The Right of State Interposition

Howard Newcomb Morse
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By

HOWARD NEWCOMB MORSE

PART I.

The three branches of our Federal Government always were, and still are, unequal. The executive department, from the first year the Constitution was in force until today, has been the only one of the three branches of the Federal Government that has had the same amount of potential power and has stayed in the same position in comparison with the power of the other two departments of the Federal Government, namely, second place. For sixteen years—from 1787 (when the Constitution was adopted) until Marbury v. Madison1 in 1803—this nation had legislative hegemony in the Federal Government. I use the term "hegemony" rather than the term "supremacy" because there can exist a supremacy of one over another or others only when there is not a common authority over all. The common authority over the three branches of the Federal Government is the Constitution since the whole is greater than any of its parts. For the next thirteen years—until Martin v. Hunter's Lessee2 in 1816—there was judicial hegemony. For the ensuing 106 years—until Kline et al. v. Burke Construction Company3 in 1922—there existed a more pronounced judicial hegemony. From 1922 until the present there has been a slightly modified judicial hegemony. Thus, it can be readily observed that there have been four distinct phases of hegemony as regards the three departments of the Federal Government from the time of the adoption of the Constitution until the present. Chief Justice Marshall caused the judicial hegemony in 1803, Mr. Justice Story caused its intensification in 1816, and Mr. Justice Sutherland caused its modification in 1922. But the Constitution caused the legislative hegemony that existed for the first sixteen years after the adoption of the Constitution. I shall explain how the very language of the Constitution created legislative hegemony.

The Constitution provides that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."4 "The executive Power shall be vested in a President

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1Cranch 137, 1 T. L. Ed. 60.
2Wheat. 304, 4 L. Ed. 97.
4Art. I, sec. 1.
of the United States of America." 

Since the word "All" in Article I, Section 1 is not contained in Article II, Section 1 or in Article III, Section 1, but instead the word "The" is used in the corresponding place in the two latter articles, this would, from a cursory examination, appear that only Congress can exercise legislative functions but that the President and the federal judiciary are not the exclusive custodians of the executive and judicial functions. But the phrase "herein granted" in Article I, Section 1 negates this conclusion until we pursue our examination. Since the word "Powers" in Article I, Section 1 is not embodied in Article II, Section 1 or in Article III, Section 1 in its plural form, but instead is used in the corresponding place in the two latter articles in its singular form, since the word "The" could have been used in reference to the word "Powers" in Article I, Section 1 in place of the word "A," and since the singular form of the word "Powers" could have been used in reference to the word "All" in Article I, Section 1, the word "Powers" in Article I, Section 1 it must be admitted encompasses a wider scope of authority than its singular form in Article II, Section 1 and in Article III, Section 1. Thus, at the outset the legislative branch embodied more authority than either of the other two departments of the Federal Government.

Secondly, the authority contained in Article I, Section 1 is divisible as it is vested in Congress, which is divisible into two parts (the Senate and the House of Representatives). The authority contained in Article II, Section 1 is vested in the President alone and, therefore, is indivisible. Thus, this consideration is an effective counter in behalf of the power of the executive branch as compared with the power of the legislative branch and, as a result, cancels out the previous consideration in favor of the legislative branch. But, the authority contained in Article III, Section 1 is not only divisible, as it is vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish, but divisible—not into an expressed number of parts as is the case in regard to the legislative department—but into an indefinite number of parts, with the legislative department the principal judge of the number of parts (I qualify this last phrase with the word "principal" taking into consideration the veto and appointing powers of the executive department). Thus, a second reason is shown why the legislative branch has more authority than the executive. A third reason lies in the fact that, although the executive department can veto the action of the legislative department, a two-thirds vote of the latter can override a veto by the former.

6Art. II, sec. 2.
6Art. III, sec. 1.
Thirdly, the legislative and executive departments can delegate power but the judicial department cannot since its authority is specifically enumerated in Article III, Section 2 and, since the same article and section sets out in detail what authority the Supreme Court shall exercise, and since Article III, Section 1 leaves to Congress and the President's veto and appointing powers the creation of all federal courts inferior to the Supreme Court and the parceling out to such inferior federal courts of all federal judicial authority not exclusively reserved for the Supreme Court. Thus, a fourth reason can be taken into account as to why the judicial department has less power than the legislative and executive departments of the Federal Government.

I submit that the lack of power of the judicial branch challenged and provoked Chief Justice Marshall to cast his Jovian thunderbolt in *Marbury v. Madison*, supra, to the effect that the federal judiciary has the power to decide that, "... a law repugnant to the Constitution is void," and that it is within the province of the federal judiciary to decide when a law is repugnant to the Constitution. Because the supremacy accorded to the laws of the United States is expressly limited to those "made in pursuance" of the Constitution by virtue of a provision in the Constitution, Chief Justice Marshall seized on this phrase as the basis for his dual conclusion. But this basis will support only part of the first half of his dual conclusion—that, "... a law repugnant to the Constitution is void," but only as regards the state or states in which the law has been in issue. Chief Justice Marshall waxes eloquently, but scrupulously avoids giving a single reason as to why the federal judiciary should be invested with the supreme power of being the arbiter of the constitutionality of a federal statute. The phrase "of the United States" following the word "power" in Article III, Section 1 constitutes an admonition to the federal judiciary to exercise only federal legal authority as expressly authorized by the Constitution. The right to pass on the constitutionality of a federal statute belongs to the individual states by the terms of the Tenth Amendment. Because of the qualifying phrase "made in pursuance thereof" it is obvious that the constitutionality of challenged federal statutes must be decided. Therefore, it is the duty as well as the right of the states to pass upon the constitutionality of a federal statute whenever its constitutionality is questioned in a court of law.

The Constitution specifies nine types of federal judicial jurisdiction:

1. Cases arising under the Constitution, laws and treaties of the United States.
2. Cases affecting ambassadors, other public ministers and consuls.
3. Cases of admiralty and maritime jurisdiction.

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7Art. VI, sec. 2
4. Controversies to which the United States shall be a party.
5. Controversies between two or more states.
6. Controversies between a state and citizens of another state.
7. Controversies between citizens of different states.
8. Controversies between citizens of the same state claiming lands under grants of different states.
9. Controversies between a state, or the citizens thereof, and foreign states, citizens or subjects.

The United States Supreme Court has original jurisdiction of numbers 2, 5, 6, and 9 (if, as regards 9, a state is a party instead of one or more of her citizens) and appellate jurisdiction of the remainder.

According to Mr. Justice Story in *Martin v. Hunter's Lessee*, supra, Congress must create a Supreme Court and at least one inferior federal court, giving to the latter original jurisdiction of all types of cases in numbers 1 and 3 but only as much original jurisdiction of each of 4, 7, 8, and 9 (if, as regards 9, one or more citizens is a party and not a state) as it cares to and giving to the former original jurisdiction of all types of cases in number 2 but only as much original jurisdiction of each of 5, 6, and 9 (if, as regards 9, a state is a party rather than one or more of her citizens) as it wants to and appellate jurisdiction of all types of cases in numbers 1 and 3 but only as much appellate jurisdiction of each of 4, 7, 8, and 9 (if, as regards 9, one or more citizens is a party and not a state) as it so desires.

But according to Mr. Justice Sutherland one hundred six years later in *Kline et al. v. Burke Construction Company*, supra, Congress need create only as much original jurisdiction of each of 2, 5, 6, and 9 (if, as regards 9, a state is a party instead of one or more of her citizens) as it wishes to.

**PART II**

That the states, and not the federal judiciary, have the power to judge of the constitutionality of acts of Congress and decisions of the United States Supreme Court is attested to by the words of Thomas Jefferson as modified and adopted by the Legislature of the Commonwealth of Kentucky in November, 1798 and known as the Kentucky Resolutions, by the Virginia Resolutions as adopted by the General Assembly of the Commonwealth of Virginia 21 December, 1798, by the words of James Madison in his Report on the Virginia Resolutions as regards the third Resolution, by a resolution of the General Court of the Commonwealth of Massachusetts in 1803 relative to the acquisition of Louisiana, by the address issued by the New England or Hartford Convention in December,
1814, by President Jackson's explanation of his Proclamation of 11 December, 1832 in the form of an editorial in the Washington Globe published by his authority, by John C. Calhoun's Resolutions as presented to the United States Senate 22 January, 1833, by Calhoun's address in the United States Senate 26 February, 1833, by Senator George M. Bibb's address in the United States Senate in 1833, by John Quincy Adams' address before the New York Historical Society in 1839, by a resolution adopted by the Massachusetts General Court 22 February, 1845 relative to the proposed annexation of Texas, by Senator Benjamin Wade's address in the United States Senate 23 February, 1855, and by Judge St. George Tucker, Professor of Law at the University of William and Mary, in the appendix to the first volume of his edition of Blackstone's Commentaries.

The state of South Carolina invoked state interposition against the Tariff Act of 1828 by her Ordinance of Nullification passed in November, 1832. The states of Connecticut, Iowa, Maine, Massachusetts, Michigan, Pennsylvania, New York, Ohio, New Hampshire, Rhode Island, Vermont, Illinois, Indiana, and Wisconsin invoked state interposition against the Constitutional provision that, 'No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due,' by enacting laws which either nullified an act passed by Congress in 1793 to effectuate the aforementioned Constitutional provision or rendered useless any attempt to execute them. Requests for the return of run-away slaves by Georgia were refused by Governors Kent and Fairfield of Maine and Seward of New York. Governor Seward subsequently made a similar refusal to Virginia.

New Jersey passed a law in conformity with her Constitutional obligation, but she invoked state interposition against the acts of Congress by enacting laws which rendered inoperative the remedies provided by her own law and by the act of Congress. Vermont invoked state interposition against the same Constitutional provision by making it penal for any person to attempt to carry out the provision within her limits as a result of the following statute: "Every person who may have been held as a slave, who shall come or who may be brought into this State, with the consent of his or her alleged master or mistress, or who shall come or be brought, or shall be in this State, shall be free. Every person who shall hold, or attempt to hold, in this State, in slavery, as a slave, any free person, in any form or for any time, however short, under the pretense that such person is or has been a slave, shall, on conviction thereof, be imprisoned in the State prison for a term not less than five years, nor more than twenty, and be fined not less than one thousand dollars, nor more than ten thousand dollars."
The Governors of Ohio and Iowa invoked state interposition against the Constitutional provision that, "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime," by refusing to surrender two of John Brown's accomplices to Virginia upon demand by that Commonwealth. The states of New York, Delaware, Pennsylvania, New Jersey, Connecticut, Massachusetts, New Hampshire, Rhode Island, Maryland, Kentucky, California, Oregon, Kansas, Illinois, Indiana, Iowa, Maine, Michigan, Minnesota, Ohio, Vermont, and Wisconsin invoked state interposition against the United States Supreme Court's decision in *Scott v. Sandford*.9

That the use of federal force against a state interposing against an act of Congress or decision of the United States Supreme Court would be a gross and palpable usurpation of power at the hands of the federal authorities is attested to by the words of James Madison in the federal Constitutional Convention, Oliver Ellsworth in the ratifying convention of Connecticut, Alexander Hamilton in the ratifying convention of New York, Governor Edmund Randolph in the ratifying convention of Virginia, President Buchanan, Horace Greeley in The New York Tribune of 9 November, 1860 and in the first volume of his American Conflict at page 359, Governor Thomas H. Hicks of Maryland, and Governor Beriah Magoffin of Kentucky.

Three states came into the Union conditionally; that is, their ratifications of the Constitution each contained a condition subsequent. These states are Virginia, New York, and Rhode Island. Virginia's condition subsequent as embodied in her ratification of 25 June, 1788 is in these words:

"That the powers granted under the Constitution, being derived from the people of the United States, may be resumed by them, whenever the same shall be perverted to their injury or oppression, and that every power not granted thereby remains with them and at their will," etc.

When Virginia's Constitutional Convention passed her ratification containing this condition subsequent, all but four of the original thirteen states had previously ratified the Constitution, all without the condition subsequent that any powers granted might under certain circumstances be resumed. Since the nine states already members of the Union accepted Virginia as a member, they assented to Virginia's condition subsequent. Such assent thereupon operated so as to make Virginia's condition subsequent apply to each and every one of the nine states as forcefully as it applied to Virginia.

9Art. IV, sec. 2, clause 2.
1019 How. 393.
The next state to join the Union, New York, also came into the Union conditionally. New York's condition subsequent as contained in her ratification of 26 July, 1788 is in these words:

"That the powers of government may be reasserted by the people, whenever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not, by the said Constitution, clearly delegated to the Congress of the United States, or the departments of the Government thereof, remains to the people of the several States, or to their respective State governments, to whom they may have granted the same; and that those clauses in the said Constitution which declare that Congress shall not have or exercise certain powers, do not imply that Congress is entitled to any powers not given by the said Constitution, but such clauses are to be construed either as exceptions to certain specified powers or as inserted for greater caution."

Since the ten states already members of the Union accepted New York as a member, they assented to New York's condition subsequent, which was the same kind of condition subsequent which already applied to all ten. The next state to enter the Union was North Carolina. The last of the original thirteen states to join the Union, Rhode Island, also came into the Union conditionally. Rhode Island's condition subsequent as embodied in her ratification of 29 May, 1790 is in these words:

"The powers of government may be reasserted by the people whenever it shall become necessary to their happiness."

Since the twelve states already members of the Union accepted Rhode Island as a member, they assented to Rhode Island's condition subsequent, which was the same kind of condition subsequent as before.

Each of the remaining thirty-five states was admitted into the Union on a basis of absolute equality with each of the original thirteen members. Once admitted to statehood, such equality is guaranteed by the very terms of the Constitution.

Since each of the thirty-five states to enter the Union subsequent to the original thirteen states came into the Union on a basis of perfect equality with each of the original thirteen states, the condition subsequent applicable to the original thirteen states applies to the remaining thirty-five states just the same as all rights and powers possessed by each of the original thirteen are possessed in equal amounts by each of the remaining thirty-five.

The people of any state, therefore, may reassert the exercise of powers of government granted under the Constitution "whenever it shall become necessary"
to their happiness." Thus, the people of any state may reassume any grant or delegation of the exercise of any power "whenever the same shall be perverted to their injury or oppression."

But since the resumption can be made only by the people of a state, some higher authority than the state legislature is necessary to decide on the question of resumption since members of the state legislature are representatives of the people of their state in all legislative matters. Members of a constitutional convention elected by the people of a state to decide on the one question of resumption would constitute authority closer to sovereignty, which of course is the people of the state themselves. Proof that a constitutional convention whose members are elected by the people of a state is closer to the sovereignty of the people of the state than a state legislature is to be found in the fact that it is provided\(^1\) in the Articles of Confederation and Perpetual Union that an amendment to said Articles of Confederation and Perpetual Union requires the consent of the legislature of every state which had ratified the said Articles of Confederation and Perpetual Union (and all thirteen states eventually ratified it); yet only nine were able to successfully amend the Articles of Confederation and Perpetual Union by the device of twelve of the thirteen states resorting to the remedy of submitting the question of amendment to authority closer to the sovereignty of the people of the states than state legislatures—constitutional conventions whose members were elected directly by the people of the states—and fixing the arbitrary number nine as the number of states whose ratifications by constitutional conventions would be necessary for the adoption of an amended Articles of Confederation and Perpetual Union for the United States of America styled the Constitution for the United States of America by the nine or more ratifying members of the twelve states. Further proof that a constitutional convention whose members are elected directly by the people of a state is closer to the sovereignty of the people of the state than state legislature is to be seen in the fact that ratification of all twenty-one of the amendments to the Constitution, with the single exception of the twenty-first amendment, was by state legislatures but that the ratification of the twenty-first amendment was proposed by Congress to be by state constitutional conventions no doubt because the twenty-first is the only amendment which amended a prior amendment to the Constitution.

Because it is provided\(^2\) in the Constitution that ratification by three-fourths of the states in the Union are necessary for the adoption of an amendment, some authority even higher than state constitutional conventions whose members are elected directly by the people of their respective states may be necessary to decide on the question of resumption when the states in issue number less than thirty-six, which is three-fourths of the number of states in the Union. There is only

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\(^{1}\)Art. XIII.

\(^{2}\)Art. \(\text{V}\).
one authority higher than a state constitutional convention whose members are
elected directly by the people of the state—the supreme authority—sovereignty
itself—the people of the state themselves! The sovereignty of the people of a
state themselves as expressed in a referendum conducted in their state would operate
so as to lift the question of resumption above Article V. Missouri, Virginia,
Arkansas, and Tennessee followed this procedure by submitting the issue of
secession to a referendum. And should the people of the state vote in favor of
resumption, an amendment to the Constitution would be effectuated, but would
apply only to the state in issue.

Since sovereignty resides with the people of each state, each state (that is,
the state government, particularly the state legislature) is the agent of the people
of each state. When the people of each of the original thirteen states, assembled,
by their representatives in state constitutional conventions, ratified the Articles
of Confederation and Perpetual Union, each state was retained by the people
thereof as their agent but was to abstain from the exercise of certain powers
formerly held in trust by each state for the people thereof as the result of a prior
delegation of the exercise of such powers to each state by the people thereof since
the exercise of such powers was reassumed by the people of each state and con-
ferred by delegation to a joint subagent—the federal Government. When the
Articles of Confederation and Perpetual Union for the United States of America
were amended and styled the Constitution for the United States of America, the
Federal Government, it is true, was delegated a greater exercise of power by the
people of the ratifying states than had been delegated to it under the Articles of
Confederation and Perpetual Union by the people of the ratifying states. But
this increase in the exercise of power delegated to the subagent—the Federal
Government—was a subtraction of the exercise of power not from the people
of the states but from the states; that is, just as the people of the states did not
delagate any new exercise of power to the Federal Government when they, as-
sembled, by their representatives in state constitutional conventions, ratified the
Articles of Confederation and Perpetual Union for the United States of America,
but simply reassumed the exercise of some of the powers previously delegated to
their state governments and delegated the exercise of these powers to a subagent,
so too did the people of the states delegate no new exercise of power to the
Federal Government when they, assembled, by their representatives in state con-
stitutional conventions, ratified the Constitution for the United States of America,
but simply reassumed the exercise of additional powers previously delegated to
their state governments and delegated the exercise of these additional powers
to the subagent.