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MARCH OF CIVILIZATION TOWARD THE OHIO VALLEY.

- **EXPLORATIONS** continued until the valley of the St. Lawrence had been traced to a point beyond the western shores of Lake Superior and until the Mississippi had been navigated from the Falls of St. Anthony to the Gulf of Mexico;—and yet all this while the upper courses of the Connecticut, the Delaware, the Susquehanna, the Potomac and the James rivers remained unknown. Frenchmen had floated down the Ohio as far as what is now Louisville, Kentucky; the Fox river of Green Bay, the Wisconsin and the Illinois had been explored by them; and they had seen the streams which drain the eastern shed of the Rocky mountains; while by far the greater part of the Atlantic slope of North America lay an unexamined and unknown wilderness. And, except along the river which washes its southern boundary, it is not known that any portion of the territory now constituting the state of Ohio had as yet been visited by civilized man.
- “There is a house,” wrote La Salle, in 1684, “at the mouth of the Niagara river, the most important on the whole lake [of Ontario] to cut off the trade of the English and which the barks of the fort [Frontenac] can reach in two days; it cost about two thousand livres. It is all that remains from the fire which happened at the little fort that had been constructed there. The situation of this fort is very advantageous both on account of the fertility of the land, the abundance of game and fishing, and the mildness of the climate, which is much more temperate than in the other parts of New France. Winter is shorter there by half and much milder,

who alone were fairly well informed on the subject. From Wisconsin Heights to the Bad Axe, every foot of the trackless way was as unknown, even from hearsay, to the Sacs and their pursuers as the interior of Africa was to Stanley when he first groped his way across the dark continent. During and immediately following the war, the newspapers of the eastern states were filled with descriptions, more or less florid, of the scenic charms of and the possibilities for extractive industries in the Rock river valley, the groves and prairies on every hand, the park-like region of the Four lakes, the Wisconsin river highlands, and the picturesque mountains, and almost impenetrable forests of western Wisconsin. Books and pamphlets were issued from the press by the score, giving sketches of the war and accounts of the newly discovered paradise: crude publications, curiously filled, as a rule, with gross narrative and descriptive errors, and to-day practically unknown except

to historical specialists. But they did the work, in their own way and season, of thoroughly advertising the country and at once attracted a tide of immigration thither. There necessarily followed, in due time, the opening to sale of public lands heretofore reserved and the purchase of what remaining territory was still in the possession of Indian tribes. Again, the decisive result of the war completely humbled the spirit of the mischief-making Winnebagoes, so that they never resumed their arrogant tone, and were quite content to allow the affair to remain the last of the Indian uprisings in either Illinois or Wisconsin. This incidental crushing of the Winnebagoes and the broad and liberal advertising given to the extended theater of disturbance, were therefore the two practical and immediate results of the Black Hawk war, the consequence of which was to at once give to the development of the new territory an enormous impetus.

REUBEN G. THWAITES.

THE BEGINNINGS OF CONSTITUTIONAL CONSTRUCTION IN THE UNITED STATES.

THE constitution of the United States is in many respects anomalous. Many governments have, indeed, existed under written forms, in the nature of compacts, articles of federation and the like. But up to the time our constitution was adopted, no great people with a conscious purpose of overcoming great elements of disunion and of making of themselves a mighty nation, had pre-

pared for themselves a written form of government. Even in that day when social and practical philosophers dwelt constantly on the theory of a social compact as the origin of all government, such attempts were regarded as visionary and impracticable, the work of doctrinaires rather than of wise statesmen. But the necessity that dictated this instrument was imperative, and so

well was it responded to that it yielded what Gladstone has called "the most wonderful work ever struck off at a given time by the brain and purpose of man." Many of those who did the most effective work in the great convention were reproached with a strong leaning toward the British constitution, and to every one trained in the noble system of English law such a leaning was most natural. That government, based upon a series of great statutes from Magna Charta down to the present day, and upon a vast body of precedents accumulated during the long history of the country, was but the embodiment of the genius of English law. It possessed on its face an elasticity which fitly subserved the ends of progress, and a fixity which had proved an unfailing barrier to the aggressions of tyranny. That this was fully appreciated by the great lawyers is certain. But some of them were moved by other considerations than the mere insurance of national strength. The great chancellor of New Jersey could not forget that there was danger that the individual existence of his own state might be swallowed up in the central government. Other representatives of the smaller states readily adopted the same views, and of the least encroachment upon the privileges and prerogatives of their states they were exceedingly jealous. Many and varied were the interests brought together in the endeavor to fix in a single instrument the whole force and scope of the central government, and very difficult was the task of so limiting and defining its powers that the future should know

no problem, save the simple one of how to live worthy of so perfect a system.

Doubtless the makers of the constitution gave little thought to those who should come after them, not with open alterations and changes—for they provided for all such things—but merely with constructions and explanations of their work. Surely, however, it must have suggested itself to some of them, for to all who are familiar with legal procedure the construction of statutory enactments is necessarily familiar. Very few important statutes escape attempts to wrest them from their right meaning, to introduce new ideas into them and to make the simplest language ambiguous. The test of the skillful draughtsman has ever been the immunity of his state papers from construction and of his legal acts from litigation. Such a masterhand as Thomas Jefferson's drew paper after paper that to this day know no glosses or constructive decisions. Surely, it might have been hoped that this document might escape and prove so rounded in form and so close of texture that the most tenacious mosses and lichens might despair of finding lodgment upon it. But what the perfection of its draught would seem to have precluded the immensity of the interests involved and the extreme diversity of views to be satisfied early effected.

Had it escaped opposition until it was adopted and the nation had begun its life under it, then, indeed, the result might have been different. But it failed to commend itself to the whole people, and its initial struggle was for its very existence. To secure its adop-

tion it was necessary to enter largely into the most careful and thorough exposition of its import and of its claims upon the people for adoption. This led to the first great series of constructive glosses comprised in the *Federalist*, and written almost entirely by two of the leading spirits in the convention that gave it birth. This exposition was singularly systematic and complete, and is to this day the great repository of the principles of one great school. Hamilton had leaned to the extreme of centralization. The English polity was constantly before his eyes, and his inclinations led him to conform the one system to the other as far as the very different circumstances would allow. There was, indeed, one great check upon him. He wrote to persuade those opposed, both to the constitution itself and to that British system which he so approved. Had he been in the act of formulating a series of laws of construction to guide his own followers in the still unknown future when Federalism and Republicanism were to be pitted against each other in a bitter faction fight, doubtless the treatment he would have adopted would have been far other. The value to students of the constitution would have been, on the other hand, far less. Madison, so soon to be arrayed on the opposite side of every question, was now no check upon Hamilton in his execution of the major part of the work. He was very thoroughly in sympathy with the scheme and method of the *Federalist*, and, indeed, though for so long a time the shadow of Mr. Jefferson, he showed in

his last years, when the weight of that dominant spirit was removed, the same tendencies towards a vigorous central power which characterized his more independent early life.

When once the constitution was adopted, all theorizing was forgotten in the absorbing work of testing by practical trial the working of the new instrument. It was a tremendous task. A complete new form of government was to be put to work upon the wreck of a similar federation that had died of inanition. The most hopeful stood with anxious hearts and waited the result. The influence of Washington gave the undertaking the people's confidence, the genius of Hamilton put it upon a sound financial basis, the wisdom and restraint of the whole people gave it the needed opportunity to get under way, and while the whole world watched and wondered the distracted and war-worn colonies took their place in the sisterhood of nations.

But even the powers of Washington were too feeble to prevent the radical differences of opinion among men, states and sections from growing into discussion as trial grew into success. The last days of his administration were turbid with partisan strife and troubled with the vilest personal criticism. No sooner had Washington retired from office than all the smothered fires burst forth. It is difficult at this day to understand the tremendous effect of foreign sympathies in moulding the feelings and political conduct of all men at that time. Whether a man sided with France or England determined his po-

litical status. This really had its *raison d'être* not in any real love for the two countries but rather to the fact that the one was in the course of a struggle for liberty and democracy, while the other was the object of a dislike naturally engendered by the bitter struggle of the Revolution, and was now the ready example of effective free government under a strong head. The country was already split into two hostile camps. The administration still held the honorable appellation of Federalist, won in the fight for the adoption of the constitution. The opposition had as yet only a negative existence; they were without a name or a platform. In this case they had thrust upon them the distasteful epithet of Anti-federalist, distasteful alike for its older association and its negative character. For a platform they as yet simply opposed the administration. This would plainly never do. The leaders saw it was necessary to form a nucleus or they could never hope to play the important part in the country to which they aspired. Mr. Jefferson was particularly active in this matter, and his endeavors to convert these freelances into a party soon won for him the position of acknowledged leader.

Mr. Adams was by nature incapable of mere policy. He well nigh justified Franklin's famous saying, that he was "always an honest man, often a wise one, but sometimes wholly out of his senses." Instead of beginning a conciliatory course toward the fast growing opposition, he was only more severe upon the party he disagreed with because

they persisted in their opposition. It was a bad omen that he should have opened his career as chief executive with the declaration that the French Revolution, the darling of every Anti-federalist, "possessed not one principle in common" with our own. Things went from bad to worse. The opposition grew fiercer, the administration but the more determined. The high-handed measures of the Federalists finally culminated in the passage of the two acts known as the alien and sedition laws. They were painfully extreme measures. No one can be found to-day to justify them, and they brought an inevitable doom upon the party that proposed and carried them. Throughout the country they awoke murmurs. Not even staunch Federal New England was free from them, Kentucky and Virginia broke out into open clamor, vague, inarticulate, blind at first—vain mouthings of local assemblies got hastily together—but growing daily more and more audible and soon to become so fairly set forth in good plain Anglo Saxon that all men should take note of them then and for a long time to come. Mr. Jefferson, ever on the alert, did not miss this great opportunity. In the cavilling and complaining at the adoption of the constitution, a set of amendments was finally precipitated from the turgid mass sent up by the various states. Out of these—ten in number—the last, merely a better ordered form of one substantially suggested by Massachusetts, Virginia, both Carolinas and the minorities in Pennsylvania and Maryland, declared that "the powers, not granted to the United States by the

constitution, nor prohibited by it to the states, are reserved to the states respectively and to the people." This was but a formulation of a very obvious truth, but it was now to be endlessly quoted as the great back-bone of the new school of construction; for "states' rights" was now about to be formally promulgated. Various local bodies in Virginia and Kentucky set forth in lengthy resolutions that the alien and sedition acts were unconstitutional. Mr. Jefferson and his compeers laid hold of these manifestations of feeling and proceeded to form a programme for the winter campaign. John Breckinridge, a prominent Anti-federalist of Kentucky and soon to become the leader of the party in that state, went to Virginia in the autumn of this year, 1798, and held a consultation with Mr. Jefferson and Colonel Wilson Carey Nicholas on this subject. Colonel Nicholas was then a young man. In after years he became governor of the state and was even now prominent and highly connected.* Unfortunately we are not sufficiently informed of what took place at this meeting. Mr. Jefferson has claimed that he drew a set of

* He was the son of the distinguished Robert Carter Nicholas. His eldest brother, George Nicholas, played an important part on the side of the constitution in the Virginia convention, after which he removed to Kentucky, where he was prominent in all the affairs of that state and the greatest rival of Mr. Breckinridge at the bar and in the forum. Another brother, John Nicholas, was now in congress, having been elected to the place that Mr. Breckinridge resigned when he removed from Virginia to Kentucky some time before. He was inclined towards Federalism and thereby hampered in Virginia, but he was opposed to the alien and sedition laws, and his most memorable achievement was his speech in favor of their repeal.

resolutions and entrusted them to Mr. Breckinridge to present to his legislature. The only resolutions found in Mr. Jefferson's papers differ radically from those passed in Kentucky, and it is probable that this meeting did no more than fix a general line of action, and lead to a tentative set of resolutions which Mr. Breckinridge afterwards altered on his own responsibility. About this time Mr. Jefferson wrote to Mr. Madison urging that he prepare a similar set for the Virginia house. This was done and the draft entrusted to John Taylor of Carolina, to be introduced into that house. On the tenth day of November, 1788, the resolutions were introduced into the Kentucky house, and being passed almost unanimously, were concurred in by the senate on the thirteenth of the same month and promptly approved by the governor. The Virginia resolutions passed the house on the twenty-first of December, and were concurred in on the twenty-fourth of the same month. Mr. Madison, in a letter to Mr. Jefferson, written shortly before the introduction of these resolutions, expressed it as his opinion that they ought to be somewhat general in terms, so that other states concurring in substance would not be deterred from responding to them from any phraseology which they might think extreme.*

In pursuance of this policy the tone of these resolutions is much milder than that of the resolutions adopted in Kentucky, and these again are milder than the draught found among Mr. Jefferson's papers. Mr. Madison's expres-

* Madison's Works, Vol. II. p. 149.

sion is that the states are bound to "interpose," while Mr. Jefferson's draught goes so far as to say that upon the assumption of powers by the general government "which have not been delegated, a nullification of the act is the rightful remedy, that every state has a natural right in cases not within the compact [*casus non fœderis*] to nullify of their own authority all assumptions of power by others within their limits." * But it must be remembered that none of these words had as yet any peculiar meaning attached to them such as they came to have in later times. The simple intent of the various sets of resolutions was to enter a formal and vigorous protest against the high-handed measures then being carried through congress, to demand a repeal of those already passed, and by inducing the other states to unite in the protest to render the repetition of such measures impossible, or at least hazardous. This was the ostensible purport of these resolves. Behind all this it seems highly probable that they were intended for the immediate party purposes of the Anti-federalists, or, more strictly, of the Jeffersonians. They were to be of the nature of a platform in the coming contest. There was probably no notion of pressing the matter to extremities at this time. Mr. Jefferson himself says in a letter to Mr. Madison (in the interval between the passage of the Kentucky and Virginia resolutions), on November 17, 1798: "I enclose you a draft of the Kentucky resolutions. I think we shall distinctly affirm all the

important principles they contain so as to hold to that ground in future, and leave the matter in such a train as that we may not be committed absolutely to push the matter to extremities, and yet may be free to push as far as events will render prudent." † Under date of November 26, he wrote to John Taylor, who introduced the measure: "For the present I should be for resolving the Alien and Sedition laws to be against the constitution and merely void; and I would not do anything at this moment which would commit us further, but reserve ourselves to shape our future measures or no measures by the events which may happen. ‡" In the view of one great party, at least, a principle of constitutional construction had been declared and the time was not ripe for pushing matters to extremities.

The resolutions themselves are too well known to require citing here. A few words upon the obvious questions in regard to them will, however, be necessary. The first of these is naturally what exactly was the intent of these resolutions. Mr. Madison declares that when the central government transcends its powers, then the states shall "interpose." What he meant by this, he, himself, declares in 1835 to have been that when the constitutional compact shall have been exceeded in a dangerous and deliberate manner, that then the states shall, not singly, but the whole, or a majority of them, interpose in the constitutional manner, *i. e.*, by means of popular conventions, to declare the

* Jefferson's Works, Ed. 1853, Vol. IX, p. 469.

† Jefferson's Works, IV, p. 258.

‡ Ibid, IV, p. 260

action of the general government void, and if necessary to reposses themselves of their original rights as sovereign states. This is, perhaps, a consistent interpretation, but it is unfortunate that it was not more distinctly expressed; but then it was said at the time that these resolutions were meant to be vague generalizations. Von Halst long ago pointed out that the word "interpose," really carried all the force of "nullify."* It is, moreover, apparent that Mr. Madison must have radically changed his position from that of 1787, seeing that he did not think the states truly sovereign in their individual capacity at the time of the drawing up of the constitution. There have been those who have doubted whether he had not suffered another change of view between that time and the time of this explanation—brought about by the growth of nullification pure and simple in South Carolina.

The Kentucky resolutions, while declaring plainly and without mincing of words that these laws were unconstitutional and therefore void and of no force, are yet open to the same interpretation that Mr. Madison puts upon his own; and he claims the same for them, and, indeed, it is far from improbable that this was what was intended. The gravest doubt that has been cast upon this theory arises from some of the expressions used by Mr. Breckinridge in the resolutions of the Kentucky house of representatives in 1799; but in the debate upon the resolutions of 1798 his

remarks tend to confirm the interpretation offered by Mr. Madison.† It is highly probable that in that day the absurdity of all attempt to nullify on the part of a single state was patent. To such clear-headed statesmen as the leaders in this affair, it was no doubt a question admitting of little discussion that when a proper occasion for such action arose, one state could not stand alone. Surely, with the confidence they had in the people, with their extreme Democratic notions, this must have been so.

From this point of view there was little to shrink from. The constitution had then been in operation some nine years. They had themselves been among the authors and advocates of it. The men they spoke to were the very men who had given it the sanction requisite to its effectuation. To them it was not sacred as it has since grown to every loyal heart in this great nation. It was the work of their hands; it was as yet only on trial; if it failed, was it a sacrilege to amend it here and there, provided it was done decently and in order by the same means by which it was originally made and put into effect? A fair allowance for the differences in judgment may make this a venial offense, but it cannot clear it from all imputations of inferior statecraft. Others saw then with fear and trembling what the result might be. This principle, if it were true, might well lead to endless tinkering with the constitution, or at least to attempts to that end,

* 'History United States,' Vol. I, pp. 146-8 et seq.

† The Frankfort Kentucky *Paladium*, Nov. 20, 1798.

and a spirit of unrest among the people as its least dangerous results. But far worse things might well spring from it, and, indeed, these very resolutions became the fulcrum of the lever whereby it was sought to overturn the Union. Washington was one of those who looked and trembled. In a letter to La Fayette, written on the twenty-fifth of December, 1798, he says: "The constitution according to their interpretation of it would be a mere cipher." And again, he wrote to Patrick Henry: "Measures are systematically and pertinaciously pursued which must eventually dissolve the Union or produce coercion."*

There is another argument that goes to show that we have rightly divined the meaning of those who drew these papers. They were a protest against the laws and at the same time an invitation to the other states to join them in this protest and thereby secure the repeal of the laws. The address of the other states was responded to by eight, all of them delivering adverse replies except the two states involved, who replied favorably to each other. Thus seven states gave a decided negative. These were the New England States, New York and Delaware. Mr. Madison says in a letter at this time that it was understood that North Carolina was about to reply adversely. This, however, she did not do, but with six others remained silent. The seed fell on bad ground. When this was seen it was at first decided to say no more, but by Mr. Jefferson's advice a "solemn

protest" was made by resolution in Kentucky, by Mr. Madison's report in Virginia, and the matter was suffered to drop. Whether anything further might have resulted had the Federalists been able to push matters to extremes, is an empty speculation. Mr. Jefferson claimed that the matter was left open, and that the series of resolutions formulated a doctrine which he was prepared to make his political creed. The result was the repeal of the obnoxious laws and the election of Mr. Jefferson to the Presidency. The first alternative, the appeal to congress, succeeded; there was no need for further action. Moreover, so complete was the overthrow of the opponents of the new party that for many years to come it had no grievance. As the favorite dogma of the ruling power, "states' rights" was now to be constantly proclaimed as the great rule of constitutional construction and the great check upon the central government—to be proclaimed, indeed, but violated and set aside whenever convenient, as for instance in the case of the Louisiana purchase and the later expenditures for internal improvements.

The replies from the states denying the truth of the propositions set forth in these resolutions relied mainly on the argument that the judiciary branch of the general government was the proper repository under the constitution of the powers to judge of infractions and violations of the constitution, or of the prerogatives of the states. This has been the position ever since occupied by the supporters of the theory held by the old Federalist party

* 'Washington's Works,' Vol. XI, pp. 378-398.

and generally known as loose constructionists, which term, however, does not convey a fair idea of their position. In answer to the argument that the judiciary, itself part of the general government, cannot be made a judge of differences between that government and the individual states, it has generally been judged sufficient to reply that the functions of the judiciary are completely distinct and separate from those of the legislative branch, that it is one of the checks imposed upon that branch and upon the executive in connection with it, and that it was called into being largely for this very purpose. The fact that the same political complexion, so they argue, may belong to two or all branches of the government cannot vitiate the fact that in the judiciary was reposed this power, nor can this power be usurped or taken away without a palpable violation of the constitution and subversion of the government.*

Thus by the passage of these resolutions was the great political contest inaugurated. The Kentucky resolutions, both on account of their superior decision and the authority lent by Mr. Jefferson's relation to them, have been most frequently referred to as the exponents of the doctrine of "states' rights." It therefore came to be sufficient to say that they were the authority for any statement to make that statement command respect as one side of a great debatable question. In this lies the singular importance of this docu-

ment, an importance that hardly attaches to any other enactment of any state legislature, or, indeed, to any act of any body after the initiation of the government.

Singularly enough Mr. Jefferson and Mr. Breckinridge were destined to be the principal actors in the first testing of the doctrine laid down in the resolutions of 1798, and, even more singularly, they were to be opposed. This happened in the autumn of 1803, and was in connection with the purchase and occupation of Louisiana. Mr. Jefferson was now President, and Mr. Breckinridge in the senate and the recognized leader of the administration in that body. Mr. Jefferson, who was generally honest enough to see just where the logical deductions from his theories led, and yet much given to yielding theory to the urging of any stern practical necessity, judged it necessary to have an amendment to the constitution authorizing the acquisition of foreign territory since the constitution is silent on that point. Three important letters on this subject may be read in Mr. Jefferson's works to Mr. Breckinridge,† Mr. Madison‡ and Mr. Lincoln,§ of dates August 12, 25 and 30, respectively. In the letters to Mr. Madison and Mr. Lincoln he gives drafts of what he thinks would be proper, both of which give authority to acquire Florida also. They differ considerably and are plainly tentative. He again wrote to Mr. Breckinridge on the thirteenth of August, and

* For replies of the states see 'Eliot's Debates,' Vol. IV, where may be found, also, the resolutions of 1798-99, and 'Madison's Report' of 1800.

† 'Jefferson's Works,' Vol. IV, p. 498.

‡ 'Ibid,' p. 501.

§ 'Ibid,' p. 504.

a draft (in Mr. Jefferson's hand) of an amendment on this subject, found among the Breckinridge papers, may have been enclosed at this time. There are some reasons to think, however, that it was sent to Mr. Breckinridge in April, 1806, when he was attorney-general, and that it was the result of an unsettled opinion on the part of the President. This is the simplest form of the draught, and well illustrates Mr. Jefferson's position. It reads as follows :

Resolved, By the senate and house of representatives of the United States, two-thirds of both houses concurring, that the following amendment to the constitution of the United States be proposed to the legislatures of the several states, which, when ratified by three-fourths of the said legislatures, shall be valid to all intents and purposes as a part of the said constitution: Louisiana, as ceded by France to the United States, is made a part of the United States.

Whatever qualms of conscience Mr. Jefferson may have felt, his agitation of the question died away without effecting anything. Mr. Breckinridge seems to have squarely differed with him on the question. If this was so, it is hard to see how he reconciled it with his position in '98. There was one reason that might well have deterred a party leader in congress from offering such an amendment. The proposing of such an amendment would have been an implied admission that such an amendment was requisite to make the purchase valid. It would require two-thirds of both houses to carry it, and it was most doubtful if such a vote could be obtained. Mr. Jefferson wrote urgent letters to the leading Democrats impressing on them the necessity of the presence of every friend of the treaty.

Now, if the measure failed in this form, it would be a complete loss of the whole negotiation. Although the Federalist party had become almost completely shattered, they still held a strong minority in congress, and the trial would have been hazardous. As the event proved, only one Federalist, General Dayton, voted for the treaty. Hence it was that at the very outset the principles of the resolutions of 1798 were neglected if not repudiated. There is some ground for believing that Mr. Breckinridge considered the second clause of section three, article four to contain an implied authority to acquire territory, inasmuch as it gave to congress "the power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." This is perhaps reasonable, and yet hardly the natural ground for the advocate of the resolutions of 1798 to take. The President, in consequence of the pressure brought to bear on him, gave way, and about the time that the matter came up, being still in a state of unrest, he shifted his ground, and Mr. Gallatin, at his request, wrote to Mr. Breckinridge in the senate chamber :

Dear Sir: I send in the shape of a bill the substance of which [what?] the President seems to think necessary in order to authorize him to occupy and temporarily govern Louisiana. Will you consult with your friends and decide whether authority be necessary, and, if so, what form should be given it?

Yours truly,

ALBERT GALLATIN.

Thursday evening.*

The enclosed bill is not sufficiently

* Breckenridge Papers, MS.

interesting or germane to the point now being illustrated to be quoted at length in this place. It simply reveals the painful consciousness on the part of the President that he had overstepped the limits allowed him by his own theory of the constitution, and that he was unwilling to bear the burden alone.

The principles thus so severely "wounded in the house of their friends" came in for a very remarkable and unlooked for reassertion a few years later. Had anyone prophesied that the Federalists of New England would in less than a score of years be the mouthpiece of the doctrines of the resolutions of '98, they would have been laughed to scorn. But this very revenge time did take. The embargo and the war of 1812 pressed heavily on the commerce of New England, and things having gone from bad to worse, the famous Hartford convention of twenty-six delegates from these states met in the early winter of 1814 at the call of the Massachusetts legislature. The report of the committee which recommended the call of this convention, declared that "when the national compact is violated, and the citizens of the state are oppressed by cruel and unauthorized law, this legislature is bound to interpose its power and wrest from the oppressor his victim." The report of the convention contained the following sentiment:

In case of deliberate, dangerous and palpable infractions of the constitution, affecting the sovereignty of the state and liberties of the people, it is not only the right but the duty of such a state to interpose its authority for their protection in the manner best calculated to secure that end.*

* 'Niles Register,' VII, p. 308.

Mr. Madison was now President, and harassed and almost in despair at the dark outlook on every side. The Hartford convention was in his eyes the dark plottings of a body of conspirators. Restless and uneasy, he watched it with armed men, and to his ears these words came like the wicked voice of treason; and yet it was he who, sixteen years before, had penned the third resolution of the Virginia draft, declaring:

That in the case of a deliberate, palpable, and dangerous exercise of powers not granted by the compact, the states who are parties thereto have a right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.†

The one is scarcely more than an echo of the other. Mr. Madison, in his later years, when he wrote much on the subject of "states' rights"—*a propos* of the movement in South Carolina, and from a stand point on the side of the general government—constantly urged that the third resolution above quoted must always be taken in connection with the seventh, which professed attachment to the Union. The parallel to this is to be found in this report, which, with a stern and decided declaration of the right of a state to resist oppression at one and the same time, counseled forbearance and an avoidance of all precipitate measures, and declared that in the judgment of the convention the time for such action had not come. In one particular this convention entirely departed from the course pursued in the earlier instance. Instead of urging on their representa-

† Ibid, VII, p. 308. Mad. Wks., Vol. IV, p. 506.

tives in congress that they make an effort for the righting of their wrongs and an appeal to their sister states to support them in the declaration of these rights, they proposed a series of amendments to the constitution setting forth their views. They had tried the former method in vain, the appeal to the states was to their minds an empty cry, and this last method was at least a thing to be tried before a breach should be made with their fellows.

The most remarkable thing in the whole history of this agitation is, that while proceeding upon the very principles of the resolutions of 1798, and using in many cases language not only identical in meaning, but even in form, not once in these reports is the example or authority of those documents named or quoted in any way. The reason for this is not far to seek. The men involved in this movement were the shattered remnant of the old Federalist party. That party had long since outlived its mission. From being the repository of many noble principles, the champion of many noble measures, it sank through too great greed of power into a body of wranglers and obstructionists. It still had some able members, men who still had a living hold of the principles that had once been its possession and held to its poor skeleton by the splendor of its traditions. Its one surviving sentiment, which was still strong and universal, was a hatred of the Republican party, of all its leaders and all its measures. It found itself now professing that party's old principles, but it was as unwilling as ever to

acknowledge the foundation whence they sprung. Their opponents, meanwhile, being in possession of the central government, were not so eager to profess such sentiments in such a form. They at least saw nothing unconstitutional in the laws now complained of, and would be slow to see the analogy between 1798 and 1814. Thus partisan grounds blinded the eyes of both parties, and the one shrunk from drawing a precedent from the other's action, while that other looked with unmasked condemnation on the reassertion in nearly identical language of their great fundamental party platform. So easily do men lose sight of the abstract principle in the concrete forms in which it is variously presented.

The country was not again stirred by any great and general revival of these questions till the beginning of the great struggle was inaugurated in South Carolina. In the meantime various questions turned upon the theory of states' rights as hitherto laid down. It was handled in a most extraordinarily elastic manner. Mr. Madison for instance gave his consent to the bank, but vetoed the bill for applying money to internal improvements, and so on through many vicissitudes, the doctrine was now stretched and now contracted. When the question of nullification was started in the tariff discussion in South Carolina, the first citation was the Kentucky resolutions of 1798. The doctrine thereof was modified and tinkered with to endless variety till it has become a difficult thing to say what that doctrine was originally. The party of secession

in South Carolina finally reduced it to a declaration of the complete and inalienable right, of that state, at least, to withdraw from the Union whenever and on whatever pretense it should see fit. This conclusion is not deducible from the fundamental statements contained in the deliverances of the Kentucky and Virginia legislatures in 1798, 1799 and 1800, and has been combatted by Mr. Madison and many devoted Jeffersonian Democrats.

It is not the intention of this paper, however, to push the discussion so far. Its aim has been merely to show how early the party cleavage took place and that from the beginning two well defined schools of constitutional construction have existed side by side, and, moreover, to point out that the Kentucky resolutions of 1798 as they were the earliest, have been ever regarded as the authoritative formulation of the doctrines of the strict constructionists or "states rights" party. The party that made this instrument has been the only one that has survived the vicissitudes of a century. It would therefore appear that in it is contained a clear and forceful expression of one view of

the constitution and that view one that has always commended itself to a large proportion of the people of this country. A powerful testimony to this conclusion is offered by the action of the New England Federalists, who while holding in abhorrence the whole policy of their opponents, and regarding the declarations contained in these resolutions with peculiar dislike, yet in the moment of extreme pressure from the central government yielded to the same considerations which prompted their enunciation, and in language almost identical published the selfsame doctrine. It is this that has given this series of resolutions put forth by a state that had been in the Union barely half a dozen years, and was still, with the exception of Tennessee, the only state beyond the mountains, an importance of the highest kind in every discussion of constitutional limitation and construction, and placed it on a plane with that most masterly series of discussions of the constitution prepared by Hamilton and Madison with infinite skill and labor.

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