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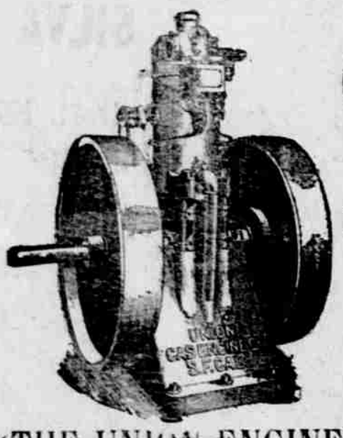

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CONSTITUTIONAL LAW AND EXPANSION POLICY

FIRST OF A SERIES OF ARTICLES ON AN INTERESTING SUBJECT.

Chief Questions Involved Discussed From the Standpoint of Law and History—A Careful Study.

[*From the Baltimore Sun.*]

Mr. Isaac Loe Straus has prepared especially for the Sun a series of articles upon the chief questions of constitutional law growing out of the policy of expansion, upon which the administration of the United States has recently entered.

Mr. Straus' authorship is a sufficient guarantee of the ability and learning with which these important subjects are discussed. The first of the articles is published below.

I.

It is assumed by the present administration of the United States, as the basis of its policy of colonial expansion, that it is competent for the federal government, through congress, to hold and rule subject dependencies free from the limitations of the Constitution.

If this assumption cannot be maintained, if the federal constitution forbids the colonial system and its provisions protect the territories intended to be governed as vassal provinces, the imperial career upon which the country has been lately launched must end.

The subject presents the following questions which will be discussed in this article and those which are to follow:

1. Whether the Constitution of the United States empowers the general government to hold and govern colonies?

2. Whether the Constitution extends of its own force into territory acquired by the union and limits the powers of congress over such territory?

3. Whether the native inhabitants of acquired territory who remain therein, subject to the jurisdiction of the United States, are citizens of the latter?

4. Whether the president and senate may by treaty vest in congress dominion over annexed territory and its inhabitants free from the operation of the Constitution?

If the question of the right of the federal government to hold colonies be considered historically it is at once evident that the distinguishing events of American history indicate the hostility deeply inveterated in the sentiments and institutions of the American people to the colonial system and the legal premissions upon which it rests. The Revolution itself was nothing more or less than an uprising against the colonial policy, which chanced to concentrate upon a question of taxation. The Declaration of Independence was a denial of the lawfulness of that policy, and the Monroe doctrine, conceived by Jefferson, approved by Madison, promulgated by Monroe and Quincy Adams and defended at the time by Calhoun, Clay and Webster, was mainly an anti-colonizing manifesto—an echo of the central principle of the Revolution—which in that very respect has been steadfastly adhered to on many interesting occasions since its announcement. But, however important the aids of history in elucidating the subject, the latter will be treated in the ensuing discussion in a more strictly legal aspect.

The opinion of Chief Justice Taney in the case of Scott vs. Sandford that the federal government has no authority to maintain colonies, governing their inhabitants with discretionary power, rests upon the fundamental tenet of constitutional law that all the powers of the federal government are limited by the purposes and objects of the Constitution, which are to be gathered from the spirit, structure, principles and provisions of that instrument. This is by no means a canon of strict construction. It is the method of interpretation employed by Alexander Hamilton (Works, Vol. IV, pp. 113, 114); by Chief Justice Jay (Writings and Corresp., Vol. III, p. 396, 456), by Chief Justice Marshall (1 Wheat., 304, 326; 2 Brock., 96, 100; Writings, 1839, pp. [illegible]) and by Daniel Webster (Works, Vol. III, 322, 334, 336; IV, p. 9; VI, 322-24; VI, pp. 389, 537). From the adoption of the Constitution, in 1788, until the autumn of 1898 the correctness of this rule of construction was never questioned or denied.

Reasoning, then, from the sources of the Constitution referred to, Chief Justice Taney concluded that the purpose for which the Constitution enabled the general government to acquire territory was its ultimate admission as a state into the union. His opinion in this respect is entirely sustained by prior and subsequent decisions of the supreme court and by the virtually unanimous opinions of the great statesmen of the republic. Chief Justice Taney said:

"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 or governed at its own pleasure. * * * No power is given to acquire a territory to be held and governed permanently in that character. * * * The power to expand the territory of the United 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 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. * * *

"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 the citizens of the United States who migrate to a territory belonging to the people of the United States cannot 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. * * A power, therefore, in the general government to obtain and hold colonies and dependent territories over which they might legislate without restriction would be inconsistent with its own existence in its present form." (19 Howard, pp. 446-8.)

The chief justice then points out that according to the Constitution, the government by congress of a territory is only temporary and initiative to its admission as a state. "The power," says he, "to acquire necessarily carries with it the power to preserve and apply to the purposes for which it was acquired. The form of government to be established necessarily rested in the discretion of congress. It was their duty to establish the one that would be best suited for the protection and security of the citizens of the United States and other inhabitants who might be authorized to take up their abode there. * * * Some form of civil authority would be absolutely necessary to organize and preserve civilized society and prepare it to become a state, and what is the best form must always depend upon the condition of the territory at the time, and the choice of the mode must depend upon the exercise of discretionary power by congress, acting within the scope of its constitutional authority and not infringing upon the rights of persons and rights of property of the citizens who may go there to reside or for any other lawful purpose. It was acquired by the exercise of this discretion and it must be held and governed in like manner until it is fitted to be a state." (Pp. 448-9.)

All the members of the court without exception concurred in these views.

Mr. Justice Wayne said:

"Concurring as I do entirely in the opinion of the court as it has been written and read by the chief justice—without any qualification of its reasoning or its conclusions—I shall neither read nor file an opinion of my own in this case, which I prepared when I supposed it might be necessary and proper for me to do so. (P. 454.)

Mr. Justice Grier said:

"I concur with the opinion of the court as delivered by the chief justice, that the Act of Congress of 6th March, 1820 (prohibiting slavery in the territories north of 36 deg. 30 min.) is unconstitutional and void." (P. 460.)

The opinion of Mr. Justice Daniel likewise coincides with that of the chief justice (pp. 488-9), and Mr. Justice Campbell in his very learned, historical and legal opinion, ably sustains Judge Taney upon every point. Referring to the second clause of the third section of Article IV of the Constitution, which provides that "congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," Justice Campbell wrote:

"I look in vain among the discussions of the time for the assertion of a supreme sovereignty for congress over the territory then belonging to the United States or that they might thereafter acquire. I seek in vain for an annunciation that a consolidated power had been inaugurated, whose subject comprehended an empire and which had no restriction but the discretion of congress. This disturbing element of the union entirely escaped the apprehensive provisions of Samuel Adams, George Clinton, Luther Martin and Patrick Henry, and in respect to dangers from power vested in a central government over distant settlements, colonies or provinces their instincts were always alive. Not a word escaped them to warn their countrymen that here was a power to threaten the landmarks of this federative union, and with them the safeguards of popular and constitutional liberty, or that under this article there might be introduced on our soil a single government over a vast extent of country—a government foreign to the persons over whom it might be exercised, and capable of binding those not represented, by statutes, in all cases whatsoever. I find nothing to authorize these enormous pretensions, nothing in the expositions of the friends of the Constitution, nothing in the expressions of alarm by its opponents." (P. 505.)

Mr. Justice Catron expressed the same view upon this subject (pp. 521-2), and Mr. Justice McLean, dissenting in other points, wholly agreed with Chief Justice Taney in his views as above set forth, saying:

"In organizing the government of a territory congress is limited to means appropriate to the attainment of the constitutional object. No powers can be exercised which are prohibited by the constitution, or which are contrary to its spirit, so that whether the object may be the protection of the persons and property of purchasers of the public lands or of communities who have been annexed to the union by conquest or purchase they are *auxiliary to the establishment of state governments*, and no more power can be claimed or exercised than is necessary to the attainment of the end. This is the limitation of all the federal powers." (P. 542.)

Mr. Justice Curtis, whose dissenting opinion in Scott vs. Sanford has always been accepted as authoritative by those who took exception to the views of the majority of the court on the status of slaves, also clearly announced his concurrence with the proposition laid down by all the other justices that the only purpose for which the federal government through congress can constitutionally hold and govern territory is to admit it as a state into the union. Said he:

"The rules and regulations must be needful. * * * Since then this power was manifestly conferred to enable the United States to dispose of its public land to settlers and *to admit them into the union as states* when in the judgment of congress they should be fitted therefor, since these were the needs provided for, since it is confessed that government is indispensable to provide for those needs and the power is to make *all needful* rules and regulations respecting the territory, I cannot doubt that this is a power to govern the inhabitants of the territory by such laws as congress deems needful *until they obtain admission as states*. * * * The purposes and objects of the clause were the enactment of laws concerning the disposal of the public lands, and the *temporary government of the settlers thereon until new states shall be formed*." (Pp. 615-616.)

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