SPEECH OF HON. PHILEMON BLISS,

OF OHIO,

In the United States House of Representatives, February 7, 1859.

Mr. BLISS, of Ohio, said:

Mr. CHAIRMAN: Debate on the appropriation bill for the judiciary having been closed, I am driven to that exhaustless mine, the President's message, now under consideration. True to his early instincts, he again appeals to the Supreme Court, as authority for political opinions, and indirectly approves an old dogma, recently endorsed in the report of a Democratic committee of my own Legislature, "that the decisions of the Supreme Court, upon constitutional questions, must stand as a part of the instrument itself, until they are reversed." It is to combat that ultra Federal dogma, and to explain the provisions of certain bills of my own, that I propose to speak.

During the last session of this Congress, the Judiciary Committee reported against a bill introduced by me, repealing the twenty-fifth section of the judiciary act of 1789, and curtailing the *habeas corpus* powers of the United States judges. I had then no opportunity to express my views upon the subject-matter of the bill. There is now before the same committee a bill introduced by me, to prevent the packing of juries in the Federal courts of Ohio. I shall not hereafter share the responsibility of Federal legislation; and, despairing of present action, I should, perhaps, content myself by letting the bills themselves express my views. But I find myself constrained to speak. Amid the din of crowding events, I may fail to get a hearing; yet I cannot return to my people without giving vent to my deep conviction of the dangers to the citizen and to our federative system from the encroachments of the Federal courts.

We justly praise the Federal Constitution. That instrument, in its simple, its comprehensive grandeur, will ever command the homage of mankind. Even when the infidelity of a degenerate people, trampling on its guarantees, abusing its powers, spurning its reservations, shall render its benignant provisions a curse, the instrument itself will deserve none the less reverence, but only prove that liberty and law, justice and tranquillity, are the result of a spirit, and not a form; a sentiment, and not a parchment. But we speak thus of the Constitution in reference to the times and our young experience. It has grave defects in not sufficiently guarding its provisions from abuse; in not providing against dangers then unseen, but which now command the most serious alarm.

As we were to have a Government as well as a league, a separate judicial department became, or was deemed, essential. This judiciary must of course have cognizance of cases arising under the Constitution and laws. It must in such cases decide upon the powers in the Constitution and upon the reserved rights of the States. There is no avoiding this, whenever a case arises that involves the necessity of considering them.

It is one of the evils arising from every written Constitution, from the fact that it is written, that a court may so twist its language as to enforce as fundamental law, provisions undreamed of when adopted. We feel this evil in the States, and seek to guard against it by judicial responsibility, by limiting jurisdiction, and, above all, by giving health to opinion. Evils like these were unknown to our fathers. The great danger, now so patent, in giving to a permanent body of men the power, without responsibility, to interpret, even in causes of a judicial character, the Constitution and Federal laws, and to decide the extent of their own powers, seemed not to have oppressed them. They regarded the judiciary as weak, and needing strength. It had not been a power in the colonies; it had not been a power in the Revolution. Mr. Hamilton says: "The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution," (Federalist, No. 78.) And thus he always spoke. It is evident, also, from Mr. Madison's convention report, that the political influence of the judiciary was not feared, (Elliot 5, 483.) Our English model had no power to nullify, only to interpret; and a false though innocent interpretation was easily remedied by appeal to the Lords, or by a new enactment. Hence the spectacle of a gowned conclave, gravely setting aside statutes and constitutions of sovereign States; enforcing powers not granted in the compact, and against the express reservations of the States; with eager zeal reversing the whole current of authority and law, to make universal a local and exceptional despotism; prompting its ministers to mayhem and murder, sure of their illegal shield, never darkened our fathers' vision. Had a tithe of what we stupidly suffer been anticipated by them, the Federation itself would have been an impossibility; at least, the court would have been but a Hamilton's dream of a life Executive and Senate. But they had seen the English danger of dependence upon the King, and, mistaking a phrase for a fact, thought they saw the English remedy in "independence of the judiciary."

There never was a more serious mistake. There is now, there was then, no such thing in England as the independence of the judiciary. The most important judicial officer—the Lord Chancellor—the only one who possesses any political power, comes and goes with every Administration; and all the other judges are subject to removal by a bare majority of the Parliament,

The power that changes an Administration can legally disrobe a whole bench; and the consciousness of that fact, with the denial of all political power to the common-law judges, has been the true conservator of the English courts. No, it is the "responsibility of the judiciary" that has redeemed the English bench. "Independence of the judiciary" simply meant independence of the Crown, with responsibility to the people. Words are sometimes the veil as well as the mirror of things; and the phrase, both true and false, kept out of sight the real character of the great English reform, and dictated the strange tenure of our judges, and blinded the Congress of 1789 to the power their jurisdiction over the States might give them. The "scarecrow of impeachment"—that laughing-stock of irresponsibility—was weakly trusted to frighten those whose unchecked will might make, or aid monopolists and demagogues to make and unmake constitutions and laws.

And, besides, it cannot be denied that the conservatism of 1787 and 1789 dared not fully to trust the people. I am often surprised at its blindness now, as then. Timid and usually honest, it shows the sagacity of the ostrich, and the clearsightedness of the owl at noonday. Conservatism would treat man as a child, to be always led; or a wild beast, to be always caged; while Democratic Republicanism regards him as a rational being, to be developed; a person clothed with the responsibilities and charged with the duties of majority. Conservatism would guide him and sustain him only, of course, to prevent mischief to himself. It would keep him from the water till he had learned to swim; would withhold a gun till he had learned its use; would measure his daily food, for fear he would over-eat; and would surround him by a police to prevent him from jostling and being jostled in his walks; while Republicanism would bid him plunge in the stream, shoulder his own weapon, regulate his own diet, and thread his own pathway.

Were development unnecessary, and could we always insure both wisdom and goodness in our rulers, there might be some excuse for conservatism. The good, though somewhat mythical Incas, were said to have made a people happy, though they kept them babes, wanting to yield to the first assault. But our experience shows us that power always corrupts, and the consciousness of irresponsibility only stimulates the selfish passions. The only true conservatism teaches personal independence in the citizen, and strict responsibility in every department of Government. It is true, the people may become corrupt; but, alas! where, then, can we look? If a man cannot govern himself, how can we trust him to govern others? If he fail to himself, will he submit to the wise? Or, rather, will he not become the prey of the unscrupulous, or the tyrant of his fellows? Surrounded by those forms that shall check passion, protect the individual, and render impotent sudden tumult, THE PEOPLE, more honest and as apt to be wise as their servants, must govern the governors—be the tribunal before whom all tribunals bow. The consciousness of this responsibility alone can make the corrupt heed his way; alone can make the judge, as well as the legislator, tempted to pander to a private interest, or break down a personal safeguard, pause to see whether he can give a good reason for his act—one that shall satisfy an honest master, and one that shall accord with those fundamental principles he has sworn, and they have more than sworn, to follow.

This blunder in the Constitution was greatly aggravated by the course of those into whose hands its first administration fell. Unfortunately, they were not satisfied with its simple powers. They honestly believed it but "a rope of sand;" and sought, by forced constructions, to fortify and strengthen it. I speak not to blame. They were great and patriotic men; but men who feared anarchy more than despotism, license more than power, and who only sought to enlarge what they deemed the basis of our liberty. The people could not always be dazzled by the names of Washington and the revolutionary heroes—all naturally on the side of a strong Government; they were passing away; and some refuge from their own passions must be furnished the people, or the fruits of the Revolution would be only strife and impotency. Fortunately, the Constitution had provided a tribunal, irresponsible and dignified, and filled by those who deeply sympathized in their fears. This tribunal, if sufficiently strengthened, might be able to build upon this Constitution the ark of our deliverance.

There were two obvious ways of strengthening it. First, by extending its jurisdiction; and second, by giving it supreme sway over the minds of the people.

In jurisdiction, they at once succeeded as fully as could be desired by the most devoted Federalist. In reading over the twenty-fifth section of the Judiciary act of 1789, I have often wondered at the tameness of the States, thus at once made vassals. If the Federal court may not only try "cases" arising under the Constitution; if, in such cases primarily brought in it, it may not only solve for itself the doubt as to whether it may be a Federal or is a State case merely; whether a power has been yielded or withheld; but if, whenever any State tribunal, the tribunal of a sovereignty *per se*, equally bound to observe the Constitution, and possessing larger powers, shall decide that a power is "reserved," and not "delegated," this Federal court may step in and take from it jurisdiction, upon mere claim of a party, then, indeed, the federation becomes really a nation, and the discretionary overseer of the States. Though many seem to have lost sight of it, yet it is really against the jurisdiction given by that section, that the struggles of the State-rights Republicans have been ever since directed. Why it has not been repealed, I greatly wonder. Why this club should be continued in the hands of this court, always rampant against the States, is passing strange.

But perhaps a solution may be found in the second method adopted by the Nationals, then, as now, to give permanence to their views. We bow to opinion, not force. Hierarchies and thrones rest upon the superstition of men. Blind reverence is always relied on to cherish authority that reason disowns. The friends of this court and its claims have sought to clothe it in the robes of majesty, and to enthrone it upon the seat of serene infallibility. We treat our State courts with the freedom that belongs to human tribunals; approving when right, condemning

when wrong. But when, from yon mysterious vault, the cerobed nine send forth their tomes, befogging by their diffuseness even when announcing the plainest principles, and still more bewildering by "words without knowledge," when essaying some new constitutional construction, as they call their attacks upon the rights of the States and their citizens, we are taught to bow without question, as the faithful to the decrees of the Grand Lama.

Having thus given the Federal court control over the State Judiciary, and taught a superstitious reverence for its opinions, a single constitutional interpolation only became necessary, to make its authority complete. The Constitution gives jurisdiction in certain "cases," *i. e.*, suits between parties. If this authority could be extended to all *questions*, as well as cases, the most ardent centralizer could ask no more. It is plain, that if I seek an advantage, a right under a written instrument, whether it be a constitution, statute, or contract, I must be governed by the construction given the instrument by the tribunal whose aid I invoke. This is equally true, whether I seek the intervention of a Federal or a State court, executive officer, Legislature, or umpire. Each power will give me relief in the specific case, as it understands my rights under the instrument, and must, necessarily, so far construe that instrument; but to give decisions upon questions and principles by which other departments or tribunals of equal authority shall be bound in other cases, is quite another thing.

If the idea could be generally infused into the public mind that this court had jurisdiction to decide all constitutional questions; could be made, like the councils, the final arbiter of faith, by whose opinions upon the political theory supposed to be involved in the cause all should be bound, the end of the consolidation party would be attained. Law and order would erect its throne upon the seat of liberty and law, the democratic element be held in check by the arm of power and the sentiment of loyalty; and from a disjointed Confederacy would spring a great and consolidated empire. To thus infuse that idea, was directed every energy. True, Mr. Jefferson and a few others have always fought against it; but they seem almost to have fought in vain. [See appendix.] From then till now, the leading Federal idea has possessed the public mind. Legislators, Presidents, orators, essayists, whether conservative or demagogue, constantly, and with confidence, appealing to the varying and contradictory opinions of Federal judges, denounce the impious dissenter. Does a United States Bank, looking in vain to the Constitution itself, demand a continued existence, its Webster, with a power alone his own, rallies us to the support of its shield, the court, as the final arbiter of all constitutional questions. Does the genius of personal despotism, from its local abode, look with jealousy upon our joyous Freedom, and seek to cut off the great domain from its enjoyment, the ready opinion of an eager court is proclaimed by the President as the ultimatum; and, from that opinion alone, Slavery is enforced as the general law. Does the State, tired of monopoly, seek to grant to others the same privilege hitherto given alone to a corporation, or to otherwise change the law creating it, we find the court making the strange discovery that all charters are contracts, and beyond the control of the State. Thus all corporations, and the multitudes interested in corporations, oppressors, and the multitudes whose chief glory is to hate the subjects of oppression, instinctively rally around this court, and wonder that any one can doubt its final authority upon all *questions* as well as "cases."

Of all the departments of the Government, the Supreme Court should be the last one to decide political questions. If the people are the source of power, if they adopt their fundamental law, they must ultimately give it construction. It is not possible that they intended to give to a body of eight or ten men, chosen for life, and almost wholly irresponsible to them, power to modify and change their Constitution at pleasure, as some new light or new influence shall inspire them. It is not possible that the States intended to give their sovereignty to such keeping. The blunder of its creation and its early powers—those strange oversights that great men might be guilty of, who were intent alone upon traditional dangers, and, scanning the history of all people, found neither example nor peril, because their system itself was without precedent, cannot be thus interpreted. No; the people of the States, both through their several State Governments and their Federal representatives, are the only power that can legitimately decide these questions. And if the Federal court, after they have become so unequivocally decided, shall, in cases before them, refuse to conform to such decision, then it becomes the duty of the people "to alter or abolish it."

The character of that court's decisions demand that we hold it strictly to the law. I have nothing to say of the judges personally; I suppose them to be like other men, generally honest, but liable to be swayed by private interest, class or local jealousies, and party passions, and needing, like others, the restraining influence of the terrors of accountability. I have alluded to some of their decisions; I have no time to speak of them at length, and will content myself with quoting a criticism of Chief Justice Bartley, of my own State, only remarking that his criticism has been endorsed by the Democratic party of Ohio by renomination for the Supreme bench immediately after it was made:

"It is a remarkable fact, that almost every unwarrantable stretch of power by Congress has been sustained by the Supreme Court of the United States. This is a matter of public history. The alien and sedition laws; the vexatious regulations of the embargo and non-intercourse acts; the act to incorporate the Bank of the United States;" * * * "the recent bankrupt law;" * * * "these, and numerous other acts which might be mentioned, now repealed, and now wholly repudiated by the force of public sentiment as unwarranted by the Constitution, received a ready sanction in the Supreme Court of the United States. In view of the unmistakable disposition manifested by that tribunal to enlarge the powers of the General Government by construction; in view of the fact that it has taken under its protection almost every species of corporation, political, pecuniary, and ecclesiastical; in view of its repeated encroachments on the sovereignty of the States, by annulling laws which in no way whatever concerned the affairs of the Federal Government, or interfered with the progress of its legitimate administration, it must be admitted, though much to be lamented, that the decisions of that tribunal have not only lost much of their moral influence, but much weight as judicial authority, in the courts of the States."—6 *Ohio State Reports*, page 379.

I do not disown judicial authority, or deny its influence, outside the given case. Every judicial decision, whether State or Federal, is entitled to respect, and if it settle a disputed poin

upon the basis of reason, should be followed by other courts. The judicial maxim, "*stare decisis*," means, this and no more. In the relations of the Federal and State courts, an additional rule prevails. The construction of a Federal statute by the Federal courts should be followed in the State courts; and, conversely, the construction of State statutes by State courts is binding on the Federal. Yet this rule only applies when exclusive jurisdiction over the subject-matter of the statute, or the constitutionality of the statute, is admitted. Hence, when the federation assumes personal jurisdiction not granted in the Constitution, as in punishing for crimes over which no jurisdiction is given them, it is the duty of the State to disregard such assumption, and vindicate its reservations; and when the State seeks to punish for acts under Federal authority, as for collecting imposts, the Federation will disregard such attempt, and vindicate its powers. In such cases, neither the decisions of Legislatures or courts have any binding force. Be not alarmed at the collisions that thus arise. They show that we have not lapsed into the calm of despotism. Through them, Freedom breathes, and great principles renew their life. It is the only way by which the public reason, that must ultimately decide all these questions, can be directed to their solution; and we shall be the wiser and better for the collisions.

The twenty-fifth section of the judiciary act, which I propose to repeal, provides for a direct supervision of the State courts by the Federal judiciary, whenever they decide against a party who claims privilege or exemption by virtue of Federal authority; though, if the decision is in favor of such party, however erroneous, his opponent is without remedy.

"Sec. 25. * * * That a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws, of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States, upon a writ of error," &c.—1 *United States Statutes at Large*, page 85.

This section of the statute is one of the uncorrected errors of those who so early sought to nationalize this Federation: the principle of it is clearly vicious. I speak not now of the twelfth section, which is subject to some of the same objections.

All cases, either at law or equity, fall under the jurisdiction either exclusively of the Federal, exclusively of the State, or concurrently of the State and Federal courts, wherever the suit is first instituted. When the jurisdiction is exclusive, any similar proceedings elsewhere are absolutely void. There is no necessity for either a Federal or State court to review on error the opinions of a tribunal that has no jurisdiction in the case. They may be treated as a nullity; and the court having exclusive jurisdiction will proceed as though no other proceedings had been had.

In nearly all the cases in which jurisdiction is given by the Constitution to the Federal courts, it is admitted that the State courts have concurrent jurisdiction. And the question arises, whether the State courts, having properly acquired jurisdiction, are courts inferior to the Federal in the sense that their final decision should be subject to review on appeal on error to the Federal courts?

Ohio has as yet always submitted to such review, and in cases deeply affecting her sovereignty. I would not counsel our own Supreme Court, for a light cause, to refuse obedience; yet the signs indicate that the time may soon come when such refusal will become a duty. Acquiescence in this Federal supervision has been by no means universal. Virginia [see Appendix] and Georgia have openly and with impunity repudiated the right of Federal review, and it has been often questioned in other States. State nullification is always a dangerous, though sometimes a necessary, remedy. Congress should remove the temptation by the repeal of a statute, which any State at pleasure may nullify, and for which we find no constitutional authority, as I will show.

If the Federal court may lawfully review a final decision in the courts of the States, that authority of course is given in the Constitution. Judge Marshall, in Cohens *vs.* Virginia, (6 Wheaton, 264, see page 416,) claims that the words of the Constitution "give to the Supreme Court appellate jurisdiction, in all cases arising under the Constitutions, laws, and treaties, of the United States. The words are broad enough to comprehend all cases of this description, *in whatever court they may be decided.*" Let us see what are these so broad words:

"Sec. 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts *as the Congress may from time to time ordain and establish.* The judges, both of the Supreme *and inferior courts*, shall hold their offices," &c.

This is very express. The judicial power is vested in the Supreme Court and courts *created by Congress*, not "in whatever court" certain cases "may be decided."

Again, immediately following:

"Sec. 2. The judicial power shall extend to all cases in law and equity arising under this Constitution," &c.

What judicial power, pray? That of any of "whatever court" may decide constitutional questions? So it would seem, from the language of Judge Marshall; and such would seem to have been the idea of those good old Federalists who framed this twenty-fifth section. But, in looking at the simple instrument itself, we see that "the judicial power" is the "judicial power of the United States" just spoken of, and is vested in a Supreme Court, and in other courts *created by Congress.* The judicial power of the several States, or of foreign States, may extend to these cases, yet not by virtue of this instrument. If a plaintiff bring a defendant into the courts of Great Britain, or of New York, and claim a right, or the defendant claim an exemption under the Federal Constitution, or laws, or treaties, such court must necessarily decide the claim. They are courts of general jurisdiction, and decide upon all claims lawfully brought before them, under whatever Constitutions or laws they arise. But they do not so decide by virtue of this sec-

tion, and their power is not "the judicial power of the United States."

The second paragraph of this second section provides directly for this appellate jurisdiction of the Supreme Court. It is the only pretended authority for the twenty-fifth section of the judiciary act; and I ask a careful attention to its language;

"In all cases affecting ambassadors, &c., the Supreme Court shall have original jurisdiction. In all other cases *before mentioned*, the Supreme Court shall have appellate jurisdiction," &c.

What cases are "before mentioned?" Why, all those enumerated cases to which "the judicial power shall extend." The judicial power of New York? of Great Britain? No; but "the judicial power of the United States," "vested in one Supreme Court, and in such inferior courts as the Congress may from time to time establish." So we see that the "appellate jurisdiction" is not from State courts or foreign courts at all; and "the words" are not "broad enough to comprehend all cases" involving a construction of Federal laws, &c., "in whatever court they may be decided."

But, as if conscious that the words of the Constitution were not broad enough to give "appellate jurisdiction" from any but those courts in which the judicial power of the United States is vested, and which are created by Congress, the same learned judge, in the same case, (pages 414, 415,) infers this power not from any "words," but from his idea of the general relation of the Federal and State Governments.

"We think that in a Government acknowledgedly supreme with respect to the objects of vital interest to the nation, there is nothing inconsistent with sound reason, or incompatible with the nature of government, in making all its departments supreme, so far as respects those objects and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals which may contravene the Constitution or laws of the United States, is essential to the attainment of those objects." * * * "It seems to be a corollary from this judicial axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by the State tribunals."

Perhaps they "should;" but, to see whether they actually *do* possess it, we must look to the Constitution itself, either for an express grant of the jurisdiction, or to see whether it is a direct inference from an express grant. The judicial power of the United States is expressly granted to the Supreme Court, and to such inferior courts as Congress may establish. Appellate jurisdiction is expressly given to the Supreme Court in cases over which judicial power is thus granted. Laws to carry into execution these express grants should provide for the organization of this Supreme and these inferior courts, and for error and appeal from the latter to the former. So far as jurisdiction is concerned, they should do no less; *they can do no more*. And yet this learned judge—and truly learned he must have been, to have established his strange constructions—has discovered an implied power, not "to make all laws which shall be necessary and proper for carrying into execution" the powers expressly granted; but he implies a power from his own theory of the general character and relations of the Federal and State Governments. The Federal Government is supreme; therefore its court has appellate jurisdiction over the State courts! So I might say the State Governments are supreme, and therefore the State courts should have appellate jurisdiction over the Federal. The truth is, the LAW is supreme, and not the courts, though each is superior to the other in their own forum, and within their own exclusive jurisdiction; but when the jurisdiction is concurrent, they are equals; and the Federal Constitution gives no color to the idea that there is any dependence or subordination of one to the other. The Federal courts, being of special and limited jurisdiction, can only pass upon the rights of litigants where certain specific questions are involved; and in such cases, so far as is necessary, must interpret Constitutions and laws. The State courts, being of general jurisdiction, may pass upon the rights of litigants, whatever the question involved, unless expressly restrained. If a party bases his claim or defence upon a law of England or France, or upon the Constitution or laws of any other State, or of the United States, it becomes the duty of this State court to construe such laws, by whatever sovereignty enacted. Because England and France and the several States are each superior in the enactment of their own laws, will error hence lie to their courts? I admit there would be more propriety, *were the power granted*, in the exercise by the Supreme Court of the United States of appellate jurisdiction from the State courts, than in its exercise by courts of extra-territorial jurisdiction. But the reasoning of the court, when it leaves the record to flounder in the mire of conjecture, applies as well to one as the other.

But it is said the Constitution, and laws of the United States in pursuance thereof, are the supreme law. Most true; but does it follow that hence the Supreme Court of the United States has appellate jurisdiction over the State courts? The State judges are all sworn to support the Constitution of the United States; they are sworn to administer its laws. Except in actions pertaining to the realty, they can only hear complaints against persons within the bailiwick. These judges are their natural protectors, and, as representatives of the local sovereign, ought to decide all local tenures. The plaintiff who appeals to them, and the defendant who sits under their shadow, cannot complain of their decision. "The supreme law of the land" is just as binding upon them as upon a Federal court; and there is no reason to believe they will not administer it as honestly, as impartially. Most of the reasoning of the Federal court, in assuming this appellate jurisdiction, is a mean imputation upon their integrity. I have yet to learn that the courts of the States, at least such of them as have fallen under my cognizance, are a whit behind the Federal Supreme Court in learning, in integrity, and in fidelity to the admitted principles of our Government. I might say more.

But, it is said, we should have uniformity in constitutional interpretations, that all the people may hold the same doctrine. This may be important, or may not; but it certainly cannot be obtained through the Supreme Court. For, firstly, it has no power to decide these questions for the people at large. It can only give or withhold relief from some particular litigant, in a given case, and can go no further. And, besides, experience has shown that constitutional questions have not been settled in this way. They have been settled only by the verdict and general

acquiescence of the people, and generally against the opinion of the Supreme Court. And even this twenty-fifth section, which seeks uniformity by a method unknown to the Constitution, fails upon the face of it. It provides for appeals in only a portion of the cases. If the State court decides, however erroneously, *in favor* of the party seeking to avail himself of some Federal weapon or cover, it is all right. There is no appeal. It is only when such weapon or cover is held illegal, that appeal lies; thus making a distinction unjust to parties and odious to the States.

But I am compelled to drop this subject just as it opens before me, or omit other things.

In the same bill before spoken of, I provided for the repeal of the seventh section of the act of March 2, 1833, "further to provide for the collection of duties on imports," (4 Statutes at Large, page 634,) commonly called the "force act." I think the whole act should be repealed. A grant of extraordinary power for a particular emergency should never become part of a permanent system. The seventh section extends the jurisdiction of the Federal judges in *habeas corpus* to cases when the prisoner is confined "for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof." It was drawn upon the supposition that Federal officers would be imprisoned for the proper execution of Federal process, or collection of Federal revenue. It was designed to meet the then threatened resistance of South Carolina; and, though it might have been necessary in that emergency, its continued existence implies an unwarranted distrust of the ever-loyal State authorities. Respect for that loyalty, if nothing else, demands its repeal. No State tribunal ever has or ever will punish any person for a lawful act under Federal authority, and the Federation has no right to insinuate such a disposition. It is a wanton insult, as if a magistrate should plant his cannon to command the dwellings of the citizens, on pretence that they may rise against him.

Besides, it is a clear usurpation of Federal authority. The States have a right to execute their criminal laws—have a right to put upon trial any man accused of violating them. A person is accused of murder. He pleads that he is a United States marshal, and the homicide was justifiably or excusably committed in the discharge of his duty. If he sustains his plea, he goes acquit. *But that is the fact to be found.* The truth of the plea is not to be presumed; any scoundrel might plead it. But this section of the force act steps in and snatches the culprit from the custody of the State, and impudently says that he shall not be tried at all. A district or circuit judge, who has no more jurisdiction of the crime than the Sultan, will decide, in chambers, upon his guilt; and if he wills it, the murderer goes abroad, not acquit, but without power in the State to put him on trial. I look in vain in the Constitution for such a surrender by the States of jurisdiction over crime. And if it were surrendered, the fact of guilt or innocence is not to be decided by any judge, but "the trial of all crimes, except in cases of impeachment, shall be by jury." (Art. 3.

My hostility to this *habeas corpus* power is not lessened by its plain abuse on the part of Federal judges. Certain occurrences in the southern district of Ohio are alluded to in the message of Governor Chase, of January, 1858. I give an extract, that this House may see the judicial antics which irresponsibility may cut:

"A disposition has been manifested, within the last few years, by some of the officials of the Federal Government, exercising their functions within the limits of Ohio, to disregard the authority and to encroach upon the rights of the State, to an extent and in a manner which demands your notice.

"In February, 1856, several colored persons were seized in Hamilton county, as fugitive slaves. One of these persons, Margaret Garner, in the frenzy of the moment, impelled, as it seems, by the dread of seeing her children dragged, with herself, back to Slavery, attempted to slay them on the spot, and actually succeeded in killing one. For this act, she and her companions were indicted by the grand jury for the crime of murder, and were taken into custody upon a writ regularly issued from the Court of Common Pleas.

"While thus imprisoned under the legal process of a State court, for the highest crime known to our code, a writ of *habeas corpus* was issued by a judge of the district court of the United States, requiring their production before him. The writ was obeyed by the sheriff, and, contrary to all expectations, and in disregard, as I most think, of principle and authority, the prisoners were taken from his custody by order of the judge, and, without allowing any opportunity for the interposition of the State authorities, delivered over to the marshal of the United States, by whom they were immediately transported beyond our limits. The alleged ground for the action and order was, that the indicted parties had been seized as fugitive slaves, upon a Federal commissioner's warrant, before the indictment and arrest, and that the right to their custody, thus acquired, was superior to that of the sheriff, under the process of the State. This doctrine must necessarily give practical impunity to murder, whenever the murderer may be seized by a Federal official as a fugitive from service, before arrest for the crime under State authority. Imputing no wrong intention to the judge, I am constrained to add, that his proceeding seems to me an abuse, rather than an exercise, of judicial power.

"A similar case occurred more recently, in the county of Champaign. Several deputies of the Federal marshal, having arrested certain citizens of this State for some alleged offence against the fugitive slave act, a writ of *habeas corpus* was issued by the probate judge of that county, requiring the arrested parties to be brought before him, for inquiry into the grounds of detention. The sheriff of Clark county, while attempting to execute this writ, was assaulted by these petty officials, and seriously injured, while his deputy was fired upon, though happily without effect. A warrant was issued by a justice of the peace for the apprehension of the perpetrators of these offences. This warrant was duly executed, and the prisoners committed to jail, under the custody of the sheriff of Clark county. A writ of *habeas corpus* was then issued by the same district judge who had interposed in the case of Margaret Garner, requiring the sheriff of Clark county to produce his prisoners before him, at the city of Cincinnati. This writ was also obeyed, and the prisoners were discharged from custody, by order of the judge, on the ground that, being Federal officers, and charged with the execution of a Federal writ, they had a right to overcome, by any necessary violence, all attempts made under the process of a state court to detain them or their prisoners, even for inquiry into the legality of the custody in which those prisoners were held.

"This principle cannot be sound. It subverts effectually the sovereignty of the States. It asserts the right of any district judge of the United States to arrest the execution of State process, and to nullify the functions of State courts and juries, whenever, in his opinion, a person charged with crime under State authority has acted, in the matter forming the basis of the charge, in pursuance of any Federal law or warrant. No act of Congress, in my judgment, sanctions this principle. Such an act, indeed, would be clearly unconstitutional, because in plain violation of the express provision which requires that the trial of all crimes shall be by jury."

These are by no means the only cases in which Federal judges have been guilty of abusing their jurisdiction in *habeas corpus*, but suffice as a specimen. I do not claim these strange acts to be within the statute. By no manner of means. But they are within the practice of irresponsible judges, under color of the statute, and furnish a strong reason for the repeal of any act that can give color to such unwarrantable proceedings.

As I first stated, I have sent a bill to the Judiciary Committee, at this session, to regulate the empanneling of juries for the Federal courts in

Ohio. I have only a moment to consider the necessity of this or some similar measure, and, indeed, it seems to me that an elaborate argument upon it would be an insult to the intelligence or purity of this House. Jurors represent no party; they represent no class; they are not transient residents; not adventurers; but belong to the body of the people, and are usually selected from the more substantial of the freeholders. The law has always been very careful in the mode of selection, so as to secure that absolute impartiality which is essential to the very idea of a juror. In Massachusetts, if not in all New England, juries are drawn in the same manner, in both the Federal and State courts, and that is by lot from the body of such of the freemen as are not rejected by the towns for cause.

In Ohio, for the State courts, the trustees of each township annually return to the county clerk the names of a certain number of qualified citizens, according to population, from which number all regular jurors are drawn by lot. The object of such mode is to insure popularity and impartiality; and more effectually to secure the latter, we have various provisions for striking juries, changing venue, &c. The selection of a prejudiced jury is a substantial denial of the jury trial; ay, and worse; it is poison for bread, a curse for a blessing. And any mode of selection that shall endanger impartiality, that shall offer facilities to take them from a party, to make them represent a class rather than the body of the people, is a fraud on the Constitution. An honest man, rather than countenance such a fraud, would boldly deny altogether the jury trial. Of what value to the citizen accused of crime is the constitutional guarantee, if the State select the jury? It is worse than a mockery; and yet such is the fact in our Federal courts. The clerk and the marshal, the creatures of Government, one directly, and the other indirectly, holding at the will of Government, by a rule of court select the names from which jurors are drawn, to decide upon the truth of Government accusations! And this power given the Government to convict any one it wills, is called "constitutional liberty," and such prosecutions, "trial by one's peers," "due process of law," &c. Give us, if you please, the naked knout or bowstring; but away with shams, and no longer prostitute the forms of liberty to the overthrow of its substance!

It is not my purpose to blame the court for the rule referred to. The State method of selecting jurors may be impracticable, without further legislation. If not, the duty of the court, under the law, is clear; and it seems to me that a rule requiring the Federal clerk to request the clerks of the several counties to draw for him, from their regular jury box, the names from which the Federal pannel is to be filled, would much more nearly follow the present statute, requiring conformity to the State method, than the rule adopted. But the method I propose, requiring the sheriffs of the several counties to return the names, is better than either, as it insures both impartiality and a probable selection of more competent men.

Mr. Chairman, I am a friend of this Union and of its Government, and demand that it do its whole duty within its jurisdiction. I would curtail no just power. The States have yielded the power to levy imposts. I would have them so levied as least to oppress and most to encourage the business and labor of the country. They have given the power to make rules and regulations respecting the common territory; I would have them so regulate it as to prevent the monopoly of the soil and the oppression of the settler. They have yielded the power to regulate commerce; I would have them so regulate it as to protect not alone from foreign aggressions, but protect it in its avenues, in its depots, whether by frigate, by lighthouse, by pier, or by snag-boat; and continue to protect it, until its subjects shall be brought within the exclusive jurisdiction of the States. So of all powers; I would have them exercised in good faith and for the common good, notwithstanding Federal recklessness and Federal neglect almost make us repent the grants. *But the powers reserved we must keep.* Most of all must we hold on to our judicial power over citizens and corporations within the States, over State criminal laws, and the power to judge of the reservations of the Constitution, where the liberty and property of the citizen is unconstitutionally endangered by foreign tribunals.

True conservatism supports State sovereignty. The Federation has primarily no citizens; we are all citizens of the States. All our governmental relations at home are with the State. Our ten thousand personal and property relations are under cognizance of the State. Engaged in the peaceful pursuits of industry, we regard Federal action, as applied to persons, almost as that of a foreign Government; and only pray to be let alone. We look to the States alone for protection in person; for protection in property. *The efficiency of that protection depends upon the power of the State.* Destroy that power, and you beat down the shield of every man's rights. Hence the contest for State sovereignty is no idle strife between powers, but a conservation of power in the only sovereignty that can protect.

I am also a friend of the Federal courts, though I regret the mode of their organization. For certain Federal purposes we need them; for those purposes I would purify and preserve them. I show not my friendship for the fallen by encouraging their prostitution; but, surrounding them with restraints and motives, I bid them go and sin no more. The people are becoming roused to the true nature and alarming encroachments of the Federation. They look upon the judiciary as the right arm of those encroachments. They will never yield their liberty; and if these things continue without remedy, *the Federal courts must fall.* I would save them by timely reform.

APPENDIX.

The following clear vindication of the independence of the other departments of the Government is given in General Jackson's veto message of July 10, 1832:

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this Government. The Congress, the Executive, and the court, must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution that may be presented to them for passage or approval, as it is of the Supreme Judges, when it may be brought before them for judicial decision. The

opinion of the judges has no more authority over Congress, than the opinion of Congress has over the judges; and, on that point, the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities; but to have only such influence as the force of their reasoning may deserve."

In the celebrated case of Hunter *vs.* Martin, (4 Munford, &c.,) the Supreme Court of Virginia, on full argument, by elaborate and clear opinions, unanimously repudiate the authority of the Supreme Court of the United States, under the twenty-fifth section of the judiciary act. I can only give the syllabus:

"1. The Court of Appeals of Virginia will consider whether a mandate issued by the Supreme Court of the United States, directing this court to enter a judgment reversing one which it heretofore pronounced, be authorized by the Constitution or not: and, being of opinion that such mandate is not so authorized, will disobey it.

"2. It is the opinion of this court that so much of the twenty-fifth section of the act of Congress, passed September 24, 1789, entitled 'An act to establish the judicial courts of the United States,' as extends the appellate jurisdiction of the Supreme Court of the United States to judgments pronounced by a Supreme Court of a State, is not warranted by the Constitution."

The opinions of Mr. Jefferson, after witnessing the insidious encroachments of the Federal court, are well known. I give a few extracts from his correspondence:

Extract from a letter to Judge Roane, dated Poplar Forest, September 6, 1819.

"In denying the right to my usurp of exclusively explaining the Constitution, I go further than you do, if I understand rightly your quotation from the Federalist, in an opinion that 'the judiciary is the last resort in relation *to the other departments* of the Government, but not in relation to the rights of the parties to the compact under which the judiciary is derived.' If this opinion be sound, then, indeed, is our Constitution a complete *felo de se*. For, intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone the right to prescribe rules for the government of the others, and to that one, too, which is unelected by, and independent of, the nation." * * *

"The Constitution, on this hypothesis, is a mere thing of wax, in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any Government is independent, is absolute also; in theory only at first, while the spirit of the people is up, but in practice as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the Constitution is very different from that you quote. It is, that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action, and especially where it is to act ultimately and without appeal. I will explain myself by examples, which, having occurred while I was in office, are better known to me, and the principles which govern them."

Extract from a letter to Mr. Jarvis, dated Monticello, September 28, 1820.

"You seem, in pages 84 and 148, to consider the judges as the ultimate arbiters of all constitutional questions—a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men, and not more so. They have, with others, the same passions for party, for power, and the privilege of their corps. Their maxim is, '*boni judicis est ampliare jurisdictionem*,' and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control. The Constitution has erected no such single tribunal, knowing that, to whatever hands confided, with the corruptions of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves. If the Legislature fails to pass laws for a census, for paying the judges and other offices of the Government, for establishing a militia, for naturalization, as prescribed by the Constitution, or if they fail to meet in Congress, the judges cannot issue their *mandamus* to them; if the President fails to supply the place of a judge, to appoint other civil or military officers, to issue requisite commissions, the judges cannot force him. They can issue their *mandamus* or *distringas* to no executive or legislative officer, to enforce the fulfilment of their official duties, any more than the President or Legislature may issue orders to the judges or their officers."

Extract from a letter to Thomas Ritchie, dated Monticello, December 25, 1820.

"The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government, to a general and supreme one alone."

Extract from a letter to Archibald Thweat, dated Monticello, January 19, 1821.

"The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass. Against this I know no one who equally with Judge Roane himself possesses the power and the courage to make resistance; and to him I look, and have long looked, as our strongest bulwark. If Congress fails to shield the States from dangers so palpable and so imminent, the States must shield themselves, and meet the invader foot to foot. This is already half done by Colonel Taylor's book, because a conviction that we are right accomplishes half the difficulty of correcting wrong. This book is the most effectual retraction of our Government to its original principles which has ever yet been sent by Heaven to our aid. Every State in the Union should give a copy to every member they elect, as a standing instruction, and ours should set the example. Accept, with Mrs. Thweat, the assurance of my affectionate and respectful attachment."

Extract from a letter to Mr. C. Hammond, dated Monticello, August 18, 1821.

"It has long, however, been my opinion, and I have never shrunk from its expression, (although I do not choose to put it into a newspaper, nor, like a Priam in armor, offer myself its champion,) that the germ of dissolution of our Federal Government is in the constitution of the Federal judiciary—an irresponsible body, (for impeachment is scarcely a scarecrow,) working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."

Extract from a letter to William T. Barry, dated Monticello, July 2, 1822.

"We already see the power, installed for life, responsible to no authority, (for impeachment is not even a scare-crow,) advancing with a noiseless and steady pace to the great object of consolidation. The foundations are already deeply laid, by their decisions, for the annihilation of constitutional State rights, and the removal of every check, every counterpoise, to the engulphing power of which themselves are to make a sovereign part. If ever this vast country is brought under a single Government, it will be one of the most extensive corruption, indifferent and incapable of a wholesome care over so wide a spread of surface. This will not be borne, and you will have to choose between reformation and revolution. If I know the spirit of this country, the one or the other is inevitable. Before the canker is become inveterate, before its venom has reached so much of the body politic as to get beyond control, a remedy should be applied. Let the future appointments of judges be for four or six years, and renewable by the President and Senate. This will bring their conduct, at regular periods, under revision and probation, and may keep them in exquoise between the general and special Governments. We have erred in this point by copying England, where certainly it is a good thing to have the judges independent of the King. But we have omitted to copy also the caution with which makes a judge removable on the address of both legislative Houses. That there should be public functionaries independent of the nation, whatever may be their demerit, is a solecism, in a Republic, of the first order of absurdity and inconsistency."

Extract from a letter to Judge Johnson, dated Monticello, March 4, 1823.

"I cannot lay down my pen without recurring to one of the subjects of my former letter, for, in truth, there is no danger I apprehend so much as the consolidation of our Government by the noiseless, and therefore unalarming, instrumentality of the Supreme Court. This is the form in which Federalism now arrays itself; and consolidation is the present principle of distinction between Republicans and pseudo-Republicans, but real Federalists."

Extract from a letter to Edward Livingston, Esq., dated Monticello, March 25, 1825.

"One single object, if your provision attains it, will entitle you to the endless gratitude of society—that of restraining judges from usurping legislation. And with no body of men is this restraint more wanting than with the judges of what is commonly called our General Government, but what I call our foreign department. They are preaching on the Constitution by inferences, analogies, and sophisms, as they would on an ordinary law."