James Madison to [Edward Everett]

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Dear Sir. Montpellier August 28th. 1830.

I have duly received your letter in which you refer to the "nullifying doctrine" advocated, as a Constitutional right, by some of our distinguished fellow citizens; and to the proceedings of the Virginia Legislature in -98 & 99, as appealed to in behalf of that doctrine; and you express a wish for my ideas on those subjects.

I am aware of the delicacy of the task in some respects, and the difficulty in every respect of doing full justice to it. But having in more than one instance complied with a like request from other friendly quarters, I do not decline a sketch of the views which I have been led to take of the doctrine in question, as well as some others connected with them; and of the grounds from which it appears, that the proceedings of Virginia have been misconceived by those who have appealed to them. In order to understand the true character of the Constitution of the United States, the error, not uncommon, must be avoided, of viewing it through the medium, either of a Consolidated Government, or of a Confederated Government, whilst it is neither the one nor the other; but a mixture of both. And having in no model, the similitudes and analogies applicable to other systems of Government, it must more than any other, be its own interpreter according to its text and the facts of the case.

From these it will be seen, that the characteristic peculiarities of the Constitution are 1. the mode of its formation. 2. the division of the supreme powers of Government between the States in their united capacity, and the States in their Individual capacities.

1. It was formed not by the Governments of the component States, as the Federal Government for which it was substituted, was formed: Nor was it formed by a majority of the people of the United States, as a single community, in the manner of a consolidated government.

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

Being thus derived from the same source as the Constitutions of the States, it has, within each State; the same authority as the Constitution of the State; and is as much a Constitution, in the strict sense of the term, within its prescribed sphere, as the Constitutions of the States are, within their respective spheres: But with this obvious and essential difference, that being a compact among the States in their highest sovereign capacity, and constituting the people thereof one people for certain purposes, it cannot be altered or annulled at the will of the States individually, as the Constitution of a State may be at its individual will.

2. And that it divides the Supreme powers of Government, between the Government of the United States, and the Governments of the Individual States, is stamped on the face of the Instrument; the powers of war and of taxation, of commerce and of treaties, and other enumerated powers vested in the government of the United States, being of as high and sovereign a character, as any of powers reserved to the State Governments.

Nor is the Government of the United States, created by the Constitution, less a Government in the strict sense of the term, within the sphere of its powers, than the Governments created by the Constitutions of the States are, within their several spheres. It is like them organized into a legislative Executive and Judiciary Departments. It operates like them, directly on persons and things And like them, it has at

command a physical force for executing the powers committed to it. The concurrent operation, in certain cases, is one of the features marking the peculiarity of the system.

Between these different Constitutional governments, the one operating in all the States, the others operating separately in each, with the aggregate powers of government divided between them, it could not escape attention, that controversies would arise concerning the boundaries of jurisdiction; and that some provision ought to be made for such occurrences. A political system that does not provide for a peaceable and authoritative termination of occurring controversies, would not be more than the shadow of a Government; the object and end of a real government being, the substitution of law and order, for uncertainty confusion and violence.

That to have left a final decision, in such cases, to each of the States, then thirteen, and already twenty four, could not fail to make the Constitution and laws of the United States different in different States, was obvious; and not less obvious, that this diversity of independent decisions, must altogether distract the Government of the Union, and speedily put an end to the Union itself. A uniform authority of the laws, is in itself a vital principle. Some of the most important laws could not be partially executed. They must be executed in all the States or they could be duly executed in none. An impost or an excise, for example, if not in force in some States, would be defeated in others. It is well known that this was among the lessons of experience, which had a primary influence in bringing about the existing Constitution. A loss of its general authority would moreover revive the exasperating questions between the States holding ports for foreign commerce and the adjoining States without them; to which are now added, all the inland States, necessarily carrying on their foreign commerce thro' other States.

To have made the decisions under the authority of the Individual States, co-ordinate, in all cases, with decisions under the authority of the United States, would unavoidably produce collisions incompatible with the peace of society, and with that regular and efficient administration, which is of the essence of free governments. Scenes could not be avoided, in which a Ministerial officer of the United States and the correspondent officer of an individual State, would have rencounters in executing conflicting decrees; the result of which would depend on the comparative force of the local posse attending them; and that, a casualty depending on the political opinions and party feelings in different States.

To have referred every clashing decision, under the two authorities, for a final decision to the States as parties to the Constitution, would be attended with delays, with inconveniences, and with expences, amounting to a prohibition of the expedient; not to mention its tendency to impair the salutary veneration for a system requiring such frequent interpositions, nor the delicate questions which might present themselves as to the form of stating the appeal, and as to the Quorum for deciding it.

To have trusted to negociation for adjusting disputes between the Government of the United States and the State Governments, as between Independent and separate Sovereignties, would have lost sight altogether of a Constitution and Government for the Union; and opened a direct road from a failure of that resort, to the ultima ratio between nations wholly independent of and alien to each other. If the idea had its origin in the process of adjustment, between separate branches of the same Government, the analogy entirely fails. In the case of disputes between independent parts of the same Government, neither part being able to consummate its will, nor the Government to proceed without a concurrence of the parts, necessity brings about an accommodation. In disputes between a State Government, and the Government of the United States, the case is practically as well as theoretically different; each party possessing all the departments of an organized government, legislative, executive, and judiciary; and having each, a physical force to support its pretensions. Although the issue of negociation might sometimes avoid this extremity, how often would it happen among so many States, that an unaccommodating spirit in some would render that resource unavailing? A contrary supposition would not accord with a knowledge of human nature or the evidence of our own political history.

The Constitution not relying on any of the preceding modifications, for its safe and successful operation, has expressly declared, on one hand 1. "that the Constitution and the laws made in pursuance thereof and all treaties made under the authority of the United States, shall be the Supreme law of the land; 2. that the Judges of every State shall be bound thereby, any thing in the Constitution and laws of any State, to the contrary notwithstanding; 3. that the Judicial power of the United States shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority &ca."

On the other hand, as a security of the rights and powers of the States, in their individual capacities, against an undue preponderance of the powers granted to the Government over them in their united capacity, the Constitution has relied on 1. the responsibility of the Senators and Representatives in the Legislature of the United States to the Legislatures and people of the States. 2. the responsibility of the President to the people of the United States; and 3. the liability of the Executive and judiciary functionaries of the United States to impeachment by the Representatives of the people of the States, in one branch of the Legislature of the United States, and trial by the Representatives of the States, in the other branch: the State functionaries, Legislative Executive, and Judiciary, being at the same time, in their appointment and responsibility, altogether independent of the agency or authority of the United States.

How far this structure of the Government of the United States be adequate and safe for its objects, time alone can absolutely determine. Experience seems to have shewn that whatever may grow out of future stages of our national career, there is, as yet a sufficient controul, in the popular will, over the Executive and Legislative Departments of the Government. When the Alien and Sedition laws were passed in contravention of the opinions and feelings of the community, the first elections that ensued, put an end to them. And whatever may have been the character of other acts, in the judgment of many of us, it is but true, that they have generally accorded with the views of a majority of the States and of the people. At the present day it seems well understood, that the laws which have created most dissatisfaction, have had a like sanction without doors; and that whether continued varied or repealed, a like proof will be given of the sympathy and responsibility of the Representative body, to the Constituent body. Indeed the great complaint now is, against the results of this sympathy and responsibility in the Legislative policy of the nation.

With respect to the Judicial power of the United States, and the authority of the Supreme Court in relation to the boundary of Jurisdiction between the Federal and the State Governments, I may be permitted to refer to the XXXIX number of the "Federalist" for the light in which the subject was regarded by its writer, at the period when the Constitution was depending; and it is believed, that the same was the prevailing view then taken of it, that the same view has continued to prevail, and that it does so at this time, notwithstanding the eminent exceptions to it.

But it is perfectly consistent with the concession of this power to the Supreme Court, in cases falling within the course of its functions, to maintain that the power has not always been rightly exercised. To say nothing of the period, happily a short one, when Judges in their Seats, did not abstain from intemperate and party harangues, equally at variance with their duty and their dignity; there have been occasional decisions from the Bench, which have incurred serious and extensive disapprobation. Still it would seem, that, with but few exceptions, the course of the Judiciary has been hitherto sustained by the predominant sense of the Nation.

Those who have denied or doubted the supremacy of the Judicial power of the United States, and denounce at the same time a nullifying power in a State, seem not to have sufficiently adverted to the utter inefficiency of a supremacy in a law of the land, without a supremacy in the exposition and execution of the law; nor to the destruction of all equipoise between the Federal Government and the State Governments if, whilst the Functionaries of the Federal Government are directly or indirectly elected by and responsible to

the States, and the Functionaries of the States are in their appointment and responsibility wholly independent of the United States, no constitutional controul of any sort belonged to the United States over the States. Under such an organization, it is evident that it would be in the power of the States, individually, to pass unauthorised laws, and to carry them into compleat effect, anything in the Constitution and laws of the United States to the contrary notwithstanding. This would be a nullifying power in its plenary character; and whether it had its final effect, thro' the Legislative Executive or Judiciary organ of the State, would be equally fatal to the constituted relation between the two Governments.

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

And in the event of a failure of every Constitutional resort, and an accumulation of usurpations and abuses, rendering passive obedience and non-resistance a greater evil, than resistance and revolution, there can remain but one resort, the last of all; an appeal from the cancelled obligations of the Constitional compact, to original rights and the law of self preservation. This is the ultima ratio under all Goverments, whether consolidated, confederated, or a compound of both; and it cannot be doubted that a single member of the Union, in the extremity supposed, but in that only, would have a right, as an extra and ultra constitutional right, to make the appeal.

This brings us to the expedient lately advanced, which claims for a single State, a right to appeal against an exercise of power by the Government of the United States decided by the State to be unconstitutional, to the parties to the Constitutional compact; the decision of the State to have the effect of nullifying the act of the Government of the United States, unless the decision of the States be reversed by three fourths of the parties.

The distinguished names and high authorities which appear to have assented and given a practical scope to this doctrine, entitle it to a respect which it might be difficult otherwise to feel for it.

If the doctrine were to be understood as requiring the three fourths of the States to sustain, instead of that proportion, to reverse the decision of the appealing State, the decision to be without effect during the appeal, it would be sufficient to remark, that this extra constitutional course might well give way, to that marked out by the Constitution, which authorises two thirds of the States to institute, and three fourths to effectuate, an amendment of the Constitution establishing a permanent rule of the highest authority, in place of an irregular precedent of construction only.

But it is understood that the nullifying doctrine imports that the decision of the State is to be presumed valid, and that it overrules the law of the United States, unless overruled by three fourths of the States.

Can more be necessary to demonstrate the inadmissibility of such a doctrine, than that it puts it in the power of the smallest fraction over one fourth of the United States, that is, of seven states out of twenty four, to give the law, and even the Constitution to seventeen States; each of the seventeen having as parties to the Constitution, an equal right with each of the seven, to expound it, and to insist on the exposition. That the seven might, in particular instances be right, and the seventeen wrong, is more than possible. But to establish a positive and permanent rule giving such a power, to such a minority, over such a majority, would overturn the first principle of free government, and in practice necessarily overturn the government itself.

It is to be recollected that the Constitution was proposed to the people of the States as a whole, and unanimously adopted by the States as a whole, it being a part of the Constitution that not less than three fourths of the States should be competent to make any alteration in what had been unanimously agreed to.

So great is the caution on this point, that in two cases where peculiar interests were at stake, a proportion even of three fourths are distrusted, and unanimity required to make an alteration.

When the Constitution was adopted as a whole, it is certain that there are many parts which, if separately proposed, would have been promptly rejected. It is far from impossible, that every part of a Constitution might be rejected by a majority, and yet taken together as a whole, be unanimously accepted. Free Constitutions will rarely if ever be formed, without reciprocal concessions; without articles conditioned on and balancing each other. Is there a Constitution of a single State out of the twenty four, that would bear the experiment of having its component parts submitted to the people and separately decided on?

What the fate of the Constitution of the United States would be if a small proportion of the States could expunge parts of it particularly valued by a large majority, can have but one answer.

The difficulty is not removed by limiting the doctrine to cases of construction. How many cases of that sort, involving cardinal provisions of the Constitution, have occurred? How many now exist? How many may hereafter spring up? How many might be ingeniously created, if entitled to the privilege of a decision in the mode proposed?

Is it certain that the principle of that mode would not reach further than is contemplated. If a single State can of right require three fourths of its co-states to overrule its exposition of the Constitution, because that proportion is authorised to amend it, would the plea be less plausible that, as the Constitution was unanimously established, it ought to be unanimously expounded?

The reply to all such suggestions seems to be unavoidable and irresistible; that the Constitution is a compact, that its text is to be expounded according to the provisions for expounding it– making a part of the compact; and that none of the parties can rightfully renounce the expounding provision more than any other part. When such a right accrues, as may accrue, it must grow out of abuses of the compact, releasing the sufferers from their fealty to it.

In favor of the nullifying claim for the States, individually, it appears as you observe that the proceedings of the Legislature of Virginia in 98 & 99 against the Alien and Sedition Acts, are much dwelt upon.

It may often happen, as experience proves, that erroneous constructions not anticipated, may not be sufficiently guarded against, in the language used; and it is due to the distinguished individuals who have misconceived the intention of those proceedings, to suppose that the meaning of the Legislature, though well comprehended at the time, may not now be obvious to those unacquainted with the cotemporary indications and impressions.

But it is believed that by keeping in view the distinction between the Governments of the States, and the States in the sense in which they were parties to the Constitution; between the rights of the parties, in their concurrent, and in their individual capacities; between the several modes and objects of interposition against the abuses of power; and especially between interpositions within the purview of the Constitution, and interpositions appealing from the Constitution to the rights of nature paramount to all Constitutions; with these distinctions kept in view, and an attention, always of explanatory use, to the views and arguments, which were combated, a confidence is felt, that the Resolutions of Virginia as vindicated in the Report on them, will be found entitled to an exposition, shewing a consistency in their parts, and an inconsistency of the whole with the doctrine under consideration.

That the Legislature could not have intended to sanction such a doctrine, is to be inferred from the debates in the House of Delegates, and from the address of the two Houses, to their Constituents, on the subject of the Resolutions. The tenor of the debates, which were ably conducted and are understood to have been revised for the press by most if not all of the speakers, 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. Concert among the States for redress against the Alien and Sedition laws, as acts of usurped power, was a leading sentiment; and the attainment of a concert, the immediate object of the course adopted by the Legislature, which was that of inviting the other States "to concur, in declaring the acts to be unconstitutional, and to co-operate by the necessary and proper measures, in maintaining unimpaired the authorities rights and liberties reserved to the States respectively and to the people".* That by the necessary and proper measures to be concurrently and co-operatively taken, were meant measures known to the Constitution, particularly the ordinary controul of the people and Legislatures of the States, over the Government of the United States, cannot be doubted; and the interposition of this controul, as the event shewed, was equal to the occasion.

* see the concluding Resolution of -98.

It is worthy of remark, and explanatory of the intentions of the Legislature, that the words "not law, but utterly null, void, and of no force or effect" which had followed, in one of the Resolutions, the word "unconstitutional", were struck out by common consent. Tho' the words were in fact but synonomous with "unconstitutional"; yet to guard against a misunderstanding of this phrase as more than declaratory of opinion, the word unconstitutional, alone was retained, as not liable to that danger.

The published Address of the Legislature to the people their Constituents affords another conclusive evidence of its views. The address warns them against the encroaching spirit of the General Government, argues the unconstitutionality of the Alien and Sedition Acts, points to other instances in which the constitutional limits had been overleaped; dwells on the dangerous mode of deriving power by implication; and in general presses the necessity of watching over the consolidating tendency of the Federal policy. But nothing is said that can be understood to look to means of maintaining the rights of the States, beyond the regular ones, within the forms of the Constitution.

If any further lights on the subject could be needed, a very strong one is reflected in the answers to the Resolutions, by the States which protested against them. The main objection of these, beyond a few general complaints of the inflammatory tendency of the Resolutions, was directed against the assumed authority of a State Legislature to declare a law of the United States unconstitutional, which they pronounced an unwarrantable interference with the exclusive jurisdiction of the Supreme Court of the United States. Had the Resolutions been regarded as avowing and maintaining a right, in an individual State, to arrest by force the execution of a law of the United States, it must be presumed that it would have been a conspicuous object of their denunciation. With cordial salutations

RC (MHi); draft (DLC).