Some Brief Observations on G. Edward White’s Rediscovery of the Cotermious Power Theory

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Abstract

My comments are directed at three points which immediately came to mind in light of Professor White’s thesis concerning the coterminous power theory.
that any additional insight has been gained at the present stage by its application. Since the days of sociological jurisprudence and the legal realists, scholars are nothing but skeptical about the claims of judicial disinterestedness voiced from the bench. One cannot find signs, amidst the vast contemporary literature on the Marshall Court, that Marshall was anything but extremely serious about expanding the reaches of national supremacy.

If the coterminous power theory is to be endorsed as an effective analytical tool, certain clarity must be brought to the concept. Most important is the clarification of the axiom’s elements. Are we to assume that all three components are present whenever the axiom’s name is invoked? Recognizing the confusion surrounding the use of its essential component (mutuality of interests), how functional is it? And finally, do the insights we derive from its application justify its insertion into the debate?

My comments are directed at three points which immediately came to mind in light of Professor White’s thesis concerning the coterminous power theory. First, was the coterminous power theory part of the constitutional ratification debates? Second, Professor White warns us about Chief Justice Marshall’s partisan agenda, but what about Tucker’s partisan agenda, and how did it shape his claims of the dangers associated with the coterminous power theory? Third, how does our understanding of the state sovereignty cases, at least in part shaped by the coterminous power theory debate, assist us in understanding the persistent struggle in our society and in our legal system over the meaning of our Constitution?

Turning to my first point, was the coterminous power theory part of the ratification debate? I believe a qualified answer of yes can be given to that question. Many members of the Founders’ generation believed that the Founders of the Constitution had left many questions unanswered or had incorrectly answered many questions about the fundamental nature of the new national government. Tucker’s comment on the coterminous power theory was part of the argument over whether the newly created federal government was a compact of states or a Union created by the people. This argument can be traced back to the ratification process itself.

The Federalists Papers discourse was designed to convince delegates to the New York ratification convention that many of the fears about the nature of the proposed national government were unfounded. Hamilton in particular addressed the nature of judicial power

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1. This view seems to be shared by Professor White in light of his expanded comments on this point in his revised paper, White, Recovering Coterminous Power Theory, 14 Nova L. Rev. 155, 162-75 (1989).


3. Id. at ix-xi.
under the Constitution and why it posed no threat to individual liberty or state sovereignty. But what is often forgotten is that some of those who opposed the Constitution during the ratification process, the anti-federalists, viewed the role of the judiciary quite differently. The anti-federalists were concerned about the potential power of the federal courts to read the powers of the other branches of the proposed national government expansively, threatening state sovereignty, while correspondingly enhancing the power of the federal courts. The anti-federalists:

object[ed] to the power of judicial review because this authority could be used to expand the boundaries of the limited powers granted the new national government. If this occurred there was little the states could do because of the Supremacy Clause. If the Supreme Court was the final arbiter of the meaning of the Constitution, then except for the time consuming and difficult amendment process there was no means to resist the interpretation given the Constitution by the Court.

[So while the anti-federalists] viewed the power of judicial review as a possible check on the Congress abusing its power,... [they also] believed it was more a placebo than a real control. [They] did not see the Supreme Court performing any true checking function on Congress claiming authority beyond that delegated in the Constitution. [They] believed the power of judicial review would be used only through interpretation as a tool to expand the powers of the new national government. This would permit harmonious relations with the other branches of the federal government. It would also in all likelihood indirectly increase the power and prestige of the Court through an increase in its business and the importance of its cases. Thus,... [the anti-federalists] greatly devalued the tendency for virtue in both the legislative and judicial branches of the proposed Constitution.

Obviously, this point is similar but not identical to the coterminous power theory which concerned Tucker. It is an inversion of the theory, not that the power of the Supreme Court will independently provide a basis for demolishing any limitation on legislative and executive power found in the Constitution, but that the Supreme Court will use its interpretive role to effectively deprive the concept of limited powers embodied in the Constitution of its check on the other branches of government. While not identical, both critiques share a perspective—the Supreme Court could use its power as interpreter of the Constitution to threaten the continued viability of the states by permitting the federal government to invade areas reserved to the states, and the unity of interests of the three branches of the new national government assured this would happen.

My second point is that we need to know a little more about Tucker in order to understand his perspective on the coterminous power theory. In 1803, Tucker published his edition of Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia. It was the first comment on American law under the Constitution during the Marshall court era. I believe it is fair to say that he clearly was committed to a pro-state sovereignty position or what we might call a states’ rights position.

In his edition of Blackstone’s Commentaries, he described the United States Constitution as “a federal compact; [of] several sovereign and independent states... unit[ing] themselves together by a perpetual confederacy, without each

6. Interestingly, many modern commentators on Hamilton’s argument often forget that Hamilton confessed that if the judiciary joined the other departments of the national government in common cause, then liberty would have much to fear from the proposed national government. “[L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.” The Federalist No. 78, supra note 4, at 394. From this observation Hamilton went on to argue that a tenure of good behavior was an appropriate means to assure judicial independence from the other branches. Of course this does not guard against the judiciary voluntarily uniting with the other branches in an expansive reading of the powers of the national government.

7. Clearly, the anti-federalists had little faith in the ideas of checks and balances as laid out in the separation-of-powers concept. 2 H. STORING, THE COMPLETE ANTI-FEDERALIST 420-23 (1981).


10. Id. at 86-87.
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10. \textit{Id}. at 86-87.
5. ‘[I]t is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states of North-America, and ratified by the people thereof . . .’” 12 Tucker, by describing the Constitution in this manner, was staking out his claim as to how at least one part of the continuing debate over the nature of the new federal government should be resolved. He preferred the state compact theory to the view that the national government was a Union created by the people, not by the states. So he had a strong intellectual commitment to zealously guarding state sovereignty against any possible encroachment by the federal government.

In order to carry this value system into effect, he read the powers granted the federal government as narrowly as possible. 13 Given this predisposition on how all issues concerning conflicts between state and federal power should be resolved, it is no small wonder that Tucker was alarmed by the potential of the concept of a federal common law. When he engaged in his lengthy rebuttal to that claim in his edition of Blackstone’s Commentaries, he was striving to prevent, from his point of view the possible destruction of state sovereignty and the consolidation of all government power in the federal government. 14 As he stated:

if this construction . . . established, that the federal government possesses general jurisdiction over all cases at common law, what else could be the consequence, but, at one stroke, to annihilate the states altogether; and to repeal and annul their several constitutions, bills of rights, legislative codes, and political institutions in

11. Tucker, supra note 8, at 141.
12. Id. at 140 (emphasis added).
13. Id. at 142-44, 412-31. Tucker specifically read the Necessary and Proper Clause as narrowly as possible. Id. at 416. He also argued for a narrow reading of the scope of judicial power and other powers granted to the national government under the Constitution. His approach to how the powers of the new national government should be viewed is typified in the following quote:

Having thus minutely examined all the enumerated powers, which are vested in the federal government, or any of its departments, and not finding any grant of general jurisdiction in cases at common law, we are warranted, under the . . . [tenth] article of amendments, in concluding, that no such jurisdiction has been granted; and consequently, that it remains with the states.

Id. at 422 (emphasis added).
14. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (The Supreme Court rejected the claim that the federal judiciary had the power to create federal common law crimes).
15. Contrary to the views of Judge Bork and others of the original intent school of constitutional interpretation, very few, if any, of these issues were resolved by the reference exclusively to the specific intent of the Framers as reflected in the language of the Constitution. See L. Levy, Original Intent and the Framers’ Constitution (1988).
ceasing to be a perfect state."[11] [It] is an original, written, federal, and social compact, freely, voluntarily, and solemnly entered into by the several states of North-America, and ratified by the people thereof . . . ."[12] Tucker, by describing the Constitution in this manner, was staking out his claim as to how at least one part of the continuing debate over the nature of the new federal government should be resolved. He preferred the state compact theory to the view that the national government was a Union created by the people, not by the states. So he had a strong intellectual commitment to zealously guarding state sovereignty against any possible encroachment by the federal government. In order to carry this value system into effect, he read the powers granted the federal government as narrowly as possible. [13]

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His concern over the invasion of state sovereignty was an argument he won at least as to the threat posed by a federal common law of crimes. [16] So he, like Marshall, was reflecting the partisan battle over the nature of the new Constitution. This battle was fought in all three branches of government and in general public discussions of current political issues. It was a battle begun in the convention and carried on during ratification and into the post-ratification era.

My last point is: what relevance to today’s world does the struggle over the coterminous power theory have? My answer is that it demonstrates how incomplete the consensus was in our society, at the time of the ratification of the Constitution and in the years afterward, as to exactly what the Constitution had created. Too often in today’s world, politicians, lawyers, and others view the Constitution as representing a rather fixed set of values and ideas which were determined during the drafting and ratification process. The reality was that there was considerable debate over what values and ideas the Constitution represents in 1789 and in 1803, as there is today. History has answered a few of these issues authoritatively, [17] among them the argument over the coterminous power theory, while others remain viable open questions for debate not only in our courts, but in our society as a whole. And even in the case of the coterminous power theory, some aspects of the general argument have survived to this day. The relatively recent decisions by the Supreme Court in National League of Cities v. Usery [18] and Garcia v. San Antonio Metropolitan Transit Authority [19] demonstrate the continuing viability of the debate over the general issue of division of authority between the states and the federal government. The general problem which the coterminous power theory was designed to address

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in part and one which continues to be argued about in the courts and in society at large.

Reply to Professor White’s “Coterminous Power Theory”

Ovid C. Lewis*  

Public confidence in the Supreme Court’s performance rests to a large extent on the perception that the justices engage in a process of reasoned elaboration of the Constitution, applying and developing discernible rules and principles to resolve justiciable controversies. In the process, justices are expected to transcend personal predilections, while considering not only the pertinent demands of justice, public policy, the structure and text of the Constitution, and the gloss of precedent embedded in historical context, but also the social antecedents and consequences of a particular decision. Unfortunately, for a variety of reasons, the public no longer perceives the justices as objective and impartial judges applying neutral principles that transcend their personal values. Indeed, as Professor White suggests, “some of us may smile” when we read Justice Marshall’s statement in Osborn v. Bank of the United States:

Courts are the mere instruments of the law and can will nothing. . . . Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.  

It is unnecessary to cite the impressive array of great judges who have made similar asseverations of commitment to the rule of law—so many come to mind. Most recently, the latest appointee to the Court,

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1. In Linkletter v. Walker, 381 U.S. 618 (1965) the Court, in justifying prospective overruling, accepted the view that judges do in fact do something more than discover law: they make it interstitially by filling in with judicial interpretation the vague, indefinite or generic statutory or common-law terms that alone are but the empty crevices of the law.” Id. at 623-24. See generally Lewis, The High Court: Final . . . But Fallible, 19 Case W. Res. U.L. Rev. 528 (1968).
2. 22 U.S. (9 Wheat.) 738 (1824).
3. Id. at 866.
4.