a power to the federal government, the Sovereign States retain a concurrent and coequal authority over the same matter unless the Constitution specifically prohibits the States from exercising that power.

**Does the Rule of Naturalization  
Trump the Arizona  
or  
any other  
State's Border Security Laws?**

## **Constitution: Article 1 Sec. 8, cl. 4**

Congress shall have Power...

To establish an uniform  
Rule of Naturalization.

## Federalist 42 - Madison

“By the laws of several States, certain...aliens, who had rendered themselves obnoxious, were laid under interdicts inconsistent...with citizenship...**What would have been the consequence, if such persons...had acquired the character of citizens under the laws of another State, and then asserted their rights as such...within the State proscribing them?...**[C]onsequences would probably have resulted, of too serious a nature not to be provided against. The new Constitution has accordingly...made provision against them...by authorizing the general [federal]government to establish a uniform rule of naturalization throughout the United States.”

# Conclusion:

The Constitution's Rule of Naturalization clause simply grants to the federal government exclusive authority to set the *criteria* for citizenship.

The purpose is one of uniformity of *criteria*, **NOT EXCLUSIVE Power Authority.**



# Looking at the Arizona Law

When Arizona official have made lawful contact with illegal aliens --

They are to turn those illegal aliens to the custody of the federal government -

- U.S. Immigration and Customs Enforcement.
- U.S. Customs and Border Protection.



## Other Provisions:

- Address crimes committed by illegal aliens and others within the borders of the State (criminal trespass, human smuggling, impeding traffic while picking up day laborers, harboring & concealing illegal aliens, and knowingly employing illegal aliens).
- After the illegal aliens have served their sentences, they will be turned over to ICE or US Customs and Border Protection.

# Question?

**When illegal aliens murder, rape,  
and rob citizens of the Sovereign  
State of Arizona, does their  
status as illegal aliens immunize  
them from responsibility for their  
crimes?**



## **The questions to ask comes from Hamilton in Federalist 32**

- Is there anything in the US Constitution which makes the powers asserted by the Sovereign State of Arizona **EXCLUSIVE** in the federal government?
- Is there anything in the US Constitution which prohibits the States from exercising the powers which Arizona exercises in her Law?

# Conclusive Argument

- No State shall...keep Troops...in times of Peace...or engage in War, unless actually invaded...

Article 1, Sec. 10, last clause

## Know that...

- Not only may the Sovereign State of Arizona turn illegal aliens over to the custody of the federal authorities, and not only may that State prosecute illegal aliens for their crimes committed within the Borders of the State.
- Arizona may also keep troops and engage in War to defend herself from the Invasion.

## Because,...

- Article IV, Sec. 4, requires the federal government to protect each of the States against Invasion.
- But the federal government has abdicated its duty.
- The Sovereign States have both a retained **and** an express authority to do it themselves or cease to exist as a sovereign entity.

# The Treaty Making Power of the United States

We hear that when the Senate ratifies a treaty, it becomes part of the “supreme law of the land”...

**Is that True?????**



# **Where do we first look?**

**The Constitution  
of  
the United States of America.**

# Our first questions...

Should always be,

- Is this authorized in the Constitution?
- Where exactly in the Constitution?
- And, precisely **WHAT** is authorized by the Constitution.

# Treaties

- Does the federal government have authority to make treaties?
- Can treaties be about any subject?
- Does the Constitution limit and define the objects of treaties?

## Article II, Sec. 2, Cl. 2

- Respecting the power of the President:

“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur...

## Article VI, cl. 2

“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, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” [emphasis added]



## Rule of Construction:

- Rules for understanding the objective meaning of writings that one must give effect to every word and phrase.
- E.g. The Clause does NOT say: Treaties made by the United States are part of the supreme Law of the Land.

Instead, the Clause says: Treaties **made under the Authority of the United States**, are part of the supreme Law of the Land.

# Rule of Construction

- Educators no longer teach “rules of construction”, because it has become the dogma of our time that texts have no “objective meaning” to be discovered.
- This is how facts are dismissed *prima facie* (without a first look) so that subjective relativism can be taught to our children instead.

# Deconstruction

- Deconstruction focuses on a text as such rather than as an expression of the author's intention, stressing the limitlessness (or impossibility) of interpretation and rejecting the Western philosophical tradition of seeking certainty through reasoning by privileging certain types of interpretation and repressing others. It was effectively named and popularized by the French philosopher Jacques Derrida from the late 1960s and taken up particularly by U.S. literary critics.

Oxford English Dictionary



## To restate...

A Treaty is part of the supreme Law of the Land ***only if*** it is made *under the Authority of the United States.*

# Understanding the Rule of Law

- The President and the Senate get the Authority to act from the Constitution.
- The objects of their *lawful* (as opposed to usurped) powers are enumerated in the Constitution.

# There must be Authorization

- The President and Senate must be authorized in the Constitution to act on a subject before any Treaty made by them on that subject qualifies as part of the supreme “Law of the Land”.

# Enumerated or its usurpation

- If the Constitution does not authorize the President and Congress to act on an object, the Treaty is not “Law” - it is a mere usurpation, and deserves to be treated as such.

# Federalist 78 - Hamilton

“There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. **No legislative act, therefore, contrary to the Constitution, can be valid.** To deny this would be to affirm that the deputy is greater than the principle; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.”

# Federalist 44 - Madison

“...as the constitutions of the States differ much from each other, it might happen **that a treaty** or national law of great and equal importance to the States **would interfere with** some and not with other **constitutions and** would consequently be valid in some of the States at the same time that it **would have no effect** in others.” [emphasis added]



“Giving to the President and Senate a power to make treaties, the Constitution meant only to authorize them to carry into effect, by way of treaty, any powers they might constitutionally exercise.”

Thomas Jefferson

# Jefferson's Common Sense

“Surely the President and Senate cannot do by treaty what the whole government is interdicted from doing in any way.”

Thomas Jefferson:

Parliamentary Manual, 1880



“According to the rule established by usage and common sense, of construing one part of the instrument by another, **the objects on which the President and Senate may exclusively act by treaty are much reduced**, but the field on which they may act with the sanction of the Legislature is large enough, and I see no harm in rendering their sanction necessary, and not much harm in annihilating the whole treaty-making power, except as to making peace.”

Thomas Jefferson to James Madison, 1796

## What are the proper objects of Treaties?

“To regulate Commerce with foreign Nations...and with the Indian tribes.” (enforce patent and copyright laws)

Article 1, Sec. 8, cl. 3

“To declare War...and make Rules concerning Captures on Land and Water.”

Article 1, Sec.8, cl. 11

“The Constitution authorizes the President to “...appoint Ambassadors, other public Ministers and Consuls...”

Article II, Sec. 2, cl. 2

# Federalist 64 - Jay

“The power of making treaties is an important one, especially as it relates to war, peace, and commerce; **and it should not be delegated** but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.”

# Federalist 64 - Jay

“There are a few who will not admit that the affairs of trade and navigation should be regulated by a system cautiously formed and steadily pursued; and that both our treaties and our laws should correspond with and be made to promote it. It is of much consequence that this correspondence and conformity be carefully maintained; and they who assent to the truth of this position will see and confess that it is well provided for by making concurrence of the Senate necessary both to treaties and to laws.”

# Federalist 42 - Madison

- THE SECOND class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit: to make treaties; to send and receive ambassadors, other public ministers, and consuls; to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; to regulate foreign commerce, **including a power to prohibit, after the year 1808, the importation of slaves**, and to lay an intermediate duty of ten dollars per head, as a discouragement to such importations.”

## Federalist 42 - Madison

- “The power to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations, belongs with equal propriety to the general government, and is a still greater improvement on the articles of Confederation. These articles contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations. The provision of the federal articles on the subject of piracies and felonies extends no further than to the establishment of courts for the trial of these offenses.”

# Patents and Copyrights

Article 1, Sec. 8, cl.8 authorizes Congress  
“To promote the Progress of Science and  
useful Arts, by securing for limited Times to  
Authors and Inventors the **exclusive Right  
to the respective Writings and  
Discoveries.**”

# Proposed Treaties

- U.N. Convention, Rights of the Child.
- U.S. membership in the International Criminal Court (ICC). This tribunal that has jurisdiction across the globe could prosecute elected U.S. leaders for entering into a war without UN approval.



# Proposed Treaties

- Law of the Sea Treaty - LOST will acquiesce to a UN council where U.S. companies can drill for oil or fish and which technologies must become global property via a form of intellectual eminent domain. The UN could tax up to 50% of royalties from offshore drilling and redistribute these proceeds to poorer nations.

# Proposed Treaties

- Outer Space Code of Conduct could seriously interfere with the U.S. implementing any type of anti-missile shield to protect itself. Using the feel-good premise of decreasing space debris, in actuality this treaty would jeopardize the U.S. military's ability to deploy platform-based weapons in space.

# Legislative Remedy

“We conceive the constitutional doctrine to be, that though the President and Senate have the general power of making treaties, yet wherever they include in a treaty matters confided by the Constitution to the three [did he mean two?] branches of Legislature, an act of legislature, will be requisite to confirm these articles, and that **the House of Representatives, as one branch of the Legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not.**”

Thomas Jefferson to James Madison, 1796

## And again...

- “I was glad ...to hear it admitted on all hands, that laws of the United States, subsequent to a treaty, control its operation, and that the Legislature is the only power which can control a treaty. Both points are sound beyond doubt.
  - Thomas Jefferson to James Madison, 1798.

# Our responsibility

- We must discover the lost art and science of Thinking and Analysis.
- We must read the Constitution and Federalist Papers for ourselves.
- Then we must learn to say, “They don’t have authority under The Constitution to do that!”

## Final Thoughts

- The prevailing philosophy or mindset changes from time to time. The prevailing philosophy of our time is very different from that of the time of our Framers. They believed in an Objective Reality, that some things were True, other things were False, and the existence of Fixed Enduring Truths and Principles. [Ayn Rand is of this school.]



## Final Thoughts

- But the prevailing mindset of our time is pragmatism & existentialism. We don't believe in fixed principles, external standards, or Truth or Falsity. We reject any standards outside of our own precious selves. We believe there is no higher standard than our own "feelings", "whims", "likes", and "dislikes." It does not occur to us to look to Standards and Principles outside of ourselves; and the idea that we should conform our Thoughts, Beliefs, and Behavior to external standards is preposterous to us of today.

## Final Thoughts

- So, these show the two schools of thought re: The Constitution.
  - The “originalists” say we must look to the original intent of the Constitution. What did our Framers mean by such and such Article, Section, clause? The best evidence is the Federalist Papers.

But today, people just want to spout off about what they themselves think. But that is the mindset which is destroying our Country. Our judges express their own opinions - not the Constitution. They believe that what *they* think is somehow important.



## Final Thoughts

- I understand that it is hard for people who have been raised in this mindset [and we who are living now all were] to understand that their own views, likes, dislikes, etc. are simply irrelevant when it comes to learning matters of objective Fact. But a Fact is a Fact regardless of what anyone might think if it.
- So, when reading the Constitution, the proper standard is, “What did the Framers say?”
- It is not, “Well, I think”, “In my opinion”.