To: Mr. Justice Powell

From: Sam Estreicher February 1, 1978

Re: No. 75-1914, Monell v. Dep't of Social Services

I

WJB's tome may contain precious nuggets of wisdom, but the mode of presentation of his ideas does not permit of easy digestion. His essential point is that Monroe's holding as to municipal immunity must be overruled as an erroneous reading of the legislative history. He is willing to say that a governmental entity should not be vicariously liable for the unauthorized torts of its employees (Memorandum, p.47), and suggests that liability must be premised on the concept of fault. As in Rizzo v. Goode, neither the supervisory official nor the municipal employer is liable --whether in an action for injunctive relief or one for damages-- for the tortious excess of a subordinate acting "under color of" his official position. But both the supervisory official and the municipal employer are subject to liability for conduct as to which they bear a "significant responsibility for the harm suffered by a § 1983 plaintiff." (Memorandum, pp. 46-47). WJB declines to pass, however, on the question of whether the governmental entity may assert a "good faith" defense (Memorandum, p. 50).

I am not going to try to give you a "road map" to WJB's exhaustive and exhausting exegesis. Much of the discussion is unnecessary and confusing; I suggest that you reread the appendix to the NEA amicus brief and the Georgetown L.J. article. His "bottom line" is

that Congress rejected the Sherman Amendment, not out of solicitude for municipal treasuries, but because the proposal imposed a duty upon municipalities to curb private mob violence. This was deemed an unwarranted intrusion by the federal government into an area of primary state competence because the obligation sought to be imposed, addressed to state inaction in the face of private lawlessness, was not based on the mandate of the Fourteenth Amendment. There was also concern with the specific terms of the Sherman proposal, e.g., the apparent imposition of liability without requiring a showing that the municipality knew or should have known of the riotous conduct; and the apparent breadth of the provision for execution of a judgment lien against all of the monies and property of the governmental subdivision, even though the law of judgments at the time recognized an exception for public property and made provision for the continued functioning of government.

II

WHR writes a concise, persuasive piece. Notwithstanding his superior advocacy, I adhere to my original position.

A. Legislative History

WHR has excerpted a few passages to prove his point that the rejection of the Sherman Amendment evidences an intent "to preserve the financial capacity of municipalities to carry out basic governmental functions...." (Memorandum, pp. 7-8, 10). I have xeroxed a copy of the pages in which these fragments appear to give you a sense

of context. (The remarks relied upon by WHR are boxed off in red squares (and other passages supportive of his cause are sidelined in red). Language which helps to place these remarks in their appropriate setting are sidelined in blue.) Perhaps the best spokesman for WHR's view is Rep. Kerr (Cong. Globe 787-789), but his words were addressed to the specific evils of imposing liability for a municipal failure to prevent private riots, and subjecting all of the resources of a municipality to a judgment lien founded on the nonperformance of this extra-constitutional obligation. The excerpted remarks of Reps. Bingham and Farnsworth are to the same effect.

Almost every one of the leading Republican opponents to the measure expressed his opposition in terms of the unprecedented imposition of a duty to keep the peace which was without basis in the commands of the Fourteenth Amendment. Rep. Bingham opposed the Sherman Amendment, but he deliberately drafted §1(now § 1983) to overrule Barron v. Baltimore, 7 Pet. 243 (1834), which he viewed as a case where "the city had taken private property for public use, without compensation ..., and there was no redress for the wrong...." Cong. Globe App. 84; WJB Memorandum, pp. 33-34. See also Rep. Burchard:

> "But there is no duty imposed by the Constitution of the United States, or usually by State laws, upon a county to protect the people of that county, against the commission of the offenses herein enumerated, such as the burning of buildings or any other injury to property or injury to person." Cong. Globe 795.

Rep. Blair:

> "[H]ere it is proposed, not to carry into effect an obligation which rests upon the municipality, but to create that obligation, and that is the provision I am unable to assent to." Cong Globe 795.

Rep. Poland:

> "But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by our Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens." Cong. Globe 514.
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> "We would go as far as [the Senate conferees] chose to go in inflicting any punishment or imposing any liability upon any man who shall fail to do his duty in relation to the suppression of those wrongs." Cong. Globe 804.

I have exercised selectivity in setting out these fragments, but I believe they are representative of the views of the oppositionists.

B. Stare Decisis

I agree with the general proposition that the Court should be hesitant to overrule prior construction of statutes, but this cautionary principle may be overriden in appropriate circumstances. See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 97 S.Ct. 2549 (1977). This is such a case.

Stare decisis cuts in both directions. On

the one hand, we have a series of rulings holding that municipalities are not "persons" for purposes of § 1983. These were not "considered holdings," however, because the only discussion of the legislative history appears in cases where the plaintiffs sought recovery on a respondeat superior theory; there was no incentive to present a view of the legislative evidence that would have precluded maintenance of their claims. The issues ventilated in the WJB-WHR interchange were simply not briefed on any previous occasion (aside from a short footnote in Morris Ernst's brief for Monroe)

On the other hand, an affirmance of CA2's decision requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great number of cases. WHR concedes that at least two decisions involved claims for money damages. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). Although individual defendants were named in addition to the school entity in several of the decisions, the opinions of this Court often made explicit reference to the school-board party, particularly in the sections discussing the relief to be awarded. WHR suggests that some of these latter decisions may have involved independent school districts (Memorandum, pp. 14,16), but the force of this point is lost because, at a later point, he makes clear that every school board, even one that is simply

"the governing body of an incorporated school district separate from the city," is immune from § 1983 liability. (Memorandum, p.21).

It should be noted that the only decision that will have to be squarely overruled is City of Kenosha v. Bruno. There, the Court determined sua sponte that there was no § 1983 jurisdiction to issue an injunction against a municipality for its own failure to hold a due process hearing with respect to the denial of liquor licenses. The municipality was held to be a non-"person" under § 1983 regardless of the nature of the relief being sought. Obviously, no discussion of the legislative history bearing on the distinct proposition that Congress intended liability for a city's own wrongdoing was advanced in that case. Moreover, Kenosha's rationale will have to be disturbed even if CA2 is affirmed. As WJB points out, importation of the Ex parte Young approach requires a "bifurcated" view of the term "person" depending on the nature of the relief being sought. A public official sued in his official capacity, concededly a "person" for purposes of injunctive relief, becomes a non-"person" in a suit for damages. WHR's opinion in Kenosha purports to reject such "bifurcation," but he implicitly approves this device here, in order to preserve the possibility of obtaining injunctive relief from a constitutional violation by state officials.

III

We should try to encourage WJB to avoid

overruling Monroe, but rather to restrict Monroe to its facts. Such a tack may soften the force of WHR's stare decisis attack. We should say that we have not had occasion previously to consider the availability of a § 1983 damages remedy for constitutional violations which are the direct result of a policy of the municipality or school board, rather than simply its failure to curb the unauthorized torts of its employees. There are line-drawing problems, as WHR notes, but this case involves a formal, written policy of the school board; it is the clear case. I would also try to encourage WJB to recognize a defense for rights not clearly defined at the time of violation, cf. Procunier v. Martinez. In all likelihood, this maternity leave case does not involve such a clearly defined right. I would reserve decision on the question of whether there is available to a municipality a defense for "good-faith" violations of a clearly defined constitutional right.

If Monroe is not to be reexamined, I agree with WHR that no meaningful distinction can be drawn between school boards and municipalities.

S.E.

to go over the ground. It seems to me the prudent course for the Government is for the Senate to reject this report and have a new committee of conference, and see if these obnoxious provisions cannot be changed.

The PRESIDENT *pro tempore*. Will the Senate agree to the report of the committee of conference? upon which question the yeas and nays have been ordered.

Mr. MORRILL, of Vermont. If that is not agreed to, of course the motion which I made to insist further and ask for another conference will come up.

Mr. THURMAN. Is the question on the motion of the Senator from California, to concur?

The PRESIDENT *pro tempore*. The question is on concurring in the report.

The question being taken by yeas and nays, resulted—yeas 26, nays 26; as follows:

YEAS—Messrs. Bayard, Blair, Casserly, Clayton, Cole, Cooper, Davis of Kentucky, Davis of West Virginia, Hamilton of Maryland, Hitchcock, Johnston, Kelly, Lewis, Nye, Pratt, Ramsey, Robertson, Saulsbury, Sawyer, Sherman, Spencer, Stevenson, Stockton, Thurman, Vickers, and Windom—26.

NAYS—Messrs. Ames, Boreman, Caldwell, Cameron, Carpenter, Chandler, Conkling, Corbett, Edmunds, Fenton, Ferry of Michigan, Frelinghuysen, Gilbert, Hamilton of Texas, Harlan, Howe, Logan, Morrill of Vermont, Osborn, Patterson, Pomeroy, Scott, Stewart, Trumbull, Wilson, and Wright—26.

ABSENT—Messrs. Anthony, Brownlow, Buckingham, Cragin, Ferry of Connecticut, Flanagan, Hamlin, Hill, Kellogg, Morrill of Maine, Morton, Pool, Rice, Schurz, Sprague, Sumner, Tipton, and West—18.

So the report was not concurred in.

The PRESIDENT *pro tempore*. The Senator from Vermont [Mr. MORRILL] moves that the Senate further insist on its amendments, and ask for a second committee of conference.

The motion was agreed to—ayes thirty-three, noes not counted.

By unanimous consent, the President *pro tempore* was authorized to appoint the second committee of conference; and Messrs. COLE, SCOTT, and CONKLING were appointed.

FINAL ADJOURNMENT.

Mr. CONKLING. I offer a resolution to lie on the table until I call it up:

Resolved by the Senate, (the House of Representatives concurring,) That on Wednesday, the 19th of April instant, at —— o'clock, the President of the Senate and the Speaker of the House of Representatives adjourn their respective Houses without day.

EXECUTIVE SESSION.

Mr. CAMERON. I move that the Senate proceed to the consideration of executive business.

Mr. THURMAN. I move that the Senate adjourn.

Mr. CAMERON. I have a motion before the Senate.

The PRESIDENT *pro tempore*. The question is on the motion of the Senator from Ohio, that the Senate adjourn.

The motion was not agreed to.

The PRESIDENT *pro tempore*. The question recurs on the motion of the Senator from Pennsylvania.

The motion was agreed to; and after fifteen minutes spent in executive session, the doors were reopened, and (at eleven o'clock and fifty minutes p. m.) the Senate adjourned.

HOUSE OF REPRESENTATIVES.

WEDNESDAY, *April* 19, 1871.

The House met at twelve o'clock m. Prayer by Rev. Dr. RANKIN, of Washington, D. C.

On motion of Mr. BLAIR, of Michigan, the reading of the Journal of yesterday was dispensed with.

ENFORCEMENT OF FOURTEENTH AMENDMENT.

The House resumed the consideration of the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes, upon which Mr. KERR was entitled to the floor.

Mr. KERR. Mr. Speaker, it is not my purpose to detain the House by any very lengthy discussion of this report, but I will as briefly as I can state the reasons why I was unable to concur with the majority of the House conferees. I will not stop to refer in detail to the disposition made by the conference committee of the first point of disagreement between the two Houses. I think the action of the committee upon that subject was not very material, but that the provision of the bill, as it is now reported to the House, is really an improvement upon the original proposition. From the second disagreement of the House the two committees require the House to recede. That disagreement relates to the time when the fourth section of the bill shall cease to have validity, and my objection to the action of the committee is this, that it enables the dominant party in Congress, by indirection, by a trick to continue this obnoxious section in operation till the first Monday of December, 1872, instead of suffering it to expire on the 1st day of June, 1872.

This result will be accomplished by the Congress, at the time of the next regular adjournment, say in midsummer next, taking a recess, *eo nomine*, until a day named, instead of an adjournment without day, a recess, for example, till the 1st day of December, so that it cannot be said that there has yet arrived an end of "the next regular session of Congress," and therefore the courts will be expected to hold that this obnoxious section continues in force until the first Monday of December, 1872.

The object of this provision is manifestly to enable the majority, the present Administration, the Republican military candidate for renomination and reëlection to the Presidency, to obtain a partisan advantage, and that, too, in an unworthy manner. They want the power this section will afford in the conduct of the great political campaign of 1872. They want to retain that power, not for the public welfare, but for personal and selfish, if not utterly unlawful, ends. I could not assent to the continuance of such a law a day longer than by possibility could not be prevented.

The third point of disagreement relates to the repeal of what is called the jury test-oath, and the result of the action of the committee is that they recommend the repeal of the first section of that law, which establishes certain additional causes of challenge to individual jurors in the Federal courts, gives the right to any suitor in those courts to require the application of those objections to jurors to enforce the cause of challenge given in that section, and excludes the best of men from jury service. It is a great point gained, I agree, to secure the repeal of that section; but why retain in operation the second section of that law? Is it less obnoxious or less objectionable than the first? Are its purposes any less vicious or proscriptive or inhuman than the purposes of the first? I submit that it is in every sense a mere reënactment of the first section, with this qualification only, that it shall not be enforced except at the discretion and pleasure of the judge of the court in which the jury is being organized. But I call attention to this difference: that, while under the first section the objection made by a suitor in any one of these courts to a juror on account of the causes alleged in this first section is personal to the single juror to whom his objection is made, the objection, if made at all, under the second section must be made to the entire panel, to the *venire*, to all the men on the jury, and it purges the entire box of any citizen against whom these causes of challenge can be truly alleged. It is therefore, I say, infinitely worse than the first section; more sweeping in its effects in the practical administration of justice, and I therefore object to the action of the committee. That second section I will read, to the end that its cruel and offensive character may be better understood:

SEC. 2. *And be it further enacted*, That at each and every term of any court of the United States the district attorney, or other person acting for and on behalf of the United States in said court, may move, and the court, in their discretion, may require the clerk to tender to each and every person who may be summoned to serve as a grand or petit juror or venireman or talesman in said court, the following oath or affirmation, namely: "You do solemnly swear (or affirm, as the case may be) that you will support the Constitution of the United States of America; that you have not, without duress and constraint, taken up arms, or joined any insurrection or rebellion against the United States; that you have not adhered to any insurrection or rebellion, giving it aid and comfort; that you have not, directly or indirectly, given any assistance, in money or any other thing, to any person or persons whom you knew, or had good ground to believe, had joined, or was about to join, said insurrection and rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; and that you have not counseled or advised any person or persons to join any rebellion against, or to resist with force of arms the laws of the United States." Any person or persons declining to take said oath shall be discharged by the court from serving on the grand or petit jury, or venire, to which he may have been summoned.

Contemplate for a moment the practical effect of the proscription contained in this section. It is true, I verily believe, that less than one thousand white men in the Commonwealth of Virginia, under this section if enforced by the court, would be competent jurors. It is true this day that Judge Rives, now of one of the district courts of the United States in that State, could not sit upon a jury in any Federal court because his own son was a rebel soldier, and although himself loyal, it is safe to assume that during the war the judge, directly or indirectly, gave some assistance in money or some other thing, or in some way, to his son. So it is throughout the South. It is impossible, if this law be enforced, to organize competent, trustworthy, intelligent, and respectable juries in the South. The jury-box must be given up to the sole occupancy of ignorance, viciousness, and incompetence. Can such mean and wretched policy promote the public peace, interests, or harmony? Does it not do violence to the better impulses of all good and humane men? Does it not mock the spirit of magnanimity and decent civilization?

But it may be said that the courts will not enforce this section. They may not; in many cases now they do not; they ought never to do so, and therefore it should be repealed at once. Sincerity in your professions demands its immediate and unconditional repeal.

But, sir, without taking further time in reference to that section, I pass to the fourth cause of disagreement between the two Houses. It relates to the extraordinary section attached by the Senate to the original bill of the House, usually, and I believe properly, called the "Sherman section." Gentlemen remember what that section is as it was sent to us by the Senate and non-concurred in by such an emphatic vote of the House. What it is now, I think I can best indicate by reading it as I go along, breaking it into paragraphs and interspersing my objections to it in that way. It provides—

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead.

I suggest, first, that the grammatical construction of this paragraph is such that it is left in extreme doubt whether the intent which is referred to in a subsequent part of the section is at all applicable to the first paragraph,

which relates to the destruction of houses, tenements, and other property. Let any gentleman read it critically and see if the intent is not confined in its application to the portion which relates to injuries to the person, not the property. I believe that the true, legal, and judicial construction will entirely exempt that class of injuries to the property from the necessity of establishing the intent stated in the subsequent words of that I have read. The offenses against the property will be complete without proof of the intent. It is, therefore, an assumption by Congress of power to go into a State and punish, without such an intent, any persons who riotously or tumultuously assemble together and commit any of these offenses. To that extent, therefore, it is entirely without the purview of anything contained in the fourteenth or any other amendment to the Constitution, or in the text of the Constitution itself.

In reference to that part of the section which I have read, I wish to ask the attention of the House to the further fact that, for the first time in the history of the United States, it is attempted by a law of Congress to punish criminally a civil division of a State of this Union for crimes or wrongs against the laws of the United States committed by the citizens of the United States within that municipal subdivision of the State. It is said by gentlemen that this is no extraordinary kind of legislation; that it was enforced at the common law, and that it has been enforced in many of the States of this Union, in several of the New England States, in the State of New York and especially in the city of New York, and in the State of Pennsylvania and especially in the city of Philadelphia. But I assure gentlemen that they will search the codes of those States in vain to find any example for this bill. There is none. There are some enactments that give remote analogy for it. But they are all most materially different in principle, altogether better guarded in their provisions, and infinitely less liable to abuse. There is no attempt anywhere to punish a citizen of a State for the commission of an ordinary crime against the person of his fellow-man, by transferring the offense which he has committed to the county, parish, or city in which he resides, and compelling all the people, the innocent as well as the guilty, to respond for him in damages.

In the States to which reference has been made it is, I agree, somewhat common to require the municipal organizations created by those States, which are part and parcel of the local machinery adopted by the State governments in the execution of their reserved powers, to require them to perform certain duties which are necessary in the police regulation, government, and protection of society, and to punish them where they fail to execute the duties thus imposed upon them, sometimes by fines and penalties, to be exacted in ways indicated in the laws of those States. But there is no example of the precise character involved in this bill. It is not in the cases of ordinary crimes, or of personal wrongs and injuries, such as arson, murder, larceny, assault and battery, and mayhem, that counties or cities of the States are required to answer for the crimes of individual citizens. Those offenses for which the counties and other municipal organizations are required to answer, are failures to keep up the public highways, failures to keep the bridges of the county in good repair, or failures of cities to keep their streets in safe condition, or failures to protect the people against mobs, against open, numerous, riotous, tumultuous uprisings of the people, leading to the destruction of property. All that is generally done upon the theory, almost always well-founded, that all the people of those respective subdivisions are by the very publicity of the manner in which these crimes are committed put upon notice that they are about to be committed, and thus it is made their duty to interpose every means in their power to prevent their commission. But in such an application there is no violation by the States either of fundamental principles or of constitutional law. It is the exercise by the State of its original police jurisdiction. The power it obtains from that great fountain of undelegated authority in the States. All power not conferred upon the Federal Government abides still in the States or the people.

It is said that this is borrowed from the common law of England. So it may be. But why go there for power under a written constitution in cases like these? I submit, however, that even there, and in the dark and curious history of the common law, you will find no countenance for some of the provisions of this section. It is true that the idea of punishing a community for offenses committed by its citizens is borrowed from the common law; but it originated many centuries ago, and was the result of a very imperfect civilization. I am sure we are not to-day, and under our system of government, called upon to go back to those ages for guidance in the interpretation of our constitutional and delegated powers.

What was the theory upon which this policy was originally adopted? It was the very one to which I have already referred—that where certain offenses were committed with demonstrations of violence, noise, and tumult, they attracted the attention of the few inhabitants of their small subdivisions, in those days called "hundreds," very inconsiderable and limited portions of country, almost within the reach of a single human voice, there being many "hundreds" in each county, so that the people were all put upon notice, and it was made the duty of each and every one to raise immediate hue and cry against the felon, and, if possible, to arrest him. And under the operation of the earliest of this class of laws, the chief of which was called the statute of Winchester, (13 Edward I, chap. 1,) it was provided that if the people of the hundred, called the hundreders, did thus promptly rise and make pursuit and arrest the criminal, they should not be held liable for the result of his crime. But it should not be forgotten that in all those cases the obligation or liability of the inhabitants rested upon the theory that by reason of the public and demonstrative character and manner of the crime, they had substantial notice, and therefore, as good citizens, it was their duty to take preventive steps at once. The inhabitants were, in other words, chargeable with guilty knowledge, as in the cases of the riots in New York, Philadelphia, and Baltimore, in 1854-55, for the outrages of which those cities were, under their State laws, made to pay.

The practical effect of that system in those very small territorial limits was to make each citizen a conservator of the peace, a sort of bailiff, to aid the public authorities in maintaining the law within those small limits. The operation of the statute of Winchester, I know, was afterward much extended, and especially by the statute of 9 George I, chapter 22, called the "black act."

But it must be remembered, in reference to this attempted application of that principle in our country at large, and by Congress, that some counties of this country are almost as large as the whole of that island from which we get our common law, and that many of our counties are very sparsely settled; that the people are engaged in agricultural employments, and live remote from each other; that these combinations of two or three persons to commit crimes against one or more of the citizens of a county may be originated and executed without any possibility that one other human being in the county or parish shall know anything about the intent or the execution.

There is, therefore, a total and absolute absence of notice, constructive or implied, within any decent limits of law or reason. And the bill itself is significantly silent on the subject of notice to these counties and parishes or cities. Under this section it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality. It is not required to be proved that there was any previous indication of the purpose of these wrong-doers, or that there were any rioters roaming over the country, or through the community, that could put any portion whatever of the people upon notice or even upon inquiry. It is arbitrarily and defiantly assumed that they know it, and are, therefore, guilty. Considering the condition of our country, the habits and pursuits of the people, I say this is simply monstrous and outrageous. It punishes the innocent for the guilty. It takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either. It violates all just principles of law. It is in full keeping with the incurably vicious character of this entire measure.

I now come to inquire is it competent for the Congress of the United States to punish municipal organizations of this kind in this way at all, with or without notice? My judgment is that such power nowhere exists; that it cannot be found within the limits of the Constitution; that its exercise cannot be justified by any rational construction of that instrument. I hold that the constitutional power of the Federal Government to punish the citizens of the United States for any offenses punishable by it at all may be exercised and exhausted against the individual offender and his property; but when you go one inch beyond that you are compelled, by the very necessities which surround you, to invade powers which are secured to the States, which are a necessary and most essential part of the autonomy of State governments, without which there can logically be no State government. For it must be remembered that if you can impose these penalties at all upon the counties, parishes, or cities, and can invade their treasuries or control their ministerial officers to any extent whatever, your power is unlimited, it may go to any extent you please, it may take the entire control of all these officers of the State governments, and thus practically and substantially break down those governments, putting everything and everybody under the sovereign will and pleasure of the Congress of the United States.

It has been declared by Chief Justice Marshall, and never questioned by the Supreme Court since, and it is not susceptible of successful denial, that wherever Congress, in the exercise of any granted power, elects any mode of execution, or adopts any instrumentality by which it will carry into execution any of these powers, the instrumentalities selected become the exclusive instruments of the Federal Government; that the power of the Federal Government over them is above all other control; that in the very nature of things there can be in these divisions of power no partnership. The power of the Federal Government must be exclusive. The power of the State government within its limits, and as to the reserved powers of the States, must be exclusive, and in an important sense sovereign. Such is the declaration of the Supreme Court. But what becomes of all this theory under the practical working of this bill?

These systems of local government by counties and cities are adopted by the States as instrumentalities to aid them in the wise and judicious regulation and protection of the local and domestic interests of their citizens. It will never do to say that they may be tampered with, impeded, or arrested in the discharge of their duties, as this bill proposes. It would be fatal to the success and very existence of local self-government. It has many times been solemnly decided by the Supreme Court that these agencies adopted by the States to aid in local administration are above the touch or control of any power, are subject only to the

exclusive regulation of the States. There is no safety in any other doctrine. If Congress can invade the counties or cities for the purposes contemplated by this measure it can also the States themselves, and can thus absorb, divert, and consume the treasure, property, and rights of the States.

Let me call attention to the further provisions of this section. Gentlemen will remember what I have already read; and in continuation I read the following:

And such compensation may be recovered in an action on the case by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured or his legal representative, and against said county, city, or parish.*

Right here I may stop to remark that it is not even required that before these judgments may be recovered against the county, parish, or city, the wrong-doer himself shall have been either arrested, tried, or convicted. You may prosecute the county, parish, or city without even prosecuting the wrong-doer. You may in his absence, and in an *ex parte* manner, as to him, prove his guilt, establish the crime, and recover against the county, although the wrong-doer goes unwhipped of justice, no attempt being made even to prosecute him or to find him, thus violating the very first principles of justice, which entitle the county to be exempted from this sort of penalty at least until the guilt of the offending citizen is established. This appears to me to involve a strange and unnatural reversal of the common rules of criminal law. It puts these counties and cities, the interests and property of all their people, at the mercy of the most worthless of citizens, liable to be robbed by combinations of idle adventurers, shysters, and perjurers; and, instead of restoring peace, order, and content, such laws cannot fail to aggravate every evil condition, to beget and encourage strife and litigation, and to make society and its most sacred interests a prey to discord and evil passions.

But I read on:

And in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment or part thereof unsatisfied, recovered by the plaintiff in such action may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment, upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution, or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may, on motion, cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of said judgment by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish so paying shall also be subrogated to all the plaintiff's rights under such judgment.

I would like to ask any gentleman where, upon the most shadowy interpretation of the Constitution, you can find power, as this bill attempts to do, to declare these judgments, arising in tort, arising out of wrongs and crimes, not out of contract, a lien on all money in the treasury of these several municipal organizations, and upon all the property of these organizations. If you may create such a lien, and it is valid, what becomes of the power of the State, through the agency of its necessary subordinate organizations, to carry on self-government at all? How are they to perform their necessary and customary functions if you may send a Federal officer to put his arms into the treasury of the county, or parish, or city in this way and withdraw therefrom all the revenues, or if you can authorize the sale of a county court house, or county jail, or the county schools, or any other of the property of the people? I ask you, if that can be done, where is the security that has hitherto been supposed to exist in this country for self-government in the States of the Union? I submit that it is gone and sacrificed forever, and it is sacrificed by gentlemen who are pursuing a myth and shadow. It is sacrificed for an unsubstantial and supremely insufficient reason. It is to me alarming that such radical and vicious propositions should find any defenders in an American Congress.

But my colleague on this committee says that it is a common practice for the courts of the United States, in the exercise of the judicial powers granted to them in the Constitution, to enforce the performance of judgments against municipalities of this kind, such as counties and cities. I answer him that he, as well as any other intelligent lawyer of this House, well knows that that proposition is true to this extent only, that the Federal courts in the exercise of this grant of judicial powers may, where they have the jurisdiction under the Constitution, compel these municipalities to execute their contracts, and that is all. To execute their contracts; but let it be remembered that no decree of a Federal court has gone to the extent of saying that any one of these divisions should execute its own contracts except in precise compliance with the law of the State, in precise accordance with its own contract and the law upon which it was based, and not in pursuance of any law dictated to it by Congress. In other words, the extent of judicial power hitherto exercised in that direction has been confined to the execution of civil contracts, such as the payment of corporation and municipal bonds issued under State authority, where the courts of the United States had jurisdiction, and then only according to the law of the State recognizing and enforcing fully and kindly, and in all respects within the precise letter of the Constitution, the right of the State to govern itself, to regulate its municipal interests, to say whether a county or State may subscribe to a railroad, may issue or put out bonds and securities in a particular way, how those securities may be made payable and their payment made certain. If any county or city fails to perform its obligations its contracts can be enforced.

Any gentleman at a glance can see that the courts give no ground for the assumption of my colleague on the committee, but do very fully sustain me in my position. This novel bill finds no refuge in the courts or the Constitution. It is condemned by both, as well as by right, reason, and humanity. It may readily be seen by looking into any one of these cases in our courts (which if I had time I would refer to,) that the court does in all cases put a mere interpretation on the laws of the States and provide for the enforcement of those laws under that construction. That is not only true, but the court goes further and says where those contracts, or charters affecting municipal organizations, have had judicial construction by the State court of last resort, that the Supreme Court of the United States will adopt and follow it and make such construction its rule of action. The only departure from it worth mention is in a case which arose lately in Iowa, where there had been an unbroken series of decisions sustaining an interpretation of a contract, and one decision afterward reversing those decisions; and the Supreme Court said that it would adhere to the policy laid down by the long line of decisions. (1 Wallace R., 175.)

But that was extraordinary, and has never been done by the Supreme Court except in some extraordinary cases. It is not pretended to be done for the purpose of enabling the court to go one inch beyond the true interpretation of the State law and the State obligation.

Now, Mr. Speaker, I will detain the House but a moment longer. I will not attempt again to discuss the general provisions of this bill. No invective, no vigor of denunciation can fitly describe its abominable character. It is incurable and unamendable. There is no section or line in it that does not deserve indignant rejection.

[Here the hammer fell.]

The SPEAKER *pro tempore*, (Mr. HAWLEY in the chair.) The Chair announces, as requested by the gentleman from Indiana, [Mr. KERR,] that twenty minutes of his time have expired.

Mr. KERR. I yield five minutes to the gentleman from Kentucky, [Mr. BECK.]

Mr. BECK. Mr. Speaker, I thank my friend from Indiana [Mr. KERR] for the five minutes allowed me to enter my protest against this report. Of course I will not attempt to discuss the merits of this bill—I beg pardon, it has no merits. It is simply a surrender of despotic power and authority to the President by the representatives of the people, who will, I hope, see to it that men who have thus betrayed the trusts confided to them shall have no chance to do so any more. But argument avails nothing. Denunciation such as a plain man can indulge in is cut off, parliamentary language being wholly inadequate to a full expression of its atrocities; nothing short of vigorous and oft-repeated profanity, in which, of course, I do not indulge, can do justice to the subject.

Still the bill, as it left the House, had some regard for the private rights of men under the despotic rule established, the most valuable of which have been stricken out by the conference committee. When the amendment of the gentleman from Ohio [Mr. GARFIELD] was adopted by the House, requiring all military officers who arrested citizens when the writ of *habeas corpus* is suspended by the President to turn them over to the civil courts for trial, I felt that if a fair jury trial was allowed them a great point was gained, as the outrages of the President and his officials, if the arrest was wrongful, could be exposed and the perpetrators brought to justice, or at least held up to public condemnation; and when the amendment of the gentleman from Maine, [Mr. HALE,] which I took more interest in than all else, repealing the infamous jury law of July 17, 1862, was passed, I felt that the sting was out of the bill. The restoration of the second section of that law by the committee of conference is a surrender to the more bitter and malignant Radicals of the Senate and House of all that was valuable in the amendments which the House, by an overwhelming majority, inserted into the original text as a *sine qua non* to its passage here.

I regard the right to have an honest, upright, impartial, and intelligent jury as the only safeguard left to individual liberty and right when this bill becomes a law. Strike that down as is done in the report, and there is nothing too monstrous that a venal or servile judge may not do in obedience to the orders of the President or those who are known or believed to be authorized to speak for him. I care comparatively little about the Sherman amendment, either in its original or modified form. It is too grossly and palpably unconstitutional to receive the sanction of any court that even a Radical President or Senate might organize. The Supreme Court, thank God, has yet a decent respect for constitutional liberty and law, and it will dismiss with the contempt it merits the first case that comes before it seeking to enforce the judgments provided for in this bill, and that will be an end of the Sherman amendment. Therefore, I am not afraid of the practical effect of that piece of narrow-minded, fanatical, and malicious legislation; it overleaps itself. The old English "hue and cry," or any other relic of barbarism, cannot save it.

Our written Constitution, its limitations and restrictions, were intended to put an end forever to the exercise of all such legislative and judicial authority by the Federal Government, and leave all these matters to the several States and the people thereof. I care nothing about the minor charges, but I do protest against the

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to the Committee for the District of Columbia when appointed.

ENFORCEMENT OF FOURTEENTH AMENDMENT.

The House resumed the consideration of the report of the committee of conference on the bill (H. R. No. 320) to enforce the provisions of the fourteenth amendment, and for other purposes.

Mr. SHELLABARGER. I now call the previous question.

The previous question was seconded and the main question ordered.

The SPEAKER. The gentleman from Ohio [Mr. SHELLABARGER] is entitled to the floor for one hour to close debate.

Mr. SHELLABARGER. I do not propose myself to occupy any portion of that hour. I will yield the first ten minutes of the hour to my colleague, [Mr. BINGHAM.]

Mr. BINGHAM. I ask the attention of gentlemen of the House, especially those on the Republican side of it, to the statement which I make of some facts touching this bill. I desire, in the first place, to say that every part and parcel of the bill as reported from the committee of conference meets my entire approval, except the section known as the Sherman amendment, or the seventh section of the bill as reported by the conference committee. I am the freer to make that remark for the reason that, with the exception of that seventh section as reported, the bill is substantially the bill that received the vote of every Republican member of this House.

They voted also upon the seventh section now reported by the conference committee not without due consideration. The principle involved in that section was printed and before this House for a month before we received this measure from the Senate. The learned special committee of the House ignored it, and would have nothing to do with it, for manifest and good reasons to them appearing. They reported a bill without that section; the House never entertained it, but proceeded to pass the bill as it is now substantially, without that section, by the vote of every Republican in the House. I stand for the bill to-day as it passed the House originally. I stand for it with the exception of the Sherman amendment, as it is called, in the form in which it is reported; for it is substantially in law and in fact the very bill which received the vote of every Republican member of the House, my own included.

Something was due to the judgment of the House, under the circumstances, on the part of the Senate. But in utter disregard of the recorded judgment of the House, with full knowledge of the fact that the very proposition they tender us had been presented to the consideration of the House for months, but had not been considered even by our committee, much less reported by it, and had not been accepted by the House, but the bill passed without it, the Senate ought to have considered before they undertook to throw that amendment in upon us by a vote of some thirty or thirty-two votes in the Senate against the votes of some one hundred and forty or more in the House who supported this bill without that amendment. A decent respect to the judgment of this House required some consideration.

But this provision was sent to us attached to our bill; and what took place? The House rejected it substantially as it comes back to us to-day; there being, on a division—118 votes against it, and only 25 in its favor. The yeas and nays were then called; and 132 votes (at least seventy of them cast by Republicans) were recorded against this section, and only 35 votes in its favor. The bill went back to the Senate, who insisted upon the amendment. I now ask the House to reject this report for reasons which must be obvious to the mind of the House; and I hope that the vote of every Republican will be cast against it. It is useless and worse than useless to vote down this important measure with any doubtful voice. Let the House record its vote emphatically for the rights of all the people of every State and all the States in the Union.

Gentlemen talk about finding precedents in the legislation of the States. With all respect, I deny it. My learned and accomplished colleague [Mr. SHELLABARGER] has referred this morning to the decision pronounced in the State of New York by Judge Denio, than whom none of the recent judges of that State was superior in all the attainments of a jurist; but that decision, instead of supporting any such legislation as this, in its very text and philosophy condemns it. Let gentlemen read that decision. It is on a case against the city of New York, a local corporation of the State, and involves the exercise of the supreme authority reserved to the States themselves by the express letter of the Constitution of the United States. There will be found underlying this decision the declaration that the only power to charge a municipality of a State for the destruction of property by a mob arises from the laws of the State; that it rests on the positive statute of the State.

In the case of Darlington *vs.* The Mayor, &c., of New York, (vol. 31, page 187,) referred to by my colleague, [Mr. SHELLABARGER,] Judge Denio said:

"The act [of the Legislature of the State] proposes to subject the people of the several local divisions of the State, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city."

Where, sir, is the law of the State to make a whole county responsible for the killing of a man by three persons engaged in a riot tumultuously assembled?

Mr. BUTLER, of Massachusetts. Will the gentleman allow me to ask him a question?

Mr. BINGHAM. I have only a few minutes; otherwise I would yield with pleasure. The provision of this section is:

That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representatives if dead.

I want to know where is the authority for making a State corporation, an integral part of the State, a county, responsible in a court of the United States for damages without limit for the destruction of the life of a citizen by riot? That is my question.

The gentleman from Massachusetts [Mr. BUTLER] referred to what is known as the force bill, passed under the administration of President Jackson. With all respect I submit to the House and to the country that legislation does not touch the question involved here all. The provision in that case was simply as to the mode of collecting the revenues of the United States and enforcing the laws for that purpose against all persons and the process of States. The decision to which I have referred, and the same cited by my colleague, [Mr. SHELLABARGER,] condemns *in toto* such legislation as is proposed in the Senate amendment, and shows that a county, being the creature of the State and an integral part of it, can in no case be made responsible for mob violence save by force of the positive law of the State creating it.

Mr. Speaker, how can States exist, how can you enforce the provisions of the Constitution of the United States as to States, if you will not maintain the corporate organizations of the several counties of States? There can no more be a State under the Constitution and laws of the several States of this Union without the corporate organization of counties or parishes therein than there can be a United States under the Constitution of the United States without organized States; because the counties in the several States are integral parts of the States, just as the States of the Union are integral parts of the nation. If you destroy either you destroy the whole fabric.

So it comes to be written in the Constitution that—

"The United States shall guaranty to every State in this Union a republican form of government and shall protect each of them against invasion" * * * * "and domestic violence."

Instead of protecting the States against domestic violence, instead of guarantying to them a republican form of government, we have introduced here for the first time in the history of the nation a proposition to make it impossible to maintain a republican form of government in any State of the Union if it happens to be the pleasure of a mob, by a riot of three or more persons, to take life and burn property in the several counties of the several States. Why, sir? Because it is provided in this Senate amendment that a judgment may be obtained against a county for an act of rioters to the extent of the damages the jury in a United States court may assess against the rioters themselves. Everybody knows an honest jury in such a case, when the rioters are impleaded with the county and an innocent person is slain in the street, will find, and no man can find fault with them, damages perhaps to the extent of fifty or one hundred thousand dollars. The county is to be held liable with the rioters, and all money in its treasury and all its property charged with the payment thereof. Such a proceeding would deprive the county of the means of administering justice.

[Here the hammer fell.]

Mr. SHELLABARGER. I now yield to the gentleman from Illinois, [Mr. FARNSWORTH.]

Mr. FARNSWORTH. Mr. Speaker, I cannot give my assent to the report of the conference committee. I dislike what they have done, especially in two respects. Why, sir, the law which we repealed, and which requires jurors to take an oath substantially like the test-oath, would prevent any man sitting on a jury, no matter how well qualified he may be in other respects, and no matter how well qualified his heart may be also, to do justice. The man may be relieved of disabilities, in pursuance of the fourteenth amendment to the Constitution by Congress, yet he cannot take that oath as a juror. He may be ever so good a friend of the colored man who brings suit, but if he cannot take that oath he cannot sit on the jury. It seems to me to be wiser to leave it to the courts in the impanneling of the jury to determine whether the juror is liable to challenge for cause, or to the parties to challenge peremptorily. The courts will see to it that the rights of all parties are taken care of.

I do not think, either, that the seventh, or Sherman section, has been improved by the conference committee.

I anticipated some such work as this when I insisted on having the yeas and nays on that section, when we voted upon it and rejected it in this House. I expected there would be some sort of modification, and it would be sent back to us, and therefore I desired that the members of the House should be on the record, "ay" and "no," that the Senate and the country might see it.

What have we now presented to us for our action? We have a section which authorizes suits to be brought against counties and cities in every case of destruction of property or injury of the person by two or more persons in a riotous or tumultuous manner, when it is done in derogation of the exercise of some constitutional right of the person, or done on account of color, or race, or previous condition of servitude; such, for instance, Mr. Speaker,

if a Chinaman should be mobbed by three or four miners in California or Nevada on account of being a Chinaman, he may sue the county in the United States courts and recover damages. Or, to take another case of a man mobbed in Illinois on account of race or color, suppose a colored and a white person get married, and some of the young men of the village get up a *charivari*, not for the purpose of preventing any right to vote, but because of color, then the person claiming that he is injured may sue the county and recover damages.

The Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer. We can impose no duty on a sheriff or any other officer of a county or city. We cannot require the sheriff to read the riot act or call out the *posse comitatus* or perform any other act or duty. Nor can Congress confer any power or impose any duty upon the county or city. Can we then impose on a county or other State municipality liability where we cannot require a duty? I think not. Suppose a judgment obtained under this section, and no property can be found to levy upon except the court-house, can we levy on the court-house and sell it? So this section provides, and that too in an action of tort, in an action *ex delicto*, where the county has never entered into any contract, where the State has never authorized the county to assume any liability of the sort or imposed any liability upon it. It is in my opinion simply absurd. And if you can do this, Mr. Speaker, if Congress can thus regulate the affairs of a county in a State, and put the hand of the national Government into its treasury, I know not where or to what lengths we may not go, even to the abolishing of counties and States.

[Here the hammer fell.]

Mr. SHELLABARGER. I yield fifteen minutes to the gentleman from New York, [Mr. SMITH.]

Mr. SMITH, of New York. I do not think that the construction which has been put upon this act by the gentleman who has just spoken is a correct and legitimate construction. A court-house is not the property of the county within the meaning of this act. It is held in trust for a public use. There is certain property within most of the counties of a State which is held by the county and would be subject to levy and sale; for instance, in the city of New York there is certain real estate, &c., that is the property of the city, which is not held and devoted to any specific use. And that sort of property would be liable to be sold upon execution under the provisions of this act. There is a legal maxim that an act shall be so construed that it will stand and not fall, and this, it seems to me, will relieve it of the difficulty which has been suggested by the gentleman who has just spoken.

Now, sir, the objects sought by this act are all-important. This House has passed its judgment upon that question. Certain portions of this bill have been subjected to criticism by gentlemen on the other side of the House, on the alleged ground of their putting doubtful powers into the hands of the President. It is objected by our friends upon the opposite side of the House that the citizens of the South are to be protected by military power. We have placed the power of redress in the civil courts. And I submit to the gentlemen upon the opposite side of the House who object to our assuming military powers that, when we refer the injured parties to the civil courts, they ought to aid us, instead of objecting to the remedy which is provided in this last proposed amendment as it has come from the Senate.

It is inquired where we get this power. Mr. Speaker, I desire to ask gentlemen upon this side of the House who voted for this bill if they have not declared by their votes for the bill that Congress has the power to suppress these alleged outrages in the South, that Congress has the power to make the perpetrators liable to a civil action for damages. Now, sir, if Congress has that power—the power under the Constitution to suppress these outrages—I submit that Congress has the incidental power to adopt any means which will be conducive to the end desired to be gained, to wit, the suppression of these outrages. And the question is, whether this amendment, making the county or the parish liable for damages occasioned by a tumultuous assemblage, is legislation appropriate to the end desired to be attained. Then, sir, if in the decision of this House, in the passage of this bill before it went to the Senate, the question is foreclosed that Congress has the power to suppress these outrages, it has the power to adopt any appropriate legislation to suppress them.

Then, sir, the question remains whether there is any constitutional inhibition against the exercise of this power provided in the amendment which we are discussing. If there be any—and the gentlemen upon the opposite side of the House have not pointed it out—it must be that clause of the Constitution which prohibits the taking of property without due process of law, or that clause of the Constitution which prohibits the taking of private property for public use without just compensation. Now, sir, it has been adjudicated over and over again, in the State courts and in the courts of England, that the making of a county or a parish liable for damages caused by tumultuous assemblages is not, in our country, a violation of these constitutional provisions, and is no violation of the provisions of Magna Charta in the old country.

I desire to call the attention of the House to the provisions of the act in the State of New York which have been subjected to the most rigorous criticism and examination in our courts of justice. The language of the act is as follows:

> Whenever any building or other real or personal property shall be destroyed or injured in consequence of any mob or riot the city or county in which such property is situated shall be liable to an action, by or in behalf of the party whose property was thus destroyed or injured, for damages sustained by reason thereof."

Now, I call the attention of the distinguished gentleman from Vermont [Mr. POLAND] and of the gentleman from Indiana [Mr. KERR] to the fact that in this act of the Legislature of New York there is no provision that proceedings shall be first instituted against the parties doing the damage, and this act has been tested through to the court of last resort in our State, and has been adjudged to be valid and constitutional by the most distinguished judges of our State. The acts of the British Parliament, contrary to what I understood to be the statement of the gentleman from Indiana, do not require that proceedings shall first be had against the parties who were the principals in the commission of the damage for which redress is sought.

Now, sir, it has been decided in my own State, in a case to which reference has been made, that the power of the Legislature of the State to make a county of the State, or a parish, responsible for damages occasioned by tumultuous assemblages does not make the county, parish, or city liable for the damages done by an individual, as stated by the gentleman from Indiana. The damage must be done by a riotous or tumultuous assemblage. The courts of our State put the legislative right to charge these damages upon a county or city upon the taxation power of the Legislature. Now, if the Legislature has power to tax, then the Congress of the United States, under the principle which is stated in the decision in 3 Dallas, in the case of Hilton *vs.* The United States, has a power commensurate with the State power of taxation. The court say in that case:

> "The great object of the Constitution was to give Congress the power to lay tax adequate to the exigencies of the Government, but they were to observe two rules in imposing it, namely, the rule of uniformity, when they laid duties, imposts, or excises, and the rule of apportionment according to the census when they laid any direct tax. If there are any other species of taxation that are not direct and not included in the words 'duties, imposts, or excises,' they may be laid by the rule of uniformity or numbers, as Congress shall think proper and reasonable. If the framers of the Constitution did not contemplate other taxes than direct taxes, and duties, imposts, and excises, there was great inaccuracy in their language. If those four species of taxes were all that were intended, the general power to lay taxes was unnecessary."

Now, sir, is it not the well settled law that the Congress of the United States may lay taxes in the District of Columbia which are not laid upon the Union at large? And, under this power of taxation, where it will be conducive to promote the general object of the law, to preserve the peace in the different localities in the Union, they have the same power, which is assumed in the amendment which is now pending before the House, to lay a tax or provide for the entry of a judgment against the locality where the offense is committed for which redress is sought.

Mr. FARNSWORTH. May I ask the gentleman a question?

Mr. SMITH, of New York. Certainly.

Mr. FARNSWORTH. Do I understand the gentleman to claim that the power of Congress to levy taxes is only to be governed by the opinion of the Congress that passes the measure?

Mr. SMITH, of New York. I am glad the gentleman has asked me that question.

Mr. FARNSWORTH. Is that so? I want to know.

Mr. SMITH, of New York. I say this: that there is no limitation or restriction, either on the taxing power of a State or on the taxing power of the General Government. I hold in my hand a decision of the court of last resort in the State of New York, made by a Democratic judge of high distinction, stating and holding that ground unqualifiedly. The right of eminent domain is restricted; there must be compensation; the power of taxation is utterly unrestricted, and there is no redress except by an appeal to the Legislature, where the power resides to levy those taxes. And it was decided in this case (in 3 Dallas) that taxes need not be uniform unless they come within the definition either of direct taxes or of imposts, duties, or excises. Those taxes which are levied here in the city of Washington, the taxes which are levied upon property upon Pennsylvania avenue, to pay for the improvement of the street, for the laying of pavements, are not uniform; that is, they are not levied outside the District of Columbia. So, sir, when it is decided, as it has been settled by the entire policy of the acts of Parliament from the time of Canute down to the time of Edward I, and from that time to the twenty-seventh and twenty-eighth years of the reign of Elizabeth, and down to the present day, and also in the several States of the Union, that the public policy requires, at least justifies, the assessment upon the locality where the crime is committed of the damages occasioned by a tumultuous assemblage, without any proceedings against the principal, I do not see the objection which is urged.

[Here the hammer fell.]

Mr. HOAR addressed the House in remarks which he has withheld for revision.

Mr. SHELLABARGER. I now yield the remainder of my time to my colleague.

Mr. PERRY, of Ohio. Mr. Speaker, I find myself entertaining opinions concerning this bill which vary from the opinions of other gentlemen upon this floor, with whom, when compelled to differ, I always differ with diffidence and hesitation. It appears to me that many of the objections to this bill as originally framed, and many of the objections to it as it now stands, are treated as unconstitutional objections, when in fact they are objections of expediency alone.

When the original bill was presented in this