RESERVED POWERS VERSUS IMPLIED POWERS

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The Brazilian Federal Constitution of 1988, in Chapter III, referring to the *federate States*, says:

> *Art. 25. The States are organized and governed by the Constitutions and laws they may adopt, in accordance with the principles of this Constitution.*
>
> *Paragraph 1. All powers that this Constitution does not prohibit the States from exercising shall be conferred upon them.*

All Brazilian Constitutions and constitutional Charters state, with slight semantic differences, what was expressed in the Constitution of 1891:

> *Art. 63. Each State governs itself according to the Constitution and the laws it adopts, respecting the constitutional principles of the Union.*
>
> *.....*
>
> *Art. 65 It is left to the States:*
>
> *.....*
>
> *Paragraph 2. in general, each and every power or right, that is not expressly denied or implicitly contained in the written clauses of the Constitution.*

In reading this Brazilian constitutional device of decisions left to the States, one would never imagine the great number of political and judicial battles behind it, battles waged in the United States of America during the forming of their Confederation (1777), of their Federation (1787), and the ratification of their first ten Amendments (1791).

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There is no doubt that the idea of a Federal State is a creation of the North-Americans, as was observed by García-Pelayo[1] and Machado Horta[2]. However, if the concept of a Confederation (*Staatenbund*) is simple, the same cannot be said of the "Federal State" (*Bundesstaat*), a more complex entity to define.[3] At its foundation, the judicial concept of a federal State revolves around the issue of "sovereignty", an idea which has been deformed and modified since the days of Jean Bodin (1530–1596).[4] Bodin himself, in speaking of *summa potestas* (*Les Six Livres de la République*), referred more to the idea of monarchy than of a federal State.[5] The idea of sovereignty, classically considered an essential element of the State,[6] lost its absolute indivisible nature, giving way, according to the studies of Laband and Jellinek, to domination.[7] Laband and Jellinek affirmed that if a territorial community (*Gemeinschaft*) has the conditions to organize itself politically, maintaining the power of domination (*Herrschaft*), this community can be considered a *State*, even if it doesn't possess its own sovereignty (*Souveränität*). This doctrine, though criticized like many others, would serve to explain the North-

[1] "El Estado Federal hace su entrada en la Historia con la Constitución americana de 1787" (GARCÍA-PELAYO, Manuel. *Derecho constitucional comparado.* 2. ed. Madrid: Manuales de la Revista de Occidente, 1951, p. 198).

[2] HORTA, Raul Machado. *Estudos de direito constitucional.* Belo Horizonte: Del Rey, 1995, p. 346.

[3] Cf. CARRÉ DE MALBERG, R. *Teoría general del estado.* Spanish version by José Lion Depetre. México: Fondo de Cultura Económica, p. 103. According to GARCÍA-PELAYO (work cited., p. 199), it was the German authors that distinguished, with precision, the word "federation" (*Bundesstaat*) from a "confederation" (*Staatenbund*). In The Federalist - the observation is still his - "federal" is used in place of confederation and "national" in place of "single state" (ibidem, p. 198).

[4] Bodin, in the Latin version of his book *Les six livres de la République*, uses *summa potestas* for sovereignty (cf. CARRÉ DE MALBERG, work cited, p. 85). The first to conceptualize "sovereignty" was Jean Bodin (cf. JELLINEK, Georg. *Teoria general del estado.* Spanish version by Fernando de los Rios. Montevideo: B de F Ltda., 2005. p. 563).

[5] Cf. CARRÉ DE MALBERG, work cited., p. 87.

[6] WILLOUGHBY, Westel W. (*Principles of the constitutional law of the United States.* 2. ed. New York: Baker, Voorhis & Co, 1938, p. 8) criticizes those that admit the divisibility of sovereignty, which is the essence of the State. Seeks to make a distinction between State and Government. Adds: "*Though the sovereign will of State may not be divided, it may find expression through several legislatives mouthpieces, and the execution of its commands may be delegated to a variety of governmental agencies*).

[7] Cf. CARRÉ DE MALBERG, work cited., p. 152, 157, 158. Cf. JELLINEK, work cited., p. 255.

American Federation and subsequently the Brazilian Federation of 1891, where simple provinces were, by decree of a revolutionary government, transformed overnight into "State-members."[8]

After the American proclamation of Independence (1776), the thirteen new "countries", former English colonies, affirmed on November 15, 1977 an international treaty, creating the *Confederation of the United States of America*. (art. I). This document, that for many is the first American constitution, declares in art. II:

> *Each state retains its sovereignty, freedom, and independence, and every Power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.*[9]

In 1780, shortly before the ratification of the before-mentioned treaty (*the Articles of Confederation* on March 1, 1781), Alexander Hamilton had already idealized the transformation of the Confederation into a *new form of government*, one that would not contain the political vagaries and the administrative torment of the recently formed Confederation.

As Pontes de Miranda observed,[10] when creating a new political entity one would do well to choose as its foundational statute the idea that any powers or rights left unenumerated would be reserved for the bigger entity. In the American case, Hamilton knew beforehand that any attempt to reserve these powers for a central entity (the United States) would cause future members of the convention (constituents) to

[8] BRAZIL. The Federal Constitution of 1891, in its art. 2, establishes: "Each of the Provinces should form a State and the former Neutral District will constitute the Federal District, ..." The current Constitution (1988), in art. 1.º, linked the Municipality to the condition of membership in the Federation: "Art. 1. The Federal Republic of Brazil, formed by the indivisible union of the States and Municipalities and of the Federal District...".

[9] COMMAGER, Henry S (Ed.). *Documents of American history.* 6. ed. New York: Appleton-Century-Crofts, Inc., 1958, p. 111.

[10] *Comentários à constituição de 1946.* 4. ed. Rio de Janeiro: Editor Borsoi, 1963, t. II, p. 154.

be wary of joining the Confederation.[11] The Federalists knew the Confederation was debilitated, that it would not last. Even George Washington viewed the Confederation with doubt: "little more than a shadow without the substance."[12] Hamilton, Madison and Washington believed in a national government, with stronger ties, even at the expense of freedom for the people.[13] At Madison's initiative, delegates from Virginia and Maryland met in Mount Vernon and Alexandria in 1785 to study and discuss questions related to commerce and navigation of common interests. They scheduled another meeting to take place in Annapolis the next year (1786). The objective of the second meeting would be the same: a common commerce for the diverse Confederate States. Representatives from just five states showed up. Hamilton, representing the State of New York, convinced the delegates to meet again the next summer in Philadelphia. In May of 1787, with the exception of representatives of Rhode Island, delegates from each of the States convened. The representatives of Virginia, who had arrived first, proposed a plan ("The Virginia Plan") to draw up a new document (a Constitution) creating a central government. The legislative body would be formed according to the population of each participating State. The least-populated States presented a different plan ("The New Jersey Plan"): the Articles of Confederation would be maintained, but with profound changes. The legislative body would be one chamber[14], with equal representation for each state. In the end, to Hamilton's chagrin, there was a compromise between the two proposals: the legislative body would become two-

[11] Cf. WOOD, Gordon S. *The creation of the American republic: 1776-1787.* New York: W. W. Norton & Company, 1972, p. 532.
[12] SCHWARTZ, Bernard. *The bill of rights: a documentary history.* New York: Chelsea House Publishers, in association with Hill Book Company, 1971, v. 1, p. 435.
[13] For scholars like George Bancroft and John Fiske, the Constitution was the realization of the *Revolution*; for others, like Charles Beard and Merril Jensen, the document of 1787 was the product of an egotistical plutocracy, a *coup d´état* of the democratic ideals affirmed in the Declaration of Independence (cf. SELLERS, Charles, MAY, Henry, McMILLEN, Neil R. *Uma reavaliação da história dos Estados Unidos.* Translation by Ruy Jungmann. Rio de Janeiro: Jorge Zahar Editor, 1990, p. 142).
[14] The idea of a one-chamber legislative body came from *Instrument of Government*, a document presented to the English Parliament by the officials of the army of Oliver Cromwell.

chamber, with one chamber formed according to the population of the State-members (House of Representatives) and the other chamber consisting of an equal number (two) of representatives from each State (the Senate). Thus, the American Federation was born.

Since the majority of the constituents of 1787 feared a central government, they opted for the technique of "enumerated powers": that which fell under the control of the new political entity (the United States) would be specifically expressed in the Political Statute; that which was not expressly covered or prohibited would be left to each State to decide. However, as Willoughby covered,

> *Though the Federal Government is one of enumerated powers, its powers are not described in detail, and from the very beginning it had been held to possess, not simply those powers that are specifically or expressly given it, but also those necessary and proper for the effective exercise of such express powers.*[15]

Section 8 of Article I of the Constitution detailed, one by one, the "Powers of Congress", or in other words, the powers of the national government. Continuing on the theme of powers and rights, the Constitution, in paragraph 10, prohibits or reserves for the States certain legislative fields. In the last directive of Section 8 in the same Article (I), however, the Constitution opens a door in favor of the Union:

> (The Congress shall have power) 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.[16]

This directive, or as the Americans prefer to call it, this "clause", refers to the idea of *Implied Powers* and is meant to strengthen

[15] WILLOUGHBY, work cited., p. 54. In the same way, the observation of Thomas COOLEY (*The general principles of constitutional law.* 4. ed. Boston: Little, Brown, and Company, 1931, p. 133).

[16] *The constitution of the United States of America.* Washington, DC: National Archives and Records Administration, 1986, p. 9.

the national government, helping to avoid infighting between its components.

In 1791, sealing a commitment between the federalists (proponents of a strong central government) and the non-federalists (proponents of autonomy for the States), the ten Amendments of the Constitution (*the Bill of Rights*) were ratified. Amendment n. 10, following the same legislative technique of Article IX of the Article of Confederation, is intimately linked to Section 8 of Article I of the Constitution. Amendment n. 10 says:

> *The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.*

In this way Amendment n. 10 functioned to counterbalance the weight of the Union. The political genius of John Marshall, then Chief Justice of the Supreme Court (1801-1835), however, understood the value of Hamilton's argument[17] and pulled the "Federalist Spirit" from the viscera of the Constitution and its Amendments. Two clauses gave support to his thesis: the *Dormant Commerce Clause* and the *Supremacy Clause*. About *Dormant Clause*", Professor Erwin Chemerinsky clarifies that *Congress could invalidate any state or local law that it deems to place an undue burden on interstate commerce*.[18] Professor Laurence Tribe,[19] in turn, reminds that the true potential of the *Commerce Clause* was revealed in 1824, with *Gibbons v. Ogden*. Marshall, in this judgment, gives an elastic meaning to the word "commerce". Commerce, without a doubt,

[17] SCHWARTZ, Bernard. *A history of the supreme court.* New York: Oxford University Press, 1993, p. 46.
[18] CHEMERINSKY, Erwin. *Constitutional law: principles and policies.* New York: Aspens Law & Business, 1997, p. 308-9.
[19] TRIBE, Laurence H. *God save this honorable court: how the choice of supreme court shapes our history.* New York: New American Library, 1986, p. 26.

is exchange, but it is much more: it is interchange, including the interchange of people.[20]

The *Supremacy Clause* of the Union, in turn, means that, in case of a divergence between federal law and state or municipal law, the federal law would prevail.[21]

An initial problem, in terms of a conflict of scope, arose at the creation of a second national bank.[22] The Constitution, in directive 8 of Art. I, did not explicitly give power to Congress to create the bank. The anti-federalists argued against its creation by the federal government, stating that corporations could only be instituted by the states. But facts and logic were on the side of the federalists... If it was up to the central government to declare war, keep peace, produce money and contract lending, etc, then it made sense that the creation of a bank fell under its scope. In 1816, the President of the Republic (Madison) approved the creation of the *Second Bank of the United States*. Some states, however, revolted and taxed the federal bank for the right to operate in their territories, which increased the expenses of the federal bank.[23] One cashier of the federal bank in Baltimore, Maryland, James William McCulloch, refused to collect the taxes demanded by the state government, giving rise to the *McCulloch case*, brought to judgment in 1819. Marshall affirmed then the *principle of federal supremacy*: "The federal government emanates from the people, not from the States."

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[20] *Gibbons v. Ogden, 9 Wheat. 1, 189-190 (1824).* See FRIEDMAN, Lawrence M. *A history of American law.* 3. ed. New York: A Touchstone Book, 2005, p. 191.

[21] Art. 24 of Brazilian Constitution of 1988 establishes concurrent scope between the Union, the States and the Municipalities. In § 4.º, it says that federal legislation "under normal conditions suspends the efficacy of state law, if the two are contrary".

[22] The *First Bank of the United States* closed its doors in 1811. From then on it is called *Second Bank* (1816). There were many misunderstandings between Hamilton (secretary of the Treasury) and Jefferson (secretary of State), both secretaries of President George Washington. Hamilton, in proposing the creation of *First Bank,* based it on a plan by Charles Montague, from England shortly after the Revolution of 1688. Jefferson alleged that a national bank, as proposed, would be a glut of jobs, lead to corruption and sacrifice the ideals of Independence (cf. BERAN, Michael Knox. *Jefferson's demons.* New York: Free Press, 2003, p. 124).

[23] Cf. NOWAK, John E., ROTUNDA, Ronald D. *Principles of constitutional law.* 3. ed. St. Paul, MN: Thomson West, 2007, p. 68.

Everything that agrees with the letter and the spirit of the Constitution was constitutional.[24] To support his thesis, Marshall inferred from the topical position of *necessary and proper clause*, which follows soon after that of *enumerated powers*...[25] In the actual case, since there was a conflict between state regulations and the federal, the federal regulations prevailed. In legal terms, the ideals of the *Supremacy Clause* grew ever firmer.[26] As Professor Charles D. Cole of Samford University makes clear, the legal implications of *McCulloch* lasted until the Civil War (1861-1865). From the end of the Civil War (1865) until 1937, the Supreme Court developed a thesis of *substantive due process* in terms of economy and individual liberties, which resulted in a narrowing of Marshall's interpretation. However, beginning with Roosevelt's first term (1933-1937), the Supreme Court returned to the doctrine of *McCulloch v. Maryland*.[27]

WORKS CITED

	The constitution of the United States of America. Washington, DC: National Archives and Records Administration, 1986.
	Constituição do Brasil e constituições estrangeiras. Textos. Brasília: Senado Federal, 1987, v. I.
BERAN, Michael Knox	*Jefferson's demons*. New York: Free Press, 2003.
CARRÉ DE MALBERG, R.	*Teoría general del estado*. Spanish version by José Lion Depetre. México: Fondo de Cultura Económica
CHEMERINSKY, Erwin	*Constitutional law: principles and policies*.

[24] Ibid, p. 69.
[25] With criticism, Bernard SCHWARTZ emphasizes that the Marshall's opinion was taken from the argument brought up by Hamilton: "Once again, however, it was Marshall, not Hamilton, who made the implied powers doctrine an accepted element of our constitutional law and finally put to rest the view that the Necessary-and-Proper Clause extended only to laws that were indispensably necessary" (*A history of the supreme court,* cit., p. 46).
[26] Cf. *McDermott v. Wisconsin 228 U.S. 115 (1913)*; *Hisquierdo v. Hisquierdo 439 U.S. 572 (1979).*
[27] COLE, Charles D. *Comparative constitutional law: Brasil and the United States.* Samford University, 2006, p. xiv.

	New York: Aspens Law & Business, 1997.
COLE, Charles D.	*Comparative constitutional law: Brasil and the United States*. Samford University, 2006.
COMMAGER, Henry S (Ed.).	*Documents of American history*. 6. ed. New York: Appleton-Century-Crofts, Inc., 1958.
COOLEY, Thomas	*The general principles of constitutional law*. 4. ed. Boston: Little, Brown, and Company, 1931.
FRIEDMAN, Lawrence M.	*A history of American law*. 3. ed. New York: A Touchstone Book, 2005.
GARCÍA-PELAYO, Manuel	*Derecho constitucional comparado*. 2. ed. Madrid: Manuales de la Revista de Occidente, 1951.
HORTA, Raul Machado	*Estudos de direito constitucional*. Belo Horizonte: Del Rey, 1995.
JELLINEK, Georg	*Teoria general del estado*. Spanish version by Fernando de los Rios. Montevideo: B de F Ltda., 2005.
NOWAK, John E., ROTUNDA, Ronald D.	*Principles of constitutional law*. 3. ed. St. Paul, MN: Thomson West, 2007.
PONTES DE MIRANDA	*Comentários à constituição de 1946*. 4. ed. Rio de Janeiro: Editor Borsoi, 1963, t. II.
SCHWARTZ, Bernard	*The bill of rights: a documentary history*. New York: Chelsea House Publishers, in association with Hill Book Company, 1971, v. 1.
SCHWARTZ, Bernard	*A history of the supreme court*. New York: Oxford University Press, 1993.
SELLERS, Charles, MAY, Henry, McMILLEN, Neil R.	*Uma reavaliação da história dos Estados Unidos*. Translation by Ruy Jungmann. Rio de Janeiro: Jorge Zahar Editor, 1990.
TRIBE, Laurence H.	*God save this honorable court: how the choice of Supreme Court justices shapes our history*. New York: New American Library, 1986, p. 26.
WILLOUGHBY, Westel W.	*Principles of the constitutional law of the United States*. 2. ed. New York: Baker, Voorhis & Co, 1938.
WOOD, Gordon S.	*The creation of the American republic: 1776-1787*. New York: W. W. Norton &

	Company, 1972.