SECESSION

CONSIDERED AS A RIGHT IN THE STATES COMPOSING THE LATE AMERICAN UNION AND JUSTIFICATION OF THE SOUTHERN STATES IN EXERCISING THE RIGHT

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To the patriot, who maintains the justice of the separation of the Confederate States from the United States, it is of vital importance to feel assured that the right of a State to secede from the Union with the United States, whenever she thought fit to exercise it, was perfect and absolute, beyond the power of denial or molestation from any source.

Upon this mainly depends the questions, what political relations subsist between the seceded States and the remaining United States; and whether the citizens of such States, in defending themselves by arms against the invasion of the United States, set on foot to enforce the laws of the United States over such States, after secession, are to be regarded as traitors and rebels, on the one hand, or as absolved from all political connection with the United States, and acting in the defense of their legitimate rights, on the other.

If the secession be without right, the position

of the people of a State resisting the authority of the United States is that of *rebellion* against legitimate power, and the armed resistants are traitors and felons; but if it be rightful and in the exercise of the legitimate powers of the State, then, the attempt at coercion by invasion and making war against the State is a usurpation and an outrage which the State is bound to repel as an attempt to destroy her rights and liberties by mere brute force. It is, therefore, a question which must most seriously impress every true patriot and every elevated mind in the South – had the State *the right* to secede in her sovereign capacity, for reasons which she judged sufficient to demand and justify her secession?

If this enquiry be resolved in the affirmative, it becomes important to consider, whether the circumstances, under which the State thought fit to exercise the right, are such as to justify her, in the estimation of mankind, in the exercise of it.

These two questions will, therefore, form the subject for consideration in these remarks; first, whether one of the States constituting the United States had the right to secede from the Union; and, secondly, whether the circumstances under which the right was exercised by the Southern States justify its exercise and acquit those Southern States of any bad faith to the obligations of the Union.

First – As to the abstract right of secession.

This right is claimed as resulting, from the rights and powers which the several States had when they formed the Constitution; and from the nature

and purposes of the Union created by the Constitution, as shown by its face and by the history of its formation and adoption.

1. In the first place, each State was, at the time of the adoption of the Constitution, a sovereign and independent State, and acted as such in adopting the Constitution. This is manifest – from the Declaration of Independence, which proclaims the several States to be "free and independent States" – from the second of the Articles of Confederation of 1778, which declares that "each State retains *its sovereignty, freedom* and *independence,* and every power, jurisdiction and right, which is not thereby expressly delegated to the United States" – from the treaty of peace with Great Britain, after the close of the war of the revolution, recognising each State by name as a "free, sovereign and independent State" – and finally, by the sanction of the Supreme Court of the United States, in the early history of the Union, in the case of *Ware vs. Hylton*, 3d Dallas' Rep., 199, in which it is held by Judge Chase, that the effect of the Declaration of Independence was "not that the united colonies *jointly,* in a *collective* capacity, were independent States, but that *each State of them was a sovereign and independent State"* – a doctrine recognised by numerous subsequent decisions of that Court.

It is also incontrovertibly true, that each State for herself, in her sovereign political capacity, by her Legislature, and not by immediate election of the people, appointed delegates to the Convention which

formed the Constitution – that the votes given in the Convention, in its formation, were given by States and not *per capita;* each State being entitled to but one vote upon every question, regardless of the relative number of delegates – and finally, each State, for herself, and in her sovereign capacity, accepted, ratified and *acceded to* the Constitution; and it was of no force or effect upon her, until so ratified and acceded to by her, she remaining, meanwhile, a separate sovereign State, to all intents and purposes.

Notwithstanding these conclusive facts, incontestibly establishing that each State was a separate sovereign State, before the adoption of the Constitution, President Lincoln, in his message of July, 1861, boldly declares that "no one of them was ever a State out of the Union," that "the word *sovereignty* is not in the national Constitution, nor, as is believed, in any of the State Constitutions" – that "the Union is older than any of the States, and, in act, it created them as States." This last is said with reference to the Union under the Articles of Confederation; which he considers in some way blended with the Union under the present Constitution. But the Union under the Articles of Confederation was entirely abrogated upon the adoption of the Constitution by the States; each State acceded to the Constitution in her sovereign political capacity, as is above shown, and thereby established a new and distinct Union; the States refusing to adopt it, remaining free and independent States, absolved from the old Union and totally disconnected with that formed under the

present Constitution, until they acceded to the latter. Of course, the rights and powers of the States, as members of the Union, can only be affected by the Union created by the present Constitution.

Reckless and unfounded as are these asseverations, the position assumed by them will be found, after a careful examination of the subject, to be the only theory upon which the right of the States to interpose their sovereign power against the usurpations of the Federal Government can be successfully denied; and it must be considered, from the imposing authority and the solemn circumstances under which it is put forth, as having been taken advisedly, as the ground on which the government of the United States rests its right to wage a war of subjugation and extermination against the people of the Confederate States for attempting to resume their original *status* of separate, sovereign States in all respects. Yet, it is so utterly unfounded in truth and in history, that no further answer to it is required than the reference to the historical facts above stated.

Each State, then, being sovereign when she ratified the Constitution, must have continued such after her ratification, except so far as she restricted herself of her sovereign powers by the Constitution; unless she absolutely surrendered her sovereignty. And here the vital question arises, did the States, in ratifying the Constitution, part with the sovereign right of judging, each for herself, whether the powers conferred on the Government by the Constitution, or the rights and powers retained by the States

had been violated; and did the States bind themselves to an indissoluble Union?

2. If we consider *the purpose* for which the Constitution was formed, we find nothing that binds the States to a Union irrevocable under any circumstances.

These purposes are stated in the letter of the Convention – signed by Gen. Washington, accompanying the Constitution, and which was submitted to the Convention of the several States with the Constitution – to be, "that the power of making war, peace and treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities shall be fully and effectually vested in the General Government of the Union." The object was merely to supply the defects existing under the Articles of Confederation, in these respects; to *entrust* the necessary powers, *in these particulars,* to a general head; because from their nature they could not be exercised either by the States separately, nor by the Union under the Articles of Confederation. This was done in the Constitution by creating a government to execute these powers, delegating them fully to it, prohibiting to the States all counteracting powers, and clothing the Government with all the power, legislative, executive and judicial, necessary to the complete exercise of the powers entrusted to it.

But these powers are all *"delegated,"* in express terms; which shows that the Federal Government was intended to be but the *agent* and *represen-*

tative of the States; and as stated by Mr. Madison, in *Federalist*, No. 45, "*the powers delegated to the Federal Government are few and defined. Those which are to remain to the State governments are numerous and indefinite.* The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce, with which last the power of taxation will, for the most part, be connected. *The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberty and properties of the people, and the internal order, improvement and prosperity of the State.*" It was admitted freely by the advocates of the Constitution, that the great elements of strength and power remained in the States; insomuch that they feared that the States would prove to be too strong for the effective operation of the Federal Government, rather than that the latter would interfere with the powers of the States (See *Federalist*, Nos. 27, 31, 45); whilst the most wise and sagacious of its friends, considered that its true theory and glory were *strong States and a weak Federal head,* whose strength consisted in its members and not of itself, and was only such as was necessary to execute the few powers plainly delegated to it.

3. In its *nature* and *character,* the Constitution was a *compact* between the States, and the Union formed under it, was *Federal.* This is clear, from the following considerations:

1. It was formed by the States acting in their

political capacities, and not by the aggregate mass of the people of all the States; and it was ratified and acceded to in the same manner by each State for herself; those not acceding to it being wholly free from its operation and remaining independent sovereign States. 2. It declares, in the 7th article, that the ratifications of the Conventions of nine States should be sufficient to establish it "*between the States*" so ratifying it – which clearly shows that *the States as such were the parties to it,* and that it was a compact *between* them as such. 3. Amendments to it are to be acted on by each State in her political capacity, by her Legislature, or by a convention appointed by her and under her own laws, each acting separately. 4. The powers not delegated are reserved to the States or to the people, by the 10th amendment – that is, to the States, so far as their exercise may be matter of political power; and to the people of each State, so far as the same may be matter of individual right, under the Constitution and laws of the State. 5. It was denominated a *Federal* Constitution by its advocates in recommending its ratification (see *Federalist passim*), the Union formed by it was called a *Confederate Republic* (*Federalist*, No. 9), and it was characterized, in the more essential and controlling points of the *foundation* and the *extent of its powers,* as Federal; while in the minor matter of *the execution of its granted powers only,* it was said to be national. (*Federalist*, No. 39). It was received in popular acceptation and called a Federal Constitution – an idea so universally received and so popular

that it was assumed as the name of the great party which came into power upon the organization of the Government, and held it until that party proved to entertain principles and views subversive of the true spirit of the Constitution, and in the meantime laid the foundation of doctrines which have led to its prostration. 6. It was received and adopted by the States as a compact between each other. While this is manifest from the history of the ratifications of all the States in their conventions, it is expressly stated in the ratifications of Massachusetts and New Hampshire, and was, in a few years thereafter, also expressly declared by Virginia, Kentucky, and several other States, in the memorable contest which arose upon the alien and sedition laws in 1798.

It was a compact between sovereign States for a union between them, for *certain specified purposes,* to promote the common defense and general welfare of its members. Its basis was that great principle of American institutions – *the consent of the parties to it;* and when that is withdrawn, and the parties refuse to comply with the terms necessary to continue its operation, its existence must cease, since there is no provision – and from the nature of the Union there could not be – for its continuance by coercion; but of this hereafter.

The doctrine is well established, that "several sovereign and independent States may unite themselves together by a perpetual confederacy, without each, in particular, ceasing to be an independent State. They will form together a Federal Republic:

the deliberations in common will offer no violence to the sovereignty of each member, though they may, in certain respects, put some constraint on the exercise of it, in virtue of voluntary engagements" (Vattel, *Law of Nations*, book 1, chap. 1, sec. 10). And this is clearly the nature of the Union of the States, under the Constitution of the United States, whether it be called a Government, a confederacy, or a compact. *"The proposed Constitution,"* says Mr. Hamilton, "*so far from implying an abolition of the State Governments, makes them constituent parts of the national sovereignty*" (*Federalist*, No. 9). "*The State Governments may be regarded,*" says Mr. Madison, "*as constituent and essential parts of the Federal Government* (*ibid*, No. 45).

It is perfectly manifest that the Constitution did not merge the States in this Federal Union, and annihilate their political existence and powers. Unlike the articles of Union of the United Kingdom of Great Britain, the Union was *Federate* in its character, the States retaining their sovereign character and most essential powers; whereas, in that of England and Scotland, in the language of the learned commentator on the laws of England, "the two contracting States are totally annihilated, without any power of revival, and a third arises from the conjunction, in which all the rights of sovereignty, and particularly that of legislation, must reside." This author states the difference between the character of the former and the latter kind of Government – that in a union of the latter description, an infringement of its condi-

tions would not justify a dissolution; while in the case of a union of the former character, an infringement would certainly rescind the compact (1 Blackstone's *Commentaries*, 98, in note).

In such a case, the sovereign character is preserved; and it must, of necessity, be capable of vindicating its rights, by a resumption of the delegated powers; for otherwise, its sovereignty would be nugatory – indeed it would be virtually annihilated; and it is perfectly evident from the entire history of the formation and ratifications of the Constitution, that it was the especial care of the States to preserve their sovereignty.

There is, therefore, nothing in the purposes for which the Constitution was formed, nor in its nature and character, to bind the States to a perpetual Union under it, under all circumstances; or to debar each of them of the high sovereign power of vindicating her rights by resuming her original powers entirely whenever she considered that the fundamental conditions of the Union had been broken by the Government, or were about to be perverted to her oppression.

It was this right which justified the States in abrogating the Union made by the Articles of Confederation in disregard of a positive stipulation that it should be perpetual; and in establishing the present Constitution of the United States in a different mode from that prescribed in the Articles, and therein positively declared to be the only mode in which they should be altered. This course could only

be justified on the principle of the right of secession; and it was so justified. When it was objected by some of the States that the Constitution was adopted in violation of these solemn stipulations and prohibitions against the consent of several of the States, the course was defended by its advocates on the ground of "the great principle of self-preservation," and of "the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and *to which all such institutions must be sacrificed*" (*Federalist*, No. 43). There was no question as to the *right of the majority* to take this step, and it could not be justified on that ground; because the rights of the minority were positively placed beyond the control or power of the majority by the prohibitions of the Articles of Confederation. The power to abolish that form of government was placed solely on the great right of American liberty to alter or abolish any form of government whenever the safety and happiness of society required it – a right never parted with and incapable of alienation – a principle as fully applicable to the Constitution of the United States as to the Union under the Articles of Confederation; and even more so, since in the former, the mode of alteration is merely authorized; whereas in the latter, it is prescribed and *all other modes of alteration are positively prohibited:* a principle which as fully justifies secession as practised by the Confederate States as it did the abrogation of the Articles of Confederation in violation of the solemnly plight-

ed faith of the States made in the adoption of that form of Union, and against the consent of several of them. The right then exercised was secession – the resumption by the States of their inherent sovereign powers, in their own discretion and for their happiness.

4. But this right does not stand alone upon the nature and character of the Union, nor upon the general reservation of rights and powers in the Constitution – clear and unquestionable as it is on these grounds. It was matter of *express and positive reservation* by several of the States in the ratifications of the Constitution, and was plainly intended to be reserved by all.

New York, in her resolutions of ratification, declared:

"*That the powers of government may be resumed by the people, whensoever it shall become necessary to their happiness:* that every power, jurisdiction and right, which is not, by said Constitution, clearly delegated to the Congress of the United States, or the departments of the government thereof, remains *to the people of the several States,* or to *their respective State Governments"* (1 Elliott's *Debates,* 361).

Rhode Island, in her ratification, declared:

"*That the powers of government may be resumed by the people whensoever it shall become necessary to their happiness"* (ibid., 369).

Virginia declared, in her ratification:

"*That the powers granted under the Constitu-*

tion, being derived from the people of the United States, *may be resumed by them whensoever the same shall be perverted to their injury and oppression"* (ibid.).

That the language, "may be resumed *by the people,*" was intended to mean *the people of the States, as States,* is most manifest.

In the first place, the powers were delegated *by the States as such,* and could not be said to be "*resumed*" except by the same political body which granted them. They never resided in the people of the United States; and hence, upon the failure of the Union, the people of the United States could not be said to "resume" them; but resumption imports *retaking by the authority which originally possessed them* – that is, the States in their political capacity. In the second place, the ratifications of several other of the States, in stating the reservation of powers not delegated to the United States, reserve them to the States, omitting the addition, *"or to the people"* – which shows that these latter words contained in the Tenth Amendment, and the equivalent words, *"resumed by the people,"* meant *the people of the States severally;* and that the true intent of this amendment and of the reservations in the ratifications of the States, was to retain the undelegated powers to the people of the several States, as sovereign communities, *to be exercised by them under their constitutions and laws;* that is to say, in their sovereign capacities. This clearly appears from the ratifications of Massachusetts, New Hampshire, New York, Penn-

sylvania and South Carolina.

Massachusetts: "That it be explicitly declared that all powers not expressly delegated by the aforesaid Constitution, are reserved *to the several States, to be by them exercised.*"

New Hampshire: "That it be explicitly declared that all powers not expressly and particularly delegated by the aforesaid Constitution, are reserved *to the several States, to be by them exercised.*"

Pennsylvania: "All the rights of sovereignty, which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised *by the several States in the Union, according to their respective Constitutions.*"

New York has been quoted above.

South Carolina: "That no section or paragraph of the said Constitution warrants a construction that *the States* do not retain every power not expressly relinquished by them, and vested in the General Government of the Union."

It was these declarations which caused the engrafting of the Ninth and Tenth Amendments into the Constitution; and furnish the true and proper exposition to the words, "the people," in these amendments; showing them to mean the *people of the States respectively in their sovereign capacity.* And this is equally true of the same words used contemporaneously in the ratifications above mentioned.

And now, when challenged to adduce positive authority for the right of secession, and for the doc-

trine that the States did not intend to bind themselves by the Constitution, to an indissoluble union, under all circumstances, we point to these solemn declarations of the States in their ratifications of the Constitution, and to the Ninth and Tenth Amendments which were produced by these declarations, as clear and positive proof that *the Union was established upon the express condition that the States respectively had the right to resume their powers of sovereignty delegated by the Constitution,* whensoever they considered that their happiness and safety demanded it.

The right of judging of this matter must necessarily reside in each State; because the reservation of power is to the States *respectively;* and from its very nature, each State must decide for herself. It could not apply to the States in the aggregate, or to a majority of them; both because of its nature, and because it is not so reserved. Hence the right, to be of any value, and especially to be consistent with the principles on which the Union was founded, must appertain to each State respectively.

It is not necessary that this right should be specified in the Constitution. It was not the office of that instrument to enumerate the reserved rights of the States, and no government makes provision for its own dissolution. It is sufficient if the right existed when the Constitution was acceded to by the States, and was not clearly parted with in that instrument. And how does the question thus stand?

When the Union was formed, the principle set

forth in the Declaration of Independence was recognised as a fundamental doctrine, in all its force and extent, by all the States, and cherished as the palladium of our liberty – that whenever *any form of government* becomes destructive of the ends for which it was established, IT IS THE RIGHT OF THE PEOPLE TO ALTER OR ABOLISH IT, AND TO INSTITUTE A NEW GOVERNMENT, laying its foundations on such principles, and organizing its powers in such form, as to them shall be most likely to effect their safety and happiness." It was upon this high principle that the States were declared "free and independent States," and came into being as sovereign States. And the basic principle on which all republican governments rest, and especially those of these States, is, "that governments derive their just powers from the consent of the governed." Assuredly this inestimable right was never intended to be impaired in the formation and adoption of the Constitution of the United States. Nay, it is positively shown that it was upon this very principle, that the formation and adoption of this Constitution – which were in palpable violation of the Articles of Confederation – were justified by its advocates, as is above shown.

It was regarded as a high and sacred right, appertaining to the people of the States when the Constitution was formed; and not only was not parted with in that instrument, but it was positively reserved.

The Ninth Amendment declares, that "the enumeration in the Constitution of certain *rights,*

shall not be construed to deny or disparage others retained by the people." This is a positive reservation of all *individual rights* appertaining to the people of the States, under their respective State governments, whether enumerated or not; and it was introduced from abundant caution, to exclude the possibility of the legal implication that other rights, not enumerated, were denied to the citizen or delegated to the Government.

Of the same character is the Tenth Amendment, "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;" that is to say, to the States, or *to the people of the States, respectively,* in *their sovereign political capacity as States,* to be exercised and enjoyed according to the Constitution and laws of each State; because it was in that capacity alone that the several States acted in forming and adopting the Constitution, and became parties to the compact. And it is manifest from the history of these amendments that their scope and object were to place beyond question and beyond the possibility of interference by the Federal Government the rights and powers of the people of the States, held and enjoyed under their respective State governments, and not delegated nor prohibited in the Constitution.

Thus all the rights and powers of each State and of her people under their respective State governments, not enumerated and not delegated nor prohibited, are expressly retained. The purpose of the Con-

stitution was not to specify the rights retained, but to enumerate those delegated to the United States. Hence, if a right existed in a State at the formation of the Constitution, and be not enumerated among the "delegated powers," or "prohibited rights," in the Constitution, it remains to the States. It is thus that all the numerous rights and powers of civil administration in the several States, and the individual rights of the citizen under their respective State governments, not reserved by enumeration, nor prohibited in the Constitution, are retained by the respective States.

Now it is incumbent on those who claim that this high power, this invaluable right, this distinguishing principle of American liberty, was given up by the sovereign States in the Constitution, to show clearly where and how that was done. It will not do to rest its surrender upon plausible refinements and doubtful theories; for it must be presumed that if this right, which was considered so sacred by the framers of the Constitution, and so inestimable by the States, had been intended to be parted with or impaired, it would have been done in language not to be mistaken. And, therefore, if the question be merely left in doubt, whether the right is surrendered, it is the part of wisdom and safety to resolve it in favor of the retention of the right; since in cases of doubt, it is always safest, according to principles of American government, to entrust high powers with the people, the source of political power.

And this brings us to consider the grounds on

which it is contended that the Constitution establishes an indissoluble Union between the States.

1. It is said that the Constitution creates direct relations between the Government established by it and the individuals composing the United States – giving to the Government power to punish individuals for crimes committed against it; to impose taxes upon them and to collect the same; to require military service of them; and creating many other direct relations of duty and responsibility between the Government and the masses of the people, involving protection by the Government, and obedience and allegiance to its authority, on the part of individuals; and that the Constitution was made and established, not as a compact between the States, but *by the people of the United States as one people.* It is hence contended that the Constitution created *a Government,* to which all the people composing the States are parties, as an aggregate mass, irrespective of the States; and that as to the authority and power of the Government, the people of all the States became one people, and the character of the States, as sovereign States, became extinguished or merged in the Union formed by the Constitution, which thereby became indissoluble by the acts of the several States.

Let us consider the arguments relied on to support these views.

In the first place, as to the parties which established the Constitution. Great reliance is placed upon the words of the preamble: "*We, the people of the United States,*" &c., as showing that it was the

act of the people of the United States, as one people. But to this, there are several conclusive answers. 1st. The language is ambiguous, and, upon its face may as well mean the people of the United States *acting in their capacity as States,* as the people of the United States *as an aggregate mass;* for the language leaves it perfectly uncertain in what capacity "the people" were acting. It is evident that the words of themselves do not clearly sustain the argument founded on them; and at best they present a case of latent ambiguity. In such a case, we must resort to the history of the proceeding to ascertain the character in which "the people" acted, and the true import of the language used. And we learn from the entire history of the event – from the appointment of delegates to the General Convention – from the votes and proceedings of that Convention – from the proceedings of the several State Conventions of ratification – that every act in the formation and ratification of the Constitution, was done *by the States severally* and *in their political capacity.*

It is sufficient, on this point, to refer to the declarations of Mr. Madison, in the *Federalist*, No. 39. Speaking of the ratifications by the States, he says: "This assent and ratification is to be given by the people, *not as individuals composing an entire nation,* but as *composing the distinct and independent States to which they respectively belong. * * * Each State, in ratifying the Constitution, is considered as a sovereign body, independent of all others,* and only to be bound by its own voluntary act."