HISTORICAL AND LEGAL EXAMINATION OF THAT PART OF THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE DRED SCOTT CASE

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THOMAS HART BENTON

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HISTORICAL AND LEGAL

EXAMINATION

OF THAT PART OF THE

DECISION OF THE SUPREME COURT OF THE UNITED STATES

IN THE

DRED SCOTT CASE,

WHICH DECLARES THE

UNCONSTITUTIONALITY OF THE MISSOURI COMPROMISE ACT, AND THE SELF-EXTENSION OF THE CONSTITUTION TO TERRITORIES, CARRYING SLAVERY ALONG WITH IT.

With an Appendix,

CONTAINING:

I. The Debates in the Senate in March, 1849, between Mr. Webster and Mr. Calhoun, on the Legislative Extension of the Constitution to Territories, as contained in Vol. II. Ch. CLXXXII. of the "Thirty Years' View."

II. The Inside View of the Southern Sentiment, in relation to the Wilmot Proviso, as seen in Vol. II. Ch. CLXVIII. of the "Thirty Years' View."

III. Review of President Pierce's Annual Message to Congress of December, 1856, so far as it relates to the Abrogation of the Missouri Compromise Act and the Classification of Parties.

BY THE

AUTHOR OF THE "THIRTY YEARS' VIEW."

Thomas H. Benton

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1857.

NOTIFICATION TO THE READER.

The writer of this "Examination" was breaking down under the approaches of a terrible attack, while he was still engaged in writing it, and was prostrate before it was finished, leaving some heads untouched, and the outline of others only sketched. Among these last was the head which related to the temporary government in Florida, and the transactions under it; General Jackson being Governor, and commissioned (according to the act under which he was appointed) with the powers of Captain-General and Intendant of Cuba, the Floridas having been a dependency of that Captain-Generalship. The "Examination" states (and all whose memory or home reading goes back twenty-five years, well know the fact), that the power of Captain-General and Intendant was no barren sceptre in Jackson's hand; that he found occasion to use the power, and did so with the energy which belonged to his nature, and was sustained by Mr. Monroe's Administration. But the history of the transactions was not gone into, and the general assertion remained without the justification which this history would give it. That history is now supplied, and will be found in the Abridged Debates of Congress, text and notes (volume VII., now about ready for the press); and is surely of a character and of an authority to put an end to the "Opinion" which nullifies the Missouri Compromise Act, and self-extends the Constitution to territories. Without going further into that history in this brief *post scriptum* notification, and confining himself to the precise point in issue, the

writer will say, that the Administration of Mr. Monroe, expressly, by unanimous Cabinet decision; and each House of Congress, impliedly, and without division, decided that no part of the Constitution and no Act of Congress went to a territory, unless extended to it by Congress. The occasion for making this decision was this:—Judge Fromentin issued a writ of *Habeas Corpus* to have the body of Ex-Governor Callava (then imprisoned by the order of General Jackson) brought before him, claiming the right to do so under the Constitution, and under the laws of Congress, vesting U. S. Judges with that power. Gov. Jackson denied the power, and dealt militarily with the Judge for issuing the writ, telling him that no part of the Constitution had been extended to the Floridas, nor any Act of Congress, authorizing him to issue the writ. The case was brought before the President and before Congress, and received the decision above stated. And this writer takes it upon himself to affirm (and he was cotemporary with the event, as well as having now traced its history) that the decision of the Cabinet was unanimous upon the point here mentioned, *namely:* that Judge Fromentin had no right to issue the writ of *Habeas Corpus*, because no part of the Constitution, nor any Act of Congress authorizing the writ, had been extended by Congress to that territory.

WASHINGTON CITY, NOV. 9TH, 1857.

INTRODUCTORY NOTE.

The title is an index to the character of this Examination, which only goes to the two points mentioned; and goes to them because they are held to be political, affecting Congress in its legislative capacity, and on which the Supreme Court has no right to bind, or control that body: as heretofore seen in the case of the Bank of the United States, the Sedition law, &c.; cases in which Congress followed its own opinion of its own powers, regardless of the Court's decision; and the Court had no way to compel it to obedience, or to punish it for contempt.

Congress holds its powers from the Constitution, where every grant of authority is preceded by the words—"*Shall have power to:*" and to the support of which the members are sworn. The grant of power is from the Constitution, and the oath is to the Constitution; and it is written, that its words, always the same, may be always seen, and no excuse for disregarding them. The duty of the member—his allegiance—his fealty—is to the Constitution; and in performance of this duty—in the discharge of this allegiance—in the keeping of this fealty—he must be governed by the words of the instrument, and by the dictates of his conscience. The member may enlighten himself, and should, with the counsels of others: but as authority—as a rule of obligation—as a guide to conduct—the Constitution and the oath alone can govern; and were it otherwise—was Congress to look to judicial interpretation for its powers—it would soon cease to have any fixed rules to go by: would soon have as many diverse interpretations as different courts: and the Constitution itself, like the Holy Scriptures, in the hands of councils and commentators, would soon cease to be what its framers made it.

The power of the Court is judicial—so declared in the Constitution; and so held in theory, if not in practice. It is limited to cases "*in law and equity;*"* and though sometimes encroaching upon political subjects, it is without right, without authority, and without the means of enforcing its decisions. It can issue no mandamus to Congress, or the people, nor punish them for disregarding its decisions, or even attacking them. Far from being bound by their decisions, Congress may proceed criminally against the judges for making them, when deemed criminally wrong—one house impeach and the other try: as done in the famous case of Judge Chase.

In assuming to decide these questions,—(Constitutionality of the Missouri Compromise, and the self-extension of the Constitution to Territories,)—it is believed the Court committed two great errors: *first*, in the assumption to try such questions: *secondly*, in deciding them as they did. And it is certain that the decisions are contrary to the uniform action of all the departments of the government—one of them for thirty-six years; and the other for seventy years; and in their effects upon each are equivalent to an alteration of the Constitution,† by insert-

* "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, &c.—*Article III., Sec.* 2.

† "The question here is, whether they (the arguments referred to) are sufficient to authorize this Court to insert into this clause of the Constitution an exception of the exclusion or allowance of slavery, not found therein, nor in any other part of that instrument. To ingraft on any instrument a substantive exception not found in it, must be admitted to be a matter attended with great difficulty. And the difficulty increases with the importance of the instrument, and the magnitude and complexity of the interests involved in its construction. To allow this to be done with the Constitution, upon reasons purely political, renders its judicial interpretation impossible—because judicial tribunals, as such, cannot decide upon political considerations. Political reasons have not the requisite certainty to afford rules of juridical interpretation. They are different in different men. They are different in the same men at different times. And when a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean. When such a method of interpretation of the Constitution obtains, in place of a republican Government, with limited and defined powers, we have a Government which is merely an exponent of the will of Congress; or what, in my opinion, would not be preferable, an exponent of the individual political opinions of the members of this Court."—*Mr. Justice Curtis.*

ing new clauses in it, which could not have been put in it at the time that instrument was made, nor at any time since, nor now.

The Missouri Compromise act was a "*political enactment*," made by the political power, for reasons founded in national policy, enlarged and liberal, of which it was the proper judge: and which was not to be reversed afterwards by judicial interpretation of words and phrases.

Doubtless the Court was actuated by the most laudable motives in undertaking, while settling an individual controversy, to pass from the private rights of an individual to the public rights of the whole body of the people; and, in endeavoring to settle, by a judicial decision, a political question which engrosses and distracts the country:* but the undertaking was beyond its competency, both legally and potentially. It had no right to decide—no means to enforce the decision—no machinery to carry it into effect—no penalties of fines or jails to enforce it: and the event has corresponded with these inabilities. Far from settling the question, the opinion itself has become a new question, more virulent than the former! has become the very watchword of parties! has gone into party creeds and platforms—bringing the Court itself into the political field—and condemning all future appointments of federal judges, (and the elections of those who make the appointments, and of those who can multiply judges by creating new districts and circuits,) to the test of these decisions. This being the case, and the evil now actually upon us, there is no resource but to face it—to face this new question—examine its foundations—show its errors; and rely upon reason and intelligence to work out a safe deliverance for the country.

Repulsing jurisdiction of the original case, and dismissing it for want of right to try it, there would certainly be a difficulty in getting at its merits—at the merits of the dismissed case itself; and, certainly, still greater difficulty in getting at the merits of two great political questions which lie so far beyond it. The Court evidently felt this difficulty, and worked sedu-

* "The case involves private rights of value, and Constitutional principles of the highest importance, about which there has become such a difference of opinion that the peace and harmony of the country required the settlement of them by a judicial decision."—*Mr. Justice Wayne.*