The Dividing Line Between Federal and Local Authority.

POPULAR SOVEREIGNTY IN TERRITORIES.

BY STEPHEN A. DOUGLAS.

[From Harper's Magazine, for September].

No such power "to exercise exclusive legislation in all cases whatsoever," nor, indeed, any legislation in any case whatsoever, is conferred on Congress in respect to the municipal affairs and internal polity either of the States or of the territories. On the contrary, after the Constitution had been finally adopted, with its federal powers delegated, enumerated and defined, in order to guard, in all future time, against any possible infringement of the reserved rights of the States, or of the people, an amendment was incorporated into the Constitution which marks the dividing line between federal and local authority, so directly and indelibly, that no lapse of time, no partisan prejudice, no sectional aggrandizement, no frenzied fanaticism can efface it. The amendment is in these words:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This view of the subject is confirmed, if indeed any corroborative evidence is required, by reference to the proceedings and debates of the federal convention, as reported by Mr. Madison. On the 18th of August, after a series of resolutions had been adopted as the basis of the proposed constitution and referred to the committee of Detail for the purpose of being put in proper form, the record says:

"Mr. Madison submitted, in order to be referred to the Committee of Detail, the following powers, as proper to be added to those of the General Legislature (Congress):

"To dispose of the unappropriated lands of the United States.

"To institute temporary governments for the new States arising therein.

"To regulate affairs with the Indians, as well within as without the limits of the United States.

"To exercise exclusively legislative authority at the seat of the general government, and over a district around the same not exceeding ——— square miles, the consent of the Legislature of the State or States comprising the same being first obtained."

Here we find the original and rough draft of these several powers as they now exist, in their revised form, in the Constitution. The provision, empowering Congress "to dispose of the unappropriated lands of the United States," was modified and enlarged so as to include "other property belonging to the United States" and to authorize Congress to "make all needful rules and regulations" for the preservation, management, and sale of the same.

The provision empowering Congress "to institute temporary governments for the new States arising in the unappropriated lands of the United States," taking in connection with the one empowering Congress to exercise exclusive legislative authority at the seat of the general government, and over a district of country around the same," clearly shows the difference in the extent and nature of the powers intended to be conferred in the new States or territories on the one hand, and in the district of Columbia on the other. In the one case it was proposed to institute temporary governments for the new States," or territories as they are now called, just as our revolutionary fathers recognized the right of the British crown to institute local governments for the colonies by issuing charters, under which the people of the colonies were entitled (according to the bill of the rights adopted by the continental Congress) to a free and exclusive power of legislation, in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity" while in the other case, it was proposed to authorize Congress to exercise exclusively, legislative authority over the municipal and internal polity of the people residing within the district which should be ceded for that purpose as the seat of the general government.

Each of these provisions was modified and perfected by the Committees of Detail and Revision, as will appear by comparing them with the corresponding clauses as finally incorporated into the Constitution. The provision to authorize Congress to institute temporary governments for the new States and territories, and to provide for their admission into the Union, appears in the Constitution, in this form:

"New States may be admitted by the Congress into this Union."

The power to admit "*new States*," and to "make all laws which shall be necessary and proper" to that end, may fairly be construed to include the right to institute temporary governments for such new States or territories, the same as Great Britain could rightfully institute similar governments the colonies; but certainly not to authorize Congress to legislate in respect to their municipal affairs and internal concerns, without violating that great fundamental principle in defense of which the battles of the Revolution were fought.

If judicial authority were deemed necessary to give force to principles so eminently just in themselves, and which form the basis of our entire political system, such authority may be found in the opinion of the Supreme Court of the United States in the Dred Scott case. In that case the court says:

"This brings us to examine by what provision of the Constitution the present Federal Government, under its delegated and restricted powers, is authorized to acquire territory outside of the original limits of the United States, and what powers it may exercise therein over the person or property of a citizen of the United States, while it remains a Territory, and until it shall be admitted as one of the States of the Union.

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain Colonies, bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way except by the admission of new States.

"The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a Colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion."

Having determined the question that the power to acquire territory for the purpose of enlarging the territory limits, and increasing the number of States, is included within the power to admit new States, and conferred by the same clause of the Constitution, the court proceed to say that "the power to acquire, necessarily carries with it the power to preserve and apply to the purpose for which it was acquired." And again, referring to a former decision of the same court, in respect to the power of Congress to institute governments for the territories the court says:

"The power stands firmly on the latter alternative put by the Court—that is, as "the inevitable consequence of the right to acquire territory.

The power to acquire territory, as well as the right, in the language of Mr. Maddison, to "institute temporary governments for the new States arisig therein" (or territorial governments, as they are now called,) having been traced to that provision of the Constitution which provides for the admission of "new States," the court proceed to consider the nature and extent of the power of Congress over the people of the territores:

"All we mean to say on this point is, that, as there is no express regulation in the Constitution defining the power which the general government may exercise over the person or property of a citizen in a Territory thus acquired, the Court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed.

"Taking this rule to guide us, it may be safely assumed that citizens of the United States, who emigrate to a territory belonging to the people of the United States, can not be ruled as mere colonists, dependent upon the will of the general Government, and to be governed by any laws it may think proper to impose. . . . The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved."

Hence, inasmuch as the constitution has conferred on the federal government no rights to interfere with the property, domestic relations, police regulations, or internal polity of the people of the territories, it necessarily follows, under the authority of the court, that Congress can rightfu ly exercise no such power over the territories. For this reason alone, the Supreme Court were authorized and compelled to pronounce the eighth section of the act approved March 6, 1820 (commonly called the Missouri compromise) inoperative and void—there being no power delegated to Congress in the constitution authorizing Congress to prohibit slavery in the territories.

In the course of the discussion of this question the court gave an elaborate exposition of the structure, principles, and powers of the federal government; showing that it possesses no powers except those which are delegated, enumerated and defined in the constitution; and that all other powers are either prohibited altogether or are reserved to the States or the people. In order to show that the prohibited, as well as the delegated powers are enumerated and defined in the constitution, the court enumerated certain powers which cannot be exercised either by Congress or by the territorial legislatures, or by any other authority whatever, for the simple reason that they are forbidden by the constitution.

Some persons who have not examined critically the opinion of the court in this respect have been induced to believe that the *slavery question* was included in this class of prohibited powers, and that the court had decided in the Dred Scott case that the territorial legislature could not legislate in respect to slave property, the same as all other property in the territories. A few extracts from the opinion of the court will correct this error, and show clearly the class of powers to which the court referred, as being forbidden alike to the federal government, to the States, and to the territories. The court say:

"A reference to a few of the provisions of the Constitution will illustrate this proposition. For example, no one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances.

"Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding. So too, it will hardly be contended that Congress could by law quarter a soldier in a house in a territory without the consent of the owner in a time of peace; nor in time of war but in a manner prescribed by law. Nor could they by law forfeit the property of a citizen in a Territory who was convicted of treason, for a longer period than the life of the person convicted, nor take private property for public use without just compensation.

"The powers over persons and property of which we speak, are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them. And this prohibition is not confined to the States, but the words are general, and extend to the whole territory over which the Constitution gives it power to legislate, including those portions of it remaining under territorial governments, as well as that covered by the State.

"It is a total absence of power, everywhere within the dominion of the United States, and places the citizens of a Territory, so far as these rights are concerned, on the same footing with citizens of the States, and guards them as firmly and plainly against any inroads which the general government might attempt, under the plea of implied or incidental powers. And if Congress itself can not do this—if it is beyond the powers conferred on the federal government—it will be admitted, we presume, that it could not authorize a territorial government to exercise them. It could confer no power on any local government, established by its authority, to violate the provisions of the Constitution.

Nothing can be more certain than that the court were here speaking only of *forbidden powers*, which were denied alike to Congress, to the State Legislature, and to the Territorial Legislatures, and that the prohibition extends "everywhere within the dominions of the United States," applicable equally to States and territories, as well as to the United States.

If this sweeping prohibition—this just, but inexorable restriction upon the powers of the government—federal, State and territorial—shall ever be held to include the slavery question, negativing the right of the people of States and territories, as well as the federal government to control it by law, (and it will be observed that in the opinion of the court "the citizens of a territory, so far as these rights are concerned, are on the same footing as the citizens of the States,") then, indeed, will the doctrine become firmly established that the principles of law applicable to African slavery are *uniform throughout the dominion of the United States*, and that there "is an irrepressible conflict between opposing and enduring forces, which means that the United States must and will, sooner or later, become either entirely a slave holding nation or entirely a free labor nation."

Notwithstanding the disastrous consequences which would inevitably result from the authoritive recognition and practical operation of such a doctrine, there are those who maintain that the court referred to prohibited the slavery question within that class of forbidden powers, which (although the same in the territories as in the States) could not be exercised by the people of the territories.

If this proposition were true, which fortunately for the peace and welfare of the whole country it is not, the conclusion would inevitably result, which they logically deduce from the premises—that the constitution by the recognition of slavery establishes it in the territories beyond the power of the people to control it by law, and guarantees to every citizen the right to go there and be protected in the enjoyment of his slave property; and when all other remedies fail for the protection of such rights of property, it becomes the imperative duty of Congress to the performance of which every member is bound by his conscience and his oath, and from which no consideration of political policy or expediency can release him) to provide by law such adequate and complete protection as is essential to the full enjoyment of an important right secured by the constitution. If the proposition be true, that the constitution establishes slavery in the territories beyond the power of the people legally to control it, another result, no less startling, and from which there is no escape, must inevitably follow. The constitution is unique and peculiar everywhere within the dominions of the United States"—is the same in Pennsylvania as in Kansas—and if it be true, as stated by the President in a special message to Congress, "that slavery exists in Kansas by virtue of the constitution of the United States," and that "Kansas is, therefore, at this moment, as much a slave State as Georgia or South Carolina," why does it not exist in Pennsylvania by virtue of the same constitution?

If it be said that Pennsylvania is a sovereign State, and therefore has a right to regulate the slavery question within her own limits to suit herself, it must be borne in mind that the sovereignty of Pennsylvania, like that of every other State, is limited by the constitution, which provides that:

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

Hence, the State of Pennsylvania, with her constitution and laws, and domestic institutions, and internal policy, is subordinate to the Constitution of the United States, in the same common manner, and to the same extent as is the Territory of Kansas. The Kansas-Nebraska act says that the Territory of Kansas shall exercise legislative power over "all rightful subjects of legislation consistent with the Constitution," and that the people of said Territory shall be left "perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States." The provisions of this act are believed to be in entire harmony with Constitution, and under them the people of Kansas possess every right, privilege, and immunity, in respect to their internal polity and domestic relations which the people of Pennsylvania can exercise under their constitution and laws. Each is invested with full, complete, and exclusive powers in this respect, "subject only to the Constitution of the United States."

The question recurs then, if the constitution does establish slavery in Kansas or any other territory beyond the power of the people to control it by law, how can the conclusion be resisted that slavery is established in like manner and by the same authority in all the States of the Union? And if it be the imperative duty of Congress to provide by law for the protection of slave property in the territories upon the ground that "slavery exists in Kansas" (and consequently in every other territory,) "by virtue of the constitution of the United States," why is it not also the duty of Congress, for the same reason, to provide similar protection to slave property in all the States of the Union, when the legislatures fail to furnish such protection?

Without confessing or attempting to avoid the inevitable consequences of their own doctrine, its advocates endeavor to fortify their position by citing the Dred Scott decision to prove that the constitution recognizes property in slaves—that there is no legal distinction between this and every other description of property—that slave property and every other kind of property stand on an equal footing—that Congress has no more power over the one than over the other—and, consequently, cannot discriminate between them.

Upon this point the court say:

"Now as we have already said in an earlier part of this opinion upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. . . . And if the Constitution recognizes the right of property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government. . . . And the government in express terms is pledged to protect it in all future time, *if the slave escapes from his owner*. This is done in plain words—too plain to be misunderstood. And no word can be found in the Constitution which gives Congress a *greater* power over slave property, or which authoriz es property of that kind to *less* protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights."

The rights of the owner which it is thus made the duty of the federal government to guard and protect, are those expressly provided for in the constitution, and defined in clear and explict language by the court, that "the government, in express terms, is pledged to protect it (slave property) in all future time, *if the slave escapes from his owner*." This is the only contingency, according to the plain reading of the constitution, as authoritively interpreted by the Supreme Court, in which the federal government is authorized, required, or permitted to interfere with slavery in the States or territories; and in that case only for the purpose "of guarding and protecting the owner in his rights", to reclaim his slave property. In all other respects slaves stand on the same footing with all other property—"the constitution makes no distinction between that description of property and other property owned by a citizen;" and "no word can be found in the constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description." This is the basis upon which all rights pertaining to slave property, either in the States or the territories, stand under the constitution as expounded by the Supreme Court in the Dred Scott case.

Inasmuch as the constitution has delegated no power to the federal government in respect to any other kind of property belonging to the citizen—neither introducing, establishing, prohibiting nor excluding it any where within the dominion of the United States, but leaves the the owner thereof perfectly free to remove into any State or Territory and carry his property with him, and hold the same subject to the local law, and relying upon the local authorities for protection, it follows, according to the decision of the Court, that slave property stands on the same footing, is entitled to the same rights and immunities, and in like manner is dependent upon the local authorities and laws for protection.

The Court refer to that clause of the Constitution which provides for the rendition of fugitive slaves as their authority for saying that "the right of property in slaves is distinctly and expressly affirmed in the Constitution." By reference to that provision, it will be seen that, while the word "slaves" is not used, still the Constitution not only recognizes the right of property in slaves, as stated by the Court, but explicitly states what class of persons shall be deemed slaves, and under what laws or authority they may be held to servitude, and under what circumstances fugitive slaves shall be restored to their owners, all in the same section, as follows:

"No person held to service or labor in one State, *under the laws thereof*, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

Thus it will be seen that a slave, within the meaning of the Constitution, is "a person held to labor in one State, *under the laws thereof*"—not under the Constitution of the United States, nor by the laws thereof, nor by virtue of any federal authority whatsoever, but under the laws of the particular State where such service or labor may be due.

It was necessary to give this exact definition of slavery in the constitution in order to satisfy the people of the South as well as of the North. The slaveholding States would never consent for a moment that their domestic relations—and especially their right of property in their slaves—should be dependent upon federal authority, or that Congress should have any power over the subject—either to extend, confirm, or restrain it; much less to protect or regulate it—lest under the pretense of protection and regulation, the federal government, under the influence of the strong and increasing anti-slavery sentiment which prevailed at that period, might destroy the institution, and divest those rights of property in a slaveholding nation sacred under the laws and constitutions of their respective States so long as the federal government had no power to interfere with the subject.

In like manner the non-slaveholding States, while they were entirely willing to provide for the surrender of all fugitive slaves—as is conclusively shown by the unanimous vote of all the States in the Convention for the provision now under consideration—and to leave each State perfectly free to hold slaves under its own laws, and by virtue of its own municipal and exclusive authority, so long as it pleases, and to abolish it when it chose, were unwilling to become responsible for its existence by incorporating it into the Constitution as a national institution, to be protected and regulated, extended and perpetuated by federal authority, regardless of the wishes of the people, and in defiance of the local laws of the several States and territories. For these opposite reasons the Southern and Northern States united in giving a unanimous vote in the Convention for that provision of the Constitution which recognizes slavery as a local institution in the several States where it exists, "under the laws thereof," and provides for the surrender of fugitive slaves.

It will be observed that the term "State" is used in this provision, as well as in various other parts of the Constitution, in the same sense in which it was used by Mr. Jefferson in his plan for establishing governments for the new States in the territory ceded and to be ceded to the United States, and by Mr. Madison in his proposition to confer on Congress power to "institute temporary governments for the *new States* arising in the unappropriated lands of the United States," to designate the political communities, Territories as well as States, within the dominion of the United States. The word "States" is used in the same sense in the ordinance of the 13th of July, 1787, for the government of the territory northwest of the river Ohio, which was passed by the remnant of the Congress of the Confederation, sitting in New York while the most eminent members were at Philadelphia, as delegates to the federal convention, aiding in the formation of the Constitution of the United States.

In this sense, the word "States" is used in the clause providing for the rendition of fugitive slaves, applicable to all political communities under the authority of the United States, including the territories as well as the several States of the Union. Under any other construction of the right of the owner to recover his slave would be restricted to the *States* of the Union, leaving the territories a secure place of refuge for all fugitives. The same remark is applicable to the clause of the Constitution which provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in *another State*, shall on the demand of the executive authority of the *State* from which he had fled, be delivered up to be removed to the State having jurisdiction of the crime. Unless the term State, as used in these provisions of the Constitution, shall be construed to include every distinct political community under the jurisdiction of the United States, and to apply to territories as well as to the States of the Union, the territories must become a sanctuary for all the fugitives from service and justice, for all the felons and criminals who shall escape from the several *States* and seek refuge and immunity in the *territories*.

If any other illustration were necessary to show that the political communities, which we now call territories, (but which, during the whole period of the confederation and the formation of the constitution, were always referred to as "States" or "New States,") are recognized as "States" in *some* of the provisions of the coustitution, they may be found in those clauses which declare that "no State" shall enter into any "treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law, impairing the obligation of contracts, or grant any title of nobility."

It must be borne in mind that in each of these cases where the power is not expressly delegated to Congress the prohibition is not imposed upon the federal government, but upon the *States*. There was no necessity for any such prohibition upon Congress or the federal government, for the reason that the omission to delegate any such powers in the Constitution was of itself a prohibition, and so declared in express terms by the tenth amendment, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Hence, it would certainly be competent for the States and Territories to exercise these powers but for the prohibition contained in those provisions of the constitution; and inasmuch as the prohibition only extends to the "States," the people of the "Territories" are still at liberty to exercise them, unless the Territories are included within the term *States*, within the meaning of the provisions of the Constitution of the United States.

(CONCLUSION ON MONDAY.)

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