The Dividing Line between Federal and Local Authority: Popular Sovereignty in the Territories

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In September 1857, pro-slavery forces in Kansas drafted the Lecompton Constitution. Their anti-slavery opponents declared the document invalid, as they had not participated in its creation. Adhering to the principle of popular sovereignty, Douglas rejected the Lecompton Constitution and called for Kansans to draft a new document. Northern Democrats, dismayed by the armed conflict in Kansas, supported his position; Southern Democrats looked on it as an act of betrayal. Douglas took every opportunity to explain his position in hopes of re-unifying his party. This speech was published in Harper's New Monthly Magazine.

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Under our complex system of government it is the first duty of American statesmen to mark distinctly the dividing line between Federal and Local Authority. To do 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, privileges, and immunities of the people of the Territories, as well as of the States composing the Union. The relative powers and functions of the Federal and State governments have 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 polity—remains a fruitful source of partisan strife and sectional controversy. The political organization which was formed 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—social, moral, 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.…

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This dividing line between Federal and Local authority was familiar to 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 averred that as loyal British subjects they deplored 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 proudly claimed as the birth-right of all Englishmen, and desired 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 Constitution, 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 management of their internal affairs and domestic concerns, in accordance with the guarantees of that Constitution and of the colonial charters granted by the Crown in pursuance of it. They conceded the right of the Imperial government to make all laws and perform all acts concerning 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 "internal polity" of the Colonies. They recognized the right of the Imperial government to declare war and make peace; to coin money and determine its value; to make treaties and conduct intercourse with foreign nations; to regulate commerce between the several colonies, and between each colony and the parent country, and with foreign countries; 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 by the people of the several States to the Government of the United States.

Recognizing and conceding to the Imperial government all these powers—*including the right to institute governments for the colonies*, by granting charters under which the inhabitants residing within the limits of any specified Territory might be organized into a political community, with a government consisting of its appropriate departments, executive, legislative, and judicial; conceding all these powers, the colonies emphatically denied that the Imperial government

had any rightful authority to impose taxes upon them without their consent, or to interfere with their internal polity; claiming that it was the birth-right of all Englishmen—inalienable when formed into a political community—to exercise and enjoy all the rights, privileges, and immunities of self-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 inhabitants of England, with a fair representation in Parliament.

Thus it appears that our fathers of the Revolution were contending, not for Independence in the first instance, but for the inestimable right of Local Self-Government under the British Constitution; the right of every distinct political community—dependent Colonies, 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 had violated this inalienable right of local self-government by a long series of acts on a great variety of subjects. The first serious point of controversy arose on the slavery question as early as 1699, which continued a fruitful source of irritation until the Revolution, and formed one of the causes for the separation of the colonies from the British Crown.

For more than forty years the Provincial Legislature of Virginia had passed laws for the protection and encouragement of African slavery within her limits. This policy was steadily pursued until the white inhabitants of Virginia became alarmed for their own safety, in view of the numerous and formidable tribes of Indian savages which surrounded and threatened the feeble white settlements, while ship-loads of African savages were being daily landed in their midst. In order to check and restrain a policy which seemed to threaten the very existence of the colony, the Provincial Legislature enacted a law imposing a tax upon every slave who should be brought into Virginia. The British merchants, who were engaged in the African slave-trade, regarding this legislation as injurious to their interests and in violation of their rights, petitioned the King of England and his Majesty's ministers to annul the obnoxious law and protect them in their right to carry their slaves into Virginia and all other British colonies which were the common property of the Empire—acquired by the common blood and common treasure—and from which a few adventurers who had settled on the Imperial domain by his Majesty's sufferance, had no right to exclude them or discriminate against their property by a mere Provincial enactment. Upon a full consideration of the subject the King graciously granted the prayer of the petitioners; and accordingly issued peremptory orders to the Royal Governor of Virginia, and to the Governors of all the other British colonies in America,

forbidding them to sign or approve any Colonial or Provincial enactment injurious to the African Slave-Trade, unless such enactment should contain a clause suspending its operation until his Majesty's pleasure should be made known in the premises.

Judge Tucker, in his Appendix to Blackstone, refers to thirty-one acts of the Provincial Legislature of Virginia, passed at various periods from 1662 to 1772, upon the subject of African slavery, showing conclusively that Virginia always considered this as one of the questions affecting her "internal polity," over which she, in common with the other colonies, claimed "the right of exclusive legislation in their Provincial Legislatures" within their respective limits. Some of these acts, particularly those which were enacted prior to the year 1699, were evidently intended to foster and encourage, as well as to regulate and control African slavery, as one of the domestic institutions of the colony. The act of 1699, and most of the enactments subsequent to that date, were as obviously designed to restrain and check the growth of the institution with the view of confining it within the limit of the actual necessities of the community, or its ultimate extinction, as might be deemed most conducive to the public interests, by a system of unfriendly legislation, such as imposing a tax on all slaves introduced into the colony, which was increased and renewed from time to time, as occasion required, until the period of the Revolution. Many of these acts never took effect, in consequence of the King withholding his assent, even after the Governor had approved the enactment, in cases where it contained a clause suspending its operation until his Majesty's pleasure should be made known in the premises.

In 1772 the Provincial Legislature of Virginia, after imposing another tax of five per cent, on all slaves imported into the colony, petitioned the King to remove all those restraints which inhibited his Majesty's Governors assenting to such laws as might check so very pernicious a commerce as slavery. Of this petition Judge Tucker says:

"The following extract from a petition to the Throne, presented from the House of Burgesses of Virginia, April 1st, 1772, will show the sense of the people of Virginia on the subject of slavery at that period:

"'The importation of slaves into the colony from the coast of Africa hath long been considered as a trade of great inhumanity; and under its present encouragement we have too much reason to fear will endanger the very existence of your Majesty's American dominions.'"

Mark the ominous words! Virginia tells the King of England in 1772, four years prior to the Declaration of Independence, that his Majesty's American

dominions are in danger: Not because of the Stamp duties—not because of the tax on Tea—not because of his attempts to collect revenue in America! These have since been deemed sufficient to justify rebellion and revolution. But none of these are referred to by Virginia in her address to the Throne—there being another wrong which, in magnitude and enormity, so far exceeded these and all other causes of complaint that the very existence of his Majesty's American dominions depended upon it! That wrong consisted in forcing African slavery upon a dependent colony without her consent, and in opposition to the wishes of her own people!

The people of Virginia at that day did not appreciate the force of the argument used by the British merchants, who were engaged in the African slave-trade, and which was afterward endorsed, at least by implication, by the King and his Ministers; that the colonies were the common property of the Empire—acquired by the common blood and treasure—and therefore all British subjects had the right to carry their slaves into the colonies and hold them in defiance of the local law and in contempt of the wishes and safety of the colonies.

The people of Virginia not being convinced by this process of reasoning, still adhered to the doctrine which they held in common with their sister colonies, that it was the birth-right of all freemen—inalienable when formed into political communities—to exercise exclusive legislation in respect to all matters pertaining to their internal polity—slavery not excepted; and rather than surrender this great right they were prepared to withdraw their allegiance from the Crown.

Again referring to this petition to the King, the same learned Judge adds:

"This petition produced no effect, as appears from the first clause of our [Virginia] Constitution, where, among other acts of misrule, the inhuman use of the Royal negative in refusing us [the people of Virginia] permission to exclude slavery from us by law, is enumerated among the reasons for separating from Great Britain."

This clause in the Constitution of Virginia, referring to the inhuman use of the Royal negative, in refusing the Colony of Virginia permission to exclude slavery from her limits by law as one of the reasons for separating from Great Britain, was adopted on the 12th day of June, 1776, three weeks and one day previous to the Declaration of Independence by the Continental Congress; and after remaining in force as a part of the Constitution for a period of fifty-four years, was re-adopted, without alteration, by the Convention which framed the new Constitution in 1830, and then ratified by the people as a part of the new Constitution; and was again re-adopted by the Convention which amended the Constitution in 1850, and again ratified by the people as a part of the

amended Constitution, and at this day remains a portion of the fundamental law of Virginia—proclaiming to the world and to posterity that one of the reasons for separating from Great Britain was "the inhuman use of the Royal negative in refusing us [the Colony of Virginia] permission to exclude slavery from us by law!"

The legislation of Virginia on this subject may be taken as a fair sample of the legislative enactments of each of the thirteen Colonies, showing conclusively that slavery was regarded by them all as a domestic question to be regarded and determined by each Colony to suit itself, without the intervention of the British Parliament or "the inhuman use of the Royal negative." Each Colony passed a series of enactments, beginning at an early period of its history and running down to the commencement of the Revolution, either protecting, regulating, or restraining African Slavery within its respective limits and in accordance with their wishes and supposed interests. North and South Carolina, following the example of Virginia, at first encouraged the introduction of slaves, until the number increased beyond their wants and necessities, when they attempted to check and restrain the further growth of the institution, by imposing a high rate of taxation upon all slaves which should be brought into those colonies; and finally, in 1764, South Carolina passed a law imposing a penalty of one hundred pounds (or five hundred dollars) for every negro slave subsequently introduced into that Colony.

The Colony of Georgia was originally founded on strict anti-slavery principles, and rigidly maintained this policy for a series of years, until the inhabitants became convinced by experience, that, with their climate and productions, slave labor, if not essential to their existence, would prove beneficial and useful to their material interests. Maryland and Delaware protected and regulated African Slavery as one of their domestic institutions. Pennsylvania, under the advice of William Penn, substituted fourteen years' service and perpetual adscript to the soil for hereditary slavery, and attempted to legislate, not for the total abolition of slavery, but for the sanctity of marriage among slaves, and for their personal security. New Jersey, New York, and Connecticut, recognized African Slavery as a domestic institution lawfully existing within their respective limits, and passed the requisite laws for its control and regulation.

Rhode Island provided by law that no slave should serve more than ten years, at the end of which time he was to be set free; and if the master should refuse to let him go free, or sold him elsewhere for a longer period of service, he was subject to a penalty of forty pounds, which was supposed at that period to be nearly double the value of the slave.

Massachusetts imposed heavy taxes upon all slaves brought into the Colony, and provided in some instances for sending the slaves back to their native land; and finally prohibited the introduction of any more slaves into the Colony under any circumstances.

When New Hampshire passed laws which were designed to prevent the introduction of any more slaves, the British Cabinet issued the following order to Governor Wentworth: "You are not to give your assent to, or pass any law imposing duties upon Negroes imported into New Hampshire."

While the legislation of the several Colonies exhibits dissimilarity of views, founded on a diversity of interests, on the merits and policy of slavery, it shows conclusively that they all regarded it as a domestic question affecting their internal polity in respect to which they were entitled to a full and exclusive power of legislation in the several provincial Legislatures. For a few years immediately preceding the American Revolution the African Slave-Trade was encouraged and stimulated by the British Government and carried on with more vigor by the English merchants than at any other period in the history of the Colonies; and this fact, taken in connection with the extraordinary claim asserted in the Memorable Preamble to the act repealing the Stamp duties, that "Parliament possessed the right to bind the Colonies in all cases whatsoever," not only in respect to all matters affecting the general welfare of the empire, but also in regard to the domestic relations and internal polity of the Colonies—produced a powerful impression upon the minds of the colonists, and imparted peculiar prominence to the principle involved in the controversy.

Hence the enactments by the several colonial Legislatures calculated and designed to restrain and prevent the increase of slaves; and, on the other hand, the orders issued by the Crown instructing the Colonial Governors not to sign or permit any legislative enactment prejudicial or injurious to the African Slave-Trade, unless such enactment should contain a clause suspending its operation until the royal pleasure should be made known in the premises; or, in other words, until the King should have an opportunity of annulling the acts of the colonial Legislatures by the "inhuman use of the Royal negative."

Thus the policy of the Colonies on the slavery question had assumed a direct antagonism to that of the British Government; and this antagonism not only added to the importance of the principle of local self-government in the Colonies, but produced a general concurrence of opinion and action in respect to the question of slavery in the proceedings of the Continental Congress, which assembled at Philadelphia for the first time on the 5th of September, 1774.

On the 14th of October the Congress adopted a Bill of Rights for the Colonies, in the form of a series of resolutions, in which, after conceding to the British Government the power to regulate commerce and do such other things as affected the general welfare of the empire without interfering with the internal polity of the Colonies, they declared "That they are entitled to a free and exclusive power in their several provincial Legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity." Having thus defined the principle for which they were contending, the Congress proceeded to adopt the following "Peaceful Measures," which they still hoped would be sufficient to induce compliance with their just and reasonable demands. These "Peaceful Measures" consisted of addresses to the King, to the Parliament, and to the people of Great Britain, together with an Association of Non-Intercourse to be observed and maintained so long as their grievances should remain unredressed.

The second article of this Association, which was adopted without opposition and signed by the Delegates from all the Colonies, was in these words:

"That we will neither import nor purchase any slave imported after the first day of December next; after which time we will wholly discontinue the Slave-Trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are engaged in it."

This Bill of Rights, together with these articles of association, were subsequently submitted to and adopted by each of the thirteen Colonies in their respective Provincial Legislatures.

Thus was distinctly formed between the Colonies and the parent country that issue upon which the Declaration of Independence was founded and the battles of the Revolution were fought. It involved the specific claim on the part of the Colonies—denied by the King and Parliament—to the exclusive right of legislation touching all local and internal concerns, *slavery included*. This being the principle involved in the contest, a majority of the Colonies refused to permit their Delegates to sign the Declaration of Independence except upon the distinct condition and express reservation to each Colony of the exclusive right to manage and control its local concerns and police regulations without the intervention of any general Congress which might be established for the United Colonies. . . .

Let us pause at this point for a moment, and inquire whether it be just to those illustrious patriots and sages who formed the Constitution of the United States, to assume that they intended to confer upon Congress that unlimited and arbitrary power over the people of the American Territories, which they had resisted

with their blood when claimed by the British Parliament over British Colonies in America? Did they confer upon Congress the right to bind the people of the American Territories in all cases whatsoever, after having fought the battles of the Revolution against a "Preamble" declaring the right of Parliament "to bind the Colonies in all cases whatsoever?"

If, as they contended before the Revolution, it was the birth-right of all Englishmen, inalienable when formed into political communities, to exercise exclusive power of legislation in their local legislatures in respect to all things affecting their internal polity—slavery not excepted—did not the same right, after the Revolution, and by virtue of it, become the birth-right of all Americans, in like manner inalienable when organized into political communities—no matter by what name, whether Colonies, Territories, Provinces, or new States?

Names often deceive persons in respect to the nature and substance of things. A signal instance of this kind is to be found in that clause of the Constitution which says:

"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."

This being the only clause of the Constitution in which the word "territory" appears, that fact alone has doubtless led many persons to suppose that the right of Congress to establish temporary governments for the Territories, in the sense in which the word is now used, must be derived from it, overlooking the important and controlling facts that at the time the Constitution was formed the word "territory" had never been used or understood to designate a political community or government of any kind in any law, compact, deed of cession, or public document; but had invariably been used either in its geographical sense to describe the superficial area of a State or district of country, as in the Virginia deed of cession of the "territory or *tract of country*" northwest of the River Ohio; or as meaning land in its character as property, in which latter sense it appears in the clause of the Constitution referred to, when providing for the disposition of the "territory or other property belonging to the United States." These facts, taken in connection with the kindred one that during the whole period of the Confederation and the formation of the Constitution the temporary governments which we now call "Territories," were invariably referred to in the deeds of cession, laws, compacts, plans of government, resolutions of congress, public records, and authentic documents as "States," or "new States," conclusively show that the words "territory and other property" in the Constitution were used to designate the unappropriated lands and other property which

the United States owned, and not the people who might become residents on those lands, and be organized into political communities after the United States had parted with their title.

It is from this clause of the Constitution alone that Congress derives the power to provide for the surveys and sale of the public lands and all other property belonging to the United States, not only in the Territories, but also in the several States of the Union. But for this provision Congress would have no power to authorize the sale of the public lands, military sites, old ships, cannon, muskets, or other property, real or personal, which belong to the United States and are no longer needed for any public purpose. It refers exclusively to property in contradistinction to persons and communities. It confers the same power "to make all needful rules and regulations" in the States as in the Territories, and extends wherever there may be any land or other property belonging to the United States to be regulated or disposed of; but does not authorize Congress to control or interfere with the domestic institutions and internal polity of the people (either in the States or the Territories) who may reside upon lands which the United States once owned. Such a power, had it been vested in Congress, would annihilate the sovereignty and freedom of the States as well as the great principle of self-government in the Territories, wherever the United States happen to own a portion of the public lands within their respective limits, as, at present, in the States of Alabama, Florida, Mississippi, Louisiana, Arkansas, Missouri, Illinois, Indiana, Ohio, Michigan, Wisconsin, Iowa, Minnesota, California, and Oregon, and in the Territories of Washington, Nebraska, Kansas, Utah, and New Mexico. The idea is repugnant to the spirit and genius of our complex system of government; because it effectually blots out the dividing line between Federal and Local authority which forms an essential barrier for the defense of the independence of the States and the liberties of the people against Federal invasion. With one anomalous exception, all the powers conferred on Congress are *Federal*, and not *Municipal*, in their character—affecting the general welfare of the whole country without interfering with the internal polity of the people—and can be carried into effect by laws which apply alike to States and Territories. The exception, being in derogation of one of the fundamental principles of our political system (because it authorizes the Federal Government to control the municipal affairs and internal polity of the people in certain specified, limited localities), was not left to vague inference or loose construction, nor expressed in dubious or equivocal language; but is found plainly written in that Section of the Constitution which says:

"Congress shall have power to exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession

of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

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," taken in connection with the one empowering Congress "to exercise exclusively 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 to 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 authorize Congress "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 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 or 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 for 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....

This exposition of the history of these measures shows conclusively that the authors of the Compromise Measures of 1850, and of the Kansas-Nebraska Act

of 1854, as well as the members of the Continental Congress of 1774, and the founders of our system of government subsequent to the Revolution, regarded the people of the Territories and Colonies as political Communities which were entitled to a free and exclusive power of legislation in their Provincial legislatures, where their representation could alone be preserved, in all cases of taxation and internal polity. This right pertains to the people collectively as a law-abiding and peaceful community, and not to the isolated individuals who may wander upon the public domain in violation of law. It can only be exercised where there are inhabitants sufficient to constitute a government, and capable of performing its various functions and duties—a fact to be ascertained and determined by Congress. Whether the number shall be fixed at ten, fifteen, or twenty thousand inhabitants does not affect the principle.

The principle, under our political system, is *that every distinct political Community, loyal to the Constitution and the Union, is entitled to all the rights, privileges, and immunities of self-government in respect to their local concerns and internal polity, subject only to the Constitution of the United States*.