NULLIFICATION, SECESSION WEBSTER'S ARGUMENT

AND

THE KENTUCKY AND VIRGINIA RESOLUTIONS

CONSIDERED IN REFERENCE TO THE CONSTITUTION AND HISTORICALLY

BY

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PREFACE.

I WAS much shocked a few years ago, in reading a Life of Webster, by the statement of its able and distinguished author that really Hayne had the right of the argument in the renowned debate on nullification. In reply I prepared a statement of Webster's argument. Besides what Webster had so ably said, I found in the Constitution itself other proofs of the nationality of our government, of the intent of those who made it to establish a nation, of their full belief that they had done so, and that, historically, there was no contention as to this.

The vital question is whether a national union was established by the States, or a confederacy of independent nations formed with the right of each to decide upon the validity of the acts of the General Government and leave it at its pleasure.

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 if the right ever existed it remains to-day.

There are many authors who have at great length discussed this matter on the side of the

South, but the case of the North, it seems to me, has not been fully set forth. The idea appears to be creeping into history, a recent fad of some Northern writers and commentators, that the nationality of our government was a question from its inception, and that the United States Judiciary and Congress by assumptions have largely extended its powers.

The nation, as Pallas Athene full grown and armed from the brain of Zeus, sprang to life from the Constitution with the sovereign authority necessary for its existence and the power to enforce its rule. In the beginning there was no debate, no question of its nationality. The early commentators on the Constitution (and Story wrote three volumes upon that matter) did not even mention that there was a doubt of it.

To those who so often quote the Kentucky resolutions, it will perhaps be a matter of surprise to learn that their purport and existence were forgotten from the time they were promulgated until South Carolina's threat in 1830 of nullification.

That Virginian of Virginians, Patrick Henry, who so strenuously opposed his State's adoption of the Constitution, struck the keynote, when he objected that it was "We, the people, and not "We the States," that made the government. Later, when convinced of the wisdom of the adoption, and Virginia had shown by its resolutions its objections to the Alien and Sedi-

tion laws, and discontent at the rule of John Adams and the Federalists, he no less forcibly declared that Virginia *owed* an obedience to the laws of the United States.

It will be new to many that the Virginia resolutions do not in the least countenance the doctrine of secession and nullification : that the resolutions and explanations of them by the Virginia Legislature testify to an attachment and love of the Union, and a professed intent to strengthen and perpetuate it, and are, as they declare, only a protest against the assumption by the government of undelegated power.

In the belief that the right and might both prevailed in our civil war, and in full trust in that faith, these remarks are submitted to the people of our whole country.

CALEB WILLIAM LORING.

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NULLIFICATION, SECESSION, WEBSTER.

CHAPTER I.

WEBSTER AND HAYNE.

In the renewed friendly relations at the dinner-table and in the lecture-room, the North of late has had the pleasure of listening to the speeches and discourses of Southern orators, soldiers, and politicians, who, while asserting their loyalty to the Union, claim that that Union was a compact between independent sovereign States, from which each of these independent sovereign States had an undoubted right to secede; our Southern brethren, beaten in the trial of arms, persistently insist that they fought for the right.

Besides Jefferson Davis' *History of the Confederacy*, as bitter to some of its generals as to the North, the Vice-President of that government, of high repute for ability and reasoning powers, Alexander H. Stephens, published two ponderous volumes to prove not only that the

South could secede, but that it was obligatory, if it wished to retain its equality and freedom, alleging as the principal reason the wrongful infringement of the right of the South to take its "peculiar property," slaves, into all the territories of the Union, the common property of all the States. Recently was published Semmes' *Career of the Sumter and Alabama*, abusive of the Yankee and of Northern friends like Buchanan, insisting on the justice and necessity of secession, and asserting the tyranny and mean oppression of the North. We have had also a republication of Governor Tazewell's *Review of President Jackson's Proclamation against Nullification;* and generally the dedication of statues and decorating of the graves of the soldiers of the Confederacy have been taken as occasions to show the justice of the lost cause.

It is to be hoped that few agree with General Early's declamation at Winchester as to those of the South who changed their opinion as to secession: "The Confederate who has deserted since the war is infinitely worse than the one who deserted during the war."

The same opinion as to the right of secession has been very generally held by British politicians; and that opinion to a great extent prevailed, and to-day prevails, in the English army and navy. Mr. John Morley, in his life of Burke, in reference to Burke's speeches denouncing the conduct of Great Britain towards

us as colonies, says that "the current of opinion was then precisely similar in England in the struggle to which the United States owed its existence, as in the great civil war between the Northern and Southern States of the American Union"; "people in England convinced themselves, some after careful examination, others on hearsay, that the South had a right to secede."

Lord Coleridge, who served as one of the British commissioners in the Geneva arbitration, in an address recently delivered at Exeter on Sir Stafford Northcote, says:

"I have myself seen that most distinguished man, Charles Francis Adams, subjected in society to treatment which, if he had resented it, might have seriously imperilled the relations of the two countries. . . . But in this critical state of things, in and out of Parliament, Mr. Disraeli and Sir Stafford Northcote on one side, and the Duke of Argyll and Sir George Cornewall Lewis on the other, mainly contributed to keep this country neutral, and to save us from the serious mistake of taking part with the South."

Even Mr. Bryce, a most learned author, whose opinion in this matter has great weight, intimates that the seceding States legally may have been right.[1]

[1] Bryce's *American Commonwealth*, vol. i., pages 409 and *seq.* Yet Mr. Bryce's whole work is in accordance with the theory he asserts at the beginning of chapter iv., vol. 1, page 29: "The acceptance of the Constitution of 1789 made the American people a nation. It turned what had been a league of States into a Federal State by giving it a National Government with a direct authority over all citizens."

Lord Wolseley, in his article in *Macmillan's Magazine* on the life of Lee, extolling him as the greatest general of his age and the most perfect man,[1] informs us that each State possessed the right both historically and legally under the Constitution to leave the Union at its will. Apparently he did not know that January 23, 1861, Lee wrote to his son: "Secession is nothing but revolution." "It" (the Constitution) "is intended for perpetual union, so expressed in the preamble, and for the establishment of a government not a compact, and which can only be dissolved by revolution or the assent of all the people in convention assembled. It is idle to talk of secession."[1]

Possibly in time the North may be of the same opinion as to Lee's transcendent ability as a general. No one doubts now his great soldierly attainments and the worth of his private character, but for the sake of the existence of our nation, may it never believe he fought for the right.

Very generally and very fortunately for the country our Southern fellow-citizens, except their historians, some of their politicians, and a few whom they call unreconstructed rebels, concede that the right of secession has been put to the arbitrament of war and decided against the South forever. Now they tell us that none are more loyal and will march more willingly under the Stars and Stripes than those who fought so

[1] General Long's *Memoirs of Lee*, page 88.

bravely to the bitter end under the flag of the Confederacy. Even Jefferson Davis, in the conclusion of his history, concedes that the result of the war has shown that secession is impracticable. It is difficult, however, to understand how might has made right, and the conquest of the richer and more populous North over the weaker South has settled forever the right or wrong of the matter. The North does not believe in the sneering maxim of Frederick the Great, that the Almighty is on the side of the heavier battalions.

Nor need we go to the South or to our English military critics for this opinion as to the Northern right. In a recent short life of Webster written for the American Statesmen series, a distinguished Republican politician and historian, Henry Cabot Lodge, in criticising the greatest speech of our greatest orator, Webster's in reply to Hayne, on South Carolina's nullification doctrines, makes these astounding statements:

"That it was probably necessary, at all events Mr. Webster felt it to be so, to argue that the Constitution at the outset was not a compact between States, but a national instrument. . . . When the Constitution was adopted, it is safe to say that there was not a man in the country, from Washington and Hamilton on the one side, to George Clinton and George Mason on the other, who regarded the new system as anything but an experiment entered upon by the States, and from which each and every State had the right peaceably to withdraw, a right which was very likely to be exercised."

This is a declaration of the right of secession at the inception of our government and that every one held that belief. If this be correct, with such a right the Union was no enduring tie, but was a mere rope of sand.

He adds that the weak places in Webster's armor were historical in nature. In support of this opinion, he instances the Virginia and Kentucky resolves in 1799, and the Hartford convention of 1814; a few disloyal, some might say treasonable, acts and declarations; and then tells us a confederacy had grown into a nation, and that Mr. Webster set forth the national conception of the Union; and the principles, which he made clear and definite, went on broadening and deepening and carried the North through the civil war and preserved the national life. A singular result from a speech, if it were so fundamentally and historically wrong.

If Mr. Lodge, and those who agree with him, and there are some at the North who do, be right, and Hayne got the better of Webster in that celebrated contest, the nullification doctrines and acts of South Carolina were constitutionally sound and legal; and if South Carolina were right in her nullification, the secession of the South, thirty years afterwards, was also right.

We do not concede that nullification and secession have been barred because the course of events has been such that independent

sovereign States have grown into a nation; nor do we admit that the Union and its indissolubility depend only on the result of an appeal to arms. We claim with Webster that nullification and secession were entirely indefensible constitutionally, and also in the light of history at the time of the foundation of our Constitution, and ever since.

There can be no doubt of the effect of Webster's speeches at the time of their delivery; they aroused the national pride of the people, and the whole country, except portions of the South, responded.

It was in this nullification controversy that Webster won the title of the Great Expounder of the Constitution; he was then at his prime, physically and mentally. Always carefully dressed, when he made his speeches, in the blue coat with brass buttons, buff waistcoat, and white cravat of the Whigs of Fox's time; his large frame, his massive head with dark, straight hair, and deep set and, in debate, luminous black eyes; his superb swarthy complexion brightened with brilliant color that is even in women so handsome; his grand and rich voice; his emphatic delivery;—all served to make him the most impressive of orators.

It was often said by his contemporaries at the bar that unless Webster wholly believed in the justice of the cause he was maintaining he could not argue well. He was not like some

of the greatest advocates, whose ability and ingenuity are only fully brought forth when they have to contend with the difficulties of a weak and almost desperate case.

Hayne, his antagonist, was an able, eloquent, and accomplished orator. His speech did not create that enthusiasm at the South that Webster's did at the North; but his own State pertinaciously adhered to its doctrine of nullification and saw no defeat to its champion.

There were no less than three speeches of Hayne's—one of them, the second, running through two days—and the same number of replies by Webster. The debate took place in the Senate in January, 1830; it arose on an amended resolution originally offered by Mr. Foote as to the expediency of limiting or hastening the sales of the public lands. South Carolina was then threatening to declare the existing tariff null and void, and to pass laws preventing the United States from collecting duties in its ports. Hayne urged that the government should dispose of the public lands and after paying the national debt with the proceeds should get rid of the remainder, so that there should not be a shilling of permanent revenue; he looked with alarm on the consolidation of the government. To get the support of the West against the East, he accused the East of a narrow policy towards the West as to the public lands and the tariff, "the accursed tariff," as he termed it, which kept

multitudes of laborers in the East to the detriment of the West. In his second speech, Hayne not only attacked the East and its policy as to the public lands and support of the tariff, but went further and "carried the war into Africa," as he styled it, reading speeches, pamphlets, and sermons, showing, as he claimed, the disloyalty of New England in the war of 1812.

He maintained that the United States had exceeded the powers granted to it by the Constitution in making the existing tariff, which protected the manufacturing industry of the East, only a section of the country, and compelled the non-manufacturing States to pay tribute to it; that the United States government was a compact between independent sovereign States; that each of the States, being an independent sovereign, had a right in its own sovereign capacity to decide whether laws made by the United States exceeded the powers given it by the Constitution, and if a State held a law made by the United States was not authorized by the Constitution, it could treat it as null and void; that the existing tariff was a clear and palpable violation of the Constitution, and that South Carolina could and would pass laws forbidding and preventing the collection in its territory of the duties levied under it.

Before taking up Webster's constitutional argument, we will give a brief account of his

answer to the attack made on himself and the East.

Webster, in his great speech, the second in reply to Hayne, alluding to Hayne's allegation that he, Webster, had slept upon his first speech, said, "he must have slept upon it, or not slept at all": and he assured him that he did sleep on it and slept soundly.

One of the most stinging and dramatic events that ever occurred in the Senate-chamber, as a distinguished Senator from Maine has told the writer, was the manner in which Webster turned upon his opponents the taunt of Hayne, that the ghost of the murdered coalition, like Banquo's, would not down at their bidding, and had brought up him and his friends to defend themselves. Webster replied that it was not the friends but the enemies of the murdered Banquo, at whose bidding the spirit would not down. The ghost of Banquo, like that of Hamlet, was an honest ghost; then turning on and pointing to Calhoun, who, as Vice-President in Jackson's first administration, was presiding over the Senate, and whose reputed ambition to succeed as President had signally failed, he asked:

"Those who murdered Banquo, what did they win by it? Substantial good? Permanent power? Or disappointment rather, and sore mortification;—dust and ashes—the common fate of vaulting ambition overleaping itself? . . . Did they not soon find that for another they had 'filled their mind, that their ambition had put

" ' A barren sceptre in their gripe,
Thence to be wrenched by an unlineal hand—
No son of theirs succeeding.' "

Calhoun showed his emotion and moved in his chair. In a speech made three years afterwards, when a Senator, he denied that he had aspired after the presidency.

Webster defended at great length, and successfully, the policy of the East as to the public lands, internal improvements, and the tariff. He showed that Calhoun himself was originally in favor of internal improvements, and that he voted for tariffs; that in 1816 a protective tariff (denounced as such) was supported by South Carolina votes and was opposed by Massachusetts; that under the tariffs of 1816, 1824, 1828, which were protective tariffs and had become the policy of the country, Massachusetts became interested in manufacturing; so he, Mr. Webster, in 1828 supported a protective tariff, though in 1816 and 1824 he had opposed it.

As to Hayne's "carrying the war into the enemy's country by attacking Massachusetts," Webster asks. "Has he disproved a fact, refuted a proposition, weakened an argument, maintained by me?" And "what sort of a war has he made of it? Why, sir, he has stretched a drag net over the whole surface of perished pamphlets, indiscreet sermons, frothy paragraphs, and fuming popular addresses; over

whatever the pulpit in its moments of alarm, the press in its heats, and parties in their extravagance, have severally thrown off in times of general excitement and violence."

Webster, declining to separate these accusations and answer them, asks: "But what had this to do with the controversy on hand; why should New England be abused for holding opinions as dangerous to the Union as those which he now holds? Why does he find no fault with those opinions recently promulgated in South Carolina?"

Then Webster, noticing Hayne's eulogium of South Carolina, instead of attacking her, puts himself on the higher plane of a common national pride and patriotism.

"I shall not acknowledge that the honorable member goes before me in regard for whatever of distinguished talent or distinguished character South Carolina has produced. I claim part of the honor, I partake in the pride of her great names. I claim them for countrymen one and all. The Laurenses, the Rutledges, the Pinckneys, the Sumters, the Marions,—Americans all, whose fame is no more to be hemmed in by State lines, than their talents and patriotism were capable of being circumscribed within the same narrow limits. Him whose honored name the gentleman himself bears, does he esteem me less capable of gratitude for his patriotism, or sympathy for his sufferings, than if his eyes had first opened on the light of Massachusetts, instead of South Carolina?"

Then Webster refers to the great harmony of principle and feeling formerly existing between the two States. "Shoulder to shoulder they went through the revolution, hand in hand

they stood round the administration of Washington and felt his own great arm lean on them for support."

It was one of those great efforts delivered on the spur of the moment, which, though not written out, had been thought and studied beforehand. The bitter invective, the grand patriotic words for our National Union, which make the heart beat and quicken the blood, came from the genius of the orator. Dr. Francis Lieber, a most competent judge, wrote: "To test Webster's oratory, which has been very attractive to me, I read a portion of my favorite speeches of Demosthenes and then read, always aloud, parts of Webster's; then returned to the Athenian, and Webster stood the test."[1] The question of the supremacy of the government of the Union over that of the States was familiar to Webster; he had taken part in the argument of the cases before the Supreme Court involving that issue, and well knew the decisions of Marshall, its great chief. There is no such thing "as extemporaneous acquisition," as Webster himself said of his speech. Its views and arguments have been adopted by our jurists, and by Bancroft, Hildreth, Fiske, and all of our old Northern historians. Webster was probably a more diligent student than Mr. Lodge gives him credit for; his habit being to rise in the early morn and work then. The writer of this has heard him say that he

[1] Lodge's *Webster*, p. 187.

had read through all the volumes of *Hansard's Parliamentary Debates.*

In giving Webster's argument on the question of nullification, we will use his speech in reply to Hayne, and his subsequent speech in answer to Calhoun, delivered three years later, in 1833.

He showed, as we shall see, that by adopting the Constitution a national government was formed, with legislative authority to make laws that should be supreme within the powers granted in the Constitution, with an Executive to carry out those laws, and a supreme Judicial Department that should decide all questions arising under those laws, and whether they were within the granted powers, whose decision no State could question.

After disposing of the personal attack on himself and that against the East, Webster took up that against the Union ; he went back to its formation, treating it historically. Under the confederacy made between the States the whole power of the government was in the Continental Congress. Though it could make war and peace, it could raise troops and obtain its revenues only through the action of the several States ; it could not even regulate commerce and had no coercive power over the States ; its executive powers were exercised by committees and officers appointed by the Congress. This Continental Congress carried the country safely through the revolution ; but during the few years afterwards,—without the

rights and powers essential to an effective government, without a Judiciary and a responsible Executive, the States quarrelling amongst themselves and struggling with internal troubles —its authority became so weakened that it inspired respect neither at home nor abroad[1]; and the people of all the States, finding the necessity of a stronger government, the separate States entered into a convention to form one.

The first resolution of this convention was, that the government of the United States ought to consist of a *Supreme Legislature, Judiciary, and Executive;* this showed the power that it intended to give the government.

The declaration in the preamble of the Constitution they formed, set forth: "We, the PEOPLE of the United States, in order to form a more perfect Union," etc., "do *ordain and establish* this Constitution for the United States of America."[2] It was not that the States or the people of the separate States made the Constitution, but it was the people of the whole United States, and the acceptance of this Constitution was submitted to conventions of each

[1] Chief-Justice Marshall, in his opinion in the case of Cohens *vs.* Virginia, says that its requisitions were habitually disregarded by the States. Mr. John Fiske, in his admirable work, called *The Critical Period of American History*, fully shows the inefficiency and inadequacy of the government of the Confederacy.

[2] See Webster's speech in answer to Calhoun, Webster's *Speeches*, vol. ii., page 180. Ed. of 1850.

State, chosen by the people, and not to the State governments and legislatures.

It was from Webster's declaration, "It is the people's Constitution, the people's government; made for the people; made by the people and answerable to the people," that Lincoln took the closing words of his short immortal Gettysburg address, and applied them to the national soldiers who had there died for the Union: "That this nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people, shall not perish from the earth."

Webster referred to contemporary history, to the writings of the *Federalist*, to the debates in the conventions, to the publications of friends and foes, as all agreeing in the statement that a change had been made from a confederacy of States to a different system, to a national government. The writers of the *Federalist* say:

"However gross a heresy it may be to maintain, that a party to a compact has a right to revoke the compact, the doctrine itself has had respectable advocates. The possibility of a question of this nature proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American empire ought to rest on the solid basis *of the consent of the people.*"

And amongst all the ratifications by the States, there is not one which speaks of the Constitution as a compact between States. "They say they ordain and establish it; we do not speak of ordaining leagues and compacts."

He argued that the Constitution that was formed was not a league, confederacy, or compact between States, but a *government proper*, creating direct relations between itself and individuals of the States. It punished all crimes committed against the United States. It had power to tax individuals, in any mode and to any extent, and it possessed the power of demanding from individuals military service. "It does not call itself a compact; it uses the word compact but once and that is when it declares that the States shall enter into no compact. It does not call itself a league or a confederacy but it declares itself a constitution." "A constitution is the fundamental regulation which determines the manner in which the public authority is to be executed,"[1] "the very being of the political society." It says, this Constitution shall be the law of the land, anything in any State constitution to the contrary notwithstanding; "and it speaks of itself, too, in plain contradistinction from a confederation; for it says that all debts contracted and all engagements entered into by the United States shall be as valid under this Constitution as under the confederation; it does not say as valid under this compact, or this league, or this confederation."

[1] Webster's definition of a constitution apparently is not a full one. A constitution is the fundamental statement of the powers granted to the government established by it; and it may, as Webster says, also contain the regulation under which its authority is to be executed.

"Again the Constitution speaks of that political system which it established as the *Government of the United States.* Is it not doing strange violence to language to call a league or compact between sovereign powers a *government.*"

The United States Government thus originated from the people, as did the State governments. It is created for one purpose, the State governments for another; it has its own powers, they have theirs. There is no more authority with them to arrest the operation of a law of Congress, than with Congress to arrest the operation of their laws.

It was an Union among the States that should last for all time. It contains provisions for its amendment, none for its abandonment at any time. It declares that new States may come into it, but it does not declare that old States may go out.

The Government was brought into existence for the very purpose of imposing certain salutary restraints on the State governments: it gave the United States *sovereign powers* over the States; it could make war, it could coin money, it could make treaties; it prohibited a State from making war, coining money, or making treaties; it gave the United States the exclusive power to make citizens. The people erected this Government; they gave it a Constitution, and in that Constitution they enumerated the powers they bestowed; they made

it a limited Government; they defined its authority. They did not leave it to the States to carry out the legal action—the application of law to individuals—as the Confederacy did. In the Constitution itself it declared the *Constitution and the laws of the United States, made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.* No State law is to be valid which comes in conflict.

Having enumerated the specified powers of the Government, it gives to Congress as a distinct and substantive clause, the power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or office thereof.

Who is to decide when a controversy arises between the laws of a State and the United States? The claim of South Carolina is that instead of one tribunal we are to have four and twenty, as many tribunals as States; that each State is at liberty to decide as to the constitutionality of an act for itself and none bound to respect the decision of others.

"But in regard to this question the Constitution is still more express and emphatic. It declares that the judicial power of the United States shall extend to all *cases* in law or equity arising under the Constitution, laws of the United States, and treaties; that there shall be one Supreme Court, and that this Supreme Court shall have appellate jurisdiction of all these cases, subject to such exceptions as Congress may make."

"No language could provide with more effect and precision than is here done, for subjecting constitutional questions to the ultimate decision of the Supreme Court." "And after the Constitution was formed and while the whole country was engaged in discussing its merits, one of its most distinguished advocates, Madison, told the people 'it was true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the General Government.' Mr. Martin who had been a member of the convention, asserted the same thing to the Legislature of Maryland and urged it as a reason for rejecting the Constitution.[1] Mr. Pinckney, himself also a leading member of the convention, declared it to the people of South Carolina; everywhere it was admitted by friends and foes that this power was given to the United States Judiciary in the Constitution."

We must bear in mind that this discussion was on the power of South Carolina while remaining in the Union to declare the laws of the United States null and void, and her own laws preventing their execution valid. A singular claim that a State could enjoy the benefits of the Union and at the same time disobey its laws; this is nullification which Mr. Webster had to combat. His argument, however, applies

[1] As the whole question of nullification depends upon whether a State is bound by a decision of the United States Court we give Mr. Martin's succinct and comprehensive statement of the power that the third article of the Constitution conferred on the United States. "Whether, therefore, any laws or *regulations* of the Congress, any acts of *its President or other officers*, are contrary to, or not warranted by the Constitution, rests only with the judges, who are appointed by Congress, to determine; by whose determination every State must *be bound.*" Luther Martin's letter, Elliot's *Debates* (second ed.), 1863, vol. i., p. 380.

equally strongly to the claim of the right of secession. Indeed he says in his speech in reply to Calhoun :

"Therefore, since any State before she can prove her right to dissolve the Union, must show her authority to undo what has been done, no State is at liberty to *secede* on the ground that the other States have done nothing but *accede*. She must show that she has a right to *reverse* what has been *ordained*, to *unsettle* and *overthrow* what has been *established*, to *reject* what the people have *adopted*, and to *break up* what they have *ratified*, because these are the terms which express the transactions which have actually taken place. In other words, she must show her right to make a revolution."

Between Webster's debate with Hayne, and that with Calhoun three years afterwards, South Carolina had called a convention of its people and passed resolutions declaring the United States tariff laws null and void, and made laws of her own, forbidding and preventing the collection of duties in the State, with threats of secession if an attempt to collect them were made. Measures had also been taken to make a forcible resistance—munitions of war collected and the militia organized and drilled. Fortunately for the country at that crisis Andrew Jackson, the President, was a Southerner and owner of many slaves and true to the Union. He was a man of indomitable will, believed in implicitly and trusted and enthusiastically followed by the great mass of the people. Any policy of his commanded success. He did not hesitate as to his course, he at once issued a proclamation, and sent a message to Congress

asking for powers to enforce the tariff laws of the United States and if necessary to remove the custom-houses to safe places. In his proclamation he declared that the Constitution of the United States forms a government, not a league; that it is a government that acts on the people individually and not on the States, and whether it be formed by compact between the States or in any other manner its character is the same. "The States retained all the power of the government," he said, "they did not grant: but each State, having expressly parted with so many powers as to constitute, jointly with the other States, a single nation, cannot from that period possess any right to secede, because such secession does not break a league, but destroys the unity of a nation." As a South Carolinian—Jackson supposed he was born in South Carolina, though his biographer, Parton, says it was in North Carolina, near the line—he earnestly pleaded with his fellow-citizens not to resist the laws of the United States.[1] He had previously at a dinner in celebration of Jefferson's birthday, when nullification sentiments had been advanced, given as his toast: "Our Federal Union: it must be preserved."

It was generally said and believed that Jackson had threatened to hang Calhoun as high

[1] Jackson's proclamation, Elliot's *Debates*, 582. Elliot's *Debates* were published by authority of Congress, Calhoun highly praising them. See his letter in the beginning of vol. i.

as Haman if the law was resisted. This from Jackson was no idle threat. There had been no other President of such inflexible will. No other general ever assumed the authority he did in the Indian wars and in that of 1812. He had fought those campaigns and gained the battle of New Orleans, suffering at times agony from old wounds received in a street brawl, that would have disabled any ordinary commander. Thrice when in command he had exercised the power of punishing capitally ; he had hanged Arbuthnot and Ambrister ; again, he had a militiaman shot ; and at the close of the war had permitted the execution of six Tennesseeans, though they pleaded in defence, and probably believed, that their time of enlistment had ended. The threat of hanging, however, did not daunt Calhoun, who declared boldly, perhaps pathetically, that Carolina alone would resist, even to death itself.

Mr. Clay, as on other occasions where a great crisis had arisen, effected a compromise. A force bill to collect duties, which South Carolina strenuously opposed, was enacted by large majorities in the Senate and House of Representatives ; and a bill was afterwards passed gradually reducing the import duties then levied, which Calhoun and South Carolina assented to.

CHAPTER II.

THE NATIONALITY OF THE CONSTITUTION.

THE claim of South Carolina, at the time of her threatened nullification and secession, and of the South at the period of our civil war, is, that the Constitution which the States adopted formed them into a confederacy and not a nation. It is admitted, and is not denied, that if the government established was national there can be no valid claim of a component part to treat its laws as of no validity, a nullity, or to dissolve it at its will.

Indeed, Calhoun, the great expounder of the nullification and secession doctrine, considered this to be a vital matter, and always insisted that the United States was not a nation. He complained that the reporters made him say, "this Nation instead of this Union." "I never use the word nation in speaking of the United States; I always use the word union or confederacy. We are not a nation, but a union, a confederacy of equal and sovereign States. England is a nation, Austria is a nation, Russia is a nation, but the United States are not a nation."[1]

The South during the civil war claimed that the States made the government of the United

[1] *Great Senators*, by Oliver Dyer, p. 153.

States, and that the States were and remained independent sovereign nations. And each State being an independent sovereign nation, had the right to decide whether the power it had given to the United States Government was properly exercised by its Legislature or its officers, and to declare and treat as a nullity and as void any law passed, any act done in excess of that authority, and to withdraw from the Confederacy—that is, to secede, at its will.

It will at once be seen, as the time during which the Union is to endure is not limited in the Constitution, that, if this right of secession exists, a State could leave the day after it adopted the Constitution. The Union is either perpetual or dissoluble at pleasure. In the secession ordinances passed by the Southern States at the commencement of the civil war the ground was taken that the States of their sovereign right and will resumed their place as independent nations. That is, the duration of the Union was from the very beginning at the caprice of each and every State. No less, if the doctrine of nullification be correct, that each State can declare and treat as null and void the acts of the United States it deems beyond the powers it has granted, it can nullify and make void the laws of the United States, all the acts of its officers, all the judiciary proceedings at its caprice.

Nor is it extravagant to say caprice. South Carolina's nullification and secession acts and

resolves in 1832 were on the ground of the unconstitutionality of a protective tariff. There had been a great number of protective tariffs enacted before, which South Carolina had favored by her votes, and the second law of the United States, enacted at the commencement of the government, at the first session of the first Congress, was for the protection and encouragement of manufactures. Its preamble is: "Whereas, it is necessary for the support of government, for the discharge of the debts of the United States, and the encouragement and protection of manufactures, that duties be laid on goods, wares, and merchandise imported." Madison,[1] who was the leader of the House of Representatives in this first Congress, wrote that no one questioned the right of making protective duties. Billions of dollars have been levied by the collection of protective duties from the beginning of the government to the present day. No litigant paying duties even as excessive as those on pearl buttons and tin plates, nor lawyer, a class not diffident in advancing untenable claims, has been found, as far as we know, to question before the Supreme Court the legality of these duties, because they were protective or paid this slight reverence to a doctrine in support of which South Carolina threatened war and secession.

[1] See 4 Elliot's *Debates*, pp. 345 and 349, showing at the inception and in the early period of our government protective duties were apparently universally approved by Congress and the Presidents.

It seems only necessary to state the viciousness of this doctrine of nullification and secession, that every State could practically put its veto on every law and act of the General Government it questioned, and dissolve it at its pleasure, to prove that no such impracticable government was established. Certainly, reasoning *a priori*, this doctrine has no standing.

Our General Government differs from that of Great Britain and nearly all other governments in that it is created by a written Constitution, and its authority is limited by that Constitution. The power of Parliament is imperial; there is no limit to it; it does what it deems best. There apparently is an almost insurmountable difficulty in the writers of other countries, only knowing unlimited, imperial supreme governments, to comprehend that a government of limited powers can be supreme in the powers granted to it. Knowing that the powers of our General Government are limited, they are apt to draw the conclusion that the fundamental unlimited power must be in the subordinate component parts, the States.

Our States, as well as the General Government, have limited powers granted by written constitutions. The State governments are not only limited in their powers, but the people, who established them in their constitutions, have invariably recognized the supreme power of the General Government; in none of them have they undertaken to confer on the State

Legislatures or government powers in conflict with the sovereign national powers of the General Government. The powers given to the State governments are subordinate and local. All the constitutions, State and General, have had the sanction and an adoption by the people.

The argument of Hayne, Calhoun, and his followers, and of all Southern writers—that the United States Constitution is a compact or agreement amongst the several States as independent sovereign nations, and that in every compact between nations, a contracting power, where there is a disagreement, as there is no superior authority over them, has the right to maintain the correctness of its construction—ignores the case where the compact may be one for the making of the several contracting powers one nation.

Compact means an agreement, nothing more or less, whether applied to states or individuals. It cannot be denied that independent sovereign nations can *by compact or agreement* make themselves into a perpetual, indissoluble nation. The voluntary combination of independent sovereign powers, or nations, or states into one national union *must be by compact.*

The question therefore resolves itself into this, What was the agreement or compact made between the people of the States? Was it for a nation with supreme powers over the subdivisions of States in its territory and all living

therein, as far as power was given to it, and for perpetuity, or was it for a confederacy or league for certain purposes, limited by the right of each of the parties to it, to judge whether the government exceeded its authority, and at its pleasure to dissolve it?

In other words, the fundamental question is, Was an indissoluble national power made or a confederacy or league declared by the adopting of the Constitution?

Webster perhaps unfortunately used the word compact in his argument when he said the Constitution was not a compact, meaning it was not a mere agreement amongst the States, a league, or confederacy, but that it was the fundamental declaration of a nation.

Madison agreed with Webster as to secession and nullification and the powers of the General Government, and of its judiciary to define and pass on them, but he held "that the government with its powers was established by a compact which each of the States had entered into, the authority for it being derived from the same source as that of the State governments—the people."[1] Webster himself, in his speech in answer to Calhoun, recognizes that compact may mean an agreement for a nation. Speaking of the Constitution, he says: "Founded in or on the consent of the people, it may be said to rest on compact or consent, but it is itself

[1] See also, to same effect, *North American Review*, Oct., 1830, p. 537, Madison's letter to Edward Everett.

not the compact, but the result."[1] It is necessary to constantly bear in mind that the word compact, used in reference to the Constitution, is consistent with its nationality.

The prominent writers who maintain the right of nullification and secession, Calhoun, Davis, Stephens, and Bledsoe in his work, *Is Davis a Traitor?* all assert to an excessive length that any person or any State that uses the word compact in reference to the Constitution admits their theory of government, which is, that the Union between the States was a mere dissoluble agreement, in which the States retained their sovereignty and right of judgment over the acts done by the United States. They mention the State of Massachusetts, Washington's, Madison's, and even Webster's subsequent use of that word as evidence of their assent to this doctrine. The fault in their reasoning is what logicians call the undistributed middle; they assume that the persons or States using the word compact are speaking of the sort of compact they maintain the Union to be—a league or mere dissoluble agreement, when in fact they may be, and are, speaking of another sort of compact, a compact for a national government.

We propose to show that by the adoption of the Constitution the people of the States formed themselves into a nation.

[1] Webster's *Speeches*, vol. ii., ed. 1850, p. 177.

First: The Constitution declares its perpetuity, and the powers given by it to the government established are those of an indissoluble nation with supreme authority over every one, not of a confederacy of nations.

Second: The members of the convention that made the Constitution intended to make a national government; and that they considered that they had done so is conclusively shown by the contemporary reports of their debates and proceedings. The members of the conventions of the people of the several States that adopted the Constitution without exception also considered and spoke of the government as national.

Third: That the government exercised its supreme national power repeatedly and uniformly over the States and over all the citizens of every State, from the time of its inception to the civil war. Historically we were a nation.

Fourth: That the general belief that the Virginia resolutions questioned this supremacy and nationality is wholly unfounded.

There is no question of the universal opinion after the termination of the war of the Revolution that the provisions under which the States were associated, made on the 15th of November, 1777, had failed essentially in giving to the Confederate Congress government the necessary powers to carry it on.[1] The Confederacy

[1] The condition of affairs then is well stated in Fiske's *Critical Period of American History.*

was made by delegates from the Legislatures of the State governments of the different States; the powers of the Confederacy were given to a Congress which consisted of one body or House, and in that Congress each State had one vote, that of Delaware, with a diminutive territory and about one sixteenth of the population, equalling that of Virginia. The Constitution which contains and defines the powers given to the United States Government was made by delegates appointed by the different State Legislatures of the Confederacy, all being represented except Rhode Island. Its members were the most prominent and distinguished men of the country. After the most careful, thorough, and patient examination and discussion, extending through four months, they formed the instrument giving the powers of the new government. They sent it to the existing Congress of the Confederacy, with the request that it might be submitted to a convention of delegates chosen in each State by the people thereof, under the recommendation of its Legislature, for their consideration and assent if approved of.

The Continental Congress unanimously forwarded the proposed Constitution to the Legislatures of the several States, who each submitted it to a convention of the people called for the purpose of deciding whether they would adopt it.

By necessity the submission was to the people of the States separately. The acceptation or

rejection rested on them, the people; they appointing delegates to carefully consider the matter and to decide for them. Thus the adoption of the Constitution was not only sanctioned by the Congress of the Confederacy, by the separate State governments, but finally by the people themselves of every State acting by virtue of their fundamental, sovereign power, they appointing the delegates who met in convention, and who in each State decided for the people, whether they would or would not enter into this new form of government. A sanction more binding on every one could not have been made.

Mr. Webster's argument that our government is that of a nation and not a confederacy, was in a great measure founded on the Constitution itself. There are other declarations and powers in the Constitution, besides those he so forcibly presented, which should not be overlooked. The Constitution is a very brief, and, as time has shown, a very perfect instrument. It gives to a general government it establishes, all the powers necessary for the existence and maintenance of a nation.

Its first declaration is, *We, the People* of the United States, do ordain and establish this Constitution. This is in emphatic contrast to the preamble and articles of the Confederacy. The preamble of the Confederacy is, Articles of confederation and perpetual union between the "States of New Hampshire, Massachusetts

Bay," etc. Article I. is, "The style of this Confederacy shall be 'The United States of America.'" Article III., "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."

Not only did the people actually make this great charter, in which they gave to the government they established over them the powers it has, but they declared in the very beginning that it was "we, the people," and not their State governments, that made it, and they also declared its perpetuity. It is "We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and to secure the blessings of liberty to ourselves and *our posterity*, do ordain and establish this Constitution for the United States of America." Here is the express declaration that it is for perpetuity, not for the people making it, but for those succeeding them, for their posterity, for all time.

When, after the civil war, the question of the legality of secession came before the Supreme Court of the United States, in the case of the State of Texas against White,[1] Chief-Justice Chase, apparently overlooking this explicit statement, in delivering the opinion of the court, said: "That by the articles of the Confederacy, the

[1] 7 Wallace *Reports*, p. 700.

union of the States was solemnly declared to be perpetual, and when these articles were found to be inadequate to the exigency of the country, the Constitution was ordained to form a more perfect union," and asks, "what can be more indissoluble if a perpetual union made more perfect is not?"

Neither the Chief Justice nor those distinguished jurists, Justice Swayne[1] and Justice Bradley,[2] controverted the right of secession when the case came before them, in the manner that Chief-Justice Marshall treated constitutional questions. They, however, declared in the most emphatic terms that there could be no secession, that the Union was an indissoluble one of indestructible States by the very provisions of the Constitution itself.

If we examine the provisions of the Constitution, we find in the first clause is declared the perpetuity of the Union; in the last clause, excepting that setting forth it shall be established on the ratification by nine States, is stated in language that cannot be mistaken, its supremacy over States and State constitutions.

It is by its very terms, we, the people, do ordain and establish this Constitution, that is the great charter giving powers to our new government, and it is, therefore, we, the people of every State, who declare that this Constitution, this government, and the laws and treaties

[1] In case of White *vs.* Hart, 13 Wallace, 646.

[2] Keith *vs.* Clark, 97 *United States Reports*, 476.

made under it "shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." There is no qualification that if we do not deem them legal we can treat them as null and void.

In order to secure and maintain that supremacy the people who made it require that the United States Senators and Representatives, "and *members of the several State Legislatures*, and all executive and judicial officers, both of the United States *and of the several States*, shall be bound by oath or affirmation to support this Constitution"; stamping, as on its coins, its authority over States and every State officer.

Now when the people of each and every State did "ordain and establish" a new form of government which was to be supreme over the constitution, that is the government of their particular State, and imposed upon every legislative, executive, and judicial officer of their own State an oath to support that government, where is the right of a State to question? Over what is the United States supreme if not over States? Why should an oath have been required to support that supremacy over State governments unless to make that supremacy certain, and resistance to or question of it criminal?

Those who made and established the government knew of the oath that is required by

State governments of their officers to support their constitutions, and they would not have required this additional oath if the two oaths could have conflicted, or if there could have been any doubt that the obligations required by a State government were to be subordinated to the supreme powers and laws of the general government.

Then to prevent the government from being encroached upon by the States the judicial power was given to the United States over all cases arising under this Constitution, the laws of the United States, its treaties, and cases affecting ambassadors, etc. So, as Webster declared, no State law or judicial decision of a State could interfere. By this clause the United States courts had the right, which they have uniformly and very often exercised, from the beginning of our government until this day, of taking from the jurisdiction of the State courts all and every case in which the construction of a United States law came in question or where the legality of the act of any United States official was concerned.

We have seen that the supremacy of the United States over all States and State laws and the right to maintain that supremacy through its own courts and by its own officers was fully established by the Constitution. If we examine further the powers granted to the general government by this Constitution, we find all that can be called sovereign: those of

intercourse with foreign nations, of war and peace, of raising and keeping an army and navy, of the currency, of commerce external and internal, of establishing post-offices and post-roads, and fixing the standard of weights and measures, the exclusive right of making citizens by naturalization, the regulating and command of the militia when in its service, and issuing of copyrights and patents, the making of all laws necessary and proper for carrying into execution the granted powers and all other powers vested by the Constitution in the government of the United States or in any department or office thereof, with prohibitions to the States from entering into any treaty, alliance, or confederation with another State or foreign power, making agreements or *compacts* with other States, keeping an army or war vessels in the time of peace, or making laws impairing the obligation of a contract, and *ex post facto* law, coining money, emitting bills of credit—that is making a paper currency (the issuing of paper had been carried to an excess by the States and the Continental Congress during the Revolution), and laying imposts or duties on imports or exports.[1] There is no sovereignty remaining to a State that has granted all these powers to the government over it, and is so restricted in its acts, and cannot even make an

[1] See Constitution of United States, Article I., Sections 8, 9, and 10, for statement of granted powers and restrictions on States.

agreement or a compact with a sister State. Indeed, Calhoun, in his argument, seemed hard pushed to specify any sovereign powers left to the States, when he mentioned that the States had the power to appoint the officers of the militia and that Pennsylvania had undertaken to punish treason.

Though the United States alone have those supreme powers, which by political writers are generally called sovereign, the word sovereign has been also used by American writers and politicians in reference to the powers of a State. The people of every State have supreme powers over their own local affairs, their own territory and citizens where the power has not been given to the United States; they can enact laws making the penalty of stealing a pocket-handkerchief or smoking on the street punishable with death and carry them into effect. If they were, however, to make such laws to take effect for past acts, the United States would interfere, because no State can make an *ex post facto* law. So, in our separate States, a town or a county can run a road through anybody's land and the State cannot interfere; because the people of the State have given that authority to the town or county. A Board of Health in many States can stop one's factory, destroy his business, or close his house, by reason of its being deleterious to the general health, and there is no appeal. In these matters the town or county or Board of Health have supreme powers in

their jurisdiction ; but however supreme or however arbitrary they may be in their jurisdiction, they cannot extend them beyond—these supreme local powers are not sovereign powers.

It is a large, local, internal government that each State has over its territory, and the property and the acts of its citizens in that territory. The General Government in our extensive domain, having in addition to the powers it now has those of the States, would from the overwhelming mass of its duties be a failure.

Indeed, we find that from necessity Great Britain is on the path of giving to her three kingdoms greater powers of local government. If one examines the bill for home rule for Ireland, proposed in 1886 by the Gladstone administration, he will find that the powers it proposed to give to Ireland are far beyond those our separate States have. Ireland, besides the right of taxing, was empowered to levy duties of customs and excise—that is, the right of protecting her own manufactures to the injury of England's. Ireland was to pay over specified contributions to the British Government, some millions of pounds annually, for her proportion of the interest on the national debt, and of the cost of the support of the army and navy, and other expenses. If there were a failure in these contributions the General Government would have been obliged to use coercion—a civil war—a policy considered fatally objectionable in the convention that made our Constitution.

Ireland also was to lose her representation in the Imperial Parliament.

As far as secession is concerned, the most important provision in the Constitution is Section 3, of Article III., concerning treason. There is no such thing as treason except where allegiance is due. The citizen of an independent sovereign State owes his allegiance to it, and not to a confederacy or a league the State has joined. There can be no treason except against a government proper. The establishing by the Constitution of the punishment of treason, implies the nationality of the Union, and that every inhabitant of its domain is a citizen. In the articles of the old Confederacy there was no punishment of treason; on the contrary, each State agreed in those articles to deliver up to its sister States any one that it might claim had committed treason.

The first part of the two clauses of Section 3 are "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and "The Congress shall have the power to declare the punishment of treason."

The peculiarity of the introduction of this first clause is to be noticed: it is taken for granted that there is treason against the United States, and that it is expedient to limit it. The founders of our new government did not intend to have rash speech, or plots, or mere resistance to its authority punishable as the high crime of

treason. They knew from the experience of their mother country the danger to personal liberty from constructive treason; so they limited the power to punish that offence, and gave it only in case of levying of war, or aiding and adhering to enemies.

It has been claimed by many writers North as well as South, that admitting secession to be illegal, the United States had no authority to use force against a seceding State. At the foundation of all government must be the right to maintain itself, and by force when necessary. There is no need of the declaration of this right. The establishment of a government implies the power to compel the obedience of its subjects.

This power in the government to punish as treason the levying of war against it applies directly and expressly to a State, or a combination of States, or a part of a State levying war. A foreign state, an enemy levying war, cannot commit treason. Its subjects owe no allegiance. Nor does a riot or a mob levy war. This making the levying of war treason was intended for powers within the National Government, like States and combination of States and parts of States. It was against some power that should have the organization and ability to levy or wage war; and the word levying is far reaching and extends beyond mere fighting. It could not have been intended for anything else than coercing such powers.

That this law was understood to reach a citizen of a State resisting the authority of the United States is clearly shown by the letter of Luther Martin, a distinguished jurist, and also the Attorney-General of Maryland, and afterwards a leader of the bar in the United States Courts, and who as a lawyer was accustomed to consider the meaning of instruments like the Constitution. In this letter to the Legislature of Maryland objecting to the ratification of the Constitution, he declares that this clause was kept for the purpose of coercing a State. He wrote: "The time may come when it shall be the duty of a State in order to preserve itself from the oppression of the General Government to have recourse to the sword; in which case, the proposed form of government declares, that the State, and every one of its citizens who acts under its authority, are guilty of a direct act of treason," and a citizen is thus put in the dilemma of being exposed to punishment, either by the State or the United States, however he may act. To prevent this, he writes, he offered an amendment that acts done under the authority of one or more States should not be deemed treason or punished as such; but this provision was not adopted.[1]

The interference of the United States with a State is expressly directed by another clause in the Constitution, that by which the United States is obliged to protect a State against

[1] Martin's Letter, Elliot's *Debates*, vol. I., pp. 382, 383.

domestic violence and guarantees to put down any government if it be not republican. There is no limit to this guaranty and it is no matter if the unrepublican government be established by a majority or unanimity of votes.

A sovereign government seldom, if ever, allows itself to be sued, and never gives the decision of a suit against itself or between itself and other governments to *another jurisdiction.* That is a direct surrender of sovereignty. The Constitution as originally adopted, gave to the United States judicial power in controversies to which the United States shall be a party, in controversies between two or more States, between a State and citizens of another State and between a State and foreign states, citizens, or subjects. The jurisdiction in suits by individuals against a State was afterwards taken away by the passage of an amendment to the Constitution, leaving however jurisdiction in controversies to which the United States shall be a party and between two or more States and a foreign State. The fact, however, remains, that the Constitution as formed and as adopted by the original States, (all that can claim to have been sovereign), did give jurisdiction to the United States over all claims, even those of individuals out of the State against the State, as if the State had no more political importance than a county or a town.

A yet more important clause in the Constitution shows conclusively the supremacy and

national character of the government; namely that giving it the power of changing and extending its authority to whatever extent it chooses by amendments, provided they are accepted by the Legislatures of three quarters of the States. By amendments made in this manner the United States can take whatever authority it pleases from the States. It can give its government a veto over the laws of the separate States, appoint the executive officers of a State—powers proposed in the convention that made the Constitution. The only limit in the Constitution to the extension of the government's power by amendments is that no State without its consent could be deprived of its equal suffrage in the Senate, and the importation of slaves until 1808 should not be prohibited. Under this provision the General Government, with the concurrence of three fourths of the Legislatures of the States, has an authority that no State government has. None of the State constitutions grant its Legislature the right to extend its powers over counties, cities, and towns; it must go to the people for that.

How can it be said that sovereignty remains in a State, when it gives to its associates the right to make all its laws if only three quarters of them so elect? The granting by a community of power to a government over it to control it, as it pleases, takes away the very foundation of sovereign right; and objection was made to

this clause for this very reason. In the convention Elbridge Gerry, a prominent delegate from Massachusetts, afterwards Governor of that State and Vice-President of the United States, objected because the Constitution is paramount to the State constitutions, and that two thirds of the States may introduce innovations that would subvert the State constitution altogether.[1] It is by the power given in this clause, that after the war of secession slavery was abolished through the acceptance by the States of amendments to that effect. The proclamation of Lincoln abolishing slavery in the States in insurrection on January 1, 1863, did not give liberty to the slaves in Delaware, Maryland, Missouri and Kentucky, and parts of other States, that were not in rebellion. Many, perhaps all, of these States abolished slavery before the amendments were passed.

The only authority given by the Constitution to States is this power of amending it by the concurrence of State Legislatures in propositions made by the Congress of the United States or the Legislatures of three fourths of the States, and also the right of equal representation in the Senate, and that in the election of President the vote is by electors appointed in such manner as the State Legislature may direct.

[1] 5 Elliot, p. 530. The clause was altered so that the ratification of three fourths of the Legislatures of the States was required, though two thirds of the States can call a new convention, and two thirds of Congress propose amendments to the Constitution.

The provisions forbidding a State from emitting bills of credit, passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, are a restriction that sovereign nations would never have submitted to.

When a foreigner becomes a citizen, he abjures his allegiance to his native country, and the oath he takes is before a United States officer to the United States, not to the State in which he is naturalized. Finally, by the Constitution the President is made the commander-in-chief of the army and navy of the United States, and of the militia of the several States. While an oath or affirmation is required of every Senator or Representative, of every executive and judicial officer of the United States and of every State, to support the Constitution, the President alone—the one having the supreme military power over all forces on land or sea—must swear or affirm that he will faithfully execute the office, and "to the best of my ability, preserve, protect, and defend the Constitution of the United States"; not to keep from encroachment upon the rights of the States, but to preserve, protect, and defend the Constitution. Can it be said that it is not to be preserved over its citizens and States that are in arms to subvert or resist its laws and supremacy?

Jefferson, in the time of the Confederacy, when the States were neglecting to pay the requisitions made of them, recommended that

the Continental Congress should show its teeth and send a frigate into the ports of a delinquent State; but the new Constitution intended to draw the teeth of the States by prohibiting them from keeping troops or ships of war; and it reserved to the national government the right "to raise and support armies"; "to provide and maintain a navy"; and gave it the power of "calling forth the militia to execute the laws of the Union, suppress insurrection, and repel invasion." Thus the Constitution added to the supremacy of the new government the power to enforce it, and took from the States the power, as far as it could consistently with freedom, of resistance.

The government of the Confederacy depended upon the several State governments, their soldiers, and their contributions; it had no direct control over the people; from the failure of the State government to make the required contributions and enforce its decrees it was fast falling into total inefficacy. We have shown that the new government, established by the people of each State over themselves and the people of the other States, had by its Constitution all the powers necessary for a national government, and State governments were prohibited from the exercise of conflicting powers; that waging war against that government was treason, thus affirming that they, the people of each State who established it, owed allegiance and were subjects of the government; they, the people,

also declared in the Constitution, that the judiciary of their general government should have authority over every case and question arising under its laws and acts; further, they gave that judiciary and the government the power to enforce their laws and the authority over every individual in its domain; and finally they expressly declared the supremacy of the government and its laws over all State laws and State constitutions.

The departments of the government established by the Constitution are three in number: the Legislative (Congress), to make the laws and to pass the acts for the carrying it on; the Executive (the President and the officers under him), to administer it, to carry into effect its laws and acts, and represent it in its dealings with other countries; and thirdly the Judiciary, to decide upon all controversies arising under the laws and acts of the government.

A department, however, in some instances has an authority in the others; the President, the chief executive officer, has the right of veto, and his principal appointments, especially those of the judiciary and foreign ministers, are subject to the approval of the Senate.

The power of the United States Judiciary Department to pass upon the constitutionality or validity of laws made by the Legislature, is one unknown to the unlimited imperial power of the Parliament of Great Britain, and has been a source of perplexity to the writers and legis-

lators of that country, and of question recently in the House of Commons. The question cannot arise and never comes before the judiciary of that government, whether a law is within the parliamentary power. With us, however, the question often arises, and the judiciary decides whenever question is made as to whether a law is within the powers granted by the Constitution. In all our States the State judiciary has the same power to decide on the constitutionality of the laws and acts of the State government.

This system of giving the judiciary the right to define the extent of the powers of the government has with us met with almost universal approval.

CHAPTER III.

THE CONSTITUTIONAL CONVENTION INTENDED NATIONALITY.

LET us now retrace our steps and see what took place in the convention that made the Constitution, and what those that made it intended. Fortunately we have the journals of the convention that framed the Constitution; the minutes, until he left, of Mr. Yates, a delegate from the State of New York; and Madison's full and careful report of all the proceedings, debates, and votes. From these sources we shall see that the makers intended, and that they considered they had made, a perpetual, consolidated, National Government.

The convention was called to amend the articles of the confederacy, and to it were sent most of the distinguished men of the country. The State of Virginia took an early and important part in the formation of the new government. Before the meeting of the convention, Madison wrote to Edmund Randolph, one of the delegates, that it would be well for him to prepare some propositions from Virginia, he in his letter suggesting what they should be. Imme-

diately after the organization of the convention after the choice of Washington as the presiding officer and the establishing of standing rules, Randolph introduced a series of resolutions, which had been considered by his colleagues and were known in the convention as those of Virginia. They were in substance, that the articles of confederation should be corrected and enlarged; that the rights of suffrage in the national Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants; that the Legislature should consist of two branches, the first branch to be elected by the people of every State; that the Legislature should have supreme rights with coercive power against any member failing to perform its duty, and that there should be a national Executive and Judiciary.

These resolutions were referred to the next meeting. At that meeting Randolph, at the suggestion of Gouverneur Morris, who said that his subsequent resolutions did not agree with the first, moved that this first resolution, which was that the articles of confederation should be corrected and enlarged, should be postponed, which was unanimously agreed to. Randolph then proposed three other resolutions, the first two that a union merely federal and treaties between the States as sovereigns would be insufficient. The convention, after debate and other propositions, considering the first two resolutions unnecessary, passed the third, which

was: "That a National Government ought to be established consisting of a supreme legislative, executive, and judiciary." All the States present voted ay, Connecticut only no, New York divided—Hamilton ay, Yates no.[1] Yates in his minutes says Randolph in first proposing his resolutions, "candidly confessed they were not intended for a federal government; and that he meant a strong consolidated union." Mr. Morris on the 30th observed that Randolph's preamble as to amending the articles of the confederacy was unnecessary, as the subsequent resolutions would not agree with it.[2]

The votes in the convention were as in the confederacy, each State had one and voted as a whole. If the delegation of a State was equally divided, its vote was lost.

By the 13th of June the Virginia resolutions had been considered and passed with changes and amendments,[3] the first resolution as changed, being that a national government ought to be established; the plan as to representation (Resolves 7 and 8), being that the representation in the two branches of the Legislature should be in accordance with the free population and three fifths of all other persons (slaves), and excepting Indians.

Further action on this report was deferred to June 14th at the request of Mr. Patterson, who

[1] 5 Elliot, 132–34.
[2] 1 Elliot, 391 and 392. Yates' minutes.
[3] 5 Elliot, 189–90 states the resolutions.

then offered a plan called that of New Jersey, formed by the deputations of Connecticut, New York, New Jersey, and Delaware, preserving the articles of the confederation, one Legislature, the equal vote of each State, but revising, correcting, and enlarging the conferred powers so as to render them "adequate to the exigencies of government and the preservation of the Union." In the resolutions the Executive, if any State or any body of men in the State should oppose the execution of the acts or treaties of the government, was to call forth the power of the States to enforce and compel an obedience.[1] The ratification was to be by the Legislatures of the States; that of the Virginia plan was to be by the people. The objection that the delegates to the convention were exceeding their authority, which was only to amend the articles of the confederation, was again brought up; the discussion whether the government should be national or a confederacy was again renewed. It was pointed out as a fatal objection by Madison, Hamilton (who then spoke for the first time), and others, that under a confederacy the coercing of a State to pay its quota or compelling it to obey would in fact be a civil war, where the militia of other States would have to march against the delinquent power. Hamilton said he neither liked the Virginia nor the New Jersey plan; he praised the constitutional monarchy

[1] 5 Elliot, 192, sixth resolve.

of Great Britain as the most perfect government. He was particularly opposed to Patterson's plan, "being fully convinced that no amendment of the confederation leaving the States in possession of their sovereignty could possibly answer the purpose."[1] He stated the plan he should prefer: a general government, with an executive and a senate for life or good behavior, the general government to have the appointment of the governors of each State, who should have a veto over the State laws.[2] He wished the States abolished as States, but admitted the necessity of their having subordinate jurisdiction.[3] He was aware that others did not approve of his plan, nor would they, he thought, of that of Virginia, but they might finally come to it. He thought universal suffrage a bad principle of government. He apparently did not know how strongly the democratic feeling existed amongst the people of this country; nor perhaps appreciate the strength of a government that has at its back the will and brute power of the majority of fighting men, as shown in our civil war. He made that unfortunate speech, afterwards used against him, that the people were getting tired of an excess of *democracy*, "and what is even the Virginia plan *but pork still, with a little change of the sauce.*"[4]

[1] 5 Elliot, 199.

[2] See his plan, 5 Elliott, 205. [3] 5 Elliot, 212.

[4] Elliot, 423; also 5 Elliot, p. 206 note.

As no one seconded Hamilton's plan and he did not urge it, the question before the convention was between Mr. Patterson's plan enlarging the power of the confederacy or the national one of Virginia. The former, after much debate, was laid aside, only New York and New Jersey voting no. The Virginia resolutions were taken up again by a vote of seven States ay, to three nay, Maryland divided, which was a vote, so Madison says, that they "should be adhered to as preferable to those of Mr. Patterson." [1]

That the word national was dropped from the resolutions of Virginia has been dwelt upon by Southern writers, and by Calhoun at length in his speech of 1833, as a proof that the national idea was abandoned. No such conclusion can be drawn from the way in which it was done. On June 20th, the day after the Virginia resolutions were again taken up and adopted, the first resolution being before the House, Mr. Ellsworth moved it should read: "That the government of the United States ought to consist of a supreme legislative, executive, and judiciary." This alteration, he said would drop the word national and retain the proper title," "The United States." Mr. Randolph said he did not object, and it was unanimously acquiesced in.

The second resolution, that the Legislature should consist of two branches, was taken up.

[1] 5 Elliot, 212.

Mr. Lansing moved instead, that "legislation be vested in the United States in Congress," and again urged a confederacy. On this George Mason,[1] to whom Mr. Lodge refers, said he did not expect this point to be re-agitated, and compared a national government to a confederate one. He spoke, "with horror," of the necessity that the latter would have of collecting its taxes by compulsion over States, of marching the militia of one State against another to enforce taxes; *rebellion* was the only case where military force should be exerted against citizens. In the early days of the convention he had urged that the new government should be one over individuals not States. He would not, however, abolish the State governments or render them absolutely insignificant. This second resolution was carried seven States to three, Maryland divided.[2]

The next resolution, that the first branch of the Legislature should be elected by the people, was supported by Mason, and Wilson said he considered it the corner-stone of the fabric; only New Jersey voted against it, Maryland divided.

On the resolution of how the second branch of the Legislature should be elected—by the State Legislature or the people,—Virginia voted that it should be by the people.[3]

That the representation in the first branch should be in proportion to the people was

[1] 5 Elliot, 216, 217.
[2] 5 Elliot, 223.
[3] 5 Elliot, 240 and note.

established. Then June 29th began the great controversy in the convention of how the representation should be in the second branch, whether in proportion to population or by State.

When this discussion took place, the three great States were Virginia, Massachusetts, and Pennsylvania. Virginia then comprised the territory which is now West Virginia and Kentucky, and, including her slaves, had the largest population. Massachusetts, instead of being insignificant in territory, had the large area of Maine, which was made into a separate State in 1820. Massachusetts had the largest white population and had furnished more soldiers than any other State in the Revolution; and it was probably for this reason that Madison alluded to it as the most powerful State. New York had then about the same population that Connecticut and Maryland had, and from apparent want of foresight as to its future great and immediate increase in population and power took a prominent part with the smaller States that wished representation should be by an equal vote in both branches of the new Legislature. The representatives of Connecticut, Sherman and Ellsworth, were also strenuously in favor of equality of States. Ellsworth, in reply to Madison's attack on Connecticut for refusing compliance to federal requisitions, excused his State by reason of her distress and impoverishment by her exertions during the

revolutionary war, and asserted that the muster rolls will show she had more troops in the field in the revolutionary war than even Virginia, and he appealed to the presiding officer, Washington, as to the truth of his statement.[1] Georgia, then estimated to be the smallest in population, trusting to the future settlement of its claimed large territory extending from the sea-coast to the Mississippi, usually voted with the larger States.[2] Mr. Bedford, of Delaware, asserted that South Carolina, puffed up with the possession of her wealth and negroes, and North Carolina were both united with the great States, and for the smaller States threatened, "sooner than be ruined, there are *foreign powers* who will take us by the hand."[3] For this he was very justly rebuked by Rufus King, of Massachusetts. It was hard for the smaller States having an equal vote in the Confederacy to change it for one proportioned to inhabitants. It was estimated that Delaware would have but one representative in each branch to Virginia's sixteen. The argument of the smaller States was that Virginia, Massachusetts, and Pennsylvania would combine to crush the other States. Madison replied that their interests were so different there was no fear of this. Massachusetts' product was fish; Pennsylvania's, flour; Virginia's, tobacco. He predicted that

[1] 1 Elliot, 469,

[2] See estimates, Note 160, 5 Elliot, 598.

[3] 1 Elliot, 472.

the struggle, when it came, would be between the Southern States with their interests as exporters and the Northern commercial States. The opinion was pretty generally entertained that any division that might arise would be between North and South.

The dispute between the greater and smaller States was finally settled by the provision that all money bills should originate in the first branch of the Legislature, that direct taxation should be in proportion to representation in that branch, and that there should be an equal representation in the upper House, the vote however being *per capita* and not by States. The final vote on this settlement was almost unanimous, only one State, Maryland, in the negative.[1]

It has been argued by Davis, Stephens, and others, that this equal representation of the States in the Senate was an establishment of a confederacy, and it has been a stumbling-block in the way of many constitutional commentators who have considered it a *compromise* between a national and a confederate government. It is a *compromise of the right of representation* in one branch only of the legislative department of the government; but it is *no compromise* in the *powers granted.* The powers granted to the government are of supremacy, legislative, executive, and judicial, over State and State constitutions and State judiciaries. If there had

[1] 5 Elliot, 357.

been rotten boroughs established by the Constitution like those then in Great Britain, if Delaware and Rhode Island had been given double the representation that Virginia had, or if every slave of the South had counted for two white men in the free States, the granted powers of the government would have been none the less supreme and national, as the Constitution itself declares, and as they in reality are. Scotland is not a sovereign nation because her peers elect twelve of their number to the House of Lords of the government of Great Britain. Oxford and Cambridge Colleges are not sovereign powers because they choose representatives to the House of Commons. Charles Pinckney of South Carolina with reason said: "Give New Jersey an equal vote and she will dismiss her scruples and concur in the national system."

The other resolutions of Virginia, except those relating to an executive, had been acted upon, when Elbridge Gerry of Massachusetts moved, that "the proceedings of the convention for the establishing of a *national government*" "be referred to a committee to prepare and report a Constitution"; a committee of five was agreed upon, no one objecting,[1] no one denying that the government was a national one. From the 23d to the 26th of July the plan of the Executive was considered and settled, and was unanimously referred to the Committee of

[1] 5 Elliot, 357.

Detail, that of five already appointed to prepare and report the Constitution. The convention adjourned until August 6th, to give the necessary time to their committee. The resolves then passed are stated in Elliot's *Debates*.[1]

The first was, that the government of the United States ought to consist of a supreme legislative, judiciary, and executive. The second, third, fourth, and fifth were the resolves as to the two branches of the Legislature. The sixth was: "Resolved, that the national Legislature ought to possess the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases for the general interests of the Union," etc., etc.

In the 12th, 13th, 14th, 15th, 16th, 20th, and 23d—the last, the executive, the legislative, the judiciary, and the government were termed national. These are the resolutions passed by the convention, all declaring the government and every branch of it was national. This was the plan agreed on; no changes were made except of detail and for euphony, and some modifications.

On August 6th the Committee of Detail reported the Constitution; a printed copy was furnished to each member.[2] The preamble was, "We, the people of the States of New Hampshire, Massachusetts," then follow the

[1] 5 Elliot, 374–6.

[2] Copy of Constitution as reported, 5 Elliot, 376-81.

names of all the other States, "do ordain, declare, and establish the following Constitution for the government of ourselves and our posterity."

"Article I. The style of the government shall be the United States of America."

"Article II. The government shall consist of supreme legislative, executive, and judicial powers."

By Article X. the executive was vested in a president, to hold his office for seven years, but not re-eligible, whose title was to be "His Excellency."

It will be noticed that the preamble had the declaration of perpetuity, that we, the people, made it for "our posterity."

The Constitution was then taken up by its separate articles, and they were minutely and thoroughly discussed and somewhat altered. Each was again passed, taking all the time from the 7th of August until September 12th.

The definition of treason was considered at great length, and in the debate it was shown that States might punish for acts against their authority under the name of treason or under other names. Madison thought the definition too narrow; Mason was in favor of extending the definition and adopting the statute of Edward III.[1] The record of the convention shows this article punishing treason was unanimously

[1] 5 Elliot, 447.

agreed to, notwithstanding the objection Luther Martin said he made.[1]

The supremacy of the Constitution and the laws of the United States over the States and all citizens and State judiciary was passed, no one opposing, August 23d.[2]

The provisions relating to the office of President and his powers and duties were much discussed and changed, and the title of "His Excellency" dropped.

The amended draft of the Constitution was submitted to a Committee of Style and Arrangement, of which Gouverneur Morris was chairman, and they changed the preamble to, "We, the people of the United States," from that of "We, the people of New Hampshire," etc.; they inserted the words, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty," retaining that it was to ourselves and our posterity, that we do ordain and establish this Constitution of the United States of America. It has been argued and strenuously claimed that this change to "We, the people of the United States," was one made for euphony at the end of the session of the convention, and has no force as a declaration that it was made by the people. But it will be

[1] 5 Elliot, 451. Article VII., Sec. 2, was then agreed to *nem. con.*

[2] 5 Elliot, 467.

seen it took the place of one as explicit, one declaring it was by the people of every State and for themselves and posterity. It was necessary to drop the name of each State, as the Constitution was to be obligatory only on the people of those States adopting it. This change was not objected to by any one. The convention considered this final draft from the 12th to the 17th of September, and made some changes, when it was signed by all the delegates present except four.

The members of the convention evidently had studied for the occasion and were learned in the history of leagues and governments; they referred to Montesquieu, to Holland, Swiss Cantons, United Netherlands, Poland, Amphictyonic Conference, Archæan and Lycian Leagues, the Germanic body, and to Germany, from which the general principles of government came.

There was a diversity of opinion in the convention about the durability of the Union. Its rapid increase in population, its future greatness in territory (for the members believed in the acquisition of the Mississippi to its mouth), were foreseen and spoken of by many.

Some there were who thought, with the extreme difficulty of communication and intercourse, not knowing how steam navigation and the railroad would almost annihilate distance, that it would be impossible to keep such an immense territory and people together. Others

congratulated themselves as the founders of a great empire. Sherman of Connecticut, on the question of limiting the number of new States to be admitted, from the fear of their controlling the old thirteen, replied: "We are providing for our posterity, our children and grandchildren, who are as likely to be citizens of new Western States as of the old States."[1] No one suggested any dissolution by claim of right of secession.

When the supremacy and nationality of the intended government were settled, Yates and Lansing (who with Hamilton formed the delegation from New York) on July 3d left the convention, and in their letter to Governor Clinton,[2] stated that they did so because they were chosen to revise the Articles of the Confederation and that the principles of the Constitution sanctioned by the convention met with their "decided and unreserved dissent," as would any system "which had in object the consolidation of the United States into one government"; and that "a persuasion that their further attendance would be fruitless and unavailing rendered them less solicitous to return."

We find after equal representation in the Senate had been granted to the smaller States, that their delegates took a prominent part in enlarging and strengthening the powers of the General Government.

[1] 5 Elliot, 310. [2] 1 Elliot, 480.

Luther Martin, who throughout the session of the convention had been the most able and persistent opponent to a national government, expressed his dissatisfaction at the close and was one of the four who refused to sign. The three Southern States, North and South Carolina and Georgia, as was stated in the convention, had exalted opinions of their future population, and had been often on the side of the larger States. They had obtained their wishes—representation for their slaves, the right to import them until 1808,[1] the prohibition of export duties on their rice, indigo, and tobacco, yielding only the taxation of imports.

General Charles Cotesworth Pinckney of South Carolina, towards the close of the convention, expressed the satisfaction of the South at the liberal conduct shown to them, and that it was for the interest of the weak Southern States to be united with the strong Eastern States, that the government should have the power of making commercial regulations, and that though he had had his prejudices against the Eastern States, "he had found them as liberal and candid as any men whatever."[2]

Washington, the presiding officer, who had been advised by his best friends not to accept the nomination as a member of the convention,

[1] Virginia opposed the importation of slaves. Mason particularly condemned it. 5 Elliot, 458.

[2] 5 Elliot, 489.

and who from a sense of duty assented to act, spoke but seldom.

At the close of the proceedings he urged an amendment that removed the objections of some members, which was agreed to unanimously.

Next to Washington, Franklin was perhaps the most prominent person in the country. His motions and suggestions did not generally meet with the approval of the convention, excepting perhaps in reference to the equality of representation in the Senate, where the committee appointed under his resolutions brought in a plan for a settlement. His witty remark, when the last members were signing, has taken its place in history. Looking towards the President's chair, at the back of which a rising or setting sun had been painted, he observed to those around him that painters had found it difficult to distinguish a rising from a setting sun, that during the session, between his hopes and fears as to the issue, he would look at the sun behind the President and could not tell whether it was rising or setting, but now he knew that it was a rising one. Hamilton did not conceal his dislike to the plan adopted, but promised his ardent support. His strenuous labors to that end in the New York convention against the most persistent and determined opposition were finally crowned with success. Gerry of Massachusetts refused to sign; Gorham and Rufus King—who with Gerry had

taken active parts in the discussion,—together with their colleague, Caleb Strong, signed. Madison and Blair alone signed for Virginia. Mason, though he had said he would bury his bones in the city rather than the convention should dissolve without doing anything,[1] and had been from the beginning in favor of a national government, declined to sign what he had been so instrumental in making; because he thought the great power given to the Senate of trying impeachment, of making treaties, of appointing ambassadors, judicial and other officers, would make an aristocracy of its members. He and Randolph, the one who brought the plan forward, thought the Constitution agreed on needed amendment and wished another convention. One cannot help thinking their decision might have been different, if Virginia had been allowed her proposed representation in the Senate in proportion to population.

We have already stated that the Constitution was sent to the Congress of the Confederacy and by them submitted to the State Legislatures, who all sanctioned it so far as to submit it to conventions chosen by the people. In each and every State the coming into the new government was ultimately decided by the people, and not by the State government.

In many of the States the adoption of the Constitution was pertinaciously and vehemently

[1] 5 Elliot, 278.

opposed on the ground of the great and excessive powers given to the new government, that might be destructive of the liberty of the people. The appointment of officers, and the power of the President with his command of an army and navy in peace as well as in war, the legislative rights of Congress with an unlimited right of taxation, were so great that eminent and prominent men expressed their belief that the government would end in a despotism.

In Pennsylvania, Wilson at great length explained the new form of government, stating "that by adopting this system we become a nation; at present we are not one."[1] His labors in the State and the general conventions have been fully recognized by recent writers.

It was only after a long and heated discussion in the large convention of the then important State of Massachusetts, where were present, John Hancock, Fisher Ames, Rufus King, and Sam Adams, who reluctantly yielded consent, that the Constitution was adopted, the majority in favor being small.

In Virginia, which was the tenth State to come into the Union, Patrick Henry, who had declined the appointment to the general convention, objected because the Constitution said "We, the people," instead of "We, the States"; and if the States be not the agents of this compact, it must be one great consolidated national government of the people of all the States."[2]

[1] 2 Elliot, 526.

[2] 3 Elliot, 22.

"It had an awful squinting towards monarchy." "The federal convention ought to have amended the old system." George Mason objected because the Constitution had no bill of rights and would end in a monarchy or corrupt oppressive aristocracy, and the confederation be converted to one grand consolidated government.[1] The acceptance was ably argued and urged by Madison and others and Edmund Randolph, who had refused to sign, but had since come to the conclusion that the only chance of escape from the discredited, crumbling Confederacy was in adopting the new Constitution. He said in the beginning of the debate, "I shall endeavor to make the committee sensible of the necessity of establishing a *national government.* In the course of my argument I shall show the inefficacy of the confederation."[2]

The acceptance of New York, her territory dividing the Central and Southern States from the Eastern, was considered all important. Her ratification of the Constitution came late. She was the eleventh State, and neglected to vote for President at Washington's first election.

John Jay, the Minister for Foreign Affairs of the Congress of the United States, in an address to the people, plainly told them the new government was national. He said: "Friends and Fellow-Citizens—The convention concurred

[1] See Mason's objections, 1 Elliot, 494, also *Debates.*

[2] 3 Elliot, 64.

in opinion with the people, that a national government, competent to every national object, was indispensably necessary."[1]

Hamilton, Jay, Chancellor and other Livingstons, Melanchthon Smith, and a number of leading citizens were members of the convention. Yates and Lansing, who were members of the general convention that made the Constitution, and Governor George Clinton strenuously and persistently opposed the ratification, alleging as the reason the danger from the great powers given to the General Government subverting those of the State.

This New York convention for a long time was opposed to the ratification. Hamilton, who was exceedingly zealous for it, wrote almost in despair to Madison, asking if a State could adopt the Constitution conditionally and afterwards withdraw from the Union if its proposed amendments were not adopted. Madison replied, that "a conditional ratification did not make a State a member of the Union. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as of some articles only." Hamilton did not question the correctness of this opinion; but New York was brought finally to giving her consent. Mr. Lansing's two motions (which show that he thought the Union perpetual) of a conditional ratification

[1] 1 Elliot, 496.

with a bill of rights, and of a reservation of a right to withdraw from the Union after a certain number of years unless the amendments proposed should previously be submitted to a general convention, were negatived ;[1] a similar conditional acceptance had been proposed in the Virginia convention and abandoned.

The proceedings in most of the conventions called by the several States are reported in Elliot's *Debates*. In none of them was the theory advanced or suggested that a State had the power to secede from the government or decide as an independent sovereignty on the validity of the acts or laws of the new government. If the power to nullify was then supposed to exist, if the right of a State to leave at its will was thought of, why was it not then urged that nullification and secession were easy remedies if the Union should be or become oppressive? No one imagined that there was any such power remaining in the States. No one answered to the alleged fear of oppression and tyranny that the State could nullify or secede. Neither friend nor foe, as Webster said, claimed either.

On all occasions, in all the speeches, it was assumed as granted, that the consolidation of the States, as it was termed, was national and perpetual. Even in South Carolina the pro-

[1] 2 Elliot, 412. The acceptance was passed in full confidence that the bill of rights proposed by New York would be passed.

ceedings are conclusive on this point. The Constitution first came before the legislature on the question of submitting it to the people of the State. Charles Pinckney, who had also been a very prominent member of the general convention that made the Constitution, said: "He repeated that the necessity of having a government which should at once operate upon the people, and not upon the States, was conceived to be indispensable by every delegation present."[1]

The question whether the States ever had individual sovereignty arose in the convention chosen for deciding on the ratification of the Constitution, and General Charles C. Pinckney[2] insisted that our independence came from the Declaration of Independence made by the Congress of the Confederacy, wherein in the name of the good people of these colonies we were declared free and independent States. The separate independence and individual sovereignty of the several States was never thought of, not even mentioned by name in any part of it. The same objection in South Carolina as in other States to the Constitution as destructive of liberty was made. James Lincoln, a delegate from Ninety-six, said: "From a democratic you are rushing into an aristocratic government. Liberty! what is liberty? The power of governing yourselves. If you adopt this Constitution have you this power? No; you give it

[1] 4 Elliot, 256. [2] 4 Elliot, 301.

into the hands of a set of men who live one thousand miles distant from you."[1]

The words of ratification of the States are also conclusive on these points. We will take the three important States whose acceptance was for a long time doubtful. Massachusetts in her pious and reverential ratification used the word compact, which numerous Southern writers, Davis, Stephens, and others, bring up as proof that Massachusetts considered the Constitution a mere confederacy and not a government.

To refute this it is but necessary to give the very words used:

"The Convention, acknowledging with grateful hearts the goodness of the Supreme Ruler of the Universe in affording the people of the United States, in the course of his providence, an opportunity deliberately and peaceably without fraud or surprise of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new constitution in order to form a more perfect union, . . . do, in the name and behalf of the people of the Commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America."

It is *the people of the United States*, not the States, nor the people of the State of Massachusetts, that enter into this explicit and solemn compact with each other for a more perfect union. As we have said before, a compact may be for a national government or for a confed-

[1] 4 Elliot, 313. The objections to the Constitution came very generally from the interior western parts of the State. They were so in Massachusetts, Virginia, and New York.

eracy. If the convention understood that it was States making a confederacy, they would have said the people of the State, and not the people of the United States.

We come next to Virginia's acceptance of the Constitution, which, to Calhoun's peculiar mind, was "a conditional one." "A condition made in the interest of all the States, and of which any State could avail."

The acceptance was made "*in behalf of the people of Virginia*"; the condition was, "that the powers granted under the Constitution being derived from *the people of the United States* may be resumed *by them*, whensoever the same shall be perverted to their injury or oppression," and that "among other essential rights the liberty of conscience and of the press cannot be cancelled, abridged, restrained, or modified by any authority of the United States."

It cannot be disputed that the convention, by this acceptance, understood and declared that there was thence but one nation; they accept the government in behalf of the people of Virginia; they acknowledge that the powers are derived from "the people of the United States"; and add, if the government be perverted to the injury and oppression of the *people* of the *United States, they, the people of the United States*, may resume the granted powers, not the people of Virginia or the State of Virginia. If the convention understood that they were making a *compact between States* that were to retain sovereignty, or the right to with-

draw, it certainly would have said: if the United States Government be perverted to the injury of the States, then the State or sovereign State of Virginia or the people of the State could resume the powers granted by her.

Clinton is one of the four persons whom Mr. Lodge cites as of the opinion that the Union was a dissoluble, precarious, and temporary affair. The letter of Madison to Hamilton—we have before mentioned—in relation to the perpetuity of the Union and that there could be no conditional acceptance, is well known to constitutional writers and historians, and regarded as of the highest authority; but the more emphatic and decisive declaration of the convention of New York, in its circular-letter to the governors of the different States, signed by Clinton, its President, and *ordered unanimously*, seems to have escaped all notice. In that letter he and they state to the governor of each State the ratification of the Constitution by New York and her recommendation of certain amendments. He and they add, none of these amendments originated in local views.

"Our attachment to our sister States, and the confidence we repose in them, cannot be more forcibly demonstrated than by acceding to a government which many of us think very imperfect, and devolving the power of determining whether that government shall be rendered *perpetual in its present form* or altered agreeably to our wishes and a minority of the States with whom we unite."[1]

[1] Circular-letter from the convention of New York to the governors of the several States of the Union. Elliot's *Debates*, vol. ii., pages 413, 414.

Can anything be more explicit that every one, everywhere, at that time understood the Union was perpetual, than this unanimous address of the convention of New York saying so to all the other States, and the submissive request that they would amend the Constitution in accordance with their wishes?

The conventions of Massachusetts, Virginia, and New York passed resolutions recommending what they considered important necessary amendments to the Constitution. These resolutions and the recommendations of other States were considered in the first Congress, and ten articles, commonly called the Bill of Rights, were passed, and duly ratified by the legislatures of the States. These articles are safeguards against the feared tyrannical grants that had been given, and are all restrictive of the powers of the United States over its citizens, not of its powers over States. They are: that the people should have the right of petition; and "a well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." This shows how deep and serious the States believed the danger to be from the great powers of the General Government with a standing army and navy.

Other amendments were, that no law should be passed abridging the freedom of speech or of the press, or of trial by jury in suits at common law where the amount involved exceeds

twenty dollars; that there should be no established religion, and matters of that kind. None of these ten amendments give any powers to State governments. The final clause reserves all the powers not granted, "to the *States* respectively, or to the *people*," not to the States and their people, or the people of the respective States; but to the people, putting the people as a whole.

Great stress has been laid by Calhoun and his followers on this clause, as giving power to the States. As the United States Government's sovereignty is undoubtedly limited to the express grants of the Constitution, the powers not granted are in the States or people. There was no need of any reservation, except to allay the fears of those who erroneously believed that the Constitution gave unlimited power to the Union.

We have seen that in the discussions in the constitutional conventions it was denied that any separate State ever had or exercised sovereign powers. Judge Story, whose authority is as great as that of any legal writer, in his commentaries on the Constitution maintains this doctrine. Many of our earlier historians concur in this.

It is urged that originally we were one people of different colonies, subjects of the British Kingdom; our independence of that kingdom and existence as a power came from the declaration of the Congress of our combined

government, in which we are called one people. No State ever acted separately in any sovereign capacity; we carried on the war, made peace, and treated with foreign countries as one nation. Even territory had been ceded to the Confederacy by the several States; and it was the Confederacy that passed the ordinance of 1787 abolishing slavery in the Northwest. The States had declared this Confederacy indissoluble. Webster, as we have seen, did not found his argument on the ground that the States never had sovereignty; he impliedly admitted the claimed independence, or sovereignty of the States, before the forming of the Union; it is safer to make this concession as Webster did. Each State had its choice to join the Union or to remain apart and become an independent sovereign power.

Our first chief-justice, John Jay, a most eminent jurist, a member of the New York convention, and one of the writers of the *Federalist*, in his decision in the case of Chisholm against the State of Georgia, where Georgia denied that a State could be sued, very clearly states how our government was formed and where the sovereignty is. He said: All the people of our country were subjects, every acre of land was held by grants from the Crown of Great Britain; the sovereignty passed from the Crown to the people, and a confederation of States was established as the basis of a general government. Then the

people of the country made a new government saying, "We, the people of the United States, do ordain and establish this Constitution." Every State constitution is a compact between the citizens to govern themselves in a certain manner, and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves as to general objects in a certain manner.[1]

It has often been asserted and apparently is generally believed, that in the lapse of time the limited authority of the United States has been gradually extended, national powers assumed, and the whole fabric of government changed. An examination, however, of the laws passed by the earliest Legislatures shows a very liberal construction of the granted powers. Madison was a leader in the first Congress, he was through life a strict constructionist of the extent of the powers given by the Constitution. He informs us that no one doubted in that Congress that the United States had the power of levying duties for protection.[2] The want of such power was the very ground on which South Carolina passed the nullification acts of 1832. The preamble of the law of the first Congress, stating that the duties laid were for the encouragement and protection of manufactures, we have already cited. The same act

[1] See 2 Dallas *Reports*, p. 471, for opinion in full.

[2] Madison's letter to Jos. C. Cabell: Consideration No. 8. 4 Elliot, 602.

made a discrimination in favor of imports of teas from China and India direct in ships belonging to citizens of the United States, allowed a drawback on dried and pickled fish and salted provisions in lieu of a drawback on the salt used in them. In the third session of that first Congress, an excise tax was laid on distilled spirits, and the Bank of the United States was incorporated—because of its utility to the government in the collection and transmitting of its revenue. Carriages were taxed in 1794. To the charter of the bank and the carriage-tax Madison and others objected as not within the granted powers. Also in 1794 sales of wines and liquors by retail and sales by auction were taxed. And Madison himself introduced a bill to make a post-road through the whole length of the States from Maine to Georgia.

The suit before referred to against the State of Georgia,[1] under the clause giving the United States Courts jurisdiction between a State and citizens of another State, is another piece of contemporary history and the strongest possible proof what was the understanding of that day. Georgia was sued by a citizen of South Carolina in a simple action of assumpsit, the legal term for a suit in which one would recover for the cost of a pair of shoes or a day's wages. Georgia refused to defend the claim on the ground that she was a sovereign State.

[1] 2 Dallas *Reports*, 419.

The case came before the full bench of the Supreme Court, and was argued for the plaintiff by Edmund Randolph, then Attorney-General, the prominent member of the general convention and that of Virginia, who stated his opinion strongly against this claim of Georgia. The decision was against Georgia; Blair and Wilson, who were members of the convention that made the Constitution, the Chief-Justice Jay, and Cushing giving fully reasoned opinions. Iredell a member of the North Carolina Convention, gave a dissenting opinion; it was not because he held that Georgia was a sovereign State as generally stated. He said as to sovereignty: "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." This same doctrine, as to the sovereignty of a State in unsurrendered powers, was held by Marshall.[1]

The reason of Iredell's dissent was that before the adoption of the Constitution a State could not be sued; that no suit now could be brought against a State, because Congress had not made a law providing for it. Further, he intimated it was not intended by the Constitution to give the right of a compulsory suit against a State. As to the sovereignty of the United States in the powers conferred to it, the court was unanimous.

[1] Providence Bank *vs.* Billings, 4 Peters, 514.

In the same suit, Jay and Cushing maintained that the United States cannot be sued, a dictum since followed, though the Constitution gives jurisdiction to the courts where the United States are a party.

At this time all the States were greatly indebted and many suits were instituted against them, the United States Courts maintaining their jurisdiction over the States. The alarm was general, and to quiet the apprehension that was so extensively entertained, an amendment, taking from the United States judicial power in suits against a State, was adopted in Congress and afterwards ratified by the State Legislatures in 1798. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It left jurisdiction to the United States of controversies to which the United States shall be a party, of controversies between two or more States, between citizens of different States, between citizens of the same State claiming under grants of different States.[1]

Early in our history, in the second administration of Washington, a formidable, armed, organized resistance was made to the enforcement of the excise laws of the General Government in the western portion of Pennsylvania,

[1] Chief-Justice Marshall's remarks in Cohens *vs.* Virginia, 6 Wallace, 264.

which extended into a part of Virginia. It was computed that there were sixteen thousand men capable of bearing arms in the district in insurrection. Washington called out the militia of several of the States and, as Commander-in-chief, suppressed the revolt. The march of the troops was fatiguing and long, late in the fall, in rain and storms, which caused much suffering and, in the end, a good many deaths. The insurrection was crushed by the power of the General Government with promptness and vigor, much to the satisfaction of Washington and Hamilton then Secretary of the Treasury; it strengthened the government and the administration. Of the prisoners tried before the United States Court at Philadelphia two were found guilty of treason, who from some palliating circumstances were ultimately pardoned by the President.[1]

We have seen what were the opinions of the nature of the new government held by Hamilton, Mason, and Clinton, three of the persons Mr. Lodge named. There can be no doubt what Washington's was. No one knew better than Washington, what a miserable condition the States, then petty in population and poor in resources, would be without a strong, indissoluble Union. Only one of the States, Virginia, had over half a million of inhabitants, nearly half slaves; two had about sixty thousand.

Washington, long before, on the disbanding

[1] Hildreth's *History*, vol. iv., p. 515.

of the army in 1783, wrote to the governors of the States that, according to the policy the States should adopt, depended whether the revolution was a blessing; and he put "first" among the essential requisites "an indissoluble union of the States under one federal head."[1] In his address as president of the convention submitting the Constitution to the Congress of the States, he said: "In all our deliberations on this subject we kept steadily in our view that which appeared to us the greatest interest of every true American, *the consolidation of the Union*, in which is involved our prosperity, felicity, safety, perhaps our *national* existence." In his farewell address, as President, to the people of the United States, in no less emphatic terms, he declared the importance and the success of the Union. He said: "The *unity of Government*, which constitutes *you one people*, is also now dear to you; it is justly so, for it is a main pillar in the edifice of your real independence—the support of your tranquillity at home, your peace abroad; of your safety; of your prosperity; of that very liberty which you so highly prize."[2]

We have before stated, that at the institution of our government there was a great fear on the part of a portion of the people of its consolidation and the extension of its granted powers over those reserved to the States and people.

[1] Eliot's *Manual of United States History*, 266.

[2] Sparks' *Washington*, vol. xii., p. 214.

It was not however until the administration of John Adams, about ten years after the government had gone into operation, that the power of a State to pass judgment on the validity of the acts of the United States was suggested. Those who had elected Adams as President called themselves Federalists, and, as is natural in those controlling the government, were in favor of a liberal construction of its powers. The name federal, taking its Latin derivation, refers to a bond uniting states; that bond may be, however, that of a confederacy or of a nation. Perhaps it was a misnomer for the party in favor of a broad national construction of the Constitution. The name has come into use, however, as descriptive of our government; it is very generally called the Federal Government. The proposed uniting of states, like the British colonies in the Pacific, is spoken of as federal. Indeed there is no substantial objection to terming any sort of government made by a constitution or agreement federal.

The party, at that time of our history, in opposition to the Federal, and who were in favor of a strict construction of the Constitution, called themselves by the national name of Republicans. When, however, they came into power under Jefferson, they were no longer strict constructionists.

CHAPTER IV.

KENTUCKY AND VIRGINIA RESOLUTIONS.

DURING Adams' administration peace had been endangered by the endeavor of foreigners to embroil the country in the war then raging in Europe. In 1798 the Alien Laws giving the power to the President to expel foreigners, and the Sedition Law punishing seditious acts and libellers of the government, were passed. The constitutionality of these laws may be fairly questioned.

Jefferson, the leader of the party in opposition to those in power, was not a member of the convention that formed the Constitution, he was at that time serving the country in Europe. He was exceedingly disturbed by the Alien and Sedition Laws, and has generally been held as the instigator and author of the Kentucky resolutions condemning them, and asserting the right of nullification, passed by its Legislature in November, 1798.[1] The Virginia Assembly soon afterwards, late in December of that year, passed the famous resolutions so much relied upon by those claiming the

[1] Two drafts of the resolutions in his handwriting were found amongst his papers and are published in his writings.

right of nullification and secession. Jefferson did not find the Legislature of Virginia as compliant as that of Kentucky; and the resolves passed by Virginia differ fundamentally from those of Kentucky.

At the time they were passed little notice was taken of the Kentucky resolves, owing undoubtedly to the small importance of the declarations of the Legislature of a State just admitted to the Union with but few inhabitants. Besides, Kentucky had no claim to original sovereignty. She owed her existence, the right of government over her territory, and of expressing her opinions, to the privilege the General Government had given her to become a State. How with any decency could such a State claim to be a sovereign, to pass judgment on the legality of the laws of the United States from whom came her very being?

Then, after all, resolutions are not laws, and these resolutions of Kentucky (and the same remark applies to the resolutions of all other States passing judgment on the laws of the United States declaring them null and void) are merely the opinion of that particular Legislature that passed them, a sort of harmless suggestion of superior wisdom. There is no provision in any of our State constitutions authorizing the Legislature to give such opinions and the next Legislature may pass others directly contradictory. They are only entitled to respect as *opinions*, as would be the opinion of

any town meeting or synod of clergymen or assemblage of citizens.

The Kentucky resolutions declare, and it was the first time any such declaration was made, the same doctrine that Calhoun and Hayne subsequently maintained; that the several States are united by compact, under the style and title of a constitution, in a general government for special purposes, and when the General Government assumes undelegated powers its acts are void and of no force.

Then comes the doctrine, that this government created by this compact is not the exclusive or final judge of the extent of the powers delegated to it, "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."

Let us examine this reasoning of the Kentucky resolutions. It is that the States are united in a general government by a compact, called a constitution, for special purposes, and when the government assumes undelegated powers its acts are null and void. There is no objection to calling the Constitution a compact for special purposes only, and declaring that the government under it has no right to assume not granted or undelegated powers, and that any such assumption is void and of no force.

The only objection to this first clause is the ambiguity in the declaration that *the several*

States are united by compact. The Constitution may be called a compact; but it cannot be denied that it was between the people of the different States. It was not a treaty or agreement made by the State Legislatures or State governments.

In the second clause comes the objectionable clause, that the government created is not the exclusive or final judge of the extent of the powers delegated to it.

We have already set forth that in this Constitution, or compact, which is declared, by those who made it, supreme over all constitutions and laws of every State, that all cases arising under the Constitution or laws of the United States shall be tried by its judiciary.[1] Here is a compact by the people of the several States, that when any questions or cases arise the United States Judiciary shall have jurisdiction and decide upon them. The parties to this compact have thus expressly made that judiciary the final judge of the validity of the laws, and therefore necessarily of the extent of power delegated to the government. It cannot be denied that even independent sovereign nations can establish a tribunal over themselves by arbitration or compact that shall be conclusive. How then can the supremacy of the judiciary of the United States be questioned by a State, whose people have deliberately declared the United States Judiciary supreme

[1] Article III, Sec. 1, of the Constitution.

over the State constitution and laws, and that it has supreme judicial authority over all cases arising under its Constitution and laws.

We must bear in mind that our Constitution and Government would have been an absurdity and a failure, if every State, as an independent authority, could question the validity of a United States law or the act of any of its legal or administrative officers; four and forty different State judiciaries to decide on what law was valid in each independent sovereign State or Nation. As Webster and Chief-Justice Marshall said, and Calhoun admitted, on every constitutional question this theory of nullification gave as many vetoes as there are States.

Admitting, however, for the argument, that the States are independent sovereign nations, this nullification doctrine of the Kentucky resolutions is very faulty. It asserts the right of those who deny the binding obligation of the compact, to break it; it entirely ignores the right of the other parties, even when of the majority, who hold to a different construction, to enforce their view. In all compacts or agreements between nations there is the right of the independent sovereign nations, and emphatically when of the majority, to make another independent nation perform the compact it has made. The majority is not obliged to yield to the minority. The *ultima ratio*, the final reasoning of nations is war, and the majority certainly have that right.

Jefferson himself asserted this right of a confederacy to coerce a State, a party to an agreement, when he wrote to Cartwright that the Confederate Congress should send a frigate and compel a State to pay its quota. Washington was of the same opinion, when, in reference to New Jersey's refusal to pay her contribution, he wrote, "that counties in Virginia and Massachusetts might oppose themselves to the laws of the State in which they are, as an individual State can oppose itself to the Federal Government." [1]

The absurdity of the Kentucky resolutions [2] does not end with the nullification theory. One would imagine the dispute would have been, who did not write them, not who did. By the Constitution certain powers are given to Congress, and the authority "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." The power to punish three offences only is mentioned, but that Congress had the power to enact all laws necessary to enforce and maintain its authority is expressly given, and never had been questioned before these resolutions.

The authority of Congress is often illustrated by referring to the power given "to establish

[1] Washington's letter to Dr. Wm. Gordon. Bancroft's *History of the Constitution*, vol. i., p. 320, Appendix.

See also in Jefferson's *Works*, letter to Madison, April 16, 1781, approving of coercion by a party to a compact.

[2] Kentucky resolutions, 4 Elliott, 540.

post-offices and post-roads." Under this brief grant, Congress has passed laws punishing the robbing and obstructing the mail, and breaking open letters, and has assumed the right of taking of lands, and building post-offices, and doing everything requisite for protecting, transmitting, and distributing mail matter. Congress has also passed laws punishing the bribing of judges and of obstructing or in any way interfering with judicial processes. In fact, it is difficult to see how the government could go on without these powers to enforce and maintain its authority. But this Kentucky Legislature resolved that Congress had only the power to punish treason, counterfeiting the securities and coin of the United States, and piracies and felonies committed on the high seas, and offences against the laws of nations; because the power to punish these three crimes was alone enumerated in the Constitution. And it expressly enumerated two acts, one the Sedition Law, and the other an act to punish forging or uttering counterfeit bills of the Bank of the United States, "and all other their acts ('Congress') which assume to create, define, or punish crimes other than those enumerated in the Constitution, are altogether void and of no force"; that the States only had this power each in its own territory.

The resolutions also arraigned the government for the sedition and other acts punishing crimes, saying "that the General Government

may place any act they think proper on the list of crimes and punish it themselves." It declared "that these and successive acts of the same character may tend to drive these States into revolution and blood." It will be noticed that the resolutions make no claim of a right of secession. The use of the words revolution and blood implied that resistance to the laws would be war.

The resolutions also arraigned the government for the Alien Law, calling it a tyranny, and asking the States to concur with them in considering that the acts of the General Government were so unconstitutional that they 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"; and they ask the States that they will concur in declaring these laws void and of no force, and in requesting their repeal. The resolutions did not call upon the people or State of Kentucky to treat these denounced laws as null and void, but asked the other States to join them in getting Congress to repeal them.

For some reasons wholly incomprehensible, these nullifying resolutions of Kentucky and those of Virginia have been seized upon and referred to by late writers in the mistaken belief that they were the same, and are alike declaratory of the right of a State, as an independent sover-

eign power, to treat as null and void any United States law it deems to be so, and with apparently the belief that they were concurred in to a great extent at the time of their adoption.[1]

No one has suffered more than Madison from this error,—Madison, justly called the father of the Constitution, who, when its adoption seemed to depend upon the acquiescence of New York, and that State hesitated about joining the Union and proposed to make a conditional acceptance, firmly declared an acceptance was absolute and perpetual, who in No. 39 of the *Federalist*, the work written for the purpose of setting forth the plan of the new government, was no less explicit on the question of nullification, and said: "It is true that in controversies relating to the boundary between the two jurisdictions, the tribunal which is ultimately to decide is to be established under the general government. . . . Some such tribunal is clearly essential to prevent an appeal to the sword and a dissolution of the compact, . . . and it could be safely established under the first alone,"—the General Government. And who later in 1833 wrote to Webster in reference to his speech in answer to Calhoun: "It crushed nullification, and must hasten an abandonment of secession."[2] His biographers speak of his double dealing in this matter, and even Mr. Hare, in his valuable commentaries on the Con-

[1] See vol. i., Bryce's *American Commonwealth*, p. 328.

[2] Bledsoe, *Is Jefferson Davis a Traitor*, p. 173.

stitution, passes the same judgment on his conduct.[1]

But, besides Madison, the fair fame of the State of Virginia, to whom, for its being, the nation owes the greatest debt of gratitude, should not be tarnished by the taint of having so soon declared that the laws of the United States and the acts of its officers could be held and treated as null and void by every State that questioned their validity. From Virginia came Washington, the great general under whose command we became a nation, the presiding officer over the convention that made the Constitution, and who as our first President inaugurated and put successfully into operation the national government, assuming no unauthorized powers. To Virginia also is due the plan of the new government proposed in the convention by Randolph, and ably shaped and developed by Madison and Mason. Nor can we overlook the great Chief-Justice, Marshall, who for so many years and from its early existence defined the powers granted to the government, and maintained them with fairness and without encroachment on those of the States.

[1] There are several works on the Constitution by Story, Bancroft, G. T. Curtis, and others, but none of them that we have seen, except the recent work of Professor Hare, that ably treats the matter, has taken up the question of nullification and secession. Apparently the authors did not think such a claim could be made. Some editions recently published have notes on this matter.

In these famed resolutions the Virginia State Assembly, professing a determination to maintain and defend the Constitution of the United States and of the State, and a warm attachment to the Union, declared that the powers of the Federal Government were limited by the plain sense and intention of the instrument constituting the compact the States are parties to, and that in a case of a deliberate, palpable, and dangerous exercise by the Federal Government of other powers not granted by the instrument of the compact between the States, it is the right and duty of the States, the parties thereto, to interpose and arrest the evil and maintain their rights. It asserted, with deep regret, that the Federal Government had enlarged its powers by forced constructions of the constitutional charter which defines them, and that there were indications of a design to consolidate the States into one sovereignty and to transform the government into an absolute or at best a mixed monarchy; that particularly the Alien and Sedition Acts exceeded the powers delegated by the Constitution, and were subversive of the general principles of a free government, and were expressly and positively forbidden by the Constitution; that the good people of this commonwealth, with the truest anxiety for establishing and perpetuating the Union, and with the most scrupulous fidelity to the Constitution, appeal to the other States to concur in declaring the acts aforesaid

unconstitutional, and in taking the necessary and proper measures, in co-operation with Virginia to maintain the rights reserved to the States or people.[1]

It is to be borne in mind that the declaration of Virginia is, "that in a case of a deliberate, palpable, and dangerous exercise by the Federal Government of other powers not granted"—(that is, in the case of usurpations), it is the duty of the States, not the duty of a State, to interpose and arrest the evil and maintain their rights. Certainly in such cases some power should interpose, and if States can legally under the Constitution interpose to remedy such an evil, there can be no objection to such interposition. Indeed a usurpation of powers might be so plain and serious as to justify rebellion.

There is apparently a belief amongst some writers since Von Holst published his, so-called, *Constitutional History of the United States*, that Virginia laid down the doctrine, that "States can interpose." As if it had been declared there was a right of States to interpose their authority and prevent the United States from enforcing its laws. It is in case of *usurpations only* Virginia claims that it is a duty and right *to interpose to redress this evil.* There is no statement how States should interpose; no suggestion that the method should be other than in the way the Constitution sanctions.

[1] Virginia's resolutions and explanations, 4 Elliot, 528, 529, 546 to 580.

It is very much to be regretted that Mr. Henry Adams, in his very able and interesting history of the United States, should have added his great authority to this construction of the resolves. He says the Republican and the Federalist parties "were divided by a bottomless gulf in their theories of constitutional powers." "The Union was a question of expediency, not of obligation: this was the conviction of the true Virginian school and of Jefferson's opponents as well as of his supporters, of Patrick Henry as well as of John Taylor of Carolina and of John Randolph of Roanoke"; and "The essence of Virginian republicanism lay in a single maxim—the Government shall not be the final judge of its own powers."

The resolutions of Virginia were understood by the other States as a denunciation of the laws of Congress, not as an assertion of a right of a State to interpose in their execution. Of the sixteen States, ten—Hildreth informs us, a fact that seems to be now overlooked, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire, and Vermont—answered and condemned them.[1] The resolutions of seven of these ten are in Elliot's *Debates*.[2] None of the other States supported them; indeed, from Jefferson's and Madison's correspondence, they were afraid North Carolina

[1] Hildreth's *History of U. S.*, vol. v., p. 296.

[2] 4 Elliot, pp. 532–9.

would also oppose them. The purport of the opposing resolutions is well stated in the report of a Committee of the Legislature of New York made in February, 1833, in the following words:

"These resolutions were met by several of the State Legislatures to whom they had been communicated by counter resolutions protesting against them with much warmth, chiefly on the ground that the act of a State Legislature declaring a law of the United States unconstitutional was in itself an unconstitutional assumption of authority, and an unreasonable interference with the exclusive jurisdiction of the Supreme Court of the United States; accompanied in some instances, with severe denunciation against their disorganizing tendency."

Some of the States argued the question of the constitutionality and expediency of the Alien and Sedition Laws, and one State approved of the able advocacy and demonstration of their validity and expediency by the minority of the General Assembly of Virginia.

Of the States, whose resolutions are in Elliot's *Debates*, two only, New York and New Hampshire, mention the name of Kentucky. Apparently the extreme viciousness of her doctrine escaped notice. In fact the nullification doctrine, the right of each State to resist the execution of United States laws though asserted at the time by Kentucky, was unnoticed or forgotten until brought to life again by South Carolina thirty years afterwards. The right of secession was not suggested in the resolutions of either Virginia or Kentucky.

Nor did it appear that any one of the Senators or the Representatives of Kentucky

ventured to lay before their respective Congressional Houses the nullifying resolutions of that State, notwithstanding the injunction contained in them to that effect.[1]

Kentucky's Legislature answered the resolutions of the other States regretting the unfounded and uncandid suggestions in them derogatory to her, and then declared an attachment to the Union. The Legislature none the less resolved, that the several States that formed the Constitution were sovereign and independent, having the unquestionable right to judge of infractions, and that in such a case nullification was the rightful remedy. The ending is not however that they nullify, but "this Commonwealth does now enter against them" (the Alien and Sedition Laws) "its solemn PROTEST."[2] The protest in capital letters: and that is all the State did.

We come again to the Virginia resolutions. When that State, in answer to her resolutions, received the indignant remonstrances of her sister States, she felt obliged to defend her position. That defence was made at great length in her General Assembly held the next year, 1799, by Madison, the author of the resolutions and the chairman of the committee to whom the communications of the other States had been referred. The report which was adopted by the assembly, coming from Madison,

[1] Hildreth's *History*, vol. v., 296.

[2] 4 Elliot, 545.

the principal constructor of the Constitution, should give no countenance to nullification and secession. Upon examination it will be found that there is none.

It begins with the very conciliatory and dignified statement that, though there might be painful remarks on the spirit and manner of the proceedings of the States who disapprove of the resolutions of Virginia, it is more consistent with the dignity and duty of the General Assembly to hasten an oblivion of every circumstance diminishing the mutual respect, confidence, and affection of the members of the Union.

The explanatory report takes up, first, the resolution to maintain and defend the Constitution of the United States and the warm attachment of Virginia to the Union, and justly says no one can object to this.

The report next notices the assertion that the powers of the Federal Government, as resulting from the compact to which the States are parties, are limited by the plain sense and intention of the instrument constituting that compact. This is merely, the powers of the United States come from and are limited by the Constitution.

The report goes on and says the compact is the Constitution, to which the States are parties. Then is defined what is meant by States. States sometimes mean territories occupied by the political societies within them, sometimes those societies organized into governments, and, "lastly it means the people composing those

political societies in their highest sovereign capacity." It says all will concur in the last-mentioned, "because in that sense the Constitution was submitted to the States, in that sense the States ratified it," and in that sense they are parties to the compact from which the powers of the Federal Government result. Now, not forgetting it is the States, the people, that are parties, is not this a declaration, an explicit one, that the people of the several States made the Constitution, and not one independent sovereign State with other independent sovereign States?

Then the report further says that the Constitution was formed by the sanction of the States, given by each in its sovereign capacity. Taking the definition of States as before given, this is merely an assertion that in each State the people, who have the sovereign capacity, sanctioned it. After this comes the rather obscure, and possibly objectionable, doctrine. "The States," meaning the people, "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, whether the contract made by them be violated, and consequently that as the parties to it they must themselves decide in the last resort."

It is to be noticed that the resolution carefully limits the decision of the people or States to "in the last resort." It does not define when

the last resort occurs. But the resolution (what the report is commenting on) is, "that in case of a deliberate, palpable, and dangerous exercise of other powers not granted by the said compact"—that is, in cases of deliberate, palpable, and dangerous usurpation—there is a right of the parties to the compact or government to decide, to act, to resist that usurpation. This is a declaration of the right of revolution; it is an assertion of that right in the last resort,—when argument and reasoning fail; a right that Webster admitted; the right that we the colonies claimed against Great Britain; the right of resistance against deliberate, palpable, dangerous usurpations of power; otherwise there is no redress for tyranny. No one denies this right. If unsuccessful, it is rebellion, and punished as such. So carefully, however, did Virginia assert this right that the explanatory report itself calls attention to "guard against misconstruction." The interposition is not only to be in cases of deliberate, dangerous, and palpable breaches of the Constitution, but "to be *solely* that of arresting the progress of the evil of *usurpation*." The resolutions do not even claim that in case of usurpation *the binding compact of the government is broken up*, but that the parties to it, which it has stated to be the people, should solely interfere to arrest the evil. The report proceeds with the statement that if there could be no interposition from *usurped* powers there is a subversion of rights recognized under State

constitutions, and a denial of the fundamental principle upon which our independence was declared.

The report admits as true, "that the judicial department is in all questions submitted to it by the forms of the Constitution to decide in the last resort." We have only to turn to the Constitution to see how extensive is this submission. It is in all cases arising under the Constitution and the laws made under it, in all cases in which States are parties, in all cases where treaties or the United States are concerned that it has this supreme power of judgment. This is precisely the contrary doctrine to that of nullification.

The explanation further proceeds that it is in the last resort, "in relation to the authorities of the other departments of the government, and not in relation to the rights of the parties to the constitutional compact, from which the judicial as well as the other departments, hold their delegated trusts. On any other hypothesis, the delegation of judicial power would annul the authority delegating it; and the concurrence of this department with the others in usurped powers, might subvert forever, and beyond the possible reach of any rightful remedy, the very Constitution which all were instituted to preserve." Perhaps it may not be amiss to notice that all judicial power is over the rights of the parties delegating it, the parties to the compact establishing the

government. The delegation is not confined to power over the authorities of the other departments of the government, and the delegation of judicial power does annul the authority delegating it as far as the power delegated extends. It does not delegate usurpation of powers, nor does it prevent revolution against usurped powers. This is what the explanation means. But why the exception as to the other departments of government? Usurpation by the judiciary over the other departments is contrary to the conferred powers, and thereby affects the rights of the parties to the compact. It is beyond what they delegate. Such usurpation could very properly be resolved against: even more, resisted "in the last resort."

Then comes the assertion. "The authority of constitutions over governments and of the sovereignty of the people over constitutions are truths which are at all times to be kept in mind, and at no time perhaps, more necessary than at present."

As people make constitutions for the sole purpose of conferring powers to governments over themselves which are to be superior and to compel obedience, and punish those refusing it; and as the people always have the power to make new constitutions or to amend them under the regulations they have established; the suggestion of superiority seems a glittering generality, at that time rather out of place.

The explanation then defends the assertion

in the resolutions, that these assumptions of powers, extending the sovereignty of the United States, supersede the sovereignty of the States in the cases reserved to them, and that its result "would be to transform the republican system of the United States into a monarchy." This fear that the government would by assuming undelegated powers end in a monarchy was the objection to the Constitution made in the convention that formed it, and in the conventions of the people of the different States when they adopted it. And in the Virginia resolutions it is said to be "the general sentiment of America." It is further argued this great assumption of increased prerogative and patronage of the President might enable him to secure his re-election and regulate the succession and establish it as hereditary. This fear of that day to us seems absurd; but in the days of George the Third, and not so many years from the Stuarts, it had a more plausible foundation.

The explanation further says, and it is in fact an admission of its truth, "that it has been stated that it belongs to the judiciary of the United States and not to the State Legislatures to declare the meaning of the Federal Constitution." "But a declaration that proceedings of the Federal Government are not warranted by the Constitution is a novelty neither among the citizens nor among the Legislatures of the States."

The report then takes up and undertakes to defend the resolve, that the government has manifested a spirit to enlarge its granted powers by a forced construction of the Constitution. It instances especially the Alien and Sedition Laws, and declares the Alien Law to be unconstitutional, because it gave the President legislative and judicial powers in addition to those of the Executive. The Act, it says, enabled him to send out of the country, in times of peace, aliens, citizens of a friendly nation whom he should judge dangerous to the public safety or suspect of treacherous or secret machinations against the government, giving him thus legislative power, making his will the law. He also is the judiciary; without the oath or affirmation of an accuser, his suspicion the only evidence to convict: his order the only judgment to be executed. And this order may be so made as to deprive the victim of the privilege of the *habeas corpus*.

The Sedition act was also claimed to be beyond the power of Congress for many reasons, and emphatically because it punished by fine and imprisonment false, scandalous, and malicious writings against the government; thus abridging the liberty of the press, the provision in the amendments of the constitution for which Virginia had been so strenuous.

In conclusion and in relation to these resolves the report says, nor can declarations either denying or affirming the constitutionality

of measures of the government be deemed, in any point of view as assumption of the office of the judge. They "are *expressions of opinion unaccompanied with any other effect* than that they may produce an opinion by exciting reflection." They "may lead to a change in the legislative expressions of the general will—possibly to a change in the opinion of the judiciary."[1]

"And there can be no impropriety in communicating such a declaration to other States," "and inviting their concurrence in a like declaration." Then it speaks of the legitimate rights of States to originate amendments to the Constitution; that it was not improper or objectionable in Virginia to ask the States to take "the *necessary and proper measures*" to maintain the rights reserved to the States or people; and that if the other States had concurred, "it can be scarcely doubted these simple measures would have been as sufficient as they are unexceptionable." This is a statement that the resolutions were a mere matter of opinion and that the laws complained of were unconstitutional, and if the other States had been of the same opinion, the States might have constitutionally remedied the evil.

Again is a repetition of the warm affection of the people of the State to the Union, and the explanation calls to remembrance the part the State had borne in the establishment of the "National Constitution," and subsequently of

[1] 4 Elliot, 578.

maintaining its authority without a single exception of internal resistance or commotion, and a declaration that the people of Virginia must be above the necessity of opposing any other shield to attacks on their national patriotism, "that the resolutions themselves are the strongest evidence of attachment both to the Constitution and the Union." "And as the result of the whole," they adhere to their resolutions and "renew their protest against Alien and Sedition acts as palpable and alarming infractions of the Constitution." Madison in a letter to Edward Everett informs us the words, "not law but utterly null, void, and of no force or effect," which followed the word "unconstitutional" in the resolutions as to the Alien and Sedition laws, were struck out by consent, and also that, "the tenor of the debate discloses no reference whatever to a constitutional right in an individual State to arrest by force the operation of a law of the United States."[1]

These resolutions and the explanation—Virginians always put them together—were nominally the political creed of the republican party that so long ruled the United States. They were a denunciation—perhaps a partisan one—of alleged unconstitutional laws made by the federal party in the administrations of Washington and Adams, and expressed a belief, which few to-day will say was warranted, that

[1] Madison's letter to Everett, before referred to. Oct. No. *N. Amer. Review*, 1830.

there was a design in them to transform the government into an absolute or at best a mixed monarchy.

The methods to arrest the evils of these alleged unconstitutional assumptions of undelegated powers were stated to be authorized by the Constitution itself. And by the concurrence with Virginia of the other States to whom the resolutions were submitted, they, the States, might remedy the alleged evils by their representatives in Congress or by the choice of Senators of different opinions; there were to be, the Virginia explanation said, no less than two Congresses before the laws expired by their limitation; or if necessary, the explanation further said, the States by a convention could alter the Constitution.

The resolutions are those of strict constructionists of the powers granted by the Constitution; they in no way assert the nullification doctrines of Kentucky, which some thirty years afterwards were revived and developed to their logical result of secession by Calhoun and South Carolina.

The prosecutions under the Sedition law, the arresting and carrying through the country and the fining and imprisoning as criminals, for the expression of opinions, of men whom the Republicans held as eminent and respectable, such as Thomas Cooper, Jefferson's dear friend, had very great influence in the defeat of the federal party under the elder Adams and

of the triumph of Jefferson and the Republicans.

The resolutions of Virginia alarmed Washington as exhibiting a discontent with the Union. He wrote to Patrick Henry, one of the Virginians Henry Adams names, to induce him to interpose his great influence in the matter.[1] Henry, whose impassioned eloquence had done so much to bring Virginia into the war of the revolution, who ably and persistently opposed in the Virginia convention the acceptance of the Constitution from fear that the great powers given to the United States would be fatal to liberty, had become one of its strongest supporters. He shared Washington's anxiety. Though he had often been Governor of the State, and had declined offers of the most important national offices under Washington, he offered himself as a candidate for election to the House of Burgesses, to do what he could to put an end to this discontent and what he considered the rash measures of the State. In his speech before his constituents, he declared that Virginia had quitted the sphere in which she had been placed by the Constitution in daring to pronounce upon the validity of federal laws, and asked, "whether the county of Charlotte would have any authority to dispute an obedience to the laws

[1] Washington's letter to Henry, Sparks' *Washington*, vol. xi., p. 387. The letter also contains his opinion of those in opposition to the government.

of Virginia, and he pronounced Virginia to be to the Union what the county of Charlotte was to her."[2] Nor did he believe that resistance would be peaceful; for he warned the people that the opposition of Virginia to the acts of the General Government must beget their enforcement, and that war would ensue with Washington and a veteran army as opponents. It was the period of our hostility with France, and Washington had been made commander-in-chief. Henry was chosen to the House of Burgesses by a large majority, but died before the session began in which Virginia's conciliatory explanation of her resolves and her loyalty and attachment to the Union and the supremacy of those laws in all delegated powers was made.

The other two distinguished Virginians whom Mr. Adams mentions; are John Taylor of Caroline and John Randolph of Roanoke. Taylor, a great friend of Jefferson's, in 1823 published a book called *New Views of the Constitution of the United States.* Of so little importance, so little known, were the Kentucky resolutions then that he does not cite them, as far as we can find from our examination, which we do not claim to be thorough. In the preface he speaks of his "survey as not devoid of novelty." He controverts at great length the opinions of Hamilton and Madison, as given in

[2] Wirt's *Life of Patrick Henry*, pp. 393, 394. John Coit Tyler's *Life of Patrick Henry*, p. 373.

the *Federalist* and a pamphlet published in South Carolina with similar views, called *National and State Rights Considered by One of the People.* His views of the Constitution are, as he says, new. He advances the doctrine that in a conflict between the laws and measures of the State and General Government neither shall prevail, but substantially the State should, unless three fourths of the States by an amendment of the Constitution should decide otherwise.

John Randolph of Roanoke was notorious for his eccentricities and vagaries, his attacks on all parties and all policies; if he had any opinion it was probably, as he said, that the Virginia resolutions and their explanations were "his political Bible." What the resolutions and explanations are we have endeavored to set forth.

CHAPTER V.

SUPREMACY OF CONSTITUTION MAINTAINED.

In less than the brief space of two and a half years after the Kentucky resolutions were passed Jefferson became President. If he believed in those resolutions he should at once have made a general jail delivery. All those in prison under United States laws for counterfeiting or forging United States bank bills, robbing or embezzling from the mail, violating the custom-house laws, interfering with the judicial proceedings of the government, or committing any crime, except the few mentioned in the Constitution, should have been set free (for the Kentucky resolutions expressly denounced all the United States laws punishing those crimes "as altogether void and of no force"). Jefferson contented himself with pardoning those imprisoned under the Sedition laws.

In his inaugural address to Congress, at the very beginning of his administration, Jefferson announced principles totally and fundamentally opposed to the Kentucky resolutions. He pleaded for unity, and denied that every dif-

ference of opinion was a difference of principle. "We are all Republicans; we are all Federalists."[1] He declared "the preservation of the general government, in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad." He also said "absolute acquiescence in the decisions of the majority, the vital principle of republics from which there is no appeal but to force, the vital principle and immediate parent of despotism."[2] Can anything be more directly opposed to the Kentucky resolutions, that give to every State a veto of every United States law or act that it deems unconstitutional, than these declarations of the preservation of the government in all its constitutional vigor and of *absolute acquiescence in the will of the majority?* Have they not been, ever since that inauguration day, the cardinal principles of Jeffersonian democracy? Perhaps it is strange that Jefferson, coming from Virginia, did not make the exception of the resolutions of the Legislature of that State, that in case of plain palpable usurpation of powers the people of the States could interpose to redress the evil by constitutional methods. Absolute acquiescence in every decision of the majority abrogates even the right of rebellion against oppressive usurpations that Webster announced. It is but reasonable to suppose that Jefferson would

[1] H. Adams, vol. i., p. 200.
[2] H. Adams, vol. i., p. 203.

have made this exception of Webster's and the reasonable affirmations of the Virginia resolutions, if he had been obliged to notice them. No possible argument, however, can reconcile these inaugural principles with the Kentucky resolutions. Is it possible that the great leader of the Republican party could have announced such doctrines if the Republican party of Virginia, of which he was the chief, held precisely the contrary, as Mr. Adams informs us?

Jefferson's policy during the eight years of his administration was emphatically national, and not that of a favorer of State rights nor even of a strict construction of the powers delegated to the General Government. In March, 1806, he signed an act laying out and making a road from Cumberland, on the Potomac, in Maryland, to Ohio. Again he approved a bill for this purpose in 1810, though from his writings it is apparent he doubted their constitutionality. Madison, Monroe, and Jackson afterwards vetoed bills passed by Congresses of their political faith in favor of this or other roads, because, as they declared, they were beyond the powers granted by the Constitution.

During Jefferson's administration a serious controversy between the United States and the great State of Pennsylvania as to the national powers of the government came to a crisis. During the revolutionary war the sloop *Active*, bound for New York with a cargo of supplies for the British, was taken from her master by

Gideon Olmstead of Connecticut and three men, who had been impressed by the English and put on the vessel to assist in her navigation. An armed brig of Pennsylvania took the *Active* from Olmstead and his associates and brought her into the port of Philadelphia. The State Admiralty Court of Pennsylvania tried the case by a jury according to the State laws, awarding to Olmstead and his companions only one quarter of the prize money, and distributing the remainder to the State, and those interested in the brig taking the *Active* and a companion vessel. An appeal was made by Olmstead from the State court to the Continental Congress as the power that had control of the maritime affairs of the revolting colonies. Congress very properly insisted on its jurisdiction over such cases. The Admiralty Court of Pennsylvania, disregarding this right, ordered the sloop and cargo to be sold, and distributed the proceeds; the Continental Congress, not having the power to enforce its rights, let the matter pass. Some years afterwards, when our new government had gone into effect, Olmstead filed his libel before the United States District Court of Pennsylvania and obtained a decision in his favor reversing the decree of the Pennsylvania court. Judge Peters, of the United States District Court, hesitated to enforce this decree against Pennsylvania, wishing to obtain the sanction of the Supreme Court of the United States. A mandamus was issued by

the Supreme Court directing its district court to enforce its decree, Chief-Justice Marshall saying that if a State could annul the judgment of a United States Court the Constitution itself became a solemn mockery. "The State of Pennsylvania can possess no constitutional power to resist the legal process which may be directed in this case."

The State of Pennsylvania did resist and did pass laws and make military preparations to enforce them. Here was a clear case of conflict between a State and the United States as to the powers the State had given, and where, according to the Kentucky resolutions, and according to Jefferson, if he were the author, the State, as a party to the compact of government, there being no umpire, could lawfully resist and insist on the construction it gave to the case. While this conflict was pending, the Republican party, which was predominant in the United States Congress, both House and Senate, in order to enforce the authority of the United States and the decision of its Court, passed an act authorizing the President, in cases of insurrection or obstruction to the law, to employ such part of the land and naval force of the United States as shall be judged necessary. Jefferson signed this act in 1807, thus sanctioning the compelling of the obedience of a State to the General Government.

It is to be observed that this took place in a case where the dispute was as to the jurisdic-

tion of the United States in a case between a State court and the authority of the old Confederate Government. The party of which Jefferson was the chief could have refused to enforce the decision of the Supreme Court on what seems a plausible ground, that the Constitution gave no power to the United States over the disputes between the old Confederacy and the States; but neither Congress, nor Jefferson by a veto, did this. They enforced the nationality of the Confederacy and of the United States Government as its successor.

The carrying out of the decree of the United States Court was resisted by the Pennsylvania State militia under General Bright, who had been called out by the Governor under the sanction of the Legislature; the United States marshal summoned a posse of two thousand men, and war was imminent. Madison had now become President, and the Governor appealed to him to discriminate between a factious opposition to the laws of the United States and resistance to a decree founded on a usurpation of power; but Madison replied that he was specially enjoined by statute to enforce the decrees of the Supreme Court. The State yielded, and also paid the money necessary to carry out the decree of the United States Court. General Bright and his men were brought to trial for forcibly obstructing the United States process, and were convicted and sentenced to fine and imprisonment. Madison pardoned those con-

victed, and remitted the fines on the ground that they had acted under a mistaken sense of duty.[1]

Nor is this all of this matter. Pennsylvania, though finally yielding an obedience to the United States, felt aggrieved, and suggested an amendment to the Constitution, that questions arising between States and the federal judiciary should be submitted to an impartial tribunal, and sent the proposed amendment to Virginia.

The Legislature of Virginia appointed a committee to consider this proposed amendment, part of whose report was, "that a tribunal is already provided by the Constitution of the United States, to wit, the Supreme Court, more eminently qualified, from their habits and duties, from the mode of their selection, and from their tenure of office, to decide the disputes aforesaid in an enlightened and impartial manner than any other tribunal that could be created." The resolutions disapproving the proposed amendment were passed *unanimously*, both in the House of Delegates and Senate.[2] Thus in

[1] A full account of this case, though well known and reported, is not to be found in the histories. The case was referred to as the Gideon Olmstead case in the debates in Congress at the time of South Carolina's threatened nullification in 1833. The account of the trial of General Bright is taken from Carson's *History of the Supreme Court of the United States*, p. 213 and *seq.*

[2] Webster's *Speeches*, 8th ed., 1850, vol. i., pp. 427, 428. See part of report and resolutions of Virginia in Mr. Pinkney's argument in Cohens *vs.* Virginia, 6 Wheaton, Rep., 264.

January, 1810, only ten years after her own resolutions and explanations, Virginia, instead of giving countenance to the nullification doctrine of Kentucky, and replying to Pennsylvania that, as a State, a party making the compact, you have a right to judge whether the United States exceeds its authority, declared that a fit tribunal for the trial of questions between the States and the United States existed in the Supreme Court of the United States, and that a better one could not be created. This should be conclusive that Virginia republicanism in no way countenanced nullification.

Immediately after the commencement of his administration, Jefferson, and Madison, the Secretary of State, entered into negotiations with France for the acquisition of the province of Louisiana and the immense territory belonging to it. The purchase was completed early in 1803, and by it and for all time the power of the old States in the Union was diminished. Even a liberal constructionist might have hesitated as to its constitutionality. Jefferson himself had his doubts. Neither he, however, nor any of his party took any measures to have an amendment of the Constitution to sanction it. It was indeed a measure of vital necessity, and acquiesced in by the people of all the States as such.

In the national convention Gouverneur Morris said that the fisheries and the Mississippi were

the two great objects of the Union.[1] Negotiations with Spain with reference to the navigation of the Mississippi were constantly before the Congress of the Confederacy in 1787, this river being the only outlet for the products of Kentucky, Tennessee, and of parts of Western Virginia and Pennsylvania, as well as of the great then unsettled country beyond. There was a fear that the inhabitants of this western territory might ally themselves with Great Britain, because of her power to compel Spain to grant the right of way to the sea; for it was recognized that the inhabitants of that country would and must be a part of the power that held the mouth of the great river. More than this, the Constitution itself provides for the admission of new States, and the annexation of Canada had been contemplated in the articles of the Confederacy.

Josiah Quincy's speech, in 1811, when the admission of Louisiana as a State came up, is often quoted by Southern writers as justifying secession. He said: "If this bill passes, it is my deliberate opinion that it is virtually a dissolution of this Union; that it will free the States from their moral obligation; and as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation,—amicably if they can, violently if they must."

This declaration does not contain any claimed right of a State as a party to a compact to judge

[1] 5 Elliot, 526.

whether it has been broken, or of a sovereign State to secede. It is an assertion that the government or nation was so changed by the annexation of Louisiana as a State, from territory formerly no part of the Union, that the other States had a right to break it up. This opinion was not concurred in by the Governor or Legislature or State of Massachusetts, which assented to the admission of Louisiana.[1] Quincy's declaration contains no assertion of the sovereignty of a State, or right to secede at will. It admits that separation, unless assented to, must be by force.

It is impossible to reconcile the doctrine of the Kentucky resolutions with those of Jefferson in his inaugural and with his whole policy during his term as President. They are fundamentally different. It must be remembered that his authorship of the Kentucky resolutions was not then known.

There are many followers and admirers of Jefferson who maintain that he did not take the same view of the Kentucky resolves as the nullifiers of South Carolina. Robert J. Walker, the distinguished financier and Secretary of the Treasury in Polk's time, in an article on nullification and secession, in the February number of the *Continental Monthly*, published at Philadelphia in 1863, gives what he alleges are Jefferson's views, and says that they were opposed to nullification and secession. Indeed, the

[1] H. Adams' *History*, vol. v., p. 326.

Kentucky resolves do not claim the right of secession; they do not follow out their premises to its logical conclusion. They do not declare or recommend that the State should treat the Alien and Sedition laws as null and void, though in their reply to the other States they say a nullification is "the rightful remedy." They carefully let it be known they only protest. That Jefferson did not carry this theory of the Kentucky resolutions to the right of secession, is perhaps shown by his correspondence when the acceptance of the Constitution was pending in Virginia. Even at the time of the Kentucky resolutions he speaks of the "scission" of the States, and about 1820, during the period of the Missouri dispute, he again alludes to the "scission," if it should come, as geographical. He would hardly have used this word, implying a cutting or tearing asunder, if he had believed in a right of secession.

Jefferson had not the cool, dispassionate judgment of Washington. He was a violent partisan. He believed the federalists were striving for a monarchy; he spoke of the great Chief-Justice Marshall, when he disagreed with a decision made by him, as a sly old fox. Both Jefferson and Madison were displeased with the rulings of Marshall on the trial of Burr for treason. The reason of their displeasure was the strict construction the Chief Justice gave to the law punishing that offence, not the

too liberal wielding of the judicial powers. The enactment of the Alien and Sedition laws and their enforcement were to Jefferson outrageous violations of liberty, and of the very amendments to the Constitution for which Virginia and Massachusetts and New York had been so persistent. He believed that the federal party was determined to keep possession of the government by crushing out the freedom of the press and the people. To oppose this, to prevent what he thought was a tyrannical abuse of authority with the intent of perpetuating itself, he was willing to put to question the fundamental authority of the government to pull down the whole structure. He found that his own State, Virginia, did not acquiesce in the doctrines of Kentucky. By a letter of his of the date of November 17, 1798, it appears he sent a draft of the Kentucky resolutions to Madison, saying that we should distinctly affirm all these important principles, not however stating that he was the author. When he came into power, if he thought of the matter at all, he must have seen that the practice of nullification would be the end of all United States government. What these resolutions actually were had apparently not been understood by the other States. Madison, his Secretary of State, who always maintained the supremacy of the General Government, was his dear friend and undoubtedly then, as in after years, his adviser.

Nor was his change of principles, if there were any change, more strange than his change of dress. Mr. Adams tells us he began his administration by receiving the gorgeously dressed foreign ministers in his threadbare coat, old much soiled corduroy small clothes, faded by many washings, and slippers without heels; for these clothes he afterwards substituted a dress of black, clean linen, and powdered hair. Is it Carlyle that says that clothes and principles are the same—that they make the man?

That Jefferson ever afterwards believed in the nationality of the Union, is shown by his administration and correspondence, and made evident by his acts in the crowning work of his life, the establishing of the University of Virginia. That he was the founder, he directed should be inscribed on the monument over his grave. In Charlottesville, where the mountains of the Blue Ridge come down to the plains that stretch many miles to the sea, was Monticello, Jefferson's charming home, the seat of his unbounded hospitality, and close to that of Madison. Near by amongst the rolling hills, most picturesquely placed by the direction of Jefferson, are the pleasing colonaded buildings of the University, planned by his own hand. It is the University's boast, but questioned by Harvard College, that Jefferson introduced there the system of elective studies, that is now spreading so widely. There were but four things that Jefferson declared should be

obligatory to the University: one was the study of the *Federalist*,—the work of Hamilton, Madison, and Jay, expounding the national doctrines of the founders of the Republic, with no countenance of those of the Kentucky resolutions. To-day Jefferson's directions are observed, and the *Federalist* remains the text-book.[1]

No President until Lincoln, save perhaps Madison in his first administration, had so troublesome a time as Jefferson in his second term of office. The rights of the United States, a small, weak power, were not only disregarded by England and France in their deadly struggle, but decrees were issued confiscating property and vessels engaged in what by the laws of nations is now universally held to be a lawful trade. Great Britain impressed sailors from American vessels, and one of her men-of-war arrogantly fought and captured a smaller United States frigate, killing and wounding many of her crew, and taking from the disabled ship her claimed subjects.

Jefferson's great panacea to cure these evils and to bring England and France to respect and grant our rights was the forcing of non-

[1] See No. LXXX. of the *Federalist* for Hamilton's clear and able statement of the powers of the judicial department. He says it is a political axiom, that the judicial power of a government should be co-extensive with its legislative, and that the government should and did have the power over States and their judiciary in all cases arising under the Constitution and United States laws.

intercourse on the high seas between the United States and all foreign countries—an embargo on all shipping. By virtue of the power in the Constitution to regulate commerce, Jefferson and his party destroyed it. The vessels were left rotting at the wharves, and ship-building and the many industries depending upon it and the sale of the products of the country abroad were stopped. The New England States suffered particularly by this arbitrary decree; they had an extensive and flourishing neutral commerce; their merchants had amassed great wealth. They, as Mr. Webster said, brought the matter to trial before the United States Court; the case was decided against them, and they submitted. No Northern State passed any resolutions affirming the doctrine of its sovereignty and its right to judge of what seemed to many "a deliberate, palpable, and dangerous exercise of powers not granted" by the Constitution. Instead of asserting sovereignty to judge, the Massachusetts Legislature passed in 1809 a resolve proposing an amendment of the Constitution prohibiting the laying of an embargo beyond a limited period. The measure failed because of not obtaining the consent of the other States.

It is always to be carefully borne in mind that the declarations of Quincy, Pickering, and Griswold, brought forward by Southern writers, favoring or threatening a separation, were never made on the ground of the sovereignty of a

State and its right to secede. The doctrine of those who held the most extreme opinions was that the policy and acts of the general government were so tyrannical and oppressive that the eastern commercial States were justified in rebellion and in separating themselves from the more southern States, where the political party was dominant, that had most grievously oppressed and impoverished them and annihilated their commerce in a futile attempt to injure Great Britain. This was not a claim of right to leave the Union and dissolve it at pleasure. Indeed, when the leaders went too far in their discontent, the people of the Eastern States would sometimes elect governors and representatives of the Republican party. The spirit of loyalty to the Union and the love of a common country would always spring up and assert itself when it came to the question of disunion and treason.

Towards the close of the war of 1812 there was great discontent at the failure of the government to repel the English forces from Maine, then a portion of Massachusetts. Troops raised in that State were sent to the defence of our more western Canadian boundary. Beyond the discontent, there was some disloyalty. At this time the Hartford convention was called by Massachusetts. That convention did not even pass resolutions of hostility to the Union. The convention was called to devise means of security and defence " not repugnant to their obligations

as members of the Union," and, according to Mr. Lodge, Josiah Quincy was not made a delegate by reason of his extreme views.[1] The convention neither asserted nor suggested nullification or secession, but *proposed amendments to the Constitution.* Its recommendations were of no particular importance.[2] The only persons who were affected by its doings were the members, who ever afterwards suffered politically from a taint of disloyalty. Peace soon came and terminated the oppressive grievances and removed the discontent.

Not only as stated in the beginning of this article is the Hartford convention with the Kentucky and Virginia resolutions brought forward by Mr. Lodge in proof of the weakness of the Union, but Southern orators and writers delight in referring to that convention in justification of nullification and secession. We have the journal of the proceedings, of the motions made and votes passed. Is it not the strongest proof possible of the universal belief in the nationality of our government that nobody, in that body of malcontents, suggested that any right existed to refuse an obedience to the laws and policy of the administration they deemed so oppressive?

After the purchase of Louisiana came that of Florida, also enlarging the territory of the Union and curtailing the relative power in it

[1] Lodge's *Life of George Cabot*, p. 518.

[2] *History of Hartford Convention*, by Theo. Dwight.

of each of the old States. The charter of a second United States Bank was granted by the party that in the first Congress had opposed it and claimed to be strict constructionists of the Constitution. Madison justified his assent on the ground of the general approval and the opinion of the Supreme Court establishing its constitutionality.[1] Historically there is no attempt to maintain, no assertion of, the doctrine of the Kentucky resolutions from the time they were passed until the debate in the Congress of 1830. The only trace of them is in the resolutions frequently passed by the Legislatures of States, which are mere opinions beyond their legislative powers, that certain laws of the government were unconstitutional and therefore null and void. If unconstitutional, they were and are null and void, but no State ever treated them as null and void. The United States Government, by its judiciary, however, took cognizance of all State laws in conflict with its laws and authority, and maintained uniformly its national supremacy.

[1] Madison's letter, 4 Elliot's *Debates*, 615.

CHAPTER VI.

CALHOUN, JACKSON, AND NATIONAL GOVERNMENT.

In 1811, John C. Calhoun of South Carolina, a young man not of the age of thirty years, took his seat as a member of the national House of Representatives, and at once became a leader in public affairs. He was one of the Committee on Foreign Relations. On the 12th of December he said what was the road the nation should tread "to make it great and to produce in this country not the form but the real spirit of union."[1] In March, 1815, he voted for a high tariff and said: "He believed the policy of the country required protection to our manufacturing establishments."[2] He also reported the bill to incorporate a United States Bank, and supported it in a speech on its constitutionality.[3] Webster, on the contrary, opposed the tariff bills, not however on the ground of their unconstitutionality. In December, 1816, Calhoun

[1] H. Adams, vol. vi., p. 143.

[2] H. Adams, vol. ix., p. 115. *Annals of Congress*, 1815-1816, p. 1272.

[3] H. Adams, vol. ix., p. 116.

moved "that a committee be appointed to inquire into the expediency of setting apart a permanent fund for internal improvement"; on December 23d, he reported a bill setting aside the bonus paid by the United States Bank, $1,500,000 and future dividends from bank stock, "as a fund for constructing roads and canals."[1] In his speech supporting it he said: "that the extent of our republic exposes us to the greatest of all calamities, next to the loss of liberty, and even to that in its consequences, *disunion*." "Probably not more than twenty-five or thirty members, in the total number of one hundred and seventy, regarded the constitutional difficulty as fatal to the bill."[2] Madison, however, consistent and persistent in his strict construction of the Constitution, vetoed it.

In 1819 and 1820 came the admission of Missouri and the struggle over the extension or restriction of slavery. The Southern statesmen feared that the South was losing its relative importance in the Union. Even those of Virginia, who had formerly been opposed to slavery, now took the opposite view, and the Legislature of that State passed resolutions for the admission of Missouri with slavery. The increase in the production of cotton had made the raising of slaves profitable. The controversy was settled by the bill called the Missouri Compromise,

[1] H. Adams, vol. ix., p. 148.

[2] See H. Adams, vol. ix, pp. 149 to 153, for debate and Calhoun's views.

admitting Missouri with slavery, and excluding slavery from all the rest of the country west of that State and north of 36° 30′, the southern boundary of Missouri. This was the first important controversy dividing the States geographically. It was the division that Mason, Madison, and others foresaw in the convention that made the Constitution; not a combination of the great States against the small, but geographical, between the South and the North, the planting and commercial States, and, underlying this and more potent, the institution of slavery repugnant to the North and existing only in the South.

It was this difference of interest between the two sections that brought Calhoun to a change of opinion on the great industrial, commercial, and moral questions that had arisen. His convictions followed what he wished to believe: not an unusual temperament. From a protectionist he became the zealous advocate of extreme free trade, from a nationalist to the belief that the Union was nothing but a league any State could break at its will, from holding slavery to be a moral evil to the support of it as a divine institution. In 1837, after the nullification controversy, when he introduced resolutions in the Senate as to slavery, he said:

"This question has produced one happy effect, at least it has compelled us of the South to look into the nature and character of this great institution (slavery), and to correct many false impressions that even we had entertained in relation to it.

Many in the South once believed that it was a moral and political evil. That folly and delusion are gone. We see it now in its true light, and regard it as the most safe and stable basis for free institutions in the world. It is impossible with us that the conflict take place between labor and capital."

He went so far as to say a mysterious Providence had brought together two races from different portions of the globe and placed them together in equal numbers in the southern portion of the Union. To which Clay forcibly replied, "to call a generation of slave-hunting pirates (who brought the negroes to this country) a mysterious Providence, was an insult to the Supreme Being." [1]

Calhoun and many of the leaders and politicians of the cotton-raising States saw that they were losing their relative importance in population and wealth; they believed that, with free trade bringing to them everything they consumed at a lower price, their products and profits would be increased. South Carolina with Calhoun as the master spirit was the leader in this matter; the existing protective tariff bearing hardly on the plantation States was in their opinion the great hindrance to their prosperity. It was not difficult for them to come to the conclusion it was a tyrannical and palpable violation of the Constitution. Seeing that they could not bring the majority in Congress to their belief, the South Carolinian politicians revived and developed the doctrine of the Kentucky reso-

[1] Oliver Dyer's *Great Senators*, pp. 183, 184.

lutions of the sovereignty of each State, and of its right as a sovereign to judge of the constitutionality of an act of the United States. A convention of the people of the State was called, and under the claimed right of sovereignty the convention, on the 24th of November, 1832, passed an ordinance in which it was declared the tariff laws of the United States were null and void, and that no duties imposed by the United States should be collected after the first of February, A. D. 1833. The convention further declared that they would resist any acts of the United States to collect its duties or to coerce the State into paying them, and that such acts of the United States would absolve the people of the State from any political connection with the people of the other States, and that the State would organize as a sovereign independent government.

Thus South Carolina, more than forty years after the adoption of the Constitution, was the first State that assumed to act as a distinct sovereign power. To such a degree did the confidence of the State in its own prowess and a spirit of rash defiance of the United States exist, that upon Governor Haynes' return to Charleston from the State Capital, the horses were taken from his carriage and the citizens dragged him in triumph through the streets.

Few leaders have had more warm admirers than Calhoun. Oliver Dyer in his *Great Senators*, tells us he was tall and gaunt, his com-

plexion dark and Indian-like. Eyes large, black, piercing, scintillant; his iron-gray hair hung down in thick masses. He was remarkable for the exceeding courtesy of his demeanor and for the sweetness and bell-like resonance of his voice. His private life, what could not be said of most of his contemporaries, was unimpeachable.

His followers are fond of praising his "inexorable logic." They probably called it so because he did not hesitate to carry out his reasoning to the extremest extravagance of conclusions. In his speech in 1833, in reply to Webster, he admitted that this sovereignty of each State, there being four and twenty of them, did give each State a separate right to judge of a law of Congress, "four and twenty vetoes." He instanced with approval the government of Rome, where the plebeians and patricians could check and overrule each other through the tribunes and the Senate. He knew "nowhere, no case in history where the power of arresting of government was too strong, except in Poland, where every freeman possessed a veto." But even there he speaks of it with favor, as the source of "the highest and most lofty attachment to liberty." He overlooked that Rome's plebeian veto produced a Sulla and a Cæsar and ended in an absolute despotism over an abject people, and that the government of Poland, unstable as water, vanished from the face of the earth. He spoke of

this country as sunken into avarice, intrigue, and electioneering, from which only an opposition like Carolina's could arouse it. Afterwards, in 1850, he said: "What was once a constitutional federal republic is now converted, in reality, into one as absolute as that of the autocrat of Russia, and as despotic in its tendency as any absolute government that ever existed." And yet many people of the South believed or brought themselves to believe this, and most of their writers now arguing for State sovereignty profess the same opinion.

Following up Calhoun's "inexorable logic," that each State has a right to pass its judgment on any act and law made by the United States, and to decide whether it is invalid and null, if it be of opinion that it exceeds the delegated authority, every citizen of South Carolina or of any other State has a right to judge whether any law of that State be invalid or null, as exceeding its delegated authority. For the State of South Carolina under its Constitution, like the United States under its Constitution, has only a limited delegated authority, and the sovereignty, according to all the political writers, remains in its people or voting citizens. Why cannot a voting citizen, or one of the people of the State, maintain that, possessing the sovereign right of all power, and being one of the parties who made the compact of the State constitution, he can judge as to whether he has delegated the power to make a certain

law; and if he thinks he has not, why cannot he defy the court and the State that undertakes to execute it? This would at once put the State in the happy condition of Poland, and almost allow the freedom claimed by a Chicago anarchist. The answer is evident, the citizens owe an obedience to the laws that they establish over themselves. They have, for the benefit of all, given to the judiciary the right to judge of the extent of the delegated power. That the doctrine of State sovereignty was unknown at the time South Carolina promulgated it, is proved by Jackson's proclamation. In it he speaks of the hardness and inequality of the excise law in Pennsylvania, the embargo and non-intercourse law in the Eastern States, the carriage tax in Virginia. All these laws and the war of 1812 in the commercial States were, he says, deemed unconstitutional, but yet they were submitted to, and this remedy of nullification and secession was not suggested. "The discovery of this important feature in our Constitution was reserved to the present day. To the statesmen of South Carolina belongs the invention."[1] Indeed it was a question in South Carolina itself who first discovered this doctrine of nullification. Dr. Thomas Cooper, Jefferson's old friend, was agreed upon as the author of its revival, and was toasted as the father of nullification at Columbia, the capital of South Carolina, at a Fourth of July

[1] 4 Elliot, 584.

dinner[1] in 1833. If the Kentucky resolutions and the doctrine of nullification had not been dead, and buried in oblivion, it is impossible that Chief-Justice Marshall should have announced in the case of McCulloch against the State of Maryland that there was a universal assent to the proposition that the government of the Union, though limited in its powers, was supreme in its sphere; that General Jackson, in a proclamation to the whole country, could have declared its discovery was made by the statesmen of South Carolina of that day; and that the nullifiers of South Carolina should have toasted Cooper as its author.

We have found nowhere any claim of a right of secession, not even the use of the word, until the threat of South Carolina's nullification. Any separation before was considered as a disruption of the Union. Jefferson spoke of it as scission. While some hold that Jackson "with his iron heel crushed out secession," numerous attempts have been made, even recently, to prove that Jackson was not opposed to nullification, that in reality the proclamation was not his but was Edward Livingston's. Parton, Jefferson's biographer, tells us, when a

[1] Niles' *Register*, p. 335, July 20, 1833. Cooper was President of the University of South Carolina. The University of Virginia would not have him as professor on account of his Unitarian belief, though Jefferson wished it. Is it possible that he was the original author of the Kentucky Resolutions, and furnished them to Jefferson? Jefferson's correspondence, as far as we have examined, shows no belief in that doctrine.

pamphlet containing the proceedings of South Carolina reached Jackson, he went to his office and began to dash off page after page of the proclamation. To this was added many more of notes and memoranda which he had been accumulating. The papers were given to Mr. Livingston to draw up in proper form. In three or four days Livingston gave to Jackson a draft of the proclamation for examination. Jackson said that Livingston had not correctly understood his notes and suggested alterations, and had them made.[1]

The proclamation, whoever wrote it, is a clear, strong statement of the nature of our Union and its nationality; an abler production than Edward Livingston's speech, when as Senator he spoke on this matter in 1830. If Jackson did not write a line of it he was not totally wanting in knowledge and comprehension, and must have understood the most important question that had arisen in his administration or in any administration since the inception of the government.

Jackson, as well as Calhoun, was of the Protestant Scotch-Irish race, that famous strain of blood that settled around Belfast and has made its mark in this country. Those who knew him well said that he had the craftiness of his canny Scotch ancestors, which he often concealed under apparently unpremeditated and ungovernable bursts of temper. No one before

[1] Parton's *Life of Jackson*, vol. iii., p. 466.

who had been a duellist and had killed his opponent, and had been a participator in street brawls and encounters, had become President. He was a warm friend and a bitter enemy, and against Calhoun he had a lasting grievance. His declaration, "I take the responsibility," was characteristic of the man and admired by his adherents. No one of a will so indomitable ever came to the presidency. A mere boy of fourteen he fought in the revolutionary war. He studied law in North Carolina and at the age of twenty-two years he commenced his professional life in Tennessee, and acquired at once a large practice throughout the State, that brought him into public notice. He was the district attorney of the territory, and a member of the convention that made the constitution of that State, and as its first representative in Congress opposed Washington's administration, and was one of the twelve members who would not join in the vote of thanks to him when he retired from the presidency. He was elected Senator in 1797 and opposed the administration of John Adams, but soon resigned the senatorship and became a judge of the Supreme Court of Tennessee and held that office for six years. He was of the party of strict constructionists. As President he vetoed bills for the aid of the Maysville and Lexington Road, a re-charter of the Second Bank of the United States, and several bills for internal improvements for harbors and rivers.

However much Livingston may have improved the style of the proclamation, or contributed to its argument, there can be no doubt that the reasoning and principles were Jackson's. The public seems to have forgotten that he was a lawyer of large experience in his younger days, and an active politician all his lifetime. The proclamation was on a subject of which he had full knowledge and had formed decided opinions. When he came to a conclusion he cared not what any other man thought.

It has been a disputed matter whether the General Government actually prevailed in its controversy with South Carolina. Though the State prepared munitions of war, increased its militia, passed laws to punish persons executing those of the United States, and declared its secession from the Union if the United States laws were attempted to be enforced, neither the State nor its citizens did actually commit any overt act of resistance. They claimed, however, that Clay's compromise bill, gradually reducing duties, which became law March 2d, was a surrender to them.

On the other hand it is asserted that the bill was not at all what South Carolina had demanded. It is undisputed that the United States Government passed a force bill based on the ground that it could compel the exercise of its authority over the citizens of a State disputing it, and that no resistance was made to the collection of the import duties after February

1st, when the State declared its ordinance should be enforced, the reduction of the tariff being subsequently passed.[1]

It was in South Carolina alone that the right of nullification was sanctioned by a majority of its citizens. There were in the debates in Congress on that matter members from other States who maintained that doctrine, but Southern writers have apparently purposely omitted, and Von Holst, Greeley, and Benton, historians of that time, have overlooked the resolutions of the other Southern States condemning the doctrines of South Carolina, which are the more significant as those States agreed with her in opposing and denouncing the tariff.

Virginia's position, though less decided than that of the other States, did not please Calhoun; in reply to her Senator, Mr. Rives, who had opposed the South Carolinian doctrine, he spoke of her as "a once" patriotic State. Virginia's resolutions were, that the doctrines of State sovereignty and State rights as set forth in her resolutions of 1798, and sustained by the report thereon of 1799, were a true interpretation of the Constitution, but she did not consider them as sanctioning the proceedings of South Carolina in her said ordinances, nor as counte-

[1] Alex. Johnston, in Winsor's *History of America*, vol. vii., p. 286, says that Jackson collected the duties at Charleston by naval and military force, and that the day before February 1st a meeting of "leading nullifiers" agreed to avoid all collision with the Federal Government.

nancing all the principles assumed by the President in his proclamation. Virginia sent Mr. Leigh as a commissioner to South Carolina, but without result.

Mississippi, Jefferson Davis' State, declared "that, in the language of the father of his country, we will indignantly frown upon the first dawning of every attempt to alienate any portion of our country from the rest, or to enfeeble the ties which link together its various parts." Nullification was condemned in the strongest terms, and it was declared they would support the President in maintaining the Union.

In the next year, Robert J. Walker canvassed the State for a seat in the Senate with Poindexter, his opponent; the issue was a question of nullification, and Walker, after a contest of three years, prevailed and became Senator at the election, January 8, 1836. General Jackson wrote a letter in his favor.[1]

Alabama declared nullification "is unsound in theory and dangerous in practice"; North Carolina, that it "is revolutionary in its character, and subversive of the Constitution, and leads to disunion"; Georgia, "that we abhor the doctrine of nullification as neither a peaceful nor a constitutional remedy," and further declare, while they deplore the rash and revolutionary measures of South Carolina, they warn

[1] Article by R. J. Walker on "Nullification and Secession," February, 1863, p. 179, *Continental Monthly Magazine.*

their citizens against adopting her mischievous policy.[1]

These were the opinions of the Southern States in 1833. So that at that time, as a matter of history, South Carolina alone claimed the right of nullification and secession.

We have before said it has been customary for the Legislatures of States to pass resolutions declaring acts and laws of the United States—that they are opposed to—unconstitutional, and therefore null and void; but that these State resolutions do not make them so; that they are merely the opinions of the Legislatures that pass them; that the decision, whether laws of the United States or acts of its government are null and void, rests solely with the judiciary of the United States.

On examination we find, from the inception of Washington's administration until the inauguration of Lincoln, that, without exception, the authority and supremacy of the laws and government of the United States have been maintained and enforced by its courts over every State, and every State government and judiciary, and every individual therein:—Over Pennsylvania, as we have before set forth in the

[1] State papers on nullification, collected and published in 1834 by order of the General Court of Massachusetts. The volume contains the remonstrances of many State Legislatures besides those quoted. It has also the ordinance of the South Carolina convention at the adjournment, held March 19, 1833, in which the convention declared the State's nullification of the force bill of Congress of March 2d then enforced: this declaration was mere *brutum fulmen.*

Gideon Olmstead case, when the representatives of the State officer who had disbursed prize money under the decision of the State Court were compelled to repay it to the United States.[1] Over Kentucky itself, in 1812, when the court maintained that a Kentucky State court had no jurisdiction to enjoin a judgment of a court of the United States.[2] Over Kentucky and Virginia, in a serious controversy about the validity of the grants of those States.[3] Over Maryland, when the State undertook to tax the branch of the United States Bank established in her territory, on the ground that no State could tax the instrument employed by the government in the exercise of its powers.[4] In this case Chief-Justice Marshall declared: "If any one proposition would command the universal assent of mankind, we might expect it to be this, that the government of the Union, though limited in its powers, is supreme within its sphere." Even further, the United States Court interfered and took from the State court of Virginia jurisdiction of the prosecution by that great State of *one of its own citizens* for illegally selling tickets in a lottery, because the lottery had been authorized in the District of Columbia and brought in question the validity of a United States law.[5] Over Massachusetts, in declaring

[1] United States *vs.* Peters, 5 Cranch, 115.

[2] McKim *vs.* Voorhies, 7 Cranch, 279.

[3] Green *vs.* Biddle, 8 Wheaton, 1.

[4] McCulloch *vs.* Maryland, 4 Wheaton, 316.

[5] Cohens *vs.* Virginia, 6 Wheaton, 264.

the embargo legal. Over New York, when it declared illegal the State's grants to Fulton, the inventor of the steamboat, of the exclusive right of navigation of the Hudson. Over Ohio, when the State insisted on taxing the branch of the Bank of the United States, the court issuing its mandamus and compelling the State's Treasurer to obey its decree.[1] Over South Carolina, in 1829, not long before her threatened nullification, when the court annulled the taxation by the city of Charleston of the bonds of the United States, because it was an interference with the power of the General Government to borrow money.[2] The disputes of States about their boundaries often came before the Supreme Court and were settled, the States appearing as parties. Indeed, such interference and control were so frequent and so implicitly submitted to that Chief-Justice Marshall said: "Though it had been the unpleasant duty of the United States courts to reverse the judgments of many State courts in cases in which the strongest State feelings were engaged, the State judges have yielded without hesitation to their authority, while perhaps disapproving the judgment of reversal." [3]

These decisions of the United States Supreme Court were made by judges appointed by all the political parties that had been in power, by

[1] Bank of U. S. *vs.* Osborn, 9 Wheaton, 738.

[2] Weston *vs.* Charleston, 2 Peters, 449.

[3] Cohens *vs.* Virginia.

those in favor of a strict as well as a liberal construction of the Constitution. Taney, a very eminent jurist, and his associates, judges appointed by the political party predominant in the States that attempted to disrupt the Union, held that the Constitution and the laws of the government were paramount, and announced and maintained their supremacy to the beginning of the rebellion over every State court and State law and constitution.[1]

The action of the State of Georgia in 1832, in a controversy between that State and the United States Supreme Court, has been cited in support of the theory that Georgia maintained the doctrine of State supremacy. In that case the matter never came to an actual conflict. Why the United States decision was not promptly enforced is a matter that it is not here worth while to enter into.[2] It is sufficient to quote the resolutions of the Legislature of the State in 1833, that she abhorred the doctrine of nullification and deplored the revolutionary

[1] See 22 Howard, 227, Sinnott *vs.* Davenport, 21 Howard, 506; Ableman *vs.* Booth, 5 Howard, 134; Rowan *vs.* Runnells. In these two last cases Taney and the Court put aside the decrees of the Supreme Courts of Wisconsin and Mississippi, because they were in conflict with the powers given to the United States; in the latter case, overruling and even reversing the decision of the Supreme Court of Mississipi as to when its constitution took effect.

[2] General Jackson's sympathy was with Georgia in this matter, and he is reported as saying: "John Marshall has made the decision, now let him execute it." The missionary that Georgia had imprisoned was, however, released by the State.

measures of South Carolina and warned her citizens against adopting that mischievous policy, to show that the State, in her opposition to the christianizing of Cherokee Indians, did not question the supremacy of the United States Government.

It is often asserted by historical writers that the Supreme Court of the United States, under the guidance of Marshall, has built up, magnified, and extended the powers of the government. Undoubtedly the court has great power in deciding whether the laws of a State or the acts of a State officer are illegal, when the question is whether they infringe on the rights of the general government; it, however, cannot make laws and acts extending the national powers. Its authority is, for the most part, that of restraint over the acts of the executive and United State officers, and of annulling, as it often has, the laws of Congress adjudged to be beyond its powers. It is Congress that made the Alien and Sedition laws, United States banks, tariffs and embargoes; it was the President and Congress who freed the negroes. Even in the war of secession, the judiciary declared the President's disregard of the habeas corpus in Milligan's case illegal.[1]

The idea which has found favor that Judge Story yielded his early convictions as to the nationality of the government to the influence of Marshall, is founded on the erroneous theory

[1] *Ex parte* Milligan, 4, Wallace, 2.

that the doctrine of the Kentucky resolutions were, after their promulgation, held and believed in by Story and the republicans. Anyone who was personally acquainted with Story, or was taught by him in the law school at Cambridge, or heard the opinions of the eminent counsel who tried cases before him, knows that no judge of a more uncompromising confidence in his own conclusions and decisions ever sat on the bench. The great fault of this most learned of our judges was the quickness of his apprehension and of his arriving at a conclusion in the beginning of a case he was hearing, and the tenacity with which he held and enforced it, sometimes even to the detriment of justice itself. Story, though generally agreeing with the Chief Justice, at times gave dissenting opinions on constitutional questions.

The government, from the time of South Carolina's earlier nullification ordinances to that of the civil war, excepting for very short periods, was in the hands of the South. Under it, and in the interest of the slave States, Polk made war with Mexico, an act of Congress declaring that it existed. Texas with its immense territory of over two hundred thousand square miles was annexed in Tyler's administration, Calhoun becoming Secretary of State for that purpose. Laws interfering with the constitutional rights of Northern citizens of the black and mixed race, and for the protection of

slavery, were passed and enforced by the Southern States.

There can be no doubt that the belief had been growing in those States, that they would be better off out of the Union than in it. The opposition to slavery was increasing at the North; no works were so widely read there as those setting forth its iniquities. The South, then, as in the time of the making of the Constitution, was an agricultural country, depending for its prosperity on a cheap, forced labor, and the exportation of its cotton and other products. It was strong in men, and no longer required the protection of the Eastern States, as in the days of the National Convention. In 1854, by the laws enacted by Congress, the whole territory of the United States was thrown open to the introduction of slavery, giving to the Southern States the right to carry into it their "peculiar property," and taking away their great grievance. Then also came the decision of the United States Supreme Court in the Dred Scott case, that all laws excluding slavery from the territories were unconstitutional, and asserting that the inhabitants of those territories could not interfere with that right. The only matter the South could complain of was the hostility of the Northern States to slavery, and that some of them would not comply with the laws for the rendition of their slaves, and had passed State laws and committed acts interfering with their legal and constitutional

right of seizing them on Northern territory. There was no pretence that there was any tyrannical usurpation of undelegated authority by the United States, such as the Virginia resolutions referred to. Prof. Bazil L. Gildersleeve, a confederate soldier, in the *Atlantic Monthly Magazine*, says in a paper called "The Creed of the old South," that the cause of secession was, that "the extreme Southern States considered their rights menaced by the issue of the presidential election." [1]

Upon the choice of Lincoln, and while Buchanan was President, preparations were made by the South for a disruption of the Union. Reuben Davis, a distinguished lawyer and a member of Congress from Mississippi, in his autobiography, informs us that he spent much time with Floyd, the Secretary of War, who had been for twelve months sending arms to Southern arsenals and had put the forts in condition to be captured. He estimated that one half of the munitions of war was in the South.[2] South Carolina again took the initiative and seceded on the ground that as a sovereign State she had the right to withdraw from the compact she had entered into; and for the second time in our history did a State, and the same State, assert its sovereign right against the supreme authority of the United States. The other plantation States

[1] *Atlantic Monthly*, January, 1892.

[2] *Reuben Davis' Recollections*, p. 395.

quickly followed South Carolina; generally there was no elaborate statement by them of their grievances, nor did they explain why the doctrines they abhorred less than thirty years before, they now asserted and so courageously fought for. Virginia joined the Southern Confederacy without passing any formal act of secession. Her convention, called for the purpose of considering the matter, voted not to secede. In an address delivered in October, 1887, at Richmond, on the dedication of a statue to Lee, the orator, a descendant of the great Chief-Justice Marshall, undertakes to explain and defend Virginia's course in joining the South. He does not claim the right of secession and apparently agrees with Lee, and puts in italics what Lee wrote on the 23d of January, 1861, that "*Secession is nothing but revolution.*" He states also that secession was unjustifiable, because the opponents of Lincoln had the majority in the National House of Representatives and Senate; but that the method of Lincoln of composing the troubles of the country brought Virginia into the contest. Following, as Southern writers and speakers do, the extravagant denunciations of Calhoun, he says: "Instead of maintaining the honor, the integrity of our National Union, it destroyed that Union in all but a territorial sense, as effectually as secession, by substituting conquered provinces for free States, and repeating in

America the shameful history of Russia and Poland." As our Poland when he spoke had an executive of its own choice and a majority of the House of Representatives, it was its own fault, if its inhabitants were in that abject condition. Is it not absurd to talk in this way, when no secessionist has been hung for treason, and a silver crown a short time since, at a public meeting, was prepared by some admirer for the dethroned autocrat of our Poland? At any rate we have no sedition law now, and freedom of speech against the government passes without comment. An unsuccessful revolution is rebellion, generally punished in other countries by death. It has not been so in our Russia. Jefferson Davis was indicted for treason; his trial never took place, as President Johnson issued a general amnesty proclamation.

Undoubtedly the confidence of the South in its assumed superiority in courage and fighting qualities had great influence in inducing its attempted secession. Jefferson Davis in his history gives instances of advantages gained at the outset by the Southern soldiers through their skill in the use of firearms. He did not tell us, and it seems to have escaped notice generally, that the Southern States had also the great benefit of the military academies they had established, which furnished at once trained officers for their troops. Their renowned general, Stonewall Jackson, was a

professor in that of Virginia, and went from the academy to the Confederate army.[1]

The seceding States in forming their new compact, in article after article followed the Constitution they rejected, prefacing it with the declaration, "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a more permanent Federal Government," instead of "We, the people of the United States, in order to form a more perfect Union, for ourselves and our posterity." They took particular care, however, by their new "Compact," to provide for the perpetuity of slavery in their Confederacy,—and, looking to conquests, in any new territory that might be acquired.

Instead of slavery being perpetuated, the whole system was annihilated under and within the Constitution. The amendment abolishing it forever was passed in the manner required in the Constitution by all the States that had refused an obedience to the United States laws. No longer is the declaration of

[1] See article by John S. Wise in the *Century Magazine*, Jan., 1890. The Virginia Military Academy was established by the State in 1839. Col. Smith, a graduate of West Point, was at the head. It was continued during the civil war under the charge of disabled officers. In 1860 a professor in this school informed the writer that there were similar academies in all the Southern States. Apparently they have been discontinued in most of them, South Carolina, however, yet maintaining hers.

independence that all men are born free and equal, in the language of Calhoun, "a glittering generality."

The seceding States were not without their internal trouble, and the authority of the Confederate Government was questioned by Georgia.

We all know how patiently and assiduously Lincoln tried to keep the Southern States in the Union and how ineffectually; and when he found that his effort was of no avail, with how firm a hand he wielded the powers of the Executive. In Merriam's case, he maintained his suspension of the habeas corpus, although Chief-Justice Taney held it was illegal. His decreeing freedom to the slaves of those in rebellion, as a war measure, was an act of imperial power seldom surpassed. Our whole history, as well as the epoch of the civil war, has proved how unfounded was Hamilton's fear that the government was not strong enough.

How wonderfully well the founders of our Constitution did their work, is shown by the fact that so few amendments have been made, while the constitutions of the different States have been changed again and again. The ten articles declaring certain rights to be in the people were adopted in 1791, then in 1798 the article taking away from the United States the jurisdiction of suits of individuals against a State; afterwards in 1804 two articles

changing the manner of electing the President and Vice-President. The theory of the founders of the Constitution, that it would be best to leave to men of prominence as electors to confer and choose those most fit for President and Vice-President, has failed. The electors chosen by the people are pledged to vote for candidates nominated at party conventions. After these few amendments, none were passed until those as to slavery, following the civil war.

A strict construction of the powers granted by the Constitution is a "State's rights" that those who believe in the supremacy of the National Union can well favor. It is beyond human wisdom to enact laws of which there can be no question; the decisions of the Supreme Court show how hard it is to make a law whose constitutionality is not disputed. Government would have been impossible, if the power had been in each State to decide for itself as to the validity of every law passed and every act of the General Government, and to secede at its will whenever it chose. Yet this is the government that the South claimed our forefathers established.

In forming the Confederacy of the Revolution, it was declared in its articles that it was indissoluble; the same declaration is in the Constitution when the States "formed a more perfect Union" than that of the Confederacy "for ourselves and our posterity," and were merged into one Nation. This Constitution

and the laws of the United States are declared there, "as the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Supreme over what, if not over the States that should adopt it? Historically that supremacy has been maintained and enforced by the United States Courts and Executive and Legislature.

In resisting the supremacy of this Constitution no State, dismembered Virginia perhaps excepted, has suffered more than South Carolina. It is truly pathetic in passing through the streets of Charleston, the home of the great planters and politicians that shaped the destinies of the State, to hear the names of the foreign bankers and merchants that have taken the place and the homes of the old leaders or who have built more pretentious abodes, to see the buildings with walls cracked and fissured by the earthquake mended by contributions cheerfully given by Northern friends, to read the newspapers lamenting the loss of their trade to Savannah and calling on the United States for larger appropriations to deepen the channels of their harbor. Then to look upon their statues of those distinguished at different periods: the mutilated one of the great Earl of Chatham, the friend of American freedom in Colony times; those of the heroes of the Revolution and the war of 1812; and in

the square opposite the barracks of her Military Academy, the great glittering bronze of Calhoun,[1] who brought so much misery to them all. But as we go Westward, where the sandy soil of the plains yields to the clay of the foothills, and find the streams turning the wheels of the factory, and hear the whirl of the spindle tended by white operatives, and see the plough, generally followed by a white man, turning over the soil amidst the stumps of trees in fields newly reclaimed; and come at last to Spartanburg and read the inscription there on the monument recently raised to those who fell at Cowpens, by the old thirteen States and Tennessee, bringing to memory the days of Greene and Morgan, we cannot but believe instead of four and forty sovereign States, we shall, in Webster's words, have for all time, "one Nation, one Union, one Destiny."

[1] This was written four years ago: Charleston now shows few signs of the earthquake, and Calhoun's statue has mellowed into a pleasing bronze color.

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