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# Comity of Relations Between Governments of the Several States and the National Government as Affected by Federal Judicial Review

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COMITY OF RELATIONS BETWEEN GOVERNMENTS OF  
THE SEVERAL STATES AND THE NATIONAL  
GOVERNMENT AS AFFECTED BY FED-  
ERAL JUDICIAL REVIEW

JAMES R. LEWIS\*

From the beginning of the National Government to the present time there has existed continually the many-sided problem of harmonizing the exercise of the sovereign powers of that government with the similar exercise of such powers by the several states, in their respective domains. Since no amount of human wisdom and foresight could mark out precisely the boundaries of sovereignty to be exercised exclusively by these separate governments, occupying, as they did and do, the same geographical domain, in respect to every situation which succeeding events would bring forth, serious conflicts inevitably arose, and were many times attended with very bitter political and sectional disputes. Time and experience have brought about the solution of many of these problems. Nevertheless, very perplexing questions affecting these relations now exist and we may, with confidence, predict that they will continue to arise, and to challenge the ingenuity of our ablest statesmen, jurists, and public administrators.

During the early years of our National Government, little attempt was made by it to exercise its sovereignty in respect to commercial and industrial regulation, and its exercise of powers relative to the basic rights, freedoms, and duties of the individual citizen was sparing, as this was left largely to the several states.

The principle of supremacy in respect to the powers committed to the government of the Union were set forth in the Constitution itself in terms so plain and unmistakable, it would seem, as to be beyond question. But while this was true, and was rather generally accepted in theory, its application to specific situations, not completely settled even in the present time, was then attended with much difficulty and characterized by many

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great struggles in the courts, among the most notable of which was that of the case of *McCulloch v. Maryland*,<sup>1</sup> decided by the Supreme Court in 1819. This Court had, in 1803, in *Marbury v. Madison*,<sup>2</sup> boldly asserted its power to invalidate a legislative act of Congress, but it had not previously been called upon to decide whether it was vested with authority to proceed in a similar manner when the validity of a state law or judicial decree was in judicial dispute. The case was argued before the Court for nine days, with some of the greatest advocates of the time as the participants, among them, Daniel Webster, William Pinkney, and William Wirt, on behalf of the government, and Luther Martin and Joseph Hopkinson, on behalf of the state of Maryland.

In what is regarded by many as his greatest state document, Chief Justice John Marshall, now near the zenith of his distinguished career, in his opinion for the Court in this case, formulated a doctrine and laid down a policy for resolving such conflicts, which has remained the law of the land without important modification to the present time. The essence of the decision was that on the Supreme Court of the United States did the Constitution of our country devolve the important duty of peacefully deciding the issues presented by conflicts of the laws of the Union with those of its members, and in the exercise of this power and the discharge of this duty in the present case, it must hold the law of the state of Maryland which attempted to impose a tax on the Maryland Branch of the Second Bank of the United States void, as being repugnant to the provisions of that Constitution.

The Court was subjected to a storm of criticism and abuse for rendering this decision, and there was a popular demand in Virginia and elsewhere that it be shorn of its power to pass upon cases to which states were parties. The decision was particularly obnoxious to those favoring strict construction of the Constitution, because it not only sustained the doctrine of the implied powers of Congress, but also recognized the binding effect of an implied limitation upon the states to interfere with the functioning of federal agencies.

With a prescience born of innate wisdom and foresight, as

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<sup>1</sup> 4 Wheaton (U.S.) 316, 4 L. Ed. 579 (1819).

<sup>2</sup> 1 Cranch 137, 2 L. Ed. 60 (1803).

well as experience, the framers of the Constitution must have foreseen the probable advent of just such disruptive struggles and controversies as this, when they were led to provide, with such meticulous care, in the second paragraph of the Sixth Article of the Constitution that "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 . . ." Long before Lincoln had uttered those memorable words, "A nation divided against itself cannot stand," our political forefathers had divined the truth of this concept, and had provided, as far as human wisdom could, against the contingency.

This supreme law of the land, under provisions of Article III of the Constitution, was to be administered by one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish, whose power was made to "extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; . . . to controversies to which the United States shall be a party; to controversies between two or more States; . . . between citizens of different States; between citizens of the same State claiming lands under grants of different States . . ." After the ratification of the Eleventh Amendment on January 8, 1798, by the terms of which the judicial power of the United States was restricted so as not "to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state," subjects of foreign countries might sue and be sued in the federal courts for the enforcement of rights created by state laws, only if "one of the United States" was not a party to the suit.

Under the sanction of Article III of the Constitution, Congress during its first session passed, and the President signed, a comprehensive act, known as the Judiciary Act of 1789. This act set up the system of federal inferior courts, and provided extensively for the functioning of the system, and its correlation with the functioning of the courts of the several States. The 34th section of the act provided, among other things, "that the laws of the several States, except where the Constitution, treaties

or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States." These provisions, together with those of the Fourteenth Amendment to the effect that "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," which were added in 1868, constituted the broad framework of the fundamental law which has so profoundly affected the vast and complex interrelations between the government of the United States and those of the several States.

Thus, the questions involving interpretation and application of State laws which have been most frequently before the federal courts were brought there under one or more of the following jurisdictional conditions: (1) When a law of a State was claimed to be repugnant to a provision of the Constitution, as being inimical to some federal function; (2) when a law of a State, or the application thereof, was challenged as abridging the privileges or immunities of a citizen of the United States; (3) when litigations arose between citizens of different States, or an alien and a citizen of the United States, involving the enforcement of a legal right created by State law.

The decision in *McCulloch v. Maryland* settled one Constitutional question of great importance, that is, the proposition that whenever a State law comes into conflict with the substantive law of the United States made in pursuance of the Constitution, the State law is invalid and must give way, and the Supreme Court is vested with authority to declare this to be so. An almost equally important question, intimately affecting relations between the National government and those of the States, however, was the subject of shifting judicial views for many years. That question had to do with the extent to which a State might regulate commercial transactions which, though originating within the State, extended beyond the boundary lines thereof, and to what extent such power was affected by the presence or absence of regulation of the same subject by the federal government.

One aspect of this question was disposed of by the Supreme Court in a leading decision interpreting the commerce clause of the Constitution, in the case of *Gibbons v. Ogden*<sup>3</sup>, which was decided in 1824. Chief Justice Marshall's opinion, for a unanimous Court, constitutes another great state document, and is one of his most respected opinions today. It has been declared to be "the first great anti-trust decision," and Mr. Cushman observes that "It was perhaps the only genuinely popular decision which Marshall ever handed down." In this decision, the Chief Justice, with penetrating analysis, defined "commerce" and delineated the powers of the federal government to regulate it, whenever it was "commerce with foreign nations, and among the several States," holding that a New York statute regulating activities of steamboats engaged in interstate commerce between New York and New Jersey was invalid, because it was in conflict with and restrictive of the federal government's right to regulate such commerce, a right which had in this case been previously asserted by that government. The Court did not directly pass upon the question as to whether a state regulation of such commerce might be valid, so long as Congress failed to act for the regulation of the particular interstate activities in question.

Chief Justice Marshall did reject the argument, however, that the act passed by Congress August 7, 1789, providing that the operations of river and harbor pilots should be governed by state laws then in force affirmatively acknowledged a concurrent power in the States to regulate the conduct of such pilots, and thus implied a recognition by Congress of the right of States concurrently to regulate commerce with foreign nations and amongst the States. On the contrary, he said, "The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things unless expressly applied to it by Congress . . . ."

The question was more directly dealt with in a later case, *Prigg v. Pennsylvania*,<sup>4</sup> decided in 1842, in which the fugitive

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<sup>3</sup> 9 Wheaton 1, 6 L. Ed. 23 (1824).

<sup>4</sup> 16 Peters 539 (1842).

slave problem was principally involved. Pennsylvania had previously passed a law to provide machinery whereby lawful owners of fugitive slaves might establish their ownership and recover their property, under stipulated conditions, the existence or non-existence of which was to be ascertained by local tribunals. A case arose in which the local tribunal denied the right of the claimant to remove a slave from the state, and the issue of validity of the state enactment was carried to the Supreme Court. Justice Story, speaking for the Court, declared that since the Constitution gave to the federal government the power to deal with fugitive slaves, that power was thereby withdrawn from the states; that the states could not enforce laws on the subject, regardless of whether any conflict with federal laws was involved.

During the same term, the Court handed down another significant decision in which Justice Story again spoke for the Court, in *Swift v. Tyson*<sup>5</sup>, upholding an action brought in the New York Federal Court by an indorsee of a bill of exchange against the acceptor who had been defrauded by the drawer.

One question presented here, the principal question in the initial action in the local tribunal of the state of New York, was whether under the circumstances of this case, a pre-existing debt constituted a valuable consideration in the sense of the general rule applicable to negotiable instruments. Acceptance of the bill was in New York, and the local tribunal there held that a debt of this kind did not constitute such a consideration. The defendant argued in the Supreme Court that, under the applicable provisions of the Judiciary Act of 1789, the federal courts were bound to follow the decisions of the state tribunals in all cases to which these provisions applied. This contention was rejected by Justice Story in the following words:

"In order to maintain the argument, it is essential, therefore, to hold that the word 'laws,' in this section, included within the scope of its meanings the decisions of the local tribunals. . . .

"In all the various cases, which have hitherto come before us for decision, this Court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals. . . .

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<sup>5</sup> 16 Peters 1, 10 L. Ed 865 (1842).

"It becomes necessary for us, therefore, upon the present occasion, to express our own opinion of the true result of the commercial law upon the question now before us. And we have no hesitation in saying that a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments."

There is much agreement among competent authorities now to the effect that had Justice Story and the other members of the Court carefully considered the legislative history of the applicable provisions of the Judiciary Act, a different decision would have been rendered in this case. Charles Warren in 1923 published significant results of his study of the original Draft Bill of this Act, and the amendments thereto.<sup>6</sup> The data he brings to light leave little room to doubt that it was the intention of those who framed and passed this enactment to insure that federal courts exercising jurisdiction in diversity of citizenship cases would give effect to the unwritten as well as the statutory laws of the State, as construed by the local courts.

The case did not attract a great deal of attention at the time, but it was important, nevertheless, quite out of proportion to the contemporaneous view of it, because it characterized the Court's attitude on this important question for almost a hundred years.

The policy in which the decision was grounded was one aiming at greater uniformity in the general body of law governing commercial relations, over the entire nation. It was thought that the State courts would follow the Supreme Court, and uniformity of interpretation was very desirable, since commercial intercourse among the states and with foreign nations was expanding tremendously and growing in complexity, while each state seemed determined to establish its own common or unwritten law as well as statutory law with complete disregard for any notion of harmony with the laws of other states and those of the Union. The aim of the Court, however, was not realized by this approach. On the contrary, it tended merely to add one more element of conflict to the discord.

Eventually, it was necessary for the Supreme Court to consider a much narrower concept as to the permissible limits of state regulation, in the absence of federal regulation, of transac-

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<sup>6</sup> Warren, *New Light on the History of the Federal Judiciary Act of 1789* (1923) 37 HARV. L. R. 49.



tions originating within but extending beyond the boundary lines of individual states. Such an issue was presented in *Peik v. Chicago and Northwestern Railway Company*,<sup>7</sup> decided in 1877. As dealt with by Chief Justice Waite in his opinion for the Court, the question was left obscure, however. Throughout his tenure, Chief Justice Waite tended to favor broadened regulatory powers of the states. In this case he upheld a Wisconsin statute regulating railroad operations which were essentially domestic, but which overlapped the state's boundary lines. He stated his views thus:

"Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its affairs, etc., so far as they are of domestic concern. With the people of Wisconsin, this company has domestic relations. Incidentally, these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without."

A contrary position was taken by the Court a short time later in *Wabash, St. Louis and Pacific Railway Company v. Illinois*,<sup>8</sup> decided in 1886, when the Court categorically held that a state might not regulate even that portion of interstate commerce which took place wholly within its own borders. This doctrine was too extreme, however, and has been modified to permit a greater degree of concurrent power to be exercised by the States, wherever their exercise of regulatory power is in furtherance of a legitimate domestic function and is not in conflict with the federal government's exclusive power to regulate interstate commerce. The decision was of much importance, nevertheless, because it did bring federal regulation of railroads and other enterprises engaged in interstate commerce much nearer.

It was not until 1938, when the case of *Erie Railroad Company v. Tompkins*<sup>9</sup> was decided by the Supreme Court, that the doctrine laid down in *Swift v. Tyson*, *supra*, was set aside and supplanted by a new concept of far-reaching significance, concerning comity of relations between the States and the National government, in the exercise of their respective sovereign powers.

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<sup>7</sup> 94 U. S. 164 (1877).

<sup>8</sup> 118 U. S. 557 (1886).

<sup>9</sup> 304 U. S. 64 (1938).

This decision brings a radically different concept to bear upon these relations, as well as a much broader interpretation of the provisions in the 34th section of the Judiciary Act of 1789. It goes far beyond simply holding that this provision, contrary to the interpretation in *Swift v. Tyson*, requires federal courts exercising their jurisdiction in diversity of citizenship cases to apply as their rules of decision the law of the State, unwritten as well as written.

Speaking through Mr. Justice Brandeis, the Court, while calling attention to the broadened interpretation of these provisions in the Judiciary Act, concluded that the Constitution itself required that federal courts in the broad field of general law accept as their rules of decision the interpretation of state courts in respect to the statutory and common laws of the various states. This conclusion was necessitated by the fact that the Constitution neither conferred nor purported to confer any power upon the federal courts to declare substantive rules of common law applicable within a state, and authority not specifically delegated to the federal government was reserved to the states. Justices Butler and McReynolds, dissenting, protested sharply but unavailingly against "changing the rule of decision in force since the foundation of the government," and Justice Reed thought that the Court should have limited its decision to the new interpretation of the Judiciary Act without regard to the constitutional question.

The trend toward greater recognition of the independence of the states in the administration of their own affairs evidenced by the decision in the *Erie* case was much more marked in subsequent decisions, particularly, *Burford v. Sun Oil Company*,<sup>10</sup> decided in 1943. The essence of the doctrine expounded in the *Burford* case is that whenever federal equity courts, in the exercise of discretionary power to adjudicate questions of law and fact over which state courts and tribunals have concurrent jurisdiction, are called upon to consider such issues, they should exercise their discretion and decline to intervene, where their intervention is likely to occasion needless delay and conflicts in the interpretation of law of the state. This doctrine constitutes a sharp demarcation of the long-unbroken rule that where a

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<sup>10</sup> 319 U. S. 315 (1943).

federal court has properly obtained jurisdiction in a case on any ground, such court has the right and power to decide any and all questions presented in the case, including the local or state questions.<sup>11</sup>

That this revitalized concept of the Court as to state rights is not purely transitory is demonstrated by a number of contemporaneous decisions, important among which are the *Railroad Commission v. Rowan & Nichols Oil Company* cases,<sup>12</sup> and *Railroad Commission v. Pullman Company*.<sup>13</sup>

Jurisdiction in the *Burford* case was recognized as being conferred both by diversity of citizenship of the parties, and because of the plaintiffs' contention that they were being denied due process of law. The principal issue was whether certain laws and regulations of the state of Texas, as applied to plaintiffs, violated the due process clause of the Fourteenth Amendment, so as to justify a grant of injunctive relief by the federal courts of equity. A sharply divided Court refused to pass on the Constitutional question, applying the doctrine that such questions will not be decided if another alternative is open, reversing the Circuit Court for the Fifth Circuit and sustaining the federal District Court in its dismissal of the suit.

Approval of the action of the District Court was predicted upon the doctrine announced in the *Erie* case, emphasizing states' rights. Speaking through Mr. Justice Black, the majority supported their position by the erection of a hierarchy of values in which individual property rights were subordinated to the necessities of the public interest. The Court appeared to address itself but incidentally to the question as to whether plaintiffs' property rights were being infringed, as claimed, choosing rather to decide the case on the proposition that a federal court having jurisdiction, whether by diversity of citizenship of the parties, or by the presence of federal question, of a suit in equity to enjoin the enforcement of an administrative order of a state commission, may, in its sound discretion, decline to intervene by granting such relief, if to do so would be prejudicial to the public interest. It was declared to be in the public interest

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<sup>11</sup> *Herkness v. Irion*, 278 U. S. 92 (1928); *Siler v. L. & N. R. R. Co.*, 213 U. S. 175 (1909).

<sup>12</sup> 310 U. S. 573 (1940); *id.* 311 U. S. 570 (1941).

<sup>13</sup> 312 U. S. 496 (1941).

that federal courts so exercising jurisdiction should use their discretionary power with proper regard for the independence of state governments in carrying out their own policy, and decline to intervene, where, to do so, though affording proper equitable relief to an injured or threatened property right, would also tend to thwart the state in carrying out its policy for the protection of the public interest.

The philosophy that individual and property rights must give way to the necessities of the public interests is neither new nor disturbing. But if our federal courts are henceforth to pursue a line of reasoning which impels them to decline to exercise a jurisdiction provided for in the Constitution and conferred upon them with but little contraction since the foundation of our government, we may justifiably entertain some anxiety as to where such a policy may lead us, and to what extent it may foreshadow even more disturbing departures of the judicial branch of the government from the policies which we have hitherto supposed it was the duty of the Congress to determine.

Nor can everyone view without some misgivings, the ultimate conclusion of the Court in this case that the application of this policy not only insures the desirable lessening of conflicts between the decisions of the federal equity courts and those of the state courts, but accomplishes this without substantially impairing or endangering recognizable property rights. On this point Justice Black declares:

“On the other hand, if the state procedure is followed from the commission to the State Supreme Court, ultimate review of the federal questions is full preserved here.” (p. 334).

The basic defect in this conclusion is that while the right of review is indeed preserved, that is not necessarily the equivalent of the preservation of the property right itself. To perceive the significance of this distinction, it is necessary only to consider the facts operative in the instant case.

The state of Texas, as it constitutionally may do, in the exercise of its police power for the protection of the public interest in the conservation of natural resources, promulgated certain rules limiting the right of plaintiffs and others to drill oil wells for the purpose of extracting oil from the common underground reservoir. Plaintiffs, claiming they had complied with these rules, complained that their property rights were

impaired by the action of the state commission in subsequently granting exceptions to these rules, authorizing adjacent property holders to drill wells tapping the common pool at closer intervals than the rules prescribed for plaintiffs, and that this would enable the adjoining operators to recover oil which equitably belonged to plaintiffs. Let it be once conceded that the plaintiffs' claims are just, and it is plain that a right of review in the federal courts, not presently available but available only after remedies are exhausted in the state courts, may avail little or not at all to protect the threatened or impaired rights. The point is so obvious as to require no further argument in support of it.

However unimpeachable may be the motives and integrity of the administrative officers of the state commission, in such a situation as that presented by the facts in this case, it is almost inevitable that errors of judgment will result from time to time in the serious impairment or destruction of property rights, unless relief through court review and revision of administrative orders is kept free from obstructions. To say that such questions are fraught with many complexities and serious difficulties, and, therefore, should be dealt with exclusively by agencies and tribunals of the state, is to formulate an argument which, it would seem, should be addressed to Congress, in whose discretion lies the power to withdraw such questions from the jurisdiction of federal equity courts, if indeed such is deemed to be in the public interest.

Is not the fact that a federal equity court, upon review of issues of the instant character, may reach a conclusion which would differ from the conclusion that would be reached by a state court considering the same issues, precisely the central reason which induced the creation of such equity courts? The classic identification of this fact was given by Chief Justice John Marshall in *Bank of the United States v. Deveaux*,<sup>14</sup> where he declared:

"The judicial department was introduced into the American Constitution, under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the State will administer justice as impartially as those of the Nation, to parties of every description, it is not less true that the Constitution itself either entertains

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<sup>14</sup> 5 Cranch (U. S.) 61, 87 (1809).

apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established National tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States."

If that reasoning was valid when it was brought forth more than a century ago, is it less valid today?

The majority opinion in the *Burford* case makes much of the fact that the issues involved in the controversy presented "as tough and thorny" a problem as had been dealt with by legislatures anywhere. Difficult the problem certainly was and is, but to conclude from this fact that its solution depends upon the state courts having exclusive jurisdiction involves a logical fallacy, because its implied premise is neither established nor admissible. How could it be truly said that only state courts have the *requisite skill and experience with which to deal* effectively with such problems?

Thus, we are brought to a consideration of the question as to what will be the most significant features in the years immediately ahead, of the attitude of the courts, particularly that of the Supreme Court of the United States, in respect to the adjudication of those controversies which intimately affect relations between the government of the Union and those of the several States. In the leading cases indicative of this attitude which have been decided by the Supreme Court in recent years, the individual members of the Court have been so evenly divided and their differences in viewpoint so distinctly drawn that a definite trend is somewhat difficult to discern. A slight change in the personnel of the Court could, under these circumstances, produce a very marked change in the concepts which would prevail in the adjudication of such questions.

The dominant spirit of the Court today, however, is one of earnest purpose to afford to the states the broadest possible scope and autonomy in the solution of their own administrative and regulatory problems which is consistent with the requirements of that part of the public interest that is committed to the exclusive protection of the national government. Therefore, a continuation of the tendency of federal courts having concurrent jurisdiction with state courts in equity suits to vacate their jurisdiction to allow the state tribunals the right of way, seems probable. Whether this procedure will eventually find sanction

in a legislative enactment of Congress, and whether it will prove as efficacious as its proponents suppose, only time and experience will determine.

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