Supreme Court of the United States.

The United States vs. Blyew et al.,

FOR MURDER.

CONSTITUTIONALITY

OF THE

CIVIL RIGHTS BILL.

Argument for the State of Kentucky,

BY J. S. BLACK.

REPORTED BY D. F. MURPHY.

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ARGUMENT OF MR. BLACK.

If Your Honors please, this is a capital case. The plaintiffs in error have been sentenced to death, and that doom is impending over their heads at this time. Usually a cause which involves the life of a human being has a certain degree of solemnity thrown around it by that fact alone. Not much, however, has been said about it here, probably because there has been a general impression made of the prisoners' guilt. The State of Kentucky accuses them, the United States have convicted them, and no counsel employed by themselves are here to defend them. I admit nothing against them. No man in a court of justice can properly say of another that he is guilty of murder, or any other criminal offence, until he has been convicted upon a fair trial before an impartial jury and a court of competent jurisdiction; and such a trial these men have not had, if I understand the subject rightly.

It is the question of conflicting jurisdiction between the state and federal courts which gives interest and dignity to this cause. The decision which you may make on it will be felt in its influence on the destinies of the country long after you and I and all of us shall have mingled with the clods of the valley. Every question of constitutional law is important when it comes to be decided by the tribunal of last resort, from which there is no appeal except to the sword; and if there be any one case that is more important than all others, even of that kind, it is one in which the supreme judicial tribunal of the country is required to draw the line of demarcation between the powers of a great central government

on the one hand and the local rights of self-government retained to the states and the people on the other. If some future Hallam shall write the constitutional history of America, I know of nothing more likely than this to occupy a prominent place on his pages. I hope and I believe he will be able to say with truth that you have been equal to your duty.

I cannot, or rather I *will* not, follow my learned friend, the Solicitor-General, where he has travelled so far out of the record, as I think he did when he indulged in that eloquent denunciation of the State of Kentucky. You would suppose, from what he and the Attorney-General have said, that the people of Kentucky are engaged in a constant and barbarous warfare upon the black population. They would have you to believe that that state, and the administration of the laws in the courts, encourage and protect the whites in the perpetration of every outrage on persons of African descent. The Solicitor-General distinctly asserted that under the laws of Kentucky a white man *had a right* to go into a negro church and kill the minister in cold blood. The Attorney-General expands this statement, and says that every man, woman, and child in the congregation may be killed with perfect impunity. They would have you to believe not only that these outrages may lawfully be perpetrated, but that they are habitual practices. The cannibals of New Zealand are mild and merciful in comparison with the Kentuckians, if you take the picture of them which the law officers of the United States have painted. But all this, you must observe, is mere general abuse, not only without proof, but without specification. They produce no evidence of their assertions, and they mention no instance of any act which, if true, would justify them. I take leave to contradict these denunciations in all their length and breadth. They are utterly without foundation. The people of Kentucky have behaved towards the Africans among them with uniform kindness, with perfect justice, and with

all the magnanimity which ought to mark the conduct of the superior race to the inferior and the weaker. The laws may not be perfect; I know of no human code that is; but thus far there has been no failure of justice to the negro on that account, much less has there ever been any instance of wrong from the partiality of the courts. By the whole body of the people, by those who make the laws and by those who administer them, crime is regarded as no less a crime when negroes have suffered by it than whites. I am instructed to say, and I do say with perfect confidence, that in no case has justice been denied or delayed to any person, white or black, except where it was caused by the interference of the federal authorities. This act of Congress called the "Civil Rights Bill" has dislocated all the machinery of the state courts, and rendered them powerless to perform their duty. If they attempt to execute justice the judges themselves are liable to be hunted down as criminals. The jurisdiction of the state courts is entirely taken away in every case which affects a negro in any way whatever, and yet the officers of the United States come into this court, and with their feet on the neck of the prostrate commonwealth, vent curses and maledictions and objurgations upon her for not doing justice to the negro!

A person standing where I stand might be tempted to follow the Solicitor-General out of the record and enunciate some general doctrines not altogether unprofitable for reproof and for admonition to federal officers. But I make no appeal to the passions. Let the stump and the newspaper do that. One who desires to speak upon this case within the record, and directly to the points before the court, will find himself restricted to a narrow compass. What I have to say upon it, therefore, will be said briefly; I hope it will be said intelligibly and plainly, as befits the discussion of a subject so entirely simple as I believe this to be.

The facts which you are required to keep in your mem-

ory can be stated in a breath. A murder was committed in a remote county of the State of Kentucky. When I say "remote," I do not mean that it was wild or uninhabited, but that it was a rural district, far away from any great thoroughfare of travel, or any great centre of trade and population. It was accompanied with circumstances of unusual atrocity, calculated to excite the alarm and indignation of the whole neighborhood, and all who heard of it. But it was committed within the limits of the State of Kentucky, and on her soil, within the body of a county. It was an atrocious insult to her dignity, and the grossest possible outrage upon the peace of that community, which, by the organic law of this land, was placed under her sole protection. Her law and the law of God alone were offended by it, and none but the Almighty and the State of Kentucky had a right to enter into judgment with the perpetrators of it. No other state, or sovereignty, prince, or potentate on the earth had made, or had the power to make, any law which would punish that offence at that place. The United States never pretended that they had legislative jurisdiction on the subject, never declared a murder within the limits of any state to be an offence against them. It was no more an offence against the United States, than it was against the Republic of France, or the Empire of Germany.

The people and the public authorities of the state took the measures that were proper and necessary in the premises. They ascertained, or supposed they had ascertained, who the murderers were. They followed them, overtook them, arrested them, carried them before a magistrate, by whom, after a preliminary examination, they were committed—committed only in the way that a state magistrate had a right to commit them—to the jail of the proper county to await their trial before the only court which, by the laws of Kentucky, had a right to try and to punish them. How long they were there I do not know. I

know nothing upon that subject except what appears upon the record and what was stated here by the Solicitor General yesterday. One thing, however, is certain; that before a trial could be had in the regular course of justice, these men were taken away out of the custody of the officer who held them and carried beyond the reach of the state authorities.

If I were to stop just there, say no more about it, and you had no means of getting any information except what I have given you, the natural, the necessary conclusion would be that this rescue of the prisoners had been made by a lawless mob, composed either of their friends, who desired to give them a chance of escape, or else a mob made up of their enemies, whose hot thirst for their blood would not wait for the slow vengeance of the law. The Solicitor-General said there was a mob in the case. I did not know that before; but it was not a mob that carried them away. They were not taken out of jail by any band of regulators nor by any committee of vigilance. It was the United States marshal who did that deed, and did it, I presume, in pursuance of what he supposed to be his duty; he transported them to Louisville, a distance of 150 or 200 miles, there to be tried, not by a Lynch court, but by the Circuit Court of the United States; and there they were tried. The public accuser of the United States for that district appeared against them, preferred an indictment to the grand jury, which was found a true bill. This indictment charged them not simply with murder but with murder upon a person of the African race. The averment was added that a witness was present of the same color, who saw it done. Then he charged them, as a further aggravation, with being white men. All these unusual charges are true. The murder, by whomsoever committed, was on a negro woman; a negro witness saw it, and the prisoners are guilty of a skin not colored like that of the African. Upon these grounds the District Attorney insisted that this offence against the State of

Kentucky was triable in the courts of the United States. His ingenious eloquence enabled him to convince that court that it had jurisdiction, and he is here now in the shape of a Solicitor-General to convince you that you ought to affirm the judgment.

If the circuit court of the United States had the jurisdiction which was claimed for, and exercised by it, then the state is utterly disarmed of the power to protect her own people against a very large class of criminal offenders, or to defend her own existence against any assault that may be made upon it; the most important function of a free state is wrested from her and delivered over to the officers and agents of another and a different government, which may or may not be administered by total strangers to the state—perhaps the bitter enemies to her peace and prosperity—men who think it a crime to sympathize with her people—men who would "laugh at her calamity and mock when her fear cometh." It is hard that a blow like this should have come from the distinguished gentleman who has given it so much force both here and in the court below. I think he is proud of his state. He nods his head. He ought to be, for there are portions of her history which would honor any nation in the world. The state is proud of him too; at least, I suppose that there is, as there ought to be, a good deal of mutual admiration between them. He can hardly be conscious that he has a rope around the neck of his political mother, and that every pull he makes upon it is choking the life out of her body.

However, we cannot get either him or his chief to understand the subject as we do. It is necessary, therefore, that we should call your careful attention to the consequences which must result from your affirmance of this jurisdiction. You will know that we are not making a mere captious objection to a measure enacted by Congress, but standing in the defence of those rights without which the state must cease to be a state.

Neither of the gentlemen on the other side has raised, but, on the contrary, both have refused to raise, or rather they have evaded the question whether the law of 1866 gives to the federal courts *exclusive* jurisdiction of the cases within its purview, or whether it is concurrent with the state courts. I am somewhat surprised to find them halting between two opinions on a point like that. The jurisdiction is exclusive beyond all possible doubt. There are, as they have truly said, two classes of cases here of which jurisdiction is given to the federal courts. One consists of those cases which arise under the law itself, such as are created, defined, and made punishable by the act of Congress—an indictment for instance against a judge for administering the law of Kentucky according to his oath. Of this first class exclusive jurisdiction is given in terms to the district court of the United States. There is another class of cases for which no federal law has provided any punishment, cases which arise wholly and entirely under the state law—such a cause as the one before you. Of these jurisdiction is given to the district court to be exercised by it *concurrently with the circuit court of the United States.* Now, when you give jurisdiction to one court concurrently with another, *ex vi termini*, that excludes all other courts. You cannot say that there is a concurrent jurisdiction between two courts and mean to say that another court has also concurrent jurisdiction.

Besides that, it is very clear that the reason why this jurisdiction was to be taken in any case from the state courts and given to the federal courts was because Congress thought it not proper to trust the state courts with the decision of any case which might affect negroes, mulattoes, or persons of African descent. That general intent and purpose of the law would be wholly defeated if the state courts had concurrent jurisdiction in every case where they, by superior vigilance, activity, or force, would be able to get possession of the party first. Congress could not have meant to give two different and hostile

sets of courts a scrambling jurisdiction, to be contended for like a piece of wild land on the western frontier, where one squatter has title as long as another does not "jump" his claim. It could not have been meant to reduce a question of jurisdiction in criminal cases to Rob Roy's rule, that—

> "He shall take who hath the power,
> And he shall keep who can."

Then it is an exclusive jurisdiction in the *federal* courts, and a total denial of all right on the part of the state courts to intermeddle in any case which *affects* the negro race. That is the result of this law if it be valid and constitutional. It does of course affect the negro race whenever one of them is a party. By the construction of our opponents negroes are also affected, and, as a consequence, the state is deprived of its power to try or punish white offenders in every case where the crime at the time of its commission incidentally produced injury to any person of that color, although the proceeding is not instituted to redress the private injury, but only to vindicate the state against a public wrong. And they assert that it also affects them in every case where any person of the African race or color may be a witness to prove the crime with which a white man is charged.

It does not matter whether the testimony of the black witness is important or unimportant. The same fact may be testified to by a hundred white witnesses of credible character, but if there be a black one, no matter how unnecessary his evidence is to the conviction of the party accused, that is sufficient, *proprio vigoré*, to oust the jurisdiction of the state courts and vest the exclusive jurisdiction in the federal courts. If a fight takes place at a militia muster, or a cross-roads meeting, or a general election, or a barbacue, or at any other public gathering in the presence of a thousand white persons who can testify to it, though it concern nobody but white men, though it is

between white men entirely, they cannot be indicted for the offence in a state court if one single negro or mulatto in that whole crowd saw the thing done. If a negro is indicted, along with others, for being in the affray, it goes, of course, to the federal courts. If a white man is taken up for a crime against the state, indicted, arraigned, and his guilt clearly proved by white witnesses, he can defeat the jurisdiction, and entitle himself to an acquittal, not by proving that he is innocent of the offence, but by proving that he is guilty, and that the crime was done in the presence of a negro. If the law of Congress be valid, and that be the true construction of it, any man that pleases may start out with a pre-expressed determination to commit any crime he pleases against the State of Kentucky, with perfect immunity from the state authorities, if he will simply take a negro along with him when he does the deed; and if he is not so happy as to have done it in the presence of one of that race, all he needs to do is to hunt up a black man and make a confession in his presence.

This is an intolerable grievance, which no state can suffer without groans and tears, even if it were confined to great cases, where the public alarm would insure punishment in the federal courts; but it extends to the smallest and the lowest cases—to that minute distribution of justice which is made by the local magistrates in the townships—to assaults and batteries, to small thefts—to the slightest breach of police regulations which the law calls a crime. Upon the prompt and speedy punishment of such offences as these the peace of neighborhoods and the morals of the people depend far more than on the decision of great causes. But in none of these can the state courts administer justice if a negro be affected. The District Court of the United States for Kentucky is filled now with cases of assault and battery and petty larceny, brought from every part of the state. I do not wish to speak disrespectfully of any of my friend's friends, but

I must be permitted to say (what I have the highest authority for saying) that negroes have a powerful bump of acquisitiveness in little things, which results frequently in producing a decided proclivity to stealing. The Solicitor-General says that the African race have been Christianized and civilized by our benign institutions—by which I understand him to mean slavery—but he will not pretend, I think, that slavery or any thing else has taught them the difference between *meum* and *tuum*. Nor will they ever learn it unless the knowledge is forced upon them by the law. But this act of Congress deprives them of the lessons which they might otherwise receive in that stern but wholesome school.

If a negro steals a hog or robs a hen-roost, the suffering party must let him run unpunished or else go to Louisville for justice, and that would cost twenty times as much as the pigs and chickens are worth. The consequence must be that nine-tenths of the lower class of crimes committed by negroes and by white men under the protection of negro witnesses must go unwhipped of justice. The people become totally demoralized; they graduate in crime from the lowest to the highest, and society is altogether broken up.

Under this law, a state court in Kentucky is not able to enforce a decree, sentence, or judgment of its own, even in a case which is admitted to be within its sole jurisdiction. Any black gentleman who chooses to say that it shall not be carried into effect can strike the process dead in the officer's hands, and a white man may do it also if he does it in the presence of a negro. The judge thus insulted may go up to Louisville and ask the federal court to punish the contempt. I do not know what answer would be given, but a proper answer would be, that no contempt can be committed against the courts of Kentucky, because they are utterly contemptible already in the eyes of the federal law.

The State of Kentucky cannot, by the aid of her judi-

cial authorities, parry the lunge of the most atrocious assassin who chooses to aim his weapon at her heart. She cannot punish treason against the state. A band of negroes and white men, either, or both united, may organize themselves into "ranks and squadrons, and right forms of war," and march upon the capital with an avowed determination to depose the legislature and the governor, and to establish somebody else in their place, or to create a civil war, which shall cover the whole commonwealth with blood and ashes, and although they be taken red-handed before they have accomplished the forcible overthrow of the government, they cannot be punished in the state courts if any negro saw the overt act, much less if he was a part of the insurrection in his own person.

There is another curious anomaly created by this law, to which I shall ask your attention, simply because it is a puzzle. I know how ingenious Your Honors are, but I do not believe there is a man among you that will untie this knot: Where is the pardoning power in a case like the present? Has the President a right to pardon an offence against the State of Kentucky? No. By the Constitution he is especially limited in the exercise of that power to "offences against the United States," that is, offences defined and made criminal by the laws of the United States. On the other hand, suppose the Governor of Kentucky, while this cause was pending, had sent his pardon and put it into the hands of the accused parties, and they had pleaded it, would the federal court have sustained that plea? Or, suppose that after they had been convicted, and they were in the hands of the marshal for execution, the governor had sent a pardon to him? The marshal would have treated it with contempt. He is acting under the sentence of a federal court, and is not bound to obey the executive of the state, when he tells him not to carry it into effect.

It is no answer to this to say that the State of Kentucky might relieve herself if she would change a certain law

which the Attorney-General and the people of other states have seen proper to disapprove. That is her own business. The rules of pleading and evidence which she may adopt depend, and ought to depend, upon the discretion of her own legislature. Congress, itself, doos not deny that her people may say what the barons of England said on an occasion equally memorable concerning a code far more obnoxious to censure—*nolumus leges nostras mutare.* Assume the law in question to be wrong—concede that the people of the state close their eyes upon the error—admit that they stubbornly refuse to be lashed into a repeal—something should be pardoned to the spirit of independence which they have inherited from their forefathers. No community, long accustomed to freedom, will ever be driven into measures by the dictation of those who have no right to intermeddle with them. All men claim the privilege to do as they please in regard to those things which concern nobody but themselves. Coercion like this has never yet accomplished a good purpose.

Men will not *reason*, they only *feel*, when they see the whip of a master held over their heads. After the laws for the punishment of heresy were enacted in the reign of Philip and Mary, Archbishop Bonner went to Ridley and proposed to convince him of his error. But Ridley said, "I can receive no instructions from a man who comes to me armed with a law which enables him to put me to death if I do not agree with him; repeal your penal laws against me and my brethren, and then we will hear you with pleasure." Laws similar to this were made and carried into execution for centuries against Ireland, with the hope of extirpating the Catholic religion, but it only made them cling with more tenacity than ever to the faith of their fathers. The morning after the Catholic emancipation bill was passed, Tom Moore, the poet, took up a newspaper in which the fact was announced: "It is passed," said he, "and now, thank God, I can turn Protestant if I please," by which he meant to say, as he

afterwards explained it, that up to that time it was a point of honor with him to stand by the old church right or wrong. But as soon as the penalties were removed, he took up the subject and considered it as he had never considered it before.

Equally in vain is it to say that the administration of justice by the federal courts will be just and proper. I have no right to say that anybody connected with the United States Government in Kentucky has done anything that was intentionally oppressive or cruel, or meant to produce the disorders which have resulted from this law. I believe that every case which has been tried in the United States courts there has been disposed of conscientiously. But it is impossible for a single court, situated upon the banks of the Ohio river, with a great state extending 300 or 400 miles around, to administer that local justice upon which the peace of every county and township depends. The people cannot afford to go there for justice; they would rather do without it. Then, again, everybody revolts against the idea of having the domestic affairs of his community interfered with by persons who, however good they may be, are strangers to them, and whose rule is forced upon them against their will.

The autonomy of a free state is not a thing to be trifled with. It has been contended for by every friend of liberty in all past time. When Megara and Corinth and Thebes lost that they lost everything, and Athens justly forfeited her own independence by trampling on that of the other Greek cities. The free towns and small principalities of Western Europe were contented and prosperous as long as they retained the right to administer justice among themselves, and as soon as some great power took that away they either sunk into abject slavery or else were given over to the most frightful disorders. This system of imperial regulation in domestic affairs was tried well in Ireland for two hundred and fifty years, and

for twenty-five years it was tried equally well in the southern departments of France. What did it produce? White-boyism in one country and Chouannerie in the other.

In the worst days of the Roman Empire it was an established rule that the local customs and local tribunals of the provinces should not be interfered with. Rome sent her pro-consuls everywhere, and they behaved badly enough sometimes; but it was their prescribed duty to abstain from all interference in mere local affairs. You have a case on that point reported in a book which I am sure some of you have read. When Gallio was the Roman deputy for Achaia, with his headquarters at Corinth, a set of pagan scallawags and carpet-bag Jews caught the Apostle Paul and brought him up on a charge that he was disturbing the peace by preaching a false religion. But Gallio answered: "If this be a question of words and names and *of your own law*, look *ye* to it, for I will be no judge of such matters;" and the report adds that "he drave them from the judgment seat." Afterwards, when Paul's accuser was riotously assaulted in the streets, he declined to take jurisdiction of that offence. "Gallio cared for none of these things." The imperial government did not send him there to boss the police jobs of the city. Tiberius was the worst of the Cæsars, but he made it the boast of his reign that he had not disturbed any separate community in the enjoyment of their own laws, or interfered with the local tribunals in the administration of justice. Base as he was he understood the philosophy of jurisprudence well enough to know that no people were ever contented, happy, or prosperous unless they were permitted to regulate their own affairs.

When the Bourbons were restored in 1815, the king was reinvested with all the powers of the old French monarchy. But he was obliged to make a solemn promise by treaty with his subjects and with his allies that he would never deprive the people of the right to be tried

by their natural judges; that is the local magistrates who, living *among* them, were responsible *to* them for the righteousness of their decisions.

But if the State of Kentucky is placed by the federal Constitution in this unfortunate predicament, I cannot help her and neither can you. I propose to show, therefore, that this act of Congress is a sheer, naked, flat breach of the Constitution. My proposition is, that the judicial, as well as the legislative and executive powers of the United States are defined and limited, and that the limitation upon the judicial power is such that no right exists or can be vested by Congress in the federal judges to try a case like this one at bar or any case at all like it.

The judicial power of the United States granted in the Constitution to this government is defined by, and limited in, the Third Article. The first section declares that, "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." That is a limitation; you have so decided. There is no other way in which the judicial power can be exercised: It cannot be delegated to a star chamber, a high commission, an ecclesiastical council, or a board of military officers, nor to any other special tribunal improvised for the conviction of particular individuals. All power to hear, decide, and adjudicate in civil or criminal cases is confined to the ordained and established courts.

The amount, quantity, extent of the judicial power which is given to the United States to be exercised by their courts is defined and limited with equal clearness by the second section of Article III. What does it say? "The judicial power shall *extend*"—mark the language; there is no English word more significant for the purpose of creating a limitation—"the judicial power shall extend," how far? Thus far, and, of course, no further: "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made,

'or which shall be made, under their authority; to all 'cases affecting ambassadors, other public ministers, and 'consuls; to all cases of admiralty and maritime jurisdic- 'tion; to controversies to which the United States shall 'be a party; to controversies between two or more states; 'between a state and citizens of another state; between 'citizens of different states; between citizens of the same 'state claiming lands under grants of different States, and 'between a state, or the citizens thereof, and foreign 'states, citizens, or subjects."

You cannot make any kind of a mistake about the cases over which the judicial power of the United States constitutionally reaches. It depends sometimes upon the nature of the subject-matter, sometimes upon the character of the parties, and sometimes upon the relation of the parties to one another; but no man will risk his reputation for sanity by saying that the power described there extends to the trial of a case like this. It cannot be ranged under any head which the Constitution enumerated. You have, then, the judicial power of the United States limited, and limited so as not to reach this case; and in a government of enumerated powers, whatever is not given is withheld. *Expressio unius exclusio est alterius.*

But our learned friends on the other side protest against a strict construction. They think that the powers of the federal government ought to be as liberally interpreted as possible. I do not know exactly what they mean by a strict construction. I am not asking for any construction that would have been called strict by the public men of Virginia at the time when that state was in the habit of furnishing Presidents to the Union. I do not ask you to believe in Washington, and Jefferson, and Madison, and Monroe, and Jackson, or any disciple of that set whose opinions were the standard of political orthodoxy for seventy years. I believe, in my heart and conscience, that they were right. They were the best and wisest men that ever lived in all the tide of time. Among

the statesmen called great in these degenerate days not one is worthy to stoop down and unloose the latchet of their shoes. If there is consecrated ground on all this earth it is the tomb at Mount Vernon, the sepulchre at Monticello, and the grave at the Hermitage. But I would not endanger any cause at this time of day by trying to sail as close to the wind as they did. I will not ask you even to adopt the notions of such men as Hamilton and Adams, or Clay and Webster, who were supposed to be rather loose in their ideas of construction. I shall not cite anything from Marshall or Taney. We are an enlightened people. We have voted ourselves to be so, and we have learned to feel a wholesome contempt for our fathers. Therefore I consent, for my part, that when you find any opinion more than ten years old, you shall discard it at once, and cast it aside among the rubbish of the dark ages. But this is what I do ask,—this we have a right to demand,—this we are sure to get, as long as the Supreme Court is allowed to stand, and as long as the Constitution is not formally abolished—that is an *honest* construction of the written organic fundamental law which we all swear to support,—such just and fair interpretation of the Constitution as any right-minded man would give to any instrument containing a grant of anything, whether it be property, corporate privileges, or political power.

By every rule of interpretation that ever was invented,—by every canon of construction known among civilized or barbarous men,—by every principle of law and logic,—by that good faith which holds the moral world together,—by that decent respect which every honest man is bound to feel for the common sense of his fellow-men,—you are compelled to say that nothing can be taken under a grant which has not been given in it. That is not only the natural construction of this grant, but it is expressly declared by the instrument itself that it shall never receive any other. The Tenth Amendment says that "the powers not delegated to the United States by the Constitution, nor pro-

hibited by it to the states, are reserved to the states respectively or to the people." The oath which binds us to support the Constitution compels us to give it that interpretation. Look also at the Ninth Amendment. Certain rights had been expressly mentioned as belonging to the states and the people in the Constitution, and, in order that the force of the general words of reservation might not be weakened by the mention of these, it was declared that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The framers of the Constitution dreaded the absorption of state authority and popular liberty by the federal government, and they did all that human wisdom could do to prevent it, and they took away all color of legal excuse from every construction which might be used to do it.

You may adopt the loosest construction you can so that it be a construction. Take all the power that is granted according to the most extended signification of the words. Stretch the meaning, as far as you possibly can, of every syllable which adds to the power of the general government. After doing this take all the additional power that your utmost ingenuity can conceive of as necessary to carry the others into effect. Then narrow down the sense of every word that expresses or implies a right on the part of states or people. Do everything that can be done by construction to magnify and increase the central authority—do nothing for liberty—let every claim for self-government be discountenanced as much as possible. Let the powers thus accumulated and extended by construction be left in the hands of the federal officers to be guarded, as no doubt they will guard it, with "love strong as death, and jealousy as cruel as the grave." But after you have gone as far as any kind of construction will carry you in that direction, we ask you to stop. Do not take what is neither expressed or implied in the grant, for that is not *con*struction but *de*struction. We stand

upon the outer limits of the Constitution and implore you not to pass that border.

I think I can illustrate my idea of these different sorts of construction by reference to a very old grant, I believe the oldest one on record of which the terms are distinctly made known.

About the time of the Trojan war, or a little before, a Phœnician king was assassinated in the city of Tyre. His widow was compelled to leave the country and she led out a considerable colony. They sailed down the Mediterranean, until they came to a place on the northwest coast of Africa, which was afterwards called Carthage. There they concluded to make a settlement. But the difficulty was to get a foothold in the country; for the native princes and people had full dominion over all the region round about. After some bargaining they got a grant, the limits of which were rather curiously defined. It authorized the grantees to take as much ground as could be enclosed by a certain number of bulls' hides. Inside of that space the Tyrians were to have political jurisdiction, as well as a proprietary right to the soil. But it was expressly agreed, and all parties swore to observe the compact, that all the land outside of the bull-skins should belong forever to the original owners and be controlled by their own governments. In other words, the powers, privileges, and property, not included in the grant, were reserved to the states respectively and the people who were the grantors. The strict, that is to say, the honest construction of this grant, would be to take the hides just as they came from the beasts' backs, and lay them down, touching one another in a circle or a square. There is a poetical tradition that one of the queen's counsellors proposed to do this; but he was an old-fashioned Jeffersonian and his advice was not adopted. The latitudinarians cut the hides up into the narrowest thongs they could make, tied them together, and in that way included as much land as they needed for a large

city, with a great deal of outlying territory besides. That is what I call a loose construction of Dido's grant: but still it was a construction. It showed some respect for the grant itself; that while they were not willing to be confined within, perhaps, the just limits of it, they still acknowledged the obligation to stay inside of it, according to some rule. After awhile, however, they set at naught even their own construction, and basely used the granted power to strip the grantors of the rights reserved. They went over the lines set by themselves, and took possession of everything. From that day to this "Punic faith" has been the synonym of treachery and falsehood all the world over. The law officers of the United States are now asking you to sanction an act of their government precisely analogous to that which made Carthage a proverb and by-word for cruelty and shame.

The states and the people made a distribution of all the power which belonged to them. Some was bestowed on the general government, and some was retained by the people and given to the states, or kept in their own hands and excepted forever out of the powers of all governments. If this be true, and if it be also true that all parties swore to observe the distribution just as it was made, that is to say, that the states should remain undisturbed in that portion of the judicial, legislative, and executive power which was not granted to the United States, and that the United States should hold, not for a day, but for all time, the powers that were granted to them, I want to know why it is any worse or any better to tear away the power allotted to the states, than it is to take from the federal government a function bestowed upon it. If the line of demarkation that was agreed to be observed between the states and the general government is to be observed at all, is it not just as bad to pass it in one direction as it is in the other?

If a state says that she will not abide by the distribution,

but that she will take back and reassume what was granted to the general government, that is manifest usurpation; and if she proceeds to maintain it by any show of military force, every individual concerned in it is guilty of treason. Now, will anybody tell me why it is not treason against the state for officers of the general government to usurp upon a state by forcibly taking away from her the rights plainly reserved?

There is one argument against the states which may have much influence with some persons. It comes, I believe, from Talleyrand, who laid it down as a rule that "the weak are always in the wrong." Certainly the United States are stronger than any state of this Union. They have more men, more money, and a better organized physical force to maintain any usurpation which they resolve upon. Public men who desire to have their talents well rewarded are sorely tempted to serve the federal power. But "we, the people," who are not politicians, and who ask nothing of any government except the privilege to earn our bread and eat it, do not understand that argument at all, and we never will; nor do I see how it addresses itself with any force to the conscience of a judge.

If the judicial power of the United States is so limited that it does not extend to a case of this kind, how can you justify the assumption of it?

Of your own head you can take no power which the Constitution has left in the hands of the states, and neither can Congress increase your power. All the departments of the government cannot increase the power of any one.

My learned friends do not find, or pretend to find, any grant of judicial power which covers a case like this in the body of the Constitution, nor in any of the first twelve amendments. The 14th and 15th are also out of all question, for they were not adopted when the act of 1866 was passed. They found their claim of jurisdiction

solely on the Thirteenth Amendment. If that enlarges the judicial power, or sets the line out so far as to take in a case like this, we have no more to say. But not a word is there to change the original distribution of the judicial authority. The power of the state is left untouched to administer her own laws for the prevention of crime and the preservation of order among her own people. When, therefore, they come with their knife to cut this pound of flesh from the bosom of the state, I tell them "it is not so nominated in the bond." But then they tell us that it is *implied* from the necessity of carrying the Thirteenth Amendment into effect.

The Thirteenth Amendment has no kind of connection, legal or logical, with the civil rights law of 1866. That amendment executed itself. It abolished slavery or involuntary servitude, except as a punishment for crime. The moment it was adopted the relation of master and servant, as it had previously existed in the Southern States, was dissolved. The statute does not profess to be based on the amendment nor to carry out the abolition of slavery. It speaks of slavery as a thing of the past—as a "previous condition" of certain persons. My learned colleague has demonstrated, by reasoning and authority which no man can answer, that such legislation as this of 1866 is most inappropriate, improper, and unnecessary to carry out anything contained in the Thirteenth Amendment. I leave that part of the argument where he put it.

But I said I would not object to a loose construction of the Constitution, and I will not go behind my word. I therefore assume, for the argument's sake, what is manifestly not true, that the Thirteenth Amendment required some act of Congress to carry it into effect; that Congress had a right to determine what law was best for that purpose; that no matter how unnecessary or inappropriate or improper this law may appear to you, if Congress chose to adopt it as a means of carrying out the amend-

ment, that fact alone made it "the wisest, virtuousest, discreetest, best" that human sagacity could have devised. In other words, you are to presume that everything is necessary—everything is appropriate which Congress chooses to enact. Let it be conceded that you cannot even inquire into the necessity of the law, nor deny its fitness, but that we must just take what is given to us and "ask no questions, for conscience sake."

If that construction is not loose enough, I desire my friend, the Solicitor-General, to tell me how I can make it looser, for he shall have it as loose as he pleases, so far as this case is concerned. He shall not say that we hold back the car of improvement in the principles of interpretation.

But there is one barrier which he cannot break—one limitation which he will not stand up and say that anybody has a right to transgress. The legislation to carry out one part of the Constitution must not violate another part; it must be within the scope of the Constitution, consistent with its general principles, and not either expressly or impliedly prohibited. That is fatal to this act, for the jurisdiction it gives to the federal courts in matters purely of state cognizance is a clear breach of the Third Article.

If that were not the rule it would always be a question between the two parts of the Constitution which should break the other down. You could resolve the whole Constitution into any one article or one clause, and, on pretence of carrying that out, with the unlimited power of Congress to determine what is appropriate, you can do anything. You can establish a national church; you can destroy the obligation of all contracts, make *ex post facto* laws, pass bills of attainder, confiscate men's property behind their backs, and organize a general system of military commissions instead of the courts, or you can let the courts stand and extend the judicial power over every conceivable case that may arise under the laws of

the states; you can clothe the President with the powers of an absolute monarch; you may suspend the writ of *habeas corpus* indefinitely by a total repeal of the law which allows it, abolish the right of trial by jury, and make a criminal code for the states as bloody as that of Draco, or you may take away all protection from property and life by declaring that theft and murder shall be counted among the virtues. I do not say that these things would be done. I think they would not be done immediately. But I do say that when you go over the line to which the Constitution limits you, and take possession, upon any pretext whatever, of that unbounded field of power which lies outside, this government must become an absolute despotism in theory and in practice. The states and the people may be mercifully dealt with, but they will have no rights which their rulers here are bound by law to respect.

I think I have shown that the judicial power of the United States does not extend to the punishment of offences against the state; that the power to do that is reserved to the states; and that to take this power away from the states and vest it in the federal authorities is a flat violation of the Third Article. You have, therefore, only one alternative; and that is to say either that the act of Congress is void, or else that the Constitution is not binding.

But I do not admit that this case is within the act of Congress. The act gives jurisdiction to the federal courts in "civil and criminal cases affecting" the black race. Does this affect them?

The victim of the murder was black, and one or more of the witnesses were of the same color. I am not going to repeat (for I could not do more than repeat) the argument of my colleague [Mr. Caldwell] upon the distinction which has been taken between the words "cause" and "case." You will not see the State of Kentucky impaled alive upon a pin's point so sharp as that.

But that is not the important word in the sentence. The construction turns on the meaning of the word "affect," and this court decided long ago, in the *United States vs. Ortega*, that a criminal case (or cause) affects nobody but the party accused and the public. That decision, indeed, is an old one, but I suppose the war has not changed the English language. At all events this is a point on which you have Moses and the Prophets, and if you believe not them you would not believe though one rose from the dead.

It is argued, however, that the words of this act must not be understood in their popular or their legal sense, because that would confine its operation to cases in which negroes are accused, and this, it is said, would be inconsistent with the well-known feelings of Congress and that portion of the people whom Congress then represented. I am willing to admit that this law was passed under the influence of violent party passions, which took the form of extreme enmity to the white people of the South and ultra benevolence, it may be, to the blacks. But I deny that you can incorporate these passions into the statute by mere construction. The law must be interpreted *ex visceribus suis*. The legislature speaks to the country only through the statute book. But why is it inconsistent with the supposed feelings of Congress to take federal possession only of negro cases? It was negroes alone that they desired to protect against the alleged severity of the state courts. This act of Congress makes persons of the black race citizens of the state, and then takes away from the state all power to enforce upon them the duties and obligations of citizens. To accomplish this, what more was necessary than to order that no state court should punish any negro for any violation of a state law? Was not this carrying their party passions into effect by appropriate legislation. And was not this exactly what they did when they declared the state courts incapable of trying any cause which *affects* negroes?

Another authority is cited by our opponents—that of Alexander the Second, King of Muscovy and Autocrat of all the Russias. It is said that some of his serfs were emancipated in 1861, and the decree for that purpose was followed by seventeen ordinances much resembling this act of Congress. You are urged to construe the XIIIth Amendment and the Civil Rights Bill so as to make them consistent with the manifest intention of the American people and their representatives, to follow closely in the footsteps of that enlightened potentate. We are getting along rather fast when the officers of our law can propose to set aside the Constitution that was signed by the sacred right hand of George Washington, and by thirty-nine others, only less illustrious than he was, because it happens to be inconsistent with the decrees of the most ultra despotism in all this world. It is as much a despotism to-day as it ever was. In all those vast dominions from Cronstadt to Siberia, from the frozen ocean to the German line, there is not a single freeman. Ever since the days of Ivan the Terrible, it has been a habit of that despot to change the relative rank of his slaves just as a Southern planter might have promoted a field hand to the dining-room or sent his body-servant out to pick cotton. But he never freed a human being. No slave of his dares to express a hope of liberty for himself or his children, except at the risk of his life. No foreigner sojourning in that country is permitted to open his lips on such a subject. The government of Russia is in sympathy with every other despotism, and whenever a tyrant wishes to fasten the shackles more securely on the limbs of his subjects, the colossal power of Russia is ready to give him aid and comfort. You know how effectually this was done upon Hungary. Does the American Attorney-General think that the American courts and juries ought to be abolished because it is the custom in Russia to murder men by military commissions? Will he advise the President that the states

should be deprived of their autonomy because the will of the Emperor is absolute law in all his provinces? Does he derive his ideas of reconstruction from the same "enlightened" source? Is the example of Nicholas sufficient authority for a repetition in this country of that brutal outrage which he perpetrated in the capital of Poland—which no Christian man can mention without blushing; but which he followed, while the shrieks of his victims were yet ringing in his ears, with that famous proclamation, "*Order reigns in Warsaw!*" Yes, it is Russian freedom, Russian law, and Russian order that the adversaries of the American Constitution have been proposing to give us.

It is not from the exercise of despotic power, nor yet from the headlong passions of a raging people, that we will learn our duty to one another. When the Prophet Elijah stood on the mountain side to look for some token of the divine will, he did not see it in the tempest or the earthquake or the fire, but he heard it in the "still small voice" which reached his ears after those had passed by. We have had the storm of political debate; we have felt the earthquake shock of civil war; we have seen the fire of legislative persecution. They are passed and gone, and now if we do not hearken to the still small voice which speaks to our consciences in the articulate words of the Constitution from the graves of our fathers, then we are without a guide, without God, and without hope in the world.