John C. Calhoun and the Constitutional Amending Process: Article V and the Theory of Concurrent Majorities

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Introduction

Among Americans, John C. Calhoun is generally regarded by scholars not only as a prominent nineteenth century statesman but also as one of the most original and logical political thinkers. (For discussion of prominent interpretations, see Current 1963 and Harris 1984.) Initially a strong nationalist who professed little concern "for refined arguments on the constitution," (Calhoun 1959, I, 403) Calhoun increasingly became the acknowledged spokesman for those southerners who turned to the Constitution (Carpenter 1963, 127-170) in the hope of protecting their peculiar institution.

I

Calhoun's most theoretical work was his *Disquisition on Government* (1953) wherein he outlined his view of human nature, challenged then dominant conceptions of the state of nature, defended freedom as a prize to be won by superior races rather than as a right to be shared by all, and developed his view of concurrent majorities. (See Beitzinger 1972, 379-387 for outline of Calhoun's major arguments.) In this work, Calhoun argued that while man was a social being, his feelings were so constituted that "his direct or individual affections are stronger than his sympathetic or social feelings" (p. 4). Such self-orientation leads to societal conflict which necessitates government to keep it in check. Being administered by men who are themselves self-oriented, however, government has a tendency toward injustice which must be held in check by a constitution: "*constitution* stands to *government* as *government* stands to *society*; and as the end for which society is ordained would be defeated without government, so that for which government is ordained would, in a great measure, be defeated without constitution" (pp. 7-8). The task of constitution-making is a difficult one requiring that government be strong

enough to protect both against internal and external dangers while preventing those who administer government from abusing power and using it to their own advantage.

While "indispensable and primary" to constitutional government, the suffrage is far form "sufficient" to this end (pp. 12-3) since it merely assures control to the majority of voters over those whom they elect, changing "the seat of authority without counteracting, in the least, the tendency of the government to oppression and abuse of its powers" (p. 13). Moreover, it is difficult to "equalize the action of the government" (p. 13) among the numerous interests into which society is divided, and, when interests combine to form a majority party, they will use government to advance their ends, distributing benefits to their friends and taxing their opponents, even to the point of impoverishing them (p. 18).

Against such a majority, Calhoun insisted that a written constitution was, by itself, an insufficient barrier, since those in control will necessarily favor liberal constructions of such a document by which their own powers can be furthered. Similary, while dividing the powers of government might lead to "greater caution and deliberation," (p. 27) all decisions would eventually fall under the sway of the numerical majority, exercising the suffrage.

As opposed to the rule of the numerical majority, Calhoun proposed that a mechanism—the concurrent majority—be instituted whereby "each division or interest" operating "through its own majority" would have "either a concurrent voice in making or executing the laws or a veto on their execution" (p. 20). While an ideal system would represent each interest, a system taking "a few great and prominent interests only . . . would still, in a great measure . . . fulfill the end intended by a constitution" (p. 21). Calhoun referred to the concurrent majority as a "negative power—the power of preventing or arresting the action of the government . . . " (p. 28).

In his *Discourse on the Constitution and Government of the United States* (1968, I, 111-406) Calhoun linked his theory of concurrent majorities to the principle of state sovereignty. He argued that the Constitution of 1787 represented a compact among individual states rather than creating a social bond among a truly united people. By Calhoun's analysis, little had changed in the transition from the government under the Articles of Confederation to that of the new constitution (I, 131). States had individually ratified the new constitution and could, only as states, amend it. As continuing geographical entities, or interests, individual states had the right to nullify acts sanctioned by the numerical majority. If this

failed, states would have to decide whether to continue under the federal constitution or secede.

The act of secession would imply, of course, that problems were beyond constitutional remedy, but the Founders had provided a constitutional amending process to provide such remedies. Calhoun's recognition of the pivotal role for the amending process led him to heap lavish praise upon it as an embodiment of his theory of concurrent majorities and to recommend its use on a number of important occasions. A review of Calhoun's reflections on the amending process, however, shows that his praise proved unwarranted in light of the implicit difficulties he himself raised as to its use in protecting minorities.

II

Calhoun's greatest praise for the amending process is found in the *Discourse* where he said that:

> It is, when properly understood, the *vis medicatrix* of the system;—its great repairing, healing, and conservative power;—intended to remedy its disorders, in whatever cause or causes originating; whether in the original errors or defects of the constitution itself,—or the operation of time and change of circumstances, or in conflict between its parts,—including those between the co-ordinate governments. By it alone, can the equilibrium of the various parts and divisions of the system be preserved; as by it alone, can the stronger be preserved from encroaching on, and finally absorbing the weaker (I, 295).

This passage also marks Calhoun's most extensive discussion of the amending process in which he respectively examined its necessity, nature, safety, and sufficiency (I, 284).

Calhoun's argument for the necessity of the amending process followed earlier justifications by the Founding Fathers. Calhoun observed that they:

> were not so vain as to suppose that they had made a perfect instrument; nor so ignorant as not to see, however perfect it might be, that derangements and disorders, resulting from time, circumstances, and the conflicting elements of the system itself, would make amendments necessary (I, 285).

Calhoun noted that, without a process being specified, changes would have required the states' unanimous consent.

Such a view was consistent with Calhoun's emphasis on the federal nature of American government and of the amending process. Calhoun stressed that amendments were "the acts of the several States, voting as

States—each counting one—and not the act of the government'' (I, 285-6). Earlier in the *Discourse*, Calhoun, drawing upon the provision in Article VII by which the Constitution had been ratified and the provision in Article V for amendment, had argued that both showed ''conclusively, that the people of the several States still retain that supreme ultimate power, called sovereignty . . . '' (I, 138). Against Publius's arguments in *Federalist* No. 39 that the amending process was ''neither wholly *national* nor wholly *federal*'' (1898, 251), Calhoun argued that it was solely federal (I, 158).

Calhoun praised the safety of the amending process as guarding against ''too much facility as too much difficulty, in amending it'' (I, 291). Explaining the requirements in Article V as a compromise at the Constitutional Convention between simple majority rule and unanimity, (I, 286-289) Calhoun said that:

> It is difficult to conceive a case, where so large a portion as *three fourths* of the States would undertake to insert a power, by way of amendment, which, instead of improving and perfecting the constitution, would deprive the remaining *fourth* of any right, essentially belonging to them as members of the Union, or clearly intended to oppress them (I, 292-3).

Similarly, he contended that Article V furnished ''sufficient protection against the combination of a few States to prevent the rest from making such amendments as may become necessary to preserve or perfect it'' (I, 294).

As to the sufficiency of the amending process, Calhoun argued that it was second only to the power of the states in creating the Union: ''Within its appropriate sphere,—that of *amending* the constitution,—all others are subject to its control, and may be modified, changed or altered at its pleasure'' (I, 294). Calhoun thus proceeded to praise the amending process as the ''*vis medicatrix*'' of the constitutional system (I, 295).

Calhoun saw in the amending mechanism an embodiment of the principle of concurrent majorities. Calhoun developed this point earlier in the *Discourse* where, in analyzing the contemporary application of Article V, he observed that at the proposal stage, the eleven smallest states with a population of 1,638,521 could defeat an amendment desired by the other members with a population of 14,549,082 while the twenty smallest states with a population of 3,526,811 could compel Congress to call a convention against the wishes of the most populous ten with a population of 12,660,793 (I, 172). At the ratification stage, Calhoun concluded, eight states with a population of 776, 969 could defeat a proposal desired by

twenty-two with a population of 15,410,635 while the less populous twenty-three states with a population of 7,254,400 could ratify an amendment against the wishes of the seven most populous with a total of 8,933,204 (I, 173). Moreover, even the smallest state could prevent an alteration in the provision granting equal suffrage in the Senate. (I, 174; for paralled analysis see Speech on Veto Power, February 28, 1842, 1968, IV, 74-99; for a modern citation and critique of similar patterns of analysis, see Livingston 1956, 242-4).

III

Calhoun's praise of the amending process in the *Discourse* was consistent with his comments in a letter to William Smith in which he answered a number of questions that Smith had directed to him and other potential presidential nominees regarding Dorr's Rebellion (See Dennison, 1976, for important role of this crisis) and the appropriate response to it (1968, VI, 209-238). In this letter, Calhoun continued to support the amending process as the lawful way to bring about governmental change.

One of Smith's questions concerned the right of a majority of citizens of a state to seek change through means other than those provided in the state's constitution or sanctioned by the state government (VI, 221). While not completely closing the door on the idea that there might be some extreme occasions where individual revolutionary actions might be permissible, Calhoun indicated that all legal means of effecting change must first be exhausted. Calhoun argued logically that the right of a majority to effect change was necessarily either a natural right or a conventional right and, since the former rights applied only in the state of nature, the right to effect constitutional change must be conventional, "belonging to the body politic, and subject to be regulated by it" (VI, 223). Even in states providing no formal mechanism for constitutional change, majority alterations in the constitution required the consent of the government.

Calhoun agreed that "the people are the source of all power; and that their authority is paramount over all" (VI, 226). Where governments are in place, however, he argued that they, rather than any abstract numerical majorities, articulated the popular will. When people act apart from governmental forms, as they may rightfully do "only where government has failed in the great objects for which it was ordained," they do a revolutionary acts on the basis of natural rights and "as a natural right, it is the right of individuals, and not that of majorities . . . " (VI, 227; for parallel idea, see Calhoun's Speech of January 5, 1937, 1968, II, 615). Were the

General Government to recognize as a legal right the authority of a majority of such individuals acting apart from governmental forms, the result would be "anarchy and violence:"

> it would be the death-blow of constitutional democracy, to admit the right of the numerical majority, to alter or abolish constitutions at pleasure—regardless of the consent of the Government, or the forms prescribed for their amendment. It would be to admit, that it had the right to set aside, at pleasure, that which was intended to restrain it—and which would make it just no restraint at all . . . (VI, 229-30).

Calhoun observed that, in writing the Federal Constitution, the Founders knew that methods for peaceful change were desirable alternatives to "violence and revolution;" they also knew that systemic stability required guards against "hasty and thoughtless innovations . . ." (VI, 236). While the ruling majority might attempt to use the amending process to forestall all needed changes, Calhoun praised the Founders for opening doors "for the free and full operation of all the moral elements in favor of change; not doubting that, if reason be left free to combat error, all the amendments which time and experience might show to be necessary, would, in the end, be made . . . " (VI, 237).

IV

Having praised the amending process, it is not surprising that recourse to it would occupy an important place in Calhoun's theory. The pivotal role of the amending process is illustrated by the fact that Calhoun's most lavish praise for it came during his defense of his cherished doctrine of nullification in *The Discourse.*

According to this doctrine, states had the power to challenge the constitutionality of a law by "interposing for the purpose of arresting, within their respective limits, an act of the federal government in violation of the constitution, and thereby of preventing the delegated from encroaching on the reserved powers" (1968, I, 279). Opponents feared that the federal government might thereby be prostrated at the feet of the states, causing "dangerous derangements and disorder in the system . . ." (I, 284). Calhoun responded that any apparent inconveniences cound be remedied by the amending process.

In Calhoun's scheme, when met by the action of a nullifying state, the federal government's duty was to forgo use of a disputed power until such time as an amendment could be adopted to settle the question. Obviously, the interposing states, typically being in a minority, could not

be expected to adopt amendments themselves (I, 296). Moreover, Calhoun asserted both that, "the party who claims the right to exercise a power, is bound to make it good, against the party denying the right . . ." and, that, in cases of conflict between delegated and reserved powers, "the presumption is in favor of the latter, and against the former . . ." (I, 297). To allow the exercise of delegated powers until an amendment was passed would work "a revolution in the character of the system" by transforming the federal system into a consolidated one (I, 299).

Calhoun had developed a similar analysis in a letter to General Hamilton on August 28, 1832 where, in outlining his views of nullification and secession, Calhoun had portrayed the chief function of the amending process as that of preserving "*the equilibrium*" between the delegated powers of the General Government and the reserved powers of the states (1968, VI, 174). Whereas interposition was designed to protect the states against intrusions of the delegated powers, the amending process was formulated to protect the General Government against encroachments by the states: "In virtue of the provisions which it contains, the resistance of a State to a power cannot finally prevail, unless she be sustained by one-fourth of the co-States . . ." (VI, 175). By such analysis, the amending process was the very "pivot of the system" since "by diminishing or increasing the number of States necessary to amend the Constitution, the equilibrium between the reserved and the delegated rights may be preserved or destroyed act pleasure" (VI, 176).

Calhoun had to acknowledge, as an objection to his scheme, that one-fourth of the states might "change the Constitution, and thus take away powers which have been unanimously granted by all the States" (VI, 176-177). To this fear, Calhoun responded both that state encroachments on the federal governments were less likely than encroachments by the latter against the former and that:

> It is . . . more hostile to the nature and genius of our system to assume powers not delegated, than to resume those that are; and less hostile that a State, sustained by one fourth of her co-States, should prevent the exercise of power really intended to be granted, than that the General Government should assume the exercise of powers not intended to be delegated (VI, 178, underlining omitted).

Usurpation of power by the federal government would be against the fundamental principle of our system—the original right of the states to self-government;" claims of state power, by contrast, would, be "in the spirit of the Constitution itself . . ." (VI, 178).

What would happen in cases where the majority of states asserting

the exercise of a power passed an amendment granting them the disputed authority? Even here, Calhoun proved unwilling to concede state sovereignty. He argued, and his position on this point was more developed in the *Discourse* than in his letter to Hamilton and other writings which seemed purposely ambiguous (McLauflin 1935, 445), that the state must decide whether a given amendment came "fairly within the scope of the amending power . . ." (1968, I, 300). Should an amendment transcend such scope, a state might, by Calhoun's analysis, secede (I, 300). Just as, under Article VII, a state had to decide whether to join the Union, so now it might withdraw either "if a power should be inserted by the amending power, which would radically change the character of the constitution, or the nature of the system; or if the former should fail to fulfill the ends for which it was established" (I, 301).

V

As a politician engaged in day-to-day politics, Calhoun sometimes advocated the exercise of the power he had so praised and analyzed. Calhoun's most publicized and criticized effort centered around the Nullification Crisis during which, in an Address to the People of the United States Prepared for the Convention of the People of South Carolina (1968, II, 193-209), he called for the reconvening of "the body, to whose authority and wisdom we are indebted for the Constitution . . ." (II, 207). Calhoun favored a convention, believing that this mechanism, rather than the more traveled route of congressional proposal and state ratification, was uniquely suited to "great emergencies" (II, 208).

Consistent with this view, Calhoun had in the aforementioned letter to General Hamilton, distinguished those occasions involving "a single power, and that in its nature easily adopted," when the tried method of amendment should be used, from a more serious "derangement of the system . . . embracing many points difficult to adjust . . ." (1968, VI, 179-180). In the latter case, he argued that:

> the States ought to be convened in a general Convention—the most august of all assemblies—representing the united sovereignty of the confederated States, and having power and authority to correct every error, and to repair every dilapidation or injury, whether caused by time or accident, or the conflicting movements of the bodies which compose the system (VI, 180).

While he was not completely clear on the subject, it appears from this quotation that Calhoun did not anticipate that such a convention would

have to submit its work to the states for ratification (Pullen 1948, 39). In this, and in other particulars, Calhoun's proposed constitutional convention mechanism seemed to anticipate a body whose power "was much broader than that actually set forth in the exact language of the amending article" (Pullen 1948, 45).

Outside South Carolina, Calhoun's call for a convention largely fell upon deaf ears, and, in other ways to be discussed below, Calhoun's hopes for the amending process were not realized. Indeed, despite his expressed faith in the safety of the amending process, Calhoun indicated concern in a speech authorized for the Southern Delegates to Congress to their Constituents dated February 2, 1849 (1968, VI, 285-313) that the amending process might not be adequate to protect the South's peculiar institution against the addition of new free states who might use the amending process to emancipate the slaves (VI, 308-309).

Calhoun thought that constitutional and institutional guarantees might guard against such a possibility. Thus, in Calhoun's last major speech to the Senate, his Speech on the Slavery Question dated March 4, 1850 (IV, 542-573), he raised his hope for "an amendment, which will restore to the South, in substance, the power she possessed of protecting herself, before the equilibrium between the sections was destroyed by the action of the Government" (IV, 572). Calhoun described his specific proposal more fully in the *Discourse* where he called for a "change which shall so modify the constitution, as to give to the weaker section, in some one form or another, a negative on the action of the government" (1968, I, 391). Going far beyond his earlier advocacy of proposals for changing the manner of electing the President (Calhoun, 1959, I, 364: Calhoun, 1899, Letter to Samuel Gouverneur, June 10, 1825, p. 230), Calhoun now called for the creation of a dual executive, in which the two great national interests could be represented by giving each a veto over Congressional legislation (I, 393).

As with his interposition scheme, however, Calhoun faced the problem of how to get the states of the majority section to agree to any diminution or sharing of their electoral control. Once again, Calhoun had to appeal to considerations of logic and fairness which would prove to be inadequate. The responsibility for passing such an amendment would rest with those least disposed to use it:

> The responsibility . . . rests on the States comprising the stronger section. Those of the weaker are in a minority, both of the States and of population; and, of consequence, in every department of the government. They, then, cannot be responsible for an act which requires the concurrence of two thirds

> of both houses of Congress, or two thirds of the States to originate, and three fourths of the latter to consummate (I, 396).

In respect to protecting the two major interests, at least, the federal Constitution was not as well constituted as South Carolina's where the state's two dominant interests—the upper country and the lower country—were equally represented in the legislature and where both houses of two successive legislatures had to approve amendments by a two-thirds vote (I, 401).

Conclusions

Calhoun's theory of concurrent majorities has been subjected to a great deal of justifiable criticism. Certainly, for all its professed concern for minorities, Calhoun's theory neither offered a system to identify which minorities were to be considered important nor offered protection to minorities within the geographical areas for which he advocated representation. His system was designed as a sure means of perpetuating slavery, not perceiving that the slave interest he so desperately tried to protect was morally repugnant in principle (Wald 1987, 52-53) and arguably moribund as a semi-feudal social order, in increasing tension with the system of free labor in the North (Schlesinger, 1945).

To focus more specifically upon Calhoun's views of the constitutional amending process is to address a tragic irony in his work. That is, that while Calhoun lavished praise on the safety and sufficiency of this process and cited it as an example of a properly working federal mechanism and an embodiment of his cherished principle of concurrent majorities, all these points were subject to criticism, some by Calhoun's own implicit analysis.

On the issue of federalism, it is sufficient to point out that Calhoun's analysis of the amending process as a federal mechanism, while near the mark, overstated the federal character of the process. While Publius had called the process partly federal and partly national, Calhoun saw no ambiguity, professing to see the process as an embodiment of the former alone. Calhoun frequently linked the amending process in Article V to the ratification provision in Article VII, ultimately granting each state the same freedom to reject an amendment as it originally had to reject the Constitution itself. By such analysis, states had, in effect, given up little, if any, of their sovereignty in joining the Union, making the ratification debates appear to have been but a tempest in a teapot.

Calhoun's affinity for the amending process stemmed in large part

from his recognition that, like his own theory of concurrent majorities, the amending process was not a purely majoritarian institution. Calhoun did not demonstrate, however, that the amending process (any more than his own scheme of concurrent majorities) protected all significant minorities. Indeed, by providing figures which suggested that a minority of the population might even adopt an amendment over the objections of the majority, Calhoun raised questions about whether the process even protected all majority interests. No wonder that Calhoun would fear that the institution of slavery which he and other southerners so cherished might eventually be abolished (as it eventually was) through the amending process.

The desire to protect the Southern slaveholding minority was, of course, a central purpose of Calhoun's theories of nullification and secession in which the amending process played such an important part. The greatest difficulty with this part of Calhoun's analysis was that, while Calhoun could implore the majority not to act on the basis of disputed powers and argue that the majority should not so act until its power had been affirmed by an amendment, by his own analysis of the self-directed character of human nature, no majority was likely so to wait. Moreover, no matter how much Calhoun would *prefer* that the federal government suspend all powers upon a state's interposition and appeal to the state for an amendment, no constitutional mechanism (including the dubious act of interposition) could *compel* such a suspension, absent a two-thirds vote in both houses of Congress and approval by three-fourths of the states. By Calhoun's own implicit analysis, the amending process was defective precisely to the extent that it could not guard against questionable constitutional interpretations approved by a majority.

Even when the federal government sought authorization for its powers, Calhoun refused to guarantee that the states would accede to it. In what one writer has called a game of "heads-I-win-and-tails-you-lose" (Current 1963, 76), Calhoun left open the possibility that states might secede in cases where they though the nature of the Constitution had been radically changed or in cases where they thought it no longer continued to serve the limited ends for which it was established. The doctrine of secession was eventually answered by the Civil War. As to Calhoun's belief in implicit limits on the constitutional amending process, the Constitution's two explicit limits on the content of amendments within the text of Article V would suggest, (Vile 1985, 380-385) though not necessarily prove (Murphy 1978, 754-757) that Calhoun was mistaken on this point.

Calhoun's distinction between those routine occasions where the tried method of amendment should be used and those extraordinary occasions where a convention might prove necessary has a commonsense appeal to it, though his apparent efforts to bypasss the requirements in Article V for calling such a convention and ratifying its proposals demonstrate that, once again, Calhoun faced the problem of initiating amendments desired for the protection of a minority of the states. As in the case of Calhoun's failed plan for a dual executive—a plan that would have most certainly led to government deadlock—Calhoun could show some logical desirability for this plan without being able to provide either a sufficient motive for the majority to adopt it or a constitutional requirement that it do so.

Calhoun's praise for the amending process, then, turned out to be more extravagant than his analysis warranted. Calhoun certainly advanced a strong case for following legal processes as opposed to entrusting such changes to any temporary majority. So too, by his analysis, the super majorities required by the amending process are revealed as a fairly good protection for clearly accepted interpretations of the Constitution against which one cannot rally two-thirds of both Houses of Congress and three-fourths of the states. The amending process may also serve to adopt constitutional understandings which are favored by such majorities against minorities without sufficient representation in the amending process. The mechanism is far less useful in adopting new measures for the protection of minority rights not favored by the requisite majorities of Congress or the states. Similarly, there is little chance that the amending process can serve, as Calhoun wanted it to do, to overturn questionable assumptions of power supported by a majority of the states. In perhaps the ultimate irony, the very difficulty of amendment which Calhoun so admired as a conservative force probably turned out to be one factor which accelerated the drive for extraconstitutional interpretations with which he differed.

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