AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 2: The Early National Era – Federalism

Massachusetts Resolution and Virginia Reply regarding the Virginia Resolutions of 1798[1]

The Alien and Sedition Acts of 1798 were deeply controversial. The Jeffersonians reacted with alarm to the Federalist measure. The Sedition Act created a federal criminal offense of seditious libel, which threatened fines and imprisonment for anyone who said or published anything that tended to bring the federal government or its officers into disrepute. Similar offenses existed in England, and several of the states recognized such a crime after the Revolution. The Sedition Act was not only partisan in its motivations and application, however; it was also seen as running afoul of both the enumeration of powers and the First Amendment. The Jeffersonian Republicans made use of the political institutions available to them to protest the Act. Those protests included resolutions passed by the Virginia and Kentucky legislatures declaring the acts to be unconstitutional and beyond the scope of federal power. Other states and Congress itself responded to the Resolutions of 1798 by defending the statutes and denouncing Virginia and Kentucky for questioning the constitutionality of a federal law. James Madison, who had secretly authored the Virginia Resolution, resigned from his seat in the U.S. House of Representatives in order to stand for election to the Virginia legislature. From that outpost, he wrote a legislative report further explaining why the Alien and Sedition Acts were unconstitutional and why the states had the authority to make such pronouncements. The Virginia Report of 1799 was published separately by the legislature and widely circulated during the electoral campaigns of 1800. The Jeffersonians won the elections of 1800 and allowed the laws to go unenforced and expire without renewal. How does Massachusetts defend the statute? How does Virginia defend its own actions ? What does Madison mean when he refers to the Constitution as a compact of the states?

Resolution of the Commonwealth of Massachusetts (1799)

The Legislature of Massachusetts, having taken into serious consideration the resolutions of the state of Virginia . . . .

. . . deem it their duty solemnly to declare, that while they hold sacred the principle, that the consent of the people is the only pure source of just and legitimate power, they cannot admit the right of the state legislatures to denounce the administration of that government to which the people themselves, by a solemn compact, have exclusively committed their national concerns: That, although a liberal and enlightened vigilance among the people is always to be cherished, yet an unreasonable jealousy of the men of their choice, and a recurrence to measures of extremity, upon groundless or trivial pretexts, have a strong tendency to destroy all rational liberty at home, and to deprive the United States of the most essential advantages in their relations abroad: That this Legislature are persuaded, that the decision of all cases in law and equity, arising under the Constitution of the United States, and the construction of all laws made in pursuance thereof, are exclusively vested by the people in the judicial courts of the United States.

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But, should the respectable state of Virginia persist in the assumption of the right to declare the acts of the national government unconstitutional, and should she oppose successfully her force and will to those of the nation, the Constitution would be reduced to a mere cypher, to the form and pageantry of

[1] Excerpt taken from Herman V. Ames, ed., *State Documents on Federal Relations* (Philadelphia: University of Pennsylvania, 1911), 18–20; *The Virginia Report of 1799–1800, touching the Alien and Sedition Laws* (Richmond: J.W. Randolph, 1850), 191–192.

authority, without the energy of power. Every act of the Federal Government which thwarted the views, or checked the ambitious projects of a particular state, or of its leading and influential members, would be the object of opposition and of remonstrance; while the people, convulsed and confused by the conflict between two hostile jurisdictions, enjoying the protection of neither, would be wearied into a submission to some bold leader, who would establish himself on the ruins of both.

The Legislature of Massachusetts, although they do not themselves claim the right, nor admit the authority, of any of the state governments to decide upon the constitutionality of the acts of the Federal Government, still, lest their silence should be construed into disapprobation, or at best into a doubt of the constitutionality of the acts referred to by the state of Virginia; and, as the General Assembly of Virginia has called for an expression of their sentiments, do explicitly declare, that they consider the acts of Congress, commonly called "the alien and sedition acts," not only constitutional, but expedient and necessary. . . .

Virginia Report of 1799

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The committee satisfy themselves here with briefly remarking, that in all the cotemporary discussions and comments which the Constitution underwent, it was constantly justified and recommended, on the ground, that the powers not given to the government, were withheld from it; and that, if any doubt could have existed on this subject, under the original text of the Constitution, it is removed, as far as words could remove it, by the 12th amendment, now a part of the Constitution, which expressly declares, "that the powers not delegated to the United States, by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The other position involved in this branch of the resolution, namely, "that the states are parties to the Constitution or compact," is, in the judgment of the committee, equally free from objection. It is indeed true, that the term "states," is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the particular governments, established by those societies; sometimes those societies as organized into those particular governments; and, lastly, it means the people composing those political societies, in their highest sovereign capacity. . . . [I]n that [last] sense, the Constitution was submitted to the "states," in that sense the "states" ratified it; and, in that sense of the term "states," they are consequently parties to the compact, from which the powers of the federal government result.

The next position is, that the General Assembly views the powers of the federal government, "as limited by the plain sense and intention of the instrument constituting that compact," and "as no farther valid than they are authorized by the grants therein enumerated." It does not seem possible, that any just objection can lie against either of these clauses. The first amounts merely to a declaration, that the compact ought to have the interpretation plainly intended by the parties to it; the other to a declaration, that it ought to have the execution and effect intended by them. If the powers granted, be valid, it is solely because they are granted: and, if the granted powers are valid, because granted, all other powers not granted, must not be valid.

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It appears to your committee to be a plain principle, founded in common sense, illustrated by common practice, and essential to the nature of compacts, that, where resort can be had to no tribunal, superior to the authority of the parties, the parties themselves must be the rightful judges in the last resort, whether the bargain made has been pursued or violated. The Constitution of the United States was formed by the sanction of the states, given by each in its sovereign capacity. It adds to the stability and dignity, as well as to the authority of the Constitution, that it rests on this legitimate and solid foundation. The states, then, being the parties to the constitutional compact, and in their sovereign capacity, it follows of necessity, that there can be no tribunal above their authority, to decide in the last resort, whether the compact made by them be violated; and, consequently, that, as the parties to it, they must themselves decide, in the last resort, such questions as may be of sufficient magnitude to require their interposition.

It does not follow, however, that because the states, as sovereign parties to their constitutional compact, must ultimately decide whether it has been violated, that such a decision ought to be interposed, either in a hasty manner, or on doubtful and inferior occasions. . . . [I]n the case of an intimate and constitutional union, like that of the United States, it is evident that the interposition of the parties, in their sovereign capacity, can be called for by occasions only, deeply and essentially affecting the vital principles of their political system.

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But it is objected that the judicial authority is to be regarded as the sole expositor of the Constitution, in the last resort; and it may be asked for what reason, the declaration by the General Assembly, supposing it to be theoretically true, could be required at the present day and in so solemn a manner.

On this objection it might be observed, *first*, that there may be instances of usurped power, which the forms of the Constitution would never draw within the control of the judicial department; *secondly*, that if the decision of the judiciary be raised above the authority of the sovereign parties to the Constitution, the decisions of the other departments, not carried by the forms of the Constitution before the judiciary, must be equally authoritative and final with the decisions of that department. But the proper answer to the objection is, that the resolution of the General Assembly relates to those great and extraordinary cases, in which all the forms of the Constitution may prove ineffectual against infractions dangerous to the essential rights of the parties to it. The resolution supposes that dangerous powers, not delegated, may not only be usurped and executed by the other departments, but that the judicial department also may exercise or sanction dangerous powers beyond the grant of the Constitution; and, consequently, that the ultimate right of the parties to the Constitution, to judge whether the compact has been dangerously violated, must extend to violations by one delegated authority, as well as by another; by the judiciary, as well as by the executive, or the legislature.

However true, therefore, it may be, that the judicial department, is, in all questions submitted to it by the forms of the Constitution, to decide in the last resort, this resort must necessarily be deemed the last in relation to the authorities of the other departments of the government; 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. . . .