

THE HISTORY OF INTERPOSITION

A Thesis

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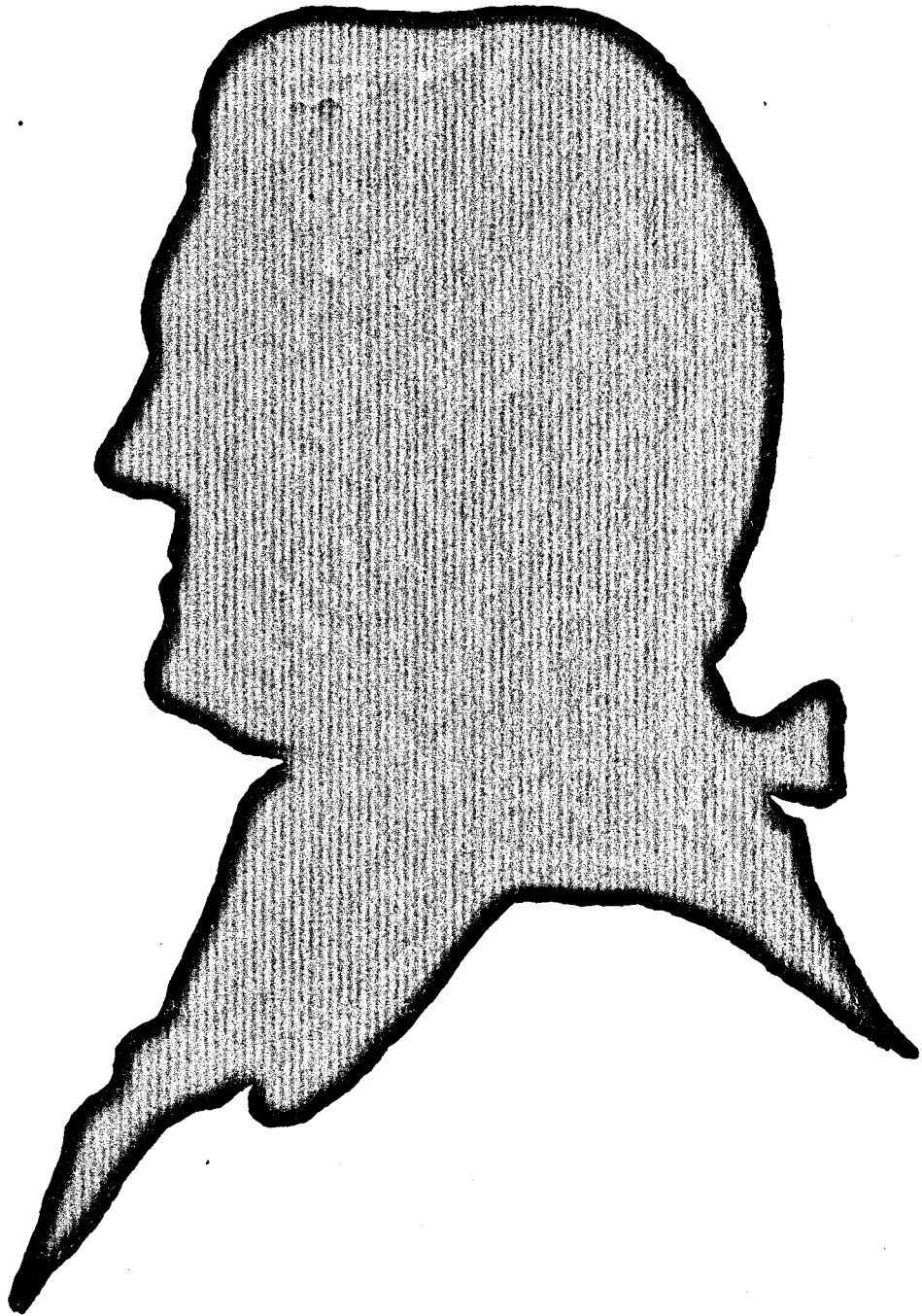
Master of Arts

by

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Thomas Jefferson

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INTRODUCTION

As long as governments, laws and regulations have existed, men have sought means to challenge, circumvent and annul them. Whether honorably or selfishly motivated, only time, the great revelator, can prove; and few lessons learned serve to prevent men's thoughts from again straying to these channels of desire.

To thoroughly exhaust the subject of desire in man to resist authority in government would be to re-write mythology and add still another labor to the burdens of Hercules. To do it completely would involve a lifetime of study, another of writing, and would necessitate encompassing all knowledge of men, religion, government and life. It is not my ambition, nor do I feel competent or worthy to begin the work of presenting the picture so extensively. It is my purpose to reveal as unbiased and objective an account of this desire, or what is now termed Interposition, as can be obtained from a brief scanning of such action in United States history.

The work will not be comprehensive or inclusively detailed throughout the tracing, but will be prompted by a sincere interest and a wish to throw direct as opposed to reflected light upon a much-debated topic. Many of the important documents will be included in their entirety allowing the reader to draw his own conclusions and interpretation without prejudice.

I will attempt to present the foundation of the idea of Interposition in American political thought, the convictions of the founding fathers upon the subject, and the appearance of the doctrine in myriad forms throughout this nation's brief span of existence. Before reading, three broad questions may be raised: What is Interposition?; Did it ever exist in our political system as a right?; Does it exist in our theory of modern U. S. government? If after reading this paper Interpositionists and opponents, alike, agree that it has presented a brief historical and un-bigoted yet informative picture of the question, my purpose will have been fulfilled.

CHAPTER I

THE ROOTS OF INTERPOSITION

To the advocate of interposition, in the modern era, an irrefutable and basic precept forms the substructure of doctrine. This vague and undefinable foundation is termed sovereignty, or the rights of States. An attempt at explanation or pin-pointed definition would in itself entail a carefully written volume and the net result would be equally as ungratifying as the absence of interpretation that prompted the study. Some terms are beyond exact and agreed upon meaning but on such a vagary the Interpositionists have chosen to construct their doctrine.

As yet it cannot be denied that the forty-eight States composing this Union maintain a degree of sovereignty, if only to the extent of dictating the most insignificant of intra-boundary affairs. A realm of self-autonomy and regulation appears to exist but is this completely void of external encroachment and interpretation? And if a violation occurs who is to judge that such is an infraction on justice and rights when the so-called usurpant defines usurpation? This is the baffling complex that confronts the examiner but when such judgment is claimed as a duty and right of the State involved, and positively asserted, it becomes the root of interposition.

The resolutions of interposition that have issued from the legislative assemblies of Virginia, Georgia, South Carolina,

Alabama, and Louisiana, within the last few months, are a far cry from revolutionary documents in political theory. They echo loudly of an age of more forceful statesmen and the odious terms of nullification and secession and emphasize the impelling necessity of unearthing evidence of such theory in the past.

Let us scan for a moment the nature of the problem and the perspective needed from which it should be analyzed. Basically it may be reduced to an inter-dependence of states for common support and welfare with a corresponding subjection of authority to the will of a democratic preponderance agreed upon. This submission of individual autonomy bears with it a contingent aversion to infringement of rights and an extension of the will of the opposition majority.

A simple illustration in physics presents a picture of the United States in true Federal actuality. Imagine two weights labelled States Rights and National Authority, respectively, arranged equidistant from a fulcrum on a freely balancing plane. Sovereignty can be visualized as a block centrally located and capable of sliding by force to either side of the plane to insure balance. Opposed to theory, however, we have history injected into our physics experiment. The balance becomes an inclined plane with States Rights thrown high in the air of helplessness and the "Sovereignty" block sliding, counter to force, toward the National Authority cemented to the ground of power. The "force" which may be

termed minority pressure, public opinion, or a dozen other forms of compulsion has been an omnipresent part of our government system. Whether or not such can encompass interposition must be determined.

Union was far from a novel governmental structure in Colonial America but it assumed snow-balling interest and support as years went by. As a prerequisite to independence it became a necessity but earlier attempts were prompted by other motives. "The old New England Confederation, in 1643-84, between Massachusetts Bay, Plymouth, Connecticut, and New Haven, for defense against Indians, Dutch and French, ended without ever having manifested the slightest vigor."¹ Similar examples of a half-hearted wish to band together were frequent occurrences but the recrudescent individual desires ever prevalent, made agreement virtually hopeless. "In the latter half of the seventeenth century Virginia had alliances with some sister colonies for protection against Indians; but there was no call for a general congress until the French and Indian attack on Schenectady, in 1690 during King Williams War."² Here we see a genuine effort toward co-operation. "Representatives from New York, Connecticut, Massachusetts, and Plymouth met that year at New York; letters came from

¹ Benjamin E. Andrews, History of the United States Vol. II, p. 51.

² Ibid., p.51

Virginia, Maryland and Rhode Island. But no permanent union was proposed here, nor at any of the similar meetings, seven at least, which occurred between 1690 and 1750.³

A notable attempt, however, was the Albany Convention- "On the instance of the Board of Trade, a congress of delegates elected by the assemblies of seven colonies met at Albany in June 1754. After declaring a colonial union 'absolutely necessary for their preservation,' the Congress adopted a plan drafted by Benjamin Franklin."⁴ Known as the Albany Plan of Union it failed of adoption despite its, in many ways, admirable features and the support of far-sighted statesmen. Direct failure can be traced to personal pride, ambition, petty bickering and a determined desire to remain aloof and individual in governmental affairs.

Such united or cooperative action gave lucid preview of far greater achievements in joint undertakings and intercourse. This pellucidity possessed by the modern student was not foreign to the political thinker of Franklin's era. Opposition was as heated and fervent for channelized individualism in colonial affairs as expressed by States Righters today. This does not mean severance with England. England's position was in the main respected and thoughts of

³ Ibid., p.52

⁴ Morison and Commager, The Growth of the American Republic, Vol. I, pp. 131-32.

breaking allegiance and declaring independence were far from the minds of most. "Even after English oppression and the diligent agency of committees of correspondence had brought union, and delegates from the colonies had met again and again in Congress, the thought of breaking away from the mother-land was strange to the minds of nearly all."⁵

The movement or undercurrent propelling itself toward freedom from England's domination at first feared the use, in open conversation, of the word "independence." In many regions it was as despised as the Stamp Act and steadfastly denounced by men who later became some of the leaders in the fight for freedom. Here is presented that intangible yet ever-present desire to throw off the rule of another. To cast aside the yoke of oppression and rule by what it thought to be a selfish and biased majority. In numbers and wealth lay strength but to amass such bulk meant alliances, compacts or union all measures certain to reduce sovereignty and increase responsibility. This the colonists were loath to do hence establishing themselves as the predecessors of states rights advocates in America.

Further probing into the attempts and experiments of the early colonists would prove expansive but hardly more

⁵ Andrews, op. cit., p. 53.

illuminating. We are concerned with interposition under the Constitution of the United States and the documents immediately preceding and most closely allied with it. It has been evidenced, however, by this brief look at colonial thought that the ideas did not change or have not changed entirely. Men desire their will to be felt and only application and curbing have been altered through the centuries.

On June 7, 1776, Richard Henry Lee, of Virginia, rose in Congress, and in obedience to the command of his State, moved a resolution:

That these united colonies are, and of right ought to be, free independent states; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved.

That it is expedient forthwith to take the most effectual measures for forming foreign alliances; and

That a plan of confederation be prepared and transmitted to the respective colonies for their consideration and approbation.⁶

Congress appointed a committee to formulate and present a formal declaration stating the purpose and reasons for the independence movement. Chosen to perform this task were: Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert Livingston, all able and deep-thinking statesmen. From the efforts of these men led by the brilliant Thomas Jefferson came the Declaration of Independence.

⁶ David S. Muzzey, A History of Our Country, p. 134.

Unanimity was far from the keynote and South Carolina, New York, New Jersey, Pennsylvania and Maryland gave evidence that an unblemished vote of approval might be difficult. However on "July 2d, after further long debate, participated in by John Adams, Dickinson, Wilson, and many other of the ablest men in Congress, not all, even now, favorable to the measure, the famous Declaration of Independence was adopted by vote of all the colonies but New York, whose representatives abstained from voting for lack of sufficiently definite instructions."⁷

The Declaration of Independence was almost wholly the work of Thomas Jefferson but much of the wording can be found in earlier documents. Under the First Colonial Congress, October 7, 1765 the Declaration of Rights and Grievances by John Cruger and An Address to the King by R. R. Livingston⁸ were adopted. More especially the Declaration of Colonial Rights of the Second Continental Congress in 1775 resolved that they were entitled to "life liberty, and property..... rights liberties and immunities.....and a free and exclusive power of legislation in their several provincial legislatures."

Throughout its text the Declaration of Independence manifests the driving motivation that founded a new nation and provided mortar for the joints of political theories to this day. In its second paragraph we deserve the concise

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Andrews, op. cit., p. 61

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Malcolm Townsend, U.S., p. 179

and forthright philosophy that made this Declaration memorable.

We hold these truths to be self-evident:-That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive to those ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate, that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.

From that paragraph interpositionists of a later date gleaned valuable fuel for their argumentive fires. When governments fail to perform the functions they were established for, "it is the right of the people to alter or abolish it altogether, and to institute new government." Jefferson renounced the idea that such a notion would lead to anarchy by saying, "all experience hath shown that mankind are more disposed to suffer while evils are sufferable, than to right them by abolishing the forms to which they are accustomed."⁹

The resolute doctrine promulgated by the revolution-

aries in July of 1776 severed formal ties with Great Britain, plunged the colonies into war and implanted the idea of sovereignty deep in the minds of colonial statesmen; yet it did not portray feelings in unanimous actuality. Anarchy threatened and most of the colonies adopted constitutions, all pulling every way in the traces of governmental theory, except in unison. "The sole momentous novelty was that every one of the new constitutions proceeded upon the theory of popular sovereignty. The new governments derived their authority solely and directly from the people. And this authority, too, was not surrendered to the government, but simply - and this only in part - intrusted to it as the temporary agent of the sovereign people, who remained throughout the exclusive source of political power."¹⁰

State constitutions were adopted on the following dates:

New Hampshire (1)	6 January 1776
South Carolina (1)	26 March 1776
Virginia	29 June 1776
New Jersey	2 July 1776
Delaware	22 August 1776
Pennsylvania	28 September 1776
Maryland	11 November 1776
North Carolina	18 December 1776
Georgia	5 February 1777
New York	20 April 1777
Vermont	8 July 1777
South Carolina (2)	19 March 1778
Massachusetts	15 June 1780
New Hampshire (2)	13 June 1784

¹⁰ Andrews, op. cit., p. 66

¹¹ Morison and Commager, op. cit., p. 232

Decentralization and State sovereignty were at the apex in American history at this time. Never again, as in this period, would the states possess such unlimited freedom of government.

The drastic need for union, cooperation and a revision of political institutions was demanding recognition and intelligent people on all sides began to search, question and formulate possible plans of agreement. Democracy was the foundation point for most of their plans and representation and separation of powers were interwoven throughout.

To present some remedy to the problem of loose and vacillating relations it was proposed that a confederation be formed. A committee of one representative of each state was created and on July 12, 1776 presented a plan of Articles of Confederation and Perpetual Union framed by John Dickinson. After adoption by Congress in November, 1777 they were submitted to the States. Differing little from contemporary undertakings the states of the 18th century were lethargic and dilatory in their acceptance but by spring of 1779 all had given their approval except Maryland. Upon the accession of the latter on March 1, 1781 the articles went into immediate effect.

The Articles of Confederation were a twenty-league step in the direction of union as known under the Constitution but they contained many of the features that lend omnipotence to State governments and fragility to the central structure.



Alexander Hamilton

Interposition could not be argued, there was no debate.

"Each state retained its sovereignty, freedom and independence which had not been delegated." This was an international compact not a union welded with the flux of "one nation indivisible" a "United States" citizenry. These people were Virginians, Pennsylvanians and Carolinians first and disagreement could easily lead to nullification or withdrawal and a civil war would have been doubtful.

Article III stated-

The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade or any other pretence whatever.

A more adamant resolution is presented in Article XIII-

Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation is submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state.

Such breadth and scope did not clearly state where the system of federalism intimated really lay. Legal minds had an eternal ticket to a field day and the usurpation of power, as defined by some, could be as common as the assumption of office. Such a framework was inadequate and even confederation backers were clamoring for revision of the Articles or complete change. Aiding in the breakdown of the confederation was the

readily apparent failure of the system to aid or better economic conditions but only seeming to worsen them. Coursing throughout was that independent feeling of bowing to no one. Americans have always been typically law-abiding and in fact function most smoothly under written documents, but they never swallow manifestations of power upon them without an utterance either great or small. As recognized especially at this period of our history each man who considered himself a citizen possessed reason, self-government and initiative and loathed the thought of outside domination or curtailment of his right to express them.

To settle a long-disputed question of interstate commerce a commission representing all of the states was proposed and accepted by a large majority. "Thus originated the Annapolis Convention of 1786. Nine States appointed delegates; all but Connecticut, Maryland, and the two Carolinas; but of the nine only Virginia, Delaware, Pennsylvania, New Jersey, and New York actually sent them. As the powers granted the commissioners presupposed a deputation from each of the States, those present, after mature deliberation, deemed it inadvisable to proceed, drawing up instead an urgent address to the States to take 'speed measures' for another fuller convention."¹² Madison and Hamilton attended the Annapolis

¹² Andrews, op. cit., p. 182

Convention and provided the prime impetus in recommending a convention.

With the cries of Shay's rebellion and the impossible Potomac river settlement reverberating in their ears the Congress of the Confederation injected the first trickle of vitalizing national elixir into the flabby federal creature. On February 21, 1787 they asked the states to send representatives to a convention in Philadelphia on 14 May, its express purpose being to revise the Articles of Confederation.

CHAPTER II

THE CONSTITUTION.

The wheels were turning, the country was governmentally ill, and the Constitutional Convention of 1787 met to find relief.

They thoroughly realized, from their experience, that they must find and establish a firm and united government, with adequate power of self-support, and especially that they must devise some method of settling disputes between the States, if there was to be peace on the American continent. The "Spectre of turmoil" was before them in all their debates on the Constitution. It is because they found the remedy in a new form of government, having real legislative and executive power, and having also a permanent judicial tribunal with compulsory jurisdiction over sovereign States, that their action can never be too often impressed upon men of today.¹³

They could not just find the suitable government as an academic study in political science as Andrew C. McLaughlin has written:

Supposing that the cleverest adjustment of powers, the most accurate assignment of authority was at last discovered, what security could there be that the states would regard the system, play their parts, and abide by their obligations? Could any method be found for making certain the power of the central authority to perform the duties bestowed upon it? Could this be done without destroying the states as political entities or reducing them to mere districts? That was a question that might well have confused the clearest brain of the time; no more delicate and intricate problem in practical politics and state craft ever confronted a thinking people. If a system could be found which did not involve the destruction of the states, which preserved an equitable distribution of authority between the centre and the parts, the great problem imperial organization had found a solution. If

¹³ Samuel Bunford, Secession and Constitutional Liberty, p. 15.

this could be done, America would make one of the greatest contributions ever made by a nation to the theory and practice of government.¹⁴

The Convention was met and with the possible exception of John Jay, John Adams and Thomas Jefferson no more complete group of competent statesmen could be found in America. Despite their background and depth of perception, however, they represented States with widely divergent schools of thought.

In 1776, "Connecticut, in its statute adopting a declaration of rights and privileges, declared itself a Republic, which shall forever be and remain a free, sovereign and independent State."¹⁵ Virginia statesmen "had no desire to form a loose confederation. Their Nationalistic outlook would startle even the most imaginative Americans of the present day. They visioned a continental nation, exercising complete, unrestricted sovereignty, with the states reduced to the administrative districts which De Tocqueville afterward insisted was their proper function."¹⁶

Staunch Massachusetts despite the efforts of some of its statesmen, was still the state that in its Constitution of 1780 declared itself 'a free, sovereign and independent body

¹⁴ Confederation and Constitution, (Harpers, 1905) pp.176-77., cited by Morison and Commager, p. 279.

¹⁵ Charles Warren, The Supreme Court and the Sovereign States, p. 3

¹⁶ Burton J. Hendrick, Bulwark of the Republic, p. X, Introduction.

politic or state by the name of the Commonwealth of Massachusetts.' "Samuel Adams had written of the Republic of Massachusetts Bay."¹⁷

Rhode Island refused to attend at all and New Jersey seemed bound and determined to strengthen the Articles of Confederation and promote equality or accept nothing.

"The delegates from North Carolina wrote home: 'A very large field presents to our view, without a single straight or eligible road that has been trodden by the feet of nations. An union of sovereign States, preserving their civil liberties and connected together by such tyes as to preserve permanent and effective governments, is a system not described; it is a circumstance that has not occurred in the history of men; if we shall be so fortunate as to find this description, our time will have been well spent."¹⁸

Charles Pinckney of South Carolina presented his plan of government and his colleague Pierce Butler said that he considered the interests of the Southern and Eastern States as different as those of Russia and Turkey.

Public opinion raged violently pro and con as the convention got under way. Everyone voiced his ideas and criticism helpful and derogatory was vehement and plentiful.

¹⁷ Warren, *op.cit.*, p.3, quoted from Warren-Adams Letters, Massachusetts Historical Society Collection (1917). Adams to James Warren, August 17, 1776; Massachusetts Centinal, April 2, 1785.

¹⁸ *Ibid.*, p.21, cited from North Carolina Delegates to Governor Caswell, June 14, 1787, Farrand, III, p.96

"A contemporary Massachusetts writer, antifederalist in politics, charged the Convention with being composed of 'advocates of the British system,' and that 'the political maneuvers of some of them have always sunk in the vortex of private interest; and that the immense wealth of others has set them above all principle'." ¹⁹

Another wrote-

"The present Convention is happily composed of men who are qualified from education, experience and profession for the great business assigned to them. These gentlemen are, assembled at a most fortunate period,.... with a variety of experiments before them of feebleness, tyranny and licentiousness of our American forms of government. Under such circumstances it will not be difficult for them to frame a Federal Constitution that will suit our country." ²⁰ As the convention progressed the Virginia plan slowly emerged as the framework upon which the Constitution was to be based. Ironically today in its entirety it would have founded a national government second to no administration in the last score of years. "Those who look with dismay upon a Supreme Court deciding the constitutionality of laws should keep in mind the even more extensive powers entrusted to the judiciary by the 'Virginia plan'.

¹⁹ Bunford, op. cit., p. 17

²⁰ Warren, op. cit., p. 22

This established a so-called Council of Revision not unlike that exercised in Colonial times by the Privy Council of England. This Council of Revision, composed of the Executive and 'a convenient number of the national Judiciary,' was to examine all laws passed by the national legislature, as well as those of the several states. On all such measures it was to possess the veto power. But keep in mind an all-important fact: this veto was to be not a judicial, but a political prerogative; it was to be utilized for deciding not the constitutionality of laws, but their desirability as public policy. Thus the Supreme Court was to have two opportunities to set aside acts of Congress: first as part of the Council of Revision, and secondly in its capacity as a judicial body, passing on constitutional questions."²¹

Against such proposals opposition was so determined that they were either dropped or rejected by vote. "The Convention became the scene of determined dissension; and it seemed impossible that the divergent views of the large and the small States, or of New England, the Middle States and the South or of the commercial and agricultural classes could ever be reconciled or compromised."²² A typical reflection on the activity was that of Alexander S. Martin writing to Governor Caswell of North Carolina, "it is no small task to bring to a conclusion the great objects of a United Government, viewed

²¹ Hendrick, op. cit., p. XII Introduction

²² Warren, op. cit., pp. 24-5

in different points by thirteen independent sovereignties."

By utilizing their superior voting power the larger States finally succeeded in overriding Patterson's New Jersey plan and that of the Virginians needed only revision enough to appease the smaller states to succeed in adoption. Hamilton with his plan of complete consolidation with life-time president and senators was pushed into obscurity and the large states came half-way to meet the small ones. The Connecticut or Great Compromise appeared to be most acceptable to all and upon this basis was readied for vote. On September 17, 1787 the Constitution, having been worked on for sixteen weeks, polished up by Gouverneur Morris and readied for vote promulgation was signed by all but three of the representatives of twelve states. Abstaining were Elbridge Gerry of Massachusetts who feared a civil war, George Mason of Virginia who was sure they would set up a monarchy, some parts being dangerous, and Edmund J. Randolph, also of Virginia, who objected to the powers conferred on President and Senate and deficient boundaries between State and national authority. Here is evidenced more bronze for the casting of a States Right bell that has rung throughout our history.

The Convention was over yet the most crucial part of the ordeal lay ahead. Ratification by nine states was necessary

²³ Ibid., p. 22, Letter from Martin to Caswell, July 27, 1787, quoted from Farrand, Vol. III, p. 64.

for adoption and all realized the length of the rugged road to its establishment as our fundamental document. Washington wrote, "Should the States reject this excellent Constitution, the probability is an opportunity will never offer to cancel another- the next will be drawn in blood."²⁴

The representative from Pennsylvania, James Wilson, said in a Philadelphia Convention, "Now is accomplished what the great mind of Henry IV had in contemplation - a system of government for large and respectable dominions united and bound together in peace, under a superintending head by which all their differences may be accommodated without destruction of the human race."²⁵

Tiny Delaware led the way, ratifying by a unanimous vote on December 7, 1787. Pennsylvania, New Jersey, Georgia and Connecticut soon followed. Acceptance did not come so easily in some of the other states, however, 1788 found severe struggles being waged; Massachusetts, New York and Virginia all secured ratification with less than a ten vote margin. By the end of June nine states had ratified and the Constitution went into effect. Only North Carolina and Rhode Island refrained from nodding affirmatively but on November 21, 1789 the former voted acceptance. Finally after much haggling and an accusation of foul play Rhode Island voted for a convention

²⁴ Ibid., p. 28.

²⁵ Ibid., p. 32, from Elliot's Debates, II, 527-58, December 11, 1787.

"This was called as soon as possible, and on May 29, 1790, Rhode Island, too, at the eleventh hour, made the National Constitution her own. Not only had a more perfect Union been formed at last, but it included all the Old Thirteen States."²⁶

It was done, a rugged and flexible instrument of government for the United States of America had been forged in the fiery furnaces of trial and war to endure for centuries. As Count Alexis de Tocqueville said:

It is new in the history of society to see a great people turn a calm and scrutinizing eye upon itself when apprised that the wheels of its government are stopped; to see it carefully examine the extent of the evil and patiently wait two whole years until a remedy is discovered, to which it voluntarily submits without its costing a tear or a drop of blood from mankind.²⁷

The Constitution was in effect but the "Constitution was ratified not by the people of America in their collective capacity- not by a nation composed of people in a mass, physically residing within the boundaries of States, but by the people of each State as a separate sovereignty."²⁸

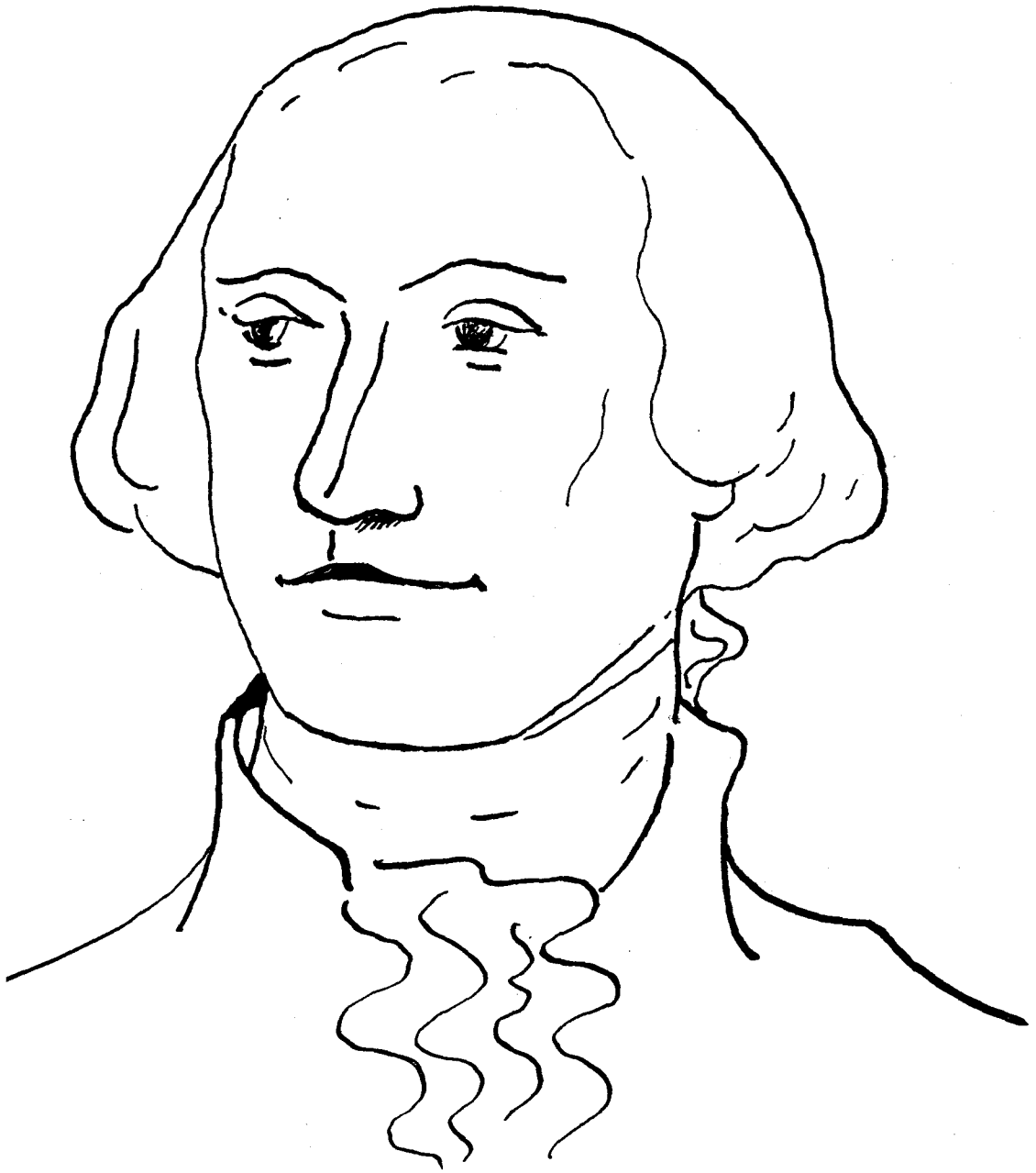
As the brilliant statesman and soon to be President, James Madison said: 'Who are the parties to it. The people. Not the people as composing one great body, but the people as composing thirteen sovereignties.'²⁹

²⁶ Andrews, op. cit., p. 193.

²⁷ Muzzey, op. cit., p. 179.

²⁸ Warren, op. cit., p. 33

²⁹ Ibid., p. 34.



George Washington

Never forget the feeling behind its passage and the diminutive margin of affirmation in New York, Virginia and Massachusetts. Acceptance was far from unanimous and Washington was moved to write to Lafayette about the convention that it appeared 'little short of a miracle that the delegates from so many different States should unite in forming a system of National Government.' Charles Turner said in the Massachusetts Convention, in February, 1788: 'Considering the great diversity of local interests, views and habits- Considering the unparalleled variety of sentiments among the citizens of the U.S. - I despair of obtaining a more perfect Constitution than this at present.'

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Many of the States presented a determined declaration that their rights were real and not to be tampered with. Those of Massachusetts, Maryland, South Carolina, New Hampshire, New York and Pennsylvania follow:

Massachusetts: First. That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised.

Maryland: First. That each State in the Union shall respectively retain every power, jurisdiction, and right, which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government. That those clauses which declare that Congress shall not exercise certain powers be not interpreted, in any manner whatsoever, to extend the powers of Congress; but that they may be construed either as making exceptions

30 Warren, op. cit., p. 129.

to the specified powers where this shall be the case, or otherwise, as inserted merely for greater caution.

South Carolina: That no section or paragraph of the said Constitution warrants a construction that the States do not retain every power not expressly relinquished by them and vested in the General Government of the Union.

New Hampshire: That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution are reserved to the several States, to be by them exercised.

New York: That every power, jurisdiction and right which is not by the said Constitution clearly delegated to the Congress of the United States or the departments of the Government thereof, remains to the People of the several States, or to their respective State Governments to whom they may have granted the same; and that those clauses in the said Constitution which declare that Congress shall have or exercise certain powers do not imply that Congress is entitled to any powers not given by the said Constitution; but such clauses are to be construed either as exceptions to certain specified powers, or as inserted merely for greater caution.

Pennsylvania (minority): That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States..... but all the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with and shall be exercised by the several States in the Union, according to their respective Constitutions.³¹

This "great diversity of local interests, views and habits" and the "unparalleled variety of sentiments" were not to be soon unified as our present situation evidences. Tempers were not easily assuaged and differences sought outlets.

³¹ Edward Payson Powell, Nullification and Secession in the U.S., pp. 110-11

Exemplary of the disturbed feeling and inability to immediately find common ground of jurisdiction is represented by the *Chisholm v. Georgia*, 2 U.S. (2 Dallas) 419, case in which suit was brought by an individual against points brought out by the Justices and the Attorney General in their arguments provided objects for reflection in debates and theories of the future. To illustrate this, representative statements have been included.

Randolph, Attorney General of the United States, for the Plaintiff, 1793:

In specific terms the Constitution announced to the world the probability, but certainly the apprehension, that States may injure individuals in their property, their liberty, and their lives; may oppress sister States; and may act in derogation of the general sovereignty.

Are States then to enjoy the high privilege of acting thus eminently wrong without control; or does a remedy exist? The love of morality would lead us to wish that some check should be found; if the evil, which flows from it, be not too great for the good contemplated. Government itself would be useless, if a pleasure to obey or transgress with impunity should be substituted in the place of a sanction to its laws.

I acknowledge and shall always contend, that the States are sovereignties. But with the free will arising from absolute independence, they might combine in Government for their own happiness.

Nor will these sentiments be weakened by the want of a special provision in the Constitution for an execution; since, it is so provided in no case, not even where States are in litigation. What if a State is resolved to oppose the execution?

Rather, let me hope and pray, that not a single star in the American Constellation will ever suffer its lustre to be diminished by hostility against the sentence of a

Court, which itself has adopted. But that any State should refuse to conform to a solemn determination of the Supreme Court of the Union, is impossible, until she shall abandon her love of peace, fidelity to compact and character.

Justice Iredell, applying the Conventional Law of Nations, disagreed with Attorney General Randolph- This Court is to be (as I consider it) the organ of the Constitution and the law, not of the Constitution only, in respect to the manner of its proceeding, we must receive our directions from the Legislature in this particular, and have no right to constitute ourselves an officina brevium, or take any other method of doing what the Constitution has chosen (and, in my opinion) with the most perfect propriety, should be done in another manner.

Every State in the Union in every instance where its sovereignty has not been delegated to the United States I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of Government actually surrendered: Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them: Of course the part not surrendered must remain as it did before.

Nothing but express words, or an insurmountable implication would authorize the deduction of so high a power.

The helm of the young state vessel fell to the Federalist Party and they skillfully began to guide it through the surf of destiny. Opposing the Federalists as crew of this national ship were the anti-Federalists or Republicans. A description of the deadly riff and threatening attitude of the two factions is admirably portrayed by Burton J. Hendrick in his Bulwark of the Republic:

The dissensions between these two armies- Federalists and Republicans- was one of the chief strains on the Constitution in its early, formative years. At times their differences seemed likely to wreck the whole structure. Even as early as the election of 1792, the South made a threat similar to that of 1860: if the Federalists gained

a majority in Congress, she would secede. The frequency with which this word "secession" appeared in Congress and on the hustings appals a contemporary observer. It was a word that had no terrors for our ancestors. In fact it was a favorite argument in debate. Whenever a particular section disliked a legislative proposal, the chronic threat was forthcoming that, if it passed, secession would follow- or "scission" as Jefferson sometimes called it. One would think that the early United States resembled one of those primitive biological organisms in which division and subdivision are natural processes. If Hamilton's funding bill should be passed, the South would depart and disrupt the Constitution. If the Federal Government assumed state debts, Virginia would leave the Union; if the Federal Government did not assume them New England would set up for itself. If the Federal Government should find its Capital on the Potomac, the North would secede; if on the Delaware or Susquehanna, - or, most odiously of all, on the Hudson, - the Southern States would abandon the national cause. If Jay's Treaty became law, the Republicans threatened to pronounce the Constitution at an end; the purchase of Louisiana almost persuaded New England and the "Yorkers" to cast that great charter adrift.³²

In 1794 rebellion broke out in western Pennsylvania and marked the work of foreign powers to disrupt the unity and solidarity of the young nation, hoping at a later date to swallow up bits of its territory and perhaps again bring it under subjection. Fortunately the passage of Jay's Treaty and the alert and determined efforts of Washington and his supporters prevented disruption of unity and the possible secession of the West.

Actual denial did not formally come until 1798 when under the authorship and guidance of John Taylor, Thomas Jefferson, and James Madison, a tidal wave of resistance

³² Hendrick, op. cit., p.110

was launched against the introduction of the Alien and Sedition Acts. John Taylor was immediately assured that the secession of Virginia and North Carolina was the only course and clamored loudly in favor of such a move against the hateful rule of an autocracy.

In an attempt to increase the solidarity and position of their part the Federalists passed these laws regulating immigration, deportation and sedition to weaken the Republicans. The result was a death-blow to the Federalists and the production of a series of resolutions regarded as basic in the school of thought on interposition.

CHAPTER III

THE VIRGINIA-KENTUCKY RESOLUTIONS OF 1798-1799

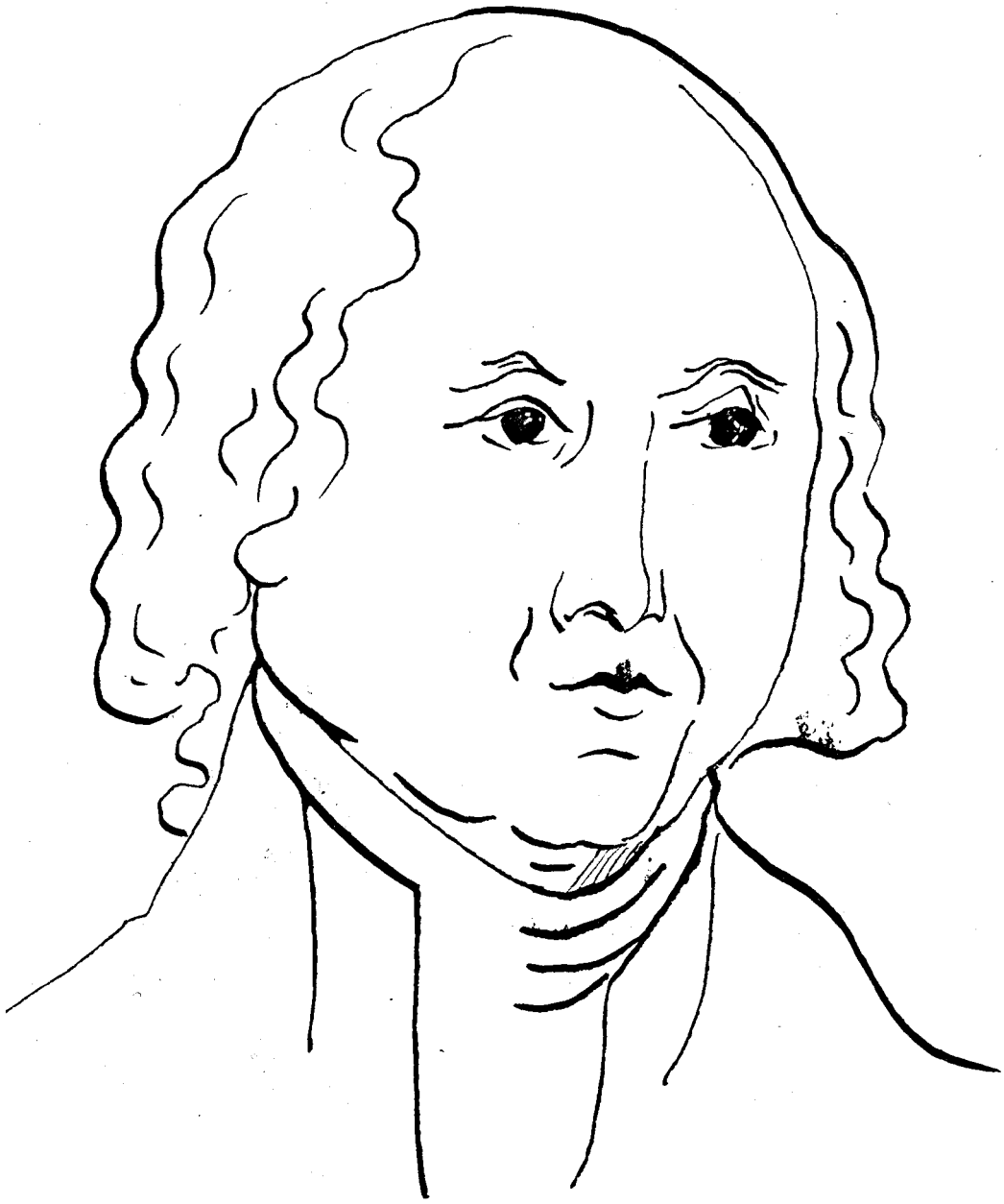
Jefferson and Madison prepared the resolutions to be introduced into the legislatures of Kentucky and Virginia attesting the right of states to "interpose their authority" when the central government overstepped its bounds. On November 16, 1798 the First Kentucky Resolution was promulgated as follows with those resolutions II-VIII deleted as applying only to the Alien and Sedition Acts:

I. Resolved, that the several States composing the United States of America are not united on the principle of unlimited submission to their General Government; but that by compact under the style and title of a Constitution for the United States and of amendments thereto, they constituted a general government for special purposes, delegated to that government certain definite powers, reserving each State to itself, the residuary mass of right to their own self-Government; and that whensoever the General Government assumes undelegated powers, its acts are unauthorative, void, and of no force:

That to this compact each State acceded as a State, and is an integral party, its co-States forming as to itself, the other party:

That the Government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers but that as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.....

IX. Resolved, lastly, that the Governor of this Commonwealth be, and is hereby authorized and requested, to communicate the preceding Resolutions to the Legislatures of the several States, to assure them that this Commonwealth considers Union for specified National Purposes, and particularly for those specified in their late Federal Compact, to be friendly to the peace, happiness, and prosperity of all the States: that faithful to the compact,



James Madison

according to the plain intent and meaning in which it was understood and acceded to by the several parties; it is sincerely anxious for its preservation; that it does also believe, that to take from the States all the powers of self-Government, and transfer them to a general and consolidated Government, without regard to the special delegations and reservations solemnly agreed to in that compact, is not for the peace, happiness or prosperity of these States:

And therefore, this Commonwealth is determined, as it doubts not its co-States are, to submit to undelegated and consequently unlimited powers in no man or body of men on earth:

That if the acts before specified should stand, these conclusions would flow from them: that the General Government may place any act they think proper on the list of crimes and punish it themselves, whether enumerated or not enumerated by the Constitution as cognizable by them; that they may transfer its cognizance to the President or any other person, who may himself be the accuser, counsel, judge, and jury, whose suspicions may be the evidence, his order the sentence, his officer the executioner, and his breast the sole record of the transaction: that a very numerous and valuable description of the inhabitants of these States, being by this precedent reduced as out-laws, to the absolute dominion of one man, and the barrier of the Constitution thus swept away from us all, no rampart now remains against the passions and the powers of a majority of Congress, to protect from a like exportation or other grievous punishment the minority of the same body, the Legislature, Judges, Governors, and Counselors of the States, nor their other peaceable inhabitants who may venture to reclaim the constitutional rights and liberties of the State and people, or who for other causes, good or bad, may be obnoxious to the views or be thought dangerous to his or their elections or other interests, public or personal:

That these and successive acts of the same character, unless arrested on the threshold, may tend to drive these States into revolution and blood, and will furnish new calumnies against Republican Governments, and new pretexts for those who wish to be believed, that man cannot be governed but by a rod of iron:

That it would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: that confidence is everywhere

the parent of despotism: free government is founded in jealousy and not in confidence which prescribes limited Constitutions to bind down those whom we are obliged to trust with power: that our Constitution has accordingly fixed the limits to which and no further our confidence may go; and let the honest advocate of confidence read the Alien and Sedition Acts, and say if the Constitution has not been wise in fixing the limits to the government it created, and whether we should be wise in destroying those limits?

Let him say what the government is if it be not a tyranny, which the men of our choice have conferred on the President, and the President of our choice has assented to and accepted over the friendly strangers, to whom the mild spirit of our country and its laws had pledged hospitality and protection: that the men of our choice have more respected the bare suspicions of the President than the solid rights of innocence, the claims of justification, the sacred force of truth, and the forms and substance of law and justice

In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.

That this Commonwealth does therefore call on its co-States for an expression of their sentiments on the acts concerning Aliens, and for the punishment of certain crimes herein before specified, plainly declaring whether these acts are, or are not authorized by the Federal Compact?

That they will concur with this Commonwealth in considering the said acts as so palpably against the Constitution as to amount to an undisguised declaration, that the Compact is not meant to be the measure of the powers of the General Government, but that it will proceed in the exercise over these States of all powers whatsoever:

That they will view this as seizing the rights of the States and consolidating them in the hands of the General Government with a power assumed to bind the States (not in cases made Federal) but in all cases whatsoever, by laws made, not with their consent, but by others against their consent:

That this would be to surrender the form of Government we have chosen, and live under one deriving its powers from its own will, and not from our authority; and that

the co-States, recurring to their natural right, in cases not made Federal, will concur in declaring these acts void and of no force, and will each unite with this Commonwealth in requesting their repeal at the next session of Congress.³³

Shortly after on December 21, 1798 the General Assembly of Virginia voted approval of the Virginia Resolution.

Resolved, that the General Assembly of Virginia doth unequivocally express a firm resolution to maintain and defend the Constitution of the United States, and the Constitution of this State, against every aggression, either foreign or domestic, and that they will support the government of the United States in all measures, warranted by the former.

That this Assembly most solemnly declares a warm attachment to the Union of the States, to maintain which, it pledges its powers; and that for this end, it is their duty, to watch over and oppose every infraction of those principles, which constitute the only basis of that Union, because a faithful observance of them can alone secure its existence, and the public happiness.

That this Assembly doth explicitly and peremptorily declare that it views the powers of the Federal Government as resulting from the compact, to which the States are parties, as limited by the plain sense and intention of the instrument constituting that compact; as no further valid than they are authorized by the grants enumerated in that compact, and that in case of a deliberate, palpable and dangerous exercise of other powers not granted by the said compact, the State who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them.

That the General Assembly doth also express its deep regret, that a spirit has, in sundry instances, been manifested by the Federal Government, to enlarge its power by forced constructions of the constitutional charter which defines them; and that indications have

³³ The Resolutions of Virginia and Kentucky, Penned by Madison and Jefferson

appeared of a design to expound certain general phrases (which having been copied from the very limited grant of powers in the former articles of confederation were the less liable to be misconstrued) so as to destroy the meaning and effect of the particular enumeration, which necessarily explains and limits the general phrases; and so as to consolidate the States by degrees into one sovereignty, the obvious tendency and inevitable consequence of which would be, to transform the present republican system of the United States, into an absolute, or at best a mixed monarchy.

That the General Assembly doth particularly protest against the palpable and alarming infractions of the Constitution, in the two late cases of the "Alien and Sedition Acts" passed at the last session of Congress; the first of which exercises a power nowhere delegated to the Federal government; and which by uniting legislative and judicial powers, to those of executive, subverts the general principles of free government, as well as the particular organization and positive provisions of the Federal Constitution: and the other of which acts, exercises in like manner a power not delegated by the Constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto; a power which more than any other ought to produce universal alarm, because it is leveled against that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.

That this State, having, by its convention which ratified the Federal Constitution, expressly declared, "that among other essential rights, the liberty of conscience and the press cannot be canceled, abridged, restrained or modified, by any authority of the United States, "and from its extreme anxiety to guard these rights from every possible attack of sophistry and ambition, having with other States recommended an amendment for that purpose, which amendment was in due time annexed to the Constitution, it would mark a reproachful inconsistency and criminal degeneracy, if an indifference were now shown to the most palpable violation of one of the rights thus declared and secured, and to the establishment of a precedent which may be fatal to the other.

That the good people of this Commonwealth, having ever felt and continuing to feel the most sincere affection for their brethern of the other States, the truest anxiety for establishing and perpetuating the union of all, and

the most scrupulous fidelity to that Constitution which is the pledge of mutual friendship, and the instrument of mutual happiness: the General Assembly doth solemnly appeal to the like dispositions of the other States, in confidence that they will concur with this Commonwealth in declaring, as it does hereby declare, that the aforesaid are unconstitutional, and that the necessary and proper measures will be taken by each for co-operating with this State, in maintaining unimpaired the authorities' rights and liberties, reserved to the States respectively, or to the people.

That the Governor be desired to transmit a copy of the foregoing resolutions to the executive authority of each of the other States, with a request, that the same may be communicated to the Legislature thereof.

And that a copy be furnished to each of the Senators and Representatives representing this State in the Congress of the United States. ³⁴

John Taylor of Caroline resigned his seat in the United States Senate in order to throw weight behind the Virginia resolutions as a member of the House of Delegates in Richmond.

In Kentucky George Nicholas pressed the cause of the new doctrine and a running correspondence passed secretly between himself and Jefferson.

Response in the negative met the rallying appeal sent to the other commonwealths by Virginia and Kentucky and denunciations were hurled from every direction. Washington described the "horrors of anarchy" as the only eventual outcome of the resolutions and old Patrick Henry rallied to the side of the Constitution.

On November 14, 1799 Kentucky issued its second resolution:

34 Ibid

Resolved, that this Commonwealth considers the Federal Union upon the terms and for the purposes specified in the late compact, conducive to the liberty and happiness of the several States: that it does now unequivocally declare its attachment to the Union, and to that compact, agreeably to its obvious and real intention, and will be among the last to seek its dissolution:

That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power contained, an annihilation of the State governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence:

That the principle and construction, contended for by sundry of the State legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of despotism- since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers:

That the several States who formed that instrument, being sovereign and independent, have the unquestionable right to judge of the infraction; and, that a nullification, by those sovereignties of all unauthorized acts done under color of that instrument, is the rightful remedy:

That this Commonwealth does, under the most deliberate reconsideration, declare, that the said Alien and Sedition Laws are, in their opinion, palpable violations of the said Constitution; and, however cheerfully it may be disposed to surrender its opinion to a majority of its sister States, in matters of ordinary or doubtful policy, yet, in momentous regulations like the present, which so vitally would the best rights of the citizens, it would consider a silent acquiescence as highly criminal:

That, although this Commonwealth, as a party to the Federal Compact, will bow to the laws of the Union, yet it does, at the same time declare, that it will not now, or ever hereafter, cease to oppose, in a constitutional manner, every attempt, at what quarter so ever offered, to violate that compact:

And finally, in order that no pretext or arguments may be drawn from a supposed acquiescence, on the part of this Commonwealth, in the constitutionality of those laws, and be thereby used as precedents for similar future

violations of the Federal Compact, this Commonwealth does now enter against them, its solemn Protest.³⁵

In the Virginia House of Delegates Session of 1799-1800 Mr. Madison presented the report of the Committee to whom were referred the communications of various States, relative to the Resolutions of '98.

Extracts reflective of the argumentive report:

On this resoltuion, the committee have bestowed all the attention which its importance merits: they have scanned it not merely with a strict, but with a severe eye; and they feel confidence in pronouncing, that, in its just and fair construction, it is unexceptionally true in its several positions, as well as constitutional and conclusive in its inferences..... The States, then being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity that there can be no tribunal above their authority, to decide in the last resort such question as may be of sufficient magnitude to require their interposition.

It does not follow, however, that because the States, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions.... In the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system. It must be a case not of a light and transient nature, but of a nature dangerous to the great purposes for which the Constitution was established. It must be a case, moreover, not obscure or doubtful in its construction, but plain and palpable. Lastly, it must be a case not resulting from a partial consideration, or hasty determination; but a case stampd with a final consideration and deliberate adherence. It is not necessary, because the resolution does not require, that the question should be

discussed, how far the exercise of any particular power, ungranted by the Constitution, would justify the interposition of the parties to it. As cases might easily be stated, which none would contend ought to fall within that description cases, on the other hand, might with equal ease, be stated, so flagrant and so fatal, as to unite every opinion in placing them within the description ³⁶

In December Washington's final word drove steadfastly to the point.

You have improved upon your first essay, by the adoption of a Constitution of Government, better calculated than your former for an intimate Union and for the efficacious management of your common concerns. This government, the offspring of your own choice, uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support. Respect for its authority, acquiescence in its measures are duties enjoyed by the fundamental maxims of true Liberty..... The Constitution which at any time exists till changed by an authentic and explicit act of the whole people, is obligatory on all..... Let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. ³⁷

³⁶ Madison's Report to the Virginia House of Delegates, 1799-1800, quoted from Stephen's Appendix

³⁷ Hendrick, op. cit., pp.142-3

CHAPTER IV

EARLY ATTEMPTS AT INTERPOSITION

In 1804 it was New England's turn to turn aside from Constitutionalism and the following reverberations again rocked the fast-aging mortar of the union. Opposed to the domination of the Southern element the Federalists proposed numerous schemes which culminated in the defeat and destruction of their party. This conspiracy of the New England element did not end the separatist tendency, however, and several demonstrations of secession were attempted in 1809-1812.

In 1812 the secessionists became active again in opposition to the War of 1812. In December of 1814 an assemblage known as the Hartford Convention met to proclaim the right of Interposition. Twenty-six delegates met in secret session, Connecticut, Massachusetts, Rhode Island, New Hampshire and Vermont being represented. Serious of intent and illustrative of the general character of feeling in existence in New England, they passed numerous resolutions, among which is this pointed and echoing declaration: "In cases of deliberate, dangerous and palpable infractions of the Constitution, affecting the sovereignty of a State and the liberties of the people, it is not only the right, but the duty of such State to interpose its authority for their protection, in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of judicial tribunals, or too pressing to

admit of the delay incident to their forms, States which have no common umpire must be their own judges and execute their own decisions. " ³⁸

The meeting was assailed as a gathering of traitors engaged in severing the Northern section from the country, and, on the other, as a pious convocation of patriots, heroically and successfully laboring to forestall that very event. Harrison Gray Otis was the leader of the convention and defended it stubbornly. As the war turned out, the New England faction did not have further disagreement and with the signing of the Treaty of Ghent the major element of dissatisfaction also wrote finis to their attempts. From that day on nullification and secession were foreign to the New England school of political thought. The cancer of disunion had augered itself into New England patriotism but when its intent was recognized it was rooted out to become an odium to all but its staunchest supporters.

All was not harmony elsewhere in the Union. Seeking other means to exert its influence on a distasteful decision Pennsylvania entered the ranks. "In 1809 the Governor of Pennsylvania asked President Madison to intervene against a decree of the Supreme Court. Madison replied: 'The Executive is not only unauthorized to prevent the execution of a decree

³⁸ Frederic Bancroft, Calhoun and the South Carolina Nullification Movement, p. 85.

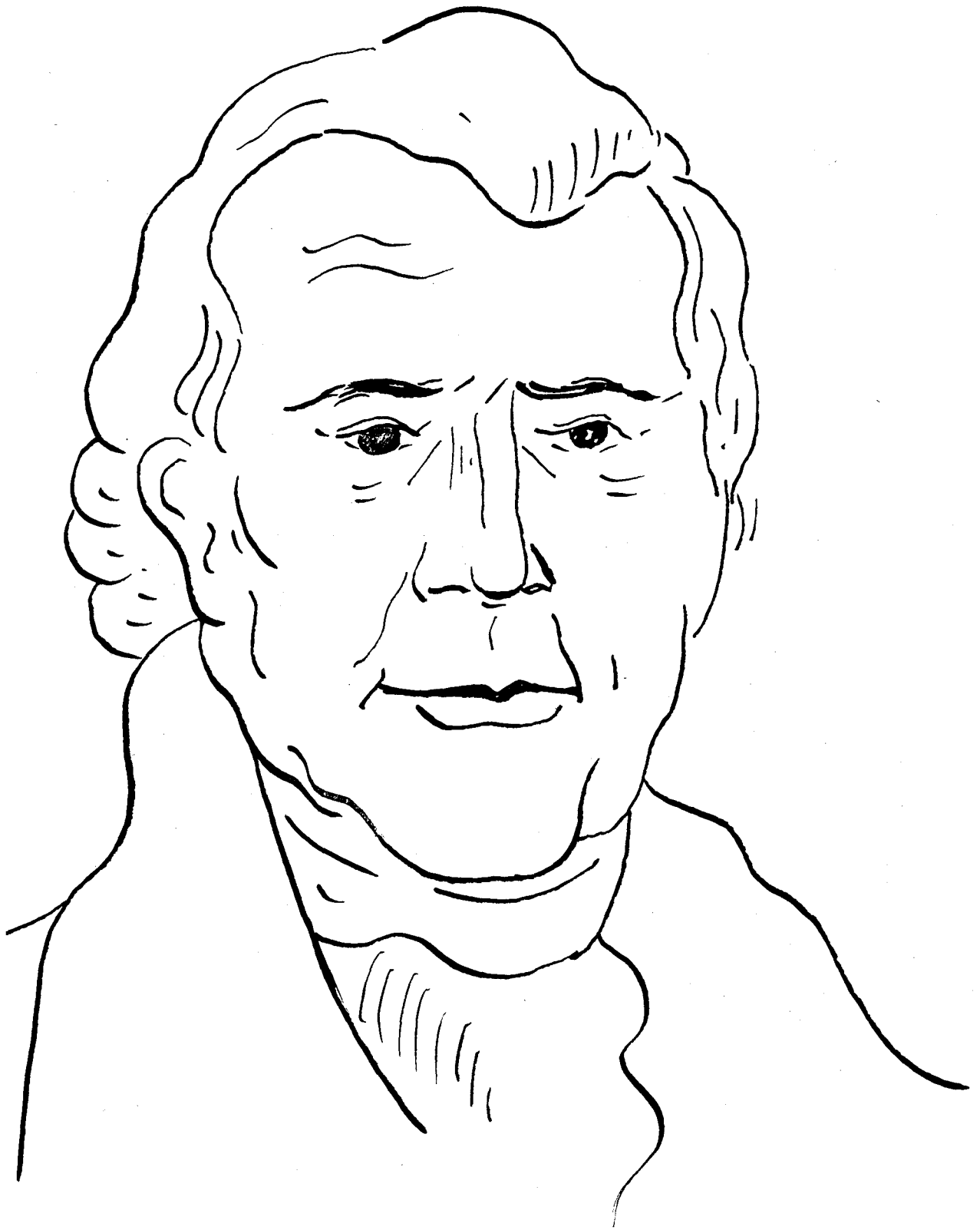
sanctioned by the Supreme Court of the United States, but is especially enjoined by statute to carry into effect any such decree, where opposition may be made to it."³⁹

The Legislature entered the field and "passed resolutions in regard to the long-pending Olmstead case- a conflict between Federal and State authority- proposed an amendment to the Constitution for the establishment of an impartial tribunal to determine disputes between the general and state governments, and sent these resolutions to the several States, not one State agreed with them and at least eleven States condemned them. Among these eleven were Maryland, North Carolina, Georgia, Tennessee and Kentucky. The answering resolutions of the Virginia general assembly were especially elaborate, rational and, in spirit, antagonistic to the doctrines of 1798-99. And they gave an effective reply to such arguments as Hayne's and Calhoun's about the danger of permitting any part of the Federal Government to decide questions concerning the rights of a State."⁴⁰

In 1819 the National Judiciary brought its siege guns again to bear on state sovereignty with the decision that the establishment of a National Bank was constitutional in the McCulloch v. Maryland (4 Wheaton 316) case. One of the primal questions was- Are the state separately or the people of the

³⁹ Warren, op. cit., pp.77-8

⁴⁰ Bancroft, op. cit., p.88.



Justice Marshall.

United States collectively, sovereign? The counsel for Maryland based his denial on the Kentucky Resolutions of '98. "The powers of the general government are delegated by the States, who alone are sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion." Chief Justice Marshall emphatically laid down the decision which declared the supremacy of the national right over the states: "The government of the Union, then is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit." Marshall further added:

The government of the Union, though limited in its powers, is supreme within its sphere of action.... We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.⁴¹

In answer to such a blow at their local sphere of power the States rallied behind complaints of "usurpation." Pennsylvania, Ohio, Indiana, and Illinois joined Maryland in denouncing the

⁴¹ Morison and Commager, op. cit., p. 435.

Supreme Court's decision. Surprisingly enough South Carolina stood staunchly behind the action of the Justices.

It is interesting to observe Marshall's decision closely followed numerous other cases decided against state sovereignty and in favor of centralization that he marked out. Among them were *Martin v. Hunter's Lessee* (1816), *Cohens v. Virginia* (1821), *Gibbons v. Ogden* (1824), *Martin v. Mott* (1827), and *Worcester v. Georgia* (1832).

To further elaborate his doctrine of nationalism Marshall revealed:

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial relations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interest, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or government's within the American territory.⁴²

Marshall did add in *McCulloch v. Maryland*-"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence when they act,

⁴² Ibid., pp. 436-7

43
they act in States."

In 1821 the *Cohens v. Virginia*, 6 Wheat 264 (1821) case saw D. B. Ogden upholding the claim of Cohens, state, "The contention that Va., as a sovereign state, was exempt from suit was denied on the ground that since the establishment of the national Constitution, there is no such thing as a sovereign state, independent of the Union. The people of the United States are the sole sovereign authority of this country."

To these staggering announcements of the court, alarm increased in many circles. Jefferson wrote:

The great object of any fear is the Federal Judiciary. That body, like gravity, ever acting with noiseless foot, and unalarming advance, gaining ground step by step, and holding what it gains, is engulfing insidiously the special government into the jaws of that which feeds them. It is a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions. It is one which should place us under the despotism of an obligarchy..... The Constitution has erected no such tribunal.⁴⁴

How that foreran the cries of Interpositionists today. Edward Livingston also read the signs in 1821: "This member of the government (the Judiciary) was at first considered the most helpless and harmless of all its organs. But it has proved that its power of declaring what the law is, ad libitum, by sapping and mining, slyly, and without alarm, the foundations of the Constitution, could do what open force would not dare to attempt."⁴⁵

⁴³ Warren, op. cit., p. 56.

⁴⁴ Hendrick, op. cit., p. 191

⁴⁵ Ibid.

The courts had begun their march to power and decisions such as that of *McIlvaine v. Coxe* (1808), 4 Cranch 209, 212, in which Justice Cushing said: "The several States which composed this Union, became entitled from the time they declared themselves independent, to all rights and powers of sovereign States, " would no longer serve as precedent. The National Judiciary was at this point not an appendage of Congress as some people desired and believed. Marshall had delivered his opinions in deference to no whims of public opinion but from his own ideas of justice and probity.

At this period in history we see the entrance to leadership of the foremost figure in the formulation of doctrine on interposition and nullification- John C. Calhoun. With piercing eye, rampant hair, brilliant mind and an incomparable aptitude for debate, he championed the cause of States Rights and the South.

Arising in opposition at the same time was the formidable calculating and staunch unionist from New England- Daniel Webster. With uncompromising, sunken eyes and tight-lipped mouth he vigorously assailed the doctrines of Calhoun and resolutely defended New England and Union.

In the early years of political ascendancy Calhoun wavered from side to side in philosophy and at one time staunchly upheld the central government and issued bitter invectives against the rights of States. This policy was not long to continue however, and shortly his irrepressible stream of

verbal abuse would be launched against the Union. In 1824 with the passage of the highly sectionalized protective tariff and the quashing of Calhoun's hopes for the Presidency the fiery South Carolinian picked up the gauntlet thrown down by the North. No one will deny that the protective tariff worked hardship on the South but it is hard to believe that the issue was not exaggerated and exploded to more than just proportions. It was an evil and one that screamed for revision but not one responsible for all the ills of the South. The South complained of political pressure, bigotry and an unfair balance in the growth of the nation.

Oddly enough the first elaboration of the theory that the Protective Tariffs were unconstitutional came from Daniel Webster in a speech at Faneuil Hall, October 20, 1820. South Carolina could not early decide upon a policy and though nullification was discussed in 1820 it was of only momentary interest.

In 1824 Congressman George McDuffie presented an admirable statement on the subject-

To lay down as a general rule, that all municipal powers, not expressly granted to the general government, belong to the State governments, either renders nugatory most of the powers of this government, or it does not advance us a single step towards the decision of the question we are discussing.

From this we are brought to the obvious conclusion that the convention did not regard the State governments as sentinels upon the watchtowers of freedom, or in any respect more worthy of confidence than the general government.....

In determining whether a given subject of legislation should belong to Congress or to the State Legislature, the inquiry before the convention was, not which of these will be most likely to abuse the trust, but to which of them does it appropriately belong in reference both to their organization and to the great objects they were designed to accomplish..... In this view of the subject, I would lay it down as a general rule that all those subjects of legislation which concern the general interest of the whole union, which have a plain and obvious relation to the powers expressly granted, and which a single State government cannot regulate, naturally belong to the general government, unless it can be shown that the regulation of these subjects by Congress impairs the powers of the State legislatures to regulate their own internal police... But, sir, in giving a construction to a power of this description, we must ascent to much higher principles than either law-books of lexicons can furnish.....

Driven, then, from the ground of precise constitutional investigation, gentlemen have conjured up a phantom which they denominate Consolidation, and which I shall now endeavor to exercise..... If they mean by it a firm and indissoluble union of the States, I, for one, am decidedly in favor of it; but if they mean by it the annihilation of the State governments, or the destruction of a single power that will add, who fears it less than I do. ⁴⁶

Not heeding the calm advise of the South Carolina liberal element the radicals began gathering their forces for a stand. Thomas R. Mitchell challenged the constitutionality of a tariff openly in Congress in 1823 and in 1824 the South Carolina Senate passed resolutions vehemently denouncing it. James Hamilton and Robert Y. Hayne jumped on the band wagon and aided Mitchell in the national legislature. Judge William Smith, W. S. Senator in 1817, was primarily instrumental in instigating the rapid advance of the doctrine in South Carolina.

⁴⁶ McDuffie's Speech in 1824, Annals of Congress, 18 Congress, I Sess., 1372-1385 (1823-24) in David F. Houston's Nullification in South Carolina, pp. 8-9.

Smith was bolstered by the genius Dr. Thomas Cooper, President of South Carolina College and Father of Nullification.

Adding color and weight to the avalanche of feeling was the writing and publishing of the Crisis by Robert J. Turnbull. Appearing as a series of articles entitled "Essays on the Usurpation of the Federal Government" it released a veritable torrent of rhetoric against the national authority.

Enthusiasm for this right of states to display indivisible, indestructible sovereignty grew by leaps and bounds. The Virginia- Kentucky Resolutions of '98- '99 were exhumed again and all of their basic precepts reiterated. The Constitution was slightly over fifty years old at this point yet from all appearances if South Carolina doctrine was authoritative it would never remain another fifty as the guiding legal beacon.

Virginia always quick to defend the sovereignty of States, issued in December of 1825 a Solemn Declaration and Protest on the Principles of the Constitution of the United States of America, and on the violations of them:

We, the General Assembly of Virginia, on behalf, and in the name of the People thereof, do declare as follows:

The States in North America which confederated to establish their independence of the government of Great Britain, of which Virginia was one, became, on that acquisition, free and independent States, and as such, authorized to constitute governments, each for itself, in such form as it thought best.

They entered into a compact (which is called the Constitution of the United States of America), by which they agreed to unite in a single government as to their relations with each other, and with foreign nations, and as to certain other articles particularly specified. They retained at

the same time, each to itself, the other rights of independent government, comprehending mainly their domestic interests.

For the administration of their federal branch, they agreed to appoint, in conjunction, a distinct set of functionaries, legislative, executive, and judiciary, in the manner settled in that compact: while to each, severally, and of course, remained its original right of appointing, each for itself, a separate set of functionaries, legislative, executive, and judiciary, also, for administering the domestic branch of their respective governments.

These two sets of officers, each independent of the other, constitute this a whole of government, for each State separately; the powers ascribed to the one, as specifically made federal, exercised over the whole, the residuary powers, retained to the other, exercisable exclusively over its particular State, foreign herein, each to the others, as they were before the original compact.

To this construction of government and distribution of its powers, the Commonwealth of Virginia does religiously and affectionately adhere, opposing, with equal fidelity and firmness, the usurpation of either set of functionaries on the rightful powers of the other.

But the federal branch has assumed in some cases, and claimed in others, a right of enlarging its own powers by constructions, inferences, and indefinite deductions from those directly given, which this Assembly does declare to be usurpations of the powers retained to the independent branches, mere interpolations into the compact, and direct infractions of it.

They claim, for example, and have commenced the exercise of a right to construct roads, open canals, and effect other internal improvements within the territories and jurisdictions exclusively belonging to the several States, which this Assembly does declare has not been given to that branch by Constitutional compact, but remains to each State among its domestic and unalienated powers, exercisable within itself and by its domestic authorities alone.

This Assembly does further disavow and declare to be most false and unfounded, the doctrine that the compact in authorizing its federal branch to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United

States, has given them thereby a power to do whatever they may think, or pretend, would promote the general welfare, which construction would make that, of itself, a complete government, without limitation of powers; but that the plain sense and obvious meaning were, that they might levy the taxes necessary to provide for the general welfare, by the various acts of power therein specified and delegated to them, and by no others.

Nor is it admitted, as has been said, that the people of these States, by not investing their federal branch with all the means of bettering their condition, have denied to themselves any which may effect that purpose; since, in the distribution of these means they have given to that branch those which belong to its department, and to the States have reserved separately the residue which belong to them separately. And this by the organization of the two branches taken together, have completely secured the first object of human association, the full improvement of their condition, and reserved to themselves all the faculties of multiplying their own blessings.

Whilst the General Assembly thus declares the rights retained by the States, rights which they have never yielded, and which this State will never voluntarily yield, they do not mean to raise the banner of disaffection, or of separation from their sister States, co-parties with themselves to this compact. They know and value too highly the blessings of their union as to foreign nations and questions arising among themselves, to consider every infraction as to be met by actual resistance. They respect too affectionately the opinions of those possessing the same rights under the same instrument, to make every difference of construction a ground of immediate rupture. They would, indeed, consider such a rupture as among the greatest calamities which could befall them; but not the greatest.

There is yet one greater, submission to a government of unlimited powers. It is only when the hope of avoiding this shall become absolutely desperate, that further forbearance could not be indulged. Should a majority of the co-parties, therefore, contrary to the expectation and hope of this Assembly, prefer, at this time, acquiescence in these assumptions of power by the federal member of the government, we will be patient and suffer much, under the confidence that time, ere it be too late, will prove to them alone the bitter consequences in which that usurpation will involve us all.

In the meanwhile, we will breast with them, rather than separate from them, every misfortune, save that only of living under a government of unlimited powers. We owe every other sacrifice to ourselves, to our federal brethren, and to the world at large, to pursue with temper and perserverance the great experiment which shall prove that man is capable of living in society, governing itself by laws self-imposed, and securing to its members the enjoyment of life, liberty, property, and peace; and further to show, that even when the government of its choice shall manifest a tendency to degeneracy, we are not at once to despair but that the will and the watchfulness of its sounder parts will reform its aberrations, recall it to original and legitimate principles, and restrain it within the rightful limits of self-government. And these are the objects of this Declaration and Protest.

Supposing them, that it might be for the good of the whole, as some of its co-States seem to think, that the power of making roads and canals should be added to those directly given to the federal branch, as more likely to be systematically and beneficially directed, than by the independent action of the several States, this Commonwealth, from respect to these opinions, and a desire of conciliation with its co-States, will consent, in concurrence with them, to make this addition, provided it be done regularly by an amendment of the compact, in the way established by that instrument, and provided also, it be sufficiently guarded against abuses, compromises, and corrupt practices, not only of possible, but of probable occurrence.

And as a further pledge of the sincere and cordial attachment of this Commonwealth to the Union of the whole, so far as has been consented to by the compact called "The Constitution of the United States of America" (constructed according to the plain and ordinary meaning of its language, to the common intendment of the time, and of those who framed it); to give also to all parties and authorities, time for reflection and for consideration whether, under a temperate view of the possible consequences, and especially of the constant obstruction which an equivocal majority must ever expect to meet, they will still prefer the assumption of this power rather than its acceptance from the free will of their constituents; and to preserve peace in the meanwhile, we proceed to make it the duty of our citizens, until the Legislature shall otherwise and ultimately decide, to acquiesce under those acts of the federal branch of our government which we have declared to be usurpations, and against which, in point of right, we do protest as null and void, and never to be quoted as precedents of right.

We therefore do enact, and be it enacted by the General Assembly of Virginia, that all citizens of this Commonwealth, and persons and authorities within the same, shall pay full obedience at all times to the acts which may be passed by the Congress of the United States, the object of which shall be the construction of post roads, making canals of navigation, and maintaining the same in any part of the United States, in like manner as if said acts were, totidem verbis, passed by the legislature of this Commonwealth. 47

⁴⁷ General Assembly of Virginia's Declaration and Protest on the Principles of the Constitution, Dec. 1825, quoted from Richmond News Leader, Nov. 21, 1955

CHAPTER V

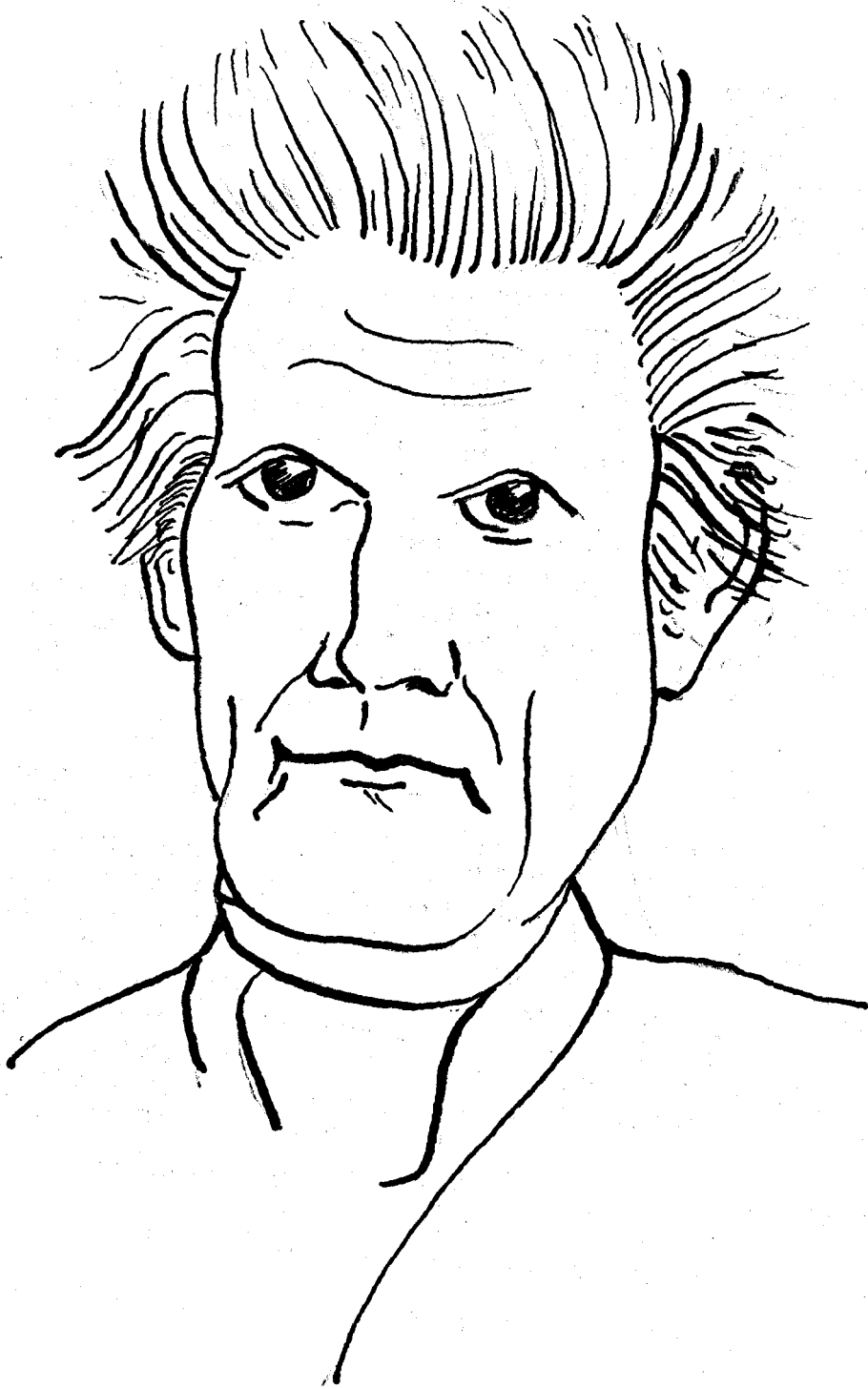
SOUTH CAROLINA NULLIFICATION

In December, 1827, the South Carolina legislature resolved that the Constitution was a compact between independent sovereignties; that in case of any violation of that compact by Congress it was the right not only of the people but the legislatures to remonstrate; and it instructed South Carolina's Senators and requested her Representatives to oppose every increase of the tariff to protect domestic manufactures of all appropriations for internal improvements or in favor of the American Colonization Society because such measures would be beyond the constitutional power of Congress. ⁴⁸

Opposition with intense feeling drew up before the tariff backers but were steam-rollered and the Tariff of 1828 went into effect. At this point not only nullification but secession was talked of and probably with the proper encouragement from sister states South Carolina would have taken the supreme step in States Rights.

At this point in history Calhoun seems to have received his cue and snapped to alert attention on the side of State sovereignty. Before the elections of 1828 he began industriously to weave his theory of "State Interposition of the Veto" and forthwith revealed it anonymously to a committee on federal relations. After consideration and addition it was presented to the legislature for acceptance. It was not approved but the lower house ordered copies printed and distributed under the title of the "South Carolina Exposition". Excerpts from the "Exposition" as arranged by Frederic Bancroft follow:

⁴⁸ Bancroft, op. cit., p.16



JOHN C. GALHOUN

How was the power of the majority to be checked? 'No government, based on the naked principle that the majority ought to govern, can preserve its liberty even for a single generation.' Construction of the Constitution could not be relied on for defense, for it was sure to be unstable. Safety demanded something stable. This was 'found in the reserved rights of the States themselves', that is, sovereignty, which means a right to judge whether delegated powers have been exceeded; and this 'clearly implies a veto or control, within its limits, on the action of the General Government, on contested points of authority; and this very control is the remedy which the Constitution has provided to prevent the encroachments of the General Government on the reserve rights of the States'.... 'It is thus effectual protection is afforded to the minority, against the oppression of the majority.' A State convention needed only to decide that any act passed by Congress was unconstitutional and then declare it null and void. This, it was held, would be binding alike on the citizens of the State and on the General Government itself, and 'place the violated rights of the State under the shield of the Constitution'.

If this veto should be unjustly used, three-fourths of the States could override it by giving the Federal Government, by amendment, authority to pass the act that had been vetoed. 'If the present usurpation and the professional doctrines of the existing system be perservered in, -after due forbearance on the part of the State, -that it will be her sacred duty to interpose; -a duty to herself, -to the Union, -to the present, and to future generations, -and to the cause of liberty over the world, to arrest the progress of a usurpation which, if not arrested, must, in its consequences, corrupt the public morals and destroy the liberty of the country.⁴⁹

South Carolina was not alone in her repudiation of the Tariff of Abominations, but was joined by Georgia, Mississippi and Virginia. The 1829 Resolutions of the Old Dominion State showing the sentiment of that State follow:

THE SELECT COMMITTEE, to whom were referred the communications of the Governor, transmitting the proceedings of

⁴⁹ Ibid. p. 48-49

the Legislature of Georgia, in relation to resolutions from the States of South Carolina and Ohio, and the proceedings of the State of South Carolina on the subjects of the Tariff and Internal Improvements, have bestowed on those subjects their most profound consideration.

Having subjected the preambles and resolutions to strict examination and severe criticism, they find the annunciations and results to be mainly sustainable, so far as they pertain to the acts of Congress, usually denominated the Tariff Laws, and thus designated in those several proceedings.

The proceedings of the Legislature of the State of Georgia, as well as those on which they are founded, emanating from the Legislature of South Carolina, announce and sustain the opinions of Virginia, heretofore proclaimed by successive Legislatures; opinions, which rest on truth and reason; which your committee can discern no cause to relinquish; but which they are ready to defend and sustain, as involving the most essential interests of the Commonwealth.

RESPECT FOR THE dignity and character of Virginia, and an anxious regard for the tranquility of the Union, admonish your committee to withhold such remarks as might be suggested by the consciousness of oppression: such remarks could have no other tendency than to excite hostile emotions, ill adapted to the grave consideration of the momentous question which they are deputed to examine. Your committee will, therefore, proceed with calmness and temperance, to examine the opinion heretofore expressed by preceding Legislatures of this State, that the several acts of Congress, passed avowedly for the protection of domestic manufactures, are manifest infractions of the Federal Constitution, and dangerous violations of the sovereignty of the States.

The Government of the United States has ever been regarded by the sovereignty of Virginia, as Federative in character, and limited in power; as deriving its powers from concessions by the States, which concessions were clear and explicit, plainly declarative of all which was delegated, and actually containing a specific enumeration of every power designed to be transferred.

The purposes for which these powers may be exerted, have been regarded as distinctly defined; and it was considered that the Government was prohibited alike, from the exercise of any power not contained in the specific enumeration, as from the perversion of those actually delegated, to any purpose not contemplated in the grant.

The Convention, which, on the part of Virginia, ratified the Constitution of the United States, gave this interpretation to the instrument. Its advocates then urged its adoption, as constituting such a Government as is here described. It was insisted on many occasions, that the powers of the Government were expressly enumerated; and that none could be claimed. It was insisted, with equal earnestness, that the purposes for which these powers might be exerted, were as distinctly ascertained, and that they could not be perverted to any other object.

The ablest and most zealous advocates of the Constitution insisted, that such was its just construction, even according to the terms of the original text, and it must be acknowledged that this construction is strengthened, by the subsequent adoption of amendment to the Constitution.

THOSE WHO OPPOSED the ratification of the Constitution founded their objection on a supposed absence of limitation, according to the plan originally submitted; and proposed, as an expedient to remedy this defect, the amendments which were subsequently adopted. A majority, however, of the Convention, determined on the ratification of the original text, explained and defined by its advocates, as organizing a Government with limited powers, specifically enumerated, and restrained in the exercise of those powers, to the attainments of specific ends. An anxious solicitude to establish indisputably this construction, induced the recommendation of those amendments which have since been engrafted on the Constitution, establishing this construction even in the opinion of those who opposed the adoption of the Constitution.

This being the sense in which the Constitution of the United States was originally accepted, your committee have anxiously examined the record of succeeding time, to discover if any things have since occurred, calculated to change the import of the instrument; and after the most patient examination, they confidently report, that nothing has transpired, which could in any manner modify its just construction.

If at any succeeding period, attempts have been made to pervert the import of the original compact, Virginia has ever been prompt to avow her unqualified disapprobation, and manifest her undisguised discontent. The imperishable history of '98, has perpetuated the memory of her laudable zeal, in sustaining the true principles of the Constitution, in maintaining the sovereign rights of the States, in successfully resisting the lawless usurpations of a Government bent on the acquisition of boundless power.

The deliberations of the Legislature of this Commonwealth during the period of '98 and '99, in relation to the construction of the Constitution, by a felicitous combination of circumstances, resulted in a just and luminous exposition of the true principles of the Federal Compact. This expose clearly ascertained the just limitations of Federal power, and happily pointed out to future generations, the just rule of interpreting the instrument. The construction then placed on the Constitution, was submitted to the most august of all tribunals, and sustained by the judgement of United America.

THE HISTORY OF Virginia discloses several occasions, on which the Constitution was brought in review, and the committee have found that on every occasion where the question was involved, the former Legislatures of this Commonwealth have insisted on a limited construction of the instrument.

Sustained by the currence of our predecessors, from the earliest history of the Constitution, your committee find but little difficulty in determining the Government of the United States, to be Federative in character, and limited in its powers; That the powers vested in the Government are conveyed in an express enumeration; That no power can be Constitutionally exercised, which is not contained in that enumeration; That the purposes for which the Government was instituted are explained in the instrument; and that the powers specified in the enumeration, cannot be legitimately exerted, for any purpose not designated by the Constitution....

(Part omitted dealt specifically with the levying of tariffs)

Having concluded this minute examination of the several clauses of the Constitution, which were supposed to refer to the subject of protecting duties, or which have been claimed to have such reference, your committee find themselves occupying a position whence they may proceed with greater advantage to the contemplation of this momentous subject.

The great design of the Federal Compact, as conceived by the wisdom of its illustrious authors, was the establishment of a Government competent to combine the energies of the several States, for the purposes of mutual and reciprocal safety and protection, against foreign insult and aggression; a Government, adequate to secure the harmony and tranquility of America, by exterminating all subjects of feud, and interposing its friendly and impartial adjudication, on occasion of cavil or dispute among the States.

Experience had shown to our sagacious Statesmen, that these were subjects of a general concern, in which the States held a common interest; the advantages of which were mainly sacrificed, by the particular, conflicting legislation of the States. The jurisdiction over these, it was obviously proper to vest in some common tribunal, having authority to legislate for the general weal, and relation to these subjects, to secure the greatest possible advantages to the common family of American States.

The difficulty and delicacy of erecting such a tribunal with powers adequate to these ends, yet so constructed as to ensure the perpetual independence of the States, with unimpaired authority over all other subjects, forcible suggested itself to the sagacity of those who then controlled the destinies of America. They despaired of this vast achievement, by the efforts and under the sanctions of individual man, and wisely determined to bring to its accomplishment, the energies and sanctions of independent sovereignties.

YOUR COMMITTEE will not impose on themselves the labour of compiling an historical sketch of the transactions which induced the foundation of the Federal Government. This history, it is presumed, is familiar to all. In conformity with arrangements previously understood, the distinct and independent States of America assembled in General Convention at Philadelphia, and in their sovereign, corporate characters, proceeded to consider the nature of the Compact, which it might be deemed wise to establish among themselves.

All the proceedings which were then had, were dispatched in their characters of sovereign States, and a Government was instituted, not sustained by the sanction of a majority of the people of America, but by the sanctions of the people of the several States.

The plan of Government, then established, was conformable to suggestions heretofore made. Each of the sovereignties then assembled, determined to cede to the Federal Government, certain portions of its sovereignty, reserving the residue unimpaired. In the cessions which were made, the Government was enabled to concentrate the whole strength of the Union, for the assertion and vindication of our national rights. It was invested with sufficient power, to tranquilize disturbances among the States; together with a general jurisdiction over such matters of general concern, as involved the common party interests of the States, but which could not be wisely arranged, by the rival, partial and conflicting legislation of the particular States.

The jurisdiction over all other subjects was expressly reserved to the States respectively. All subjects of a local nature, the internal policy of the States, the jurisdiction over the soil, the definition and punishment of crime, the regulation of labor, and all subjects which could be advantageously disposed by the authority of a particular State were reserved to the jurisdiction of the State Governments.

The wisdom of this regulation will not be questioned; for it surely must be sufficiently obvious that to subject our local or domestic affairs, to any other authority than our own Legislature, would be to expose to certain destruction, the happiness and prosperity of the people of Virginia.

THIS PRINCIPLE was accordingly established: That all subjects of a general nature should be confided to the Federal Government, whilst those which were local in their character, were reserved for the jurisdiction of the States respectively.

This distribution of political power having been established by the Constitution, the happiness and prosperity of the American people demand, that it should be preserved. The theory of government as established in America, contemplates the Federal and State Governments as mutual checks on one another, constraining the various authorities to revolve within their proper and constitutional spheres. Each Government is invested with supreme authority, in the exercise of its legitimate functions; whilst the authority of either is wholly void, when exerted over a subject withheld from its jurisdiction.

Should either depository of political power unhappily be disposed to disregard the Constitution, and destroy the proportions of our beautiful theory, it devolves upon the other to interpose, as well from a regard to its own safety as for the perpetual preservation of our political institutions.

If there be a characteristic of the Federative system, peculiarly entitled to our admiration, it is the security which is found for individual liberty in the separate energies of distinct Governments, uniting and cooperating for the public good; but separating and conflicting when the object is evil. This inherent characteristic of the Federative system, was contemplated with the most anxious solicitude by the founders of the Federal Republic. It was in it, that they found the general interests of America preserved from the clash of particular legislation; it was

by it, that they fortified our domestic concerns from the invasions and infractions of Federal authority. It was by it, that their fears were calmed and subdued, on the great question of adoption or rejection, when the very being of the Federal Constitution, depended on the determination of the several States.

The history of that eventful period, discloses the apprehensions of illustrious sages, lest the sacred liberty of the American citizen should be invaded by the arbitrary acts of the General Government; and that these apprehension could only be allayed by the assurance and conviction, that the State Governments were adequate to the resistance of Federal encroachments.

THE LEGISLATURES, THEN, of the several States are contemplated by the theory of the American Government as the guardians of our political institutions; and whenever their proportions are destroyed or violated, it becomes the duty of the several Legislatures calmly and temperately to attempt their restoration.

The reflection in which your committee have indulged, constrain them to express their unfeigned regret that the Government of the United States, by extending its influence to Domestic Manufactures, has drawn within its authority a subject over which it has no control, according to the terms of the Federal Compact; and that this influence has been exerted after a manner, alike dangerous to the sovereignty of the States, and injurious to the rights of all other classes of American citizens.

Acting under the influence of these reflections, your committee have contemplated with deepest interest the situation of the General Assembly, and the duties which devolve upon that body.

They cannot suppress their solemn conviction, that the principles of the Constitution have been disregarded, and the just proportions of our political system disturbed and violated by the General Government. The inviolable preservation of our political institutions is entrusted to the General Assembly of Virginia, in common with the Legislatures of the several States; and the sacred duty devolves upon them, of preserving these institutions unimpaired.

Yet, an anxious care for the harmony of the States, and an earnest solicitude for the tranquility of the Union, have determined your committee to recommend to the General Assembly, to make another solemn appeal to those with whom we unhappily differ; and that the feelings of Virginia

may be again distinctly announced, they recommend the adoption of the following resolutions:

1. Resolved, as the opinion of this committee, That the Constitution of the United States, being a Federative Compact between sovereign States, in construing which no common arbiter is known, each State has the right to construe the Compact for itself.

2. Resolved, That in giving such construction, in the opinion of this committee, each State should be guided, as Virginia has ever been, by a sense of forbearance and respect for the opinion of the other States, and by community of attachment to the Union, so far as the same may be consistent with self-preservation and a determined purpose to preserve the purity of our Republican Institution.

3. Resolved, That this General Assembly of Virginia, actuated by the desire of guarding the Constitution from all violation, anxious to preserve and perpetuate the Union, and to execute with fidelity the trust reposed in it by the people, as one of the high contracting parties, feels itself bound to declare, and it hereby most solemnly declares, its deliberate conviction that the Acts of Congress, usually denominated the Tariff Laws, passed avowedly for the protection of Domestic Manufactures, are not authorized by the plain construction, true intent and meaning of the Constitution.

4. Resolved, also, That the said acts are partial in their operation, impolitic, and oppressive to a large portion of the people of the Union, and ought to be repealed.

5. Resolved, That the Governor of this Commonwealth be requested to communicate the foregoing preamble and resolutions to the Executive of the several States of the United States, with the request that the same be laid before their respective Legislatures.

6. Resolved, That the Governor be further requested to transmit copies of the same report and resolutions to the Senators and Representatives of Virginia in the Congress of the United States, with a request that the same be laid by them before their respective Houses.

Agreed to by Both Houses 50
February 24th, 1829

South Carolina had established herself as the leader in rebellion against the enactments of the central government. It seems almost ironical that the State on whose legislative floor had been read the "Exposition of 1828" should sixty years prior have reverberated to the address of Charles Cotesworth Pinckney:

This admirable manifesto (the Declaration of Independence) sufficiently refutes the doctrine of the individual sovereignty and independence of the several States. In that declaration the several States are not even enumerated; but after reciting, in nervous language and with convincing arguments, our right to independence, and the tyranny which compelled us to assert it, the declaration is made in the following words, etc. The separate independence and individual sovereignty of the several States were never thought of by the enlightened band of patriots who framed this declaration. The several States are not even mentioned by name in any part, as if it was intended to impress the maxim on America that our freedom and independence 'arose from our Union'; and that, without it, we never could be free or independent. Let us, then, consider all attempts to weaken this Union by maintaining that each State is separately and individually independent as a species of political heresy which can never benefit us, but may bring on us the most serious distresses. ⁵¹

In December of 1829 the giants among statesmen, the Senators of the United States, took up the debate and the greatest orators of United States history entered the fray. Foremost to engage in verbal duel were Senators Hayne and Webster.

Hayne referred to the consolidation of the Union. Webster artfully parried and thrust home. "Hayne was not and

⁵¹ Debates in South Carolina, Miller, p. 43, cited by Francis Lieber, What is our Constitution, pp. 18-19

never could be of those who habitually spoke in disparagement of the Federal Government and had declared that it was time to calculate the value of the Union.⁵² This challenge to defend South Carolina doctrine Hayne accepted.

In reply to Hayne's assertion of States Rights, Webster forcibly said:

"I understood the gentlemen to maintain, that without revolution, without civil commotion, without rebellion, a remedy for the supposed abuse and transgression of the powers of the General Government lies in a direct appeal to the interference of the State Governments."

Mr. Hayne replied; "He did not contend for the mere right of revolution, but for the right of constitutional resistance. What he maintained was that, in case of a plain, palpable violation of the Constitution by the General Government, a State may interpose; and that this interposition is constitutional."

Mr. Webster resumed:- "So, Sir, I understood the gentleman, and am happy to find that I did not misunderstand him. What he contends for is, that it is constitutional to interrupt the administration of the Constitution itself, in the hands of those who are chosen and sworn to administer it, by the direct interference, in form of law, of the States, in virtue of their sovereign capacity. The inherent right of the people to reform their government, I do not deny; and they have another right, and that is, to resist unconstitutional laws, without overturning the Government. It is no doctrine of mine that unconstitutional laws bind the people. The great question is, 'Whose prerogative is it to decide on the constitutionality or unconstitutionality of the laws?' On that, the main debate hinges. The proposition that, in case of a supposed violation of the Constitution by Congress, is the proposition of the gentleman. I do not admit it. If the gentleman had intended no more than to assert the right of revolution for justifiable cause, he would have said only what all agree to. But I cannot conceive that there can be a middle course between submission to the laws, when regularly pronounced constitutional, on the one hand, and open resistance, which is revolution or

⁵² Bancroft, op. cit., p. 66

rebellion on the other. I say the right of a State to annul a law of Congress cannot be maintained, but on the ground of the inalienable right of man to resist oppression; that is to say upon the ground of revolution. I admit that there is an ultimate violent remedy, above the Constitution and in defiance of the Constitution, which may be resorted to when a revolution is to be justified. But I do not admit that, under the Constitution, and in conformity with it, there is any mode in which a State Government as a member of the Union, can interfere and stop the progress of the general movement, by force of her own laws, under any circumstance whatsoever." 53

To further emphasize that the Constitution was not a compact between States as maintained by Hayne, Webster said:

So, then, Sir, even supposing the Constitution to be a compact between the States, the gentleman's doctrine nevertheless, is not maintainable; because first, the General Government is not a party to that compact, but a government established by it, and vested by it with the powers of trying and deciding doubtful questions; and secondly, because, if the Constitution be regarded as a compact, and one can have no right to fix upon it her own peculiar construction.

He has not shown, it cannot be shown, that the Constitution itself, in its very best front, refutes that proposition; it declares that it is ordained and established by the people of the United States. So far from saying that it is established by the governments of the several States, it does not even say that it is established by the people of the United States in the aggregate. The gentleman says, it must mean no more than that the people of the several States, taken collectively, constitute the people of the United States; be it so, but it is in this, their collective capacity; it is as all the people of the United States that they establish the Constitution.

The Confederation was, in strictness, a compact; the States, as States, were parties to it. We had no other General Government..... The people were not satisfied with it, and undertook to establish a better. They undertook to form a General Government, which could stand on a

53 Horace Greeley, The American Conflict, p. 86, citing portions of the "DEbate on Foot's resolutions", Jan. 26, 1830

new basis - not a confederacy, not a league, not a compact between States, but a Constitution; a popular government, founded in popular election, directly responsible to the people themselves, and divided into branches with prescribed limits of power, and prescribed duties. They ordained such a government, they gave it the name of a Constitution, and therein they established a distribution of powers between this, their General Government, and their several State governments. When they shall become dissatisfied with their distribution, they can alter it. Their own power over their own instrument remains.

But this is not a treaty, but a constitution of government, with powers to execute itself, and fulfill its duties.

He argues that, if we transgress, each State, as a State, has a right to check us. The gentleman's doctrines would give us a strange jumble of authorities and powers, instead of governments of separate and defined powers.

Finally Sir, the honorable gentleman says, that the States will only interfere by their power, to preserve the Constitution. They will not destroy it, they will not impair it; they will only save, they will only preserve, they will only strengthen it! Ah Sir, this is but the old story. 54

James Madison became incensed at Haynes use of his resolution of '93 as precedent for South Carolina's action.

In a letter to the North American Review August 1830 he wrote:

The Constitution was formed by the States, that is by the people in each of the States, acting in their highest sovereign capacity; and formed consequently by the same authority which formed the State constitutions.....

Being thus derived from the same source as the constitutions of the States, it has, within each State, the same authority as the Constitution of the State; and is as much a constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are, within their respective spheres: but with this obvious and essential difference, that being a

⁵⁴ Bancroft, op. cit., p. 68-9 from Congressional Debates, 1829-30, pp. 92-93.

compact among the States in their highest sovereign capacity, and constituting the people thereof, one people for certain purposes, it cannot be altered or annuled at the will of the States individually, as the Constitution of a State may be at its individual will.....

How far this structure of the Government of the U. S. is adequate and safe for its objects, time alone can absolutely determine.....

Should the provisions of the Constitution as here reviewed, be found not to secure the Government and rights of the States, against usurpation and abuses on the part of the United States the final resort within the purview of the Constitution, lies in an amendment of the Constitution, according to a process applicable by the States.....

In order to understand the true character of the Constitution of the U. S., the error, not uncommon, must be avoided, of viewing it through the medium, either of a consolidated Government, or of a confederated Government, whilst it is neither the one nor the other; but a mixture of both. And having, in no model, the similitudes and analogies applicable to other systems of Government, it must, more than any other, be its own interpreter, according to its text, and the facts of the case. 55

Both camps became more bitter and common ground impossible as the four month's debate continued. The only middle-of-the-road approach was attempted by the eminent Statesman and jurist Edward Livingston:

I think, that the Constitution is the result of a compact entered into by the several States, by which they surrendered a part of their sovereignty to the Union, and vested the part so surrendered in a General Government.

That this Government is partly popular, acting directly on the citizens of the several States; partly federative, depending, for its existence and action, on the existence and the action of the several States.

⁵⁵ James Madison, Letter to the North American Review, August, 1830, Virginia Political Pamphlets, Virginia State Library.

That, by the institution of this Government, the States have unequivocally surrendered every constitutional right of impeding or resisting the execution of any decree or judgement of the Supreme Court, in any case of law or equity, between persons, or on matters, of whom, or on which, that court has jurisdiction, even if such decree or judgement should, in the opinion of the States, be unconstitutional.

That, in cases in which law of the United States may infringe the constitutional right of a State, but which in its operation cannot be brought before the Supreme Court, under the terms of the jurisdiction expressly given to it over particular persons or matters, that court is not created the umpire between a State that may deem itself aggrieved, and the General Government.

That, among the attributes of sovereignty retained by the States, is that of watching over the operations of the General Government, and protecting its citizens against their unconstitutional abuse; and that this can be legally done-

First, in the case of an act, in the opinion of the State palpably unconstitutional, but affirmed in the Supreme Court in the legal exercise of its functions,

By remonstrating against it to Congress;

By an address to the people, in their elective functions, to change or instruct their Representatives;

By a similar address to the other States, in which they will have a right to declare that they consider the act as unconstitutional, and therefore void;

By proposing amendments to the constitution, in the manner pointed out by that instrument;

And, finally, if the act be intolerably oppressive, and they find the General Government persevere in enforcing it, by a resort to the natural right which every people have to resist extreme oppression.

Secondly, if the act be one of those few which, in its operation, cannot be submitted to the Supreme Court, and be one that will, in the opinion of the State, justify the risk of a withdrawal from the Union, that this last extreme remedy may at once be resorted to.

That the right of resistance to the operation of an act of Congress, in the extreme cases above alluded to, is not a right derived from the constitution, but can be justified only on the supposition that the constitution has been broken, and the State absolved from its obligation; and that whenever resorted to, it must be at the risk of all the penalties attached to an unsuccessful resistance to established authority.

That the alleged right of a State to put a veto on the execution of a law of the United States, which such State may declare to be unconstitutional, attended with a correlative obligation on the part of the General Government, to refrain from executing it, and the further alleged obligation, on the part of that Government, to submit the question to the States, by proposing amendments, are not given by the constitution, nor do they grow out of any of the reserved powers.

That the exercise of the powers last mentioned would introduce a feature in our Government not expressed in the constitution, not implied from any right of sovereignty reserved to the States, not suspected to exist by the friends or enemies of the constitution, when it was framed or adopted, not warranted by practice, or contemporaneous exposition, nor implied by the true construction of the Virginia resolutions in '98.

That the introduction of this feature in our Government would totally change its nature, make it inefficient, invite to dissension, and end, at no distant period, in separation; and that, if it had been proposed in the form of an explicit provision in the constitution, it would have been unanimously rejected, both in the convention which framed that instrument, and in those which adopted it. 56

In 1832 a new and more permanent appearing tariff was passed and Calhoun and his nullifiers, their hand called, accepted the challenge.

On November 24, 1832 the South Carolina Legislature summoned a Convention and its result was the "Nullification

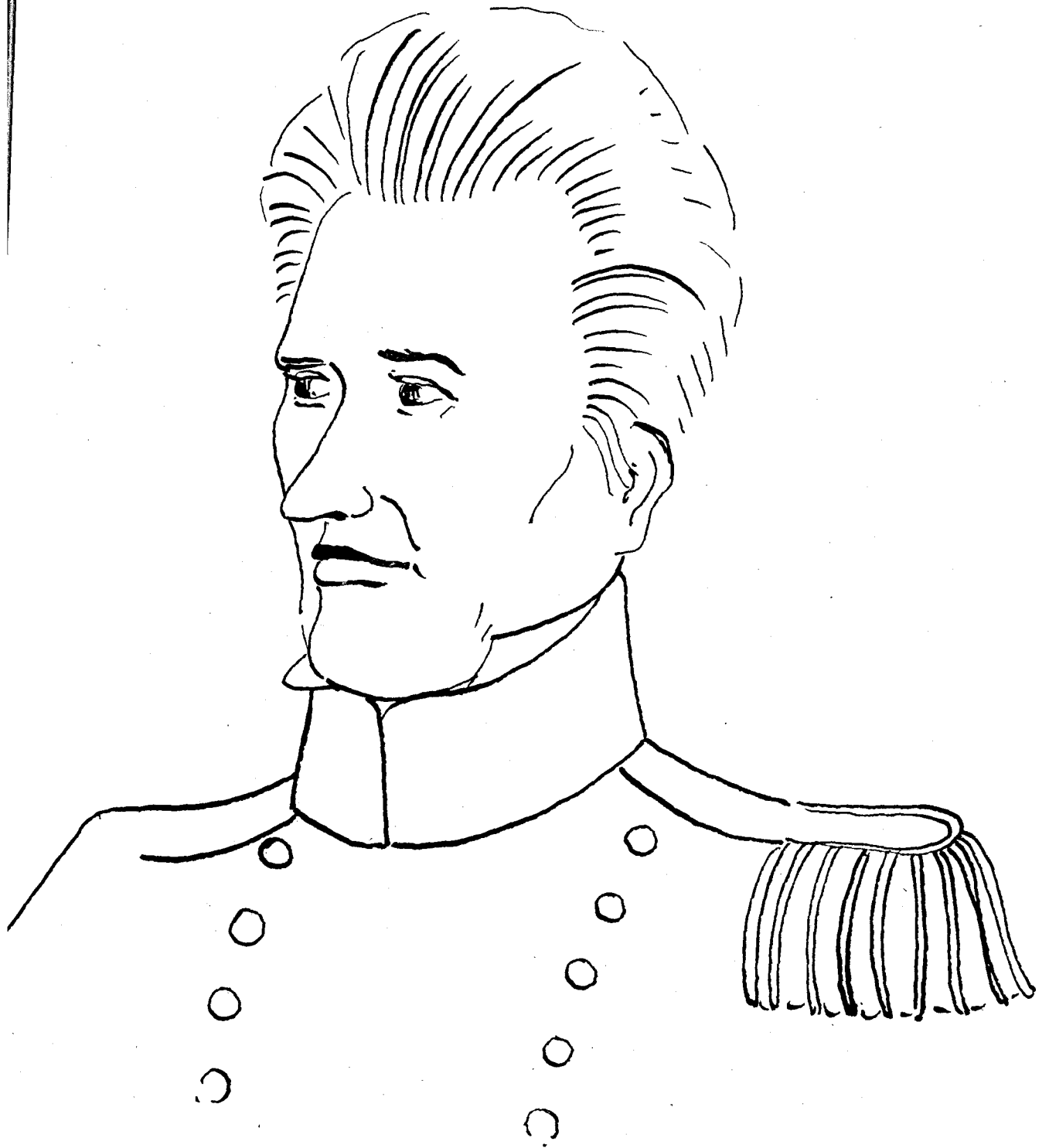
⁵⁶ Ibid., pp. 71-74, Congressional Debates, 1829-30

Ordinance." It was adopted by a vote of 136 to 26. In it the legislature declared in the name of the sovereign people of South Carolina that the tariff Act was 'unauthorized by the Constitution' and not to be recognized in any way by the State and threatened immediate secession from the Union if the central government attempted to carry it out by force. The Convention further stated:

It is true that in ratifying the federal Constitution the States placed a large and important portion of the rights of their citizens under the joint protection of all the States, with a view to their more effectual security; but it is not less true that they reserved a portion still larger and not less important under their own immediate guardianship, and in relation to which their original obligation to protect their citizens, from whatever quarter assailed, remains unchanged and undiminished.⁵⁷

Only two southern States were in favor of the tariff but not one would support South Carolina's Ordinance. Mississippi termed it "a heresy fatal to the existence of the Union;" North Carolina called it "REVOLUTIONARY in its character, subversive of the Constitution of the United States and a doctrine that leads to a dissolution of the Union;" Alabama maintained it was "unsound theory and dangerous practice..... leading in its consequence to anarchy and civil discord;" Georgia said, "We abhor the doctrine of nullification as neither a peaceful nor a constitutional remedy but, on the contrary as tending to civil commotion and dis-

⁵⁷ Address to the People of South Carolina by their Delegates in Convention, Columbia, 1832, Virginia State Library.



Andrew Jackson

union;" and Kentucky, author of the Resolutions of '98-'99, thoroughly denounced the action of the South Carolinians. All eyes were then turned toward Virginia, historically the birthplace of Presidents, a leader in national politics, and an ardent defender of States - rights.

Andrew Jackson, the popular hero of the Battle of New Orleans, defender of the common man, lauded by the Southern yeoman, praised by the Irish and rural groups of the North, supported by the Western farmers and working men throughout the nation, was president of the United States. To him fell the task of bringing the proponents of nullification to heel and destiny could not have found a more apt overseer to crack the whip. Old Hickory, with characteristic forcefulness, early wielded the iron fist and in so doing fertilized the embryonic volcano that a few years later would produce a political eruption disastrous to his party, and responsible for the birth of another.

On March 2, 1833 Jackson signed the Force Bill authorizing him to enlist the army and the navy behind an attempt to collect duties if judicial process were obstructed.

Virginia had a difficult choice to make and sentiment on both sides was widespread throughout the state, and clamorous outbursts both in opposition to South Carolina's Nullification Ordinance and in support of it were so vehement, that it was decided to submit it to the General Assembly of

Virginia for consideration. The eyes of the nation were trained on this legislative assembly, as it deliberated, as no objective mind, with capable perception, could fail to see that the life of the young Republic was held in the balance.

Careful thought and the realization of the seriousness of a hasty decision caused the Virginia legislators to weigh the demands and arguments of groups even as radical as on Federalist faction claiming roots in the deepest recesses of our nation's past. After a long series of hearings and debates the Assembly voted 73-59 to ask South Carolina to suspend the ordinance and work toward reducing the tariff which prompted it. They simultaneously denied the Resolutions of 1798-99 (sanctioning the course of action) and maintained the Ordinance was based on a false theory of the origin, structure and organization of the United States Government. However, a motion to affirm undiminished confidence in Jackson (patriotism and firmness) and denying the right of Secession was defeated 107-24. 58

Dazed and bewildered by this maelstrom of feeling that had disrupted the traditional solidarity of Virginia, its people turned to the paternal state leaders a pleading for guidance. Foremost of these fathers was Littleton Waller Tazewell of Eastern Virginia, revered by all and a pillar of state-rights strength.⁵⁹

⁵⁸ Henry Harrison Simms, The Rise of the Whigs in Virginia, 1884-40, p.67, quoting from the Journal of Virginia House of Delegates, Jan. 14, 1833

⁵⁹ Ibid., p. 71

Tazewell rose to the occasion and stated "the Commonwealth of Virginia has never transferred the allegiance of her citizens to the government of the United States, either in the first instance or at any other time. She claims it of them all now as strongly as she did on the 29th of June, 1776, when she first demanded it; and at any and every time since, nor can any man living point to the act or instrument by which she has ever surrendered it." 60 In rebuttal Senator Rives of Virginia defending the Force Bill in a speech February 14, 1833 said, "The constitution of a State is always the act of a State in her highest sovereign capacity; and if it can oppose no obstacle to the laws of the Union, as is here declared, it follows that neither the sovereign, nor the legislative interposition of a State is sufficient, under the constitution, to defeat a law of the United States." 61 He did, however, go on to say that the Proclamation did contain doctrinal errors but it was the duty of Virginia to adhere to the law. In this he received the hearty and vigorous approval of the people of the western part of the state. 62

In retrospect we can see many sectional and divisive forces at work both within and without the state of Virginia,

60 Ibid., p. 72

61 William C. Rives, Speech on Force Bill, Delivered in Senate, February 14, 1833, Virginia State Library.

62 Simms, op. cit., p. 74

but they were forces lacking immediate longterm goals or the cohesiveness necessary to make their ideas felt in more than temporary action. They are, nevertheless, many of those same forces that appeared later as the initial impetus that plunged the nation into civil war.

The Northern and Western States joined in each issuing resolutions supporting the President and denouncing South Carolina's action. Those of three New England States are sufficient to show the trend of sentiment:

Resolves of the Legislature of New Hampshire

That the sentiments of the Presidential Proclamation, December 10, 1832 met with the approbation of its Legislature. They lauded the "salutary exercise of his Veto" as chief executive and one whose "devoted patriotism and moral courage are equal to any crisis, and under the guidance of whose wisdom the ancient landmarks of the Constitution will be preserved." ⁶³

Resolves of Maine

That we heartily approve the policy and measures of President Jackson's administration, and in the present difficult and threatening aspect of public affairs, we look with confidence to the patriotism vigilance and firmness of our chief Magistrate, as sure pledges that all his efforts will be directed to preserve unimpaired the union, happiness, and glory of our Republic. ⁶⁴

Resolves of Massachusetts.

After denouncing the action of South Carolina, Massachusetts in its Report states: "Were it even true, that the Legislature of this Commonwealth had expressed the intention of forcibly resisting the execution of an unconstitutional law, it would not therefore follow,

⁶³ State Papers on Nullification, New Hampshire.

⁶⁴ State Papers on Nullification, Maine.

that they had countenanced the doctrine of Nullification. The right of forcible resistance to the laws, in cases of extreme oppression, is undisputed. If such a case should ever occur, Massachusetts will openly take her stand upon that right. Nullification undertakes to reconcile resistance with submission; to obey and break the law at one and the same time. It must be justified if at all, on principles entirely different from those which justify the natural right, of resistance, and on principles which have never been professed, countenanced or practised upon by the Government or people of this Commonwealth.⁶⁵

A very interesting, an illustrative series of articles reflecting the viewpoint of South Carolina was that termed the "Sovereign Right of States" or a Reply to the Consolidation and Force Doctrines of the Whigs as set Forth by the National Intelligencer in Advocating the Norfolk Speech of Senator Douglas. Excerpts from the articles by Justinian with four proposition established by the National Intelligencer follow:

South Carolina views of the Federal Constitution ought to be regarded as the most orthodox, authentic, and correct from the fact that she did more towards framing the instrument than any other State. Both the Original Drafts of that Constitution were made by South Carolina members of the Convention which framed that instrument, in May 1787; the first by that able civilian, Charles Pinckney, and the second by that most eminent statesman John Rutledge, who was chairman of the committee which reported the constitution, and whom I have ever regarded as the ablest member of that body, "inter principes, facile princeps." These two distinguished men were, beyond a doubt, the true "Fathers of the Constitution," not only from their having been throughout the debates which ensued by far their ablest supporters; and I state this fact especially for the purpose of correcting the strange error which has got abroad that Madison did more than any other member in framing the Federal Constitution, whereas the direct

65 State Papers on Nullification, Massachusetts.

reverse was the case, from the very fact upon which he has so much prided himself, that he was constantly occupied in taking the most careful notes and journal of the proceedings, which he has published, and which labor precluded the possibility of his taking much share in the debates, or the action of that Convention. He was not even a member of the framing committee, and in fact did little or nothing towards the actual framing of the Federal Constitution, although he has been one of its ablest expounders in his Legislature.

The National Intelligencer Propositions

1. That this is a Government of the people, and not alone of the States.

2. That however true it may be that every lawyer, every statesman, every scholar knows that a sovereign State cannot commit treason at all, much less against a mere agent (Constitution) or attorney appointed to attend to war and commerce, and nothing else whatever, it appears from the awards of history to be none the less true that in point of fact our fathers did form a Government against which it is possible for a sovereign State to commit treason.

3. That in the formation of the Constitution the Government established under it was understood as in time to be incompatible with the right of secession as inhering in or accruing to any member of the Union.

4. That the Virginia and Kentucky Resolutions of '98-'99 are themselves misinterpreted to sustain the false interpretation of the Constitution, to which they lend neither countenance nor support. There is nowhere found upon the face of our great charter any clause intimating it to be compact, or in anywise providing for its interpretation as such; on the contrary, the preamble emphatically speaks of it as an ordinance, and establishment of government in the name and by authority of the people of the United States. The language is: "We the people of the United States, do ordain and establish this Constitution for the United States of America." The people (not the sovereign States) do ordain and establish (not contract and stipulate) this Constitution (not this 'agency') for the United States of America.

Justinian replied, "Does not Union mean the joining together of two or more separate bodies of things? What is the meaning of the word Federal? Its origin is based on

what appertains to a covenant, league or contract between parties? Does not United States inexorably signify an 'Alliance, league or union?' When the thirteen colonies separated themselves from Great Britain, did they not become thirteen independent and sovereign States?"⁶⁶

With the issuance of the Force Bill the tariff was also decreased and both sides claimed the victory. South Carolina repealed her Nullification Ordinance accordingly but to save face issued the "Ordinance Nullifying the Force Bill":

We, the people of the State of South Carolina, in Convention assembled, do declare and ordain that the Act of Congress of the United States, entitle "An Act further to provide for the collection of duties on imports," approved 2nd March, 1833, is unauthorized by the Constitution of the United States, subversive of that instrument, destructive of public liberty, and that the same is and shall be deemed null and void within the limits of this State; and that it shall be the duty of the Legislature, at such time as they may deem expedient, to adopt such measures and pass such acts as may be necessary to prevent the enforcement thereof, and to inflict proper penalties on any person who shall do any act in executing or enforcing the same within the limits of this State.

We do further ordain and declare that the allegiance of the citizens of this State, while they continue such, is due to said State; and that obedience only, and not allegiance, is due them to any other power or authority to whom a control over them has been or may be delegated by the State; and the General Assembly of the said State is hereby empowered from time to time when they deem it proper, to provide for the administration to the citizens and officers of the State, or such of the said officers as they may think fit, of suitable oaths or affirmations, binding them to the observance of such allegiance, and adjuring all other allegiance, and also to define what shall amount to a violation of their allegiance, and to provide the proper punishment for such violation.⁶⁷

⁶⁶ Justinian, Sovereign Rights of States, pp.1-2

⁶⁷ Journal of the South Carolina Convention of 1833.
(March 18, 1833).

Webster, disgusted with the unyielding Southerners, summed up his arguments briefly in opposition to Calhoun:

Mr. President, turn this question over, and present it as we will argue upon it as we may - exhaust upon it all the fountains of metaphysics- stretch over it all the meshes of logical or political subtlety- it still comes to this: Shall we have a General Government? Shall we continue the union of the States under a Government instead of a league? This is the upshot of the whole matter; because, if we are to have a Government, by majorities; it must have this power, like other Governments, of enforcing its own laws, and its own decisions; clothed with authority by the people, and always responsible to the people; it must be able to hold its course, unchecked by external interposition. According to this gentleman's view of the matter the constitution is a league; according to mine, it is a regular popular Government. This vital and all-important question the people will decide, and, in deciding it, they will determine whether by ratifying the present CONSTITUTION AND FRAME^LOF GOVERNMENT they meant to do something more than to amend the articles of the old confederation. ⁶⁸

Old James Madison forecast in a letter to Edward Coles
written August 29, 1834:

It is not probable that this offspring (nullification) of the discontents of South Carolina will ever approach success in a majority of the States. But a susceptibility of the contagion in the Southern States is visible and the danger is not to be concealed that the sympathies arising from known causes and the inculcated impression of a permanent incompatibility of interests between the South and the North may put it in the power of popular leaders aspiring to the highest stations, and despairing of success on the Federal theater, to unite the South on some critical occasion in a course that will end in creating a new theater of great, though inferior, extent. ⁶⁹

⁶⁸ Bancroft, op. cit., pp. 164-5, citing Congressional Debates, 1832-33, 777.

⁶⁹ Daniel W. Howe, Political History of Secession, p. 16-17, citing Madison's Writing Vol. IV, p. 357.

While nullification had been virtually snuffed out in South Carolina it was simultaneously granted a complete triumph in Georgia. A certain section of Georgian territory had been granted the Creek and Cherokee Indians by treaty with the United States. An attempt was made to wrest these lands away from the Indians by our Government but their cause was defended on appeal by President Adams. Governor Troup, of Georgia, upheld the validity of a fictitious cession of the land by a minority of Creeks and threatened to use force in removing the Indians and enforcing the title. Much to his dismay President Adams did use troops and the matter rested. In 1828 Jackson became President and the new regime, loyal to its sovereign political backers upheld the Georgian claim to the territory as a sovereign right. When Chief Justice Marshall decided against the sovereignty of Georgia in opposition to that of the United States in a subsequent case involving the Indians the President stated, "John Marshall has made his decision, now let him enforce it." Interposition was twice triumphant, but the triumphs were hollow, they were made with the acquiescence of one of the national arms of government not in opposition to them all.

CHAPTER VI

THE INTERIM PERIOD

An interim period in the struggle to secure an acceptable doctrine of interposition had been reached. The crisis was temporarily over, but what had been solved? The Sectionalism, the differences, all of the divergencies that had existed in the colonies, and more, were obvious. An impartial observer scanning a composite list of the numerous differences would have said it was the impossible, union on such a basis could not endure. This feeling was in the hearts of many a thoughtful citizen too, as evidenced by an author writing under the pseudonym "Locke" to Thomas Ritchie of Virginia in 1833:

Is there, or is there not, any principle in the Constitution of the United States, by which the States may resist the usurpation of the Federal Government; or are such usurpations to be resisted only by revolutions?

Are the States bound to submit to laws which are unconstitutional and void?

Is there any common umpire established by the constitution to whom may be referred questions touching a breach, thereof? 70

The period I have termed the interim or the years between 1832 and 1858 are comparatively free of attempts at interposition or nullification. The national government continued its growth in power and the Union became larger. Chief Justice Taney and Justice Story delivered famous and weighty opinions. Taney decided in the Dred Scott case in favor of the Southern viewpoint.

⁷⁰ Locke, "An Exposition on the Virginia Resolutions of '98, Virginia Political Pamphlets, Virginia State Library.



Justice Taney

A Constitution was described as a compact; the rights of states took precedence over those of the central government; the territories were the joint possession of all the States and the Missouri Compromise was unconstitutional. Interposition received a solid pillar beneath its doubtful platform. Story delivered a decision in 1842 in *Swift v. Tyson*, 16 Pet. 1, and confined the meaning of "laws" to "enactments" promulgated by the legislative authority of the state, "with the result that federal courts were free to disregard decision of state courts in common law cases. Arguments and differences were prevalent and the plow of governmental progress was always inches above the dreaded threats of nullification and secession but no moves were made.

In 1858 and '59 following the enactment of the Fugitive Slave Law and the Dred Scott decision, Wisconsin, a strong abolitionist State, entered the field of Interposition. In attempting to prevent the arrest of one Joshua Glover, fugitive slave, by a United States Marshall, the citizens of Racine ran afoul of the Federal Courts. In defiance, the General Assembly and Supreme Court of Wisconsin held the highest judiciary in the land at bay claiming the Court's "assumption of power and effort to become the final arbiter was in conflict with the Constitution."

Their published resolution in part read:

Resolved, that this assumption of jurisdiction by the Federal judiciary in the said case, and without process, is an act of undelegated authority, and therefore without power, void and of no force.

Resolved, that the government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to itself but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.

Resolved, that the principles and construction contended for....that the general government is the exclusive judge of the extent of powers delegated to it, stops nothing short of despotism, since the discretion of those who administer the government, and not the Constitution, would be the measure of their powers; that the several States which formed that instrument have the unquestionable right to judge its infraction, and that a positive defiance by those sovereignties, of all unauthorized acts done or attempted to be done under color of that instrument is the rightful remedy.⁷¹

Conscious of the position being taken up by the central government and the disagreements of the past, some statesmen never rested in their quest for denial of the Union's hold. A Louisiana Senator stated:

The Constitution of the United States is a contract. Mr. Webster says a contract broken at one end is broken all over. The Constitution of the United States has been broken. Therefore, the contract is broken all to pieces, and is at an end. Therefore, each component part of the former United States (Specifically Louisiana) stands for itself. Therefore, each portion, thus floating for itself, can do what seems best to itself- become a separate empire, join a new confederacy, or become again a French dependency, or else a starting point for a new government throwing its seine over Mexico.⁷²

Dr. Francis Lieber answered forwardly:

This argument contains almost as many fallacies as it contains positions. Lets say the Constitution is a contract. What sort of a contract, there are many species? All publicists

⁷¹ Wisconsin Resolution, 1859, quoted from Richmond News Leader, Nov. 21, 1955

⁷² Francis Lieber, op. cit., p.7

have maintained that the government contract is made in perpetuity. Dr. Lieber continued by adding that this the existence of feeling not formulation, however, and this was arrived at through the inherent nature of society and the idea that society is a 'continuum'.... Mr. Webster was too great a lawyer not to know that 'a contract broken at one end' does not apply to all contracts. Everything depends upon what constitutes the breaking of a contract, and upon its nature.... Louisiana was acquired from France, incorporated into the United States Constitution allows no ex post facto laws, where did this State suddenly develop sovereign power? There is no validity to this thesis of the Senator's. 73

CHAPTER VII

SECESSION

The year 1860 saw all of the trials, differences and arguments seeth to the top of the cauldron of war that was fast reaching its boiling point. The ultimate form of a State's or group of States' denial was about to present itself.

During Buchanan's administration a "Platform of State Disunion" was adopted at a convention in Worcester, Massachusetts that reflected some of the sentiment prevalent at the time:

Resolved, That the meeting of a State Disunion Convention attended by men of various parties and affinities, gives occasion for a new statement of principles and a new platform of action.

Resolved, That the cardinal American principle is now, as always, liberty, while the prominent fact is now, as always, slavery.

Resolved, That the conflict between this principle of liberty and this fact of slavery has been the whole history of the nation for fifty years, while the only result of this conflict has thus far been to strengthen both parties, and prepare the way for a yet more desperate struggle.

Resolved, That the fundamental difference between mere political agitation and the action we propose, is this, that the one requires the acquiescence of the slave power, and the other only its opposition.

Resolved, That the necessity for disunion is written in the whole existing character and condition of the two sections of the country, in their social organization, education, habits and laws; in the dangers of our white citizens in Kansas, and of our colored ones in Boston; in the wounds of Charles Sumner and the laurels of his assailants, and no government on earth was ever strong enough to hold together such opposing forces.

Resolved, That this movement does not seek merely disunion

but the more perfect union of the free states by the "expulsion" of the slave States from the confederation, in which they have ever been an element of discord, danger and disgrace.

Resolved, That it is not probable that the ultimate severance of the Union will be an act of deliberation or discussion, but that a long period of deliberation and discussion must precede it, and this we meet to begin.

Resolved, That henceforward, instead of regarding it as an objection to any system of policy that it will lead to the separation of the States, we will proclaim that to be the highest of all recommendations and the grateful proof of statesmanship; and will support, politically and otherwise, such men and measures as appear to tend most to this result.

Resolved, That by the repeated confession of Northern and Southern statesmen, "the existence of the Union is the chief guarantee of slavery," and that the despots of the old world have everything to fear, and the slaves of the whole world everything to hope from its destruction and the rise of free Northern Republic.

Resolved, That the sooner the separation takes place the more peaceful it will be; but that peace or war is a secondary consideration, in view of our present perils. Slavery must be ⁷⁴conquered, peacefully, if we can, forcibly, if we must.

The ship of state seemed destined to plunge over the cataract of disunion. Every turn found violent disagreement. Social, economic, political, territorial, slavery, all were smashed back and forth from pillar to post with neither side even attempting objectivity. Every imaginable construction was attempted on the document of 1787 and regardless of content arguments read in and out of, at will. Judah P. Benjamin, in debating the status of territories, said, "if therefore, they

⁷⁴ Benjamin E. Green, Calhoun Nullification Explained, citing, Platform of State Disunion Convention, Worcester, Mass., 1860

be popular sovereigns, he does not get rid of his difficulty by saying that when the Constitution talks about States it means Territories, because that is not so."⁷⁵

The Honorable John W. Botts spoke on "Union or Disunion" in Lynchburg, Virginia, October 18, 1860: Quoting Henry Clay- "In all parts of this Union it must become the unanimous conviction of the people of these United States that whether a State in this Union is or is not to regulate labor, in this or that manner, depends upon the will of the people of that State and Territory." He went on to quote Yancey, "The powers delegated.... 10th Amendment.... and reserved to the people.... because the power was not delegated to the Government to destroy itself, therefore the power was reserved to the States to destroy it." Bott's facetious reply compared the union to a solemn marriage contract- "I would advise all the secession⁷⁶ men to go over to the Free Love party."

The Honorable Jefferson Davis spoke against Douglas' territorial speech, "The call is on every men to come forward now, after the Supreme Court has given all it could render

⁷⁵ Judah P. Benjamin, Speech on "Defence of the National Democracy Against the Attack of Judge Douglas, Delivered in U.S. Senate, May 22, 1860. Virginia Political Pamphlets, Virginia State Library.

⁷⁶ John M. Botts, Speech on "Union or Disunion," Virginia Political Pamphlets, Virginia State Library.



Jefferson Davis

upon a political subject, and state that his creed is adherence to the rule thus expounded in accordance with previous agreement."⁷⁷

Davis had previously spoken on May 7, on the "Relations of States" and revealed that the idea of a State's position can be seen in reference to Rhode Island's resolution that, "the powers of government may be resumed by the people whenever it shall become necessary to their happiness."⁷⁸

Secrecy and clandestine activity was paramount in many circles as the "irrepressible conflict" drew nearer but some well-guarded secrets were joyfully revealed. Interposition belief was running at fever pitch. It was publicly announced that "in October, 1856, a Convention of Southern Governors was held at Raleigh, North Carolina, at the invitation of Governor Wise, of Virginia. It was proclaimed that, had Fremont been elected he would have marched at the head of twenty thousand men to Washington, and taken possession of the Capitol, preventing by force Fremont's inauguration at that place."⁷⁹

How similar that meeting was to that of October 25, 1860 held by the politicians of South Carolina in which they stated unanimously that if Lincoln was elected they would immediately

⁷⁷ Jefferson Davis, of Mississippi, "Reply to Senator Douglas" delivered in Senate May 26, 17, 1860. Virginia Political Pamphlets, Virginia State Library.

⁷⁸ Jefferson Davis, Speech on "Relations of States," delivered in Senate May 7, 1860, Virginia Political Pamphlets Virginia State Library.

⁷⁹ Horace Greely, The Great American Conflict, p. 320

instigate South Carolina's withdrawal from the Union. Disagreement and disaffection for the course of events in every field of endeavour became to some minds intolerable and like cabals were held by practically all of the Slave States. Letters, communication, pamphlets, and essays were circulated throughout the South and the right of Interposition, to any extent, was lauded to the skies. Alexander H. Stephens presented his views on Secession and Union:

Allegiance, as we understand that term, is due to no Government. It is due the power that can rightfully make or change Governments. This is what is meant by the Paramount authority, or Sovereignty. Allegiance and Paramount authority do go together; we agree in that. But there is a great difference between the supreme law of the land and the Paramount authority, in our system of government, as well as in all others. Obedience is due to the one, while allegiance is due to the other. Obedience to law, while it is the law, or the Constitution, which is an organic law for the time being, and allegiance to the Paramount authority, which can set aside all existing laws, fundamental laws, Constitutions, as well as any others, are very different things.⁸⁰

Mr. W. D. Porter, Charleston, President of the South Carolina Senate said on November 5, 1860, in reference to South Carolina's proposed stand, "In our unanimity will be our strength both physical and moral. No human power can withstand or break down a united people."

Kentucky's Judge Bibb commented on South Carolina's course in 1832 in a manner which seemed as applicable again as when uttered previously:

⁸⁰ Alexander H. Stephens, A Constitutional View of the War Between the States, p. 25

The question of war against South Carolina is presented as the only alternative. The issue was false. The first question is between injustice and justice. Shall we do justice to the States who have united with South Carolina in complaint and remonstrance against the injustice and oppression of the tariff? Shall we cancel the obligations of justice to five other States, because of the impetuosity and impatience of South Carolina under wrong and oppression? The question ought not to be whether we have the physical power to crush South Carolina, but whether it is not our duty to heal her contents, to conciliate a member of the Union, to give peace and happiness to the adjoining States which have made common cause with South Carolina so far as complaint and remonstrance go. Are we to rush into a war with South Carolina to compel her to remain in the Union? Shall we keep her in the Union by force of arms, for the purpose of compelling her submission to the tariff laws of which she now complains? How shall we do this? By the naval and military force of the United States, combined with militia? Where will the militia come from? Will Virginia, will North Carolina, will Georgia, Mississippi, or Alabama, assist in enforcing submission to the tariff laws, the justice and constitutionality of which they have, by resolutions on your files, denied over and over again? Will those States assist to forge chains by which they themselves are to be bound? Is this to be expected, in the ordinary course of chance and probability?

My creed is that, by the Declaration of Independence, the States were declared to be free and independent States, thirteen in number, not one Nation- that the old Articles of Confederation united them as distinct States, not as one people:- that the treaty of peace, of 1783, acknowledged their independence as States, not as a single Nation; that the Federal Constitution was framed by the States, submitted to the States, and adopted by the States, as distinct Nations or States, not as a single Nation or people.

By canvassing these conflicting opinions, we shall the better understand how far South Carolina has transcended her reserved powers as a Sovereign State- how far we can lawfully make war upon her- and whether we, or South Carolina are likely to transcend the barriers provided in the Constitution of the United States.⁸¹

This time, however, it was not one of the United States that needed coercing as in the 1860's it was a problem of many.

⁸¹ Ibid., p. 426-7

And this time it was not just a tariff that bothered the oppressed but a combination of factors generating malice, hate ill-feeling and distrust that knew no alleviation or solace to those involved but not in accord.

Governor Gist of South Carolina said in his communication to the two Houses of the Legislature, November 5, 1860:

Under ordinary circumstances, your duty could be soon discharged by the election of Electors representing the choice of the people of the State; but, in view of the threatening aspect of affairs, and the strong probability of the election to the Presidency of a sectional candidate, by a party committed to the support of measures, which if carried out, will inevitably destroy our equality in the Union, and ultimately reduce the Southern States, to mere provinces of a consolidated despotism, to be governed by a fixed majority in Congress hostile to our institutions, and fatally bent upon our ruin, I would respectfully suggest that the Legislature remain in session, and take such action as will prepare the State for any emergency that may arise.⁸²

Mr. James Chestnut Jr., United States Senator from South Carolina, addressed a secession gathering on November 5, :
 "Before the setting of tomorrow's sun, in all human probability the destiny of this confederated Republic would be decided (Lincoln's Election)..... Peace, hope, independence, liberty, power and the prosperity of Sovereign States, may be draped as chief mourners in the funeral cortege of the Constitution of the country."

Honorable Wm. W. Boyce, General M. E. Martin's, Colonels Cunningham, Simpson, Richardson, Mr. Trenholm, Mr. Rhett, Moses, Ruffin of Virginia, all rallied to the "Fire Eaters" banner with

⁸² Ibid., p. 428

fiery speeches and actually congratulated each other when Lincoln was elected. "Southern Independence" was at last at hand and the supreme attempt at Interposition was launched.

On December 20, 1860 the South Carolina Secession Convention met and issued the "Ordinance of Secession":

We, the People of the State of South Carolina, in Convention assembled, do declare and ordain, and it is hereby declared and ordained.

That the Ordinance adopted by us in Convention, on the twenty-third day of May, in the year of our Lord one thousand seven hundred and eighty-eight, whereby the Constitution of the United States of America was ratified, and also, all the Acts and parts of Acts of the General Assembly of this State, ratifying amendments of the said Constitution are hereby repealed; and that the Union now subsisting between South Carolina and other States, under the name of "The United States of America," is hereby dissolved.⁸³

The die had been cast and on December 24, 1860 South Carolina proclaimed the causes which induced her secession:

The people of the State of South Carolina, in Convention assembled, on the 26th day of April, A. D. 1852, declared that the frequent violation of the Constitution of the United States, by the Federal Government, and its encroachments upon the reserved rights of the States, fully justified this State in then withdrawing from the Federal Union; but in deference to the opinions and wishes of the other slaveholding States, she forebore at that time to exercise this right. Since that time, these encroachments have continued to increase, and further forbearance ceases to be a virtue.

And now the State of South Carolina having resumed her separate and equal place among nations, deems it due to herself, to the remaining United States of America, and to the nations of the world, that she should declare the immediate causes which have led to this act.

In the year 1765, that portion of the British Empire

⁸³ Townsend, op. cit., p. 213

embracing Great Britain, undertook to make laws for the government of the portion composed of the thirteen American Colonies. A struggle for the right of self-government ensued which resulted, on the 4th of July, 1776, in a Declaration by the Colonies, "that they are and of right ought to be, Free and Independent States; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all the other acts and things which independent States may of right do.

When any form of government becomes destructive of the ends for which it was established, it is the right of the people to alter or abolish it, and to institute a new government. Deeming the government of Great Britain to have become destructive of these ends, they declared that the Colonies 'are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be totally dissolved.'

In pursuance of this Declaration of Independence, each of the thirteen States proceeded to exercise its separate sovereignty; adopted for itself a Constitution, and appointed officers for the administration of government in all of its departments- Legislative, Executive, and Judicial.

By this Constitution certain duties were imposed upon the several States, and the exercise of certain of their powers was restrained, which necessarily implied their continued existence as sovereign States. But, to remove all doubt, an amendment was added, which declared that 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. On 23 May, 1787, South Carolina, by a Convention of her people passed an Ordinance assenting to this Constitution, and afterwards altered her own Constitution, to conform herself to the obligations she had undertaken.

Thus was established, by compact between the States, a Government, with defined objects and powers, limited to the express words of the grant. This limitation left the whole remaining mass of power subject to the clause reserving it to the States or to the people, and rendered unnecessary any specification of reserved rights.

We, therefore the people of South Carolina, by our delegates assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, have solemnly

declared that the Union heretofore existing between this State and the other States of North America, is dissolved; and that the State of South Carolina has resumed her position among the nations of the world, as a separate and independent State; with full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do.⁸⁴

Not just rabid unionists and Northerners recoiled from the thought of secession, Alfred Iverson, noted statesman, said in 1860:

I do not myself place the right of a State to secede from the Union upon Constitutional grounds. I admit that the Constitution has not granted that power to a State. It is exceedingly doubtful even whether the right has been reserved. Certainly it has not been reserved in express terms. I therefore do not place the expected action of any of the Southern States in the present contingency, upon the constitutional right of secession; and I am not prepared to dispute therefore the position which the President has taken upon that point.

I rather agree with the President that the secession of a State is an act of revolution; taken through that particular means or that particular measure. It withdraws from the Federal compact, disclaims any further allegiance to it, and sets itself up as a separate government, an independent State. The State does it at its peril, of course because it may, or may not, be cause of war by the remaining States composing the Federal Government. If they think it proper, to consider such an act of disobedience, or if they consider that it cannot submit to this dismemberment, why then they may or may not make war, as they choose, upon the seceding States.⁸⁵

Georgia's Governor Joseph E. Brown affirmed the right of secession and the "duty of other Southern States to sustain South Carolina in the step she was then taking." He added, "He would like to see Federal troops dare attempt the coercion

⁸⁴ Ibid., p. 214.

⁸⁵ Powell, op. cit., p. 399

of a seceding Southern State." The Georgia Convention quickly voted for secession by more than a two to one margin. A disunion conspiracy flourished in Texas and action was precipitated in all of the Slave States some successfully and some not so.

ACT OF SECESSION

<u>STATES</u>	<u>ADOPTED BY LEGISLATURE</u>	<u>YES</u>	<u>NO</u>
Alabama	January 11, 1861	61	39
Arkansas	May 6, 1861	69	1
Florida	January 10, 1861	62	7
Georgia	January 19, 1861	208	89
Louisiana	January 26, 1861	113	17
Mississippi	January 9, 1861	84	15
North Carolina	May 21, 1861	unanimous	
South Carolina	December 20, 1860	unanimous	
Tennessee	June 8, 1861	-----	
Texas	February 1, 1861	166	7
Virginia	April 17, 1861	88	55

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Missouri, Kentucky, Maryland and Delaware failed to pass an Ordinance of Secession, so declared themselves neutral.

On January 21, 1861 Jefferson Davis presented his view on the "Right to Secede" as he withdrew from the United States Senate:

Nullification and secession so often confounded are antagonistic principles. Nullification is a remedy which it is sought to apply within the Union, and against the agent of the States. If it is only to be justified when the agent has violated his constitutional obligation; and a State assuming to judge for itself, denies the right of the agent thus to act, and appeals to the other States of the Union for a decision; but when the States themselves, and when the people of the States have so acted as to convince us that they will not regard our Constitutional rights, then, and for the first time, arises the doctrine of secession in its practical application.

A great man who now reposes with his fathers, and who has been often arraigned for a want of fealty to the Union, advocated the doctrine of nullification because it preserved the Union. It was because his deep-seated attachment to the Union, his determination to find some remedy for existing ills short of severance of the ties which bound South Carolina to the other States, that Mr. Calhoun advocated the doctrine of nullification, which he proclaimed to be peaceful, and to be within the limits of State power; not to disturb the Union, but only to be a means of bringing the agent before the tribunal of the States, for their judgement.

Secession belongs to a different class of remedies. It is to be justified upon the basis that the States are sovereign. There was a time when none denied it. I hope the time may come again when a better comprehension of the theory of our Government and the inalienable rights of the people of the States, will prevent anyone from denying that each State is a sovereign; and thus may reclaim the grants which it has made to any agent whomsoever.⁸⁷

Although the final rush to secession seemed headlong this was not quite the fact. During the "interim period" calculating, experimenting minds had been at work and the fruits of their labors were ripe in 1861!

On February 4, 1861 the Southern Confederacy was formed at Montgomery, Alabama and Jefferson Davis was inaugurated President, February 18. On March 11 the Constitution was adopted.

It clearly appears that the seceding States were not only satisfied with, but deeply attached to, the plan and principles of the Constitution of the United States. The changes in no respect anarchial or revolutionary, were 'explanatory of the well-known intent' of the instrument, or remedial of evils, unanticipated by our forefathers,

⁸⁷ Jefferson Davis, Speech of the "Right to Secede," January 21, 1861, Delivered in U. S. Senate, Virginia Political Pamphlets, Virginia State Library.

which had developed themselves in the practical administration of the Government.....The Confederate Constitution was the embodiment of the State rights and republican construction of our organic law. ⁸⁸

Alexander Stephens said about the new Confederate document, "All the essentials of the old Constitution, which have endeared it to the hearts of the American people, have been preserved and perpetuated. Some changes have been made and some of these I should prefer not to have been made; but ⁸⁹ other important changes meet with my cordial approbation."

The Confederate Constitution's preamble read:

We, the People of the Confederate States, each State acting in its Sovereign and Independent character, in order to form a Permanent Federal Government, establish justice, insure domestic tranquility, and secure the blessings of liberty to ourselves and our prosperity - invoking the favor and guidance of Almighty God - do ordain and establish this Constitution for the Confederate States of America.

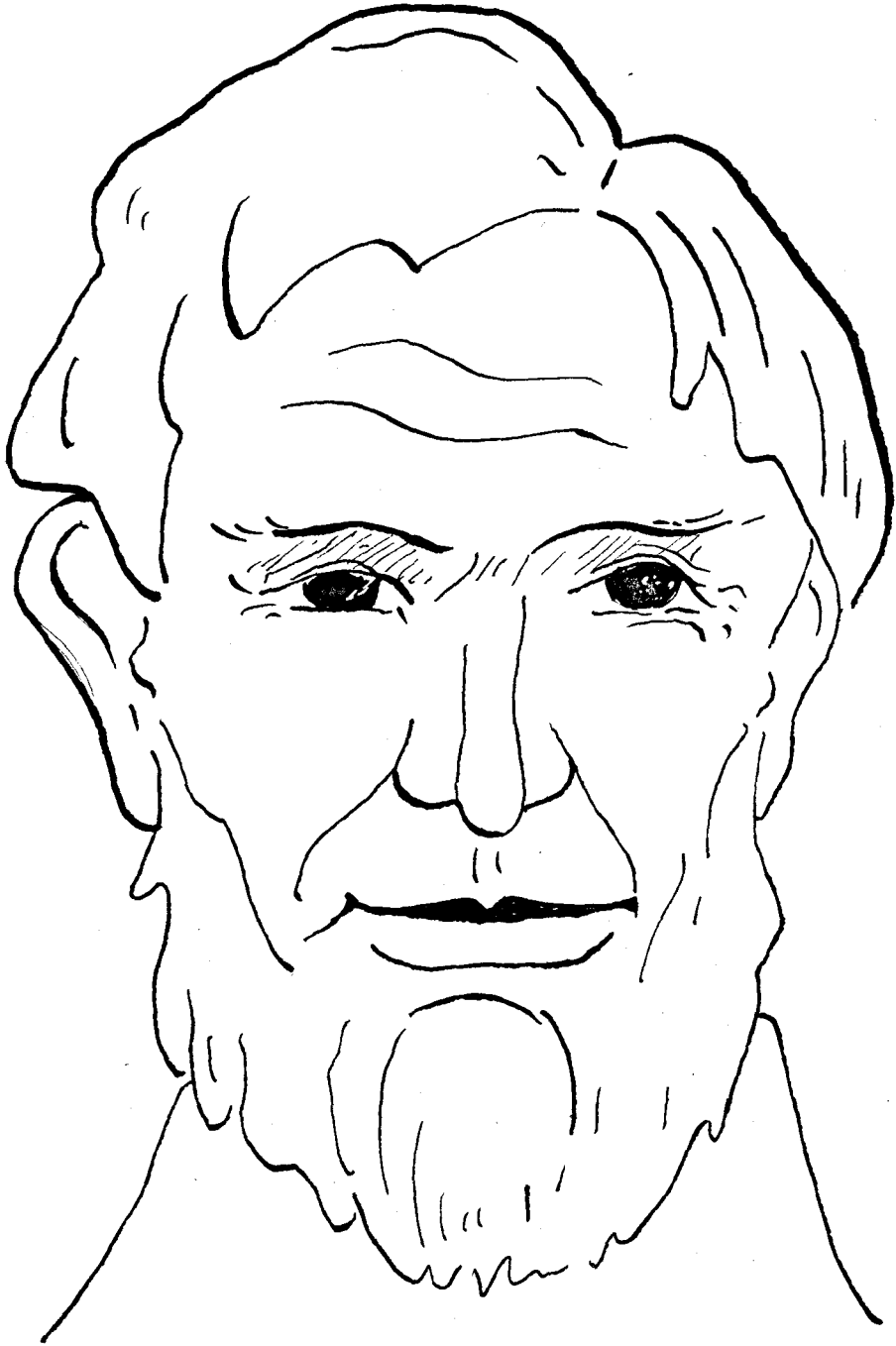
The Confederate government made an illustrative statement when they asked recognition from France, July 2, 1862

Their (United States) first union was formed by a compact of sovereign and independent states upon covenants and conditions expressly stipulated in a written instrument called the Constitution.

In that Union the States constituted the units or integers and were bound to it only because the people of each accorded to it in their separate capacities through the acts of their representatives. That Confederacy was designed to unite under one Government two great and diverse social systems, under the one or the other of which all the States might be classified. As these two social systems were unequally represented in the common Government,

⁸⁸ J. L. M. Curry, The Southern States of the American Union, pp. 198-9.

⁸⁹ Ibid., p. 394



Abraham Lincoln

it was sought to protect one against a warfare which might be urged by the other through the forms of law by careful designed restrictions and limitations upon the power of the majority in the common Government. Without such restrictions and limitations it is known historically that the Union could not have been formed originally. But the dominant majority, which at last proved to be sectional in its character, not only used the machinery of Government which they wielded to plunder the minority through unequal appropriations made for their own benefit; but proceeding from step to step, they waged through the forms of law a war upon the social system of the slaveholding States and threatened, when fully armed with political power, to use the Government itself to disturb the domestic peace of those States. Finding that the covenants and conditions upon which the Union was formed were not only persistently violated, but that the common Government itself, then entirely in the hands of a sectional majority, was to be used for the purpose of warring upon the domestic institution which it was bound by express stipulations to protect, thirteen of the slaveholding States felt it to be due themselves to withdraw from A Union when the conditions upon which it was formed either had been or were certainly to be violated. ⁹⁰

The rebels had launched their ship of state and for four years would battle that of the old Constitution. Manned by a crew of none too unanimous sailors she would be buffeted by abuse both verbal and metallic till brought to an inglorious sinking in 1865. That great captain Lincoln with his Federal crew conned his frigate United States through the waters of the Civil War till she was again Queen of the American Seas and the right of nullification and secession had been proven false

The war came to a close in '65 and the Union was whole once more. Warren wrote:

⁹⁰ Samuel Bunford, Secession and Constitutional Liberty
p. 21.

Who would have thought- strange paradox- in Webster's time, that the combatants who for four years had fought one another in deadly conflict, the very men who stood on the firing line, should be the first to be reconciled? Webster hoped that he might never live to see the sun in heaven shining 'on the broken and dishonored fragments of a once glorious Union, on States dissevered, discordant, and belligerent; on a land rent with civil feuds, drenched it may be in fraternal blood.' But there are men still living who have seen what Webster did not live to see, they have also seen what Webster dreaded to see, the old Union, the Union of our fathers, now knit together by ties stronger than any that have ever bound it since the days of the Revolution. ⁹¹

⁹¹ Warren, op. cit., p. 612

CHAPTER VIII
THE SECOND INTERIM PERIOD

In the period immediately after the Civil War the State of Iowa chanced to run afoul of the National Judiciary in attempting to rule unlawful grants to railroads. The Supreme Court of Iowa disregarded the decisions of the National Court and eventually forced it to backdown. Interposition again shewing its head.

Jonas Mills Bundy wrote in 1870:

If a fair construction of the Consitution which is contrary to our notions of what ought to be, we should still recognize its force in considering what is, the fundamental law of the land. We should, as a matter of course, in endeavoring to ascertain the powers given by the Constitution, throw aside all considerations as to the inconveniences, or even as to the dangers, likely to ensue from any construction to which we may be led in an honest and thorough study of its provisions.

If dangerous powers are given by that instrument, it is certainly matter for deep regret, and the consideration of them would have been proper for the Convention which made, and for the people who ratified it; and we find that both the Convention and the people did consider nearly all of the objections which have since been made to the Constitution. ⁹²

In 1893 Caleb Loring injected new vitality into the old argument, "The Superiority in men and wealth that gave the North the victory did not decide the right or wrong of secession; it may have shown its impracticability; but ⁹³ if the right ever existed it remains today.

⁹² Jonas Mills Bundy, Are We a Nation?

⁹³ Caleb W. Loring, Nullification and Secession, Preface.

Time marched on and the doctrine of States Rights came blandly to the forefront. The South was making a new stand and the 10th Amendment was the rallying point. Yet as James M. Beck wrote, "If the Constitution were submitted tomorrow as an entirety to a referendum, it would be re-adopted by a majority so preponderating as to approach unanimity."⁹⁴

Weight was thrown into the balance on the side of the central government at every turn. Justice Field in the *Tarble's Case* (13 Wall. 397 (1872)) said, "There are within the territorial limits of each State two governments..... The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land.... Whenever therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National Government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This ultimate determination of the conflict by such decision is essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments."⁹⁵

⁹⁴ James M. Beck, The Vanishing Rights of the States, p. 13

⁹⁵ Francis H. Heller, Introduction to American Constitutional Law, pp. 130-131.

In the Virginia v. West Virginia case, 264 U.S. (565) 1918, West Virginia was ordered by the Supreme Court to pay her Civil War damages but stood on her sovereign rights and refused. Later she thought better of her attempt at interposition and complied.

So the country proceeded through the twenties and thirties witnessing an ever-growing centralized government and ever-weakening doctrine of States Rights authority.

Mr. Justice Reed said in the case United Public Workers v. Mitchell, 330 U. S. 75(1947), "The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail."⁹⁶

In the New York vs. United States 326 U.S. 572 (1946) case, Mr. Justice Douglas, with whom Mr. Justice Black concurs, dissents:

⁹⁶ James Hart, An Introduction to Administrative Law
p. 201

The notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system. There will often be vital regional interests represented by no majority in Congress. The Constitution was designed to keep the balance between the States and the nation outside the field of legislative controversy.

The immunity of the States from federal taxation is no less clear because it is implied. The States on entering the Union surrendered some of their sovereignty. It was further curtailed as various Amendments were adopted. The 10th Amendment provides..... The Constitution is a compact between sovereigns. If the power of the Federal government is granted the states are relegated to a more servile status.

CHAPTER IX

INTERPOSITION

On May 17, 1954 the Supreme Court of the United States injected a revitalizing elixir into a "monster" that has plagued this country for generations. On that date the Court ruled against segregation in public schools and simultaneously brought into prominence the race problem, this time with a magnitude of effect, and depth of penetration, not seen since Civil War days. This decision has unearthed such a complex of ambivalent feelings and relationships that no American can turn a deaf ear to their rumblings.

It has been an intrinsic right in the United States system to voice one's opinion on anything and everything pertaining to government. This has been noticeably true in connection with Supreme Court decisions, but it has been decades since such vituperative and blasphemous cries, in a formal manner, have been hurled at the highest judicial authority in the land.

Such formal conduct of States at this level of Republican ascendancy on the shaky staircase of governmental evolution screams of a turpitude this nation can well do without. The words "sovereign," "compact," and "confederation" seem to be meaningless, inappropriate and terminologically inapplicable to this modern United States. The Union is indivisible and consists of forty-eight states, welded into one, each willing to relegate individual differences and desires to the background for the common good. By such an action of unity they



agreed to pledge allegiance to the nation and accept the will of the majority in democratic process. This process provides, directly or indirectly for filling the various offices necessary to the government, as stipulated in the Constitution. Nine of these offices, though not specifically designated, reside at the apex of the judicial structure of the country. Entitled the Supreme Court, as provided for, they are recognized as the paramount, interpretative organ of jurisprudential authority in the country. To that sole Court is the right of final interpretation of the Constitution given, no other body is included in the delegation of this ability.

But is the foregoing true? Certainly in 1898, 1832 and 1860 it would not have been conceded. Has the centralization trend made it so? The Southern States are not ready to accept it.

Members of the Gray Commission in Virginia stated, in regard to the Supreme Court decision May 17, 1954, "It is a matter of the gravest import, not only to those communities where problems of race are serious, but to every community in the land, because this decision transcends the matter of segregation in education. It means that irrespective of precedent, long acquiesced in, the Court can and will change its interpretation of the Constitution at its pleasure, disregarding the orderly processes for its amendment set forth in Article V thereof. It means that the most fundamental of the rights

of the States and of their citizens exist by the Court's sufferance and that the law of the land is whatever the Court may determine it to be by the process of judicial legislation." ⁹⁷

The age-old problem that prompted this paper has cropped up again with the Southern States once more for going to front with a doctrine of "interposition." James F. Byrnes, ex-Supreme Court Justice wrote, "The Supreme Court Must be Curbed," "the trend of the Court is disturbing to millions of Americans who respect the Constitution and believe that in order to preserve the republic we must preserve what is left of the power of the States." ⁹⁸

Many another American seconded this idea of Mr. Byrnes and with the rendering of the decision on May 17 began formulating new doctrine and calling up old. One of the leaders in this movement is Editor J. Kilpatrick of the Richmond News Leader who early in the fall of 1955 began beating the States Rights bushes and screaming the validity of interposition. In the News Leader, November 22 he said,

From the very day of the Supreme Court's opinion in the school segregation cases, the South, in searching for a wise course of action, has been handicapped by a fault that in ordinary time is among our highest virtues: It is our reverence for law and our obedience to constituted authority.

⁹⁷ "Report on the Gray Commission to the Governor of Virginia on Public Education," Commonwealth of Virginia: Division of Purchases and Printing, 1955

⁹⁸ James F. Byrnes, "The Supreme Court Must be Curbed" in U.S. News and World Report, p.58, May 18, 1956

Thus, when the Supreme Court handed down its decision, there was everywhere an agonizing, but automatic acceptance of the courts authority. The decision was wrong we said; it was violative of the Fourteenth Amendment as the amendment had been universal understood for more than 80 years. Yet the Supreme Court had declared that the right to operate racially separate schools was, as of May 17, 1954, a right now "prohibited to the States." And a people too long accustomed to submissiveness agreed that the court, indeed, was "supreme."

What we must ask ourselves as Virginians, as heirs to the philosophical inheritance of Jefferson and Madison, is whether any means exist by which this "process of judicial legislation" may be brought to a pause. If the "most fundamental of the rights of the States and of their citizens" are not to be swept away by judicial encroachment, and the States reduced to the status of mere counties, must we not exert every possible effort to halt the courts in their usurpation of our sovereign powers?

Careful reasoning, we believe, would lead the Gray Commission conducting the study to conclude the right does indeed exist. Ours is a Union formed of sovereign States who voluntarily have surrendered certain of their powers to a central government, and voluntarily have prohibited the exercise of certain powers to themselves. By solemn compact, they have agreed that the rights 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. Thus each of the respective States stands coequal in the compact with every other State; theirs is a joint venture, an agreement among principals; it was only by the consent of the individual States that the Union came into being at all.

If one of the principals has no right to assert an infraction of this agreement who then has the right? If the central government created by the States should usurp powers that might destroy the States, can it be contended that the principals have no right of protest, no right of appeal to their co-equals, to resolve an issue of contested powers? Is it reasonable to believe that the States, like Frankenstein, have created an agency superior to themselves, and that they are utterly powerless to contest their own destruction?

The briefest statement of the hypothesis suggest its absurdity. The right of interposition, as Jefferson and Madison termed it, exists because it has to exist.

Without such a right, the Constitution is a hollow shell; and the "perfect Union" it was intended to insure is disclosed as no Union at all, no joining of respective parts, but rather a single mass, monolithic, a creature more powerful than its creator.⁹⁹

Other newspapers added their voices but in the other direction the Charlotte, (North Carolina) News, said, "interposition has a fetching label and a history full of bluff and bluster. But it represents a futile, inappropriate gesture. Moreover, it is inconsistent with the principles of constitutional government as we know and practice them."

The Christian Science Monitor recorded interposition as "Flimsiest weapon yet grasped by Dixie's most ardent champions of segregation is the 'doctrine of interposition'." It further added "interposition has a seductive appeal for many a southerner today. But as a legal proposition it has no validity. It is an error which has led to trouble in the past and promises nothing better in the future."

An Indianian wrote of Interposition, "The patience of the people of the North with this cold war against the Constitution is exhausted. The acts of the men who the South allow to lead them have made it necessary for both parties to adopt a strong civil rights program and a stern reprimand to the subversive leaders in the South. It will be stronger."

⁹⁹ Richmond News Leader, November 22, 1955.

Let us look for a moment at heated comment and denunciation as it was hurled at the action of the Supreme Court and prompted State legislators to take their overwhelming stand in support of the interposition resolution.

An enthusiastic backer claimed, "We have gone much too far afield under the pressure of propaganda and smart phrases. For too long we have packed our Federal Courts with men taking the oath to defend the Constitution but who, instead, attack the very heart of that great document and amend it by interpretation."¹⁰⁰

An interposition advocate wrote the News Leader, "I think extreme measures call for extreme and unusual reactions and I would like to see the State Legislature pass a resolution and send it to the Supreme Court of the United States to the effect that the State of Virginia respectfully declines to honor its segregation ruling and state its reason."¹⁰¹

Another writer delivered an appeal, "I call upon those 'in authority' (Virginia) to start a movement to propose another amendment to the Constitution. If three-fourths of the States would agree that the powers should be prohibited to the States the Supreme Court, on its own, is trying to prohibit to the States, then so be it. But the people are

¹⁰⁰ Ibid., November 25, 1955

¹⁰¹ Ibid., November 24, 1955

supreme not the Court." With reckless abandon of the fact he continued, "The Supreme Court of the United States has never had the right at any time other than to rule as to whether legislative actions are in accordance with the Constitution. Any action other than this is usurping power they do not possess."¹⁰²

A noted East Virginia lawyer spoke, "I have never thought it possible for this Commonwealth, or the other Southern States, to avoid disaster if they should be compelled to recognize the validity of the Supreme Court's decision of May 17, 1954. From the day of the rendition of this infamous decision, my thought has been concentrated upon devising sound theory upon which State sovereignty and autonomy might be preserved and the power of the State invoked for the purpose of maintaining segregation in the Schools and otherwise."¹⁰³

The Defenders of State Sovereignty and Individual Liberties called on the General Assembly to adopt a resolution of interposition on the school segregation issue. The stand in favor of a move for interposition was taken by the board of directors of the Defenders which represents the state-wide, pro-segregation organization with over 8,000 members. One of its members declared, "Pattern it after the resolutions adopted by the General Assembly in 1798 in opposition to the

¹⁰²Ibid., November 24, 1955

¹⁰³Ibid., November 25, 1955

Alien and Sedition Laws."

Governor Stanley, of Virginia, said in a speech to a joint session in the hall of the House of Delegates on the 30th of November, "Action must be taken to safeguard our rights and maintain an educational system."

The cause of interposition and state sovereignty was upheld staunchly by Editor Tom Waring in the Charleston News and Courier when he said, "The question before our country is wider and deeper than whether white or colored children shall attend the same or separate schools. The question is whether the republic shall continue as it was founded, or change to some other form of government..... The trend is toward central dictatorship at Washington. The Southern States today are sentinels to stop that trend. "

Probably the lengthiest defense and advocacy of interposition appeared in the Editorial section of the News Leader on December 1, 1955, a segment follows: "This usurpation of power by the Federal government has been going on for a long time and our General Assembly has done little to counteract the evil.. But the time has now come when such arrogance by the Federal Government should be stopped dead in its tracks.

Just as the General Assembly, in the days of our

104 Ibid., November 26, 1955

forefathers has held back and annuled, by interposition, the tyrannical arrogated powers of the national government, so now again it has become even more critically necessary to protect our rights by interposition or by other means best suited to the occasion.

The Old Dominion should again point out to the Federal Government its legal sphere of action as limited by the Constitution. Let us all stand up together and for once and all, tear out those tentacles of this national octopus which are strangling the power of our State government contrary to the Bill of Rights of our National Constitution." ¹⁰⁵

Although sympathy as displayed through the newspapers and pamphlets seemd to lend an atmosphere of unanimity to the support rallied behind the interpositionists it cannot be said this held true. Opposition, although mainly individual and widely divergent in geographical origin, was nevertheless present and took the form of denial of interposition both in mild and vehement terms.

In January of 1955 the Interpositionists got their band wagon rolling in earnest and with stately old Virginia leading the way began to formulate concrete doctrine.

Senator Harry C. Stuart of the Virginia General Assembly, chief patron of the Virginia Interposition Bill, readied his work for passage. Senator Stuart said he realized the resolution would not suspend the enforcement of the Supreme

¹⁰⁵ Ibid., December 1, 1955

Court's decision but added "However, I hope the resolution will set in motion a chain of actions that will not only impede the enforcement of it (the decision) in Virginia, but will entirely obliterate the decision in Virginia and elsewhere."

On the 25th, Governor Stanely held a long conference and reviewed the discussion of a Governor's conference held prior in which Mississippi, Georgia, South Carolina and North Carolina participated. All of the Governors had agreed to adopt some type of interposition or protest except North Carolina's. That State's Legislature was not in session.

In Mississippi a House member on the 24th called on States to declare the Supreme Court's ruling "illegal and invalid and of no force and effect" within their borders. Representative John Bell Williams said, "Not only is the question of segregation involved, but also the question whether the court has the right to amend the Constitution and usurp the sovereignties of the 48 States." ¹⁰⁶ In typically 1832 Carolinian fashion Williams maintained on interposition. "The very purpose of interposition is to nullify," he declared. "If that is not to be the purpose, the act of interposition becomes merely an expression of disfavor and is meaningless. Interposition is the act by which a State attempts to Nullify." ¹⁰⁷

¹⁰⁶ Richmond Times Dispatch, January 25, 1955

¹⁰⁷ Ibid.,

Georgia moved swiftly into the fray and prepared an interposition resolution and Governor George Bell Timmerman, Jr. announced on the 25th that he would soon advise the General Assembly of South Carolina on its part in combatting the decision.

On the 31st South Carolina was introduced to its interposition resolution and from the approval seen it seemed certain to undergo rapid acceptance. Timmerman, in a personally delivered message, said the resolution "represents the studious thought and deliberate work of the men who have provided sound advice and wise leadership in this crisis." He added, "I recommend its adoption so that we may take our firm place with our sister States in performing our duty to uphold and defend constitutional government."¹⁰⁸

The 31st saw the Virginia General Assembly readying itself for the launching of full scale debate on the first resolution of its kind to come out of the legislative chambers of the Old Dominion State in many decades. At that time there were 35 Senate patrons and 93 House backers, assuring passage of a resolution."¹⁰⁹

Unanimity seemed practically a reality in the Virginia Legislature as the deadline for passage drew near. With the

¹⁰⁸ Ibid., January 31, 1955

¹⁰⁹ Richmond News Leader, January 31, 1955

swaying of a few hard-to-influence skeptics notably Delegate Robert Whitehead, Senator Ted Dalton, who saw in it traces of dreaded nullification and one hundred per cent backing would have been assured.

Editor James Kilpatrick said of the Assembly's work—
 "This resolution is more than a mere protest. It is more than a mere memorial to Congress."

"This is a solemn statement of policy on the part of the General Assembly as the supreme lawmaking body of this Commonwealth. It is an assertion of certain beliefs and convictions. It enunciates a broad course of action to be taken in the future."

"By this resolution, the State of Virginia makes a charge against the Supreme Court of the United States that the court has violated the Constitution by 'deliberate, palpable and dangerous encroachment' upon the reserved powers of the States. It is not a charge to be taken lightly."¹¹⁰

On the first of February both houses of the Virginia General Assembly opened debate of the Interposition Resolution. With 95 House and 35 Senate patrons ready to vote approval of the bill seemed assured. Representative Boatwright, chief patron of the administration backed bill, said, "the Federal Constitution plainly reserves to the States all powers not

¹¹⁰ Ibid, Editorial.

specifically delegated to the central government- including the power to regulate their own schools on a racial basis. He asserted: "The judicial branch of the government has undertaken to amend the Constitution, something it has no right to do."

In the Senate chamber of the Virginia body Ted Dalton a forward opponent of the resolution offered a substitute bill but it was ruled out of order. ¹¹¹ Following repeated assertions, made during a debate which lasted two hours and 36 minutes that the step would be only a protest, not an effort to nullify, the Senate voted to interpose the sovereignty of the State between its citizens and the effects of the Supreme Court decision by a vote of 36 to 2. At 4:15 p.m. the House of Delegates completed what several members described as a significant page in State and national history- in passage of the interposition resolution by a vote of 90-5. ¹¹²

House Joint Resolution No. 30 or Senate Resolution No. 3 as was finally adopted is in its entirety as follows:

Be it resolved by the Senate of Virginia, the House of Delegates concurring, (vice versa in other resolution)

That the General Assembly of Virginia expresses its firm resolution to maintain and to defend the Constitution, of the United States, and the Constitution of this State, against every attempt, whether foreign or domestic, to undermine the dual structure of this Union, and to destroy

¹¹¹ Ibid., February 1, 1956

¹¹² Richmond Times Dispatch, February 2, 1956

those fundamental principles embodied in our basic law, by which the delegated powers of the Federal government and the reserved powers of the respective States have long been protected and assured;

That this Assembly explicitly declares that the powers of the Federal Government result solely from the compact to which the States are parties, and that the powers of the Federal Government, in all of its branches and agencies, are limited by the terms of the instrument creating the compact, and by the plain sense and intention of its provisions;

That the terms of this basic compact, and its plain sense and intention, apparent upon the face of the instrument, are that the ratifying States, parties thereto, have agreed voluntarily to delegate certain of their sovereign powers, but only those sovereign powers specifically enumerated, to a Federal Government thus constituted; and that all 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;

That this basic compact may be validly amended in one way, and in one way only, and that is by ratification of a proposed amendment by the legislatures of not fewer than three-fourths of the States, pursuant to Article V of the Constitution and that the judicial power extended to the Supreme Court of the United States to "all cases in law and equity arising under this Constitution" vested no authority in the court in effect to amend the Constitution;

That by its decision of May 17, 1954, in the school cases, the Supreme Court of the United States placed upon the Constitution an interpretation, having the effect of an amendment thereto, which interpretation Virginia emphatically disapproves;

That the State of Virginia did not agree, in ratifying the Fourteenth Amendment, nor did other States ratifying the Fourteenth Amendment agree, that the power to operate racially separate schools was to be prohibited to them thereby and as evidence of such understanding of the terms of the amendment, and its plain sense and intention, the General Assembly of Virginia notes that the very Congress which proposed the Fourteenth Amendment for ratification established separate schools in the District of Columbia; further, the Assembly notes that in many instances, the same State Legislatures that ratified the Fourteenth Amendment also provided for systems of separate public

schools; and still further, the Assembly notes that both State and Federal courts, without any exception, recognized and approved this clear understanding over a long period of years and held repeatedly that the power to operate such schools was, indeed, a power reserved to the States to exercise "without intervention of the Federal Courts under the Federal Constitution;" the Assembly submits that it relied upon this understanding in establishing and developing, at great sacrifice on the part of the citizens of Virginia, a school system that would not have been established and developed had the understanding been otherwise; and this Assembly submits that this legislative history and long judicial construction entitle it still to believe that the power to operate separate schools, provided only that such schools are substantially equal, is a power reserved to this State until the power be prohibited to the States by clear amendment of the Constitution;

That with the Supreme Court's decision aforesaid and this resolution by the General Assembly of Virginia, a question of contested power has arisen: The court asserts, for its part, that the States, did, in fact, in 1868, prohibit unto themselves, by means of the Fourteenth Amendment, the power to maintain racially separate public schools, which power certain of the States have exercised daily for more than 80 years; the State of Virginia, for its part, asserts that it has never surrendered such power;

That this declaration upon the part of the Supreme Court of the United States constitutes a deliberate, palpable, and dangerous attempt by the court itself to usurp the amendatory power that lies solely with not fewer than three-fourths of the States;

That the General Assembly of Virginia, mindful of the resolution it adopted on December 21, 1798, and cognizant of similar resolutions adopted on like occasions in other States, both North and South, again asserts this fundamental principle: That whenever the Federal Government attempts the deliberate, palpable, and dangerous exercise of powers not granted it, the States who are parties to the compact have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for preserving the authorities, rights and liberties appertaining to them;

That failure on the part of this State thus to assert its clearly reserved powers would be construed as tacit consent to the surrender thereof; and that such submissive acquiescence to palpable, deliberate and dangerous encroachments upon one power would in the end lead to the surrender of all powers, and inevitably to the obliteration

of the sovereignty of the States, contrary to the sacred compact by which this Union of States was created:

That in times past, Virginia has remained silent- we have remained silent too long!- against interpretations and constructions placed upon the Constitution which seemed to many of the citizens of Virginia palpable encroachments upon the reserved powers of the States and willful usurpation of powers never delegated to our Federal Government; we have watched with growing concern as the power delegated to the Congress to regulate commerce among the several States has been stretched into a power to control local enterprises remote from interstate commerce; we have witnessed with disquietude the advancing tendency to read into a power to lay taxes for the general welfare a power to confiscate the earnings of our people for purposes unrelated to the general welfare as we conceive it; we have been dismayed at judicial decrees permitting private property to be taken for uses that plainly are not public uses; we are disturbed at the effort now afoot to distort the power to provide for the common defense, by some Fabian alchemy, into a power to build local schoolhouses;

That Virginia, anxiously concerned at this massive expansion of central authority nevertheless has reserved its right to interpose against the progress of these evils in the hope that time would ameliorate the transgressions; now, however, in a matter so gravely affecting this State's most vital public institutions, Virginia can remain silent no longer; Recognizing, as this Assembly does, the prospect of incalculable harm to the public schools of this State and the disruption of the education of her children, Virginia is in duty bound to interpose against these most serious consequences, and earnestly to challenge the usurped authority that would inflict them upon her citizens.

THEREFORE, the General Assembly of Virginia, invoking that Divine Guidance impleaded by her people on July 4, 1776, when first they declared themselves a Free and Independent State, appeals now to her sister States for that decision which only they are qualified under our mutual compact to make, respectfully requests them to join her in making proper application to the Congress, which application is made on Virginia's part hereby, for the purpose of calling a convention, pursuant to Article V of the Constitution, which convention would consider and propose an amendment designed to settle the issue of contested power here asserted.

And be it finally resolved, that until the question

here asserted by the State of Virginia be settled by clear Constitutional amendment, we pledge our firm intention to take all appropriate measures honorably, legally and constitutionally available to us, to resist this illegal encroachment upon our sovereign powers and to urge upon our sister States, whose authority over their own most cherished powers may next be imperiled, their prompt and deliberate efforts to check this and further encroachment by the Supreme Court, through judicial legislation, upon the reserved powers of the States. 113

After passage Governor Stanley signed the resolution and transmitted copies to President Eisenhower, Virginia's Congressmen and Senators, the Governors of the 47 other states, the United States Supreme Court and to the clerks of the House of Representatives and the Senate.

In a letter to the State Governors, Stanley said, "Your careful consideration is invited to the resolution which was adopted by the overwhelming vote of the two houses of the General Assembly. The Commonwealth of Virginia hopes sincerely that her sister States will join in this effort to safeguard the rights of the States and preserve our cherished constitutional system."

Here was a document that called up theory that dated back to the Virginia-Kentucky Resolutions of '98 and '99 giving the Virginia legislators an opportunity to expound in the feeling and manner of their forefathers who had framed the highly similar works nearly 158 years before.

113 Virginia General Assembly Senate Resolution No.3
Commonwealth of Virginia: Division of Purchases and Printing
1956.

Alabama entered the lists with a resolution that called the Supreme Court's decision "null and void."

Senator Harry Byrd, Virginia's United States Senator and leader of the State Democratic Party, termed the General Assembly's adoption of the resolution as "a very wise and proper action" in which he hoped other States would join. Byrd was very much gratified at the large majority and said that he would insert the resolution in the proceedings of the Senate and the Congressional Record. He also stated that he expected Senator George of Georgia would call a meeting of the Southern Senators soon to act jointly in support of the plan of interposition.

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On February 7th Governor Adlai Stevenson, when asked his views on Interposition, said, "I don't understand interposition. It sounds like nullification to me. I cannot express an opinion of what the Supreme Court might do to test interposition...." "But I doubt whether interposition can ever work."

115

On February 10th South Carolina joined the ranks of Alabama, Georgia and Virginia in promulgating an interposition resolution. It expressed the intention to use "all powers reserved to it to protect its sovereignty and the rights of its people."

116

Georgia's Resolution of Interposition, passed 179-1 in

114 Richmond News Leader, February 2, 1956

115 Ibid., February 8, 1956

116 Richmond Times Dispatch, February, 10, 1956

the House, as quoted in the New York Times, February 11, 1956 is presented as an interesting comparison to Virginia's and as an example of the legislation emanating from that historic stronghold of sovereignty:

(1) The powers of the Federal Government flow from and are limited by "the compact (the Constitution of 1787 and its amendments) to which the states are parties"; but are also limited by the "plain sense and intention" of that Constitution.

(2) Federal powers are confined to those specifically enumerated, and not prohibited to the states, in the national charter and in amendments "validly adopted and ratified".

(3) The "assertion by the Supreme Court" of constitutional authority to invalidate this form of control of education by the states, "accompanied by threats of coercion and compulsion against (them), constitutes a deliberate, palpable and dangerous attempt to prohibit to the states certain rights and powers never surrendered by them."

(4) Therefore, the states, "who are parties to the compact (the Constitution as amended) have the right, and are in duty bound, to interpose for arresting the progress of evil, and for maintaining in their separate limits the authorities, rights and liberties appertaining to them. "Failure by Georgia to "interpose" would be construed as acquiescence, and the surrender of one state right "would lead to the surrender of all."

(5) The question of contested power raised in the Georgia resolution "is not within the province of the Supreme Court to determine." The judgment of all the states in the "compact" must be that determination (by ratification or rejection of a constitutional amendment forbidding separated state public schools). The Supreme Court had no jurisdiction to review or even "to hear" the desegregation cases.

(6) Its jurisdiction is limited to cases in law and equity, whereas the subjects of this controversy are of a legislative not a judiciary, character." Only the people themselves, speaking through their state legislatures, have this jurisdiction. The desegregation suits were, essentially, "brought by individuals against states," and the Constitution forbids the court to

entertain such suits unless the state consents. And even if the Supreme Court had jurisdiction, control of education is reserved among the enumerated powers of the Federal Government nor prohibited to the states in the Constitution.

(7) If the Supreme Court were to be granted the power to hold a state law unconstitutional on the test of "inexact and speculative theories of psychological knowledge,"¹¹⁷ and because of the opinions of the judges as to its suitability," the Union will have "ceased to exist," and the Supreme Court will have "constituted itself, without jurisdiction or authority from the people, one central government of total power."

(8) Georgia alone has the responsibility to "protect life, property and the priceless possession of freedom" within its borders. Therefore, in this instance it is the duty of Georgia to "interpose." Hence the legislature "declares" the desegregation decision and decree "null and void"; and urges other states to "firm and deliberate efforts" toward the same end. 117

Virginia's Attorney General J. Lindsay Almond Jr predicted in a speech that the North would join the South in the Interposition movement. He felt that the Northern States would realize that the issue "transcended implications of race" and at its core was the individual sovereignty of the States. He said, "Virginia will never yield in its fight to preserve its integrity and its existence." On his own position he said, "I have never defied the Constitution, but I have defied the defiers of the Constitution."¹¹⁸

Attorney General Almond issued what is probably the final word on the present Interposition stand in answering the following questions of Virginia Delegate Robert Whitehead:

¹¹⁷ Georgia Interposition Resolution as quoted in the New York Times, February 12, 1956.

¹¹⁸ Richmond Times Dispatch, February 17, 1956

"1. Until there is settled the 'issue of contested power' referred to in the resolution, is the decision of the Supreme Court of the United States in the Prince Edward County School case the law in Virginia?"

Under our constitutionally ordained system of government, forming as it does an "indissoluble union of indestructible states," I draw and adhere to a basic and fundamental distinction between that which issues from and under the authority of the Constitution and that which is created through usurped power under the pretended color of but ultra vires of the Constitution. That authorized by the Constitution is de jure law and binding. That not authorized is de facto law and binding only through the sheer force of power. As to the latter, this is true solely because there is no method or procedure known to our system of government whereby an appeal can be taken by the parties aggrieved which would stay the binding effect of holding the decision in abeyance pending determination of the issues raised.

Law, whether statutory or decisional, as conceived and instituted under our Federal system of conferred and limited powers must emanate from, find lodgment in, and be supported by a basic constitutional source. The Federal government is a creature of the creating States endowed with no powers beyond those voluntarily conferred by compact mutual between its creators. It cannot create additional powers save through violation of the organic law.

The decision to which you refer is devoid of constitutional derivation or support. As herein above pointed out, it is presently binding by virtue of superior force shackled upon a sovereign State through usurpation of authority and arrogation of power transcending the Constitution of the United States, and in abnegation of every apposite legal precedent known to American Jurisprudence. It violates the amendatory processes of the Constitution prescribed by Article V thereof in that it, in effect, amends the XIV Amendment and, pro tanto, repeals the Xth.

The elected legislative representatives of a sovereign people have raised an "issue of contested power" arising as the result of "a deliberate, palpable and dangerous" usurpation of the amendatory power explicitly embodied in the Constitution. Pending determination of the issue in the manner prescribed by the Constitution the sovereignty of the State is interposed to the extent of a pledge of "firm intention to take all appropriate measures honorably, legally and constitutionally available" to

resist an encroachment violative of the Constitution and therefore illegal.

The resolution is not one of nullification. Its plain terms negate the concept of nullification. The court embraced that doctrine in its most far-reaching implications when it nullified basic provisions of the Constitution of the United States. The resolution is one of interposition processes for relief.

"2. Does this resolution operate to legally suspend, in whole or in part, within Virginia the enforcement of the said decision, and can it be used in the Federal District Court of Virginia in which the Prince Edward case is now pending as a defense?"

The resolution does not purport to operate as a suspension of or supersedeas to the decision as it relates to the defendants in the Federal District Court.

This resolution cannot be asserted as a defense in the pending case. The District Court is bound by the mandate which issued on May 31, 1955. The decision of the Supreme Court and its mandate is the law of the case as far as the District Court is concerned. However, the resolution is an unequivocal epitome of Virginia's unyielding devotion and loyalty to the perpetuation of that constitutional system of government which, more than any other State, she molded and launched in the formation of the Union and the building of an enduring foundation to support the superstructure of the nation. It is predicted on principles woven ineradicably into the very fabric of the nation's life. It represents the overwhelming solidarity of a great people in their attachment of heart, mind and conscience to deep rooted convictions which they cannot compromise. It is indisputable evidence of the supreme gravity of the manifold problems created by the Supreme Court far transcending considerations of race.

While this resolution cannot be asserted as a defense, its solemnity, gravity, and patriotism of purpose should give pause and invoke deliberate consideration at the hands of every branch of the Federal government dedicated to a Union indissoluble composed of indestructible states.

"3. What duty, if any, does this resolution impose upon the officials of Virginia and the local officials, especially the local school boards and the division superintendents of schools?"

The Maintenance of the public school system is a joint State and local responsibility, both under the Constitution and by statutes. It is the primary responsibility and well within the province of the General Assembly to establish policy, consistent with the Constitution, relating to same, and to change that policy when it deems the public interest so requires.

The resolution is not a legislative enactment having the force and effect of law. It is a solemn and deliberate declaration of right, impelled by the sacred obligation of duty, asserting and interposing the sovereignty of the State to arrest illegal encroachments and to preserve "the authorities, rights and liberties" which Virginia has never surrendered, and which she cannot in honor and duty surrender save only in the manner prescribed by the Federal Constitution. Deprivation or loss of these rights can be brought about in no other manner except through usurpation of authority and arrogation of power by the Federal government, or by abject surrender or acquiescence by this State or its cohesive governmental units. The resolution manifests a firm determination to resort to constitutional means, thereby rejecting surrender or acquiescence. Representing the all but unanimous resolve of the elected representatives of the people, it imposes upon all officials, State and local, the duty to observe "all appropriate measures honorably, legally and constitutionally available to resist this illegal encroachment upon the sovereign powers of this State."

"4. Is Section 140 of the Virginia Constitution (prohibiting the teaching together of white and colored children in the public schools of Virginia) still law in Virginia?"

On May 31, 1955, the Supreme Court rendered its so-called implementation decision and remanded the cause of the District Court.

The opinion of May 17, 1954, declared "that racial discrimination in public education is unconstitutional." The court further declared that separation of the races as alleged as per se discrimination.

The opinion of May 31 incorporated by reference the opinion of May 17 and declared: "All provisions of Federal State or local law requiring or permitting such discrimination must yield to this principle."

The order entered by the District Court, in response to the mandate, on July 18, 1955, adjudged, ordered declared

and decreed:

"That insofar as they direct that white and colored persons, solely on account of their race or color, shall not be taught in the same schools, neither said Section 140, Constitution of Virginia of 1902, as amended, nor said Section 22-221, Code of Virginia of 1950, as amended, shall be enforced by the defendants, because the provisions of said sections are in violation of the clauses of the Fourteenth Amendment to the Constitution of the United States forbidding any State to deny to any persons within its jurisdiction the equal protection of the laws."

While by force of power Section 140 of the Constitution is declared by the Federal Courts to be unenforceable, yet, without any constitutional provision relating to the subject of mixed schools, there is, of course, no requirement that integrated schools be operated by any political subdivision of the State.

"5. Aside from being a stern protest and a memorial for the adoption of an amendment to the Federal Constitution what effect in law, if any, does the said resolution have on the legal situation in Virginia presented by said decision?"

The substance of this question is answered under 1 and 2 above.

The implications of this question tend to minimize the purport and gravity of the resolution. I do not subscribe to these implications.

The resolution is far more than a "stern protest and memorial." It does not seek to accomplish that which is merely desirable. It does not inveigh against an erroneous action. It calls for no redress for any imposition laid under express or implied constitutional sanction. These and kindred situations would comport with the office and function of a resolution of protest (stern or not) and a memorial to the legislative or executive branch of the Federal Government to take corrective action by establishing or changing a policy or by enacting, repealing or amending substantive laws.

The resolution under consideration is a declaration of right invoking and interposing the sovereignty of the State against the exercise of powers seized in defiance of the creating impact; powers never surrendered by the remotest implication but expressly reserved and vitally essential to the separate and independent autonomy of the States.

It is an appeal of last resort against a deliberate and palpable encroachment transgressing the Constitution.

"6. Is it within the powers of (a) the General Assembly of Virginia by resolution, or (b) the people of Virginia in conventions assembled by ordinance, to legally nullify, in whole or in part, the said decision, or to thereby suspend for any period of time its enforcement in Virginia?"

(a) No. (b) No.

"7. In the report of the Gray Commission there is no reference to 'State interposition' or 'nullification'. Was this doctrine presented to the Commission by your office, or by any other source to your knowledge, as a possible defense to the enforcement of said decision in Virginia or as a possible solution of the problem created by said decision?"

No. As far as my knowledge goes this doctrine was not considered by the commission. 119

Action in the Senate and House of Representatives of the United States was precipitated when Senator George of Georgia appointed Senator Russell, Georgia, Senator Ervin, North Carolina, and Senator Stennis, Mississippi to study the entire problem of the Supreme Court's decision.

Senator Ervin sought immediate remedy and said:

The Constitution of the United States was written to establish an indissoluble union of indestructible States. We must ascertain whether it is possible to keep the States from being destroyed.

As a former judge, I know that for many years the Supreme Court has been nullifying the rules of procedure and has made it very difficult for the States to enforce their own laws.

119 Attorney General J. Lindsay Almond, Letter to Delegate Robert Whitehead, Richmond News Leader, February 14, 1956

If the written Constitution can be changed every time pressure brought, we have no security.

Senator Stennis Said:

It is highly important that we have a unified action and I favor action as strong and firm as possible.¹²⁰

Various sources urged implementation of Interposition by a conference of Governors, action in the United States Congress and a host of other ways.

On the 24th of February Senator Byrd called for massive resistance to the decision.

Byrd made it clear in an interview he is not advocating or condoning violence in opposing enforcement of the order but said he wants Southern States to stand together in declaring the court's opinion unconstitutional.

If we can organize the Southern States for massive resistance to this order I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South, he said.

In interposition, the South has a perfectly legal means of appeal from the Supreme Court's order.

Interposition is a doctrine under which some students of constitutional government have contended that the States could refuse to implement within their own confines a Supreme Court decision they felt did not comply with the Constitution. Virginia's General Assembly and the Legislatures of some of the other Southern States have already passed resolutions of this type.¹²¹

On March 6, the Constitutional Convention of Virginia, called to amend Section 141 of the Old Dominion's Constitution, saw its powerful Privileges and Elections committee adopt the

¹²⁰ Richmond Times Dispatch, February 8, 1956

¹²¹ Ibid., February, 26, 1956



Assembly Interposition Resolution by a vote of 7-3. From there it was sent to the Convention proper and was overwhelmingly accepted 35-3.
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On March 10, nineteen Senators and 77 Representatives all from the South, pledged to exercise every "lawful means" to reverse the Supreme Court ruling against school segregation. Their resistance came in the form of a Manifesto representing the feeling of the eleven States from whom the Congressmen came. Its text is as follows:

The unwarranted decision of the Supreme Court in the public school cases is now bearing fruit always produced when men substitute naked power for established law.

The founding fathers gave us a Constitution of checks and balances because they realized the inescapable lesson of history that no man or group of men can be safely entrusted with unlimited power. They framed this Constitution with its provisions for change by amendment in order to secure the fundamentals of government against the dangers of temporary popular passion or the personal predilections of public office holders.

We regard the decision of the Supreme Court in the school cases as a clear abuse of judicial power. It climaxes a trend in the Federal judiciary undertaking to legislate, in derogation of the authority of Congress, and to encroach upon the reserved rights of the States and the people.

The original Constitution does not mention education. Neither does the Fourteenth Amendment nor any other amendment. The debates preceding the submission of the Fourteenth Amendment clearly show that there was no intent that it should affect the systems of education maintained by the States.

The very Congress which proposed the amendment subsequently provided for segregated schools in the District of Columbia.

When the amendment was adopted in 1868, there were 37 States of the Union. Every one of the 26 States that had any substantial racial differences among its people either approved the operation of segregated schools already in existence or subsequently established such schools by action of the same law-making body which considered the Fourteenth Amendment.

As admitted by the Supreme Court in the public school case (*Brown v. Board of Education*), the doctrine of separate but equal schools "apparently originated in *Roberts v. City of Boston...*(1849), upholding school segregation against attack as being violative of a State constitutional guarantee of equality." This constitutional doctrine began in the North- not in the South, and it was followed not only in Massachusetts, but in Connecticut, New York, Illinois, Indiana, Michigan, Minnesota, New Jersey, Ohio, Pennsylvania and other northern States, until they, exercising their rights as States through the constitutional processes of local self-government, changed their school systems.

In the case of *Plessy v. Ferguson* in 1896, the Supreme Court expressly declared that under the Fourteenth Amendment no person was denied any of his rights if the States provided separate but equal public facilities. This decision has been followed in many other cases. It is notable that the Supreme Court, speaking through Chief Justice Taft, a former President of the United States, unanimously declared in 1927 in *Lum v. Rice* that the "Separate but equal" principle is "....within the discretion of the State in regulating its public schools and does not conflict with the fourteenth amendment."

This interpretation, restated time and again, became a part of the life of the people of many of the States and confirmed their habits, customs, traditions and way of life. It is founded on elemental humanity and common sense, for parents should not be deprived by government of the right to direct the lives and education of their own children.

Though there has been no constitutional amendment or act of Congress changing this established legal principle almost a century old, the Supreme Court of the United States, with no legal basis for such action, undertook to exercise their naked judicial power and substituted

their personal political and social ideas for the established law of the land.

This unwarranted exercise of power by the court, contrary to the Constitution, is creating chaos and confusion, in the States principally affected. It is destroying the amicable relations between the white and Negro races that have been created through 90 years of patient effort by the good people of both races. It has planted hatred and suspicion where there has been heretofore friendship and understanding.....¹²³

The Manifesto was read in Congress and received widely differing response. Some said it "encouraged mob rule and lawlessness others that it was 'absurd'." Senator Kefauver said he "didn't agree with it." Senator Morse dared the Southerners to present an amendment and Senator McNamara from Michigan charged the signers with "subversion" though not outright sedition. President Eisenhower drew a distinction between "defiance of the court," as suggested by a reporter from the American Broadcasting Company, and legal efforts to overcome the court's segregation decree, as advocated by the Southern members of Congress. He declared that the Constitution, as interpreted by the Supreme Court, is our basic law. Then he continued: "The one thing is, though, the basic law appears to change, as I pointed out last week. It was one thing in 1896, and it is a very, greatly different thing now."¹²⁴

¹²³ Richmond News Leader, March 11, 1956

¹²⁴ Ibid., March 24, 1956

Another forward step had been taken by this current attempt at Interposition but what will be the next? Will nullification follow, non-compliance with Federal wishes, complete refusal. Southern leaders refuse to answer or don't know, opponents claim they'll be forced to yield, but what will happen. Governor Stanley said, "I think the chips will fall where they may." That seems to present the general consensus opinion today. Wait and see. As the Christian Science Monitor stated: "The door is still open for the gradual solution of the problem through the interplay of political forces within the boundaries of law and order. At least for the moment, all concerned have pulled back from resort to violence."¹²⁵

If a peaceful solution is reached in an intelligent way it will be another feather in the cap of the United States. John Perkins said in The Saturday Review: "the only restraint upon government so conceived as our own when it disregards the conditions of freedom and freedom itself is the self-restraint of an understanding citizenry. Vigilance and service from each of us are essential if the blessings of freedom and liberty are to survive."¹²⁶

Whether this means Interposition is for each of us

¹²⁵ Christian Science Monitor, March 14, 1956

¹²⁶ John Perkins, "Washington, A Birthday Reminder" in The Saturday Review, p. 32, February 26, 1956.

to decide in his own mind, with the aid of God and a calm reflection on what history, as here related, has shown us.

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