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CONFLICT OF JURISDICTION*

*James Wm. Moore***

We are in an era of upheaval and strife.

Unfortunate as the international tensions may be, it is gratifying that we as a Nation present a united front to the aggressors; and that the dissension among ourselves is domestic and minor in character. Minor in character, because we are essentially a people of good will committed to a rule of law. I do not want to minimize the serious conflicts that divide some of us, and which the communication media so stridently proclaim. But there is no basis for despair nor alarm. There has been conflict within our Nation from its inception, and conflict will continue, although I should hope and trust that the more seamy aspects of current conflict will abate and disappear.

Rational and ordered conflict within the rule of law is a healthy sign of a federal government such as ours. For if the national government becomes all powerful, we shall end with a monolithic system. On the other hand, if the states become all powerful, we shall end with chaos far more confounded than that endured as this people were struggling through the Revolution and toward the creation of a national government. The problem is one of rational adjustment.

I propose to discuss one aspect of this problem — the matter of conflict between the federal and state judicial systems. While the discussion will be technical I believe it mirrors broader principles that far transcend technicalities.

Some of my students, sensing the great power exercised by the federal courts today and hearing so much of federal rules and federal jurisdiction, tend to ignore the state courts until reminded, not always gently, that state courts antedated the federal courts; were powerful before there were federal courts; and have a very important role to play today.

I ask you to go back with me in history to pre-Constitution days when faltering steps toward a federalism, that included a

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national judicial system, were being taken. A few pages of history will reveal deficiencies that have, in general, been remedied.

The beginnings of a federal court system may be seen in the development of American courts of admiralty. Prior to the Revolution, the colonial governors were usually commissioned vice-admirals; and they or a specially appointed judge held vice-admiralty courts, with jurisdiction, among other matters, over cases of prize and capture. Following the commencement of the Revolution the vice-admiralty courts came to an end, and the Congress filled the void by asking the states to set up admiralty courts for the trial of rights of capture, with final appeal to Congress. Appeals were heard in Congress at first by ad hoc committees, later by a standing committee. While originally the states readily allowed appeals to Congress, as time went on, they attempted to restrict this right. Finally, the system proved unworkable when, in a case involving the sloop *Active*, Pennsylvania refused to follow the mandate of the committee, and the committee stopped hearing appeals. Parenthetically, I want to discuss the sloop *Active* case in a few moments.

Subsequently in 1780 Congress established the "Court of Appeals in Prize Cases," while the Articles of Confederation were in the process of ratification. The court was set up as an independent judicial body; but after debating the issue, Congress again denied it necessary powers of enforcement, and the court had to look to state courts for enforcement of its decrees.

Under Article IX of the Articles of Confederation, Congress was given power of "appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures." And, under this Article, Congress was to be the last resort on appeal, by petition of the executive or legislative authority of a state, in boundary disputes between states; and in private disputes, where title to land was claimed under different grants from two or more states, which originated prior to the adjustment of the states' boundaries by Congress.

The federal Court of Appeals in Prize Cases continued after the ratification of the Articles of Confederation. But jurisdiction that had been granted under Article IX in cases of piracies and felonies on the high seas was delegated to special courts composed of state admiralty or superior court judges. The power

of Congress under the Articles to act as an arbitral body on appeal from a state executive or legislative authority in cases affecting the boundaries between states, or grants of the same land by two or more states, was exercised in a few instances, only one of which actually came to trial. However, this case probably averted further war between Pennsylvania and Connecticut following a few battles between the forces of those states.

The central failure of the system of appeals under the Articles of Confederation was that this system depended for its enforcement on the courts and officers of the very states whose judgments were reversed. And, in areas where there was no federal appellate jurisdiction, Congress looked futilely to state courts for enforcement of what were essentially national interests, and which were often antagonistic to the states.

We turn now from pre-Constitution days to the federal system created by the Constitution. As the judicial system under the Confederacy had proved futile and ineffective, lessons learned from that system stilled dispute as to whether there should be a supreme court of the United States. Such a national court, with power to expound and act as final arbiter of a national Constitution, treaties made, or laws enacted thereunder is an imperative necessity, if the federal government created by the Constitution is to be an effective, national government. This is certainly true when the national Constitution contemplates, as does ours, (1) a division of power between the federal government on the one hand and state governments on the other; (2) that the Constitution and laws made in pursuance thereof and treaties made under the authority of the United States shall be the supreme law of the land; and (3) that there be a separation of federal power among the executive, legislative, and judicial branches.

And so we find that the Constitution itself created a Supreme Court of the United States. The Judiciary Article, Article III, which enumerates the cases and controversies embraced within the judicial power of the United States, created the Supreme Court, although leaving its organization to Congress; and vested the Supreme Court with original jurisdiction over certain cases, embraced within the federal judicial power, and with appellate jurisdiction over all the other cases, "with such Exceptions, and under such Regulations as the Congress shall make." Thus the Constitution provided, and Congress by the first Judiciary Act

of 1789 organized, a national supreme court with power to speak with finality in construing the Constitution and laws and treaties made in pursuance thereof. While the power of judicial review over federal legislation, which was early established (and wisely, it would seem) by Marshall in *Marbury v. Madison*,¹ is not essential to a strong national government, there must be some power in the national government to vindicate federal supremacy over state legislation and state courts. And, as to judicial matters, it was also early established that that power is committed to the Supreme Court of the United States — *Martin v. Hunter's Lessee*.²

The framers of the Constitution were, however, in disagreement as to whether there should be any inferior federal courts. Under the Randolph proposal lower federal courts were also to be established by the Constitution, but under the competing Patterson plan there were to be no inferior courts and litigation at the trial level was to be left to the state courts. The compromise adopted was to give Congress the constitutional option to establish inferior federal courts. Thus Article III creates no inferior federal courts; and vests such courts, when created by Congress, with no jurisdiction. The enumeration in Section 2 of Article III of the cases and controversies to which the federal judicial power extends is not self-executing in relation to the inferior federal courts. Congress cannot confer upon the inferior federal courts jurisdiction over cases and controversies unless they are within the judicial power of the United States. But within the permissible limits stated in the Constitution it can confer some or all of the judicial power upon the inferior federal courts, and attach conditions and limitations to the jurisdictional grant.

Congress exercised its authority to create inferior federal courts at its first session when it enacted the Judiciary Act of 1789. And we have since had lower federal courts with their jurisdiction expanded at times, restricted at other times, depending upon congressional will. Had there been no constitutional power to create inferior federal courts, our Nation today would be quite different. The federal government would then have been dependent upon state courts to enforce federal rights. And although the state courts are duty bound to enforce federal rights, duty and effective enforcement of rights can be quite different

1. 5 U.S. (1 Cranch) 137 (1803).

2. 14 U.S. (1 Wheat.) 304 (1816).

things, depending to a considerable degree on whether or not the state court is sympathetic to the federal right. To be strong a national government must have national courts that can be expected to accord sympathetic and effective enforcement to federal rights. An illustration that comes readily to mind involves the controversial subject of civil rights.

How do the inferior federal courts, such as the district courts and courts of appeals, differ from state courts? The judges of those federal courts have tenure during good behavior and their compensation is not subject to diminution. The Constitution thus assures them an independence which a great many states do not assure their judges; and no state, I believe, gives an independence exceeding that accorded federal judges. If a federal judge is not courageous he was born a coward.

The jurisdictional pendulum, on the other hand, favors the state courts. The United States District Courts, while courts of authority, are courts of limited jurisdiction; there is no presumption in favor of their jurisdiction; and, so long as the case pends, either in the trial or appellate courts, any party may raise lack of federal jurisdiction, including the party who invoked the federal court's jurisdiction, and the court—trial or appellate—may raise want of jurisdiction on its own motion. Sometimes these principles are destructively applied; and judicial administration becomes bankrupt in that case. All this is done, so the boys from the Charles River say, to keep the foundations of the Republic from crumbling.

On the other hand, within each state is a baseline set of trial courts of general jurisdiction; there is a presumption in favor of their common law and/or equitable subject matter jurisdiction; and the party who would challenge this must point out some valid enactment, constitutional or legislative, that has withdrawn jurisdiction over the case. Speaking of this in the *Dred Scott* case, Chief Justice Taney stated:

“. . . they are presumed to have jurisdiction, unless the contrary appears. No averment in the pleadings of the plaintiff is necessary, in order to give jurisdiction. If the defendant objects to it, he must plead it specially, and unless the fact on which he relies is found to be true . . . the jurisdiction cannot be disputed in an appellate court.”³

3. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 401 (1856).

In states other than Louisiana, which have the common law heritage, state base line trial courts are successors to the equity jurisdiction exercised by the English Court of Chancery and to the common law jurisdiction exercised by the Court of Common Pleas, King's Bench, and Court of Exchequer. Not only do the state courts have the power to adjudicate state-created rights, they have the power to adjudicate federal rights, unless Congress has conferred exclusive jurisdiction upon a federal court or courts. Even a case within the Supreme Court's original jurisdiction is subject to state court adjudication, unless Congress has provided otherwise. This was ruled in *Plaquemines Tropical Fruit Co. v. Henderson*,⁴ a case coming out of Louisiana, which held that the Louisiana courts had jurisdiction of an action by Louisiana against a citizen of New York although such a suit was within the original jurisdiction of the Supreme Court of the United States. Indeed, where the federal courts do not have exclusive jurisdiction, state courts are duty bound to enforce federal rights in a manner that does not discriminate against the federal right.

Federal and state courts, then, are working partners, subject to the supremacy of federal law as declared by the Supreme Court of the United States. Two cases, one old, the other modern, point up these principles.

The first is the one mentioned earlier involving the sloop *Active*; and its origins pre-date the Constitution. One Olmstead, after he had been captured by the British and put aboard the sloop *Active*, led a revolt of the crew and seized the sloop. But before reaching port, the ship was seized by a brig belonging to Pennsylvania. Taken into port, the sloop was claimed as a prize by a privateer that had been cruising with the brig, by the state of Pennsylvania, and by Olmstead and three others who had participated in the revolt. The Pennsylvania state court awarded Olmstead and his fellow claimants only one-fourth of the prize and they appealed to Congress. Its Standing Committee on Appeals reversed the state court and ordered the proceeds to be turned over to the appellants. The state court refused, saying that under the law of Pennsylvania the verdict of the jury was final. Although the Committee had enjoined the state court marshal from turning over the proceeds to the judge of the state court, this was defied. Thereupon the Committee refused to

4. 170 U.S. 511 (1898).

take further action "lest consequences might ensue at this juncture dangerous to the public peace of the United States." Following the adoption of the Constitution, litigation ensued in a United States district court, and adjudication again went for Olmstead. This time, however, the adjudication meant something. In holding that Olmstead was entitled to have his decree enforced, Marshall stated in 1809 :

"If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

"The act in question does not, in terms, assert the universal right of the state to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

"If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question."⁵

Subsequently the federal court's judgment and process were enforced by means of a large federal posse, sanctioned by President Madison, against state troops called by the governor of Pennsylvania.

Marshall's language and the enforcement process strike a current chord.

5. *United States v. Judge Peters*, 9 U.S. (5 Cranch) 115, 136 (1809).

The modern case, *Testa v. Katt*,⁶ decided in 1947, dealt decisively with Rhode Island's attempt to secede from the Union during World War II. I do not know whether your bayous would swallow up Rhode Island. There are, however, canyons in my native state of Montana where you could fling Rhode Island in the fall and never find it until spring, when the chinooks had melted away the winter snows. The Emergency Price Control Act provided for actions to recover up to three times the amount of a charge over the ceiling price, and conferred concurrent jurisdiction on the federal, state, and territorial courts. Although Rhode Island's courts had jurisdiction adequate and appropriate for enforcement of the federal claim and the local forum was not an inconvenient one, the Rhode Island Supreme Court held that the federal claim was not enforceable in the state court since it involved "a penal statute in the international sense" and a state need not enforce the penal statutes of a foreign sovereign.

In rejecting this thesis, Justice Black stated:

"For the purposes of this case, we assume, without deciding, that [the Emergency Price Control Act] is a penal statute in the 'public international,' 'private international,' or any other sense. So far as the question of whether the Rhode Island courts properly declined to try this action, it makes no difference into which of these categories the Rhode Island court chose to place the statute which Congress had passed. For we cannot accept the basic premise on which the Rhode Island Supreme Court held that it has no more obligation to enforce a valid penal law of the United States than it has to enforce a penal law of another state or a foreign country. Such a broad assumption flies in the face of the fact that the States of the Union constitute a nation. It disregards the purposes of [the supremacy clause] Article VI, § 2 of the Constitution. . . ."⁷

After reviewing the history of the principle that states have an obligation, under the supremacy clause of the Constitution, to enforce federal law, Justice Black continued:

"But after the fundamental issues over the extent of federal supremacy had been resolved by war, this Court took oc-

6. 330 U.S. 386 (1947).

7. *Id.* at 389.

casation in 1876 to review the phase of the controversy concerning the relationship of state courts of the Federal Government. *Claflin v. Houseman* . . . It repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and people. . . .”⁸

Thus the United States was spared the expense of sending an ambassador to Rhode Island; Rhode Island was brought back into the Union; and litigants could resort to Rhode Island courts for the enforcement of federal rights.

The dual system of courts — federal and state — which we have had since 1789 is rather unique. At best, some conflict is bound to arise.

Time will permit only a resume of the sources of jurisdictional conflict and principles designed to lessen or minimize the conflict. On the whole the Supreme Court’s original jurisdiction over cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party is of such a character and the exercise of it has been such as not to breed conflict between the federal and state judicial systems. In fact, the exercise of its jurisdiction over cases between states, and the United States and a state, is a rational substitute for diplomacy or strife.

On the other hand, its appellate jurisdiction over state courts, which it has had from the time of the original Judiciary Act of 1789, has caused more conflict. Although the validity of such jurisdiction was hotly contested at one point in our Nation’s history, it was sustained in *Martin v. Hunter’s Lessee*⁹ and in *Cohens v. Virginia*;¹⁰ and, at least since the War Between the States, has not been doubted, as to all types of cases, civil and criminal. At times, though, there is a tendency on the part of some state courts to evade the Supreme Court’s mandates.

Conflict, though there may be, is minimized by the principles that the judgment be final, that it be rendered by the highest court of the state in which a decision can be had, that the fed-

8. *Id.* at 390.

9. 14 U.S. (1 Wheat.) 304 (1816).

10. 19 U.S. (6 Wheat.) 264 (1821).

eral question must have been duly raised, and that there is no jurisdiction to review a state court judgment resting on an adequate non-federal ground.

Jurisdiction of the federal and state trial courts, some exclusive, some concurrent, and the principle that two in personam actions may both proceed produce conflict.

Diversity jurisdiction bred resentment in the past. The federal courts have had this jurisdiction since 1789, and thereby the power to adjudicate state rights when the plaintiff is a citizen of one state and the defendant a citizen of another state. Under *Swift v. Tyson*,¹¹ decided in 1842, the federal judge had a roving commission to improve upon state substantive law as formulated by the state decisional or common law. Naturally many people resented this federal intrusion in a field in which the state was presumably supreme. Rightly or wrongly, people often prefer their own brand of cussedness to that imposed upon them by an intruder. *Erie-Tompkins*¹² changed this in 1938. While *Erie-Tompkins* has produced many headaches for the federal courts, I believe it has produced beneficial results by requiring the federal courts to apply state substantive law, substantially as the state court would do, where no federal matter is involved. And diversity jurisdiction now serves a useful function.

To some extent removal jurisdiction is an irritant, but mainly as to state criminal prosecutions and removal here is quite restricted. And the Code of 1948 has eliminated some of the sources of conflict of jurisdiction between the federal and state court by providing that all petitions for removal are to be filed with the federal district court, whereas before some petitions were filed with this court and others with the state court.

Injunctive power is apt to be an irritant. In this area the steady trend of federal legislation has been toward the delimitation of the power of federal courts to interfere with state courts and state action through the equitable writ of injunction. This legislative development may be summarized as follows:

(1) Section 2283 of Title 28 of the United States Code, which, subject to some exceptions, provides that a court of the United States may not grant an injunction to stay proceedings in a state court;

11. 41 U.S. (16 Pet.) 1 (1842).

12. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

(2) the statute providing for a three-judge district court, and direct appeal to the Supreme Court, where an injunction is sought to restrain the enforcement of a state statute or order of a state administrative board or commission, upon the ground that the statute or administrative order is contrary to the Federal Constitution and this federal claim is substantial;

(3) the Johnson Act of 1934, withdrawing federal jurisdiction to interfere with state rate orders, not affecting interstate commerce, where a plain, speedy, and efficient remedy is available in the state courts; and

(4) the Act of August 21, 1937, withdrawing federal jurisdiction to restrain the assessment, levy, or collection of state taxes where a plain, speedy and efficient remedy is available in the state courts.

A parallel tendency to limit federal court interference with state action may be traced in the decisions of the Supreme Court. A facet of this is the Court's abstention doctrine, which usually makes two law suits grow where only one grew before. This Brobdingnagian approach can be very burdensome to litigants; and, at times, has reached such debilitating bounds under Justice Frankfurter's tutelage that it seems the Supreme Court spends too much Harvardian time thinking up reasons why the federal courts should do nothing.

In the field of federal habeas corpus, Section 2254, which is largely declaratory of prior decisional law, requires an applicant for habeas corpus, held in custody pursuant to a state judgment, to exhaust his state remedies before petitioning the federal court. This lessens the conflict between federal and state power; but due to the present broad scope of the writ, exercise of the federal power still remains a great irritant.

Americans, on the whole, are individualistic; and some are rugged individuals. It is natural that some are rugged federalists; while others are great champions of state rights. Many may rationally believe the federal government intrudes too much into local matters. Some laws and many legal principles are bound to be unpopular at any given time with certain people. In our federal system a clash between federal and state power may reasonably be expected. Free and frank discussion of all laws and decisions must remain open. The judiciary, no more than the executive and legislative, is above criticism. But only orderly

processes — not force — are legitimate to change that which we do not like. As stated earlier, conflict need not be feared so long as it is confined within ordered bounds; is subject to the rule of law; and the rule of law as declared by the Constitution, valid federal statutes, and related principles are the supreme law of the land.

These are principles which men and women of good will, wherever they may be, may champion.