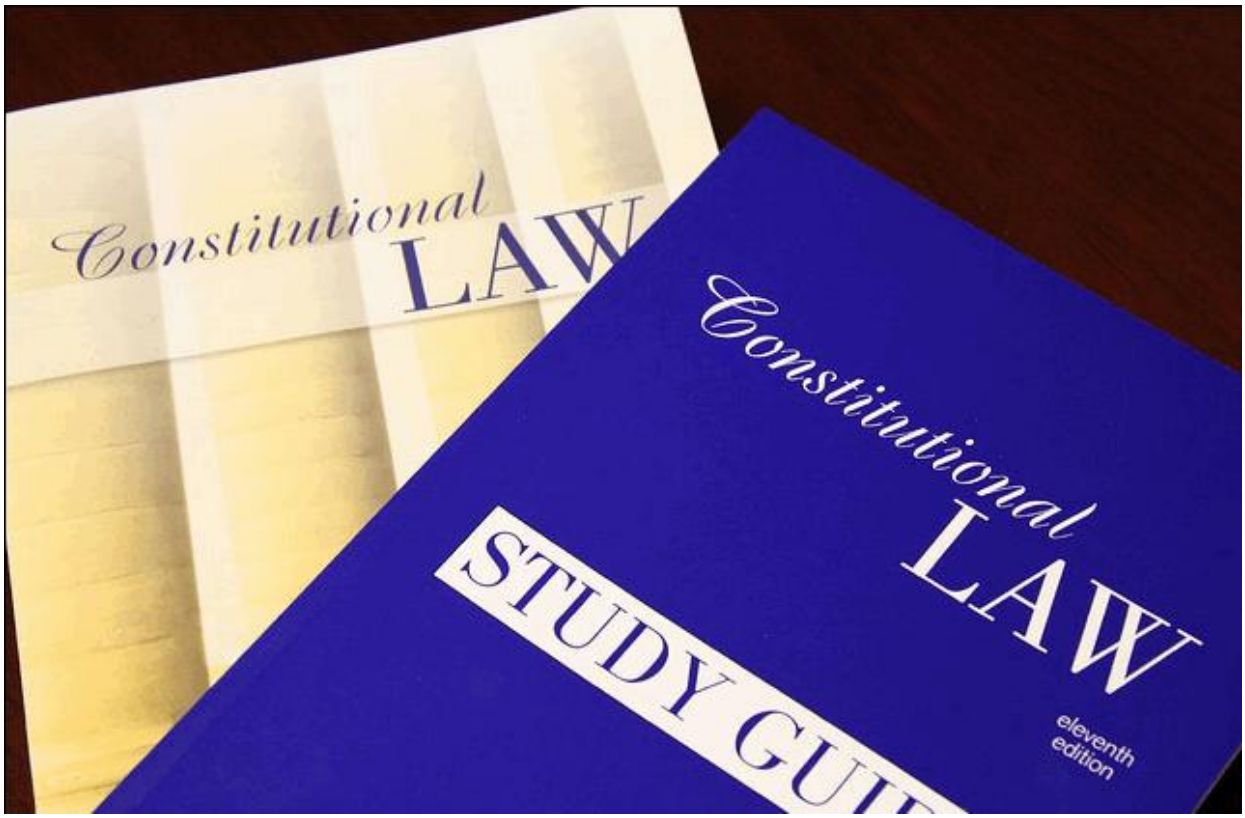

Scott, Books for my Con Law class, 28 January 2010. www.flickr.com

Taking Back the Constitution - Part 17 - Constitution or Revolution?

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04 February 2014

An alternate way to resolve constitutional disputes.

In Part 15, I suggested a way for states to assert constitutional violations in a manner that does not radically change our governmental structure. In the current column, I will suggest a way for the states to challenge the constitutionally of federal statutes by creating a new inter-state body.

Who has the final word.

It sounds strange in this century, but the states can be the most powerful governmental units in North America.

The federal government was set up to carry out certain limited objectives that are enumerated in our Constitution.[i] The states, on the other hand, are restricted by only a few express limitations in the U.S. Constitution and their own Constitutions. As mentioned in column 15, I choose to treat the Constitution as a "compact" between the states. As well expressed by knowledgeable constitutional scholars, our Constitution can also be considered as an "agreement," directly

ratified by the people of all the states, and hence not subject to any state's jurisdiction except through amendment and that state's senators.[ii] By choosing to treat it as a compact between the states, and amending the Constitution to make that compact explicit, the federal government becomes the agent of the states rather the direct agent of all the people. If the states are an intermediary between the citizens and the federal government, a distinct role is reserved for the states – it allows them to defend citizens from an overly powerful federal government. Recovering some of the power that the federal government has grabbed from the states may return life to the "50 laboratories of democracy." If the federal government is the agent of the states, it is also subject to the oversight of its creators.

States may neglect their oversight function, they may ignore federal constitutional infractions, may be bribed to ignore unconstitutionality, but still retain the ultimate power to confine the federal government (their agent) to its assigned role.

One can always expect an agent (particularly one allocated its own taxing power) to expand at every opportunity. The ambitions of men are such that to expect any other result, in the absence of the discipline of voluntary customer purchases as in the private economy, is to indulge in fantasy!

What about the Supreme Court?

Some expect the Supreme Court to be the final arbiter of these state disagreements with the federal government. This is unrealistic on two grounds:

One. The Supreme Court is an arm of the federal government. With its isolation from the other departments it has some leeway in its opinions, but it is subject to the appropriations of Congress (except salaries which are guaranteed by the Constitution). The Court's size can be reduced or expanded at the discretion of Congress and justices are subject to potential impeachment by that same Congress. Thus it is an agent for one of the two parties to a dispute brought by a state against the federal government. Normal legal practice requires it to recuse itself. As an "interested party," its impartiality highly suspect.

One only need look at the gradual acquiescence to the programs of FDR in the years after 1935 to see the real degree of control the federal government exercises over the Supreme Court.

Normally two parties to a dispute expect a neutral third party to act as a judge.

Two. When two parties enter into a contract they often designate an arbiter or rely on the general courts of their area. In the case of the states entering into a contract to pass limited powers to an agent (the federal government), it makes no sense to make the agent the arbiter. You would never contract to have a house built and then give the builder control over when and what he chooses to deliver or how the contract is to be interpreted.

Who then is the arbiter?

What happens when the arbiter between contracting parties is not designated? It often devolves on the next legal forum to resolve the matter. Since our Constitution is a compact between the states there is no real body designated to determine whether a federal law is within the scope of the Constitution or not. In the case of these sovereign entities there exists no higher "court" to adjudicate the dispute.

Rather the sovereign entities who authored the Constitution must negotiate and resolve the proper interpretation of their compact. The Supreme Court has tried to fulfill this role, but they have occasionally failed since they are a proxy of the created agent (the federal government) rather than of the contracting parties. The federal government may present a view, but the states' must decide how they wish the agreement to be interpreted.

Attempts to use nullification.

How does a state bring the nation's attention to a federal ruling or law that is invalid under the Constitution? One means is by nullification within each state of the offending law. Often the mere threat of nullification has been sufficient to cause Congress and the President to remove the offending act. This worked for the 1798 Alien and Sedition act and the 1808 embargo.

However the heavy tariff of 1828 (often called the "Tariff of Abominations") with its strong favoritism for manufacturing areas was judged to be an improper use by Congress of its taxing power by some disadvantaged states. In particular South Carolina, after finding it could not obtain relief, chose to nullify the tariff in its own state. Both President Andrew Jackson and the South Carolina convention could be accused of threats as each prepared for the use of armed force. Fortunately, cooler heads negotiated a lower tariff that could be tolerated by the principal parties, open conflict was averted, and South Carolina rescinded its Nullification Ordinance. War between the states was postponed for another 30 years.

The difficulties attendant with the "Tariff of Abominations" crisis may well have prompted South Carolina to opt for secession when the next crisis arose in 1861. Since the ensuing civil war, the states have assumed a recumbent pose as the federal government has gathered power with both hands.

Both political parties have been guilty of adding duties and powers to the Federal government almost without regard for the Constitution for the last 100 years. By 2013 with the Presidency in the hands of an extreme leftist, people are seriously alarmed about the erosion of their liberties and are starting to suggest that their state governments tend to their duties and enforce the Constitution.

What are we to do?

In a prior column, I proposed a way of dealing with the problem of federal overreach. In this column I propose a more radical, but also more conclusive way of addressing this problem.

We badly need a formal method of limiting expansion of the federal government short of revolution. Jefferson may have said "the tree of liberty must be refreshed from time to time,

with the blood of patriots and tyrants," but it behooves us to avoid bloodshed whenever we can. Our civil war has proven that revolution is not a desirable way of interpreting the Constitution.

The following proposal is a formal way for resolving these questions about which areas the Federal government can address. It places in the Constitution an amendment that provides a body, reporting to the states, to decide these issues. That body would have real authority designated by the States to decide Constitutional disputes between states and their agent (the federal government). Its voting powers would duplicate the powers that the states assumed when they adopted the Constitution, so each state is permitted exactly one vote.

In an attempt to avoid a Second Civil War, I humbly offer:

Amendment Number ____

Each state shall designate one to three delegates to the Constitutional Review Court. These delegate(s) shall serve at the pleasure of the state from which the come, but serve no more than one six-year term. These delegate(s) shall be citizens of the appointing state and may not have been previously employed by the appointing state or by the federal government. The delegates from a state will share one vote in all proceedings and decisions. Delegates need not meet in person, but electronic access to each and recorded transcripts of their formal proceedings shall be electronically available to all. Each year in July the delegates shall elect one of their number to be the presiding officer for one year. Each state shall reimburse their delegates as they wish and provide any staffing required. This Constitutional Review Court may only review pleadings from a state that assert a federal action is outside the limits of our Constitution. Any delegate may propose acceptance of a pleading to the other delegates. Acceptance of a pleading shall require the vote of at least one third of the states.

The purpose of the Constitutional Review Court is to insure the adherence of the federal government to the provisions of the Constitution and propose remedies, either by:

1) **Termination or a ramping down of a federal program, or**
2) **Rejecting the state's claim of unconstitutionality, or**
3) **Proposing a constitutional amendment to the states for approval or rejection.**

Amendments proposed by the Constitutional Review Court must be approved of ¾ of the state delegations voting. They are sent directly to all states after approval by the Constitutional Review Court.

This amendment shall go into effect in the first July following its ratification.

Radical? Well to the folks who have never followed the adoption of the Constitution, the Federalist and anti-Federalist debates, the nullification debates of 1798-9, 1908, 1928 to 1933, it might be considered radical. However to those more serious about our Constitutional rights, the states have an obligation to enforce their compact.

The game is indeed serious. Classical liberals would characterize it as a battle to determine if a long-term Republic, with individual rights, can survive.

Our states are now being urged by a disgusted citizenry to correct Congress' usurpations. A large number of states have sued to overturn the federal government's health care law. With

timidity shown by their long neglect of Constitutional law they began by suing in federal district court. This is an error. The Constitution specifies that the Supreme Court should handle matters between sovereign entities.[iii] Resolution of the state's suits could be expedited if they used their prerogatives' as sovereign entities.

We badly need to amend the Constitution to clarify the right of the states to defend their compact from destruction. A federal government restricted to those areas it was designed to serve would be more efficient, less tyrannical, and significantly less expensive.

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[i] **The areas in which the U.S. Congress may legislate are defined in Article 1, Section 8 where it states:**
The Congress shall have the Power To lay and collect Taxes, Duties, Imposts an Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts an Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations and among the several States, and with the Indian tribes;

To establish a uniform Rule of Naturalization and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular states, and Acceptance of Congress, become Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;--And

To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

[ii] **Roger Pilon, Ph.D., J.D., Director, Center for Constitutional Studies at the Cato Institute holds this view and supports it very well (private communication 12/22/11).**

[iii] **Article III, Section 2 of our Constitution contains:**
In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.