

**James Madison to Nicholas P. Trist, December, 1831.
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TO N. P. TRIST. MAD. MSS.

December, 1831.

Other, and some not very candid attempts, are made to stamp my political career with discrediting inconsistencies. One of these is a charge that I have on some occasions, represented the supreme Court of the U. S. as the judge in the last Resort, on the boundary of jurisdiction between the several States & the U. S. and on other occasions have assigned this last resort to the parties to the Constitution. It is the more extraordinary that such a charge should have been hazarded; since besides the obvious explanation, that the last resort means in one case, the last within the purview & forms of the Constitution; and in the other, the last resort of all, from the Constitution itself, to the parties who made it, the distinction is presented & dwelt on both in the report on the Virga Resolutions and in the letter to Mr. Everett, the very documents appealed to in proof of the inconsistency. The distinction between these ultimate resorts is in fact the same, within the several States. The *Judiciary* there may in the course of its functions be the last resort within the provisions & forms of the Constitution; and the people, the parties to the Constitution, the last in cases ultra-constitutional, and therefore requiring their interposition.

It will not escape notice that the Judicial authority of the U. S. when overruling that of a State, is complained of as subjecting a Sovereign State, with all its rights & duties, to the

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will of a Court composed of not more than seven individuals. This is far from a true state of the case. The question wd. be between a single State, and the authority of a tribunal representing as many States as compose the Union.

Another circumstance to be noted is that the Nullifiers in stating their doctrine omit the particular form in which it is to be carried into execution; thereby confounding it with the extreme cases of oppression which justify a resort to the original right of resistance, a right belonging to every community, under every form of Government, consolidated as well as Federal. To view the doctrine in its true character, it must be recollected that it asserts, a right in a single State, to stop the execution of a Federal law, altho' in effect stopping the law everywhere, until a Convention of the States could be brought about by a process requiring an uncertain time; and finally in the Convention when formed a vote of 7 States, if in favor of the veto, to give it a prevalence over the vast majority of 17 States. For this preposterous & anarchical pretension there is not a shadow of countenance in the Constitn. and well that there is not; for it is certain that with such a deadly poison in it, no Constn. could be sure of lasting a year; there having scarcely been a year, since ours was formed, without a discontent in some one or other of the States which might have availed itself of the nullifying prerogative. Yet this has boldly sought a sanction under the name of Mr. Jefferson, because, in his letter to Majr Cartwright, he held out a Convention of the States, as, with us, a peaceable remedy in cases to be decided in Europe by intestine wars. Who can believe that Mr. J. referred to a Convention summoned at the pleasure of a single State, with an interregnum during its deliberations; and, above all with a rule of decision subjecting nearly $\frac{3}{4}$ to $\frac{1}{4}$. No man's creed was more opposed to such an inversion of the Repubn. order of things.

There can be no objection to the reference made to the weakening effect of age on the judgment, in accounting for changes of opinion. But inconsistency at least may be charged on those who lay such stress on the effect of age in one case, and place such peculiar confidence, where that ground of distrust would be so much stronger. What was the comparative age of Mr. Jefferson, when he wrote the letter to Mr. Giles, a few months

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before his death; in which his language, tho' admitting a construction not irreconcilable with his former opinions is held, in its assumed meaning, to outweigh on the tariff question, opinions deliberately formed in the vigour of life, reiterated in official reasonings & reports; and deriving the most cogent sanction from his Presidential Messages, and private correspondences. What again the age of Genl. Sumter, at which the concurrence of his opinion is so triumphantly hailed? That his judgment may be as sound as his services have been splendid, may be admitted; but had his opinion been the reverse of what it proved to be, the question is justified by the distrust of opinions, at an age very far short of his, whether his venerable years would have escaped a different use of them.

But I find that by a sweeping charge, my inconsistency is extended "to my opinions on almost every important question which has divided the public into parties." In supporting this charge, an appeal is made to "Yates's Secret Debates in the Federal Convention of 1787," as proving that I originally entertained opinions adverse to the rights of the States; and to the writings of Col. Taylor, of Caroline; as proving that I was in that Convention "an advocate for a *Consolidated national Government*."

Of the Debates, it is certain that they abound in errors, some of them very material in relation to myself. Of the passages quoted, it may be remarked that they do not warrant the inference drawn from them. They import "that I was disposed to give Congress a power to repeal State laws," and "that the States ought to be *placed under the controul of the Genl Gt.* at least as much as they were formerly when under the British King & Parliament."

The obvious necessity of a controul on the laws of the States, so far as they might violate the Constn & laws of the U. S. left no option but as to the mode. The modes presenting themselves were 1. A Veto on the passage of the State Laws. 2. A Congressional repeal of them. 3. A Judicial annulment of them. The first tho' extensively favored at the outset, was found on discussion, liable to insuperable objections arising from the extent of Country and the multiplicity of State laws. The second was not free from such as gave a

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preference to the *third* as now provided by the Constitution. The opinion that the States ought to be placed not less under the Govt. of the U. S. than they were under that of G. B., can provoke no censure

from those who approve the Constitution as it stands with powers exceeding those ever allowed by the colonies to G. B. particularly the vital power of taxation, which is so indefinitely vested in Congs. and to the claim of which by G. B. a bloody war, and final separation was preferred.

The author of the "Secret Debates," tho' highly respectable in his general character, was the representative of the portion of the State of New York, which was strenuously opposed to the object of the Convention, and was himself a zealous partisan. His notes carry on their face proofs that they were taken in a very desultory manner, by which parts of sentences explaining or qualifying other parts, might often escape the ear. He left the Convention also on the 5th of July before it had reached the midway of its Session, and before the opinions of the members were fully developed into their matured & practical shapes. Nor did he conceal the feelings of discontent & disgust which he carried away with him. These considerations may account for errors; some of which are self-condemned. Who can believe that so crude and untenable a statement could have been intentionally made on the floor of the Convention, as "that the *several States* were political Societies, *varying* from the *lowest corporations* , to the *highest sovereigns* ," or "that the States had vested *all the essential rights* of Government in the *old Congress*."

On recurring to the writings of Col. Taylor¹ it will be seen that he founds his imputation agst myself and Govr. Randolph, of favoring a Consolidated National Governmt. on the Resolutions introduced into the Convention by the latter in behalf of the Virga. Delegates, from a consultation among whom they were the result. The Resolutions imported that a Govt., consisting of a *National Legislr.*, Executive & Judiciary,

¹ See "New Views," written *after* the Journal of Conn was printed.— *Madison's Note*.

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ought to be substituted for the existing Congs.. Assuming for the term *national* a meaning co-extensive with a single Consolidated Govt. he filled a number of pages, in deriving from that source a support of his imputation. The whole course of proceedings on those Resolutions ought to have satisfied him that the term *National* as contradistinguished from *Federal*, was not meant to express more than that the powers to be vested in the new Govt were to operate as in a Natl. Govt. directly on the people, and not as in the old Confedcy. on the States only. The extent of the powers to be vested, also tho' expressed in loose terms, evidently had reference to limitations & definitions to be made in the progress of the work, distinguishing it from a plenary & Consolidated Govt.

It ought to have occurred that the Govt. of the U. S. being a novelty & a compound, had no technical terms or phrases appropriate to it, and that old terms were to be used in new senses, explained by the context or by the facts of the case.

Some exulting inferences have been drawn from the change noted in the Journal of the Convention of the word *national* into "United States." The change may be accounted for by a desire to avoid a misconception of the former, the latter being preferred as a familiar caption. That the change could have no effect on the real character of the Govt was & is obvious; this being necessarily deduced from the actual structure of the Gov. and the quantum of its powers.

The general charge which the zeal of party has brought agst. me, "of a change of opinion in almost every important question which has divided parties in this Country," has not a little surprized me. For, altho' far from regarding a change of opinion under the lights of experience and the results of improved reflection as exposed to censure, and still farther from the vanity of supposing myself less in need than others, of that privilege, I had indulged the belief that there were few, if any of my contemporaries thro' the long period & varied services, of my political life, to whom a mutability of opinion on great Constitutional questions was less applicable.

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Beginning with the great question growing out of the terms “Common Defence & General Welfare,” my early opinion expressed in the Federalist, limiting the Phrase to the specified powers, has been adhered to on every occasion wch. has called for a test of it.

As to the power in relation to roads & canals, my opinion, without any previous variance from it, was formally

announced in the veto on the bonus bill in 1817, and no proof of a subsequent change has been given.

On the subject of the Tariff for the encouragemt of manufactures, my opinion in favor of its constitutionality has been invariable from the first session of Congs. under the new Constn. of the U. S. to the explicit & public maintenance of it in my letters to Mr. Cabell in 1828.

It will not be contended that any change has been manifested in my opinion of the unconstitutionality of the alien & Sedition laws.

With respect to the supremacy of the Judicial power on questions occurring in the course of its functions, concerning the boundary of Jurisdiction between the U. S. & individual States, my opinion in favor of it was as the 41 No. of the Federalist shews, of the earliest date; and I have never ceased to think that this supremacy was a vital principle of the Constitution as it is a prominent feature in its text. A supremacy of the Constitution & laws of the Union, without a supremacy in the exposition & execution of them, would be as much a mockery as a scabbard put into the hand of a Soldier without a sword in it. I have never been able to see, that without such a view of the subject the Constitution itself could be the supreme law of the land; or that the *uniformity* of the Federal Authority throughout the parties to it could be preserved; or that without this *uniformity*, anarchy & disunion could be prevented.

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On the subject of the Bank alone is there a color for the charge of mutability on a Constitutional question. But here the inconsistency is apparent, not real, since the change, was in conformity to an early & unchanged opinion, that in the case of a Constitution as of a law, a course of authoritative, deliberate, and continued decisions, such as the Bank could plead was an evidence of the Public Judgment, necessarily superseding individual opinions. There has been a fallacy in this case as indeed in others in confounding a question whether precedents could expound a Constitution, with a question whether they could alter a Const. This distinction is too obvious to need elucidation. None will deny that precedents of a certain description fix the interpretation of a law. Yet who will pretend that they can repeal or alter a law?

Another error has been in ascribing to the *intention* of the *Convention* which formed the Constitution, an undue ascendancy in expounding it. Apart from the difficulty of verifying that intention it is clear, that if the meaning of the Constitution is to be sought out of itself, it is not in the proceedings of the Body that proposed it, but in those of the State Conventions which gave it all the validity & authority it possesses.