Constitution Class Handout
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Lesson 11

Debt and Supremacy

Prior Debt

Article VI begins with "*All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation*."

The first clause of Article VI legally transfers all debts and engagements under the Articles of Confederation into the new government. This is not only the debts and engagements by the United States Government under the Articles of Confederation, but also includes all debts of each of the several States. After ratification of the Constitution, each and every State would be debt free, and all debt would be held by the federal government. This condition, according to the Constitution, would be the last time the States would legally be in debt. In Article I, Section 10, the Constitution forbids the States from issuing bills of credit.

Alexander Hamilton, the first Treasury Secretary, suggested that the United States should remain in perpetual debt. Maintaining a perpetual debt, he explained, would be a mechanism that could assist in holding together the union, since States would be unlikely to secede when they are responsible for a part of the national debt.

Thomas Jefferson disagreed with Hamilton. He recognized the necessity to maintain the ability to borrow, and the need for credit, but found a national debt to be a potentially dangerous proposition.

"*Though much an enemy to the system of borrowing, yet I feel strongly the necessity of preserving the power to borrow. Without this, we might be overwhelmed by another nation, merely by the force of its credit*." -- Thomas Jefferson to the Commissioners of the Treasury, 1788.

"*I am anxious about everything which may affect our credit. My wish would be, to possess it in the highest degree, but to use it little. Were we without credit, we might be crushed by a nation of much inferior resources, but possessing higher credit*." -- Thomas Jefferson to George Washington, 1788.

"*Though I am an enemy to the using our credit but under absolute necessity, yet the possessing a good credit I consider as indispensable in the present system of carrying on war. The existence of a nation having no credit is always precarious*." -- Thomas Jefferson to James Madison, 1788.

"*I wish it were possible to obtain a single amendment to our Constitution. I would be willing to depend on that alone for the reduction of the administration of our government; I mean an additional article taking from the Federal Government the power of borrowing. I now deny their power of making paper money or anything else a legal tender. I know that to pay all proper expenses within the year would, in case of war, be hard on us. But not so hard as ten wars instead of one. For wars could be reduced in that proportion; besides that the State governments would be free to lend their credit in borrowing quotas*." -- Thomas Jefferson to John Taylor, 1798.

"*I sincerely believe... that the principle of spending money to be paid by posterity under the name of funding is but swindling futurity on a large scale*." -- Thomas Jefferson to John Taylor, 1816.

"*If the American people ever allow private banks to control the issue of their currency, first by inflation, then by deflation, the banks…will deprive the people of all property until their children wake-up homeless on the continent their fathers conquered…. The issuing power should be taken from the banks and restored to the people, to whom it properly belongs*." -- Thomas Jefferson in the debate over the Re-charter of the Bank Bill (1809)

"*I believe that banking institutions are more dangerous to our liberties than standing armies*." -- Thomas Jefferson

"*... The modern theory of the perpetuation of debt has drenched the earth with blood, and crushed its inhabitants under burdens ever accumulating*." -- Thomas Jefferson

The Supremacy Clause

Article VI, Clause 2: "*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"

Perhaps one of the most misunderstood and misapplied clauses of the U.S. Constitution, the **Supremacy Clause** has been used in line with the concept of Federal Supremacy. Federal Supremacy is a concept our first Chief Justice, John Jay, believed in. During his stint on the Supreme Court Jay worked feverously to establish broader powers for the courts, and to transform the federal government into a national government. He quit the Supreme Court after failing, pursuing an opportunity to be governor of New York.

Chief Justice John Marshall spent his 36 years on the Supreme Court attempting to establish, and expand federal supremacy, and largely succeeded. Marshall is embraced by statists as the one to develop federal supremacy in his opinion of the *Mcculloch v. Maryland* case in 1819 where the Court invalidated a Maryland law that taxed all banks in the State, including a branch of Alexander Hamilton's creation, the national Bank of the United States. Marshall held that although none of the enumerated powers of Congress explicitly authorized the incorporation of the **national bank**, the Necessary and Proper Clause provided the basis for Congress's action. Marshall concluded that "*the government of the Union, though limited in its power, is supreme within its sphere of action*."

During the 1930s, under Franklin Delano Roosevelt, the Court invoked the Supremacy Clause to give the federal government broader national power. The federal government cannot involuntarily be subjected to the laws of any state, they proclaimed, and is therefore supreme in all laws and actions.

The legally, and commonly, accepted definition, as a result of the courts and the persistence of, regarding the Supremacy Clause, is that all federal laws supersede all State laws.

The commonly understood definition of the Supremacy Clause is in error. To understand the true meaning of this clause, one must pay close attention to the language used.

If the federal government has a law on the books, and the law was made under the authorities granted by the States in the United States Constitution, and a state, or city, passes a law that contradicts that constitutional federal law, the federal government's law is supreme based on The Supremacy Clause. However, if the federal law is unconstitutional because it was made outside constitutional authority, it is an illegal law, and therefore is not supreme over similar State laws.

An example of the federal government acting upon the assumption that all federal law is supreme over State law is when the medical marijuana laws emerged in California in 1996 after the passage of Proposition 215. Though I do not necessarily agree with the legalization of the casual recreational use of marijuana, and believe "weed" should be heavily regulated like any other pharmaceutical drug if being used for medicinal purposes, the actual constitutional legality of the issue illustrates my point quite well.

California's law legalizing marijuana for medicinal purposes was contrary to all federal law that identified marijuana as being illegal in all applications. Using the commonly accepted authority of the federal government based on their definition of the Supremacy Clause, federal agents began raiding and shutting down medical marijuana labs in California. However, there is no place in the U.S. Constitution that gives the federal government the authority to regulate drugs, nor has there been an amendment passed to grant that authority to the federal government. From a constitutional point of view, then, the raids on medical Marijuana labs in California were unconstitutional actions by the federal government.

The Supremacy Clause applies only to federal laws that are constitutionally authorized. Therefore, federal drug laws are unconstitutional. As a result, California's medical marijuana laws are constitutional because they are not contrary to any constitutionally authorized federal laws.

Language plays an important part in the Constitution, and The Supremacy Clause is no different. The clause indicates that State laws cannot be contrary to constitutionally authorized federal laws. For example, Article I, Section 8, Clause 4 states that it is the job of the U.S. Congress *to establish an uniform rule of naturalization*. The word "uniform" means that the rules for naturalization must apply to all immigrants, and to all states, in the same way. If a state was to then pass a law that granted citizenship through the naturalization process in a way not consistent with federal law, the State would be guilty of violating the Supremacy Clause.

In the case of Arizona's immigration law, S.B. 1070 in 2010, the argument by the federal government that Arizona's law is contrary to federal law was an erroneous argument. Assuming, for just a moment, that the federal government has complete authority over immigration (which is not true since immigration is one of those issues in which the federal government and the States have **concurrent powers**), Arizona's law would then need to be identical to federal law. And in most ways, the Arizona law was similar to federal immigration law. The only difference was that Arizona's law disallowed racial profiling.

The federal government's argument when the United States Department of Justice filed a lawsuit against the state of Arizona in the U.S. District Court for the District of Arizona on July 6, 2010, was that the law must be declared invalid because it interfered with the immigration regulations exclusively vested in the federal government. Therefore, a State cannot enforce immigrations laws if the federal government decides not to, nor can a State pass law regarding an issue that the federal government has sole authority over. In this way, Arizona was considered to be acting "contrary" to the federal government.

Article I, Section 9, Clause 1, and Article I, Section 10 in the final clause, provides that States hold concurrent authorities regarding immigration, and securing the border. Therefore, the federal government's argument that they held sole authority over the issue was in error.

Eric Holder, when he filed the lawsuit in the U.S. District Court also acted unconstitutionally because in Article III, Section 2, the Constitution states that all cases "*in which a State shall be Party, the supreme Court shall have original Jurisdiction.*" Since the case was the *United States v. Arizona*, the case, constitutionally, could only be filed with the United States Supreme Court.

The language in Article VI, Clause 2 reveals clearly that only laws made under the authorities granted to the federal government have supremacy. Article VI, Clause 2 reads, "*This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.*"

The clause establishes three things as being potentially the supreme law of the land. First, "*This Constitution*." Second, "*Laws of the United States which shall be made in pursuance thereof*." And Third, all *Treaties made, or which shall be made*."

"This Constitution" is the supreme law of the land. Understanding that first part of the clause is easy.

The second one has a condition attached to it. "*Laws of the United States which shall be made in pursuance thereof*."

In pursuance thereof? In pursuance of what?

Of "This Constitution."

Therefore, if a law is not made "in pursuance" of "This Constitution," then the law is an illegal law, and cannot possibly be the supreme law of the land. Unconstitutional laws are not the supreme law of the land, which reveals that all federal laws are not the supreme law of the land. Illegal law made outside the authorities granted by the Constitution of the United States cannot legally be the supreme law of the land.

After "pursuance thereof" in the clause, a semicolon is used. The semicolon separates "Treaties" from the "Laws of the United States." The separation by the semicolon means that "in pursuance thereof" applies to "Laws of the United States," but not to "Treaties." This means that treaties not in line with the principles of the Constitution can be accepted as the supreme law of the land.

The concern over treaties was not great, because the Senate was the voice of the States, and the States are the final arbiters of the Constitution. If the States are willing to ratify what would be considered an unconstitutional treaty, they must be given the chance. Therefore, "in pursuance thereof" does not apply to treaties.

The importance of this part of the Supremacy Clause revealed itself during Jefferson's Louisiana Purchase in 1803. As discussed in Article I, Section 8, Clause 17, the federal government does not have the authority to buy or own land unless it is purchased from a State, by the consent of the State legislature, for the purpose of needful buildings. The details of the Louisiana Purchase did not fit Article I, Section 8, Clause 17's requirement. To get around that, President Thomas Jefferson negotiated the Louisiana Purchase with France through treaties. Since treaties were ratified by the States through the Senate, it kept the States involved in the process, and made the purchase the law of the land even though technically it was not constitutional.

Oath or Affirmation to Support This Constitution

Article VI, Clause 3 indicates that all elected officials are bound to support the Constitution by oath or affirmation. An **oath** is to God, and an affirmation is not a sworn oath to God. This was offered because

the Founding Fathers recognized that not everyone believed in God, and that there were some religions that believed swearing to God to be a sin.

The final clause of Article VI also states that there shall be no religious test to serve. This was not the case inside the States. This was a provision only required of the federal government. At the State level, established churches, and religious tests were the norm. The Danbury Baptists in Connecticut appealed to President Jefferson because they felt they were being mistreated by the Puritans. The Baptists felt they were being treated like second class citizens in a State dominated by the Puritan Church. Jefferson replied that the federal government could not help them. It was a State issue.

Alexis de Tocqueville observed when he visited the United Sates in the 1830s that religious freedom had truly come to The States. In America, the politicians prayed, and the pastors preached politics, yet neither controlled the other. He concluded America's greatness was a result of the good in America, coining the term American **Exceptionalism**.

Terms:

Concurrent Powers – Government powers shared by the State and the federal government.

Exceptionalism - The condition of being exceptional or unique; the theory or belief that something, especially a nation, does not conform to a pattern or norm.

National Bank - In the United States, a bank chartered by the federal government authorized to issue notes that serve as currency; a bank owned and administered by the government, as in some European countries.

Oath - A solemn sworn declaration, or promise, to a deity (God), to fulfill a pledge.

Supremacy Clause - Clause in the Constitution that indicates that all federal laws, and treaties, passed under the authorities granted by the Constitution, are the Supreme Law of the Land

Questions for Discussion:

1. What was the common opinion by the Founding Fathers regarding a perpetual national debt?

2. What limitations on national debt did the Framers of the United States Constitution consider?

3. It is a common belief in today's society that all federal laws are supreme to all State and municipal laws. Why is this belief wrong?

4. How does the Supremacy Clause enable Nullification?

5. Why does the Constitution offer the opportunity for both oaths, and affirmations?

Resources:

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Joseph Andrews, *A Guide for Learning and Teaching The Declaration of Independence and The U.S. Constitution - Learning from the Original Texts Using Classical Learning Methods of the Founders*; San Marcos: The Center for Teaching the Constitution (2010).

Madison's Notes Constitutional Convention, Avalon Project, Yale University: *http://avalon.law.yale.edu/subject_menus/debcont.asp*

Philip B. Kurland and Ralph Lerner, *The Founder's Constitution – Volume Four – Article I I, Section 8, Clause 5 to Article VII*; Indianapolis: Liberty Fund (1987)

Sam Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828*; Chapel Hill: University of North Carolina Press (1999)