EASTERN-SHORE WHIG AND PEOPLE'S ADVOCATE.

VOL. V.---No. 34. EASTON, MD.---SATURDAY MORNING, FEBRUARY 16, 1833. WHOLE No. 242.

PRINTED AND PUBLISHED EVERY
TUESDAY & SATURDAY MORNING,
(during the Session of Congress,)
and every TUESDAY MORNING, the residue of the year—BY
EDWARD MULLIKIN,
PUBLISHER OF THE LAWS OF THE UNION.

THE TERMS
Are THREE DOLLARS PER ANNUM, payable half yearly in advance.

No subscription discontinued until all arrearages are settled, without the approbation of the publisher.

ADVERTISEMENTS not exceeding a square, inserted THREE TIMES FOR ONE DOLLAR, and twenty five cents for each subsequent insertion—larger advertisements in proportion.

THE JUDICIARY BILL.

IN SENATE—JANUARY 31, 1833.

SPEECH OF MR. BIBB, of Kentucky.

[CONTINUED.]

Mr. Bibb resumed the argument which he yesterday began upon the bill. He felt very sensibly, he said, the weight which devolved upon him, in sustaining his views of this subject against an authority so highly respectable, and so deeply seated in the affections of the people, as the author of the proclamation, to the doctrines of which it had become his duty to advert. But, whilst he stood on the principles of the Constitution; whilst he had on his side the opinions of patriots, of lovers of liberty; opinions which were delivered by some of the most eminent of the men who framed the Constitution—which opinions were promulgated throughout the United States, for the purpose of inducing the adoption of the Constitution by the people—he felt himself clad in armor impenetrable to adverse argument, by however high authority sustained.

He had left off yesterday, he said, at that point of his argument in which he had maintained that the Federal Constitution is a compact between the States.—He now said, in addition, that he considered every Government instituted by consent, and reduced to the form of a written Constitution, to be a compact; and that they who hold the power to alter and amend, who have a sovereign power over the Government, are parties to that compact. The 5th article of the Federal Constitution, he said, placed the power of amending the Constitution in the Legislatures of the respective States, or in their respective conventions. They created, and they can destroy it. The Constitution, he said, abounds with compacts. Article 1, section 9, contains compacts by the several States not to exercise certain powers which might be injurious. The 4th article contains compacts by the several States with each other, and by the whole with each. The various stipulations in the Constitution, and especially the equality of representation in the Senate, and the majority required to add new powers or to amend, exhibit sedulous care to preserve to their respective local Governments, their local interests.

In prosecution of this jealous care for the preservation of the powers and rights of sovereignty not surrendered by the States, a number of States, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction, that, further declaratory and restrictive clauses should be added. According ly the first Congress, held under the new Constitution, proposed amendments, ten of which were adopted by the States.—The tenth of which is as follows: "The powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

It is clear that the Federal Government was made by the States; that it is a compact between States; that the States are constituent and essential parties to the existence of the Federal Government; that the States surrendered only a portion of their powers and authorities; that all powers not delegated nor prohibited are retained; that they have retained the ultimate sovereignty over the Federal Government; that special care has been taken in the compact, to protect against the addition of new powers, unless three fourths of the States shall concur.

This brings us to the question, how the several States are to be protected against an irregular, unconstitutional action of the Federal Government, in evading a proposition for a grant of new powers by amendment, and substituting therefor a palpable usurpation of powers not delegated.

The abuse of delegated powers is one case. The palpable usurpation of powers not delegated but reserved, is another case.

How are the several States to be protected against the usurpation of their respective reserved powers? How are minorities of the States to be protected against a breach of the constitutional guaranty, requiring the concurrence of three fourths to sanction a further abridgement of their reserved powers? For it is clear that, by the compact, a minority of seven States are intended to be protected against the concurrence of seventeen States in any regular proposition to delegate to the Federal Government any portion of their reserved powers. Does the security consist solely in the good faith and unambitious temper of the Federal Government? Does the security of the minority of the States, against the usurpation of their reserved powers, by the delegates of a majority of States, not sufficient to carry a constitutional amendment, or against the usurpation of their reserved powers, by any one of the departments, rest solely upon the machinery and regulating checks of the Federal Government itself?

It is conceded by me, that generally the security against abuses of the delegated powers lies in the nature and organization of the Government itself; the distribution of its powers into several departments; the tenure of office; the mode and frequency of elections, &c. When acting within the pale of delegated powers, the majority must be obeyed for the time, abuses or mal-administration of delegated powers must be corrected through the instrumentality of elections. The security in such cases rests upon the regulating checks contained within the Government itself, the responsibility of the rulers to those who elected them. To abuse and mal-administer delegated powers, and to usurp powers not delegated, but reserved, are subjects entirely different.

The question is, whether or no, "in case of a deliberate, palpable, and dangerous exercise of powers not granted by the said compact, the States who are parties thereto have the right to interpose, for arresting the progress of the evil, and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them."

The question is not whether the State Governments shall direct and control the Federal Government in the exercise of its delegated powers, but whether they shall interpose for arresting the exercise of powers not delegated, but usurped.—The question is not whether the Federal Government is the servant of twenty-four masters of different wills, yet bound to obey all, in the exercise of its granted powers, but whether the Federal Government shall be sole and exclusive judge of the limits of its own powers; an autocrat, the sole director of his own will, and the unbridled usurper of the rights and liberties appertaining to the States.

That there are powers, authorities, and liberties, appertaining to the States, which belonged to them as States, and which they have not surrendered, but reserved, is undeniable. The general principle is clear, that in all compacts, leagues, conventions, and treaties between sovereign States, Powers, and Potentates, each party has the right to judge whether a breach has been committed by the other party; and in case of a wilful, deliberate breach, to take such measures for redress as prudence and the discretion of the injured party shall dictate.

Is the compact between these States an exception to this general rule? If it is, then the States must, by some act of theirs, have surrendered this portion of their sovereignty. What part of the Constitution declares such a surrender. There is no such express declaration of such surrender. In the various enumerations of powers prohibited to the States and agreed not to be exercised by them, there is no declaration that they shall not exercise the right, appertaining to them as parties to the compact, to judge of an excessive, alarming and dangerous stretch of power, by the Federal Government.—The abridgement of the powers of the States in this particular not being expressed, cannot be made out by implication or by construction. The powers not delegated by the States to the United States, nor prohibited to the States by the Constitution, are reserved to the States. So says the Constitution. What clause in the Constitution delegates to the Federal Government the sole power of deciding the extent of the grant of powers to itself, as well as the extent of the powers reserved to the States?

It is said that this power is vested by the Constitution in the Supreme Court of the United States. The provisions are, "The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

These are the two provisions of the Constitution which are referred to as delegating the power to the Supreme Court, to be the sole judge of the extent of the powers granted, and of the powers reserved; and as denying to the States the sovereign power of protecting themselves against the usurpation of their reserved powers, authorities, and privileges. If the delegation to the Supreme Court, and prohibition to the States, are not contained in these two clauses, then they are not to be found in the Federal Constitution.

The latter clause cannot touch the question in debate; for that only declares the supremacy of the Constitution, and the treaties "and laws made in pursuance thereof." Powers exercised contrary to the Constitution, acts done contrary to the Constitution, by the exercise of authorities not under, but in violation of the Constitution, and by usurpation of State rights, State authorities, and State privileges, are the subjects under consideration.

Let us examine the former clause: "The judicial power shall extend to all cases in law and equity, arising under this Constitution." The case must be of "judicial power:" it must be a case, "in law or equity," arising under the Constitution. The expression is not—to all cases arising under the Constitution, treaties and laws of the United States—but it is "in all cases in law and equity."

"Use is the law and rule of speech."—By this law and this rule we must examine the language of the Constitution.

A judicial power is one subject—a political power is another and a different subject. A case in law, or a case in equity, is one subject—a political case is another and a different subject.

Judicial cases in law and equity, arising under the regular exercise of constitutional powers, by laws and treaties made by authority, are different from political questions of usurpation, surmounting the Constitution, and involving the high prerogatives, authorities and privileges of the sovereign parties who made the Constitution.

In judicial cases arising under a treaty, the court may construe the treaty and administer the rights arising under it to the parties who submit themselves to the jurisdiction of the court in that case. But the court must confine itself within the pale of judicial authority. It cannot rightfully exercise the political power of the Government, in declaring the treaty null, because the one or the other party to the treaty has broken this or that article; and, therefore, that the whole treaty is abrogated. To judge of the breach of the articles of the treaty by the sovereign contracting parties, and in case of breach to dissolve that treaty, and to declare it no longer obligatory, is a political power belonging not to the judiciary. It belongs to other departments of the Government, who will judge of the extent of the injury resulting from the violation, and whether the reparation shall be sought by amicable negotiation, or whether the treaty shall be declared no longer obligatory on the government and people of the injured party. Yet, by the law of nations, the wilful and deliberate breach of one article of a treaty is a breach of all the articles, each being the consideration of the others; and the injured party has the right so to treat it.

By the act approved on the 7th of July, 1798, the Congress of the United States declared themselves of right freed and exonerated from the stipulations of the treaties, and of the consular Convention heretofore concluded between the United States and France, and that they should not thenceforth be regarded as legally obligatory on the Government or citizens of the United States—because of the repeated violations on the part of the French Government, &c.

Before this declaration, the Supreme Court of the United States was bound, in cases of judicial cognizance coming before them, to take the treaties as obligatory, and to administer the rights growing out of the treaties between France and the United States. After that declaration, the Court was bound to consider the treaties as abrogated. The Courts had no power before the act of July, 1798, to inquire into violations, and therefore to declare the treaties not obligatory. After that act, they had no power to demand evidence of the violations recited, and revise the political decisions of the Government.

To declare these treaties no longer obligatory was a political power, not a judicial power. Yet the violations of these treaties, committed under the authority of the French Government, and the consequent injuries to the citizens and Government of the United States, and the rights of the United States consequent therefrom, before the act of July, 1798, were "cases arising under the Constitution" and treaties of the United States. But the judicial power did not extend to those cases of violation, so as to declare the treaties no longer obligatory. The question whether those violations should, or should not abrogate the treaties, did not make a case in law or equity, for the decision of a judicial tribunal. Yet they were cases arising under the Constitution. The power to decide them belonged to the Government of the United States as a political sovereign; but the judicial power did not extend to them; those cases belonged to the political powers, not to the judicial powers of the Government.

The British Courts of Admiralty executed upon the commerce of the United States the British Orders in Council; disclaiming the power to decide whether those Orders in Council were conformable to the general law of nations, which every nation is bound to respect and observe. In like manner the French Courts of Admiralty executed upon the commerce of the United States the Berlin and Milan decrees.

The British and French Courts had not cognizance to judge the sovereign powers of the nations, and to declare those orders and decrees contrary to the laws of nations—that was not a judicial power. So the courts of the United States, even the Supreme Court, had not the power to declare the treaties between the United States and France and Great Britain, no longer obligatory upon the citizens and Government of the United States, because of the multiplied wrongs and injuries comitted upon the citizens of the United States under color of those orders in council, and decrees, infracting the laws of nations, and treaties, and hostile to the rights of the Government of the U. States. Those cases in their effects upon the treaties and amicable relations between the United States and those Governments, did not fall within the judicial power of the Courts of the United States. Those questions did not fall within the description of "cases in law and equity," as used in the Constitution of the U. States, in conferring, vesting, and defining the powers of the Judicial Department. Those political powers belong to other departments of the Government. According to the law and rule of speech established by use, such powers are classed under the denomination of political powers, prerogative powers not under the head of judicial powers.

Before I proceed to illustrate by other examples, the distinctions which I have taken, between *political powers* and *judicial powers*, between *political* questions or cases, and *judicial* questions or cases, I will refer to the declaration of one, whose opinions on constitutional questions I know will command respect; a man to whose opinions I willingly yield my respect, without, however, submitting with that implicit faith which belongs to fools. On the resolutions of Mr. Livingston, touching the conduct of President Adams, in causing Thomas Nash, alias Jonathan Robbins, to be arrested and delivered over to a British naval officer, without any accusation, or trial, or investigation in a court of justice, Marshall, then a Representative of Virginia, now Chief Justice of the United States, in defending the conduct of the President, thus delivered his opinion in that debate—(Appendix 5, Wheat. p. 17.)

"By extending the judicial power to all cases in law and equity, the Constitution had never been understood to confer on that Department any political power whatever. To come within this description the question must assume a legal form for forensic litigation and judicial decision. There must be parties to come into court, who can be reached by its process and bound by its power; *whose rights admit of ultimate decision by a tribunal to which they are bound* to submit. A case in law or equity may arise under a treaty, where rights of individuals acquired or secured by a treaty, are to be asserted or defended in courts." "But the judicial power cannot extend to political compacts."

This distinction between a political power and a judicial power, is recognized and acted upon by the Supreme Court of the U. States, in the case of Williams vs. Armroyd, 7 Cranch 423, 433.

Again, in the case of Marbury vs. Madison, (1 Cranch 137; 1st Peters' condensed reports, 279,) this distinction between the political powers of Government and the judicial power, is most explicitly avowed and recognized by the Supreme Court.

The supremacy of that court is a judicial supremacy only. It is supreme in reference to the other courts in questions of a judicial character, brought within the sphere of judicial cognizance by controversies which shall have assumed a legal form for forensic litigation and judicial decision. There must be parties amenable to its process, bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit. "Questions in their nature political, or which are by the Constitution and laws submitted to the Executive, can never be made in this court." So said the Supreme Court of the United States, in Marbury vs. Madison.

The decision of the Executive upon political questions submitted to its discretion, is as supreme as the decision of the court within its jurisdiction. Neither department ought to invade the jurisdiction of the other.

A judicial decision binds the parties litigant in that particular case, not others who are neither parties nor privies; whose rights and privileges are separate and distinct. Not even the court itself is bound to give the like decision between other parties where a similar question may be involved. Prudence will dictate that a former decision be not lightly disregarded, but adhere to it in a subsequent case unless the judges see an error in the former decision. But honesty requires that an erroneous opinion be not carried into doctrine, and error perpetuated, merely because of the first error. Errors should be corrected not perpetuated. To err is the lot of man; to correct an error is noble and praisworthy. No decision binds in law or in morality, beyond the rights of the parties litigant, and those claiming under them as privies; and even there, not until the time for a new hearing or retrial has expired. But as to all other persons, it binds not. It is contrary to the first principles of justice, that the rights, interests, and privileges of any person should be decided, negatived, and abrogated, before he is heard to make good his title and his claim, his rights and his justification. God in his infinite wisdom did not condemn Adam unheard. And this example of Divine wisdom and justice is fit to be imitated by human tribunals.

When parties present themselves before the Supreme Court of the U. States to litigate the judicial question involved in that controversy, the decision of the court binds the rights and interests therein represented and litigated; it binds no others.

The public rights, privileges, authorities, and prerogatives of the States, are not the property of individuals, and cannot be represented and brought up for decision of individuals.

In a case between two citizens, parties to an ejectment, claiming lands, the one party under a grant from the State of New York, the other a grant from the State of Connecticut, in the gore which was claimed by both States, the court was competent to decide the private right and interests of the parties. But that decision could have no controlling influence over the line of jurisdiction between the two States; because those States were not parties. So said the Supreme Court of the U States in the cases of Fowler vs. Miller, and Fowler vs. Lindsay, (3 Dallas, p. 411.) And one of the Judges, in delivering his opinion, with whom all concurred, asked, emphatically, "On what principle can private citizens, in the litigation of their private claims, be competent to fix the important rights of sovereignty?"

The twelfth amendment to the Constitution takes away the jurisdiction which had been given to the Supreme Court to hold jurisdiction of a suit against one of the United States by a citizen of another State, or by citizens or subjects of any foreign State; but leaves the jurisdiction conferred over a controversy between two or more States. If two States, therefore, have a controversy, which, in its character, makes a case in law or equity proper for judicial cognizance, it may be brought before the Supreme Court. Controversies between two or more States about territory or limits, may be litigated before the Supreme Court of the United States. But then, each State must have an opportunity, as a party, to prosecute or defend her right before the decision can bind her. Those are questions of meum et teum, rights of property which one State claims to the exclusion of the other; not political rights belonging to all the States respectively, where the rights and powers of one State does not exclude, but establishes the rights of each and every other. Such rights claimed for all, as belonging equally to each and every of the States respectively, cannot make a controversy in law or equity between two States.

Political powers not delegated to the Federal Government—political powers reserved to the States, constitute the subjects of the propositions which are affirmed on the one side and denied on the other. The propositions affirmed are, that the powers of the Federal Government result from the compact to which the States are parties; that these powers are limited by the plain sense and intention of the instrument constituting that compact, and no farther valid than they are authorized by the grants enumerated in that compact; "and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the States, who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining, within their respective limits, the authorities, rights, and liberties appertaining to them."

If the Congress of the United States usurp and exercise a power not delegated, but reserved, it is evident that the controversy about this exercise of power must be between the Government of the United States and the States. How is this controversy to get into the Courts, and finally to the Supreme Court, so as to bind the State as one party, and the Government of the United States as the other party? For on no principle can private citizens in the litigation of their private claims be competent to fix the important rights of sovereignty. A decision in a case to which a State