

FEDERAL JURISDICTION IN THE TERRITORIES.

RIGHT OF LOCAL SELF-GOVERNMENT.

JUDGE BLACK'S ARGUMENT FOR UTAH.

FOLLOWING is the full text of the argument made by Judge Jeremiah B. Black before the Judiciary Committee of the House of Representatives, February 1st, 1883:

Mr. Chairman and Gentlemen of the Committee:

I am here with your permission and at the request of the people of Utah to discuss their rights and the powers of the Federal Government to control them.

If you think for a moment how much they may suffer by your legislation and remember that they have no vote in either House of Congress, I trust you will bear without objection the defence of their counsel, and permit him to show, if he is able, that the hostile measures passed and proposed against them are unjust and unconstitutional.

I though I claim nothing for those people on the score of their merits, yet their behavior and character ought not to be misunderstood. It is said (with how much truth you know as well as I) that they are sober, honest, peaceable, upright, and charitable, not only to one another, but to the stranger within their gates. The records show them to be singularly free from the crimes forbidden in the decalogue, and not at all addicted to the vulgar vices which often deform the character of frontier communities. Their Territorial government has been conducted with surprising purity, wisdom, and justice. Simple in its machinery and impartial in its laws, its burdens are light and its protection universal; no cheating at elections, no official defalcations, no special taxes, and not a dollar of public debt.

They profess almost universally a religion of their own, for which they are daily reviled and insulted; but they make no legal discrimination against the faith of those who dissent from them; there is no trace of intolerance in their enactments, and the constitution framed by themselves, and under which they ask for admission as a State, guarantees to every human being the most perfect freedom in matters of worship and conscience. Nowhere on earth has the value of local self-government been so strikingly attested by the success of the people who enjoyed it. Thirty-six years ago the valley of Salt Lake was the most forlorn and dreary region on the surface of the globe—a mere waste, which produced literally nothing. But under the stimulus of civil and religious liberty these Mormons struggled against all the obstacles of nature. By a system of irrigation, amazing for its extent, ingenuity, and cost, they brought ample supplies of water from the distant mountains down upon the plains, and by their persevering industry they converted that rainless desert into a land of plenty, covered with fruitful farms and thriving towns.

I think that under these circumstances it would be an infinite pity to strike the Territory of Utah with the curse of political slavery, to deprive the people of their local government, and deliver them up naked and defenceless to be sacked and pillaged by their enemies. But let it be understood that I am not asking for mercy. If you have the constitutional power you must exercise it as you please.

There are many reasons which naturally incline an American statesman to do all the harm he possibly can to the people of Utah. They are powerless to resist it. They have not a single vote in the national legislature, and cannot exercise the slightest influence on a Presidential election. They are excluded from all political rings; they cannot be anybody's competitor for the spoils of office; they can make or mar no scheme to save or squander the public money. On the other hand, the whole country outside of their own Territory is populous with their enemies, whom you must conciliate and gratify if you can do so with a safe conscience, for they have votes, and power and influence which will not be opposed without danger.

The religion which the people of Utah adhere to with so much tenacity is regarded in other parts of the country with extreme dislike, as the mere superstition of

an upstart sect. No man, however, who has the faintest perception of Christian principles, thinks it right to kill or plunder or outlaw them for holding an erroneous faith. From real Christianity there comes no howl for the blood and property of the Mormons. But in other quarters the most rancorous hatred breaks out. By some famous preachers the policy of killing the Mormons by wholesale, unless they leave their property, abandon their homes, and flee beyond the Union, is openly advocated and apparently concurred in with great warmth by congregations supposed to be respectable; and this is accompanied with curses loud and deep upon all who would interpose a constitutional objection to that method of dealing with them. When we read of such things in history we are apt to think them diabolical. But approved as they are now and here by popular judgment, and unrebuked even by Senatorial wisdom, we must concede, I suppose, that it is very good taste and refined humanity disguised in a new dress. As a general rule political piety, wherever it has turned up the whites of its eyes in this country or in Europe, is a sham and a false pretence, but in this exceptional case it would be speaking evil of dignities to call it hypocrisy. The soundness of the religion which endorses a Mormon is not to be questioned. Equally pure is the act of a returning officer who fraudulently certifies the election of an anti-Mormon candidate known to be defeated by a majority of more than fifteen to one, nor will we attribute any sordid motive to those residents of Utah, official and private, who busy themselves here and at home to break down the territorial government, seize its offices, and grab its money. Their righteous souls are vexed from day to day by the mere fact that sinful men are allowed to live peaceful and prosperous lives.

They are animated solely by disinterested zeal for the advancement of the Lord's kingdom, which in their judgment would be much obstructed by the further continuance of free government in Utah. But the case does not depend on the merits or demerits of the parties. It is not a question what measure of punishment the people of Utah deserve for their wickedness, but what Congress has a right to inflict. Whatever may be the superior sanctity of the holy men who promote this legislation, they cannot be gratified at the expense of a breach in the Constitution. If you shall be satisfied that you have no power in the premises, you will not usurp it; for that would be hideous crime, of which you are wholly incapable. Before I go further let me vindicate the justice of this censure, not because you doubt it, (for that is impossible,) but merely to stir up your pure minds by way of remembrance.

Mr. Grote, the most learned and thoughtful of modern historians, has shown by divers examples that fidelity to the fundamental law—which he terms constitutional morality—is the one indispensable condition upon which the safety and success of every free government must depend. The high career of Athens from the expulsion of the Peisistratids to a period after the death of Pericles—the marvel and the admiration of all time—was plainly due to the faithful practice of this supreme virtue. It was this that made the steady Roman strong enough to shake the world. England observes not only the theories, but the minutest forms of her constitution when legislating for her own people, and that has given her domestic tranquillity and solid power at home; her shame and her misfortunes are all traceable to the disregard of it in dealing with colonies and outside dependencies. Constitutional morality was cherished and inculcated by our fathers, in the early ages of the Republic, as the great principle which should be the sheet-anchor of our peace at home and our safety abroad, and to the end that it might never be forgotten they impose a solemn oath upon every legislator and every officer to keep it and observe it with religious care at all times and under all circumstances. In contrast with the self-imposed restraints of the American democracy, Grote mentions the French, a nation high in the scale of intelligence, but utterly destitute of attachment to any constitution or any form of government, except as a matter of present convenience. You know what came of it—eleven revolutions in less than eighty years—a history filled with wrong and outrage—a people forever alternating

between abject slavery and the license of ferocious crime.

It is plain as the noonday sun that without constitutional morality every pretense of patriotism must be false and counterfeit. The man who says he loves his country, and yet strikes a fatal blow at the organic law upon which her life depends, shows his sincerity as Nero proved his filial affection when he killed his mother and mutilated her body.

A violation of constitutional law is not an offence which is ever made venial by the occasion. You cannot do evil that good may come. The evil is there, and the good never comes.

No matter how unimportant the breach may seem; though small at first, it will widen like a crevasse in the Mississippi, until the whole stream of arbitrary power goes rushing through it. Besides, the grade of a crime is not measured by the extent of the particular mischief. Forgery is forgery, whether the sum obtained by it be great or small, and murder is not mitigated by showing that the victim was short of stature.

It often happens that legislators, as well as other men, feel themselves hampered by such restrictions; but that does not authorize a disregard of them. You cannot break lawlessly over the Constitution because it confines you to limits inconveniently narrow.

In this country all men and all classes are equal. No one can lawfully say to another, "Stand aside, I am holier than thou," and push him from his place on the platform of the Constitution. Superior sanctity is not a thing to be safely believed; it is easily simulated; it is often false; and when it comes into politics it is almost universally put on to cover some base and malicious design. The scribes and the Pharisees were hypocrites.

The party whose rights are injuriously affected by vicious acts of Congress outside of the Constitution may be weak and defenceless, the inhabitants of a distant territory and the members of an unpopular sect whose complaint cannot reach the general ear, and would excite no sympathy if it did. But these are the very considerations which plead most strongly against the usurpation of ungranted power to destroy them. This is no appeal to your magnanimity, but a mere suggestion that the Constitution was made most especially for the weak.

We are not all agreed about the wisdom of the Constitution or the virtue of the men who made it; but whether you like or loath it, you are equally bound to obey it. You do not lessen this obligation one whit by railing at it. When you break it you do not diminish your guilt in the least by calling it an agreement with death, and a covenant with hell.

Nor can you change the nature or lessen the degree of the wrong by your own contemptuous feeling for the object. He may be altogether unworthy of your favor, but you owe him justice, and you must pay the debt to the uttermost farthing. A legal right is, in and of itself, a very respectable thing, however much you may hate and despise the man, or body of men, that sets it up.

Moreover: Constitutional morality means general morality in all things public and private, and the converse of the proposition is also true. Political power, under our system, is a trust given and accepted upon certain covenanted terms and to be executed within certain limitations. A wilful breach of this trust by transgressing its limitations, perverting its purposes, or violating its conditions is an act of personal dishonesty which not only corrupts the officer who commits it, but demoralizes all other citizens who are tempted by their personal or party attachments to defend or apologize for the wrong. Thus the floodgates of iniquity are set wide open—all that is pure in morals, all that is perfect in politics, all that is holy in religion, are swept away; the public conscience swings from its moorings, the baser passions become masterless, and rapacity riots in the spoils of its lawless victories. If you are not satisfied with a free constitution, honestly obeyed, give us a despotism, but save us from a rotten republic if you can.

I have not offered this feeble and faint support to the doctrine of constitutional morality because I suppose you to be against it, but for quite a different reason. I know very well that I am not addressing men who claim that their own sentiments or their own interests are

a higher law than the Constitution they have sworn to support, or a better rule of action than the law of God, which commands them to keep their caths.

Let us see whether the measures passed and proposed against the Territory of Utah and its people are or are not open to objection on the score of immorality.

The constitutionality of the act of March 22, 1882, has been much and seriously questioned as an invasion of religious freedom. That is not my point. A mere sin against God, not affecting the relations of man to his fellow-man, false worship, heterodox belief, erroneous teaching, bad systems of ecclesiastical discipline; these are placed by our constitution beyond the reach of human legislation. But any overt act detrimental to society in general or injurious to the public may be forbidden by the State, and the offender cannot justify himself by showing that it is right according to his interpretation of the divine will. A Jew believes it his religious duty to take the widow of his deceased brother and raise up children by her, though he has a wife and family of his own; but that is adultery by the law of the land, and he cannot nullify the law by pleading the revelation to Moses. A Seventh-day Baptist may be compelled for the temporal convenience of others to keep Sunday as a day of rest, though his conscience assures him that Saturday is the Sabbath of his God. One who has no faith at all is protected as well as one whose faith is wrong, but if the infidel insults or annoys his fellow-citizens by uttering his loose blasphemies at improper times and places, the law may check him with a penalty. It is sometimes difficult to see with certainty whether a particular act falls on one side or another of the line which divides the domain of conscience from that of the secular ruler. In doubtful cases, the civil authorities have the right of decision, or, as Judge Gibson expressed it, the courts have the last guess.

My clients, or at least the leading teachers and jurists among them, are unshaken in the belief that marriage, being ordained of God and a sacrament of the church, cannot be rightfully interfered with by the State. For the practical purpose of the present case it does not matter whether they are right or wrong about that.

Conceding the authority of the State, the question arises, who is the State? Where is the civil power to control them vested?

They assert that this power resides in their own government, and can be exercised only by their own legislature; that in this as in all things of purely local concern they are their own masters, with a perfect right to govern themselves. Therefore they hold that the forcible interference of Congress in such affairs, whether it be or be not an invasion of their religious freedom, is beyond all doubt a plain and palpable infraction of their civil liberties.

The opposing theory carried out to its logical consequences is that they are not a free community but a body of mere slaves, subject in all matters of every kind to the will of Congress; a body in which they have no representation, and composed of strangers, perhaps of enemies, who will take pleasure and give pleasure to their constituents, by the most injurious legislation they can invent against the people who are subject to it. The underlying question is, therefore, that of jurisdiction, which you are obliged to determine before you can know whether you are passing a law or merely disgracing the statute book by an act of gross usurpation. If it be *ultra vires*, it is not only a violation of constitutional morality, but as void as an ordinance on the same subject passed by the directors of a private corporation.

Perhaps it may be worth while to enquire for a moment how this conflict of jurisdiction came about. It started thus: The Mormons, being successively driven out of Ohio, Missouri, and Illinois, took their religion with them to the wilderness of Utah. To us it is false. But that is truth to them which they believe to be true. Their faith in their own creed is proved by their works and sealed with more suffering than any other sect in modern times has ever endured. It is all nonsense to doubt their sincerity. Nobody does doubt it.

It is a part of this religion that plural marriages are in some cases righteous and proper. Their church teaches that, and they made no laws to punish its members for act-

ing according to their belief. This simple forbearance of their government to fine and imprison people for doing what they all believed to be right is the head and front of their offending. How could any sane person expect them to do anything else? They had the misfortune to believe implicitly and almost unanimously as an article of religious faith that polygamy was not wrong. How could they make it a penal offence without subverting their civil institutions? You might as well ask a people to punish one another for their complexion, the color of their hair or the shape of their bodies common to, and admired by, all. They simply could not either make or execute such a law. As an organized community they must have perished if they had undertaken it.

Because they would not and could not take this destructive course they are supposed to be guilty of such heinous wickedness that they are hardly fit to live on the same planet with us.

The law which they could not make for themselves, because their judgment condemned it as unjust and impolitic, is now to be made for them and thrust down their throats "against the stomach of their sense." Their government refused to commit suicide; therefore it ought to be murdered.

The question whether you can constitutionally legislate on this subject involves the entire right of self-government. It covers the whole ground between freedom and slavery. The formation of the family, marriage and divorce, the legitimacy of children, the succession to property, these are the most purely private, domestic, and local of all subjects to which human legislation can apply; and if your right to control a people in these respects be conceded there is nothing else on which your jurisdiction can be defined. You can make your laws good or bad, as you please, and they are as binding one way as the other. That they will be very bad is not an idle apprehension; for you will be impelled by strong motives to legislate without the smallest regard for the rights, interests, wishes, or feelings of the people concerned.

If you can forbid polygamy where it is believed to be right, you can force it on a community that holds it in detestation. You can divorce every man from his wife or wives, whether he has one or many. You can abolish the institution of marriage entirely, strip all men and all women of their conjugal rights, bastardize all their children, and bring on the reign of universal free love. If you can imprison, disfranchise, and disgrace a man for marrying the woman he lives with, there is no reason (I mean no legal reason) why you should not patronize adultery and honor the brothel.

This omnipotent power of Congress, which makes and breaks the matrimonial contract, extends to all the relations of private life. That of parent and child necessarily goes with it; ancestor and heir follow, of course, and by parity of reasoning, master and servant are included. Then why not debtor and creditor, landlord and tenant, vendor and vendee? What shall hinder you to take away the testamentary power, forbid administration of a decedent's estate, regulate all business, and stop all work except what you and your constituents approve?

To carry into effect the laws already passed, it is necessary and proper that you should have a police force composed of spies and delators, who will thrust themselves into the kitchens and bedchambers of all families, employ eavesdroppers who will watch them at keyholes and windows, or in default of that, change the rules of evidence, (as a committee of the Senate has actually proposed,) and compel the lawful husband and wife to testify against one another in contemptuous defiance of the great principles which protect the sanctities of the family and lie at the basis of civil society.

It is perfectly clear that if your claim to exclusive jurisdiction be established, so as to comprehend the power to punish men and women for making family arrangements which you disapprove, you have authority to define all offences; anything is a crime which you choose to call so, and everything is innocent which you think proper to tolerate. You may therefore make an entire criminal code for them, and you may make it as pernicious as you choose. It need not be "a terror to evil-doers, or a praise unto them that do well," if you wish to have it other-