THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA. By James Jackson Kilpatrick. Chicago: Henry Regnery & Co., 1957. Pp. xi, 347. $5.00.

INTEREST in the proper division of political and legal power within the American federal system has been restimulated by a number of recent events, notably the Supreme Court's school segregation decisions.[1] Adding to the growing body of both technical and popular literature which reflects this interest,[2] James Kilpatrick has written a volume purporting to defend "interposition." His book gives a chronological account of the conflicts between state and federal governments from the time of the Articles of Confederation to early 1957. Throughout, his avowed theme is that the states have never appointed a common umpire to judge the range of powers delegated to the national government and that an individual state therefore has the right—even the duty—to interpose its authority and nullify a federal act whenever it believes the act to infringe its own prerogatives. Professor Robert Harris of Vanderbilt, for one, has characterized this reasoning as "compounded of distortions, half-truths, and spurious arguments" and evidence of the "intellectual poverty and political sterility" of the school of thought for which Kilpatrick claims to speak.[3]

The great temptation to side with Professor Harris in this fascinating controversy is wisely restrained, for he, like other critics, has assumed that the book actually means what it says. Does not another possibility exist? Kilpatrick is editor of the *Richmond News Leader* and is thus under great social pressure to conform with local tradition, that is, to support states' rights and segregation. In such an atmosphere, an ancient technique of writing flourishes. Rather than submit to the censor's scissors or to social ostracism, subtle and intelligent authors express their opposition to current doctrine by deftly weaving into an apparent defense of orthodoxy deliberately faulty arguments founded on omissions which tend to contradict, if not ridicule, the current party line.[4] In this approach, what a writer fails to say may be more important than what he does say. Similarly, an author may seek to undermine accepted dogma by reference to other authors who, on close reading, are revealed to attack rather than defend the dogma.

Ostensibly, the fundamental constitutional argument of *The Sovereign States* is that the tenth amendment is the true keystone of the American political system. Kilpatrick defines the amendment as reserving to the states all "inherent powers of sovereign States, not *specifically* abridged."[5] Nonetheless, the educated reader, perceiving that the amendment's legislative history is strangely omitted, will recall that the anti-Federalists attempted three

1. Brown v. Board of Educ., 347 U.S. 483 (1954), 349 U.S. 294 (1955).
2. For collections of bibliographies, see 1 RACE REL. L. REP. 501, 835 (1956); 2 *id.* at 287, 913 (1957).
3. Harris, Book Review, 20 J. POLITICS 229, 230-32 (1958).
4. See STRAUSS, PERSECUTION AND THE ART OF WRITING (1952).
5. P. 28. (Emphasis added.)

times to change the amendment in order to reserve to the states all powers not *expressly* delegated, and that the Federalists were able to defeat this proposal and thus to retain the concept of implied powers in the national government.[6]

Standing alone, this omission in a book dealing with the Constitution would be merely curious. It becomes more significant when the author's commerce clause remarks are analyzed. Asserting that, as originally written and understood, "commerce" refers only to the actual act of transporting goods, Kilpatrick cites *Hammer v. Dagenhart*.[7] Three facts make the case a weird and self-defeating authority for such a proposition. First, *Hammer* was decided in 1918, 130 years after the Constitution was adopted. Second, a more contemporary definition given by John Marshall in *Gibbons v. Ogden* equated commerce with all forms of commercial intercourse [8]—the meaning of "commerce" in late eighteenth century American usage.[9] Third, *Hammer v. Dagenhart* was overruled seventeen years ago and is not a viable precedent.[10] That Kilpatrick did not realize these facts is improbable. On the contrary, it is quite possible that he is spinning between the lines an intricate web to be discerned by the thoughtful reader.

Additional evidence supporting this surmise can be found in his discussion of the fourteenth amendment. Again, he gives the strong initial impression of rising to defend states' rights. He cites the 1885 case of *Barbier v. Connolly* [11] to show that the Supreme Court had so respected local police power in the past that it found constitutional a San Francisco ordinance obviously aimed only at Chinese.[12] In keeping with a predesigned plan, however, he may be inviting the student of constitutional law to draw his own conclusions. Such a student will of course realize that the year after *Barbier*, the Supreme Court, in *Yick Wo v. Hopkins*,[13] gave a very similar San Francisco regulation a more thorough examination and found it unconstitutional.

The web spins on. James Madison is so frequently cited by Kilpatrick as a constitutional authority that the reader is impelled to investigate further what this founding father had to say about interposition. In fact, Kilpatrick stimulates inquiry by casually admitting that Madison forsook The Cause in his later years.[14] Responding to the stimulus, the reader finds that when Pennsylvania was claiming the right to defy a federal court order, President Madison refused the governor's request for aid and expounded on the presi-

6. For the legislative history of this amendment, see 1 CROSSKEY, POLITICS AND THE CONSTITUTION 680-81 (1953).
7. 247 U.S. 251 (1918).
8. 22 U.S. (9 Wheat.) 1 (1824).
9. See CROSSKEY, *op. cit. supra* note 6, at c. IV.
10. United States v. Darby, 312 U.S. 100 (1941).
11. 113 U.S. 27 (1885).
12. P. 233.
13. 118 U.S. 356 (1886).
14. Pp. 91, 181.

dential duty to assist in the execution of a judicial decree.[15] Later, Madison characterized interposition as "deadly poison,"[16] a "spurious doctrine,"[17] and "preposterous and anarchaical pretension [for which] . . . there is not a shadow of countenance in the Constitution."[18] He furthermore specifically dismissed the proposition as being put forth with "a boldness truly astonishing."[19] Claiming that Jefferson had believed that the federal government possessed the necessary authority to coerce a recalcitrant state,[20] Madison himself asserted that adjudication by the Supreme Court was the proper method of settling national-state disputes.[21]

John Caldwell Calhoun is of course also cited as an authority for Kilpatrick's supposed opinions. Like the references to Madison, however, the handling of Calhoun offers another possible clue to the author's real intent. Kilpatrick portrays Calhoun as consistent in his states' rights position and implies that his support for the Tariff of 1816 was only an isolated instance of mistaken judgment.[22] Does Kilpatrick here speak to those familiar with the fact that Calhoun was an ardent nationalist for a substantial part of his public life?[23] If this oblique signal is recognized, the vigilant reader will observe that the proposition which forms the heart of Calhoun's sectionalist theory is left pointedly unendorsed by Kilpatrick: the right of secession. According to Calhoun, after a state had nullified a federal act, the controversy would be submitted to the remaining states. If three fourths of them

15. For details of the case—United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) —see, generally, 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 366-89 (rev. ed. 1932).

16. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 229 (Lippincott ed. 1865).

17. *Id.* at 397.

18. *Id.* at 206.

19. *Id.* at 418.

20. *Id.* at 229.

21. *Id.* at 290. He reasoned:

> "The words of the Constitution are explicit that the Constitution and laws of the United States shall be supreme over the constitution and laws of the several States; supreme in their exposition and execution, as well as in their authority. Without a supremacy in these respects, it would be like a scabbard in the hand of a soldier without a sword in it." *Ibid.*

And the founding father on whom Kilpatrick leans had this to say about critics of judicial review:

> "It will not escape notice, that the judicial authority of the United States, when overruling that of a State, is complained of as subjecting a sovereign state, with all its rights and duties, to the will of a court composed of not more than seven individuals. This is far from a true state of the case. The question would be between a single State and the authority of a tribunal representing as many States as compose the Union." *Id.* at 206.

22. "Calhoun himself supported the tariff of 1816 (in an *impulsive* speech he was to regret all his life) . . . ." P. 174. (Emphasis added.) Other than a passing mention of Calhoun's support of the Second Bank of the United States, p. 145, this is the only reference to Calhoun's nationalism.

23. See, generally, WILTSE, JOHN C. CALHOUN: NATIONALIST 1782-1828 (1944).

agreed with the national government, federal action would be validated, though only in the assenting states. Any state which disagreed would have to make a constitutional choice between acceptance and secession.[24] Kilpatrick never alludes to this choice, and without it interposition loses much of its sting because a sovereign state would still have to bow to outside judgment regarding the extent of its powers.

That Kilpatrick, by citing Madison and espousing an emasculated version of Calhoun, might really be arguing against interposition and for federal supremacy seems still more likely as one reads on. The book discusses the role of Virginia in the resolutions against the Federal Alien and Sedition Acts, her adverse reaction to Supreme Court decisions in the early nineteenth century, and her current leadership of the opposition to the school segregation decisions.[25] The historical one-sidedness of these passages is designed, perhaps, to highlight those occasions when Virginia has been in unionist ranks.

In fact, Kilpatrick may have revealed his purpose by noting Virginia's rejection, in 1809, of Pennsylvania's plea for a court to decide federal-state disputes. The Old Dominion then declared:

> "A tribunal is already provided by the constitution of the United States, *to wit*: The Supreme Court, more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide the disputes aforesaid in an enlightened and impartial manner, than any other tribunal which could be erected."[26]

A painstaking writer could not have supposed that a thoughtful reader would disregard such a hint, particularly in light of another remark, that Virginia "revived" the doctrine of interposition in the 1830's.[27] Researching between the lines, the reader here discovers an early Virginia protest of South Carolina's use of nullification[28] and a twentieth-century suit by the Commonwealth in which her attorney general earnestly argued that the Supreme Court had authority not only to order a state legislature to convene but also to command the legislature to appropriate money.[29]

As an additional argument for states' rights, Kilpatrick's perplexing book, seemingly contesting the belief that the Civil War settled the question of state sovereignty, demonstrates that force does not make law in our type of socie-

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24. See 1 THE WORKS OF JOHN C. CALHOUN 241-301 (Crallé ed. 1851); 6 *id.* at 1-59, 144-93.

25. Pp. 62-83, 120-25, 262, 305.

26. STATES RIGHTS AND THE WAR OF 1812, in STATE DOCUMENTS ON FEDERAL RELATIONS: THE STATES AND THE UNITED STATES No. II (Ames ed. 1900).

27. Pp. 179-86.

28. 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *op. cit. supra* note 16, at 395.

29. Brief for Plaintiff, pp. 9, 12, 24, Virginia v. West Virginia, 246 U.S. 565 (1918). For background details, see Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925); Powell, *Coercing a State To Pay a Judgment: Virginia v. West Virginia*, 17 MICH. L. REV. 1 (1918).

ty.[30] But does not this reasoning expose the whole states' rights argument to far wider attack? Since the southern states themselves appealed to arms, the author implies that their claims—rejected by Congress, the President, the Supreme Court and a majority of the states—would not have been legitimized even by military victory.

Superficially viewed, Kilpatrick's volume seems to be a brief for the preservation of segregation. His treatment of this problem merits special attention, for here he does not limit himself to moderate and defensible statements, but echoes almost verbatim many of the white supremacist arguments without even troubling to sift out the more obvious fallacies. An example is his statement that, as a group, Negroes in the South are "woefully less educable" than whites.[31] Such inequality, he seems to say, must be natural rather than the result of inferior Negro schools in the South, since similar findings have been made in the District of Columbia. But, as everyone who has bothered to read any of the statistics on school expenditures realizes, the District of Columbia, to the shame of Congress, had been scarcely less guilty than the southern states in ignoring the second half of the "separate but equal" formula.[32] Thus, by comparing identities, Kilpatrick emerges with an identity. This could neither have been an unexpected result, nor could it have been seriously intended to convince an educated reader of the worth of the supremacist argument.[33] And, of course, it must be assumed that a man of Kilpatrick's stature would not aim his writing at the ignorant and credulous.

Proceeding on this assumption, one naturally wonders why there is no mention of Crosskey's voluminous study of the Constitution.[34] It is Crosskey who, above all others, is diametrically opposed to the classic states' rights position. And although his conclusions are still being heatedly debated, the encyclopedic nature of his work and the force of his arguments make it impossible for any serious commentator to ignore his attack on the states' rights thesis. Is this omission another indication of Kilpatrick's true beliefs? Could his failure to take issue with Crosskey stem from actual agreement with anti-segregationist views? The alternatives—that Kilpatrick did not know of

30. P. 222.

31. P. 280.

32. See ASHMORE, THE NEGRO AND THE SCHOOLS (2d ed. 1954); HOBSON, STATISTICS OF PUBLIC ELEMENTARY AND SECONDARY EDUCATION OF NEGROES IN THE UNITED STATES 1951-52 (1955); PIERCE, KINCHELOE, MOORE, DREWRY & CARMICHAEL, WHITE AND NEGRO SCHOOLS IN THE SOUTH: AN ANALYSIS OF BIRACIAL EDUCATION (1955).

33. In the same vein, the book omits reference to Army IQ findings showing higher group scores for northern Negroes than for southern whites. See Marcuse & Bitterman, *Notes on the Results of Army Intelligence Testing in World War I*, 104 SCIENCE 231 (1946); Montagu, *Intelligence of Northern Negroes and Southern Whites in the First World War*, 58 AM. J. PSYCHOLOGY 161 (1945); see also Harv. L. Record, Oct. 18, 1956, p. 3. For an analysis sustaining Kilpatrick's overt claim of racial superiority, see McGurk, *Psychological Tests—A Scientist's Report on Race Differences*, U.S. News and World Report, Sept. 21, 1956, pp. 92-96.

34. See CROSSKEY, *op. cit. supra* note 6, at 680-81.

Crosskey or that, knowing of him, felt incompetent to do battle with him—hardly seem plausible.

The book's omissions, contradictions and inconsistencies could be multiplied almost endlessly. The longer Kilpatrick writes, the more straw he strews about his pages, the deeper he cuts into the underpinning of the very position he outwardly defends. James Jackson Kilpatrick is clearly an intelligent man. He was a protégé of the late Douglas Southall Freeman and is now the editor of a large daily newspaper. His several hundred footnotes and citations are evidence of considerable research and laborious writing. Could such a learned and well-trained man have been unaware of the deficiencies in his overt arguments? Did he not realize that careful readers would immediately heap ridicule on his stated conclusions? Or did he have a deeper design? Perhaps his opening sentence points to a hidden purpose. He writes:

> "Among the more melancholy aspects of the genteel world we live in is a slow decline in the enjoyment that men once found in the combat of ideas, free and unrestrained. Competition of any sort, indeed, seems to be regarded these days, in our schools and elsewhere, as somehow not in very good taste."[35]

This could be a warning that the writer (who subtitles his book *Notes of a Citizen of Virginia*) dares not openly oppose the ideas prevalent in his home state; that we are witnessing a courageous southern editor who has chosen his own form of social protest for other men, less affected by emotion, to read and understand.

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POLITICAL POWER AND THE GOVERNMENTAL PROCESS. By Karl Loewenstein. Chicago: The University of Chicago Press, 1957. Pp. ix, 442. $6.00.

BASED on six lectures given at the University of Chicago in 1956, this book is the pilot study for a much larger work which, when completed, should be a significant contribution to the study of comparative government. This is not to say that Professor Loewenstein has at this time served only an hors d'oeuvre with the main course reserved for the future; for this book contains the substance of the author's thesis. Its present importance—the presentation of his concept of power as the key to the analysis of government—may even appear more sharply in this condensed form.

Loewenstein is striving for a framework which expresses the "reality" of the political process, rather than its philosophical or conceptual basis. His premise is that "power" can be used as a unifying "conceptual framework" against which to compare one nation's government with another's.[1] In his

35. P. ix.

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1. Pp. vii, viii.