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THE DIVIDING LINE BETWEEN FEDERAL AND LOCAL AUTHORITY.

POPULAR SOVEREIGNTY IS THE VERY POINT.

BY STEPHEN A. DOUGLAS.

From Harper's Magazine for September.

Under our complex system of government it is the first duty of an American statesman to mark distinctly the dividing line between Federal and local authority. To this with accuracy involves an inquiry, not only into the powers and duties of the Federal Government under the constitution, but also into the rights and privileges and immunities of the people of the territories as well as the States composing the Union. The relative powers and functions of the Federal and State governments therefore become well understood and clearly defined by their practical operation and harmonious action for a long series of years; while the disputed question—involving the right of the people of the territories to govern themselves in respect to their local affairs and internal policy—remains fruitful source of partisan strife and excited controversy. The political organization which was founded in 1854, and has assumed the name of the Republican party, is based on the theory that African slavery, as it exists in this country, is an evil of such magnitude—moral, social and political—as to justify and require the exertion of the entire power and influence of the Federal Government to the full extent that the constitution, according to their interpretation, will permit for its ultimate extinction. In the platform of principles adopted at Philadelphia by the Republican National Convention in 1856, it is affirmed:

"That the Constitution confers upon Congress sovereign power over the territories of the United States for their government, and that in the exercise of this power it is both the right and the duty of Congress to prohibit in the territories those two relics of barbarism, polygamy and slavery."

According to the theory of the Republican party there is an irreconcilable conflict between freedom and slavery, free labor and slave labor, the free States and slave States, which is irreconcilable, and must continue to rage with increasing fury until the one shall become universal by the annihilation of the other. In the language of the most eminent and authoritative expounder of this political faith,

"A house divided against itself cannot stand. I believe this government cannot endure permanently half slave and half free. I do not expect the house to fall, but I do expect it will cease to be divided. It will become a thing or the other. Either the opponents of slavery will arrest the further spread of it and place it where the public mind shall rest in the belief that it is in the course of ultimate extinction, or its advocates will push forward till it shall become alike lawful in all the States—old as well as new, North as well as South."

Thus, it will be seen, that, under the auspices of a political party, which claims sovereignty in Congress over the subject of slavery, there can be no peace on the slavery question—no truce in the sectional strife—no fraternity between the North and South, so long as the Union remains as our fathers made it—divided into free and slave States, with the right on the part of each to govern itself as long as it chooses, and to abolish it whenever it pleases.

On the other hand, it would be uncandid to deny that while the Democratic party is a unit in its irreconcilable opposition to the doctrines and principles of the Republican party, there are radical differences of opinion in respect to the powers and duties of Congress, and the rights and immunities of the people of the territories under the federal constitution, which are as intimately connected with and as vital to its integrity. These differences of opinion arise from the different interpretations placed on the constitution by persons who believe in the following two creeds:

First—Those who believe that the constitution of the United States neither establishes nor prohibits slavery in any State or territory beyond the power of the people of the territory to control it, but "leaves the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the constitution of the United States."

Second—Those who believe that the constitution establishes slavery in the territories, and withholds from the territorial legislature the power to control it; and who insist that, in the event the territorial legislature fails to enact the requisite laws for its protection, it devolves the imperative duty of Congress to interpose its authority and furnish such protection.

Those who, while professing to believe that the constitution establishes slavery or the territorial legislature to control it, at the same time go so far against the duty of Congress to interfere for the protection of slavery, that it is the duty of the judiciary to protect and maintain slavery in the territories without any law upon the subject.

By a careful examination of the second and third propositions, it will be seen that the advocates of each agree on the theoretical question, that the constitution establishes slavery in the territories, and that the only point at issue is, whether they must, or not, differ on the practical point, whether a right secured by the constitution shall be protected by an act of Congress when all other rights of property fail. The reason assigned for not protecting by law a right secured by the constitution is, that it is the duty of the courts to protect slavery in the territories without any legislation upon the subject. How the courts are to afford protection to slaves or any other property, where there is no law providing remedies and imposing penalties and conferring jurisdiction upon the courts to hear and determine the cases as they arise, remains to be explained.

The acts of Congress, establishing the several territories of the United States, provide that "The judicial authority of the several courts herein provided for, both appellate and original, and that of the probate courts and justices of the peace, shall be as limited by the laws of the United States in force and the territorial legislatures shall from time to time enact. It will be seen that the judicial tribunals of the territories have just such jurisdiction, and only such, in respect to the rights of persons and property pertaining to the citizens of the territory as the territorial legislature shall see fit to confer, and consequently, that the courts can afford protection to persons and property no further than the legislature shall, by law, confer the jurisdiction, and prescribe the remedies, penalties, and modes of proceeding.

It is difficult to conceive how any person who believes that the constitution confers the right of property in the enjoyment of slave property as the other species of property of the white of the people and of the action of the territorial legislature, can satisfy his conscience and his sense of fidelity to the constitution of which he is a judicial expositor, by refusing to pass such a law as the exigency may require, to protect the property in question. Yet, if the territorial legislature fail to enact the requisite laws, the property in question will be without protection, and the judiciary, which alone is empowered to afford the remedy, will be powerless to afford it. Under this state of the subject it is impossible to escape the conclusion that, if the constitution does establish slavery in the territories, beyond the power of the people to control it by law, it is the imperative duty of Congress to supply all the legislation necessary to protect it, and if the proposition is not true, it necessarily results that the constitution neither establishes nor prohibits slavery in the territories, but leaves the people of each State and territory entirely free to form and regulate their domestic affairs to suit themselves, without the intervention of Congress or of any other power whatsoever.

But it is urged with great plausibility by those who hase entire faith in the soundness of the proposition, that "a territory is a mere creature of Congress; that the territories can not be clothed with any powers not possessed by the creator; and that Congress not possessing the power to legislate in respect to slavery in the territories, it follows that it can delegate to a territorial legislature any power which it does not itself possess."

This proposition is so plausible as it is fallacious, that the wonder of it is true as a general rule, Congress cannot delegate to a territorial legislature, or to any other body of men whatsoever, any power which the constitution has not vested in Congress to exercise. In other words, Every power conferred on Congress by the constitution, must be exercised by Congress in the mode prescribed by the constitution.

Let us test the correctness of this proposition by reference to the powers of Congress, as defined in the constitution:

"The Congress shall have power—

"To lay and collect taxes, duties, imposts, and excises," etc.;

"To borrow money on the credit of the United States;

"To regulate commerce with foreign nations," etc.;

"To coin money, and regulate the value thereof;

"To establish post-offices and post roads;

"To constitute tribunals inferior to the Supreme Court;

"To declare war," etc.;

"To provide and maintain a navy."

This power might be extended so as to embrace all the powers conferred on Congress by the constitution; but enough is shown to test the principle. Will it be contended that Congress can delegate any one of these powers to the territorial legislature or to any tribunal whatever? Can Congress delegate to Kansas the power to "regulate commerce," or to Nebraska the power to "establish uniform rules of naturalization," or to Illinois the power to "coin money and regulate the value thereof," or to Virginia the power to "establish post offices and post roads?"

The mere statement of the question carries with it the emphatic answer, that Congress cannot delegate any power which it does possess; but that every power conferred on Congress by the constitution, can be exercised by Congress in the manner prescribed in that instrument.

On the other hand, there are cases in which Congress may establish tribunals and local governments, and invest them with powers which it does not possess and cannot exercise in its own person. For instance, Congress may establish courts inferior to the Supreme Court, and confer upon them the power to hear and determine cases, and render judgments and decrees affecting the life, liberty, and property of the citizen, without itself having the power to hear and determine such causes, render judgments, or revise or annul the same. In like manner Congress may institute governments for the territories, composed of an executive, judicial and legislative department; and may confer upon the governor all the executive powers and functions of the territory, without having the right to exercise any one of those powers or functions itself.

Congress may confer upon the judicial department all the judicial powers and functions of the territory, without having the right to hear and determine a case, or render a judgment, or to revise or annul any decision made by the courts so established by Congress. Congress may also confer upon the legislative department of the territory certain legislative powers which it cannot itself exercise, and only such as Congress cannot exercise under the constitution. The powers which Congress may thus transfer but cannot exercise, are such as relate to the domestic affairs and internal policy of the territory, and do not affect the general welfare of the Republic.

In striking line between federal and local authority was drawn by the framers of the Constitution. It is clearly defined and distinctly marked on every page of history which records the great events of that immortal struggle between the American colonies and the British government, which resulted in the establishment of our national independence. In the beginning of that struggle the colonies neither contemplated nor desired independence. In all their addresses to the crown, and to the Parliament, and to the people of Great Britain, as well as to the people of America, they avowed that, as loyal British subjects, their deprived the causes which impelled their separation from the parent country. They were strongly and affectionately attached to the constitution, civil and political institutions and jurisprudence of Great Britain, which they humbly proclaimed as the birthright of all Englishmen, and sought to transmit them, unimpaired as a precious legacy to their posterity. For a long series of years they remonstrated against the violation of their inalienable rights of self-government under the British crown, and humbly petitioned for the redress of their grievances.

They acknowledged and affirmed their allegiance to the crown, and their affection for the people, and their devotion to the constitution of Great Britain; and their only complaint was that they were not permitted to enjoy the rights and privileges of self-government, in the manner of their internal affairs and domestic concerns, in accordance with the guarantees of their charters, and the principles of the British constitution, and of the colonial charters granted by the crown in pursuance of it. They conceded the right of the imperial government to control their foreign affairs, to levy duties on the colonies, which were in their nature imperial and not colonial—which affected the general welfare of the empire, and did not interfere with the rights of internal policy of the colonies. They recognized the right of the imperial government to declare war and make peace; to coin money and determine the value; to make treaties and conclude commerce with foreign nations; to regulate commerce between the several colonies, and between each colony and the parent country, which formed the navigation laws; and in general they recognized the right of the imperial government of Great Britain to exercise all the powers and authority, which, under our federal constitution, are delegated to the people of the several States to the government of the United States.

Recognizing and conceding to the imperial government all these powers, they claimed the right to institute governments for the colonies, by granting charters upon the express condition that the people of any special territory might be organized into a political community, with a government consisting of the appropriate departments, executive, legislative, and judicial, and that, in all the territories, the colonies emphatically denied that the imperial government had any rightful authority to impose taxes upon them without their consent, or to make laws for them in all cases, whatever, claiming that it was the birthright of all Englishmen—inalienable when formed into a political community—to enjoy such rights, privileges, and immunities under the government in respect to all matters and things which were local and not general—internal and not external—colonial and not imperial—as fully as if they were still living in England, with a fair representation in parliament.

Thus it appears that our fathers of the Revolution, when speaking of the independence in the first instance, and for the first time, the right of local self-government under the British constitution; the right of every distinct political community, composed of a portion of the territories, and provinces, as well as sovereign States—to make their own local laws, form their own domestic institutions, and manage their own internal affairs in their own way, subject only to the constitution of Great Britain as the paramount law of the empire.

The Government of Great Britain has violated this inalienable right of local self-government in a long series of acts on a great variety of subjects. The first serious point of difference between the colonies and the mother country, which continued a fruitful source of irritation until the Revolution, and formed one of the causes for the separation of the colonies from the Mother land, was

For more than forty years the provincial legislatures of Virginia had passed laws for the emancipation of the negro slaves of their country within her limits. This policy was steadily pursued until the white inhabitants of Virginia became alarmed for their own safety, in consequence of the great number of the African savages which surrounded and threatened the feeble white settlements, while ship loads of African savages were being daily landed in the ports of the mother country, and forced upon the colonies against their remonstrance of Great Britain, which they hotly proclaimed as the birthright of all Englishmen, and sought to transmit them, unimpaired as a precious legacy to their posterity. For a long series of years they remonstrated against the violation of their inalienable rights of self-government under the British crown, and humbly petitioned for the redress of their grievances.

They acknowledged and affirmed their allegiance to the crown, their affection for the people, and their devotion to the constitution of Great Britain; and their only complaint was that they were not permitted to enjoy the rights and privileges of self-government, in the manner of their internal affairs and domestic concerns, in accordance with the guarantees of their charters, and the principles of the British constitution, and of the colonial charters granted by the crown in pursuance of it. They conceded the right of the imperial government to control their foreign affairs, to levy duties on the colonies, which were in their nature imperial and not colonial—which affected the general welfare of the empire, and did not interfere with the rights of internal policy of the colonies. They recognized the right of the imperial government to declare war and make peace; to coin money and determine the value; to make treaties and conclude commerce with foreign nations; to regulate commerce between the several colonies, and between each colony and the parent country, which formed the navigation laws; and in general they recognized the right of the imperial government of Great Britain to exercise all the powers and authority, which, under our federal constitution, are delegated to the people of the several States to the government of the United States.

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