an illustration of truthfulness, honesty, justice and equity. Your honor will find when you come to consider it—I say it with the highest possible respect because I have been studying your honor's opinion in connection with it—that this decision does militate against your honor's, and, your honor will pardon me, when I say that it is utterly impossible for that decision to be law, if the opinion which your honor lately pronounced in a case of *habeas corpus* is law.

Now let us see what Chief Justice Chase says in the Engelbrecht decision:

> The theory upon which the various governments for portions of the Territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation, providing for the division of all the Territory ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the Territories, authorized the adoption of State governments from the start, and committed all matters of *internal legislation to the discretion* of the inhabitants, unrestricted otherwise *than by the State Constitution* originally adopted by them.
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> This ordinance, applying to all territories ceded or to be ceded, was superseded three years later by the ordinance of 1787, restricted in its application to the territory northwest of the river Ohio—the only territory which had been actually ceded to the United States.
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> It provided for the appointment of the governor and three judges of the court, who were authorized to adopt, for the temporary government of the district, such laws of the original States as might be adapted to its circumstances. But as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives, to a house of representatives, who were required to nominate ten persons from whom Congress should elect five to constitute a legislative council; and the house and council thus selected and appointed were thenceforth to constitute the legislature of the Territory, which was authorized to elect a delegate to Congress, with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the Territory.
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> In all the Territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all.

The doctrine, in the early, palmy days of this government, was, that these people who scattered themselves over the Territories, who encountered the Indians, and who built up towns, cities and villages in the Territories of the United States, and erected railroads and telegraphs, should be a state *ad interim*, thus showing that they were not to become the wards of Congress, but that they were subject precisely to the same rights under the power of Congress that the people of the States were. It provided for the appointment of a governor, three judges, &c. This legislature in 1784, your honor, subject to the negative of the government, was clothed with full power of legislation. Now, your honor, can anything be clearer and plainer? Let me look a moment more to the decision from Michigan. There is no State in this Union whose bench stands higher. In 21 Michigan, page 75, in the case of Crane *vs* Reeder, the Court says:

> Immediately after the Government of the United States was organized under the constitution, a brief statute was passed to adopt the ordinance of the constitution,—not to change its nature, but as stated in the preamble, in order that it "may continue to have full effect." And so long as the system should continue, the whole local regulation was clearly delegated to the Territory, as it was afterwards to Michigan when separately organized.
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> Then, under the old common law notions, the creation of such a government would be at least an equivalent to the erection of a county palatine, and would transfer all necessary sovereign prerogatives. But under this ordinance the Territory not only differed from a *State* in holding *derivative* instead of *independent* functions, but in being subject to such changes as Congress might adopt. But, until *revoked* or *annulled*, *an act of the Territory was just as obligatory as an act of Congress, and for the same reasons.*

Of course, your honor, the legislative power was, practically, a necessity, and this ordinance of 1787, which I have just read, provides expressly that such laws as were "not disapproved" should only be repealed by local authority.

Now let us read. Right here, your honor, he says, "Even at common law, under the old common law notions; the creation of such a government—a Territorial government—would at least be equal to the erection of a county palatine, and the transferring of the necessary sovereign prerogatives, and until revoked or annulled any act of the Territory of Utah is just as obligatory as an act of Congress."

PRISONER'S COUNSEL. "What becomes of your theory that Congress has no right to interfere in the Territorial laws?"

MR. BATES.—They may finally repeal those laws. I am coming to that; but until revoked, your honor, "an act of the Territory is just as obligatory as an act of Congress and for the same reasons." Now, your honor, a question arose in the Michigan Court as to the right of *Escheat*, and it was decided, by a court as able as any that was ever organized, to go to the people of the *Territory* and not to the *Federal* Government. It is flippant talk on the streets that Congress controls all matters. That illustrious man, the late Chief Justice Chase, says, "Congress gave to the Legislature full power over all rightful subjects of legislation," which must include crimes againt the local laws and the jurisdiction of the courts which are to enforce them.

Now, your honor, not only has this been the doctrine of this government judicially, by the Supreme Court of the United States since the first case of the American Insurance Company against Canter, down to this last case last winter, but it has been the theory of every department of the government, and never until this new-fangled theory sprang up in 1862, did anybody believe that Congress had any right to interfere with *local* affairs, *local* courts, or offences against the *local* laws of a Territory. Never. It is part and parcel of this drifting into federalism and consolidation, by which these members of Congress speak of us as their people, and us as the wards of such guardians.

Now, your honor, in illustration of this very point, I wish to call your attention to a speech made in 1850. It is not a legal authority, but it is one which my friend here will not gainsay. In 1850, when the Southern States undertook to force slavery on the North, California was admitted into the Union on the 9th of September; Utah was organized as a Territory on that day, and New Mexico on the same day, and they were all part and parcel of the great questions called the Compromise Measure, the omnibus bill. Then, for the first time, Congress undertook to intermeddle with local matters in the Territories. Jeff. Davis led the Southern hosts to defeat in the Senate then, as he did afterwards in the field. Daniel Webster, Henry Clay, Mr. Benton and all those illustrious men resisted it, and at that time the question was propounded as to the power of the Federal Government to interfere with local and domestic matters, and I now read a quotation from General Cass. Mr. Cass says:

> To us it appears that, from the earliest times, the policy has been to leave all matters of internal legislation to the Legislative Assembly, as soon as there was one, in a Territory of the United States. The only deviation to be found from this rule was when the agitation about slavery prompted attempts at exceptional provisions for or against it. It was at the very time that Utah was erected into a Territory that adverse pretensions on the subject of slavery in the Territories received a quietus, in the measures of 1850, advocated by Clay, Webster, Douglass, Cass and other eminent statesmen. They framed and advocated the several acts, among them the act organizing Utah, by which, without proscribing slavery or protecting slavery, the matter was left to the people of the Territory, like all other local subjects, and with the best results. Slavery never was introduced into either New Mexico or Utah, both organized on the same principle of leaving all domestic institutions to the local law. General Cass, in the debate on the subject, gave its true history. He said:
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> "During the pendency of the Territorial government they should be allowed to manage their own concerns in their own way. Does not slavery come within this category? Is it not a domestic concern? Is not that the doctrine of the South—of common sense indeed? No Territorial government was ever established which had not power to regulate the domestic relations of husband and wife, of parent and child, of guardian and ward; and if the inhabitants are competent to manage these great interests, and indeed the interests belonging to all the departments of society, including the issues of life and death, are they not competent to manage the relation of master and servant, involving the condition of slavery?"

I have shown your honor that the Supreme Court of the United States, from the beginning to the end, as already quoted, from Chief Justice Chase, has ever and always resisted this power of Congress.

Are not the people of this Territory, ignorant though they may be, fanatical though they may be, misguided though they may have been, are they not competent to define larceny and other crimes and to prescribe the punishments, and fix the jurisdiction of the court that is to try these offences?

Now, your honor, I come to the next proposition. And admit that Congress has the power to prescribe and define the criminal jurisdiction for local offences [nobody denies that they have for offences against the United States, such as post-office robberies, counterfeit coining, &c.]; but admit that they have the power to define and prescribe criminal jurisdiction for crimes against the local laws, the organic law is not an act that Congress may repeal. It is a "CHARTER," as much so as the charter granted to Dartmouth College, which the Supreme Court declared could not be changed by the act of the legislature; and they who talk flippantly about the changing of laws by Congress do not understand the law. This is federalism—this is consolidation—this is despotism—and I repeat again that the intelligent men who live here are no more the slaves or wards of Congress now than they were when they lived in their old homes. Now, your honor, I come to the very pith of this matter.

This organic law of Utah does not touch this question of *criminal jurisdiction at all;* you may call this froth, a political disquisition, or whatever you please, but, your honor, the organic law, the charter of Utah, does not pretend by word, sign, sentence or letter to confer *criminal jurisdiction* on any court in this Territory. Am I right or am I wrong? If I am right, that is an end of this case. I most respectfully entreat your honor, when you come to deliver your opinion in this case, if you are against me, to show a word or line in this organic law, or anything connected with the government of Utah, which authorises you or any court to say that Congress has ever legislated at all on the subject of CRIMINAL JURISDICTION. Now let us see this 9th section. I contend, in the first place, that there was not any attempt by Congress in that section to define criminal jurisdiction.

> In Section 9 of the "Organic Act," it is declared "that the judicial power of said Territory shall be vested in a Supreme Court, District Courts, Probate Courts, and in Justices of the Peace;" and "the jurisdiction of the several courts herein provided for, both appellate and original, and that of the Probate Courts, and of Justices of the Peace, shall be as limited by law; provided that Justices of the Peace shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars; and the said Supreme and District Courts, respectively, shall possess chancery as well as common law jurisdiction."

Now with the highest possible respect here, because I have studied your honor's opinion again and again in connection with that of Chief Justice Chase; the object of that was simply to create certain courts, and define what they should be. Then as to the jurisdiction, if it was to be limited by law, what law? There is no law in the world that defines the jurisdiction of a probate court. A probate judge is supposed to possess certain powers—to administer upon estates, grant guardianship and all that sort of thing; but there is nothing in the word "probate" that excludes him from administering law in other cases, provided the law confers *upon him the power to do it.*

Now, your honor, I come with my battery. If the district court shall possess chancery as well as common law jurisdiction, is there anything there about *criminal jurisdiction?* Where does your honor find in that statute, where does your honor ever find, any act of Congress which authorizes district courts, of which your honor is one, to entertain jurisdiction in *criminal matters?* I repeat in *criminal matters.* I will show directly, right when and where this federal doctrine began. In 1862, during the war, the powers of government naturally floated into the hands of the Executive and of Congress. Let me read to you several acts of Congress in which you will find that since 1862 Congress has conferred this very power that your honor, in your opinion, has asserted that you possess under section 9 of the organic act. In 1861 the government of Colorado was organized. I read now from the 12th volume of the Statutes at Large, page 175, and this brings me down to this identical 9th section. In the first place I will read you section 9 of the Organic Act of Utah, and then section 9 of the Organic Act of Colorado. In each of these organic acts the 9th section reads as follows: "And the said Supreme and District Court shall possess chancery and common law jurisdiction, *and authority for the redress of all wrongs committed against the laws of said Territory, affecting person or property.*" There is the first time your honor, and I challenge any member of this bar, I do not care whether he is among its leading or minor members, I challenge any historian who understands anything of this country to show me that, until that statute was passed by Congress, such a thing as the exercise of power over the criminal jurisdiction with reference to the punishment of local offences by the local legislature was ever aimed at. I am not mistaken. I will read again, your honor, from page 242 of the same volume, in the case of Dakota Territory, from the same section—section 9. That too is exactly a copy of our statute. Now, may I ask your honor, as a capable, as I know you are an honest, judge, tell me why, if you possess this power which you claim, Congress has gone to work and added it by virtue of that special legislation? The members of Congress are not fools, by any means, they are very sharp fellows.

Let me look once again, your honor. The Territory of Arizona was organized in 1863. The statute organizing it was very short, and does not contain any provision as to jurisdiction either in civil, chancery or criminal cases. Let us come now to the very last Territory organized in this government, I mean Wyoming—the youngest one of them all, and on page 181 of the United States Statutes at Large, volume 15, the same provision is put in, designating that the district courts shall possess "chancery jurisdiction, as well as jurisdiction at common law, and also criminal jurisdiction." I repeat again, your honor, tell me if you can, why Congress, for six, seven, eight or ten years, has been conferring upon modern Territorial district judges *criminal jurisdiction* for offences against local laws if it was possessed by virtue of our Territorial organization. Jurisdiction in criminal cases, except for crimes under the acts of Congress, is not mentioned at all in our law, and the only thing in the world which Congress confers upon you district judges is that you may have authority to enforce the laws of the United States for crimes against the United States, and that the Territorial courts may enforce the laws against the United States, such as post office robbers, counterfeiters of coin, stealing timber from the public lands, bribery, buying and selling offices, &c. These are offences against the laws of the United States.

I pass on. It may be said, and has been said here with the same sort of glibness with which people generally talk of things they know nothing about, that section 9, which says that the district and circuit courts shall have jurisdiction in chancery and *common law*, confers common law jurisdiction upon you. To which I answer, there is no common law of the United States either in civil or in criminal cases. —I am not wrong—I know I am not wrong in this. The common law! What is the common law? That which our ancestors brought from England to the Colonies. Does the common law exist in this Territory? If so, how came it here? Utah was transferred under the treaty of Guadaloupe Hidalgo, in 1848, from *Mexico.* The civil law remains attached to its soil, just as it did to California until by act of the legislature they adopted the common law in certain respects. The common law, such as right of dower, how did it come here? Who brought it? Where is your authority? The only law in the world that exists in Utah to-day is, first, the Constitution of the United States; second, the laws of the United States; and third, that statute book, which has been *adopted by the tacit assent of Congress*, as I will show you directly. The common law, forsooth! This very act prescribes that your honor shall pursue the form of common law as a matter of remedy, not as fixing rights. Does the right of dower exist here? If so, how came it here?

PRISONER'S COUNSEL.—"When was it abolished?"

MR. BATES.—It never existed, never. The common law exists to-day in California, only by statute. It does not exist anywhere except in those colonies formed by people from Great Britain. But this soil was transferred from Mexico, and with all the rights and customs of the citizens of that republic, until changed by Congress or the local legislature, will remain as at the treaty.

Now, your honor, admitting that section 9 of our organic act confers exclusive jurisdiction in common law and chancery cases, still there is no provision whatever as to *criminal jurisdiction.* Having studied your honor's opinion you will pardon me when I say that to draw the distinction between civil and criminal jurisdiction, I will admit that this court, that the district courts have sole and exclusive jurisdiction in civil cases. I will admit that that statute is binding upon us, but I challenge this court and this bar, with all their learning, and men who understand the history of the country, to show that in this organic law Congress has provided any jurisdiction in CRIMINAL CASES WHATEVER; and I affirm that if the probate courts do not hold it to-day then there is no jurisdiction. If I were to be convicted before your honor, and you were to send me to the gallows, though I might be as great a rascal as some others, it would be a judicial murder.

In Colorado, Dacota, Nevada and Wyoming Congress has conferred the power upon the Territorial District courts to exercise criminal jurisdiction, but it has *withheld it from you, sir.* I understand that this investigation will lead to future litigation. I trust it may. I hope I shall live long enough, and I think I shall, to see these cases carried to the last tribunal of our country, and that all these perversions of law will be overthrown by the Supreme Court of the United States, as former ones have been.

Now, your honor, I come to the last point which I make, and that is:

That criminal jurisdiction is conferred upon the Probate Courts of Utah, by an act *approved by Congress*, and that is as binding upon this court as if Congress had passed an act saying—"'Be it enacted, by the Senate and House of Representatives, that the act of the Legislature of Utah Territory, page 31 Territorial statues,' passed 15th of January 1855, is approved and we do hereby affirm and ratify the same." I know that I am entrenching on delicate ground, because I am coming right in conflict with your honor's decision. I am perfectly assured, however, that I shall get a fair hearing, and when your honor shall give us a full decision on this subject I shall bow to it. My proposition is that the *tacit* consent of Congress is just exactly as binding as an act of Congress itself, and all the laws in the statute book of this Territory, much as they have been denounced, are laws of Congress as much so as if Congress had enacted that all the laws in the Utah statute book, passed from 1851 to 1871 "are hereby approved, affirmed and confirmed." And if there be the horrible things in that statute book which have been charged, Congress, your honor, is solely responsible for it.

Let us see who made these laws. "Be it enacted by the *Governor* and Legislative Assembly of the Territory." Who is the Governor? Where does he get his appointment? Who pays his salary? Who sends him out here? Congress. He is the agent of the government. He constitutes one half of the Legislative power. In addition to that he can veto any statute he pleases. And then what? If the legislature passes it, it goes immediately to Washington at the close of the session. And then what? If it is not disapproved, why then what? "All the laws passed by the Legislative Assembly shall be submitted to Congress for sanction, and if *disapproved shall be of no effect,*" but if not disapproved, then what? Your honor, what does language mean? They are APPROVED.

Now let me read to you a decision which has never been cited in any of these cases. It is in 7 Wendell's reports, page 543, Williams against the Bank of Michigan. Let me tell you what this case was. It was a very important one. It was an action brought by the Bank of Michigan against John R. Williams, president of the bank. It became necessary to prove whether there had ever been a charter granted to the bank, and in addition to that, whether the Territorial legislature had *power to grant* a charter of incorporation. Your honor knows that the granting of a corporation was formerly regarded as one of the jewels of the crown; and all corporations in England, until very recently, were from the favor of the King,