THE PARADOX OF POWER IN THE UNITED STATES CONSTITUTION

The Constitution is a document which, since its instatement in 1787, has been regarded as the highest standard of American legislature. The document is the epitome of sound construction and organization; it is a glowing manifestation of American values and laws, written in the most sophisticated and ordered manner seemingly possible. However, the Constitution has one blatant and glaring fault: the balance of power between the federal government and the states is difficult to distinguish. This paradox contributed to the complexity of several conflicts in the late 1700's and early 1800's, including the Virginia and Kentucky Resolutions, the case of McCulloch v. Maryland, and the Webster-Hayne debate. The issue of nullification, a right which is not defined in the Constitution as belonging to the states' or, conversely, illegal and against the spirit of the federal government, was at the heart of all three events; the paradox in the Constitution was exemplified, therefore, through nullification.

The Constitution gives the federal government the primary portion of power in the United States government. The legislative branch has the ability to make laws, which is fundamentally allowing this branch of the federal government to define what makes the United States a fair and just country for its citizens. "The Congress shall have the power…to make all laws which shall be necessary and proper for carrying into execution the [powers listed in the beginning of Section Eight] and all other powers vested by this Constitution in the government of the United States…"[1] The amount of power allotted to

[1] Article One, Section Eight

Congress is not only shown in the length of the list of powers, but the powers themselves are crucial and influential in determining the shape of the country.

The Supreme Court, the judicial branch of the federal government, has the power to interpret the Constitution by determining the constitutionality of any laws imposed in a legislative body at a status below that of the Constitution. Those who drafted the Constitution, "assumed that the new national court would have the power to hold statutes unconstitutional, because, as they saw it, such power was inherent in the very idea that a written constitution adopted by the people was superior to any statutes adopted by the people's representatives."[2] The Supreme Court's ability to decide and act on the constitutionality of laws drafted by the states and Congress gives this branch of the federal government a significant amount of power.

The Constitution can be interpreted to give the federal government a large amount of power as easily as it can be read to allot the states the primary bulk of power. While both the state power and federal power are outlined, the boundaries which each inhabit are not. The states have the power to amend the Constitution (Article Five), and therefore take on a role similar to that of the Supreme Court in that they are allowed to judge any part of the Constitution and change it. The power of amendment holds enormous responsibility and power: the states can, with two large enough majorities, change the fundamental structure of the federal government.

The rights and powers of the states are further defined in Article Four. Each state must recognize the official acts any and every other state, which ensures citizens of each

[2] George Robert, Great Cases in Constitutional Law (New Jersey: New Forum Books, 2000) 20

state equal rights as it pertains to written records: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." Similarly, the citizens of each state are guaranteed equal treatment, regardless of which state they inhabit. "The citizens of each State shall be entitled to all the privileges and immunities of every other State." Perhaps the clause that most clearly gives power to the states is: "The United States shall guarantee to every State in this Union a republican form of government." Although this clause limits the type of government the states may have, a republic gives voters the choice of representatives to govern them; because this choice is made solely by citizens of the states, the states have power.[3] The Tenth Amendment also gives more power to the states: those powers not given directly to the federal government belong to the states. "The powers not delegated to the United States by the Constitution, now prohibited by it to the states, are reserved to the states respectively…"[4] This limit upon the power of the federal government by definition must give more power to the states.

The unclear boundaries of power between the federal government and the states were remarked upon by the Anti-Federalists even before the Constitution was signed into effect. They "denounced the Constitution as a strange mingling of types of government; because it was neither fish nor fowl, it was destined to fail."[5] The Anti-Federalists foresaw that the impossibility of giving power to both the federal government and states as the Constitution had would inevitably lead to some sort of failure – the Virginia and

[3] Article Four, Sections One, Two, and Four

[4] Tenth Amendment

[5] Richard Bernstein, Are We To Be A Nation? The Making of the Constitution (Cambridge, Massachusetts and London, England: Harvard University Press, 1987) 225

Kentucky Resolutions, the case of McCulloch v. Maryland, and the Webster-Hayne debate are only a few examples of the kind of conflict that the paradox in the Constitution could complicate, shown though the singular issue of nullification.

In 1798, the conflict between states' power and federal power was illustrated in the debate over the constitutionality of nullification. The Virginia and Kentucky Resolutions sprung from the Alien and Sedition Acts, which were thought by some to be unconstitutional. The Resolutions declared that Virginia and Kentucky had the right to nullify, or make void, the Alien and Sedition Acts on the basis of their unconstitutionality.[6] The Virginia and Kentucky Resolutions were based on the theory that because the states had created and ratified the Constitution, the citizens of those states had the right to decide whether or not they would accept the constitutionality of laws imposed by the federal government. Jefferson, who wrote the Resolutions, wrote in a letter to Abigail Adams (whose husband was the Federalist opponent of Jefferson), "You think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution had given them a right to decide for the Executive, any more than the Executive had a right to decide for them…The judges, believing the law was constitutional, had a right to pass a sentence…because that power was placed in their hands by the Constitution. But the Executive, believing the law was unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution." Jefferson saw the judicial branch as "despotic" if they could "…decide

[6] Charles, Mary, and William Beard, The Beards' New Basic History of the United States. 2nd Ed. (Garden City, New York: Doubleday and Company, Inc., 1960) 166 – 167

what laws are constitutional…for the legislative and Executive."[7] Jefferson pardoned those who had been convicted under the Alien and Sedition Acts when he became president in 1801. When he explained it to Abigail Adams several years later, he was still convinced that the Acts were unconstitutional – he was simply explaining that all three branches of government were responsible for determining the constitutionality of a law. In Jefferson's view, when the Supreme Court had declared the Alien and Sedition Acts constitutional, those three branches of government failed. It was then the states' duty to take action regarding the unconstitutionality of the Acts.

Those in favor of the Alien and Sedition Acts argued that the Constitution gave only the judicial branch the power to determine whether a law was constitutional or not, and that if a law was to be nullified, it could only happen through the powers of the federal government. Because the Resolutions declared nullification of a law that had passed through the federal system, they were unconstitutional. Furthermore, the only body of government that can judge the constitutionality of a law is the Supreme Court – not the states. The Supremacy Clause, written by Luther Martin, put the federal government at a superior level to the state government. James Madison wanted to go so far as to take away all state legislative power; the Supremacy Clause was an attempt at a certain amount of compromise. It was this blurred compromise that eventually led to the added complexity in debates over nullification. "The Supremacy Clause makes the Constitution, federal laws, and treaties the supreme law of the land, elevating them above state constitutions and laws. The clause thus confers on the federal courts the power to enforce the Constitution against the states, giving implicit sanction to the federal courts'

[7] The Writings of Thomas Jefferson. CD-ROM. (H-Bar Enterprises, 1995)

power to declare the state laws unconstitutional."[8] At its most basic level, the Constitution is the highest legislative document in the United States – therefore rendering all other legislature void if they contradict with the Constitution.

However, because the Constitution was written paradoxically, parties of both sides were right. The states did ratify the Constitution, and they are allowed to amend it. Concurrently, Congress has the right to make laws. Those who supported the Virginia and Kentucky Resolutions believed that Congress was wrong in writing the laws, and that they were unconstitutional. To take action in defense of those beliefs, Jefferson and others effectively separated Virginia and Kentucky from the rest of the Union. That course of action may have been unconstitutional. However, the Alien and Sedition Acts may have been unconstitutional as well. This basic paradox of power in the Constitution complicated the issue of which party was right and which was wrong. Adams, upon writing "A Defence of the Constitutions of Government of the United States of America," "did not understand or appreciate the Federal Convention's unique, almost inadvertent development of federalism, with its division and commingling of federal and state sovereignty."[9] Neither did anyone involved with the Alien and Sedition Acts and the Virginia and Kentucky Resolutions. The confusion and controversy that was added to arguments about nullification can only be attributed to the inconsistency within the Constitution.

---

[8] Richard Bernstein, Are We To Be A Nation? The Making of the Constitution. (Cambridge, Massachusetts and London, England: Harvard University Press, 1987) 171

[9] Bernstein 145

The case of McCulloch v. Maryland was caused by the same inconsistency between the appropriation of power to the federal government and the states in the Constitution. In 1816, a national bank was created by Congress and funded by private investors. Maryland did not want the bank due to its heavy reliance on private owners; the state's solution was to put an unreasonably high tax on all transactions, the result of which was the complete failure of the bank. McCulloch, who operated the national bank in Baltimore, refused to pay this tax. When this case went to the Supreme Court, the Court ruled that the federal government has the right to create a national bank regardless of the sentiment of the state. Furthermore, the Supreme Court ruled that because of the wording of the Preamble to the Constitution, the "federal government" was declared a federation of people – not of states.

Maryland's position was that the bank gave too much power to its private owners; this negative opinion of the bank gave the state the right to discontinue the bank from functioning. However, in a unanimous decision from the Supreme Court, chief justice Marshall said that, "The Constitution and the laws thereof are supreme. The control the constitutions and the laws of the respective states and cannot be controlled by them."[10] Much like in 1798, both the states and the federal government felt that the Constitution supported their respective cases. "In some areas, the central government felt that the Constitution would have final power of sovereignty; in others, the state governments would be supreme; in still others, the federal and the state governments would have overlapping, or concurrent, power. This intricate solution to the problem of strengthening

[10] Jennifer Brandsberg, McCulloch v. Maryland.

www.landmarkcases.org/mcculloch/descriptions.html#mcculloch

the government of the United States while paying due respect to the authority of state governments evolved more by accident than design."[11] While this contradiction in power may have been an accidental result of an attempted complex solution to strengthen the government, it was still a problem that would arise multiple times, especially in the form of the debate over nullification – and would never truly be solved until after the Civil War.

The Webster-Hayne debate in 1830 was symbolic of the growing tension between North and South, nationalism versus state sovereignty, and unity versus nullification. The debate in Senate in 1830 about western expansion soon deviated to a debate over the nature of the United States government. Nullification and states' rights were the primary issues under discussion. Hayne, supported by Calhoun, said that the North and the federal government were effectively breaking up the Union. The states could not agree with the decisions handed down from the Supreme Court and the laws being created by Congress – worse, according to Calhoun, was that the states were not allowed to take action on their disagreement with the federal government. "…the Constitution is, in fact, a compact to which each state is a party; and that the several states, or parties, have a right to judge of its infractions; and the case of a dangerous, palpable, deliberate exercise of power not delegated, they have the right, as a last resort, to use the language of the Virginia Resolutions, 'to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.' This right of interposition…be it called what it may – State-right, veto, nullification – I

[11] Richard Bernstein, Are We To Be A Nation? The Making of the Constitution. (Cambridge, Massachusetts and London, England: Harvard University Press, 1987)171

conceive to be the fundamental principle of our system…"[12] Calhoun's system was one in which those who ratified the Constitution had a right to judge, and act on, the debate over the constitutionality of its laws – and, should the states decide to nullify those laws, that is their right and their choice.

Webster defended New England, stating that nullification was not only unconstitutional, but immoral and detrimental to the Union. His cry for, "Liberty and Union, now and forever, one and inseparable,"[13] was the sentiment of the North and those condemning the idea of nullification, a group which included Andrew Jackson. Jackson's opinion was clearly stated in his Proclamation to the People of South Carolina in December of 1832. "I consider, then, the power to annul a law of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed…Each state, having expressly parted with so many powers as to constitute, jointly with the other states, a single nation cannot, from that period, possess the right to secede, because such secession does not break a league but destroys a nation…"[14] Jackson's fear of the consequences of secession – a destroyed nation – were proved later with the violent culmination of tensions that manifested themselves in the Civil War; these same tensions were the ones being discussed heatedly in the Webster-Hayne debate.

The issue of nullification and states' rights were evident in Virginia and Kentucky Resolutions, the case of McCulloch v. Maryland, and the Webster-Hayne debate. The

---

[12] John C. Calhoun, *Fort Hill Address*, Fort Hill, Clemson, South Carolina. 26 July 1831.

[13] Jack Newlon, Webster-Hayne Debate. www.u-s-history.com/pages/h330.html

[14] Andrew Jackson, *Proclamation to the People of South Carolina*, 10 Dec. 1832.

paradox of power within the Constitution only further complicated the issue of nullification in all three events. The ambiguousness in the appropriation of power between the federal government and states gave the parties representing both sides reasonable support from the Constitution in their arguments; no solution could be conceived because the Constitution did not offer a clear direction. That flaw in the Constitution – that it gives power to both the states and the federal government, which is impossible – makes the conflict of the issue of nullification in the Virginia and Kentucky Resolutions, the case of McCulloch v. Maryland, and the Webster-Hayne Debate so complex that it remained truly unsolved until after the conclusion of the Civil War.

Works Cited

Beard, Charles, Beard, Mary and Beard, William. The Beards' New Basic History of the United States. 2nd Ed. Garden City, New York: Doubleday and Company, Inc., 1960.

Bernstein, Richard. Are We To Be A Nation? The Making of the Constitution. Cambridge, Massachusetts and London, England: Harvard University Press, 1987.

Brandsberg, Jennifer. McCulloch v. Maryland. http://www.landmarkcases.org/mcculloch/descriptions.html#mcculloch. 1998.

Calhoun, John C. *Fort Hill Address*. Fort Hill, Clemson, South Carolina. 26 July 1831.

George, Robert, ed. Great Cases in Constitutional Law. New Jersey: New Forum Books, 2000.

Jackson, Andrew. *Proclamation to the People of South Carolina*. 10 Dec. 1832.

Newlon, Jack. The Webster-Hayne Debate. www.u-s-history.com/pages/h330.html. 2002.

The Writings of Thomas Jefferson. CD-ROM. H-Bar Enterprises, 1995.

US Const. Art. 1, sec. 8. Art. 4, sec. 1. Art. 4, sec. 2. Art. 4, sec. 4. Art. 5.