United States
v.
Cruikshank
92 U.S. 542

IN THE

SUPREME COURT OF THE UNITED STATES

No. 609

THE UNITED STATES,

—VS.—

WILLIAM J. CRUIKSHANK, WILLIAM D. IRWIN, AND JOHN P. HADNOT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF LOUISIANA.

BRIEF FOR THE UNITED STATES

GEO. H. WILLIAMS,
Attorney-General.
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In the Supreme Court of the United States.

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Brief for the United States.

This is a certificate of division between Mr. Justice Bradley and Judge Woods, while holding the circuit court above mentioned, at April term, 1874, upon a motion to arrest judgment, a verdict of guilty having been found upon the first sixteen counts in the indictment.

The indictment (*returned* June 16, 1873,) is for *conspiracy*, under the sixth section of the Enforcement act of May 30, 1870, which is as follows:

"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provisions of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege

granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States." (16 Stat., 141.)

[As the prosecution was commenced before the Revised Statutes went into effect, it is necessary only to add that the provisions of the above section are to be found in section 5508 of that work, (p. 1018;) the only substantial change being that the offense is no longer a felony. That this repeal and re-enactment (Rev. Stat., sec. 5596) do not affect the *prosecution* and *punishment* of this offense, see Revised Statutes, sect. 5598.]

The counts upon which the verdict was found comprise two series (of eight counts each) differing from each other only in that those of the first series charge that the defendants *banded together*, while those of the second charge that they *combined, conspired, &c.* They are to be found in the record, from p. 6 to p. 21, bottom.

The counts in each series differ among themselves in specifying the object of the conspiracy, as being the hinderance and prevention of certain citizens of African descent, &c., from (1) peaceably assembling together, (2) bearing arms, (3) enjoying life and liberty, &c.

Upon the motion in arrest, "the opinions of the justice and judge, who heard the motion, to wit, &c., were opposed in the question whether the said sixteen counts of said indictment are severally good and sufficient in

law, and contain charges of criminal matter indictable under the laws of the United States: The opinion of the said justice being that the said several counts are not, and that neither of them is, good and sufficient in law, and do not, nor does either of them, contain charges of criminal matter indictable under the laws of the United States; and the opinion of the said circuit judge being that the said several counts are, and that each of them is, good and sufficient in law, and do, and each of them does, contain charges of criminal matter indictable under the laws of the United States;

And the opinions of the said justice and judge were also opposed on the question whether the said motion in arrest of judgment should be granted; the said justice being of the opinion that it ought to be granted, and the said circuit judge being of a contrary opinion.

In order to relieve the discussion of difficulties peculiar to some of the counts, which, practically, (U. S. *v.* Pirates, 5 Wheat., 184,) are extraneous to the issue between the United States and the defendants, we will confine ourselves to the 14th and 16th counts, (beginning at the bottom of pp. 18 and 20 of the record,) which, as intimated above, are in effect the same as counts 6 and 8 of the first series.

The substance of these counts is:

14. That the defendants, [and others,] on the 13th of April, 1873, at the parish of Grant, in the State of Louisiana, feloniously conspired, one L. N. and one A. T., each a citizen of the United States, of African descent, and a person of color, "to injure, oppress, threaten, and intimidate," with the intent such citizens "to *prevent and hinder* in their free exercise and enjoyment of

their several and respective right and privilege to vote at any election to be thereafter, according to law, had and held by the people in and of the said State of Louisiana, or by the people of and in the said parish," &c.; the defendants well knowing the said citizens to be well qualified and entitled to vote at any such election as aforesaid, contrary to the form of the statute, &c.

16. This count corresponds with that above down to the words *prevent and hinder*, after which it proceeds thus: "in their several and respective free exercise and enjoyment of each, every, all and singular the several rights and privileges granted or secured to the said L. N. and the said A. T. in common with all other good citizens of the said United States by the Constitution and laws of the United States of America, contrary to the form," &c.

One question, therefore, presented to this court is, whether persons who have been found guilty of *conspiring* to prevent certain duly-qualified citizens from voting at *any* election in the State of Louisiana, (which expression, of course, includes all Federal elections in such State), and also guilty of conspiring to prevent such citizens from exercising *any one* of the rights and privileges granted or secured to them by the Constitution of the United States, are guilty of a crime of which the United States can take, and has taken, cognizance. Besides this, there is a question whether the counts containing the charges are in due technical form.

We will endeavor to maintain (1) that one or both of the above counts contain a charge of a crime cognizable by the United States, in the court in which it was tried; (2) that such counts are sufficient in form.

It is not necessary to detain the court by discussing the 14th count at length. The charge therein is also comprised under the general language of the 16th count. We will therefore give our special attention to the matters alleged in the latter.

I. *The crime charged is cognizable by the United States, in the court in which it was tried.*

A *conspiracy* may be an offense against the United States. If it be to do something which directly concerns the United States, and if it have been made criminal by statute, it is within Federal jurisdiction.

Although it be to do something which directly concerns the United States, it is not within Federal criminal jurisdiction unless itself made criminal by statute, as there is no common law of crime under the United States.

But where Congress has enacted that a combination to effect an object which directly concerns the United States shall be criminal, nothing material occurs to us to suggest that such legislation is not both competent and proper. There are several instances of such legislation; one of which is of long standing, (3 March 1825, § 23, 4 Stat., 115,) has been often enforced, and never seriously questioned from the present point of view, so far as we are informed. (See, also, acts of 31 July, 1861, § 1, and of March 2, 1867, § 30; 12 Stat., 284, and 14 Stat., 471.)

By the section quoted above from the Enforcement-law, so far as material here, Congress has enacted *that if two or more persons shall band or conspire together with intent to injure, oppress, threaten, or intimidate any citizen with*

intent to prevent or hinder his free exercise of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, &c.

We might content ourselves here with saying that inasmuch as the XIVth amendment to the Constitution establishes the relation of citizenship of the United States independently of any other citizenship, and confers upon Congress the power to enforce that relation by suitable legislation, it seems plain that if such *citizenship* be not merely a *sound*, signifying nothing; if it include (ex. gr.) political and other "rights and privileges" *respecting the Government of the United States*, this amendment empowers and *thus makes it the duty of* Congress to legislate so as to enforce those rights and privileges, whether by protection against criminal assault or otherwise.

This is an express and a fresh signification of the will of the people of the United States upon this point, but it is not the origin of that *duty*, for it seems that this statute would have been constitutional *at any time since* 1789, as regards (ex. gr.) the right to vote in Federal elections; the right to resort to the protection of Federal courts; the right to hold Federal offices; the right to inter-state and foreign *commerce;* and the right to assemble and consult about Federal politics, and to petition Congress for redress of Federal grievances. (Slaughter-house cases, 16 Wall., p. 79.)

As these rights owe their existence to the Federal Government, and as, *vice versa*, the Federal Government owes its value, if not its existence, very much to their exercise, it seems that nothing can be said to impeach the validity of Federal legislation to protect them against

any opposer. (See United States *vs.* Quinn, 8 Blatch., 48; and the Opinion of Mr. Justice Bradley in the present case, below, Am. Law Reg., Oct., 1874.) Such protection seems indeed to raise not so much a question of POWER in the United States, as of DUTY.

As an illustration: *The right to vote in Federal elections* is entirely a Federal right, and *cases* affecting it must be *cases under the Federal Constitution.* It makes no difference that the Constitution of the United States has chosen to define this right by referring to a definition in the several State constitutions. The latter definition is, the reference, taken to be incorporated into the United States Constitution, and cannot affect the character of the vote as a *Federal* right.

This right is entitled to all the guaranties which the Federal Government can afford to any right which it bestows. We mean no offense by comparing it, for instance, with the well-known Federal right to reclaim fugitives from labor; but we assert its equality with that right only to avail ourselves of what has been said in connection with the latter by this court, in the case of Prigg *vs.* Pennsylvania, 16 Pet., 539.

After stating that the constitutional provision that fugitives from labor *shall be delivered up* gives rise to many questions, such as, *By whom? In what mode? How enforced?* &c., the court proceeds:

> These and many other questions will readily occur upon the slightest attention to the clause; and it is obvious that they can receive but one satisfactory answer. They require the aid of legislation to protect the right, to enforce the delivery, and to secure the subsequent possession of the slave. If, indeed, the Constitution guaranties the right, and if it requires the delivery upon the claim of the owner, (as cannot well be doubted,) the natural inference certainly is, that the National Government is clothed with the appropriate

authority and functions to enforce it. The fundamental principle, applicable to all cases of this sort, would seem to be that where the end is required the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted. The clause is found in the National Constitution, and not in that of any State. It does not point out any State functionaries, or any State action to carry its provisions into effect. The States cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation to insist that the States are bound to provide means to carry into effect the duties of the National Government nowhere delegated or intrusted to them by the Constitution. On the contrary, the natural, if not the necessary, conclusion is, that the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper Departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution.

The remark of Mr. Madison, in the Federalist, (No. 43,) would seem in such cases to apply with peculiar force: "A right," says he, "implies a remedy; and where else would the remedy be deposited than where it is deposited by the Constitution?" meaning, as the context shows, in the Government of the United States.

It is plain, then, that where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property, capable of being recognized and asserted by proceedings before a court of justice, between parties adverse to each other, it constitutes, in the strictest sense, a controversy between the parties, and a case "arising under the Constitution" of the United States, within the express delegation of judicial power given by that instrument. Congress, then, may call that power into activity for the very purpose of giving effect to that right; and, if so, then it may prescribe the mode and extent in which it shall be applied, and how and under what circumstances the proceedings shall afford a complete protection and guarantee to the right. * * *

But it has been argued that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body; and therefore it is void. Stripped of its artificial and technical structure, the argument

comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the National Government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although, in a practical sense, they may become a nullity from the want of a proper remedy to enforce them or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights, and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation exercise powers or enact laws beyond the powers delegated to it by the Constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end. Thus, for example, although the Constitution has declared that Representatives shall be apportioned among the States according to their respective Federal numbers, and, for this purpose, it has expressly authorized Congress, by law, to provide for an enumeration of the population every ten years, yet the power to apportion Representatives after this enumeration is made is nowhere found among the express powers given to Congress, but it has always been acted upon as irresistibly flowing from the duty positively enjoined by the Constitution. Treaties made between the United States and foreign powers often contain special provisions, which do not execute themselves, but require the interposition of Congress to carry them into effect, and Congress has constantly, in such cases, legislated on the subject; yet, although the power is given to the Executive, with the consent of the Senate, to make treaties, the power is nowhere in positive terms conferred upon Congress to make laws to carry the stipulations of treaties into effect. It has been

supposed to result from the duty of the National Government to fulfill all the obligations of treaties. The Senators and Representatives in Congress are, in all cases, except treason, felony, and breach of the peace, exempted from arrest during their attendance at the sessions thereof, and in going to and returning from the same. May not Congress enforce this right by authorizing a writ of *habeas corpus*, to free them from an illegal arrest in violation of this clause of the Constitution? If it may not, then the specific remedy to enforce it must exclusively depend upon the local legislation of the States; and may be granted or refused according to their own varying policy or pleasure. The Constitution also declares that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. No express power is given to Congress to secure this invaluable right in the non-enumerated cases, or to suspend the writ in cases of rebellion or invasion. And yet it would be difficult to say, since this great writ of liberty is usually provided for by the ordinary functions of legislation, and can be effectually provided for only in this way, that it ought not to be deemed by necessary implication within the scope of the legislative power of Congress.

We adopt this argument, and, applying its doctrines to the right to vote in Federal elections, we conclude (may it not be said *a fortiori?*) that it is competent for the United States to protect that right by the exercise of all its functions, legislative, executive, and judicial; and that such competency does not spring from the recent constitutional developments, but is coeval with the earliest adoption of the Constitution—has at all times been a part of its very *fibre*—and, as regards importance, may be said to be an *article* of standing or falling *sovereignty*.

Whilst it may be that it is only because of the recent Amendments that *persons of the African race* share in this *secondary* right, (*i. e.*, of *protection*, &c.,) the right itself is as old as any of those *primary* rights for which it may be vouched.

The above section of the Enforcement act is, therefore, an ample warrant for the prosecutions which it commands by way of protection of Federal rights and privileges. How far its provisions cover the case before the court will be discussed in connection with what we have to say about the form of the counts.

It has been suggested that by the third section of the Civil-rights act of 1866, (14 Stat., 27,) which was re-enacted by the eighteenth section of the Enforcement act, (16 Stat., 144,) jurisdiction over such prosecutions is vested *exclusively* in the several District courts of the United States. We refer to the case of United States *vs.* Holliday, 3 Wall., 407, as showing that the Circuit courts have in such cases concurrent jurisdiction. (See Rev. Stat., sec. 629, clause 20.)

II. *The 14th and 16th counts (involving also counts 6 and 8) are sufficient in form.*

The question involved here concerns only *statutory conspiracy*, and as the authorities in regard to certainty in criminal pleading turn a great deal upon the consideration whether the pleading concerns a *common-law crime*, or only one that is of *statutory* creation; and whether it be for a crime *actually committed*, or for a mere *conspiracy*, we will confine ourselves to a comparison of the *certainty* exhibited by the counts in question, with the standard of that quality required by the authorities in cases of Conspiracy and of Statutory crimes.

1. We first call attention in general to the 8th section of the act of 1872, ch. 255, (17 Stat., 198,) viz: "That no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial,

judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." (Rev. Stat., sec. 1025.)

2. Irrespective of the above statute, there seems to be due certainty, of *venue*, of *time* and *place* of the conspiracy; of the *parties* against whom the conspiracy was made, as to the *status* of the latter as citizens of the United States, &c., and of *conclusion*.

3. In other respects, the charge is, in substance, that *the defendants conspired with the intent one L. N., &c., to injure, oppress, threaten, and intimidate, with intent the said L. N., &c., to prevent and hinder in their several and respective free exercise and enjoyment of each and every, all and singular, the several rights and privileges granted and secured to the said L. N., &c., in common with all other good citizens of the said United States, by the Constitution and laws of the United States, &c.*

The corresponding provisions of the statute are, *If two or more shall conspire with intent to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, such person shall be held guilty of felony, &c.*

It appears by inspection that *the words of the statute* have been pursued very closely in the indictment. This is in accordance with the rule of pleading in such cases, as laid down in all the authorities.

Wharton tells us:

> It is a well-settled general rule, that in an indictment for an offense created by statute, it is sufficient to describe the offense in the words of the statute; and if, in any case, the defendant

insists upon a greater particularity, it is for him to show that, from the obvious intention of the legislature, or the known principles of law, the case falls within some exception to such general rule. But few exceptions to this rule are recognized. Where the words of the statute are descriptive of the offense, the indictment should follow the language, and expressly charge the described offense on the defendant, or it will be defective. It is necessary that the defendant should be brought within all the material words of the statute; and nothing can be taken by intendment." (Criminal Law, vol. 1, sec. 364.)

We also cite Bishop on Statutory Crimes, secs. 575, &c.; Bishop on Crim Proced., 2d ed., secs. 608, 612, and secs. 623, &c; in the last of which books, as cited, is contained a full discussion of the rule, and also of *the exceptions thereto.* Whiting *vs.* The State, 14 Conn., 487; and State *vs.* Lockbaum, 38 Conn., 400; Mason *vs.* The State, 42 Ala., 543; State *vs.* Cooke, 38 Vt., 437; United States *vs.* Gooding, 12 Wheat., 460, and United States *vs.* Mills, 7 Pet., 138.

The present is a case of statutory *felony*, but this perhaps makes *no* difference under the provisions of the act of 1872 above quoted, (see United States *vs.* Staats, How., 41,) and probably never made a *specific* difference, beyond that of rendering necessary the use, in some form, of the word *felonious.* (Regina *vs.* Gray, 9 Cox Cr. Cases, 417; Erle's Case, 2 Lewin, 133.)

The application of the above rule and its exception is to be determined in great measure by *precedents:* bearing in mind a general application of the rule, that the certainty required in indictments is such as serves *to identify* the issue upon trial with that passed upon by the grand jury, *to inform* the defendant of what it is that he is to answer, *to warrant* the jury in its finding upon the premises, and the court in its judgment thereupon, and

also, in case the defendant is put on trial a second time for the same matter, *to afford a proper basis* for his defense under a plea of former conviction, or acquittal. (1 Chitty's Crim. Pl., 168.)

We submit that in the present case the statute expresses *the facts* which make the offense, and, therefore, all that is necessary to state in the indictment.

The case is one in which the statute has itself *created and defined the offense*, and therefore precedents of indictments upon statutes which affect offenses *already existing*, or which, in describing the offense, use words of legal art at common law, are not in point. (See Bishop, Stat. Crimes, sec. 381.)

a. The *rights*, a conspiracy to hinder whose exercise is rendered indictable by the statute before us, are described therein as "any rights or privilege granted or secured to him by the Constitution or laws of the United States."

The sixteenth count of the indictment before us charges that the defendants conspired against *each and every, all and singular*, of such rights and privileges of the citizens named.

A conspiracy having a vast object must nevertheless be described *in its own likeness*, and does not thereby become liable to censure as *vague;* as in cases where indictments charge a conspiracy to cheat *indefinite individuals* or *the public*. (Judd's case, 2 Mass., 329. See also Harley's case, 7 Met., 506, and 2d Bishop, Cr. Proced., 1866, 173.)

It follows, indeed, from Harley's case that, if the count had charged that the conspiracy was against *some named one* of the rights and privileges of Nelson, &c., proof of a conspiracy against *all* such rights would not

have supported it. The conspiracy must be charged as it was *in fact*, and not as what it was *in legal conclusion.*

It is quite conceivable that a conspiracy may have had an object of no less extent than that here charged. There may be conspiracies to do what may be called *political murder*, *i. e.*, to deprive a citizen of *all* his political rights, as well as conspiracies to affect political mayhem, or, so to say, mere battery. Each of these is contemplated, and is covered by the statute. Its words protect the rights referred to, severally and collectively. If the indictment before us had charged that the conspiracy was aimed at *two* specified rights, no fault in pleading would have been committed, although the burden of proof for the prosecution might, perhaps, have been greater than if it had specified only *one*, and at the same time the defense rendered correspondingly more easy. This is true (and, as to the latter part of the proposition, in greater degree) of a case in which *all* of those rights are involved. To include in a description "all" of such a class of objects, is as specific as to mention only *any named one* of them. *The burden* upon the prosecution may be greater, but it seems plain that the notice to the defendant of what he is to answer is, in a legal sense, entirely definite, and that the basis for a subsequent proof of a *former conviction* or *acquittal* is all that is necessary. All that he will need upon a plea of *former conviction*, &c., is to show that the former proceedings involved the matter at issue in the latter, which is always, to as great an extent as here, to be determined by parol proof of what previously transpired in the evidence. Wharton, Cr. Pl., (1868,) secs. 569, &c.

If it be suggested that the 9th section of the act of 1872, ch. 255, (17 Stat. at L., 198; Rev. Stats., sec. 1035,) by providing that a defendant may be found guilty of any offense *necessarily included* in that with which he is charged, nullifies this argument in a great degree, we submit that such statute does not alter the rules of *pleading;* that its whole object is to make old forms of pleading cover cases not theretofore included in them; and that to attribute to it the effect of requiring indictments to be more specific than before, is, so far, to defeat its object, which is to *diminish* the scope of technical objections.

b. The means by which the conspiracy was to be rendered effectual are specified in the statute by the words "injure, oppress, threaten, or intimidate." The indictment copies these words *conjunctively.* (1 Bishop Cr. Proc., [1866,] sec. 333.)

Here, again, it is conceivable that the defendants proposed to use all of these means, and not one only.

But a question is made as to the *certainty* of the above expressions. It is suggested that the prosecution ought to have given a detail of the acts relied upon as "*injury,*" &c., and thus to have allowed the court to say whether the detail amounted in judgment of law to *injury,* &c.

The authorities recognize, at this point, a distinction betwixt the *certainty* required in cases of conspiracy, and that required in cases of executed violence. Less *certainty* is needed in the former class of cases. (Arch. Cr. Pl., [1871,] 55 and 939; Mulcahy *vs.* The Queen, Law Rep., 3 Eng. and Irish Ap., 306.)

For, in the latter class, the pleader can always inform himself of the specific acts of *injury, oppression,* &c., done by the defendant. *They are past,* and so have received their final form. But it may be that in shaping a *con-*

spiracy, which in its most definite form *rests in resolutions, written or spoken*, (Hunt's Case, 4 Metc., Mass., p. 125,) the conspirators have expressed their intentions as to the *means*, by the *very words* employed in the indictment!

We are not understood to speak here of those sorts of conspiracy where, as by the act of 1867, ch. 170, the law requires an *overt act* in order to complete the offense. (14 Stat., 484.)

Common-law conspiracies are said to be of two classes, *i. e.*, either to effect an illegal (*not necessarily criminal*) purpose, or to effect a legal purpose by illegal means. (Hunt's Case, *ubi supra*, p. 123; Queen *vs.* Warburton, Law Rep., 1 Cr. Cas. Reserved, 274.) As the present is a conspiracy created by statute, we are concerned in the distinctions observed as to these classes, only in a subordinate degree. To make out the offense, both the object and the means must be those which are specified in the act, and therefore it may be more accurate to say that statutory conspiracies make a *third* class.

The reason for holding, in such common-law conspiracies as aim at a legal purpose by illegal means, that such means must be specified, *in order that the court may see that they are illegal*, does not apply to such statutory conspiracies as designate both the *objects* and the *means* upon which they operate. In the latter, whether the object be *legal* or *illegal*, the means must be stated; *i. e.*, the description in the statute must be followed, and that description is complex, viz: *not* that what is punishable is a conspiracy *to effect a certain object*, but a conspiracy *to effect that object in a certain way.*

In the present case the object mentioned in the act is, in the general sense of the word, *illegal*, and so also are

the *means;* even supposing them not to be *indictable* in the courts of the United States.

We submit, therefore, that this is a matter to be discussed by the light of the rules for criminal pleading as regards *statutory offenses,* and as regards *conspiracy* in general.

As to statutory offenses, the only general rule, as this court has said, is, *to allege the offense in the very terms of the statute.* (12 Wheat., p. 474.) The cases not included under this principle *establish no general rule; on the contrary, the course has been to leave every class of them to be decided very much upon its own peculiar circumstances.* (Ibid.)

We will, therefore, call attention to such precedents in pleading as seem nearest to that before us.

Among the very numerous cases which, under the guidance of text-books and digests, we have seen, none seems to be more like the present than that of Regina *vs.* Rowlands and others, (9 Eng. L. and E., 287, and 17 A. and E., N. S., 671, [3 Wharton, 2323;] Paley Convictions, 209, n.; Arch. Cr. Pl., [1871,] 939,) decided in 1851 by the Court of Queen's Bench, (Campbell, Patterson, Coleridge, and Earle,) upon a motion in *arrest,* after an elaborate argument for the defendant, and an *advisari,* the Lord Chief-Justice delivering the opinion.

It was an indictment for Conspiracy at common law to commit acts rendered criminal by the 6th George IV, ch. 29, s. 3. There were twenty counts; upon the sixteenth, seventeenth, and nineteenth of which, after intimation by the court that they might be too *vague,* a *nolle prosequi* was entered. The other counts were held to be "perfectly good."

The act in question provides that "if any person shall, by violence to the person or property, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavor to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade, or business, to depart from his hiring, employment, or work, or to return his work before the same shall be finished, or prevent or endeavor to prevent any journeyman, manufacturer, workman, or other person not being hired or employed from hiring himself to, or from accepting work or employment from any person or persons;" "or if any person shall by violence to the person or property of another, or by threats or intimidation, or by molesting or in any way obstructing another, force or endeavor to force any manufacturer or person carrying on any trade or business, to make any alteration in his mode of regulating, managing, conducting, or carrying on such manufacture, trade, or business, or to limit the number of his apprentices, or the number or description of his journeymen, workmen, or servants; every person so offending, or aiding, abetting, or assisting therein, being convicted," &c., (summarily before justices,) shall be imprisoned, &c. (See note to 17 A. & E., N. S., (172 B,) p. 678.)

The indictment charged that the defendants conspired (1) by *molesting* certain workmen hired by R. P. and G. H. P. in their trade, &c., to force and endeavor to force said workmen to depart from their hiring, (2) by *using threats* to, (3) by *intimidating* said workmen to force them, &c., (4) by the *molestation* of, &c., (5) by *threatening*, (6) by *intimidation.*

This will serve as a sample of the various counts, except that the 14th and 15th, added to the *means* men-

tioned in other courts—"intoxicating;" and the 18th—"intoxicating, and thereby rendering senseless."

The case was argued for the defendants by the attorney-general, Sir A. Cockburn, and by four other counsel. The argument is instructive both for what was said by the counsel and for what was suggested in interruption by the court. Some of the *points* were, (1) that "molesting" was no word of art, and therefore that the *acts of molestation* should have been set out; (2) that "threats" was liable to the same objection, and unless it was shown what the threats were, it would be presumed that they were harmless; (3) so for "intimidating," which, in O'Connell's case, (II. Cl. & F.,) had been decided to be too general; (4) so also "obstructing."

The court said, (9 Eng. L. & E.:) "The principal ground of objection was, that they do not set out the means and nature of the molestation or intimidation charged. We think that is quite unnecessary. These counts, in fact, follow the words of the statute which is thus shown to have been infringed, and these words have a legal meaning stamped upon them. A distinction may be made between a conviction for doing the acts prohibited by the statute and an indictment for a conspiracy which charges those acts as the means by which another offense is carried out. Here the offense consists of a conspiracy to violate an act of Parliament, which is an offense at common law; and the acts prohibited by the statute are charged as the means by which the conspiracy is to be effected. We think that the means so alleged are sufficiently specified," &c.

The only points in which this case differs from ours do not affect its value as an authority. For *conspiracy at common law* to do an *act* criminal by statute, such act

being defined by the statute as the effecting of a certain end by a certain means, seems to differ in nothing material as regards the rules of pleading from *conspiracy created by a statute that makes a similar definition of the object intended.* We have met with no authority, and no reason suggests itself, for applying different standards of *certainty* in these cases.

That the case before Lord Campbell was a misdemeanor, while the present, when instituted, was a felony, is not a matter of importance in this connection. In this connection, it will be borne in mind that conspiracy, whether misdemeanor or felony, is a *quasi infamous offense*, and originally at common law was followed by "villainous judgment," very much as is inflicted here by the Enforcement act. (Ch. Cr. Pl., 3d, 1144.)

The suggestions in Staats' case (8 How., 4) render it doubtful whether any distinction in pleading exists between misdemeanors and felonies in the courts of the United States—at all events, excepting that which is involved in the rather obscure rule that courts are never disposed to be as strict as to less offenses as they are in reference to those of greater consequence. As an illustration, we submit that the rule of pleading as to the offense under consideration remains under the Revised Statutes as it was by the act of 1872, *the punishment being the same* although the offense is no longer a felony.

As regards statutory offenses, we have met with no rule defining a difference between pleading in misdemeanors and in felonies, (except formerly as to the word *felonious*,) although here and there the courts have called attention to the fact that the case before them was a *misdemeanor*, as affording some reason for their decision.

We submit that where the case is one of *conspiracy*,

exhibiting (as here) a rigid adherence to the words of the statute, the rule is the same as to both classes. (See Erle's case, 2 Lewin, 133; Gray's case, 9 Cox Cr. Cas., 417.) If the statutory words "obstruct," "molest," "threaten," "intimidate," convey sufficient meaning in misdemeanors or less serious offenses, they do so equally in more serious offenses, or in felonies. This will leave it an open question whether in less offenses the court might be willing to tolerate a greater departure from the words (by using synonyms, &c.) in less, than they might in greater offenses.

In this connection we also submit that as the trial, and also this motion, occurred after the passage of the Revised Statutes, which reduced the offense to the grade of misdemeanor, that revision is to be treated as a statute of jeofails as to any distinction (supposing such to exist) in pleading between statutory felony and statutory misdemeanor, particularly if such distinction be based upon considerations of the hardship of allowing a defendant to be convicted of a felony. A defendant who declines to move to *quash*, thereby waives certain objections which cannot be urged *in arrest*, (Wharton Cr. Pl., 395, &c.) It seems that thereby he also submits himself to whatever effect any statutory amendments in the mean time tending to *lessen the severity of the law* may produce, expressly or by implication, upon his situation. He takes the benefit of such amendment *cum onere*.

We dismiss Regina *vs.* Rowlands with the remark that the counts which the court *were disposed* to think too vague departed from the words of the act, which contained no provision as to the "intimidation," "prejudice," or "oppression" of the employer of the workmen.

O'Connell's case, (11 Cl. and F., 155,) cited for the defendants in the above case, was for Conspiracy entirely *at common law*, and therefore what is there said as to the use of the word *intimidation* is not in point here. Another pertinent distinction upon this point between that case and Rowland's was suggested by the Lord Chief Justice, who had acted as one of the law lords in the former, viz, that in O'Connell's case the count did not say who were to be the objects of intimidation. Besides, there seems to be good sense in the suggestion made by Lord Brougham, in O'Connell's case, (p. 332,) that even at common law there is no substantial difference between *intimidating* and *impressing with fear*.

We will now present briefly and informally some other authorities bearing upon this question.

People *vs.* Underwood, 16 Wend., 546, (see Wharton Cr. Prec., 507:)

The statute in question made it a misdemeanor "to secrete, assign, convey or otherwise dispose of" certain property.

The indictment charged the offense in the same words conjunctively, leaving out *otherwise*.

Commonwealth *vs.* Eberle, 3 Serg. and R., 9:

Certain persons had *conspired* "with their bodies and lives" to effect a certain object.

The indictment used the same words.

R. *vs.* Cooke, 2 B. & C., 618: and Wharton's Prec., (647.)

A count for conspiring "by *threats* of the power of said R.," &c., without overt act.

So in appendix to 1 Cox Cr. Cas., p. 27, (Wharton's Prec., 650,) a count for conspiracy "by divers indirect subtle, and fraudulent means and devices to *injure, oppress*, impoverish, and wholly ruin R. R., and wholly to prevent him from carrying on his trade," &c.

U. S. *vs.* Kelley, 11 Wheat., 417.

The statute (1 Stat., 115, s. 12) provided that if any seaman shall "endeavor to make a revolt."

The indictment charged that the defendant "did endeavor to commit a revolt," &c. (See also 4 Mason, 105; 1 Sumner, 168.)

[So it was in England as to "making a revolt," although the offense was capital. (See U. S *vs.* Gooding, 12 Wheat., p. 476.) In the United States, since the act of 1835, (4 Stat., 775,) which defines the acts that amount to a revolt, it is better to adopt that definition into the indictment. Whart. Prec.]

U. S. *vs.* Patterson, 1 W. & M., 305. The act (4 Stat., 776, S. 2) provided that if any one of a crew shall assemble with others "in a tumultuous and mutinous manner."

The indictment used the same words.

So, the following expressions: "Knowingly and willfully [willingly] obstruct, resist, or oppose" any officer. (U. S. *vs.* Stowell, 2 Curtis, 153.)

[This indictment was defective at another point.]

"Force on shore," (4 Stat. 115, S. 10,) and (Whart. Prec., 931.)

"Inflict cruel and unusual punishment," (4 Stat., 775, S. 3,) and (Wheat. Prec., 925.)

"Damage with intent to destroy." (Gray's case, 9 Cox, Cr. Cas., 417; Statute on p. 418.)

"Destroy," (9 Stat. 441,) and (Whart. Prec., 575.)

In 2d Bishop Cr. Proced., (1866,) sec. 204, is given an English form of a conspiracy to *intimidate, prejudice, and oppress* one J. G. in his trade as agent, &c., and to prevent the workmen in his employ from continuing to work, &c.

"Menace," (3 Chitty Cr. Pl., 807,) and statute in note.

If any one, by "fraud, sleight, cozenage, deceit, circumvention, or unlawful device, or ill practice" in playing at cards, &c., (3 Chitty Cr. Pl., 681, and statute in note.)

From the authorities we therefore conclude that the courts attribute a definite meaning to the words *threaten*, *injure*, *oppress*, and *intimidate*, as means to commit a wrong; that, if this be not so at common law, it is true where the proceeding before ths court is under legislation using those words in defining a new crime; and thirdly, that where the case is one of an indictment for a conspiracy created by statute, or for a conspiracy at common law to commit a statutory crime, there is a still higher degree of propriety in resting upon such words alone. The above words express *facts*, and not mere *legal conclusions;* at all events—which is all that is material here—in describing a statutory conspiracy, defined by the legislature in those terms.

In reference to the 14th count, in which the object of the conspiracy is charged to be the *right of L. N., &c., to vote*, we submit that the expression that the defendants well knew L. N., &c., "to be respectively well and law-

fully qualified and entitled to vote," &c., is a sufficient statement of such qualification. (Whart. Prec., 1018.) In other respects the count is included in what is said above upon the 16th count, although not subject to the objection of *vagueness* alleged against that.

Upon the whole we submit that it being alleged that Nelson, &c., were citizens of the United States, and well qualified to vote at any election in Louisiana, this court will take notice of the Federal rights (of voting and all other) which pertained to them in that character; that a conspiracy to deprive them of such rights may well be rendered indictable in the courts of the United States; and that the conspiracy of which the jury below have found them guilty, is, in the 6th, 8th, 14th, and 16th counts of the indictment, properly set forth according to technical rules, and is within the words of the act.

Finally, the counts in question are not to be read as referring to other rights than those which the courts of the United States can thus protect. If there be any "right to vote," or if there be any "rights and privileges" whatever which may be thus protected, these counts refer to them and them only.

If the learned counsel for the defendants can show that the words of the counts, taken in some large sense, include rights enjoyed by Nelson, &c., because of their connection with another political society, that are not in this particular way to be protected by the courts of the United States, we reply that such conclusion is not material, without a demonstration that there are no rights (to vote, &c.,) enjoyed because of connection with the United States. So that there be *some* such we are not in-

terested in this connection to say whether they be more or less, or to settle the debate whether certain rights are upon this or that side of the boundary.

GEO. H. WILLIAMS,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 609

UNITED STATES

—VS.—

C. C. NASH, et als.

WILLIAM J. CRUIKSHANK, JOHN P. HADNOT AND WILLIAM B. IRWIN

ERROR FROM CIRCUIT COURT, DISTRICT OF LOUISIANA

BRIEF FOR DEFENDANTS

P. PHILLIPS,
DAVID S. BRYON,
Attorneys.

WM. R. WHITAKER,
E. JOHN ELLIS,
Of Counsel.

No. 609.

SUPREME COURT,

OF THE UNITED STATES.

UNITED STATES

versus

C. C. NASH, ET ALS.

WILLIAM J. CRUIKSHANK, JOHN P. HADNOT AND WILLIAM B. IRWIN.

ERROR FROM CIRCUIT COURT, DISTRICT OF LOUISIANA.

The indictment is based upon the the sixth and seventh sections of the act of Congress, approved May 31st, 1870, entitled "An Act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes." (16 Statutes, 144). The 6th section reads as follows—"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any of the provisions of this act, or to injure, oppress, threaten or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony, and on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the Court," etc.

The next section of the same act declares: "That, if in the act of violating any provision in either of the two preceding sections, any other felony, crime or misdemeanor, shall be committed, the offender, on conviction of the violation of said sections, shall be punished for the same, with such punishments as are attached to said felonies, crimes, and misdemeanors, by the laws of the State in which the offence may be committed."

The prisoners are charged under an indictment containing thirty-two counts. The first eight contain the substance of the charges; the second eight in effect repeat the first eight and the remainder are a reiteration of them, with the addition of the charge of murder committed whilst carrying out the purposes charged in first eight counts. The first count charges that the prisoners on the 13th day of April, 1873, at Grant Parish, in the District of Louisiana, unlawfully and feloniously did band together, etc., and one Levi Nelson and one Alexander Tilman, being citizens of the United States, and of African descent, to hinder and prevent in the free exercise and enjoyment of the right to peaceably assemble together with each other, and other citizens of the United States, for a peaceable and lawful purpose, the same being a right granted and secured to the said Nelson and Tilman, in common with all other good citizens of the United States, by the Constitution and laws of the United States.

The second count charges them with a like banding, etc., to deprive the said Nelson and Tilman of the free exercise and enjoyment of their constitutional right to bear arms for a lawful purpose.

The third count charges a like banding together with intent to injure, etc., the said Nelson and Tilman, with the purpose of depriving them of their lives and liberty without due process of law.

The fourth count charges an intent to injure, etc., the said Nelson and Tilman, and hinder them from the free exercise and enjoyment of their rights and privileges to the benefit of all laws

and proceedings enacted by the United States and the State of Louisiana, for the security of their person and property, at that time enjoyed within the State of Louisiana by white citizens of the State.

The fifth count charges the intent to injure and oppress, etc., with the purpose to prevent and hinder the said Nelson and Tilman on account of their African descent, in the enjoyment of their constitutional and lawful rights, privileges, immunities and protection, granted and secured to them as citizens of the United States and State of Louisiana.

The sixth count charges with intent to injure, etc., with the purpose to prevent and hinder the said Nelson and Tilman in the free exercise of their *right to vote* at any election to be thereafter by law held in the State of Louisiana and in the parish of Grant, said Nelson and Tilman being lawful voters.

The seventh count charges the intent to injure, etc., with the purpose to put Nelson and Tilman in great fear of bodily harm, because they, having a lawful and constitutional right so to do, had voted at an election held on the 4th day of November, 1872, and at divers other elections before that time held by the people of the State of Louisiana.

The eighth count charges an intent to hinder and prevent the said Nelson and Tilman, being citizens of the United States, of African descent, in the enjoyment of every, each, and all and singular, the several rights and privileges granted and secured to them by the Constitution and laws of the United States.

The act on which this indictment is founded, has been declared to be "the law of the land," (see Judge Wood's charge to the jury on first trial in this case, N. O. Republican, March 14th, 1874,) and all the charges in the indictment within the jurisdiction of the Circuit Court of the United States. If this be so, the act must be *based* on some article of the Constitution of the United States.

It is hardly necessary to remark that the government of the United States is a government of limited powers; that it is not a kingdom, like France and Great Britain, with *all-pervading powers;* that the States which formed the Government, before and at the time they formed it, possessed the powers and capacities of kingdoms; and that they delegated to the General Government, certain specific powers, necessary and proper to be exercised for the common benefit of all. These powers, though few in number, were great and important; they were the right to deal with for eign nations, to form treaties, to make peace and war, to regulate commerce, coin money, and to regulate and conduct the postal affairs of the country and maintain an army and navy, etc.

Those powers not granted to the Federal Government were retained by the States; and among those, was the power to protect the lives, liberties and property of their citizens, while within the limits of the State; this power was not granted to the Federal Government in the original Constitution, nor was any authority assumed by it in regard thereto, until within a few years past. The Government of the United States assumed to protect those great rights of the citizen of a State, only when they were in *peril* on the high seas, or within the domains of foreign countries.

Nor can it be said that the early amendments to the Constitution give any color or support to this statute.

The first ten articles of amendment to the Constitution were adopted so soon after the original, that they may almost be considered as part of the original. They were the *offspring of the jealousy and fear of the people*, that the Federal Government would *trench* upon the powers of the States, and gradually swallow them up, and thus become a great *central, dominating* and resistless power. The States believed that the liberty of the people depended upon the *integrity* of the States, they therefore suggested these several amendments to the Constitution, which are so many *inhibitions* on the power of the Federal

Government. They were so regarded at the time of their adoption, and the Supreme Court of the United States has uniformly confirmed that opinion, whenever their *meaning, purpose and intent*, has been called in question before that tribunal.

The case of Barron vs. the Mayor and City Council of Baltimore, see 7 Peters, 247, is the leading case, declaratory of the fact, that the first ten articles of amendment to the Constitution of the United States are inhibitions on the powers of the General Government, and not inhibitions on the powers of the States Chief Justice Marshall delivered the opinion of the Court.

He says, "the judgment brought up by this writ of error, having been rendered by the Court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the 25th section of the judicial act.

"The plaintiff in error, contends that it comes within that clause in the fifth amendment to the Constitution, which inhibits the taking of private property for public use without just compensation. He insists, that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of the State as well as that of the United States.

"If this proposition be untrue, the Court can take no jurisdiction of the cause.

"The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual States. Each State established a Constitution for itself—and in that Constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government, were to be exercised by itself; and the limitations on

power, if expressed in general terms, are naturally, and we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes.

"If these propositions be correct, the fifth amendment must be understood as restraining the powers of the General Government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested, such as they deemed most proper for themselves. *It is a subject on which they judge exclusively*, and with which others interfere no further than they are supposed to have a common interest.

"The counsel for the plaintiff in error, insists that 'the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State Governments, as well as against that which might be attempted by their General Government.' In support of this argument he relies on the inhibitions contained in the 10th section of the first article.

"We think the section affords support, if not a conclusive argument in support of the opinion already indicated by the Court.

"The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the General Government. Some of them use language applicable to Congress; others are expressed in general terms. The third clause, for example, declares that 'no bill of attainder or *expost facto* law shall be passed.' No language can be more general; yet the demonstration is complete that it applies solely to the Government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that 'no State shall pass any bill of attainder or *expost facto* law.' This provi-

sion, then, of the 9th section, however comprehensive its lan guage, contains no restriction on State legislation.

"The 9th section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the 10th proceeds to enumerate those which were to operate on the State Legislature. These restrictions are brought together in the same section, and are by express words applied to the States. 'No State shall enter into any treaty,' etc. Perceiving that in a constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State Government unless expressed in terms, the restrictions con tained in the 10th section are in direct words so applied to States.

"It is worthy of remark, too, that these *inhibitions generally restrain State legislation on subjects entrusted to the General Government*, or in which the people of all the States feel an interest.

"A State is forbidden to enter into any treaty, alliance, or confederation. If these contracts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the General Government; if with each other for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate its several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects *intrusted* to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to the State is not left to construction. It is averred in positive words.

"If the original Constitution, in the 9th and 10th sections of

the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government and on those of the States; if in every inhibition intended to act on State power, words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and *judicious course* in framing the amendments, before that departure can be assumed. We search in vain for that reason.

"Had the people of the several States, or any of them, required changes in their Constitutions; had they required additional safeguards to liberty from apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwiedly and cumbrous machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of the sister States, could never have occurred to a human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State Governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States, by affording the people additional protection from the exercise of power by their own Governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language. But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union and to the attainment of those invaluable objects for which union was sought,

might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. The amendments demanded security against the apprehended encroachments of the General Government, not against those of the local governments.

"In compliance with a sentiment thus generally expressed, to quiet fears, thus extensively entertained, amendments were proposed by the required majority in Congress and adopted by the States. These amendments contain no expression indicating an intention to apply themto the State Governments. This Court cannot so apply them. We are of opinion that the provision in the 5th amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, *is intended solely* as a *limitation on the exercise* of power by the Government of the United States, and is not applicable to the legislation of the States."

See also, case Preveur vs. Commonwealth, Mass. 5 Wallace, 479, where it is declared that the eighth article of amendment to the Constitution of the United States, which says " excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted," applies to national and not to state legislation.

So, too, in the case of Twitchell vs. Commonwealth of Penn., 7 Wallace, 321. It was claimed that the fifth and sixth amendments to the Constitution were violated. Mr. Chase delivered the opinion of the Court. After quoting from Chief Justice Marshall's opinion in the case of Barron vs. Baltimore, he says "and this judgment has since been frequently reiterated and always without dissent." That they "were not designed as limits upon the State governments in reference to their own citizens," but "*exclusively as restrictions upon federal power,*" was disclosed in Fox vs. Ohio, to be the only rational interpretation which the amendments can have. He says "language equally decisive if less emphatic, may be found

in Smith vs. State of Maryland, 18 Howard, 76, and Whitters vs. Buckley and others, 20 Howard, 99." "In the views thus stated and supported we entirely concur. They apply to the sixth as freely as to any other of the amendments."

It is thus seen, that neither the original Constitution, nor the early amendments made to that instrument, give any support to this indictment, nor the act on which it is founded.

Chief Justice Marshall placed the subject on the right basis when he said " the Constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual State." The first case of Barron against Baltimore was decided in 1833, fixing the jurisprudence of the country upon this subject, and the case in 7th Wallace was decided in 1868, conforming and approving the principles laid down in that case; so that it cannot be expected that this jurisprudence will be changed, except by changes that will amount to a revolution.

The first count in the indictment must therefore fail, depending as it does for its support, on the first amendment to the Constitution; for that article declares that "*Congress shall pass no law abridging the right of the people peaceably to assemble, and petition the government for a redress of grievances.*" Yet it has been decided in the Slaugter House case, 16th Wallace, 36, that it is one of the rights of citizens of the United States, *resulting not from any particular article of the Constitution, but from the general nature of the government, to peaceably* assemble, *provided* it be " to *petition the government for a redress of grievances.*" But the count in question declares no such purpose and intent on the part of Levi Nelson and Alexander Tilman, and therefore it must fail of the support of the authority of these cases.

II.

The second count is in no better condition than the first. The right to bear arms is not guaranteed by the Constitution of the United States. It has been said that "a man who carries his

arms openly, and for his own protection, or for any other lawful purpose, has as clear a right to do so, as to carry his own watch or wear his own hat." [Judge Wood's charge referred to.] The right to bear arms, if it be a right, is a matter to be regulated and controlled by the State, as each State may deem best for itself; and the United States have nothing whatever to do with it; either to support the right or abridge it. The truth is, that the power to regulate and control the bearing of arms on the part of the people, and their assembling together in great numbers, belongs to the *police authority* of the State, and it is a necessary power to be exercised by the State for the peace of society and the safety of life and property; and it is a power that the States have always exercised from a time before the General Government was formed until the present, without gainsaying or dispute.

The third count which charges the *intent* to deprive Nelson and Tliman of their lives and liberty of persons without due process of law, and which is based for its support on the fifth and fourteenth amendments of the Constitution of the United States, so far as the fifth *amendment is concerned, it is disposed of expressly by the case of Barron vs. Baltimore.* What effect the fourteenth amendment may have, we will enquire hereafter. But I will remark here, that Levi Nelson and Alexander Tilman in Grant Parish, were under the protection of the Constitution and laws of the State of Louisiana, and if their lives or property were taken, the individuals concerned in it are answerable to the State of Louisiana for their crime, and not to the United States, or to any other authority whatever under Heaven. The government of the United States has no power to punish the crimes of *murder*, or *robbery*, or *burglary*, or *arson* or *any other crime committed in the State of Louisiana*, or any other State, unless it be committed within her forts and arsenals, or relates to her post office, her revenue or her coin, or her army or navy. The officers of the United States government, from the lowest to the highest, are while within the limits of a State under the protection of the laws and authorities of the State. If the crime

of murder was committed against the highest officer of the United States in Louisiana, or in any other State, it would be a crime against the State and not against the United States. It would be the business of the State to have the criminal prosecuted and punished. It would be the business of the State courts to try and condemn him, and not the courts of the United States. It would be the business of the sheriff of the parish to arrest and hold them, and not the business of the marshal of the district.

4th, 5th and 8th. The *fourth, fifth and eighth* counts I class together, as the charges they contain are similar in substance, and similar in their *vagueness* and *uncertainty*. In truth, so vague and uncertain and indefinite are the charges, and I may say, multitudinous also, that no jury can find a verdict, or court render a judgment upon them.

The 4th charges the intent to hinder and prevent Levi Nelson and Alexander Tilman, in the exercise and enjoyment of their rights and privileges to the benefit of all laws and proceedings enacted by the United States, and the State of Louisiana, for the security of their persons and property, at that time enjoyed within the State of Louisiana, by white citizens of the State.

The 5th charges a like purpose, to hinder and prevent in the enjoyment of their constitutional rights and privileges, immunities and protections granted and secured to them as citizens of the United States and State of Louisiana.

The 8th charges a like intent to hinder and prevent the said Nelson and Tilman in the enjoyment of every, each, all and singular, the several rights and privileges, granted and secured to them, by the Constitution and laws of the United States.

An indictment should charge *specifically* such crimes and offences, as it is intended, on the part of the prosecution to prove—for the simple reason, that the accused may be able to offer counter proof and show his innocence. The crime should be set forth with all the particulars of time, place and circumstance. Charging the accused generally with all the crimes in the decalogue, or

with violating all the statutes passed by the United States and the State of Louisiana, in favor of people of African descent, is no charge at all in the eye of the law. The District Attorney has cast his net far and wide, in the hopes of catching something—but his net cannot hold even what may be caught.

In regard to "such laws and proceedings" as have been enacted by the State of Louisiana, in favor of Levi Nelson and Alexander Tilman "for the security of their persons and property," and the "rights and privileges, immunities and protections granted and secured to them," are matters to be inquired into by the State of Louisiana, not by the United States. The courts of the State should try those charged with violating her laws, and not the courts of the United States. The courts of the United States have no original jurisdiction in such cases.

But let us inquire what are the *rights, privileges, immunities* and *protection*, that Levi Nelson and Alexander Tilman, may claim, as citizens of the United States, from implied guarantees of the Constitution of the United States, and which the courts of the United States may inquire into? Fortunately, in a case recently decided by the Supreme Court, we have those rights and privileges enumerated. See Slaughter House case, 16th Wallace.

On page 79, the court say: "It is said to be the right of the citizen of this great country, protected by implied guarantees of this Constitution (Crandall vs. Nevada, 6 Wal. 44) and "to come to the seat of government, to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the sub-treasuries, land offices, and the courts of justice in the several States. "Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty and property, when on the high seas, or within the jurisdiction of a foreign government. Of this there can be no

doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition *for a redress of grievances*, and the privilege of the writ of *habeas corpus*, are rights of the citizen guaranteed by the Federal Constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several States, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a State. One of the privileges is conferred by the very article under consideration. 'It is, that a citizen of the United States can, by his own volition, become a citizen of any State of the Union, by a *bona fide* residence therein, with the same rights as other citizens of that State. To these may be added the rights secured by the 13th and 15th articles of amendment, and by the other clause of the 14th."

Which of these rights, or privileges, or immunities, have the prisoners at the bar, hindered or attempted to hinder, or prevent, Levivi Nelson and Alexander Tilman, from exercising and enjoying? If none, then this Court has no jurisdiction to try the accused for any of the charges contained in the 4th, 5th and 8th counts of the indictment. It will be seen that the right to bear arms is not enumerated among the rights of a citizen of the United States. Nor, the right to assemble together, except with the purpose of *petitioning the Government of the United States for a redress of grievances*—a purpose not alleged on the part of Nelson and Tilman.

But to show still more conclusively that the courts of the United States have no jurisdiction to try cases involving the "privileges and immunities" of the citizen of a State, I quote from same case. At page 74, the court say: "It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon characteristics or circumstances in the individual. The language is "no State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to a citizen of a State against the legislative power of his own State, that the words citizen of a State, should be left out when it is so carefully used, and used in contra-distinction to citizen of the United States, in the very sentence that precedes it. It is too clear for argument that the change, in phraseology, was made understandingly and with a purpose.

"Of the privileges and immunities of citizens of the United States and of the privileges and immunities of the citizens of the State, and what they respectively are, we will presently consider; but we wish to state here, that it is only the *former that are placed by this clause, under the Federal Consttiution*, and that the latter, whatever they may be, are not intended to have any *additional protection* by this paragraph of the amendment." "If then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizens of the State as such, *the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.*"

In Corfield vs. Coryell, decided by Mr. Justice Washington, in the Circuit Court for the District of Pennsylvania, in 1823, to the enquiry, what are the privileges and immunities of citizens of the several States? he says: "We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong, of right, to all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent and sovereign. What these fundamental principals are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, with the right to acquire and possess property of every kind, and to pursue and obain happiness and safety, subject, however, to such restrictions

as the government may prescribe for the general good of the whole."

See, also, the case of Ward vs. State of Maryland, 12 Wallace, 430. In the case of Paul vs. Virginia, 8th Wallace, 180, the Court, in expounding this clause of the Constitution, says that " the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those *privileges and immunities* which are common to the citizens of the latter States, under their Constitution and laws, by virtue of their being citizens." The court go on to say: " The constitutional provision there alluded to, did *not create those rights*, which it called privileges and immunities of citizens of the States. It threw around them *no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the Sate governments over the rights of its own citizens.*"

III.

6th and 7th. The sixth count charges the intent to injure, oppress, etc., with the purpose to prevent and hinder Levi Nelson and Alexander Tilman in the free exercise of their respective right to vote at any election to be thereafter by law held in the State of Louisiana or the Parish of Grant, said Nelson and Tilman being lawful voters. The seventh count charges the *intent and purpose* of putting the said Nelson and Tilman *in great fear of, bodily harm*, because they had *voted* on the 4th day of November 1872, and at divers other elections before that time held by the people of the State of Louisiana.

In regard to these counts, the question arises, has the *Federal Government* the *power* to *regulate, conduct and control* the several elections held by the people of the State of Louisiana? Has that government the right to say who shall vote in the State of Louisiana, whether they shall be men or women, or both; to say what qualification the voter shall possess in respect to *age*, property, intelligence, and character; to superintend and conduct the elec-

tions by their own appointed officers, and to count the votes and declare the result? Moreover, has it the right to enact laws in regard to such elections; to fix *penalties* for fraudulent voting, and for threatening and intimidating electors with the intent of preventing them from voting, or for inflicting injury on them for having voted; or to call out the militia of the State and the army and navy of the United States in order to enforce such enactments?

It is submitted that if the Federal Government has the power to do one of these things, it has the power to do all of them, and even more. That such powers were granted to the Federal Government by the Constitution formed by the fathers, will not be contended. The States were jealous of this power and were careful to retain it in their own hands. They believed, and rightly, too, that the *existence* of the *States* depended upon their retaining in their own hands and under their own control, the entire subject of *electors and elections;* and they provided, in order that there should be no antagonism between their representatives in Congress and in their own legislatures, that those who voted for the members of the Lower House in the State, should vote for members of the Lower House in Congress; "the electors in each State shall have the qualifications for electors of the most numerous branch of the State Legislature." See 1st article and 2d section of Constitution of U. S.

It is evident, therefore, that if the Federal Government possesses such powers, they must have been granted by the late amendments to the Constitution. The thirteenth amendment abolishes slavery; it makes him who was a slave, a free man—nothing more.

The fourteenth amendment declares "that all persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of

the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor shall any State deny to any person within its jurisdiction, the equal protection of the laws."

The fourth provision in that amendment does not give the right of suffrage. Congress had not been so far educated at that time, as to interfere with the rights of the States. It sought to accomplish the end by what may be called a persuasive measure. It provided, that if, in any State, there should be any distinction in the right of suffrage, on account of color, or race or other cause, the Representatives in Congress should be diminished in the proportion that the number excluded might bear to the whole number of voters. It will be seen, that by the very language of this provision, the right of suffrage depends upon the laws of the State alone. It does not assume to change those portions of the Constitution which bear upon the subject, but leaves them in full force, and tries to induce the States to allow the freedman to vote, by holding up to them the inducement of an increased representation in Congress.

The fourteenth amendment, therefore, cannot be looked to as giving to Congress the right to interfere in the right of suffrage in the States, in any manner whatever.

The fifteenth amendment declares, that "the right of citizens of the United States to vote, shall not be denied or abridged by the United States, or by any State, on account of race, color or previous condition of servitude" and "Congress shall have power to enforce this article by appropriate legislation."

It will be seen, that this amendment does not assume to create or originate anything, but that it pre-supposes, and takes for granted, that a certain right or privilege is already in existence in the State. It don't create "de novo" the right or privilege of voting in the State, but it simply provides, that the right or privilege, which had existed long before the general government was formed, and which was exercised by white men with certain

qualifications, should not be denied, by the State, to the negro possessing like qualifications.

The first question which naturally arises in this connection is: Has the State of Louisiana "denied or abridged the right of citizens of the United States to vote, or account of race, color or previous condition of servitude?" The answer is, that she has not. With this answer, before the Congress of the United States, it would seem there would be no occasion for it to take any action in the premises. If the State has not violated the amendment, then she ought not to be punished for having violated it; and yet, notwithstanding the State has not denied the negro the privilege of voting, and the State is the only party named in the amendment, except the United States, the Congress of the United States has passed this act on which the indictment is founded, which provides the severest penalties, "if any person, by force, bribery, threats intimidation, or other unlawful means, shall hinder, delay, prevent or obstruct, or shall combine or confederate with others to hinder, delay, prevent or obstruct, any citizens from doing any act required to be done to qualify him to vote, or from voting, etc." See 4th section.

We ask, what there is in the 15th amendment, or in the 13th or 14th, to authorize this part of the act? That the old Constitution which our fathers made, does not authorize such legislation; no one, I suppose, will deny. Congress must find its authority in the 14th or 15th Amendment, or find it not at all. We have seen that the language of those amendments is addressed to the States and the United States, and not to persons or the individual citizen. It is *the States and the United States* only that are interdicted. What constitutes a State in the United States? Does a *person or an individual citizen constitute the State of Louisiana?* In France, some two hundred years ago, there was such a person; but in Louisiana we have not been so educated, except in the last few years. "A State," says a writer of acknowledged authority, (see Skinner, Issues of American Politics, page 319,) "is a *quasi corpora-*

tion for the purpose of administering government within well defined territorial limits. It acts, moreover, *solely through its legally constituted legislature, or its people in general convention, legally assembled.* The first section of the 14th amendment places certain inhibitions upon the several States. Bearing in mind, the sentence above italicised, the only way in which a *State* can violate this constitutional provision *is by its legislative or conventional acts.* But supposing a State promulgates such legislative or conventional acts, as in their nature, contravene this provision of our organic law, what then? Such acts are an absolute dead letter. The national Constitution is the paramount law of the land; it annuls and renders nugatory, in fact, the legislative or conventional acts of every State which are repugnant thereto. It needs, neither relatively speaking—can it have, any *special* enforcement? It contains its own coercive power. Our Constitutional law, in fact, renders the *mere existence* of this provision an enforcement thereof

"With the belief, that the portion of the first section of the 14th Amendment, now under discussion, *needs* no enforcement, the question is pertinent in this connection. Does the bill, (he is speaking of the Act of April 20, 1871, but the reasoning is equally applicable to the Act of May 31, 1870,) now under consideration, *contain provisions for such enforcement,* superfluous though they may be? In no respect whatever. This section, as already seen, commands a State. *The act above mentioned deals directly with individuals;* every interdiction it contains runs against *individual action,* and every penalty it imposes attaches to *personal wrong* doing. It deals with a State, in no respect whatever, whereas, the first prohibitory portion of the 14th Article refers exclusively to such corporations."

Hon. Reverdy Johnson, speaking upon the 15th Amendment, see Ku Klux trials, S. C., page 73, says: "The right to vote, whatever that right may be, shall not be diminished on account of race or color, or antecedent state of servitude; that is all. Does it

profess to give a right, or does it deal with some existing right? And if it deals with an existing right, what is the existing right to which it refers? I have endeavored to show your honors, that the right of suffrage existing at the time the amendment was adopted, was to be found in the laws of the States; and all that the amendment does, so far as the right is concerned, is to declare that there shall be no distinction on account of race, color or previous condition of servitude. *No grant of any right*, but a restriction upon the power of the States to interfere with some existing rights, and nothing else. And you will, therefore, have to go to the Constitution, as it stood when the 15th amendment was adopted, in order to ascertain the right, and upon what the right to vote existed. It depended, for its exercise, upon the laws of the States, as such, and not upon any principle to be found in the Constitution of the United States, or any law passed by Congress before the 15th amendment was adopted."

Did the several States which adopted the 15th amendment, understand that they were giving up to the Federal Government all control over the right of suffrage in the State; giving to Congress the right to fix the qualifications of voters, the time and manner of holding election, and of inflicting penalties for fraudulent voting and for threatening and intimidating electors?

How did Massachusetts understand the operation of this 15th amendment? Certainly not in the manner interpreted by Congress in the acts of May, 1870, and of April, 1871, for it will be remembered how bitterly she complained but lately, because the power of the Federal Government was interposed in her Gubernatorial election in behalf of one of the candidates, while that force, so interposed, was simply moral. The people of Massachusetts, in their declaration of rights, in the fourth section, said:

"The people of this Commonwealth shall have the sole and exclusive right of governing themselves as a free, sovereign State, and they shall forever hereafter exercise and enjoy every power, jurisdiction and right which is not or may not hereafter be by

them expressly delegated to the United States of America in Congress assembled."

Surely the States which adopted this amendment, did not mean to change the whole character of the Government in respect to the exercise of the right of suffrage. "They did not presume to call in question the wisdom and foresight of their fathers. They did not assume to be wiser than the great and pure men who brought the Government of the United States into existence, and for years administered it consistently with all the limitations to be found in the Constitution." They meant simply what the article says—that the right or privilege of voting as exercised by white men, [a thing already in existence and not a new creation], should not be *denied by the State* to the negro.

And if this be all, what support does the second clause or section of the amendment give to the first? Does it enlarge the power of Congress in the way of legislation? Not at all. Congress would have had the same power without it, for when Congress legislates it must confine its legislation to the terms contained in the first section. Mr. Johnson says [page 76]: "Does that extend the powers? Does that enlarge the amendment? Does that give, or profess to give, a right not given by the antecedent clause of the amendment? Certainly not. What did it do? It only did with reference to that amendment, what the eighth section of the first article of the Constitution of the United States, as originally framed, did in relation to all the powers vested in the general government; that is to say, it gave them the power, by legislation, to enforce that amendment—that is all. To provide that the amendment shall stand unharmed—that is all. Thus you have to go back to the amendment itself, in order to ascertain its purpose; and if, as I conclude, your Honors will think it was not the purpose of the amendment to grant a right to vote, but to protect some other right, existing under the laws of the States, all that Congress can do under the latter clause of the amendment, is

by legislation to provide that the right so secured shall not be interfered with, *in the way pointed out* in the amendment."

The opinion of the Court presided over by Mr. Justice Bond and Justice Bryan, rendered on this argument, says of the right to vote, (page 91): "We are of opinion that the second count is bad, because it does not allege that Amzi Rainey was qualified to vote; and, for another reason, more fatal, that it *alleges the right of Rainey to vote to be a right and privilege granted to him by the Constitution of the United States.* This, as we have shown, is not so. *The right of a citizen to vote depends upon the laws of the State in which he resides,* and is not granted to him by the Constitution of the United States, nor is such right guaranteed to him by that instrument. All that is guaranteed is, that he shall not be deprived of the suffrage by reason of his race, color or previous condition of servitude."

Story on Constitution, by Cooley, on the 15th amendment, § 1972, page 689, says, "What is particularly noticeable in the case of this article is, the care with which it confines itself to the particular object in view." "There was no thought or purpose of regulating by amendment, or of conferring upon Congress the authority to regulate, or to prescribe qualifications for the privilege of the ballot. From the beginning, the State had exercised that authority, and however diverse had been their action, there was no complaint of any resulting evil, which, in any case, had become of national importance, except the simple one at which this article is aimed."

Again, in the Slaughter House case, 16 Wallace, commenting on the clause in 14th Amendment (the reasoning, however, is applicable alike to both the 14th and 15th amendments): "Nor shall any State deny to any person within its jurisdiction the equal protection of the law." The Court say: "But if the State did not conform its laws to its requirements, then, by the fifth section of the article, Congress was authorized to enforce it by suitable legislation." "We doubt very much whether any action of a 'State,'

not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. *But as it is a State that is to be dealt with, and not alone the validity of its laws*, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall demand a decision at our hands." It is not pretended that the Constitution and laws of the State of Louisiana operate unequally on the negro race. On the contrary, they operate equally on the white race and the black, and it is a part of the grievances charg ed in the indictment, that the accused hindered Levi Nelson and Alexander Tilman, being persons of African descent, from enjoying the *rights and privileges granted them under the laws and Constitution of the State of Louisiana.*

IV.

I will now inquire what effect the 14th amendment of the Constitution may have in the way of supporting the *third count*, which charges the accused with the "intent to deprive Levi Nelson and Alexander Tilman of their *lives and liberty of person, without due process of law.*" After what has been said in respect to the 14th and 15th amendments to the Constitution of the United States, and the authorities that have been cited explanatory of their meaning, it would seem that little else need be said, to show beyond a doubt, that the 14th amendment has left the *life, liberty* and property of the citizen where it was before this amendment was passed, under the care and protection of the Constitution, laws and authorities of the State.

The language of that clause of the 14th amendment is, "*Nor shall any* 'STATE' deprive any person of life, liberty or property, without due process of law."

This language is addressed to a "*State*"—to the State of Louisiana. What is a "State?" Is it an individual? Is it one, two, or three persons? Do the acoused at the bar constituted the State of Louisiana?

Do you say that the proposition is absurd on the face of it; that two opinions cannot be entertained in regard to it? I reply, that the absurdity is not mine. I did not make it. The Congress of the United States is responsible for it. The language of the Constitution is addressed to the "State"—the "State shall not deprive any person of life, liberty or property, without due process of law." Congress, in the acts of May, 1870, addresses the *individual* citizen of a State, or two or more individuals, as though he were the State. It says to him: "You are the State"—in the meaning of the 14th and 15th amendments to the Constitution—" *You shall* not deprive any person of life, liberty or property, without due process of law." It addresses the individual wrong doer, and assumes to punish him for acts of personal violence and fraud; and under the construction given to these acts, what crime or offense known to the law, committed with in the limits of a State, is there, of which the courts of the United States, may not take jurisdiction? For surely, killing a man, would be taking his life, without due process of law; and robbery, and theft, and arson, and house-breaking, and obtaining money under false pretenses, would be depriving one of his property without due process of law, and are these offenses hereafter to be tried in the courts of the United States? Is the Marshal to take the place of the Sheriff, and are citizens to be tried by jurymen, selected at the will of the prosecution, from distant parts of the State, instead of the vicinage? And when convicted, are they to be sent to some Northern penitentiary, or some Dry Tortugas, to serve out the period of atonement?

I ask again what is a " State? " As already stated, it is a *quasi* orporation for the purpose of administering government within well defined territoral limits. It acts, moreover, *solely through its legally constituted legislature*, or its people in general convention legally assembled.

The fourteenth and fifteenth amendments to the Constitution of the United States, places certain inhibitions on the several

States. The *only way in which these amendments can be violated*, is by the legislative or conventional acts of a "State." All the people of a State in their *personal and individual capacity*, may do what the amendments prohibit a State from doing, and still they are not violated; they may take a man's life, in open combat, or by a secret taking off, they may rob him of his property on the highway, or by stealth; they may restrain him of his liberty, and by violence and intimidation prevent him from voting, and still they have not violated these amendments, because these individuals are not the State, and their acts are not the acts of the "State."

In the Slaughter House case, 16 Wallace, p. 77, the court say: "It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection beyond the very few express limitations which the Federal Constitution contains—such for instance, as the prohibitons against expost fact laws, bills of attainder, and laws impairing the obligations of contracts; but with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?"

V.

As already stated, the indictment is founded on the Sixth and seventh sections of the act; but the jury did not find the accused

guilty under the seventh section, as charged in the several counts, Yet the provisions of the section are so extraordinary that we propose to examine them for a few moments, in order to show their unconstitutionality, as well as the general unconstitutionality of the whole act.

The section reads as follows: "That if in the act of violating any provision in either of the two preceding sections, any other felony, crime or misdemeanor shall be committed, the offender, on the conviction of the violation of said sections, shall be punished for the same, with such punishments as are attached to the said felonies, crimes and misdemeanors by the laws of the State in which the offence may be committed."

Now, to apply the provisions of this sections, for instance, to the first count in the indictment, which charges the breaking up of a peaceable assemblv; if the jury find the accused did break up a peaceable assembly, as charged in the indictment, and in doing so killed Alexander Tilman, then they would be punished, not for the crime of murder, but for the breaking up of a peaceable assembly, with the punishment attached to the crime of murder in the State of Louisiana.

Congress in this legislation attempts to do *indirectly* what it cannot do *directly*. Conscious that it has no authority to legislate in regard to crimes and misdemeanors committed within the body of a State, it attempts to reach and punish such crimes and offences under the guise of some trivial matter over which it claims jurisdiction. Thus the breaking up of a peaceable assembly is punished, not with a punishment ordinarily and properly meted out for such an offence, but with such punishment as is awarded to the highest crime known to the law. And the jury: have they not to find the accused guilty of murder as well as guilty of breaking up a peaceable assembly? The issue is made upon one charge, as well as the other, and evidence is adduced to support both alike.

But suppose it should happen that the State had first tried the accused on the charge of murder and they should have been acquit-

ed, what then? Are they to be tried again? Would the Court not say that that humane provision of the law applied in this case, which provides that the accused shall not be twice tried for the same offence? And if such should be the decision of the court, would it not be a virtual declaration that the accused were as much on trial for the crime of murder as for the offence of breaking up of a peaceable assembly? We humbly submit to the court that such legislation cannot stand; that Congress cannot do indirectly what it cannot do directly and openly.

Again: another peculiarity of this legislation is, that the *penalty imposed so far as its character and weight are concerned, is not ascertained and fixed by Congress, but is left to be determined by the State Legislatures.* This is a *delegation of the power of legislation* on the part of Congress to the various State Legislatures. They have the power to fix the penalty for breaking up of a peaceable assembly, provided "any other felony, crime or misdemeanor shall be committed."

A legislative body cannot delegate the power to legislate to another body.

See Cooley's Constitutional Limitation, 116. He says: "One of the settled maxims of constitutional law is, that the power conferred upon the legislature to make laws, cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the power, there it must remain; and by the constitutional agency alone, the law must be made until the Constitution is changed. The power to whose judgment, wisdom and protection, this high prerogative has been entrusted, cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved. Nor can it substitute the judgment, wisdom, and patriotism of any other body, for those to which alone, the people have seen fit to confide this sovereign trust."

See, also, Bradley vs. Baxter, Barb. 122; Barto vs. Himrod, 8 N. Y. 483; People vs. Stout, 23 Barb. 349; South vs. State Iowa, 165;

Parker vs. Commonwealth, 6 Penn. St. 507; 11 Penn. St. 61; State vs. Parker, 26 Vt. 362. Lock on Civil Government, § 142, says: "These are the bounds which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every Commonwealth, in all forms of government.

First—They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plow.

Secondly—These laws ought to be designed, for no other end, ultimately, but the good of the people.

Thirdly—They must not raise taxes on the property of the people, without the consent of the people, given by themselves, or their deputies. And this property concerns only such governments where the legislature is always in being, or at least, where the people have not reserved any part of the legislation to deputies, to be from time to time, chosen by themselves.

Fourthly—The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."

Another peculiar feature of this section is, that the *punishment imposed for the same offence*, as for the breaking up of a peaceable assembly, and where "any other felony, crime or misdemeanor shall be committed" on citizens of the United States living in different States, will not be uniform. For it is well known, that the punishment meted out to crimes and offences, differ in most all of the States; that while murder in Louisiana is punished with death or imprisonment for life, in the State of New York there are four degrees of punishment for the same crime, the death penalty being the highest, and imprisonment for six years the lowest and that in some of the States the death penalty is abrogated altogether.

Thus is seen the incongruous character of this legislation. Citizens of the United States are placed on an inequality before the law. That while one citizen is punished with death, another for the same offence is punished with a short term of imprisonment. Can these things be? Is this the law of the land? *Is not equality before the law a just rule and the rule of the Constitution?*

In closing the examination of the law of this case, we may safely say, that no greater or more important case was ever brought before a court for judgment.

It is difficult to realize its importance, it is so far reaching in its consequences. When we look at the bearings of the case, we loose sight of the rights and interests of the accused, in contemplating the rights of the people of the States, which are threatened with destruction. In truth, the government which our fathers formed for themselves and their children, is on trial in this case. Our fathers believed *in self government—in local self government*, and when the States formed the general government, the people of the States, never for a moment entertained the thought of delegating to it the right to fix the status of a citizen of a State, or to provide for the protection of his person, or his property, while within the body of the State.

But if the act of the 31st of May, 1870, "is the law of the land,' then, all that is changed. The original or inherent rights of the States are crushed out and absorbed by a great central power—a revolution has been accomplished, brought about by an act of Congress and a judicial decree.

Respectfully submitted,

DAVID S. BRYON,

Attorney.

We concur:

WM. R. WHITAKER,

E. JOHN ELLIS,

Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 609

THE UNITED STATES, *Plaintiff in Error.*

—VS.—

CRUIKSHANKS, IRWIN AND HADNOT.

BRIEF FOR DEFENDANTS

R. H. MARR,
Of Counsel for Defendants.

Supreme Court of United States.

No. 609.

THE UNITED STATES,
Plaintiffs in Error.

versus

CRUIKSHANKS, IRWIN AND HADNOT.

Argument for Defendants.

Some eighty citizens of Grant Parish, in the State of Louisiana, were indicted in the Circuit Court of the United States, at New Orleans, under the sixth and seventh Sections of the Act of Congress, approved 31st May, 1870, entitled "*An Act to enforce the Right of citizens "of the United States to vote in the several States of the "Union, and for other purposes.*"

The indictment contains thirty-two counts, of which the first eight charge that the accused did *band* together, and the next eight charge that they did *combine, conspire* and *confederate* together, to deprive certain colored persons, of African descent, of certain rights granted or secured to them by the laws and Constitution of the United States.

The third eight of the series charge that the accused did *band* together, as charged in the first eight, and while so *banded* did kill and murder one Alexander Tillman; and the last eight charge that they did *combine, conspire* and *confederate* together, as charged in the second eight, and while so *combined*, etc., did kill and murder Alexander Tillman.

Nine of the accused were put upon trial, at the November Term, 1873: One was acquitted, and the jury failed to agree as to the others. The remaining eight were tried at the April Term, 1874: six of them were acquitted; and three of them were convicted on the first sixteen counts, and were acquitted on the last sixteen. It is not necessary, therefore, to consider the last sixteen counts; nor will it be necessary to consider the second eight, since they are identical with the first eight, except that in the first eight the charge is that the accused did *band* together, while in the second eight the charge is that they did *combine, conspire* and *confederate* together.

The parties thus convicted moved for a new trial, which was refused by the Circuit Judge, sitting alone; and they afterwards moved in arrest of judgment before a full Court composed of Mr. Justice Bradley and the Judge of the Circuit Court.

The grounds of the motion in arrest are:

1°. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offenses against the laws of the United States, and do not come within the purview, true intent

and meaning of the Act of Congress, approved 31st May, 1870, entitled "*An Act to enforce the right of citizens of the* "*United States*," etc.

2°. Because the matters and things in the said indictment set forth and charged, do not constitute offenses cognizable in the Circuit Court, and do not come within the power and jurisdiction of the Court.

3°. Because the offenses created by the sixth section of the Act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the Courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutionally reserved rights of the several States.

4°. Because the said Act, in so far as it creates offenses and imposes penalties, is violative of the Constitution of the United States, and an infringement of the constitutionally reserved rights of the several States and the people.

5°. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient and uncertain to afford accused proper notice to plead and prepare their defense, and set forth no specific offense under the law.

6°. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion the opinion of Justice Bradley was that the several counts in question are not, and that neither of

them is, good and sufficient in law, and do not, nor does either of them, contain charges of criminal matter indictable under the laws of the United States.

The opinion of the Circuit Judge, Woods, was that the several counts are, and that each of them is, good and sufficient in law, and do, and each of them does, contain charges of criminal matters indictable under the laws of the United States.

The opinion of Justice Bradley was that the motion in arrest of judgment ought to be granted; and Judge Woods was of the contrary opinion. The case comes up, at the instance of the government, on certificate of this division of opinion. Printed Record, pages 1, 2, 3, 82, 83.

The gravity of the questions thus presented for solution will be fully appreciated by this Court; and an analysis of the several counts of the indictment will show precisely what is brought up for review.

The first count charges that the accused did *band* together with the intent and purpose one Levi Nelson and Alexander Tillman, being citizens of the United States, of African descent, and persons of color, to injure, oppress, threaten and intimidate, with intent thereby the said Nelson and Tillman, respectively and severally, to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other, and with other good citizens of the United States, for a peaceful and lawful purpose, the same being a right or privilege granted or secured to the said Nelson and Tillman, respectively, in

common with all other good citizens of the United States, by the Constitution and laws of the United States. P. R. 6, 7.

The second count charges that the accused did *band*, etc., with intent, etc., to hinder and prevent Nelson and Tillman in their right to keep and bear arms for a lawful purpose. 7, 8.

The third count charges that the accused did *band*, etc., with intent, etc. Nelson and Tillman to deprive of their respective several lives and liberty of person without due process of law in that behalf. P. 8, 9.

The fourth count charges that the accused did *band*, etc., with intent, etc., Nelson and Tillman to prevent and hinder in their free exercise and enjoyment of their several and respective right and privilege to the full and equal benefit of all laws and proceedings then and there enacted or ordained by the said United States and the State of Louisiana, then and there at that time being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed within the said State and District of Louisiana, by white citizens of the said State and of the United States, for the protection and security of the persons of said white citizens. See Corresponding Count, 12, page 17.

The fifth count charges that the accused did *band*, etc., with intent, etc., Nelson and Tillman respectively to hinder and prevent in their respective free exercise and enjoyment of the rights, privileges, immunities and protec-

tion, granted and secured to them respectively as citizens of the United States and as citizens of the State of Louisiana. P. 10, 11.

The sixth count charges that the accused did *band*, etc., with intent, etc., Nelson and Tillman to prevent and hinder in the free exercise and enjoyment of their several and respective right and privilege to vote at an election to be thereafter held, etc., they, the said defendants, and each and all of them, then and there well knowing the said Nelson and Tillman to be and to have been, respectively, well and lawfully qualified and entitled to vote at any such election, etc. P. 11, 12.

The seventh count charges that the accused did *band*, etc., with intent, etc., the said Nelson and Tillman, severally and respectively, then and there, to put in great bodily fear, etc., because and for the reason that the said Nelson and Tillman, being and having been, in all things lawfully qualified and entitled so to do, had, before that time, etc., severally and respectively exercised their several and respective right to vote, and had respectively and lawfully voted, etc. P. 12, 13.

The eighth count charges that the accused did *band* etc., with intent, etc., the said Nelson and Tillman respectively, to prevent and hinder in their several and respective free exercise and enjoyment of each, all and singular the several rights and privileges granted or secured to them respectively, in common with all other good citizens of the United States, by the Constitution and laws of the United States. P. 13–14.

The offence charged is a conspiracy; and the theory of the indictment is that the rights charged to have been violated by the accused, are granted or secured to the individuals, Nelson and Tillman, by the Constitution, or the laws of the United States. These rights may be thus stated in brief:

1°. The right peaceably to assemble:

2°. The right to keep and bear arms:

3°. The right to be protected in the enjoyment of life and liberty, and not to be deprived of the same, without due process of law:

4° The right to the equal protection of the laws of the United States, and of the State of Louisiana:

5°. The right to the privileges, immunities and protection granted or secured to individuals as citizens of the United States and of the State of Louisiana:

6°. The right to vote at any election to be held in the State of Louisiana:

7°. The right to vote at an election which had been held:

8°. The rights and privileges granted or secured by the Constitution or laws of the United States, to the individuals named, in common with all other good citizens of the United States.

To maintain this indictment, therefore, independently of the speceal objections to which it may be subject, it must be established that power has been conferred upon Congress to protect individual citizens by punitive legislation, against the violation of these right by individuals.

None of these rights are mentioned in the Constitution as originally framed. It is true, that clause 1, section 2, of article 4, assures to the citizens of each State; the privileges and immunities of citizens in the several States, but this article is manifestly addressed to States exclusively, and not to individuals. It is not applicable to citizens of a State, in their relations with that State; but it protects the citizens of each State against discrimination to their prejudice, by the government of any other of the States of which they are not citizens.

If therefore, the rights charged to have been violated, are granted by the Constitution to individuals, or are secured by it against violation by individuals, it must be by the Amendments alone.

It is elementary that the powers of the Federal government are delegated, and strictly limited. This is sufficiently and plainly declared in article 10, of the Amendments. See also, Marbury vs. Madison, 1 Cranch; 1 Cond. Reps., 283; Briscoe vs. Bank of Commonwealth, 11 Peters, 316. Congress therefore, can enact no law, whether Civil or Criminal, except in relation to matters over which power has been delegated to it; and only to the extent to which such power has been delegated.

To what extent then, has Congress been intrusted with the power and authority to protect the rights charged in the indictment to have been violated?

The Constitution was designed to create and to organize a government. The State governments were already established, and were in actual operation, under their respec-

tive organic laws; and they were exercising, unchallenged, complete and exclusive control over persons and property within their respective jurisdictions. It was not the intention to create a government for the Union, which should abridge the powers of the State governments in matters purely internal and domestic; and great care was taken in the framing of the Constitution, to define the powers which were delegated to the Federal government, and the limitations on the powers of the States, to which they were willing to submit, touching certain matters of general concern.

The Constitution no where deals with the ordinary relations of society; nor does it undertake to protect individuals in the several States, against the acts of individuals. It leaves the citizens of each State, in all that pertains to their purely internal and domestic affairs, including the protection of persons and property, whether by civil or criminal laws, under the exclusive dominion and control of their own local governments, with the single limitation that State laws must not contravene the Federal Constitution.

It cannot be pretended that the Amendments prior to 1865, were designed to enlarge the powers of the Federal government. On the contrary, they were the result of the apprehensions of the people that the Federal government would become too powerful, and might ultimately destroy the rights of the States and the liberties of the people; and these Amendments were designed to define and to limit more strictly the power which was so much feared.

These Amendments do not grant or secure, nor do they profess to grant or secure, the rights of which they treat. They simply recognize them as existing rights, derived from some other source; and they give the assurance which the people demanded and insisted upon, of a formulated declaration and solemn pledge, to be permanent and part of the organic law, that the Federal government should have no power to interfere with these acknowledged, pre-existing rights.

This Court has frequently had occasion to sit in judgment upon these Amendments, and to declare, authoritatively, their scope, design and effect: and the decisions are clear, consistent and uniform.

In Barron vs. The Mayor, the question was as to the effect and extent of that clause, of Art. 5, which declares "*nor shall private property be taken for public use* without just compensation.

Chief Justice Marshall delivering the unanimous opinion of the Court, said:

"The Constitution was ordained and established by the "people of the United States for themselves, for their own "government, and not for the government of the individual "States. Each State established a Constitution for itself, "and in that Constitution provided such limitations and "restrictions on the powers of its particular government "as its judgment dictated. The people of the United "States framed such a government as they supposed best "adapted to their situation, and best calculated to pro-"mote their interests. The powers they conferred on

" this Government were to be exercised by itself, *and the* " *limitations on power, if expressed in general terms, are* " *naturally, and we think necessarily, applicable to the gov-* " *ernment created by the instrument. They are limitations of* " *power granted in the instrument itself, not of distinct gov-* " *ernments, formed by different persons, and for different* " *purposes.* If these propositions be correct, the 5th " Amendment must be understood as restraining the power " of the general government, not as applicable to the " State.s" 7 Peters, 247.

In Withers vs. Buckley, 20 How. 89, arising under the same clause, after an exhaustive review the same doctrine was approved and re-affirmed.

In Lessee of Livingston vs. Moore, 7 Peters, 551, where the question was as to the effect of Art. 7, in securing the right of trial by jury in a State tribunal, the Court said:

" As to the Amendments of the Constitution of the " United States, they must be put out of the case, since " it is now settled that these Amendments do not extend " to the States."

In Fox vs. The State of Ohio, 5 How., 434, it was contended that the punishment, by the State of Ohio, of an offense punishable also by a Statute of the United States, was in contravention of that clause, of Art. 5, which declares, " *nor shall any person be subject, for the* " *same offense to be twice put in jeopardy of life or limb:*" The Court said:

" The prohibition alluded to as contained in the Amend- " ments to the Constitution, as well as others with which

" it is associated in those articles, were not designed as " limits upon the State governments in reference to their " own citizens. They are exclusively restrictions upon " Federal power, intended to prevent interference with " the rights of the States and of their citizens. Such has " been the interpretation given to those Amendments by " this Court in the case of Barron vs. The Mayor, 7 Peters, " 243; and such, indeed, is the only rational and intelli- " gible interpretation which those Amendments can bear, " since it is neither probable nor credible, that the States " should have anxiously insisted to ingraft upon the Fede- " ral Constitution restrictions upon their own authority— " restrictions which some of the States regarded as the " *sine quâ non* of its adoption by them."

In Smith vs. The State of Maryland, 18 How., 76, the question was as to the power of the State authority to issue a warrant without an oath to support it, as required in Art. 4 of the Amendments. The Court said:

" If rested on that clause in the Constitution of the " United States which prohibits the issuing of a warrant " but on probable cause, supported by oath, the answer is " that this restrains the issue of warrants only under the " laws of the United States, and has no application to " State process."

In Purvear vs. Commonwealth, 5 Wall., 479, which depended upon the 8th Amendment, the Court said:

" The third proposition of the plaintiff is, that fines " and penalties imposed and inflicted by the State law for " offenses charged in the indictment are excessive, cruel

" and unusual. Of this proposition it is enough to say " that the article of the Constitution relied upon in sup- " port of it does not apply to State but to National legis- " lation."

The language of the Court in the celebrated Slaughter House cases is equally clear, forcible and conclusive:

" It would be the vainest show of learning to attempt " to prove, by citations of authority, that, up to the adop- " tion of the recent Amendments, no claim or pretense " was set up that those rights depended on the Federal " government for their existence or protection, beyond " the very few express limitations imposed upon the States. " Such, for instance, as the prohibition against *ex post facto* " laws, bills of attainder, and laws impairing the obliga- " tion of contracts. But with the exception of these, " and a few other restrictions, the entire domain of the " privileges and immunities of citizens of the States, as " above defined, lay within the constitutional and legisla- " tive power of the States, and without that of the Fede- " ral government." 16 Wall., 77.

These authorities have been cited for the single purpose of bringing under the eye of the Court the language and unanswerable arguments from which these important and inevitable conclusions follow:

1°. All the Amendments, prior to 1865, are mere limitations and restrictions upon the powers of the Federal government:

2°. The rights mentioned and referred to in those Amendments are not granted, nor are they secured by the

constitution, except that they cannot, lawfully, be infringed by any Federal authority:

3°. These Amendments were not intended to secure any of the rights in question against interference either by the State governments or by individuals:

4°. Such of these rights as are not natural and inherent depend, for their existence, and all of them depend for their protection, upon State laws alone, and are beyond and without the constitutional and legislative power of the Federal government.

The next question is, to what extent have these rights been brought within the constitutional and legislative power and protection of the Federal government by the recent Amendments, 13, 14 and 15.

Article 13 abolishes slavery; and declares that Congress shall have power to enforce this Amendment by appropriate legislation. As all the States in which slavery existed have ratified this Amendment, so that slavery no longer exists within the United States, no legislation, by Congress, on the subject could be either operative or appropriate; and the power conferred by the second section of this Article cannot be exercised or called into requisition until some attempt is made to establish slavery within the United States.

Article 14 contains several sections, the 2d, 3d and 4th of which have no application whatever to any of the rights charged in this indictment to have been violated.

The first clause of the first section makes "all persons "born or naturalized in the United States, and subject to

" the jurisdiction thereof, citizens of the United States,
" and of the States wherein they reside."

Obviously, no act of individuals could deprive a person of the citizenship thus conferred; nor can any case arise which would require Congress to protect this right against aggression by individuals.

The remainder of this first section consists of the prohibition and limitations which it imposes, expressly and exclusively upon the States:

" No State shall make or enforce any law which shall
" abridge the privileges and immunities of citizens of the
" United States; nor shall any State deprive any person
" of life, liberty or property, without due process of law,
" nor deny to any person within its jurisdiction the
" equal protection of its laws."

Section 5 confers upon Congress power to enforce the provisions of this Article by appropriate legislation.

In the Slaughter House Cases this Amendment was very fully considered and elaborately discussed. Immediately following the language just quoted from 16 Wall., p. 77, and in the same paragraph, the Court proceeded to say:

" Was it the purpose of the Fourteenth Amendment by
" the simple declaration that no State should make or en-
" force any law which shall abridge the privileges and im-
" munities of *citizens of the United States*, to transfer the
" security and protection of all the civil rights which we
" have mentioned from the States to the Federal govern-
" ment? And where it is declared that Congress shall

" have the power to enforce that article, was it intended " to bring within the power of Congress the entire domain " of civil rights heretofore belonging exclusively to the " States ?

" All this and more must follow if the proposition of " the plaintiff in error be sound." Proceeding to show the far-reaching and disastrous consequences which would follow, the fettering and degradation of the State governments, the great departure from the structure and spirit of our institutions, the radical change in the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people, in an argument which indeed " has a force that is irresistible," the proposition is demonstrated " that no such " results were intended by the Congress which proposed " these Amendments, nor by the Legislatures of the States " which ratified them."

Commenting upon the last clause of this first section, " *nor shall any State deny to any person within its juris-* " *diction the equal protection of its laws,*" the Court said:

" In the light of the history of these Amendments, and " the pervading purpose of them, which we have already " discussed, it is not difficult to give a meaning to this " clause. The existence of laws in the States where the " newly emancipated negroes resided which discriminated " with gross injustice and hardship against them as a class, " was the evil to be remedied by this clause, and by it " such laws are forbidden.

" If, however, the States did not conform their laws to

" its requirements, then, by the fifth section of this arti-
" cle of the Amendments, Congress was authorized to en-
" force it by suitable legislation. We doubt very much
" whether any action of a State, not directed by way of
" discrimination against the negroes as a class on account
" of their race, will ever be held to come within the pur-
" view of this provision. But as it is a State that is to
" be dealt with, we may safely leave that matter until
" Congress shall have exercised its power, or some case of
" State oppression, by denial of equal justice in its Courts,
" shall have claimed a decision at our hands."

This first section, therefore, in no manner adds to or changes the power of the Federal government with respect to the protection, against the acts of individuals, of the rights charged in the indictment to have been violated. It does, indeed, add to the power of the Federal government. It puts the States with respect to the prohibition and limitations imposed, under the restraining power of the Federal Constitution. None of the restrictions of the first ten Amendments were applicable to the State governments. The prohibition and limitations of the first section of the Fourteenth Amendment are applicable to the State governments alone.

Manifestly, there must be some act by a State, which is prohibited to each and every State by the terms of this Article, to authorize Congress to enforce it by legislation; and no act of individuals can call into requisition this power of Congress, or bring within its control the protection of the rights of individuals against aggression by individuals.

The Fifteenth Amendment is : " The right of citizens " of the United States to vote shall not be denied or " abridged by the United States or by any State, on ac- " count of race, color, or previous condition of servitude ;" and power is given to Congress to enforce this Article by appropriate legislation.

It is evident that this Article does not intend, nor does it attempt to protect the right of suffrage against the acts of individuals; nor does it authorize any legislation by Congress, except in the case falling specially within its terms; that is, where a State, or the United States, shall deny or abridge the right of a citizen to vote on account of his race, or color, or previous condition of servitude.

The right of a citizen to vote may be denied absolutely by a State because of his inability to read or write the English language, or because of his want of a property qualification, or for failure to pay a tax, or because of his having been convicted of crime. No article of the Amendments would be violated by any such denial or abridgment of the right to vote. The prohibition is against the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude; and until this right is denied on this specific ground, the power of Congress cannot be invoked.

Whenever the proper case shall arise for Congress to enforce the Fifteenth Amendment, its legislation must be directed either against the offending government, or against the offensive action of that government, not against individuals. In the language of this Court in the

Slaughter House cases, "IT IS A STATE THAT IS TO BE DEALT WITH." Like the Fourteenth Amendment, this Article merely places restriction upon power; and it does not attempt to deal with the acts of individuals, or to bring within the legislative power of Congress the protection of the right to vote, except against the discriminating action of governments in the denial or abridgment of that right "*on account of race, color, or previous condition of servi-*" "*tude.*"

Section 8 of Article 1 of the Constitution declares affirmatively what powers Congress shall have; and clause 18, in general terms, authorizes Congress to make all laws which shall be necessary and proper for carrying them into execution.

Section 10 of the same Article subjects the States to certain limitations, in the language of prohibition, "No STATE SHALL," etc., just as in the Fourteenth and Fifteenth Amendments; but no power is conferred upon Congress, either by Section 8 or Section 10, to enforce these restrictions. The people would never have consented to a constitution authorizing Congress to sit in judgment on State laws, to declare them violative of the Constitution, and to annul or abrogate them.

Indeed, there was no necessity for conferring upon Congress any such delicate and dangerous power. The Constitution makes ample provision for the enforcement of the restrictions on the States, as well as on Congress, by creating a Federal Judiciary, and conferring upon it jurisdiction of all cases arising under the Constitution and laws

of the United States; and the 25th section of the Judiciary Act brings it within the power of this Court to review and reverse decisions of the State courts, of last resort, in contravention of the constitution and laws of the United States.

Numerous cases have occurred of State legislation, in violation of the prohibitions of the constitution, such as *ex post facto* laws, laws impairing the obligation of contracts, and the issuing of bills of credit; but no one ever supposed that such action was subject to the revision or control of Congress, or that it armed Congress with power to remedy the wrong, or to correct it by legislation either preventive or punitive. In all cases of affirmative grants of power to Congress, the power is exercised by legislation: in all cases of violation of constitutional restrictions the question is purely judicial; and the judicial tribunals are clothed with ample power, by the constitution and the laws organizing the courts, to afford to parties affected by the unconstitutional action of Congress or the States, all the remedy which may be appropriate. The books of Reports are full of cases arising under restrictions upon the States; and no complaint has been made of the failure of the Judiciary to enforce these restrictions.

The power conferred upon Congress by the recent Amendments is not a general grant of power to legislate with respect to the subject-matter of the Amendments, but it is a specific grant of power to enforce them by appropriate legislation; and like all the powers delegated to Congress, this power must be construed strictly, and can

be exercised only to the extent of the delegation. The prohibitions are addressed to governments—to organized power alone; and the authority given to Congress to enforce the Amendments respectively must be in abeyance—must remain dormant, until the prohibition is violated by the action of the government, the organized power, to which alone it is addressed.

The use of the word "enforce" necessarily implies as a prerequisite, a condition precedent to the exercise of the power granted, opposition, resistance. A constitutional restriction which is not opposed, which is not resisted, which is acquiesced in, enforces itself, *ex proprio vigore*, and needs not to be otherwise enforced; and there could be no appropriate legislation, there would be nothing for force or power to act upon in the absence of opposition or resistance.

The State of Louisiana has not, in any respect, opposed or violated the provisions of these Amendments. On the contrary, the first article of the Constitution, adopted 29th July, 1864, abolished slavery. The State promptly ratified and adopted these amendments; and the first sections of all of them are incorporated substantially, in the Bill of Rights, in the Constitution of 1868.

So far, therefore, as the State of Louisiana is concerned, the case has not arisen which requires any legislation by Congress, to enforce, within the limits of Louisiana, these Amendments, which are part of the organic law of the State. But if the case had arisen, it would not be possible to deduce, from the specific grant of power in these Amend-

ments, any authority to Congress to punish individuals for violating the rights, which the Amendments have attempted to protect only against the prohibited action of the Federal government and of the State governments.

The sixth section of the enforcement act, upon which this indictment is based, declares: "that if two or more "persons shall band or conspire together, or go in disguise "upon the public highway, or upon the premises of "another, with intent to violate any provisions of this act, "or to injure, oppress, threaten or intimidate any citizen "with intent to prevent or hinder his free exercise and "enjoyment, of any right or privilege granted or secured "to him by the Constitution or laws of the United States, "or because of his having exercised the same, such per- "sons shall be held guilty of felony, and on conviction "thereof, shall be fined or imprisoned, or both, at the dis- "cretion of the court—the fine not to exceed five thousand "dollars, and the imprisonment not to exceed ten years, "and shall moreover, be thereafter ineligible to, and dis- "abled from holding any office or place of honor, profit "or trust created by the Constitution or laws of the "United States."

It will be observed that this section does not require anything more than the mere banding or conspiring together, with the intent. The seventh section deals with the cases in which the intent is followed by an overt act, and provides for the punishment of such act, whether it be a crime or a mere misdemeanor; and it is remarkable that where the overt act amounts only to a misdemeanor,

the penalty would actually be less than the sixth section imposes for the mere banding and conspiring together with the intent, which intent is not carried into execution.

An act of Congress which punishes, by absolute disqualification for office, and by fine of five thousand dollars and imprisonment for ten years, the mere conspiring of two or more persons with intent to do an act, however unlawful, which intent they abandon, or at least do not execute, plainly violates article 8, of the Amendments to the Constitution of the United States, which prohibits excessive fines, and cruel and unusual punishments.

The only act which the indictment charges to have been done by the accused, beside the banding and conspiring together with the intent laid in the several counts, is the killing of Alexander Tillman. On all the counts charging the killing, the defendants were acquitted; so that they stand convicted of the mere conspiracy, with the intent alleged, without the doing of any act intended or contemplated by them. And yet they are subject to a punishment which might impoverish them, and deprive them of their liberty for ten years.

No matter how criminal the intent may be, if the conspirators stop with the intent, if they do not carry out the purpose intended, they inflict no serious injury upon society; and such a mere conspiracy, with a purpose and intent not executed, cannot deserve the severe penalties of this statute.

The Constitution no where gives Congress the power

to punish crimes and misdemeanors in the States. The States were in full and undisputed possession and exercise of this power, within their respective jurisdictions, at the time of the adoption of the Constitution; and no restriction upon this power is to be found in the prohibitions of the Constitution, nor is any such power conferred upon Congress by the affirmative grants of the Constitution. When the Constitution says, "Congress shall have power," it means it shall have no other power than that expressly granted; and to guard against abuse or extension of the powers granted, the Amendments were demanded and insisted upon. It is as true now, as it was at the time of the adoption of the Constitution and the Amendments, that "the powers not delegated to the United States by "the Constitution, nor prohibited by it to the States, are "reserved to the States respectively, or to the people:" And this tenth Amendment is but the formulating of that which would have been equally true without this express declaration.

There are other objections to this indictment, which will be briefly noticed here, deferring to the oral argument such further discussion as may be necessary.

Each and every count is subject to the objection of vagueness, uncertainty and insufficiency, in addition to the general objections already urged, which are applicable to the entire indictment as a whole. These counts cover the whole range of the rights, privileges, immunities and protection supposed to have been granted or secured by the Constitution and laws of the United States, and of

the State of Louisiana, and it would be as difficult to meet such charges, and to defend one's self against them, as is was to meet and disprove the terrible charge of *incivism* in the dark days of the French Revolution. The charge is not that the accused actually deprived the objects of their conspiracy of any of the rights counted upon, but that they conspired with intent to hinder and prevent the free exercise and enjoyment of these rights.

The act usually indicates the intent; but who can know the secret intent; by what proof short of an explicit avowal, can the mere intent, in the absence of a corresponding act, be established? And yet the intent is of the very essence of this indictment.

The right peaceably to assemble for a lawful purpose, as laid in the first count of the indictment, is not the right referred to in the last clause of Article 1 of the Amendments. The object of this clause was to assure the people that their right peaceably to assemble. for the purpose of petitioning the government for a redress of grievances should not be interfered with by Congress; and no people with a just conception of their natural and inherent rights would ever have required any assurance from any government resting solely upon their consent, that they should not be deprived by that government of the right resulting from the very nature of man, to assemble peaceably for any and all purposes, social, or political, or religious. What the people wanted, what they demanded, what they intended to secure, beyond the power of denial or abridgment by Congress, is the right to petition the government

for redress of grievances, and to assemble peaceably for that purpose. The inseparable connection in this clause and in the several State constitutions of the right peaceably to assemble, with the right to petition the government for a redress of grievances, makes this interpretation manifest, and demonstrates the entire want of conformity of the right set forth in this count, with the right which the first amendment protects against the action of Congress.

This count is also defective in that it does not charge what the lawful purpose of the assembly was, nor when nor where it was to be, nor the acts by which it was to be interfered with.

The right to keep and bear arms for a lawful purpose, as laid in the second count of the indictment, is not the right contemplated by the second article of the Amendments. The right of self-defence is a natural right; and the right to keep and bear such arms as may be necessary for that purpose cannot be questioned. But the right which the people intended to have secured beyond the power of infringment by Congress, is the right to keep and bear arms for the purpose of maintaining, in the States, a well regulated militia, acknowledged in this article to be necessary for the security of a free State.

This count is also defective, in that it does not charge what the lawful purpose was, for which arms were to be kept and borne, nor does it set forth either the time or place at which they were to be kept and borne, nor the acts by which this alleged right was to be interfered with.

The third count charges a conspiracy with intent to deprive Nelson and Tillman of life and liberty, without due process of law. It is the naked charge of a conspiracy to subject the parties named to false imprisonment, or some other unlawful restraint of their liberty of person; and to commit murder. The offense charged is a grave one; but as laid in this count, it is an offense against the State of Louisiana, not against the United States. This charge can no more be entertained in the courts of the United States, than could a charge of burglary, or theft, or arson, or robbery, or any other crime committed in a State, by which persons are deprived of property feloniously.

The fourth count charges a conspiracy with intent to prevent and hinder Nelson and Tillman in the exercise of their right to the full and equal benefit of the laws of the United States, and of the State of Louisiana, for the security of their persons and property, at that time enjoyed by white citizens of the State of Louisiana, and of the United States, for the protection and security of such white persons. It is not easy to understand this vague and complex charge. Persons and property are secured by laws, civil and criminal. The constitution of Louisiana establishes the perfect equality of all its citizens, "*without regard to race, color, or previous* condition," in all civil, political and public rights. It makes all citizens of the United States, residents of the State for one year, citizens of the State of Louisiana, and it subjects all to the same pains and penalties. The en-

forcement of this right devolves upon the officers of the State charged with the administration and execution of the laws; and it is difficult to perceive how individuals could hinder or prevent the free exercise and enjoyment, by any citizen, of the equal benefit of all the laws of the State or of the United States. It might be done by an incompetent or corrupt Judiciary, possibly by other faithless officials; but the redress of any such wrong is not within the legislative power of Congress. It would depend, in last resort, on this Court.

The count is defective in not stating specifically, of what laws the accused intended to deprive the parties named of the full and equal benefit, whether laws of the United States or of the State of Louisiana; and by what act the accused intended to perpetrate this wrong.

The fifth count covers all the rights, privileges, immunities and protection granted to Nelson and Tillman as citizens of the United States, and as citizens of the State of Louisiana. There is no crime, no wrong, no offense, which two or more persons could conspire with intent to commit, affecting life, or liberty, or property or reputation, which would not be reached by this count. How could any man conjecture what specific crime or offense the prosecution would attempt to show, under this count, that he had conspired with others with intent to commit? How could he, with the aid of the most skillful and learned counsel, prepare for, or make his defense? For all the purposes of judicial inquiry, it might as well be charged in an indictment, that

the accused had conspired to violate every law of the State, and to commit every crime in the calendar.

The sixth count charges a conspiracy with intent to prevent and hinder Nelson and Tillman in the enjoyment of the right to vote at any future election. The elections in Louisiana are bi-ennial, and the time for the next succeeding election was the 2nd November, 1874. It is difficult to imagine what proof could show an intent to hinder and prevent, more than eighteen months in advance of the election, the exercise of the right to vote at that election.

But the most serious objection to this count is, that no part of the Constitution gives Congress any control of the right to vote in a State, except the second section of the Fifteenth Amendment; and that relates only to the denial or abridgement of the right to vote on account of race, color, or previous condition of servitude. The right to vote depends upon the law of the State; and neither the act of Congress on which this indictment is based, nor this sixth count, is limited to the prohibited discrimination. The count does charge that Nelson and Tillman were citizens of African descent; but it does not charge that the accused conspired with intent to hinder them in the exercise of the right to vote on that account. Under the Statute, black men might be indicted for a conspiracy to prevent and hinder a black man or a white man; or white men might be indicted for a conspiracy to prevent and hinder a white man or a black man, in the exercise of the right to vote.

Obviously, nothing in the recent Amendments can

authorize any such legislation by Congress, or make the thing charged in this count an offence against the United States.

The seventh count charges a conspiracy with intent and purpose to oppress, intimidate, &c., Nelson and Tillman, because they had voted at an election held on the 4th November, 1872. It is difficult to imagine what proof could be offered of a conspiracy with such intent, five months after the election had been held. This count differs from the sixth, only in so far as the one relates to a future election, and the other to an election which had been held; and all the objections to the sixth count are equally applicable to the seventh count.

The eighth count covers every, each, all and singular, the several rights and privileges granted or secured to Nelson and Tillman, in common with all other good citizens, by the Constitution and laws of the United States.

This count is subject to the objections urged against the fifth count; and it is no better than a charge, in general terms, of a conspiracy with intent to violate every Article of the Constitution of the United States, and every act of Congress, granting or securing rights and privileges to citizens of the United States.

If the theory of this indictment can be maintained; if the enforcement act, particularly this sixth section, shall be held by this Court to be within the constitutional power of Congress, then, indeed, will the government have been completely revolutionized, by the mere conferring of power upon Congress to enforce the prohibitions of

the recent Amendments. All the serious, far reaching and pervading consequences, so forcibly depicted in the Slaughter House cases, will be realized; and we shall have taken a fatal departure from the structure and spirit of our institutions. The State governments will be "fettered " and degraded, by subjecting them to the control of Con- " gress in the exercise of powers, heretofore universally " conceded to them, of the most ordinary and fundamental " character. The whole theory of the relations of the " State and Federal goverments to each other, and of " both these governments to the people, will have been " radically changed. The entire domain of civil rights, " heretofore belonging exclusively to the States, will be " brought within the power of Congress;" and the right of local self-government in the States, will no longer exist

The time has come when the line of demarcation between State and Federal power must be plainly defined, and maintained with a steady and an even hand, lest it be obliterated and utterly lost, to the ruin of our institutions. This duty now devolves upon this Court, the great conservative department of the government, made independent by the Constitution. Let us hope that the conclusion of the Court, in the Slaughter House cases, will never be disturbed, "that no such far reaching and disastrous " results (as there prognosticated) were ever contemplated " by the Congress which proposed, or by the States which " ratified the recent Amendments;" and that the power granted to Congress by these Amendments will be strictly limited to the purposes contemplated, the prohibition and

preventing of any discrimination against citizens, in the laws, on account of race, color, or previous condition of servitude. The shackles will have fallen in vain from four millions of blacks, who were born slaves, if fetters more galling are to be rivetted on so many more millions of white people, who were born free.

R. H. MARR,

Of Counsel for Defendants.

NEW ORLEANS, February, 1875.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 609

UNITED STATES

—VS.—

WM. J. CRUIKSHANK, et al.

CONSPIRACY AND BANDING IN GRANT PARISH, LA.

BRIEF FOR DEFENDANTS

JOHN A. CAMPBELL,
Attorney.

Supreme Court of the United States.

No. 609.

UNITED STATES OF AMERICA,

vs.

WM. J. CRUIKSHANK, ET AL.

STATEMENT OF THE CAUSE.

Certificate of division of opinion from the Circuit Court of the United States for the District of Louisiana.

The certificate of division of opinion between the Judges sitting in the Circuit Court, subjects to examination and review sixteen counts of an indictment prosecuted in that Court against the defendants, to ascertain whether they are, severally, good and sufficient in law. and contain charges of criminal matter, indictable under the laws of the United States.

There had been a demurrer to the indictment which was overruled; there was a trial, and verdict for the prosecution, before one of the Judges; there was a motion to set aside the verdict, not to give judgment; to arrest the judgment before the presiding Judge and the Circuit

Judge, and a disagreement between them. Record, 82, 83.

Eight of these counts charge that Levi Nelson and Alexander Tillman were citizens of the United States and of Louisiana, of African descent, and persons of color, and on the 13th of April, 1873, were in the District of Louisiana; that, on this day the defendants did *band together, with* the intent and purpose to injure, oppress, threaten and intimidate the said persons, with the unlawful purpose, to hinder and to prevent them in their respective *free exercise and enjoyment* of their lawful right to *peaceably assemble* for a *lawful purpose with other citizens* of the United States and with each other; OR, to hinder and prevent them in their *free exercise and enjoyment* of their lawful right to *bear and keep arms for a lawful purpose;* OR to deprive them of *their* respective *several lives and liberty of person and property without due process of law:* the full right and privilege to *protection* against the *deprivation* of their life, *liberty* of person and property without due process of law; *Or* to hinder and prevent them in their free exercise and enjoyment of the right and privilege *to vote at any election thereafter to be held* in the State of Louisiana, they being duly qualified to vote—and to put them in fear of bodily harm *for having voted* at *the* general election in the State *in November*, 1872, and divers other elections.

All of these are charged to be rights or privileges granted and secured in the constitution and laws of the United States to these two individuals, and the acts done

are charged to be contrary to the form and statute of the United States.

These counts differ from the others of the sixteen for the reason that they specify after a manner, a particular right or privilege, which the prosecutor supposes has been affected by the *banding together* of the defendants with a purpose and intent by means of injury, oppression, threats, or intimidation, to hinder or prevent the free exercise and enjoyment of

The remaining counts we shall separately consider—these charge the defendants with conspiracy, combination and confederacy, with intent to injure, oppress, threaten and intimidate the same two persons, to hinder and prevent them, either, in the free exercise and enjoyment of the several right or privilege to the *full and equal* benefit of *all laws* and *proceedings* ordained and enacted and in force, by the State of Louisiana and by the United States, for the *security* of their *persons* and property, *in general*—or, such as were made for white citizens; or such as were made for colored citizens; or such as were made for citizens of the United States, without making any distinctions or references, with respect to race or color.

The objections to the counts are specified in the motions made to arrest the judgment. Record, 82. These objections are that no offence is charged which the Courts of the United States have cognizance of. That the subject matter of these counts and the offences they describe are not within the jurisdiction of the United States or the

departments of their government, but belongs to the States and their tribunals under their own constitution and laws.

The motion and the certificate of division of opinion draw in question the sufficiency of every count, on which there was a verdict against the defendants.

STATEMENT OF THE POINTS AND AUTHORITIES.

The counts of the indictment which have some specification of the ultimate aim of the defendants, and contain some attempt to exhibit some definite object of the alleged banding, or conspiracy, or confederation, set forth that the intent of the banding, confederacy, conspiracy—was by injury, oppression, intimidation and menace to hinder and prevent them respectively, from peaceably joining in a lawful assembly for a lawful purpose; for the enjoyment of life, liberty and property, and the security thereof from deprivation otherwise than by due process of law; and the exercise of the right and privilege to vote at elections in the State, and the exemption from injury, oppression, menace and threats for having giving such votes.

It will be admitted that citizens in every State in this Union may band, confederate, combine, or conspire together, and that the U. S. have no authority to question them under the Constitution of the United States for these simple acts. Neither have the United States, nor any department thereof, a universal or a general or any other than a very special, particular and incidental con-

trol in the matter of the banding, conspiring or combination of persons within the limits of a State. We shall not deny that Congress may pass laws to punish conspiracies to levy war against the United States; or to overthrow the government; to seize its property, rob its mails, counterfeit its coin, or to cast away vessels bearing its flag, or in any manner to invade its constitutional authority, or frustrate the administration of its constitutional powers. But beyond this we shall not go—the Constitution of the United States delegates no authority to Congress, to define the purposes for which the people may assemble, nor to superintend the conduct of the members at those meetings; nor to provide a safe conduct for any who may desire to attend them; nor for violations of their order or decorum, nor to take cognizance of those that are, or become unlawful or tumultuous, or which might become riotous and dangerous to the peace of the State. These are all concerns, which affect the order, tranquillity and police of the State. The first amendment to the constitution, denies power to the United States, to abridge the right of the people to assemble and petition the government for a redress of grievances. But this prohibition contains no implication of control, superintendence, allowance or prevention of such assemblies. The same objections apply to the counts which charge the object of the conspiracy to disturb the exercise of the right to keep and bear arms. This is not a right derived from or secured in the Constitution of the United States. The second amendment to the constitution, denies to the government power to infringe

that right, and no article in the Constitution of the United States has any relation to that right, except that which relates to the organization and equipment of the militia; the privilege of citizens to keep and bear arms, for a lawful purpose, is not a right or privilege which the United States granted, nor its government charged to guard and to guarantee; nor is an interference with this right an offence against any law of the United States. The counts which charge the defendants with banding to deprive the two persons named, of their respective lives and liberty of person without due process of law, and of the full right and privilege to protection against the deprivation of their life, liberty, and property without process, cannot be said to contain any specific charge. It is the established rule that the offense is consummate and complete by the unlawful combination, and therefore, the purpose to be accomplished must be distinctly stated, with as much certainty as practicable, so that it may appear to be unlawful. Commonwealth vs. Hunt, 4 Metcalf Rep. 111; Commonwealth vs. O'Brien, 12 Cushing, 84; 5 Har. & John. 317; Alderman vs. People, 4 Mich. 414.

We have seen that banding together—with the purpose to oppress, injure, threaten and intimidate a citizen, is not an offence against the United States, nor cognizable by their tribunals; the conspiracy and the means employed by the conspiracy as stated, are alike beyond the reach of their punitive jurisdiction and authority; the crime then must be found in the object of the persons in banding and employing such measures. This indictment

describes the illegal object in the manner we have stated, to hinder and to prevent the injured parties in the enjoyment of life, liberty, and property, and to deprive them of all or some, without due process of law.

The 5th Amendment to the Constitution of the United States, debars the government of the United States, from depriving any person of his life, liberty and property, without due process of law. But it was admitted prior to the adoption of the 14th Amendment to the constitution, that the government of the United States could not hinder or prevent the people of the States from doing so, except, in a very few cases. The States could not do so by ex post facto laws, bills of attainder or laws impairing the obligation of contracts. Several millions of men were held in slavery. No power has been delegated to the United States to legislate for protection of persons and things within a State, directly. "The power of dealing with persons and things, is incidental to the employment of general grants in the constitution." A State has the same undeniable jurisdiction over all persons and things within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the U. S. that by virtue of this, it is not only the right, but the solemn and bounden duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise is not surrendered or restrained. That all

those powers which relate to merely municipal legislation, or what may be termed its *internal police*, are not thus surrendered or restrained; and that consequently, in relation to these, THE AUTHORITY OF A STATE IS COMPLETE, UNQUALIFIED, AND EXCLUSIVE.

City of New York vs. Myln, 11 Pet. 105, 139.

The opinion we have quoted describes the scope of this sovereignty to be, that under the restriction above stated, it embraces all that concerns the welfare of the people of the State or any individual in it; whether it related to their rights or their duties; whether it respected them as men, or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property of the whole people of the State, or of any individual of it; and whose operation was within the territorial limits of the State and upon persons and things within its jurisdiction. 11 Peters, 139; supra. 9 Wh., 204.

The count in the indictment under consideration—claims that the government of the United States has the unlimited jurisdiction over all persons and things in the United States, and to vindicate each citizen in the State when injured, oppressed, threatened, intimidated, by two or more persons, with the purpose to deprive one or more of life, liberty or property, by means of a criminal prosecution in its tribunals. The count cannot be supported.

The same considerations apply to the counts which charge a purpose to prevent and hinder the two persons named, in their enjoyment of the right and privilege of

suffrage at future elections, and to punish or molest them for the exercise of their suffrage in November, 1872.

The elections referred to are the State elections in Louisiana. No article of the Constitution of the United States prescribes to the State the time, manner or place of holding the elections for offices of the State—nor prescribes to the State who shall vote at those elections except in a qualified way, the extent of which we shall discuss hereafter. The constitution places the control of the election of members of the House of Representative of Congress, in the Congress, and the time and manner of the election of Senators also. But all that relates to a State election, as to the manner in which it shall be conducted and the protection to be accorded to the voters is left under State jurisdiction. The 4th and 5th sections of the act of 1870, provide fully for the offences set forth in these counts; they are there classed as *misdemeanors;* the successful obstruction of the exercise of the right, the attempt to do so, the attempt to injure the voters for having exercised the right, are set forth in those sections of the act as misdemeanors, and punishments are declared, for those found guilty.

The prosecutor in this case treats as a felony banding to prevent and hinder, that which being actually done is only a misdemeanor under the preceding sections of the same act.

We shall have occasion to invite attention to this discrepancy when the 6th section of the act comes to be minutely examined; the principles we have stated have been settled in the jurisprudence of the States and of the

Union. We say the Federal government is the result of concessions made by the people of the States composing the Union to it, and that all of the powers which any of its departments may properly exercise are derived from the constitution; and the acts done, are no farther valid than they are authorized by the constitution:

Exparte Milligan, 4 Wall., 4.

That with the exception of those surrendered by that constitution the people of the several States are absolutely and unconditionally sovereign within their respective territories:

Ohio L. & T. Co. vs Debolt, 16 H. 416, 428.

4 Peters, 463, (McLean).

18 How., 350.

We say that the limitations in the first eleven amendments are imposed upon the powers of the Federal government and its various departments in the administration of the affairs of the Union—that they apply no restriction upon the people of the States in the organization of their State governments and the regulation of their own internal economy, and that the people remain in full and entire possession of all of the powers of self-government not surrendered or granted by the constitution.

As a corollary from these principles, we conclude that the banding and conspiring of two or more persons, within a State, without more, is not an offence against the sovereignty of the United States; nor is the banding and conspiring of two or more persons within a State, simply to oppress, injure, put in fear of bodily harm, threaten, or

intimidate two or more of other citizens; nor is the banding or conspiring together of two or more persons within a State to injure, oppress, put in fear of bodily harm, threaten and intimidate two or more other persons in the State, to prevent and hinder them from participating in an assembly of citizens for a lawful purpose; or to prevent and hinder them from keeping and bearing arms for a lawful purpose; or to prevent or to disturb them in the exercise and enjoyment of life, liberty and property; or to hinder them in the exercise of suffrage in the future or for having used it at some day which had passed.

All of these rights and privileges have their origin in and their protection from such injury, oppression threats or intimidation, and from the banding and conspiring of two or more persons to obstruct or invade them in that great mass of rights and powers which the people of the States did not surrender to the government of the United States, but reserved to themselves or to their governments.

II.

The remaining counts of this indictment referred to the Supreme Court by the disagreement of the Judges in the Circuit Court, severally contain a charge of a conspiracy, manifested by an intent to injure, oppress, threaten and intimidate two citizens of color, with a purpose to hinder and prevent a free and full enjoyment of all and singular, each and every of their respective rights and privileges under the Constitution and laws of the

United States—some of the counts include the rights and privileges granted and secured in the Constitution and laws of Louisiana, thus applying the acts of 1870, under which the indictment is framed, to embrace the entire capacity and faculties of the citizen to the possession and enjoyment of every right and privilege, State or Federal, within its terms. A violation of any civil right or political right, in whatever degree, by a conspiracy or banding of two or more persons forms a case for indictment in the Courts of the United States, upon the principles of this prosecution. The first observation to be made in respect to these counts, is their novelty and originality as pleadings.

They surely do not fulfill the command of the 5th Amendment of the Constitution of the United States—"to inform the accused of the nature and cause of the accusation against him." To answer this accusation the defendant must know the constitutional and statutory law—the codes and customs,—by which rights, privileges and immunities have been granted and secured to a citizen, whether a colored man or a white man, that might in any manner be hindered or obstructed in the slightest measure of exercise or enjoyment, by a conspiracy to do so, displayed by threats, intimidation, injury or oppression.

The opinion embodied in the counts of this indictment seems to be that whatever two or more persons may do, which can be construed as purposed injury, oppression, menace or intimidation of colored persons, is a sort of in-

civism—a renewed rebellion or conspiracy against the Constitutions and laws of the United States and the State, whether there be force and violence, or merely passionate and menacing expressions—these serve to show a determinate intent to hinder and prevent a free exercise of some right or privilege granted or secured in some constitution, or law, or proceeding of the United States or the State. Such an opinion, if adopted, changes the structure of the Constitutions of the United States and the States. All criminal administration would be absorbed by the Federal tribunals by the adoption of the opinion, for the 6th section of the act of 1870 embraces all citizens of the United States, white as well as black. The principles of interpretation, which conduct to the preferment of such indictments were in vogue several centuries ago in England among the crown lawyers and the dependent and subservient judges who administered the vengeance of the crown. Lord Hale, (p. 82) in his pleas of the crown, says:

"That at common law there was a great latitude used in *raising offences* to the crime and punishment of treason by way of *interpretation* and *arbitrary construction* which brought great uncertainty and confusion—thus accroaching on royal power was an usual charge of treason anciently, though a very uncertain charge; so that no man could tell what it was, or what defence to make." Undoubtedly the careful definition of the crime of treason, and the assurance to the accused of a *right* to be informed of the cause of accusation, in the Constitutions of the

United States, have their origin in the abuses which are referred to in the extract we have made. There is some appearance of danger that the crime of conspiracy will be made to serve the same purpose in the United States by perversion and tortuous construction.

A charge of an act of conspiracy "To prevent A. and B. in their free exercise of their several right and privilege to the full and equal benefit of all laws and proceedings before this time enacted or ordained by the State of Louisiana and by the United States in force for the security of their respective persons and property, at that time in force, *etc.. etc.*, may be fairly presented to compete with anything invented or used in the time of Henry VII or VIII, of England, or of Edward IV or Henry VI. Lord Coke, 3 Inst., 23, says, before Edward III. so many treasons had been made and declared, and in such sort penned as not only the ignorant and unlearned people, but also learned and expert men were trapped and snared. So as the mischief before Edward III, of the uncertainty of what was treason, and what not, became so frequent and dangerous as that the safest and surest remedy was by this excellent act of Mary to abrogate and repeal all, but only such as are specified and expressed in the statute of Edward III. By which the safety of both the king and the subject and the preservation of the common weal were wisely and sufficiently provided for, and in such certainty that "*Nihil relictum est ad arbitrio judicis.*"

In accordance thereto, Lord Hale after stating several cases of cruelty and wrong, remarks upon the uncertainty and

vexation, and of a time as this party or that party, got the better, the crime of treason was in a manner arbitrarily imposed and adjudged, which by various vicissitudes and revolutions, mischiefed all parties first or last and left a great inquietude and unsettledness in the minds of the people. The Earl of Strafford in his defence of himself and against the enhancing into treason the words and acts of himself and others connected with him, employs these eloquent words, "It is now two hundred and forty years since treasons were defined; and so long has it been since any man was touched to this extent upon this crime, before myself. We have lived my lords happily to ourselves at home; we have lived gloriously abroad to the world; let us be content with what our father left us; let not our ambition carry us, to be more learned than they were in these killing and destructive arts. Great wisdom it will be in your lordships and just providence, for yourselves, your posterities, for the whole kingdom, to cast from you unto fire these bloody and mysterious volumes of arbitrary and constructive treasons, as the primitive Christians did their books of curious arts, and betake yourselves to the plain letter of the statute, which tells you where the crime is, and points out to you the path by which you may avoid it."

These eight counts of this indictment, furnish no sort of information as to the offence for which these parties are arraigned. There is allegation of a combination formed among a number of persons with characterizing epithets. There is charge that there was an intent to injure, oppress,

threaten and intimidate, two citizens, belonging to a known class of persons. For what end? To hinder and deprive them of all and singular, each and every, of the rights and privileges secured to them as citizens of the State and of the Union. But there must be some precise and defined right, over which the constitution and laws of the United States are supreme, and the government of the United States empowered by the people to maintain and secure, and have by appropriate legislation secured, to justify a prosecution. This must be shown in the indictment.

The 6th Section of the Act of 1870, does not justify this prosecution.

An analysis of this act shows that it has no such all embracing scope and comprehension as the indictment assumes.

The title of the act is to enforce the right of citizens to vote in the several States of the Union and other purposes.

The First Section of the Act of 1870, commences with a declaration of the import of the 15th Amendment to the Constitution. We shall consider this in another place.

The Second and Third Sections provide for the enforcement of the right of voters to prove their capacity and qualifications, and to fulfil the requirements of the laws of the State to entitle the voter to the privilege. Penalties are imposed upon the officers who put obstructions in the way of the voter, either in the preliminary stages, or at and after the election.

The Fourth Section, provides penalties against acts of force, bribery, threats, intimidation, or other unlawful means, and against *combinations and confederacies with others* to hinder, delay, prevent or obstruct from doing any act to qualify him to vote.

The Fifth Section, provides penalties against those who hinder, control or intimidate or attempt to do so, any person from exercising the right of suffrage by means of *bribery, threats*, of discharging from employment, or as a tenant, or threats of *violence* to *himself* or family; then he shall be deemed guilty of a *misdemeanor*. We have stated these sections of the Act, generally, in order to apply them in the construction of the Sixth Section.

This section has become familiar from the reading of this indictment. It is that if two or more persons shall band or conspire together, or go in disguise on the public highway, or upon the premises of another, with intent to violate any provision of this Act, or to injure, oppress, threaten or intimidate any citizen, with intent to prevent or hinder his free exercise of any right or privilege granted or secured to him, by the Constitution and laws of the United States, or because of his having exercised the same, it shall be felony. The penalty is a fine not to exceed $5000, and imprisonment not to exceed 10 years, with incapacity to hold any office under the Constitution and laws of the United States.

The act is more penal than the acts which provide punishments for conspiring to overthrow the government, and approximate the alternative and secondary punish-

ment for the crime of treason. The sixteen counts of this indictment could be established by proof of violent declarations and menaces to a single person that he should not attend public meetings of citizens, should not keep or carry arms, should not occupy his own house ,come to the county Court, or attend at the election, or serve on the jury. Although these interferences and obstructions might be offensive and oppressive, but they are not such acts as usually are denounced as felonies or are punished with fine, imprisonment and *disfranchisement.* But we fine in the 4th section the facts which would satisfy many of the counts if established, defined and classed, as proof of a misdemeanor of a venial class.

These acts are acts of a combination and confederacy to hinder, delay, prevent or obstruct a citizen from doing some *act to qualify him to* vote, *or from voting at any election, as aforesaid.* Four of the counts we have considered are for acts of this kind, and in the indictment are treated as *felonies* in these counts. The interpretation which this prosecutor has placed on the sixth section of the act of 1870, cannot be supported either from the act itself, or the language of the 6th section.

His interpretation is that the sixth section, embraces distinctly, all cases of combination, or conspiracy, by two or more persons, who intend by injury, oppression, threats or intimidation, to hinder and deprive any citizen of any right or privilege granted or secured in the constitution and laws. We have seen that there are in the second and third sections provisions to protect such rights and privi-

leges against the parties who actually did hinder and prevent the exercise of some of these rights and privileges. In the fourth and fifth sections of the act, the most obvious and obnoxious of the modes of hindrance and prevention, as well as of combinations and confederacies to hinder and prevent, and the actual and successful attempts at hindrance and prevention, are treated as misdemeanors. These enumerated cases have respect to elections, the subject of the act as shown by the title and the first section. It would be a singular mode of legislation, to provide for the punishment of a large class of cases, those most offensive to the legislator as simple misdemeanors, and then in the same act, to provide for every case, including those to arise from a breach of that act or any other act. or the constitution itself, of the same nature and character, by denouncing all as felonies of particular turpitude to be visited with punishment, severe, unusual, and ignominious.

The same incongruity is apparent in the 6th section. This indictment treats the words "that if two or more persons shall band and conspire together with intent to violate that act, or to injure, oppress, threaten, or intimidate, with intent to hinder and prevent," etc., as a universal, and to include all cases of banding and conspiracy, whether under that act, or any other act, for the purpose of hindering and preventing the exercise and enjoyment of rights and privileges by a citizen.

The fact of disguise, whether upon a highway or a by-way, in a tavern or a farm-house, with measures of injury or intimidation, for the purpose above mentioned, would

come under this section, as well as the cases where there had been no disguise, in the same conditions. So, were the owner of a plantation to band and conspire with his sons and overseer, to injure, oppress, intimidate his own laborers on the plantation or visitors at his place, would be embraced in the act, on the interpretation made by this prosecutor, as shown in this indictment, with the same imputations of guilt as if they had gone to the premises of the persons to be hindered and prevented by the same means. If the words "or go in disguise upon the public highway, or upon the premises of another," are not a limitations and qualification of the words that precede, they are strangely out of place and irrelevant. If two or more persons, either with or without disguise, go upon a highway or upon the premises of another to violate that act, or to injure, oppress, threaten, or intimidate a citizen, to prevent or hinder his free exercise, etc., he is, by the terms of that act, guilty; and that independently of the words above quoted, because the combination of two or more persons for the accomplishment of an unlawful purpose, is a conspiracy—a banding.

This exposition of the act is exceedingly clear. The enquiry arises, did Congress mean to pass an act which can be thus exposed? The answer is that the Congress intended to act rationally. It had provided adequate punishment for various acts of hindrance and prevention, and for the more important and usual modes by which hindrance and prevention are accomplished. These more important and usual modes are treated as misde-

meanors. There were two other modes sufficiently pernicious to be treated with glaring and impressive severity. These are the offenses intended to be suppressed or punished in the 6th section. The act should read " that if two or more persons shall band or conspire together, AND GO IN DISGUISE UPON THE PUBLIC HIGHWAY, *or* UPON THE PREMISES *of another*." These are the cases of *ku klux*, so called. The offense consisted in the terror inspired; the alarm to the superstitious apprehensions of a feeble, ignorant, and despised population, to prevent and to hinder them from the free exercise of civil or political rights. The parade, on the highway, or on the premises of one of the victims, are aggravations of the real offense. Such acts are more appalling and influencive than depriving of employment, ejectment from rented lands or houses, refusing to renew leases, or threats of violence to the family, or by force, bribery, threats, intimidation, to hinder, delay, or obstruct a citizen from voting at the election. The intent being clear, the interpretation will be given.

All of the counts of this indictment which have been certified to this Court, charging a banding and conspiracy, are founded upon the terms of the 6th section of the act of 1870, and on the assumption that the first term in the act is universal and applicable to all cases of banding and conspiracy for the purpose set forth. In the view we have taken of that section of that act, it is limited to the specific instances of banding and conspiracy manifested under the special conditions of disguise on the public highway, or at the private dwellings of the citizens, to be

hindered or obstructed in the exercise of rights or privileges. The review of this 6th section, in connection with the counts in the indictment, and the drama of several weeks in representation in 1874, in the Circuit Court of the United States at New Orleans, bring us to the conclusion that this is but a reproduction of the sad tragedy of ku klux in another judicial forum, but that the important and necessary incident in the tragedy of the appearance of *ku klux* is omitted from all of the scenes.

The counts are all fatally defective under the act of 1870, without the averments of a *disguise*, and apperance in disguise on the highway, or the premises of another.

III.

We shall now consider whether the Constitution of the United States, or law in pursuance of it, warrants a judgment against the defendants on the counts of the indictment certified for examination to this court. Prior to the adoption of the Thirteenth Amendment of the Constitution, no such a case could have arisen.

That Amendment accomplished a change in the capacity and state of a portion of the inhabitants of a number of the States. The same change had been made prior thereto, in the capacity and state of the same class of inhabitants by the sovereign power of those States. In all of the States there had been some instances of emancipation of slaves, and in a majority there were no slaves.

Such persons took their place among the free population and were not often heard of, as a distinct class. All publicists worthy of the name, all statesmen and philosophers

of every country, hold that slavery, whatever may have been its origin, nature or duration, is a legal state, so long as, and wherever it may be authorized by law; but, that it is a violent and exorbitant state, and consequently, exceptional and transitory, and which can be legitimately maintained, only until it can be reasonably abolished. That it may be reasonably abolished whenever the emancipation of slaves is compatible with the essential conditions of social order, obedience to laws, the security of persons, respect for property, the remuneration and conservation of work, and the regularity of civil transactions. The manner of emancipation consists in the abrogation and the repeal of the constitutions statutes, laws, ordinances, customs, titles, which subject the person, faculties, organs and capacity for employment and action to the will of another without his consent, and for the advantage of the other as property—or which place men in service or degrading conditions in the organization of the state or society, for the emolument, or aggrandizement of other classes. When the entire law of slavery was thus abolished in all of the States, and there was no color of law or support of authority for slavery, this Amendment of the Constitution was fully executed.

Instances will probably occur in every State where there shall be injury, oppression, tyranny, cruelty, suppression of free agency, as harsh as slavery in its most rigorous form—but, the person will not be a slave nor in servitude which this Constitution prohibits. This indictment does not allege that the victims of the wrongs

charged, were slaves—nor that they were held in servitude; It asserts they were citizens, living in the peace of the State; in possession of rights and privileges and immunities, and that there was a conspiracy to dispossess them of their free exercise. The Constitution and laws of Louisiana have fully complied with this Constitution, by the removal of every support or sanction to the institution of slavery, and by placing in possession of the rights of citizens all who have ever been submissive to the laws of slavery.

IV.

The indictment has for its basis, the first section of the Fourteenth Amendment to the Constitution, and the 6th section of the act of Congress of May, 1870.

The charges in the indictment are of a conspiracy with unlawful and felonious intents, to hinder two citizens in the exercise and enjoyment of rights and privileges, granted or secured in the Constitution and laws of the United States—the grant and security are found in this Amendment of the Constitution and the Act of May, 1870. The first sentence in that article determines what persons are citizens of the United States and of the States respectively. All who have been liberated by the 13th Amendment, or by prior acts of emancipation or abolition, if not before, were now citizens. This constitution was a full and complete execution of the 13th Amendment as to the living population. No conditions could be constitutionally imposed to degrade or to debase them.

The clauses which follow the first sentence are com-

mands from the people of the United States to the States severally and respectively. None shall pass a law to abridge the privileges or immunities of a citizen of the United States; nor to deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws. No count in the indictment makes any charge that the persons named as victims, were injured, oppressed, threatened or intimidated, under color of, or by reason of any law of the State which abridged the privileges or immunities of citizens of the United States, or of these citizens, or deprived them of life, liberty or property with or without process, or which denied to them equal protection.

In these counts it is admitted that those persons were in the enjoyment and exercise of all and of each; but that there was a conspiracy, the intent of which, was by injury oppression, threats of intimidation, to prevent and hinder their free exercise and enjoyment of all of these.

Referring to the Constitution and laws of Louisiana, it will be seen that there is no law to abridge the privileges and immunities of the parties mentioned, that denies to them the equal protection of the laws; or which provides to deprive them of life, liberty or property, without due process of law. Such being the clear and admitted fact, there is no breach of this constitution by the State of Louisiana, to whom the people of the United States directed the commands contained in the 14th Amendment? Wherefore, then is this indictment prosecuted?

The prosecution assumes that these commands in the first section of the 14th Amendment were addressed to each and every inhabitant in the State, in his individual and personal capacity and character, and irrespective of the States, and that every breach of these commands by one inhabitant, to the damage of another, or to his detriment authorizes him with the leave of Congress to assert his claim in the tribunals for redress, and that Congress may enforce the commands by penal enactments.

The entire subversion of the institutions of the States and the immediate consolidation of the whole land into a consolidated empire, is the immediate consequence of such a conclusion being adopted as law.

The object of this amendment was to restrain the States from exorbitant, excessive and tyrannical legislation affecting the privileges, and immunities of citizens, their rights to life, liberty and property, and to equal protection of the laws.

This amendment to the constitution conferred no rights, privileges or immunities on citizens which they did not and their nor did it change the relations of the States have before ; people. It only afforded an additional guarantee to existing rights and liberties, by authorizing an appeal by the citizens against an exorbitant law of the State in the matters embraced in this amendment.

V

The Fifteenth Amendment provides that the right of citizens of the United States to vote shall not be denied or abridged on account of race, color, or previous condition of servitude.

This is the only restriction on the power of the States to determine the qualification of voters. The second article of the Fourteenth Amendment admits the plenary authority in relation to the elections for State officers and for the members to Congress, and the President.

The act of May, 1870, declares that all citizens of the United States, otherwise qualified to vote, shall be *entitled* and *allowed* to *vote* at all elections, without distinction of race, color, or previous condition of servitude.

The constitution of Louisiana (art. 86) adopts the principle of free suffrage. Residence in the State for a year, and in the parish for ten days prior to the election, entitles every male of 21 years of age and upwards to a vote. Laws have been made to secure this right to all without regard to color, age, or condition, as to servitude.

Revised Stat.: titles, Election, Registration.

The act of 1870 adopts penal provisions in respect to the preparations for the election, and all that follows upon the election. Under the constitution, which provides that neither the United States nor the State shall make discriminations for a particular cause, the Congress assumes to make laws in respect to registration or other pre-requisite to the receipt, count, certification, and report of the officers, to insure to each one the claim to vote. The 4th and 5th sections of the act deal with the whole subject of purity of elections in all the States.

The Constitution of the United States at the time of its adoption, contained prohibitions addressed to the States. The States were forbidden to pass ex post facto laws, bills

of attainder, laws to impair the obligation of contracts. But, these prohibitions were not construed to confer on Congress any power of legislation over the subject of crimes or contracts, if not otherwise granted in the Constitution.

The assumption on which the act of 1870 was framed, and which conspicuously appears in the counts of this indictment, appears to be that the Federal government, is an Imperial government without limitation on its powers, and that the sixth section of the act of 1870, invests the Courts of the United States with a criminal jurisdiction, within the States, co-extensive with this assumption. In this aspect, this cause is one of surpassing interest, and on its determination depends either the maintenance of the government upon its ancient foundation, or a radical change in its entire structure.

JOHN A. CAMPBELL,

For defendants.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 609

THE UNITED STATES

—VS.—

WILLIAM I. CRUIKSHANK AND TWO OTHERS

BRIEF FOR THE DEFENDANTS

DAVID DUDLEY FIELD,
Of Counsel for the Defendants.

Supreme Court

OF THE UNITED STATES.

THE UNITED STATES

agst.

WILLIAM I. CRUIKSHANK and two others

Points and Brief of
MR. DAVID DUDLEY FIELD,
For the Defendants.

STATEMENT.

Ninety-seven persons being indicted in the Circuit Court of the United States, for the District of Louisiana, three of them, the present defendants, were found guilty upon the first sixteen counts.

The indictment was found under the 6th and 7th sections of the Enforcement Act, sixteen counts being for simple conspiracy, under the 6th section, and the other sixteen being for conspiracy, with overt acts resulting in murder.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten and intimidate" two citizens of the United States, "of African descent and persons of color," with "the unlawful and felonious intent thereby" them "to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege, to peaceably assemble together with each other and with other citizens of the

said United States for a peaceable and lawful purpose."

The *second* count avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person without due process of law."

The *fourth* avers an intent to deprive the same persons of the "free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property," enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons in the "exercise and enjoyment of the rights, privileges, immunities and protection granted and secured to them respectively as citizens of the said United States and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color" of the same persons.

The *sixth* avers an intent to hinder and prevent the same persons in "the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana."

The *seventh* avers an intent "to put in great fear of bodily harm, injure and oppress" the same persons, "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons "in their several and respective free exercise and enjoyment of every, each, all and singular the several rights and privileges granted or secured" to them "by the Constitution and laws of the United States."

The next eight counts are a repetition of the first eight, except that, instead of the words "band together," the words "combine, conspire and confederate together" are used.

POINTS.

First: There can be no question that, before the last three amendments to the Constitution, the 6th section of the Enforcement Act, as indeed all the sections of that Act, would have been beyond the competency of Congress. The question in the case is, therefore, whether these amendments have conferred the power.

Second: It was not the design of the people, in adopting them, to change the fundamental character of the Government or to alter the relations between the Union and the States. They intended, that the Union should continue to be, what it had been before, to use the language slightly changed of the late Chief Justice, an indestructible Union of indestructible States.

Third: It was the design of the amendments, and their whole design, to raise the freedmen to an equality with their late masters before the law, and to give the blacks all the rights which the whites enjoyed. There was no complaint that the whites were oppressed. There was no mischief in that respect to remedy. They did not need new guarantees, and none were intended for them. The complaint to be relieved, the mischief to be remedied, the guaranty to be provided, had respect to the lately subject race, and that alone. In saying this, we of course leave out of view the temporary provisions respecting the treatment of the rebels and the rebel debt. So understood, there is symmetry in the whole of the amendments; they are all conformed to one plan, and carry out one great purpose. Thus the 13th Amendment decreed the emancipation of the slaves; the 14th gave them the privileges of citizens

of the United States, and to assure them equality of civil rights, and to debar forever discriminating legislation to their oppression, forbade the States, to deprive any person of the equal protection of the laws, or of life, liberty or property, without due process of law; and finally, the 15th Amendment gave them equality of political rights, to the extent of an equal right to vote.

Fourth: The rules of interpretation applicable to the Federal Constitution have not been in any respect changed by the amendments. The question is always, first, what is the natural sense of the language used; and then, if that be doubtful, what was the intention of the law-givers, that is, of the people of the United States. In the natural sense is included not only that of the particular provision under consideration, but the other provisions of the same instrument. In short, when the question arises, what legislation Congress may adopt to enforce the amendments, the answer that should follow is, that it must be *appropriate*, and must *not* be *prohibited* by other provisions of the Constitution, either *expressly* or *by implication.*

Fifth: Following these rules of interpretation, in their application to the late amendments, and especially to that portion of them involved in the present inquiry, we are led to the following conclusions:

I.—The prohibitions being against State action, *that action must precede any counter-action* under

act of Congress. This is so obvious, as to amount almost to a truism. Even if Congress should be supposed competent to legislate in anticipation of State action, nothing could be done under the act of Congress until something had been done under the act of the State, contrary to the prohibition.

II.—It follows from the last proposition, as well as from other considerations, that in respect to the mere prohibitions upon the States no action under a law of Congress can be had for the mere *inaction* of a State. If, for example, a State should wholly fail to provide for certain rights of property, Congress would not thereby become authorized to pass laws for the protection of such rights. There are many rights which courts acting only according to the common law cannot adequately protect. Massachusetts and Pennsylvania were formerly without equitable remedies. If they were so now no sane man would pretend that therefore Congress would be authorized to establish such remedies for them. So, too, in respect to certain new rights of property, as, for instance, those which arise out of telegraphy, should a State or all the States fail to define and protect them, Congress could not do so.

III.—Any legislation by Congress to enforce the amendments must leave the officers of the States in the full possession and exercise of their repective offices, and the citizens of the States in the full possession and enjoyment of all their rights, under their own laws, except so far as those laws may be in conflict with acts of Congress justifiable by the Constitution.

IV.—The rights of citizens of the States, the right to assemble, the right to bear arms, the right to vote, and the right to life, liberty and property are now, as they have always been, under the

exclusive authority of the States themselves, with the single qualification that these must not discriminate between the different races of men; and Congress cannot by any legislation, directly or indirectly, destroy or weaken this authority of the States.

Sixth: From the foregoing considerations it follows:

I.—That the right to assemble, the right to keep and bear arms, the right to life, liberty and property, the right to vote, and the rights, privileges, and immunities belonging to, or granted and secured to the citizens of the States, are not within the control of Congress, but remain under the exclusive control of the States.

II.—That, as to the rights, privileges or immunities, granted or secured to citizens of the United States, or by the Constitution and laws of the United States, the question of their enforcement does not arise in this case. The protection which may be given by Federal legislation must depend upon the nature of the right, privilege or immunity granted or secured. In the present case the vagueness and generality of the charges leave no opportunity for discrimination.

Seventh: Judgment upon the verdict should be arrested.

DAVID DUDLEY FIELD,
Of Counsel for the Defendants.

THE UNITED STATES

—vs.— No. 609

WILLIAM I. CRUIKSHANK, et al.

Washington, D.C.
March 31, 1875

The above-entitled matter came on for oral argument pursuant to notice,

BEFORE:

MORRISON R. WAITE, *Chief Justice of the United States*
NATHAN CLIFFORD, *Associate Justice*
NOAH H. SWAYNE, *Associate Justice*
SAMUEL F. MILLER, *Associate Justice*
DAVID DAVIS, *Associate Justice*
STEPHEN J. FIELD, *Associate Justice*
WILLIAM STRONG, *Associate Justice*
JOSEPH P. BRADLEY, *Associate Justice*
WARD HUNT, *Associate Justice*

APPEARANCES:[1]

DAVID DUDLEY FIELD, ESQ., *on behalf of defendants.*

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[1]The argument of Mr. Field is the only argument in this case for which a copy was located.

Supreme Court

OF THE UNITED STATES.

THE UNITED STATES
agst.
WILLIAM I. CRUIKSHANK & two others.

ARGUMENT of
MR. DAVID DUDLEY FIELD
On behalf of the Defendants.

The argument that I shall have the honor to address to the Court will be confined to the question of compatibility between the Federal Constitution and the legislation of Congress, which is supposed to authorize the present indictment.

It is indeed true, that if the form of the accusation is not conformable to the act of Congress, the defendants are entitled to be presently discharged, but inasmuch as a new indictment might possibly be preferred, supposing the present to fail for defect of form, this question is insignificant compared with the other.

For my part I shall leave the matter of procedure where it now stands upon the argument, and confine myself to the question of conformity or non-conformity of the act of Congress to the Constitution. If the legislation upon which this indictment rests is conformable to the organic law of this country, then it matters little what is or is not decided about the forms of proceeding. The substance of American constitutional government, as received from the

Fathers, will have gone, and the forms will not be long in following.

Let us reduce and formulate the question, if we can, so as to separate the incidental from the essential, in order that our attention may be withdrawn from all other considerations than that of the one fundamental and permanent theory, upon which this legislation must stand, if it stand at all.

The 13th Amendment to the Constitution declares, that neither slavery nor involuntary servitude, except in punishment of crime, shall exist within the United States, and authorizes Congress to enforce the declaration by appropriate legislation.

The 14th Amendment, after defining citizenship of the United States, prohibits the States (1) from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; (2) from depriving any person of life, liberty or property, without due process of law; and (3) from denying to any person within their jurisdiction the equal protection of the laws. After these prohibitions, it authorizes Congress to enforce the provisions of the Amendment by appropriate legislation.

The 15th Amendment prohibits the States from denying or abridging the rights of citizens of the United States to vote, on account of race, color or previous condition of servitude. This prohibition also Congress is authorized to enforce by appropriate legislation.

Professing to act under the authority of these amendments, Congress has passed four acts, three only of which were in existence at the time of the indictment now under consideration; one called the Civil Rights Act, passed April 9, 1866; the second, called the Enforcement Act, passed May 31, 1870, and the third, amending this, passed February 28, 1871.

The Civil Rights Act is first in order of time. Section one, after declaring that all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are citizens of

the United States, enacts, that "such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right in every State and Territory of the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none others."

Section 2 enacts that "any person, who, under color of any law, statute, ordinance, regulation or custom," shall cause any *inhabitant*—the word *citizen* being dropped—"to be subjected to the deprivation of any right secured or protected by this act," shall be guilty of misdemeanor.

Section 3 confers upon the Federal Courts jurisdiction over infractions of the act.

Sections 4 and 5 provides an army of officers to enforce the act.

Section 6 enacts penalties for obstructing or resisting the execution of the act.

The remaining sections, 7, 8, 9 and 10, are not material to the present inquiry.

The first section of the Enforcement Act declares, that all citizens of the United States, otherwise qualified, shall be allowed to vote at all elections, without distinction of race, color, or previous servitude.

Section 2 provides that, if by the law of any State or Territory a prerequisite to voting is necessary, equal opportunity for it shall be given to all, without distinction, &c.; and any person charged with the duty of furnishing the prerequisite, who refuses, or knowingly omits to give full effect to this section, shall be guilty of misdemeanor.

Section 3 provides that an offer of performance, in respect to the prerequisite, when proved by affida-

vit of the claimant, shall be equivalent to performance ; and any judge or inspector of election who refuses to accept it shall be guilty, &c.

Section 4 provides that any person who, by force, bribery, threats, intimidation or other unlawful means, hinders, delays, prevents, or obstructs any citizen from qualifying himself to vote, or combines with others to do so, shall be guilty, &c.

Section 5 provides that any person who prevents, hinders, controls or intimidates any person from exercising the right of suffrage, to whom it is secured by the 15th Amendment, or attempts to do so, by bribery or threats of violence, or deprivation of property or employment, shall be guilty, &c.

Section 6 provides that "if two or more persons shall band or conspire together, * * * with intent to violate *any provision of this Act*," that is, of either act, "or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony," &c.

Section 7 provides that, if in violating any provision of §§ 5 and 6 any other offence is committed, that shall be visited with such punishments as are prescribed for like offences by the laws of the State.

Sections 8, 9 and 10 give jurisdiction to certain Courts, provide commissioners and direct the execution of warrants, &c.

Section 11 provides penalties for preventing or obstructing the execution of the act.

Section 12 regulates the fees of officers.

Section 13 authorizes the President to employ the public forces.

Section 14 and 15 relate to the holding of office by persons disqualified under the 14th Amendment.

Section 16 enacts, that "All persons within the jurisdiction of the United States shall have the same right in any State and Territory to make and enforce

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, licenses and exactions of any kind, and none other," etc.; and that no tax or charge shall be imposed upon immigrants from one country not imposed upon immigrants from any other.

Section 17 enacts, that any person, who "under color of any law, statute, ordinance, regulation or custom," subjects any inhabitant to the deprivation of any right secured or protected by § 16, or "to different punishment, pains or penalties, on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens," shall be guilty, etc.

Section 18 re-enacts the Civil Rights Act.

The remaining sections, 19, 20, 21, 22, 23, relate to elections, and construct a very large and complicated piece of machinery for their management.

The amendatory Act, passed February 28, 1871, relates chiefly to elections of members of the House of Representatives; the provisions of which, however extraordinary, are not within the scope of our present inquiry.

By authority of this legislation, ninety-seven persons were indicted together in the Circuit Court of the United States for the District of Louisiana, and three of them, the present defendants, were found guilty upon the first sixteen counts. The indictment was found under the 6th and 7th sections of the Enforcement Act, sixteen counts being for simple conspiracy under the 6th section, and the other sixteen being for conspiracy, with overt acts resulting in murder.

The *first* count was for banding together, with intent "unlawfully and feloniously to injure, oppress, threaten and intimidate" two citizens of the United States "of African descent and persons of color," "with the unlawful and felonious intent thereby"

them "to hinder and prevent in their respective free exercise and enjoyment of their lawful right and privilege to peaceably assemble together with each other and with other citizens of the said United States for a peaceable and lawful purpose."

The *second* count avers an intent to hinder and prevent the exercise by the same persons of the "right to keep and bear arms for a lawful purpose."

The *third* avers an intent to deprive the same persons "of their respective several lives and liberty of person without due process of law."

The *fourth* avers an intent to deprive the same persons of the "free exercise and enjoyment of the right and privilege to the full and equal benefit of all laws and proceedings for the security of persons and property" enjoyed by white citizens.

The *fifth* avers an intent to hinder and prevent the same persons "in the exercise and enjoyment of the rights, privileges, immunities and protection granted and secured to them respectively as citizens of the said United States, and as citizens of the said State of Louisiana, by reason of and for and on account of the race and color" of the said persons.

The *sixth* avers an intent to hinder and prevent the same persons in "the free exercise and enjoyment of the several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana."

The *seventh* avers an intent "to put in great fear of bodily harm, injure and oppress" the same persons "because and for the reason" that, having the right to vote, they had voted.

The *eighth* avers an intent "to prevent and hinder" the same persons "in their several and respective free exercise and enjoyment of every, each, all and singular the several rights and privileges granted and secured" to them "by the Constitution and Laws of the United States."

The next eight counts are a repetition of the first

eight, except that instead of the words "band together" the words "combine, conspire and confederate together" are used.

This indictment, or that portion of it upon which these defendants have been convicted, is supposed to be justified by the 6th section of the Enforcement Act, and that section is said to rest upon the late amendments. In considering the question, whether it is or is not supported by them, I assume what indeed no one disputes, that before the late amendments this section, and the same may be said of the other sections, would have been beyond the competency of Congress. The point of contention, therefore, is whether the amendments have conferred the power.

Upon this my first proposition is, that it was not the design of the people, in adopting them, to change the fundamental character of their government, or to alter the relations between the Union and the States. They intended, that the Union should continue to be what it had been before, to use the language slightly changed of the late Chief-Justice, an indestructible union of indestructible States.

The events of the last fifteen years are no secret. The origin of the war, the war itself, the questions to which, in its varying progress, it gave rise, and its great results, are known of all men. It established the unity of the nation and the freedom of the slaves. Upon the final settlement, while it was not thought necessary to make any constitutional changes in respect to the claim of secession and the relation of the States to the Union, it was thought necessary to provide for the equality of the freedmen.

In doing this, two courses were open; one was, to place them and all their rights and relations under the cognizance of the Federal power, and the other was to leave them as they were, under the cognizance of the States, but to provide that these should make no discrimination to their disadvantage. The latter course was adopted. The articles are congruous and plainly adapted to that end.

They all imply that, apart from the prohibitions, the States have plenary power over the subject, and they leave that power as it was, with the single qualification, that it shall treat all alike, the emancipated slaves side by side with their old masters. It was in this respect somewhat like the treaty stipulation that we often make, agreeing that the nation treating with us shall be put on the footing of the most favored nations, which, while it leaves us at full liberty to make what new treaties or enact what new laws we please, obliges us to grant to the one what we grant to the others.

It was the design of the amendments, and their whole design, to raise the freedmen to an equality with their late masters before the law, and to give the blacks all the rights which the whites enjoyed. There was no complaint that the whites were oppressed. There was no mischief in that respect to remedy. They did not need new guarantees, and none were intended for them. The complaint to be relieved, the mischief to be remedied, the guaranty to be provided, had respect to the lately subject race, and to that alone. In saying this, we of course leave out of view the temporary provisions respecting the treatment of the rebels and the rebel debt. So understood, there is symmetry in the whole of the amendments; they are all conformed to one plan, and carry out one great purpose. Thus the 13th amendment decreed the emancipation of the slaves; the 14th gave them the privileges of citizens of the United States, and to assure them equality of civil rights and debar forever discriminating legislation to their oppression, forbade the States to deprive any person of the equal protection of the laws, or of life, liberty or property, without due process of law; and finally, the 15th amendment gave them equality of political rights, to the extent of an equal right to vote.

The general question now is, *what may Congress do to enforce the prohibitions* thus directed against the States. The particular question upon which this

case depends is, whether, under color of enforcing the prohibitions, and before any State has violated them, Congress can anticipate and prevent their violation by taking into its own hands the regulation of the whole subject.

This may be undoubtedly one way of accomplishing the object. You can prevent a thing being done in a manner displeasing to you by doing it yourself. Congress can prevent the States from making a wrong regulation by itself making all the regulations. But is that the fair purport of the authority? Is it the legitimate interpretation of a charter of Federal Government, by which power is carefully partitioned between the Union and the States, to say that, if the former has authority to prevent the latter from doing a *wrong* thing, it may prevent their doing *any*thing, by doing *every*thing itself?

It seems to me the more natural and convenient way of treating the subject, to discuss, first the general propositions, and then to apply them to the case in hand.

The prohibitions of these amendments of the last decade are reasonably clear; their general purpose is unmistakable; they are laid upon the States, and Congress has express power to enforce them by appropriate legislation. So much is indisputable. The dispute begins when the word *appropriate* is to be interpreted. What is, and what is not, appropriate legislation? And who is to judge of the appropriateness? These are the cardinal questions upon which hinges the decision of the present cause, and with it the determination in no small measure of the future of the country.

The first observation to be made is that the amendments being made part of the constitution are to be construed in connexion with the original parts of it, and according to the well-understood and long-established interpretation of that instrument, Congress is, *within certain limits*, the exclusive judge of the appropriateness of its legislation to the end designed;

but that *there are such limits*, and beyond them, Congress may not pass.

The rules of interpretation applicable to the Federal Constitution have not been in any respect changed by the amendments. The question is always, first, what is the natural sense of the language used, and then, if that be doubtful, what was the intention of the law-givers, that is, the people of the United States. In the natural sense is included not only that of the particular provision under consideration, but the other provisions of the same institution. In short, when the question arises what legislation Congress may adopt to enforce the amendments, the answer that should follow is, that it must be *appropriate*, and must *not* be *prohibited* by other provisions of the Constitution, either *expressly* or *by implication*.

There are certain express prohibitions, which are so many qualifications of the powers granted, and there are also implied prohibitions. For example, Congress could not, under color of preventing a State from doing certain things, destroy the State, or any of its essential attributes. If it were proved, beyond question, that to-morrow the Legislature of Massachusetts, if not prevented by Congress, would pass a law denying suffrage to every colored man in the Commonwealth, Congress could not, by any legislation whatever, terminate the session of the Legislature, or authorize the President to march the garrison of Fort Warren into the State House and turn the members out of doors. Congress *could not*, I say, do this. I do not confine myself to saying it would not; I say that if it were so minded it could not, and every respectable authority in the land—legislative, executive and judicial—would so pronounce. Why could not Congress do this, let me ask? The answer is, that the State of Massachusetts is a self-existing and indestructable member of the American Union, and neither Congress nor any other department of the Federal Government has, expressly or by implication, power to destroy

any essential attribute of the sovereignty of that Commonwealth. The word sovereignty I use in its American sense of supreme power, partitioned between the Union and each of the States. Neither the one nor the other is an absolute sovereign; each power is sovereign in its own sphere. The dividing line between them is as marked to the eye of a lawyer as if it were territorial.

Congress then is judge of the means to be chosen for attaining a desired end, only in this sense, that it must choose *appropriate* means, and such as are *not* otherwise *expressly or by implication prohibited.* Certain means are expressly prohibited, as for example, the establishment of an order of nobility. Other means are by implication prohibited, as for example, the destruction of a State. Congress is not expressly prohibited from destroying a State; the implied prohibition, however, is not less real and imperative. After eliminating these prohibited means from the category of those which are eligible, there must be a still further elimination of all means which are not appropriate. This word *appropriate* is one of limitation. Congress is not clothed with power to enforce the prohibition by every kind of legislation, but by appropriate legislation. We have, then, in the very body of the Constitution, these limitations upon the choice of means by Congress; they must *not* be *prohibited.* and they must be *appropriate.*

When, therefore, it is said, as it often is, that Congress is the exclusive judge of the means to be chosen for attaining an end, the proposition is to be admitted only with the two qualifications that have been mentioned. So it was said by Madison, Hamilton and Jay, in the *Federalist;* so it was said by Hamilton in his argument for a bank of the United States; so it was said by Ch. Justice Marshall in McCulloch *a.* Maryland, and so it has been said, scores of times since, by Judges of this Court and other Judges, State and Federal.

To illustrate the rule that no means can be adopted

which contravene the implied as well as the express limitations of the Constitution, let us suppose a few cases. Congress could not authorize the criminal prosecution of a State legislator who voted for a bill within the prohibition. Why not? Because that would be incompatible with the independence of the State Legislatures, an independence essential to the sovereignty, or, if the expression is liked better, the partial independence, or the autonomy, of the States. Congress could not authorize an injunction against a State Legislature, forbidding it to pass such a bill, for the like reason. Congress could not subject to criminal process the Judges of a State Court for deciding against the constitutionality of the enforcement act, and the reason here is the same.

There are many limitations upon the choice of means beyond those which are expressed. They are implied from the nature of the Government, the history of the country and the traditions of the people. The right to declare an act invalid, because incompatible with the Constitution, applies with the same effect where the incompatibility relates to the implied, as where it relates to the express limitations of the Constitution.

General language, though in itself unambiguous, is limited by the circumstances in which it is used. Thus "the United States shall guarantee to every State in this Union a republican form of government." But what sort of a republican government? Is there any express provision of the Constitution which forbids Congress to establish in a State, whose authorities are overthrown, a government like that of Venice, or like that of another of the Italian republics of the middle ages? According to the classification of writers on government, Genoa under its doges, Florence under its dukes, and Poland under its kings, were republics. Why may not Congress take that form of republican government now existing in France, or that lately existing in Spain, or any of the republican forms of past ages, that, for instance, of the Commonwealth of

England under Cromwell, or even that of Poland? There is no reason other than this, that there are certain essential, inherent, ineradicable principles of American republican government, to which the framers of the Constitution referred, and by which Congress is bound. And if Congress be thus limited the Courts must say so, whenever the question is brought before them. What otherwise could prevent Congress from establishing in a disorganized State a government of military Dukes?

In all that I have said I am justified by recent decisions of this Court. Not longer ago than 1868 this Court, speaking by its late Chief Justice, uttered these memorable words, which will live in constitutional history so long as the Constitution lives in its vigor. "Not only, therefore, can there be no loss of separate and independent autonomy to the States through their union under the Constitution, but it may be not unreasonably said that the preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. *The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.*" (Texas *a.* White, 7 Wall, 725.) And in 1870 the Court, speaking by Mr. Justice Nelson, used this language: "The General Government and the States, although both exist within the same territorial limits, are *separate and distinct sovereignties*, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme, but *the States, within the limits of their powers not granted*, or, in the language of the Tenth Amendment, "reserved," *are as independent of the General Government as that Government within its sphere is independent of the States.*" (Collector *a.* Day, 11 Wall, 124.) And again: "It"—the taxing power—"is therefore one of the *sovereign powers vested in the States* by their constitutions, which re-

mained unaltered and unimpaired, and in respect to which the State is as independent of the General Government as that Government is independent of the States. *The supremacy of the General Government*, therefore, so much relied on in the argument of the counsel for the plaintiff in error in respect to the question before us *cannot be maintained. The two governments are upon an equality*," &c., (p. 126) And again: "In this respect, that is, in respect to the reserved powers, *the State is as sovereign and independent as the General Government*" (p. 127). The case itself is the strongest possible example of an implied limitation upon the powers of Congress. Its power to tax is apparently unlimited, and it had passed an act, by the terms of which the salary of a State Judge was liable to taxation, but this Court pronounced the act unconstitutional, because, in the exercise of an express power, Congress had transgressed the *implied* limitations. Other instances of implied limitations will readily suggest themselves; federal judges declining duties, not judicial, imposed on them by Congress, and state officers declining federal duties.

The only principle that can justify the legislation now in question, if it be justifiable at all, is this: that, in the choice of means to prevent a State violating the prohibitory clauses of the late amendments, Congress may itself do the things which the State would otherwise have done, in order to make sure that they are not done improperly. The States may, every one of them, do what New York and Massachusetts now do, in securing the right of all citizens to vote, without regard to race, color, or previous condition of servitude; but for fear that they will not continue to do so, Congress may, it is claimed, register the voters and receive and count the votes. And if it may do that, it may do any other thing that is to be done by a Government in an election; in short, take upon itself to construct and work the whole machinery of elections. And what is true of voting is, as I shall endeavor to show

more fully hereafter, true also of every other subject within the scope of these amendments, and that includes almost every subject of government. For what is there in the world for State legislation but "life, liberty and property," and the "protection of the laws"? If the validity of the present legislation is affirmed, one may affirm the validity of legislation upon any subject concerning life, liberty, property, and protection by the law.

It is idle to answer that such an attempt will never be made. Who can tell what, in the frenzy of future parties, may not be attempted? Who that has seen the things happening in this generation can foretell what may not be done or attempted in some of the times to come? One of the most extraordinary phenomena of political history is the tendency of majorities to oppress minorities, and to trample upon all obstructions standing in the way. It would have been thought probable, that as each person, who helps to make the majority, is himself but an individual and may soon be in the minority of individuals, he would be sedulous to guard his own rights, by refusing to join in pressing too heavily upon the rights of others. But the fact is different, though every Federal legislator and every other Federal officer does in truth depend for his own protection and that of his family, more upon the State to which he belongs, than upon the Federal Government which he for the time being serves. Yet this truth is lost sight of in the thoughtlessness and excitement of national discussions. Whoever has carefully watched the political events of the last decade must have seen a constant and constantly accelerated movement towards the organization and cumulation of Federal authority. This has been brought about by the action of good men as well as bad, in obliviousness of the truth that every new power added to the Nation is just so much subtracted from the States.

A political argument addressed to the Supreme Court would of course be out of place. Its great but single function is to interpret the law and the

Constitution, be the consequences what they may. But it is proper to reflect, that for the true interpretation of language we may, and should, look at the occasion and circumstances in which it was used. This is both natural and philosophical. The imperfection of language leaves room for different interpretations, in the choice of which we put ourselves, so far as may be, in the place of those who used it, see with their eyes, hear with their ears, and imagine ourselves to be aiming at that at which they aimed. We know the history of the Federal Constitution; and we know also the history of the late amendments. The latter is too fresh, for us to be ignorant of the views and intentions of those who ratified their provisions. We may appeal to the knowledge of men around us, to our fellow-citizens of the whole nation, to bear us out in the assertion, that the people did not suppose they were thereby changing the fundamental theory of their government. If this be assumed, and it be shown, that the legislation in question goes upon a new theory of the Government and of the relation of the States to the Union, then it is shown that the people never contemplated, and much less sanctioned, such an interpretation of their acts. Should this be done, then, in a case where language is susceptible of two interpretations, that one is to be preferred as the true one which conforms to the understanding of the people, whose acts alone these amendments are.

My argument, therefore, will consist of an endeavor to establish the following two propositions:

I.—The natural interpretation of the language of the new amendments does not justify the present legislation;

II. If the natural interpretation did justify it, yet, as the language is susceptible of a different one, the latter must be preferred as that alone in which it was understood by the people.

The natural interpretation of the amendments does not justify the legislation No State, this is the language, shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, *or* deprive any person of life, liberty or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws; no State shall deny or abridge the right of citizens of the United States to vote, without regard to race, color, or previous condition of servitude. A State is a corporate body, and can act only by its corporate authorities. Until these corporate authorities have acted, the State has not violated the prohibition. Congress therefore must move *after* the State, not before it. But as yet no State has moved, so far as we are informed. Not one of them has done anything which a State is, by these amendments, commanded not to do.

The prohibitions being against State action, *that action must precede any counter-action* under act of Congress. This is so obvious, as to amount almost to a truism. Even if Congress should be supposed competent to legislate in anticipation of State action, nothing could be done under the act of Congress until something had been done under the act of the State, contrary to the prohibition.

It follows from the last proposition, as well as from other considerations, that in respect to the mere prohibitions upon the States no action under a law of Congress can be had for the mere *inaction* of a State. If, for example, a State should wholly fail to provide for certain rights of property, Congress would not thereby become authorized to pass laws for the protection of such rights. There are many rights which courts acting only according to the common law cannot adequately protect. Massachusetts and Pennsylvania were formerly without equitable remedies. If they were so now, no sane man would pretend that therefore Congress would be authorized to establish such remedies for them. So, too, in respect to certain new rights of property, as,

for instance, those which arise out of telegraphy, should a State or all the States fail to define and protect them, Congress could not do so,

Failure to provide a remedy for a wrong is not the same thing as depriving of a right. If it were so, then Congress might examine the codes of the States, and, if it found their provisions inadequate, might supplement them. Were a State to repeal a part of its laws for the protection of rights or the punishment of crimes, the National Government could not supply the deficiency. Thus, if New York were to repeal all laws for the collection of debts, Congress could not reënact them. If Massachusetts were to provide no punishment for conspiracy or embezzlement, Congress could not provide it.

It could hardly be claimed that these prohibitions require any more of the State Legislatures than would have been required of them if the same had been contained in their own constitutions. Then surely their doing no more and no less cannot give just occasion for Federal interposition. *State inaction therefore is no cause for Federal action.* There must be affirmative action by a State tending to deprive a citizen of his rights before Congress can interfere. Should a State legislature attempt to deprive a person of property without due process of law, its action would be a nullity. What, in that event, might Congress do? Provide legal means for establishing the nullity. What legal means did Congress, long ago, provide for establishing the nullity of an *ex post facto* law, or a law impairing the obligation of contracts, or a bill of attainder? An appeal to the Federal courts. Has not that proved adequate? The whole question may be stated in these words: *How may Congress enforce the nullity of a State law.*

Guaranty is not the converse of prohibition. The prohibitions do not amount to guaranties. They do not require the States to make sure that no man shall be deprived of life, liberty or property without

law. The prohibitory amendments act upon the States and not upon individuals. Because the States are interdicted from certain things, and Congress may enforce the interdict, that does not prove that Congress may do the converse things. Because the States are prohibited, it would be a strange inference that Congress is authorized. When the Constitution says to the States *you shall not*, that is not the same thing as saying to Congress *you shall or you may*. If it were so, there would be found a strange omission in the Constitution, wide enough to let in many of the mischiefs which the prohibitions were intended to remedy. Congress is not by **the 14th amendment** prohibited; it is only the States which are. If in consequence of the prohibition upon the States, Congress can exercise plenary power over the subject, it can do some, indeed many, of the very things, which the States were forbidden to do. Congress is not forbidden to pass a law abridging the privileges and immunities of citizens, or denying to certain persons the equal protection of the laws.

But suppose a State, not content with its present laws, to be about to act aggressively, and thus to violate the prohibition, we may speculate upon what Congress could, in that event, enact. *The means adopted must be appropriate, and not prohibited.* The Federal Legislature can act only by statute, to be put in execution by the Executive and the Courts. Could Congress authorize the Executive to do anything against the recalcitrant State? It is difficult to see what it could empower the President to do. It must act through the courts. And the only question is, what appropriate action could Congress authorize to be taken in the courts to enforce the prohibition, that is, to prevent or redress *the violation*. Could it indict and punish the individuals who had taken advantage of the State's violation of the prohibition, or take action against the State authorities, or nullify the acts, which the State ordains or permits? Direct action against the State authorities

is out of the question for reasons hereinbefore and hereafter stated. For Congress to punish individuals for violations of State laws is also out of the question. To punish them for obeying the State laws would always be of doubtful expediency, as leading to unnecessary conflict, and would often be unconstitutional. The third remedy is the true, if not the only one, to *nullify* the action which the State should not have ordained or permitted.

We have lived now three-quarters of a century under the Constitution, and it has not been thought necessary to apply to Congress for the punishment of a conspiracy to impair the obligation of a contract, or to pass an *ex post facto* law, or a bill of attainder. No one seems to have thought that Congress was competent to punish such a conspiracy, or that there was any occasion for such legislation, if it were possible.

Equality before the law is the general aim of the amendments. That is secured by nullifying inequality, that is, for example, by declaring that whatever the State grants to its white citizens, shall for that reason be also the right of the black. This rule would execute itself in most cases. Take that clause of the 14th Amendment which forbids a State to make or enforce a law abridging the privileges and immunities of citizens of the United States. The State cannot enforce a law until it is made; if, therefore, it makes no such law, the condition on which alone Congress can act has not arrived. When the State has made such a law then Congress can take steps to enforce the prohibition. What may they be? Not the passing of an Act to declare the State law null; that has already been done by a power higher than act of Congress—that is, the Constitution itself—not by empowering the President to act, for he cannot use force against a State statute, but by protecting the individual aggrieved from the operation of the obnoxious law. How is that to be done? Just as Congress has hitherto protected an individual aggrieved against an *ex post facto* law, or a

law impairing the obligation of contracts. It is not necessary to go into details. Various legal processes will readily suggest themselves to a lawyer, the effect of which will be to protect the person from any law aiming to abridge his privileges or immunities as a citizen of the United States, whatever they may be.

Take the next clause, that which forbids a State to deprive any person of life, liberty or property without due process of law. Upon this the same observations may be made. It is difficult to imagine any proceeding of a State to deprive a person of life, liberty or property, which may not be effectually reached by the means suggested. One of the most powerful instruments for depriving a person of life, liberty or property, is a bill of attainder, or a bill of pains and penalties. This is prohibited by the original Constitution. Is not that prohibition adequately enforced by existing Acts of Congress, allowing an appeal to the Federal judiciary?

Then take the third clause, that which forbids a State to deny to any person within its jurisdiction the equal protection of the laws. Cannot this be dealt with in the same way? A denial in words only, though in the form of a State statute, would be harmless. If the denial is followed by acts, the person aggrieved can be defended against them by the same machinery of the courts, which would be sufficient for his defense against a violation of either of the preceding clauses. Indeed, the mode of dealing with the prohibition against bills of attainder is marked out as the true mode of dealing with the other prohibitions. No act of a State could be more violent and aggressive than a bill of attainder, and if the machinery of the 25th Section of the Judiciary Act has hitherto been sufficient to defend the citizen against that, it surely will be sufficient to protect him against whatever is less violent and aggressive.

Will it be said, that life, liberty and property cannot be protected without law; that the equal pro-

tection of the laws pre-supposes the existence and enforcement of laws, and that if the States do not make the laws, or, being made, do not enforce them, then Congress may interfere? I have already said something on this head, and will add only a few words.

Let the question be put in this form: Suppose a State not to provide adequate remedies for the protection of life, liberty and property, what may Congress do? The answer must be, Congress may do nothing whatever, beyond providing judicial remedies in Federal Courts for parties aggrieved by deprivation of tneir rights. Beyond this there is no alternative between doing nothing or doing everything, between leaving the States alone or destroying them altogether. Congress cannot do everything, because that would be the annihilation of the States; therefore it can do nothing, beyond providing the judicial remedies here indicated.

For want of a better expression, I will call affirmative legislation, that which declares and enforces substantive law; and by negative legislation, that which operates by way of defense, in giving redress to a party aggrieved. Using the expression in this sense, I should say that affirmative legislation in respect to the prohibitions of the 14th Amendment is not within the competency of Congress. I see no middle ground between giving Congress plenary power over the subject of these fundamental rights, and giving it none. If a State were to abrogate its whole civil and penal code, can Congress make one for it? By neglect of the government of New York, we will suppose A. to be deprived of his property, without due process of law. His remedy is to sue in the State Courts. If that remedy is denied he can go into the Federal Courts by appeal. Should the present process of appeal prove too dilatory or cumbrous, Congress can afford an adequate remedy, by providing a simpler and speedier appeal.

Then let us consider the prohibition of the 15th

Amendment. "The right of citizens of the United States to vote shall not be denied or abridged by * * * any State, on account of race, color or previous condition of servitude," and Congress may enforce the provisions of this article. It might seem at first sight, that here is a declaration of the right of citizens of the United States to vote, but that would be an error. No *right* is guaranteed or asserted. *Discrimination* only is prohibited. The right or privilege, whichever it may justly be called, of the elective franchise is still where it has always been, under State control, with this single qualification, that in determining it, the State shall make no distinction on account of race, color or previous servitude.

This amendment is nothing but a prohibition, like the first section of the 14th Article, and should be dealt with in the same manner. But the right or privilege of voting cannot be exercised without affirmative legislation, it may be said. No more can the right to property be exercised without affirmative legislation. Because a Judge of Election refuses my right to vote, is that a reason why he should be indicted in the Federal Courts any more than the Judge of a Police Court, who refuses my claim for redress against a ruffian who has assaulted me in the street? Because individuals, bad men, band together to deprive me of my redress from the police magistrate, is that a constitutional reason why the Federal judiciary should be called upon to indict, try and punish them? As individuals they have violated the State laws, and the State must take them in hand; if the State will not, the inhabitants of the State are the sufferers, and in their hands lies the power of redress; let them not call on Congress to help those who can help themselves.

It must never be forgotten that the Judges and other officers of all the States are sworn to support the Constitution. The cases have hitherto proved rare in which they have failed justly to interpret,

and firmly to enforce, the provisions of the Federal Constitution, and there is no reason to suppose that they will be less faithful hereafter. There should seem therefore to be no occasion for attempting to bend the Constitution till it snaps asunder.

My proposition, in short, is this, that an act of a State in violation of the prohibitions of the amendments would be a nullity, and that Congress, being authorized to enforce the prohibitions by appropriate legislation, the natural, the true, and the only constitutional mode of enforcement is by judicial remedies to establish and enforce the nullity.

The 6th section of the Enforcement Act assumes that Congress has power to punish a conspiracy to deprive any citizen of the United States of his right to vote, of any right granted or secured by the Federal Constitution, of any privilege or immunity of a citizen of the United States, of the right to life, liberty and property, and of the right to the equal protection of the laws.

Let us take one of these, and direct our attention to that; for example, the right of property. The prohibition of the 14th amendment commands a State not to *deprive* any person of property without due process of law. The State may deprive a person of his property by due process of law, but not without it. To deprive without due process is to proceed without law, by arbitrary acts of legislation, miscalled law. The State can act only by its corporate officers, and then only in pursuance of State legislation. If a State Governor despoils a citizen, he is a simple trespasser, unless there be a State law to justify him. We will suppose then a State law, prohibited by this amendment, which law authorizes a certain thing to be done; it is the doing of this thing which Congress may nullify. Suppose an act declaring that A. shall have a farm belonging to B. This would be simply void. If not so declared by the State courts, the Federal courts, on appeal, would reverse their

decision. That would be all that need be done. Suppose that certain tenants in New York conspire to deprive, by force, a citizen of that State of his rights as landlord. That is a conspiracy to deprive a person of his property without due process of law. May Congress enact a general law for the punishment of the conspirators in a court of the United States?

We must discriminate among the prohibitions between those which aim merely at equality, and those which aim at other rights. The provision about the right to vote, without disparagement arising from race, confers no right of voting; but simply provides, that if the right be given to whites, it shall be given to blacks also. Had a similar expression been used in respect to the right to hold office, it surely would not have been said that a right to an office was conferred. So if the right to education had been mentioned in the same terms, that would not have been construed to confer the right to be educated.

Upon the whole, it is submitted that the amendments, *taken in their natural sense*, do not justify the legislation now under review.

We come now to the second proposition, which is, that if the interpretation contended for were not the more natural one, yet it is at the very least a possible interpretation, and is to be preferred, because it is the only one conformable to the understanding and purpose of the people, by whom the text was adopted.

The general doctrine up to the time of these amendments continued to be, that the States were sovereign over their own State concerns. This complex government was curiously contrived to give liberty and safety to the people of all the States. It was fashioned by the people, in the name of the people, and for the people. Its aim was to keep the peace among the States and to manage affairs of common concern, while it left the States the entire manage-

ment of their own affairs. Its founders were wise and practical men. They knew what history had taught from the beginning of Greek civilization, that a number of small republics would perish without federation, and that federation would destroy the small republics without such a barrier as it was impossible to pass. Liberty and safety were the ends to be won by the double and complex organization; liberty from the States, and safety from the Union, and the founders thought that they had contrived a scheme which would make the States and the Union essential parts of a great whole; that they had set bounds to each which they could not pass; in short, that they had founded "liberty and union, one and inseparable."

No man in his senses could have supposed, at the formation of the Constitution, or can now suppose, that a consolidated government, extending over so much territory and so many people, can last a generation without the destruction of the States and of republican government with them. History is a fable, and political philosophy a delusion, if any government other than monarchial can stretch itself over fifty degrees of longitude and half as many of latitude with fifty millions of people, where there are no local governments capable of standing by themselves and resisting all attempts to imperil their self-existence or impair their authority. The moment it is conceded that Washington may, at its discretion, regulate all the concerns of New York and California, of Louisiana and Maine; that the autonomy of the States has no defense stronger than the self-denial of fluctuating Congressional majorities; at that moment the Republic of our fathers will have disappeared, and a Republic in name, but a despotism in fact, will have taken its place, to give way in another generation to a government with another name, and other attributes.

Observe how far on that road the maintenance of the present legislation will carry us. It has already led to Kellogg *a.* Warmouth, United States *a.* Clayton

and Harrison *a.* Hadley, and these cases are but a foretaste of what we may have hereafter. Its essential principle is, that in order to anticipate and prevent a violation of the prohibitions, Congress may establish a system of law for the general regulation of all subjects within the scope of the amendments. The logical and inevitable conclusions from this new theory are that the prohibition against denying or abridging the right to vote on account of color, race, or previous condition of servitude, may be enforced by framing and working the machinery of elections, no matter what may be the office or the function to be filled by the electors. The prohibition against making or enforcing any law abridging the privileges or immunities of citizens of the United States may be enforced by framing a code of these privileges and immunities, defining the methods of enjoyment, and providing penalties for their violation. And the still more comprehensive prohibitions against depriving any person of life, liberty or property without due process of law, or denying to any person the equal protection of the laws, may be enforced by a more comprehensive code, defining the rights of life, liberty and property, in all their ramifications, the processes of law which are to be deemed due, that protection of the laws which is to be considered equal, and the various modes of enforcing the rights of life, liberty and property by remedies civil and criminal. If these numerous and multiform provisions would not cover the whole ground of law, substantive and remedial, it is not easy to see what would be omitted that is contained in the most comprehensive existing code. The legislation of Congress would, of course, supersede or exclude legislation by the States upon the same subjects; the United States would stand as the universal lawgivers of the country, and the laws of the States would dwindle to the dimensions of corporation ordinances or the regulations of county supervisors. The argument appears to be unanswerable that such was not, and

could not, have been the intention of the American people, in sanctioning these amendments, and therefore they should not be thus interpreted, even if the natural significance of their language were, as it is not, favorable to such an interpretation.

To suppose the contrary, is to suppose that the people of this country have forgotten all their history and all their traditions, and have come to regard as evil that which their fathers accounted good, and good evil. If Washington, when he left the chair of the Convention and signed his great name to the draft of the Constitution as President and Deputy from Virginia; if Franklin, when he made there his last speech, and looking at a picture of the sun in the horizon, said he had been in doubt whether it was rising or setting, but then, as they had so auspiciously concluded their labors, he believed it was the rising sun; if those patriot fathers had been told that the time would ever come when the great commonwealths which they represented would be accounted the vassals of that Union which they were so sedulous to create and so strenuous to defend, they would have turned upon those who uttered such prophesies as fomentors of discord and enemies of the States.

If confirmation of these views of the Constitution were needed, it would be found in the interpretation, legislative, executive and judicial, heretofore at all times given. We find that, with few exceptions, the current is all one way. The original instrument contained prohibitions, that "no State shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility." These prohibitions have subsisted now for nearly ninety years, but Congress has never attempted to enforce them, except by the 25th section of the Judiciary Act of 1789, which gave an appeal

to the Supreme Court, from the State Courts, upon Federal questions, and this action of Congress has proved all sufficient.

As to the executive department, although it is made the duty of the President to recommend to the consideration of Congress "such measures as he shall judge necessary and expedient," there has never been, so far as I am aware, any executive recommendation of further legislation to enforce these prohibitions. As to the judicial department, we have a concurrence and weight of authority, that leaves no room for doubt as to its views of the power of Congress.

Though this Court, in every period of its history, has had occasion to interpret the Constitution, and to declare the rules by which it is to be interpreted, we have little occasion to go further back than the last two years, for an exposition of those rules, and their effect, especially upon the last three amendments. In the Slaughter-House cases, the Court declared, that any question of doubt concerning the true meaning of the amendments cannot be safely and rationally solved, without a reference to the history of the times, and that "in any fair and just construction of any section or phrase of these amendments, it is necessary to look to the purpose which * * * was the prevailing spirit of them all, the evil, which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the

exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?

All this and more must follow, if the proposition of the plaintiffs in error be sound, for not only are these rights subject to the control of Congress, whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and most useful functions, as in its judgment it may think proper on all such subjects. And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this Court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment.

The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State

governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal Governments to each other, and of both of these Governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.

We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them."

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"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them was the evil to be remedied by this clause as a class, and by it such laws are forbidden.

If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in the courts,

shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment.

In the early history of the organization of the Government its statesmen seem to have divided on the line which should separate the powers of the National Government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of our late civil war. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for the determined resistance to the General Government.

Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National Government.

But however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in these amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on

the States, and to confer additional power on that of the nation."

These extracts from the opinion of the Court, delivered by Mr. Justice Miller, are given at such length, because they are so important in themselves, and dispose of so many of the questions in the present case.

Of the three dissenting opinions, two certainly, and perhaps the third, properly understood, contain nothing in conflict with what is here stated. The difference of views among the learned judges of the Court was upon the *extent* of the prohibitions, not upon the means of enforcing them.

If these amendments be understood and applied, as it is here insisted they should, they will prove most beneficent in results. The prohibitions upon the States are merely such as every State Constitution should contain for its own Legislature. It is only when the interference of Congress is invoked that the danger begins, and that will cease so soon as it is understood, that Congress cannot act until the States have legislated in violation of the prohibition, and then only by way of nullifying their action through the Courts.

I have heard it argued that, as allegiance and protection create mutual obligations, all who have been made citizens of the United States by the late amendments are entitled to the protection of the United States. So they are, but that does not prove the constitutionality of the present legislation, and for two reasons. The first is, that all the citizens of the States were also citizens of the United States before the amendments, and the effect of these was merely to increase the number of citizens, but not their rights. That protection of the Federal Government which the whites could not have claimed before, the blacks cannot claim now. The second reason is, that the allegiance and protection of the Union are qualified by the allegiance and protection of the States. The same person is a citizen of both, owes allegiance to both, and may claim the protec-

tion of both. Each is his sovereign to a certain extent. When, therefore, a citizen of the United States claims the protection of the United States, the first inquiry should be, against what, and in what manner the protection may be given. He cannot be protected against the lawful act of his own State, nor can he be protected against its unlawful act, except in the manner sanctioned by the constitution of the United States. Who are citizens we learn from one part of that instrument; their rights and duties from another.

I must here close my part of the discussion. The general claim on the part of the Federal Government, is nothing more nor less than this: that Congress is clothed with authority to *punish in Federal Courts any persons* for agreeing together in intention to prevent or hinder the free exercise and enjoyment by *any citizen* of *any right* or privilege granted or secured to him by the Constitution or laws of the United States, these laws being not only the three statutes just mentioned, but all other existing statutes, revised and not revised, and all statutes which Congress may choose hereafter to pass. This is an assertion of absolutism or legislative omnipotence amazing to contemplate.

The particular claim in the present case is authority to punish an agreement between two or more persons, to prevent or hinder the free exercise and enjoyment by *any citizen* of his *right to the equal protection of the laws*, his *right to life, liberty and property*, unless deprived thereof by due process of law, and his *right to vote*, without regard to race, color or previous servitude. This is the claim in the present case, reduced to its strictest limit. It includes of course, as has been already said, the power *to define* what is the right to the protection of the laws, what is the right to life, liberty and property, what is due process of law, what is the right to vote. It would be a logical inconsistency to pretend that a government can clothe its courts with authority to punish for crime,

without authority to say in what that crime consists. When the Constitution gave Congress power to *punish* piracies and felonies on the high seas, and offenses against the laws of nations, it gave also the power to *define* them.

It is difficult to speak of the pretensions upon which this legislation rests, in guarded language. It is a relief to think, that they are here to be tested by the constitution of the country, without the disturbing influence of party; by that constitution which is above all parties, and which was made, not for the use of partisans, but for the safety and happiness of the whole people, and not for one, but many generations.

The first two words of the national motto are as much a part of it as the last. They have never been changed since their use began. They have been borne in every battle, and on every march, by land or sea, in defeat as in victory. They are still blazoned on our escutcheon, and copied on every seal of office. May the motto never be mutilated or disowned. I would have it written on the walls of the Capitol and of every State-house. I would wish it written on the ceiling of this chamber, that upon every turning of the face upward, the eye might behold it. In its three words is written a faithful history; may they abide for ages, witnesses of the past and pledges of the future.

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