APPELLATE JURISDICTION OF THE FEDERAL, OVER THE STATE COURTS.

In the last number of this journal there appeared an elaborate decision of the District Court at Cincinnati, in which the right of appeal from the State courts to the Supreme Court of the United States in cases within the Act of 1789, as well as in so far, the constitutionality of the act itself, were denied, and the absolute and uncontrolled independence of the former, was maintained. This decision was willingly inserted by us, on account of the importance of the subject, and the great ingenuity and ability which its reasoning displayed. The peculiar doctrines which it promulgates can nowhere, indeed, be found more clearly or forcibly propounded, or pressed more boldly to their legitimate conclusions, than in the opinion of Judge Bartlett. So far, therefore, it had a right to claim the attention of our readers and ourselves. But, lest we should be supposed, by the publication of this case, to indicate our concurrence in or approbation of doctrines and conclusions which we believe to.

1 Stunt vs. The Steamboat Ohio, 4 Am. Law Reg. 49. It was the intention to have accompanied the publication of the case with remarks in substance such as the following; but it was found impossible to do so, from want of space.
be not only erroneous in themselves, but dangerous in the highest
degree to the integrity and stability of the government, we must
take the earliest opportunity to express a respectful and total dis-
sent from them, and to offer an earnest protest against their adopt-
tion elsewhere.

As the topic is an old one, however, we shall do so, at no great
length, confining ourselves in our remarks, to a short statement of
the principal arguments on the subject.

The question involved, is one, which of course must be affected in
some degree by political considerations, and to that extent by parti-
zan feelings. In order to remove any objection on that score,
therefore, it is proper to state at the outset, that, so far as personal
proclivities are at all deserving to be spoken of in this connection,
we, as well as the learned chief justice of Ohio, adhere to the
school of "strict construction," and desire to see the federal gov-
ernment limited in all matters to the powers clearly granted to it
in 1789. We entirely agree with him that such is the only safe as
well as true method of interpretation; and that the tendency to
centralization which the opposite doctrine involves, should be most
jealously watched, and restrained by all lawful means. So far we
journey together harmoniously and upon the same track, and if we
subsequently diverge, it is due not so much to a difference upon
general principles, as to the extent to which they can be logically
carried. The subject is one, therefore, which we believe we are
able, as we certainly shall endeavor, to treat without prejudice, and
apart from political bias.

To proceed, then, without further preamble to the subject of
discussion. The constitution enacts that the judicial power of the
United States, shall be vested in one Supreme Court and in such
inferior tribunals as the congress may from time to time ordain and
establish. It next declares that this judicial power shall extend to
certain classes of cases and controversies, and finally provides that
in certain of these cases the Supreme Court shall have original, and
in all the others appellate jurisdiction, with such exceptions and
under such regulations as the congress shall make. When a case com-
prehended within this definition of the judicial power of the United States, originates in a State tribunal, can there constitutionally be an appeal from its decision to the Supreme Court of the United States? It is alleged that there cannot, that the judicial power of the United States, is only concurrent with that of the States, and that appellate jurisdiction cannot exist where the courts to be appealed to and from, do not belong to the same judicial system.

We will consider the latter of these objections first, for it is plain that if such appellate jurisdiction in fact exists, it is not very material whether the judicial power itself be originally concurrent or not.

In the first place, what is the natural and prima facie construction of the article on the judiciary? It will be remarked at once that the words of the clause which gives appellate jurisdiction to the Supreme Court grant it in general terms, after enumerating the cases of original jurisdiction, over "all the other cases" to which the judicial power extends, and do not refer in their grammatical or logical connection to the inferior tribunals which, by another clause congress may establish; that is, they make it depend upon the subject matter of any cause, and not on the court in which it originates.

This distinction is important to be insisted on, as some have fallen into an obvious fallacy, from neglecting to observe its effect. Thus it has been said, that, as the judicial power of the United States is expressly vested in the federal courts, the appellate jurisdiction of the Supreme Court, applying, it is assumed, solely to that power, can extend to them only, and not to the State courts. Here, "judicial power" is confused with the agency through which, and the subjects over which it is to be exercised. But the term in its true sense means merely that abstract authority which belongs to every government as a portion of its sovereignty to administer justice with regard to matters within its sphere of action, either ultimately or in the first instance. Such authority being assumed by the constitution to be in the United States, as a matter of necessity, it is then vested in general terms, in certain courts, and its subject matter—that is, the cases and controversies to which it is to extend—defined. But it is obviously not necessary, nor indeed proper that judicial
power should always be exercised in the first instance; and hence the jurisdiction of, that is the practical exercise of that power by, any court or set of courts in which it is vested, may be partly or wholly appellate over the subject matter. The latter, for example, is the case when an appeal is given by the legislation of any State from the acts or decisions of executive officers, as, in the ordinary case of the assessment of taxes; or again, with regard to a mandamus to a corporation. Appellate jurisdiction, therefore, though a means of exerting judicial power, may exist, notwithstanding that the person or body appealed from, has not been acting by virtue of that power as such. Now, the constitution does not expressly prohibit the State courts from holding cognizance of the cases and controversies enumerated, except as to certain ones over which original jurisdiction is given to the Supreme Court, but leaves it to the determination and regulation of congress according to the nature of the case. So far, therefore, as regards such cases as are or may be still within the permitted primary cognizance of the State courts, an appellate jurisdiction over the latter, might at any rate, properly exist in the federal tribunals, and be described as such. But the constitution expressly declares that the Supreme Court shall have such jurisdiction over all of certain cases, among which these fall. Hence, it lies on those who attempt to prove that the State courts are not within the jurisdiction, to show some reason aliunde to that effect.

This view is confirmed by the fact that it is not made imperative but optional with congress, to ordain and establish any inferior tribunals, while the appellate jurisdiction is conferred in absolute terms. The constitution thus contemplates and prescribes such jurisdiction in the Supreme Court, notwithstanding that there may be no inferior courts of the United States in existence; in which case, of course, the appeal must be taken from the State courts, if at all. It, therefore, makes no difference with regard to the appellate jurisdiction of the Supreme Court, whether the case in which it is to be exercised originated in an United States or a State court. With this, the obvious construction of the clause, all contemporary
interpretation, the debates of the federal convention, the Federalist and the subsequent decisions of the Supreme Court, as is well known, agree with an uniformity which is hardly to be found in any other subject.

A further proof of the necessity of this conclusion, is the fact that a similar appellate jurisdiction over the State courts in certain cases, existed under the Articles of Confederation. This was given by the article which empowered congress to appoint courts "for the trial of piracies and felonies committed on the high seas, and to establish courts for receiving and determining finally appeals in all cases of captures." It has been attempted to evade the force of the *a fortiori* argument, which is derived from this provision. (1) On the ground that it occurs in the clause in which the then "sole and exclusive" powers of congress were given—and hence that, as the words "sole and exclusive" are not applied by the constitution to the appellate jurisdiction of the Supreme Court, the analogy fails. But the answer is, first, that these words in the clause of the Articles of Confederation, apply to the power of congress to establish such courts, and not to the *appellate jurisdiction* which they were to possess when established. Second, the words "sole and exclusive," are not used in the constitution at all, with regard to the powers granted to the United States, the question of exclusiveness being left to be determined by their nature.

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1 See the Madison papers, pp. 782, 98, 9, 800, 1136, 7. We have not space to refer to the particular passages, which are, besides, sufficiently familiar to all. It is enough to say that when the article on the judiciary was first drafted, it was made imperative on congress to establish inferior tribunals. This was objected to on the part of the State-rights party in the convention, because it was supposed that such tribunals would be expensive, and would interfere with the State courts and deprive them of too much authority. It was therefore proposed that there should be but one national tribunal, which should have only appellate jurisdiction from the State courts except in a few cases. The object of this tribunal was to produce uniformity of decision on national matters, and to act as arbiter between the United States and the States. These views prevailed at first, but a compromise was afterwards effected by making it, as now, discretionary with congress to establish inferior tribunals. It was agreed on all hands, however, that an appellate jurisdiction over the State courts was to exist, and was conferred on the Supreme Court by the constitution. The famous New Jersey plan, which may be considered as representing the negative pole of the political tendencies in the convention, admitted, nevertheless, that jurisdiction.
(2) Another objection to the argument is said to be, that the relation of the States to the authorities under the confederation, was essentially different from that of the States to the present federal government: that the latter is now, but was not then a distinct and independent government, and that under the confederation there was no distinct judicial system at all. It is difficult to believe that such reasoning as this, is intended to be serious. It seems like logic turned upside down. The argument is from the fact that the federal courts under the confederacy, had appellate jurisdiction over the State courts, and it is answered, not that confederacy had then a stronger and more extensive central power, but that it had less, indeed next to none at all. The very point is, that as every branch of the government has now greatly more extended powers than before, it must be assumed, unless there is something in the words of the constitution to show a contrary intent, that the grant of appellate power to the United States courts, is at least as broad as under the confederation. As to there being no distinct judicial system under the confederation, if this means that it was not then a judiciary department, distinct from the congress, as at present, it is not the fact, inasmuch as so far as the powers of these courts extended, they were judicial and not legislative powers; and whether they were given in an independent article or not is wholly unimportant. If, however, it means that the judiciary of the United States, was not then distinct from the judiciary of any one State, or all the States, it is just as much and no more true of it now. Neither then nor now did the federal judiciary derive its authority from any direct legislative act of any of the States separately, and as to any indirect derivation of authority, it applies with more force in favor of the present system, inasmuch as it is created directly by the States themselves, while the other was originated only by the agents of the States in Congress assembled.

This brings us back to the examination of the general effect of the second of the objections above stated. The argument implied thereby is this: there can be no appellate jurisdiction as between courts not belonging to the same judicial system; the federal and State courts do not belong to the same judicial system; there-
fore, &c. In order to determine the value of this syllogism, we must
first ascertain the exact meaning of the phrase, "belonging to the
same judicial system." This, however, it is not so easy to do; for
it is just one of those vague expressions current in politics, which
may be made to mean anything or nothing, as happens to be most
convenient. Appellate jurisdiction includes every species of re-
visory power which its subject matter may require, whether exer-
cised by writ of error, appeal proper, certiorari, or otherwise. It
is applied in one shape or another, as well to cases where the court
appealed from has not, as where it has, jurisdiction of the subject
of decision; where it proceeds under the same or under a different
code of laws; where it is organized by the same or a different legis-
lative body; and where it is or is not an "inferior" tribunal in the
technical sense of the word. The supervisory jurisdiction of the
Court of King's Bench at common law, in England, over all the
other courts, from the civil law and local tribunals, proceeding
under different codes, up to the Common Pleas, a co-ordinate court,
furnishes one illustration of this. The relation of the privy council
of the same country to the colonial courts, which are generally con-
stituted by the local legislatures, and are governed also by extremely
diverse systems of jurisprudence, constitutes another. The control-
ling power of the superior courts of the States, over all other
tribunals, even when not of a strictly judicial character, to keep
them within the limits of their jurisdiction, is a further example.
Again, it is no objection to the existence of appellate jurisdiction,
that it extends only to certain defined cases, and that the court
appealed from has itself a much more extensive original and appel-
late jurisdiction, as in the case of the revenue courts in England,
the prize courts under the confederation, and the courts of appeal
in those States which have also Supreme Courts. Finally, it may
apply even to the courts of a distinct kingdom, or State, when
united under one head with another, as formerly was the case
between England and Ireland, and in the Germanic empire.

The phrase, "belonging to the same judicial system," must be
presumed, therefore, not to be intended to be used in any of the
connections just mentioned: that is to say, not to refer to want of
same in modes of constitution, organization, regulation, action, or decision; in systems of law, or in spheres of jurisdiction. The only thing left is to consider it employed to denote a want of identity in the source whence judicial power is derived. This is something tangible, at any rate; for where that does not exist, there can be rightfully no appellate or any other jurisdiction of one court over another.

The major premiss of our syllogism must be, therefore, defined to mean: there can be no appellate jurisdiction between courts not deriving their judicial power from the same source. In this sense, is the minor premiss true?

All power is derived from the people in their sovereign capacity. The judicial power of any State, Pennsylvania, for instance, is the creation of the people of that State, acting as such in convention assembled. But the judicial power of the United States lawfully extends to many subjects over which the judiciary of Pennsylvania would otherwise have exclusive jurisdiction. Whence did the United States derive this power? It is not material whether we answer with some, from the whole people of the United States, or with others—as we, and, if the _argumentum ad hominem_ be admissible, those who differ with us on the general question we are discussing, do—from the people of the several States, acting in their respective sovereign capacities. It will not be pretended that the people of Pennsylvania were not competent to vest a portion of their judicial power in other courts than those which it had previously constituted. Consequently, the judicial power of Pennsylvania and that of the United States, so far as the latter extends to questions, over which the former would otherwise have exclusive jurisdiction, are derived from the same source. But the same is true as to each of the other States. Hence the Supreme Court of the United States, and those of the States, do belong to the same judicial system, in the only sense in which, as we have seen, the term can be used in the argument; and the latter falls to the ground.

To meet this difficulty, however, the objection is made to assume a new phase. Admitting it is said that such appellate jurisdiction might
exist in the federal Supreme Court, as deriving its judicial power from the same source with the State courts, and thus belonging to the same judicial system, yet it is not necessary that it should so exist. The power may well be, it is urged, concurrent and independent in each. It is therefore thought to be a proper case for the application of the tenth amendment of the Constitution, that powers not delegated to the United States, are reserved to the States and the people.

There can be no doubt, as we have shown that the constitution in giving appellate power to the Supreme Court, uses language which is broad enough, in the first instance, to cover appeals from State courts; and indeed, in absolute terms applies only to them, as the establishment of inferior courts is merely optional with congress. Still it may be argued that if there be, as there are, inferior tribunals to the Supreme Court established by law, it is not "necessary or proper" in congress to pass any law to carry into effect appellate power as regards State courts.

Here comes properly into action the argument from expediency, which has received so much reprobation in this connection. We freely admit, that no motives of convenience or propriety, however cogent, should be allowed weight to impart into the grant of power by the constitution, anything which is not already there. But with regard to the construction of a clause or a sentence, which is fairly capable of a narrower or wider interpretation, the arguments of expediency, and ab absurdo, are of the utmost validity. If there are two significations of a phrase, for instance, one of which is in accordance with the spirit and tendency of the rest of the constitution, and the other is absurd in itself, and leading to dangerous, or even undesirable consequences, of course the former must be adopted, however much it may interfere with State rights. It is merely the application of common sense to determine what was, not an attempt to grasp what was not, delegated to the United States.

If then, the State courts have an absolute, independent, and concurrent jurisdiction over the subject of the judicial power of the United States, and are fully capable and competent to administer justice with respect thereto, without control or appeal, what need was there to
constitute or to provide for the constitution of federal tribunals. They entail a very heavy expense to the country; and necessitate a double set of officials, without lightening in any material degree, the labors of the State courts. They interfere with the professional duties of lawyers, increase heavily the costs of litigation, take away jurors and suitors from their avocations, without deciding any controversy or establishing any law. On the hypothesis their whole organization is a mere farce, a fifth wheel in the judicial coach. Is it possible to suppose that this could have been the intention of the federal convention, or of the conventions of the States which adopted the constitution?

Again, the consequences which necessarily flow from such an interpretation of the language of the constitution, are equally conclusive against its adoption. It is admitted, at least, that there is nothing to compel a suitor to choose either class of tribunals. Suppose him then to commence an action of ejectment in a court of the United States, to test the constitutionality of the law of a State of which he is not a citizen, affecting his rights, and to succeed in establishing its invalidity. His antagonist, then of course brings his ejectment in the State court, when the statute is declared constitutional. The first again resorts to the federal, the second to the State tribunal: and so they may go on with their see-saw, as long as the money or the obstinacy of either holds out. The same thing may happen with regard to any other of the subjects of the judicial power of the United States. An alien and a citizen may play at battle-door and shuttle-cock with a case, between the two courts. A ship, as the subject of admiralty jurisdiction, may pass its nautical existence in short voyages from one jurisdiction to the other, under the alternate pilotage of the sheriff and the marshal. As the same reasoning must apply with equal force to the original jurisdiction of the United States, the "ambassadors, other public ministers, and consuls," whose causes are apparently invested with so much dignity, will find their stately privileges collapse at the torch of any disrespectful plaintiff who chooses to drag them before an accommodating justice of the peace. And what is more serious, where a controversy arises between two States, each will naturally
prefer its own judiciary, and each judiciary its own State: neither will yield, and so a question as to a few square miles of barren land, which might in the federal court, be determined by a couple of surveyors, may grow into a civil war, in which the only appellate jurisdiction will be that of the sword.

The nature and consequences of such a concurrent but independent jurisdiction in the State courts, are therefore so absurd and so dangerous in themselves, that if for no other reason, we should be bound to reject the construction contended for. But it appears doubly irrational when we consider the objects and motives for which judicial power was conferred upon the general government. These are clear enough on the face of the constitution, and they are further made known to us by the debates in the federal and state conventions, the Federalist, and from the other contemporary interpretations.

The purpose of the constitution was to withdraw from the State tribunals certain classes of cases, which were not suitable for their decision, or with regard to which their impartiality might be suspected. The representatives of foreign powers were to be removed beyond the action of irresponsible bodies; aliens, and citizens of other States to be protected from the effect of local prejudice or passion; the legislatures of the states to be kept within the limits prescribed by the constitution; a peaceful arbiter of controversies among the States to be established. In these, and the other cases enumerated, jurisdiction was therefore given to the federal judiciary, because, and solely because, it was improper to be exercised by the State courts.

What are we to say then of a doctrine which insists that they are still left within the control of the latter?

So much, then, for the language of the article on the judiciary, and the interpretation of which it is susceptible. The controlling authority of the federal judiciary is not, however, a mere matter of construction. The sixth article enacts that the constitution of the United States and the laws made in pursuance thereof, shall be the Supreme law of the land, and that the judges of every State shall be bound thereby, anything in the constitution and laws of any State to the contrary notwithstanding. If this be so, then each branch or department of the government created by the constitution must
be supreme, and this not only in the abstract, but with regard also to its action, of whatever nature, within its legitimate sphere. Consequently, the judicial power of the United States, and the original and appellate jurisdiction of the Supreme Court, the law which it enounces and the decisions which it makes, must be supreme, with regard to the cases and controversies defined in the constitution. Now, congress is expressly authorized to make all laws which shall be necessary and proper for carrying into execution the powers vested by the constitution in the government of the United States or in any department or officer thereof. What then is the necessary and proper means to enforce a jurisdiction which is supreme over a particular subject matter, to carry into effect the decisions of the courts in which it is vested, and to compel conformity to the law which they enounce? There is no other, than either to authorize the removal of cases falling within the definition, from any other court in which they may have been originated by appeal or otherwise; or else to prohibit their prosecution there, under a penalty. The former as the milder and more usual course, is that which congress has adopted.

It is said, indeed, that the clause of the sixth article just referred to is merely declaratory, and vests no specific power in any department; but this distinction, if it have any meaning at all, is quite apart from the subject. It certainly cannot refer to the division of statutes into declaratory and enactory, for the whole of the constitution in that sense is enactory of new law. Again, it may mean declaratory of the general effect of the instrument, and not granting or conferring any right or power which is not explicitly granted or conferred. This however, is liable to the following objections. (1) It would make the clause “useless, superfluous, void, and insignificant,” which is contrary to a primary principle of construction. Bacon Abr., Statute I. (2) The clause occurs in the article in question, in connection with others which are unquestionably enactive, and then nosceitur a sociis is the rule. (3) The objection is self destructive, for if the judicial power of the United States be already as supreme by its very constitution as this clause would otherwise make it, then cadit questio. (4) Finally, if the force of the objection
be supposed to lie in the assertion that the clause "confers no specific power on any department of the government," then it is not obvious what stress is intended to be laid on the allegation that it is "only declaratory." For if it be, as it is, declaratory of the absolute sovereign and supreme nature of the general powers granted to all the departments of the government, which had not been before expressly declared, there is an end of the matter. Indeed the distinction itself rests entirely on an ignoratio elenchi, on what is at least a mistake as to the proposition advanced. Nobody has ever contended that this clause in itself confers a specific appellate power on the federal judiciary, but the argument is, that such power having been already conferred, the clause converts it from what might have been otherwise a limited and co-ordinate, into an absolute and supreme power. Such a relation is thereby established between the federal judiciary, and the State judges and courts, that an appellate jurisdiction over them, to that extent is necessarily created, notwithstanding anything in the State constitutions or laws contrary to, and a fortiori, only inconsistent therewith. This needs but the organizing power of congress, in making the necessary and proper laws, to be converted into the active agency which we have at present.

There is one more objection remaining to be stated, upon which, when hard pressed, those whose views we oppose have always fallen back, and which underlies, indeed, the whole of their reasoning. We mean the famous "no final arbiter" argument, which may be briefly expressed thus: Any unlawful exercise of power, executive, legislative or judicial, by the United States, while a violation of the constitution, is at the same time an encroachment on the sovereignty of every State. But the question whether such encroachment, in any particular instance, has been made, does not present a case arising under the constitution or laws of the United States, within the article on the judiciary; because (1) the word "case" there refers only to the term in its technical signification, which is assumed to be an action or suit judicially prosecuted. (2) Such a question would not arise under, but, from its nature, outside of or beyond the constitution. Further, it is said, that as to such encroachments, the
federal judiciary is, as a portion of the government of the United States, indirectly, and where they originate in its own action, directly an interested party, and hence incompetent.

Now, so far as this argument tends to establish the right of nullification or secession, as a sovereign right reserved to the States, and, therefore, to negative in that respect the doctrine of final arbitrament power in the Supreme Court of the United States, we do not intend to affirm or deny its validity. It will be sufficient to show that it has no application in the present connection.

It is to be observed, in the first place, that this argument bears only on one of the several classes of cases to which the judicial power of the United States is asserted to extend. It could not be honestly contended to apply, for instance, to a case under a law of the United States, admitted to be constitutional, or one affecting an ambassador or other public minister; to a controversy between States, or between an alien and a citizen. Whatever may be its inherent force, so far as it goes, it does not militate in any way against the arguments for appellate jurisdiction over the classes of cases which it does not reach. Such jurisdiction being assumed, therefore, to be the general rule, if it do not extend to the particular class now to be considered, it must be treated only as an exception, whether ex necessitate rei or otherwise. As such, the burden of proof is on those who assert its existence.

With regard, then, first, to the allegation that such questions are not within the jurisdiction of the federal tribunals at all, because they do not constitute (1) cases arising (2) under the Constitution, &c. (1.) Whatever weight the argument on this word might have in support of other doctrines, it has none here. The gist of the objection lies in the assertion that the phrase “cases in law and equity arising under the constitution” does not refer to “questions or points of law thus arising, and judicially presented, but applies only to the means by which a litigation is brought before any tribunal. In the first place, we cannot admit this to be the fact. “Case,” except in very loose modern phraseology, is not synonymous with suit or action, which latter are the technical terms for the machinery, while the former is that for the subject-matter of
a controversy. It is defined by Johnson to be "the state of facts juridically considered;" that is, considered with reference to the questions of law to be determined thereon. The words "in law and equity," were added, we know, merely to give the United States courts equity as well as law jurisdiction. Moreover, if the word had so narrow a sense, the correlative verb would be "brought" or "prosecuted," not "arising." Next, such questions could not be brought before a federal court, otherwise than on some case arising and presented judicially; and therefore the language is precisely adapted to reach them. But further, the same is true, with regard to any jurisdiction which the State courts could have over them. The only way in which they can entertain such a question, is on a "case arising under the Constitution of the United States, &c.," even if we interpret this in the narrowest sense. Hence, the subject of the judicial power in each case is the same; and this is all we have to do with in the present inquiry, which is simply as to the appellate jurisdiction over the latter.

Again, so far as the argument is intended to prove that the authoritative character of the decisions of the federal tribunals, on such a subject, is confined to the "case" itself, and does not extend to the principle involved, it proves too much. It cannot be denied, that with regard to questions arising on the construction of the Constitution of any State, the decisions of its judiciary have that character in both respects. Yet those questions also can only be presented in the form of a "case at law or in equity." Finally, it is forgotten that the judicial power extends as well to "controversies to which the United States shall be a party." The word "controversy" is much more extended and popular in its signification than "case." But on the supposition before us, the denial by a State of the constitutionality of any exercise of power on the part of the United States, involves a contest between them, and hence a controversy in the abstract, as to its validity, to which the United States is a party. If resistance be further offered on the part of the State or its officers, the controversy becomes an actual

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1 3 Madison Papers, 1485.
one, to be settled by indictment or other criminal proceeding, on behalf of the federal government, of which the federal judiciary will undoubtedly have jurisdiction, and the defence to which must raise this very question of constitutionality. Hence, so far as this is concerned, the United States courts have the power of ultimately deciding on such questions, in the most important form in which they can be presented; that is, when there is an actual conflict between the two governments. It would be unreasonable to suppose, therefore, that they cannot take jurisdiction of similar questions, when they arise in a "case" between private individuals.

(2) "Under the constitution and laws made in pursuance thereof." We must frankly say that we cannot perceive in this part of the objection, even a shadow of plausibility. But as it has been repeated with apparent seriousness by distinguished lawyers, we are bound to treat it with respect, and answer it according to what we may suppose to have been intended, that is, to confine the words "under the constitution" in their application here, to cases arising out of the ordinary action of the different departments of the government, about which no question of constitutionality can be made. In the first place, the only one of the significations given by Johnson to the word "under," which would make any sense whatever in this connection is, that of "in respect to." Such is its constant use in legal as well as ordinary phraseology. No one could doubt, that, if a court were given jurisdiction to determine cases arising under the provisions of a particular statute, it would be authorized to declare the construction of the statute, and whether or not any particular case fell within its scope. So, if in an agreement the parties provided that all questions arising under the same, should be referred to an arbitrator for decision, unquestionably the latter would be empowered thereby to determine the construction of the contract itself. Again, the analogies of the judicial system of the States, are against the objection. Every power prohibited by the constitution of a State, remains with the people thereof, as a portion of their reserved sovereignty. The question as to the constitutionality of a State act, involves therefore a contest between sovereignty granted and sovereignty retained, as much as that with regard to an act of congress. But though a
portion of the former, and so far interested, the State judiciary is competent to decide in such a case, from the necessities of a written constitution. In order to prevent the application of the analogy, there should have been the clearest language used in the constitution of the United States; which is not the case, for the utmost that can be said with regard to the phrase "under the constitution," is, that it is a little ambiguous. Finally, the objection ends in this absurdity, that the federal judiciary has not the power to declare an act of congress or of the executive unconstitutional; and further, that as regards even its own jurisdiction, it cannot refuse to take cognizance of a case not falling within the judicial power of the United States. For if the argument be sound affirmatively, it is equally so negatively; if the one is not a case arising under the constitution, neither is the other. Both require, in order to their determination, the decision of the court upon the construction of the constitution. It is not necessary to dwell upon the results of such an extravagant doctrine as this.

This brings us to consider the last argument contained in the objection, which affirms that as the judiciary of the United States is a portion of its government, it is interested, and therefore incompetent as to all constitutional questions. So far as this asserts an absolute incompetency, it is answered at once by a reference to the other provision that the judicial power shall extend to "controversies to which the United States shall be a party." It cannot be argued that the federal judiciary is any more incompetent where the United States is indirectly, than where it is directly a party in interest.

We may therefore dismiss as entirely untenable, so much of the reasoning, as would tend to show that the judicial power of the United States does not extend to the determination of questions such as we are now considering. It remains to be seen, however, whether the objection though ineffectual to that extent, may not be sufficient to establish an independent and uncontrollable jurisdiction over these questions in the State courts.

Bearing in mind, what was before stated, that this, if it exist, is an exception, we find (1) that such a jurisdiction is nowhere expressly given by the constitution, and therefore, in respect to that instru-
ment, can only be considered as permissive. (2) It cannot be im-
plicated as inherent in or necessarily belonging to the judiciary of any
State, because it exercises the judicial power of the latter, or so far
as it does. No doubt every individual, as well as every court, must
in one sense determine upon the construction of the constitution.
This however, is not what is meant, but a right to decide which is
final and not to be appealed from. Where a case under the consti-
tution or laws of New York, for instance, arises, as it may well arise,
before a court of Pennsylvania, the latter must decide it as it is best
able, upon their construction. But this is not authoritative, but
merely accidental, because the Pennsylvania court has been given
by the people of New York no power to determine that construc-
tion, and hence no one would be bound by it except the parties to
the particular cause. Now, either the government of the United
States and its judiciary are superior to the government and judici-
ary of any State, in which case the objection falls to the ground, or
they are co-ordinate and independent, as is contended on the other
side. But if the latter, then the judiciary of one State cannot, from
the nature of the case, have any authoritative or final power to con-
strue the constitution of the United States, any more than that of
another State. It is said, however, that the case is a different one
because the constitution of the United States and the judiciary of
the States, are created by the same authority. But this involves
what the logicians call the fallacy of division, for it assumes that to be
true of each State separately, which is only true of all the States in
the aggregate. The constitution of the United States, and that of
any State so far as regards the latter, are derived from the same
source; but not so far as regards the former, because it is the pro-
duct of the combined sovereignties of all the States. An attempt
on the part of the judiciary of one State to decide authoritatively
and independently upon any question affecting the powers created
by all, would therefore be an exercise not only of its own but of the
sovereign rights of the rest, and hence an usurpation of the latter.
But, as judicial power cannot extend beyond the sphere of the sov-
eignty whence it is derived, the authority to make such a decision
must be considered to that extent, not to belong to the courts of
any one member of the Union.
Further, it is easy to see that a decision upon such a question, by the courts of any one State, cannot be final even as to its own inhabitants. A citizen of Pennsylvania for instance, is at least equally bound by the laws of the United States, and the decisions of its judiciary with respect thereto, as by those of its own commonwealth. Suppose then, an act of congress is declared constitutional by the one, unconstitutional by the other, which is he to obey? Certainly not the State court, if he believe it to be, and it be in fact, wrong, for his duties to the United States, which cannot be affected by an arbitrary act of the judiciary any more than of the executive of his State, remain. But if it must be thus left to the determination of each citizen whether a decision is to be obligatory or not, then it can have no authoritative character, and the tribunal no independent jurisdiction over the subject matter. This is sufficient for our present purpose, which is merely to negative the implication of such a jurisdiction as an inherent and necessary function of the judicial power of a state, it not having been given by the constitution, and the burden of proof being on those who assert it. Hence, it is no answer, to say, that as in the case supposed it might be the decision of the federal court which was wrong, the argument would then tell the other way; because the authority of the United States courts to decide upon the subject has been already otherwise proved, and the jurisdiction shown to be expressly given.

(3) The whole question, therefore, finally reduces itself to the political one, whether it must be assumed that under our system of distribution of sovereignty the State courts are invested with the absolute and unappealable power to decide upon the constitutionality of the acts of the federal government, in order to prevent encroachments by it upon the reserved rights of the States. This obviously does not involve any argument on the constitution, but is rather one of expediency, or from the necessity of the case.

In the first place, we are unable to see that it is expedient that such a power should exist. If it be true that the federal judiciary is interested as a branch of the government, in extending its powers even beyond their constitutional limits, that is just as strong an argument against giving final power to decide constitutional cases
to a single court, in any country whatever, for the same reasoning applies to all governments. Again, the judiciary of a State must be as much interested to amplify, as the judiciary of the United States to curtail, the reserved rights of the State. The argument proposes therefore, to prevent one danger by substituting another. But, further, as it is as important to some of the States, at least, to resist encroachments on the federal powers by other States, as vice versa, the reasoning in favor of the independent and authoritative character of the decisions of State courts is as strong in that case as in its opposite. But, practically a decision by one State judiciary in the negative of any constitutional question, and which, if erroneous, is an encroachment on the federal powers, will annul the effect of any number of affirmative decisions by the others; which is equivalent to appellate jurisdiction over the latter. Hence, the argument, if valid, amounts to the destruction of one set of State rights by the enforcement of others. Again, there are many questions arising under the constitution with regard to restrictions on the powers of the States, as that prohibiting ex post facto laws for instance, in the determination of which the United States can have no interest one way or the other. But there is no possible case under the constitution in which a State will not be directly interested. Hence, the argument of incompetency applies much more forcibly against the courts of the latter, than of the former. Finally, when we consider the number of states in the Union, their diverse interests and the greater comparative strength of local over national political bias, it is impossible not to see that the inevitable result of the doctrine of such an independent jurisdiction as is contended for, would be the generation of a chaos of irreconcilable decisions on every question affecting the constitution. The federal government in the midst of these conflicting adjudications, would soon cease to possess more than nominal authority, the anarchy of the confederation would return, and the Union degenerate into a mere aggregation of States, jealous, conflicting, and at last inimical. History demonstrates no political conclusion more emphatically than this, and its laws will not be suspended in courtesy to any theory of government, however ingenious. "Men may reason badly, but nature and fate are lo-
Far better is it, therefore, as it seems to us, to submit to the possible evils of an exclusive jurisdiction in the federal courts over cases arising under the constitution, in order to secure uniformity of decision, and obedience to law, than to adopt a doctrine which is certain to produce such disastrous results.

So much, then, for the argument from expediency and necessity.

As to that which is based on this, that a right to resist encroachments by the United States must be presumed of necessity to be reserved to the States respectively, in order to prevent their sovereignties from being gradually destroyed, it contains an obvious flaw when applied in this connection, which must be briefly noticed.

Every citizen of the United States is bound to obey its constitution and what he believes the lawful acts of the government, nor can he oppose forcible resistance, even to what is in his opinion, an unconstitutional law, unless he be so far regularly released from his allegiance by his State. This can only be done, if at all, by the State acting in its sovereign capacity, on the principle that an obligation cannot be dissolved except in the manner it was created. But the judiciary of the State, does not represent the whole, but only a portion of the sovereign authority. It by no means follows that the executive, the legislature, or what is more to the point, the State acting in convention, would take the same view of a constitutional question with the judiciary, and if they or either of them, took a different view, which must the citizen obey? It certainly cannot be argued, that if two or three judges of a state afflicted with extreme political doctrines, at variance it may be with those of the majority in the State, should declare an act of congress void, they can thus put the State against its will, in a position of resistance to the United States. It is not the judiciary of a State alone therefore, in which is vested that effective power of resistance to encroachments by the federal government, which is supposed to be necessarily re-

1 This is fully settled in the jurisprudence of the States as to their own constitutional law. See in particular an admirable exposition of this principle, by Chief Justice Shepley, of Maine, 1 Am. Law Reg., 212. We are here speaking, of course, of the ordinary and established course of things, and do not refer to the right of rebellion, the ultima ratio populi, upon which no argument can be based on either side.
served. But if this be the fact, then an appellate jurisdiction in
the Supreme Court of the United States, in the class of cases we
are discussing, over the State courts, can no more affect the right
and power of resistance contended for, on a proper occasion, than
the decision of such cases in the federal tribunals originally. For if
the judgment of a State court in such a case is not to be the basis of
the action of the State or the other branches of its sovereignty, then
it is entirely unimportant; if it is, it can be quite as well accepted
as the declaration of the constitutional rights of the State, when
appealed from, or even when reversed, as before. We must there-
fore conclude, that whatever the argument be otherwise worth, the
right of each State to decide upon questions arising out of the con-
stitution, does not involve any necessity that the jurisdiction of its
courts over them, when judicially presented, should be absolute and
independent, and hence, that it does not constitute an exception to
the appellate jurisdiction of the courts of the United States, pre-
viously proved to exist as the general rule.

We have now gone over the general arguments on either side of this
question, patiently, to the best of our ability, and we believe, without
prejudice. The discussion has necessarily involved principles of the
most elementary character, and been conducted by reasoning which
was already trite by repetition. We could say nothing indeed,
that has not been said a hundred times before, in far better lan-
guage, and with much greater cogency; nor could we advance an
argument which had not been anticipated by a train of decisions.
If authority were sufficient in itself, the question was closed. So-
far, therefore, our task might seem, we admit, to have been quite
supererogatory. But it is one of the necessary evils of our national
freedom of discussion, that no principle is too evident, no doctrine
too settled, no usage too binding, no institution too venerable, to be
beyond the reach of criticism, however unjust, or exempt from the
necessity of defending itself against attacks however ill founded.
Silence is no longer taken for the confidence of strength, nor para-
dox as a badge of error. There is a corrosive agency in arguments
when left unanswered, so that even the weakest cat at last intr-
the convictions of men, instead of being shed off indiscriminately, as in the days when prejudices were worn as Para coats. False reasoning will not die for lack of nourishment, indeed, but propagates itself with the rapidity of noxious weeds, till it usurps almost the field. It is, therefore, well for all of us, whatever our capacity, when doctrines we hold by as essential to the peace and well being of our country, are assailed, not only to re-assure ourselves, but to establish to the satisfaction of others, that they are based on a sure and solid foundation.

At this time, indeed, the cause of law and good government has need of the services of its humblest adherents. What has occasioned us most regret in the decision which has given rise to these remarks has been less its erroneous and unconstitutional tendencies, than its appearance at a period when every disorganizing agency in the country appears to be at work. The centrifugal forces of our orbit so to speak, are powerful enough by themselves now, without any gratuitous addition to their intensity. There are those, we know, in some portions of the country, who profess to deride systematically all warnings of danger to the Union. This is the security of ignorance. Those who stand, as it were, upon the line which divides the sections now so unhappily at variance, and can survey without prejudice the movements on either side, see and know too well the imminence of the peril. There is such exasperation on one side and determination on the other, as was never known before, and it will need the greatest caution and good sense, to prevent an explosion which would rend the Union into fragments. It may be called a wolf-cry, but the wolf of the fable came at last. In such a crisis, it is the duty of all honest thinking men, to join in an endeavor to remove all those causes of controversy which are rankling and festering in the heart of the nation, by submitting them to the peaceful arbitration of the Supreme Court. To leave them in the present temper of local politics, in the hands of the State courts could only tend to organize passion by giving it the sanction of law, and to convert party quarrels into the conflicts of States. Admit that the federal judiciary may in its time have been guilty of errors, that it has occasionally sought to wield more power than was safe, that it is as