THE JUST SUPREMACY OF CONGRESS OVER THE TERRITORIES

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649244690

The Just Supremacy of Congress Over the Territories by George Ticknor Curtis

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

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JUST SUPREMACY OF CONGRESS

OVER

THE TERRITORIES.

BY GEORGE TICKNOR CURTIS.

SUPER ANTIQUAS VIAS.

BOSTON:
A. WILLIAMS AND COMPANY,
100, WASHINGTON STREET.
1859.

INTRODUCTORY NOTE.

It is, perhaps, scarcely necessary to say, that this pamphlet was written as an answer to the article by the Hon. STEPHEN A. DOUGLAS, which originally appeared in Harpers' Magazine, entitled "The Dividing Line between Federal and Local Authority; Popular Sovereignty in the Territories;" and which has since been republished in a separate form. Private engagements and other circumstances have delayed the publication of my Essay longer than I had originally intended; but I believe that the subject is not likely to lose its interest. The impersonal style in which it is written is to be accounted for by the fact that it was designed for publication in some periodical work, and it was not convenient to make any change in this respect after I determined to publish it in a pamphlet. I should add, that I have seen no other of Mr. Douglas's writings on this subject than the article to which this pamphlet undertakes to reply; nor have I read the papers written by the Attorney-General, Mr. Black.

G. T. C.

BOSTON, NOV. 5, 1859.

BOSTON:
PRINTED BY JOHN WILSON AND SON,
22, SCHOOL STREET.

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JUST SUPREMACY OF CONGRESS

OVER THE TERRITORIES.

THE appearance, in a popular magazine, of an article on a constitutional question, written by a prominent candidate for the Presidency, with his name prefixed to it, is something new. We do not know that there can be any reasonable objection to this mode of promulgating or defending political opinions. It has one advantage over electioneering speeches, inasmuch as what is written is likely to be more deliberate than what is spoken; and if our public men would employ the pen a little more, and the tongue a little less, we think that they and the country would be gainers. On the other hand, what is thus carefully prepared in an elaborate article, as the doctrine on which a statesman means to challenge the suffrages of his countrymen for the highest office in their gift, brings him in a peculiarly responsible attitude before the tribunals of contemporary criticism and public judgment. What he says and maintains in such a form is not like a Congressional speech, which may be thrown off in the heat of debate or while defending or attacking a particular measure, and which is liable, even if not likely, to be forgotten when the interest in the occasion has passed. Mr. Douglas steps forward boldly and frankly, as becomes him, and puts on record, in a journal of a very wide circulation, his opinions upon a grave constitutional question, which enters largely into the politics of the day; and the doctrine which he thus promulgates is notoriously relied upon by his friends, as the great topic, the championship of which is to carry him into the White House. He certainly will not

be disposed to complain if his opinions thus put forth are subjected to examination in the same form of discussion.

We shall begin what we have to say upon this subject with the free admission, that there are a good many elements of popularity both in Mr. Douglas's character and in his present position. The public man who presents himself as an advocate for the right of self-government for any people, however they are situated, will always command popular sympathy in this country. But we are not now concerned with Mr. Douglas's chances or means of political success, but with the soundness and correctness of his constitutional opinions. Whether he is or is not of that order of men who "would rather be right than be President," we do not presume to decide; but we are sure for ourselves, that, having no personal interest in the matter, we would rather be right than be able to prevent him or any other man from reaching the Presidency, if we had the power of all the nominating conventions or of all the voters in the land.

It is the purpose of Mr. Douglas's article to maintain, that the people of a Territory have the right to decide, independently of the will of Congress, whether the institution of slavery shall or shall not exist among them while they are in the Territorial condition. On a cursory reading of his paper, we were a little at a loss to determine whether he meant to be understood that this power belongs to the people of a Territory because the organic act bestows upon them general legislative power, or, as in the case of Kansas, declares that they shall be free to form their own institutions in their own way; or whether he holds that the people of a Territory are originally free to establish or prohibit slavery without any Congressional declaration or grant of such a power, or even against a Congressional prohibition. But, on a more careful perusal, we find that his argument goes the entire length of maintaining, that, in reference to what he calls their local concerns and internal polity, the people of a Territory are absolutely sovereign in the same sense in which the people of a State are sovereign. In order to establish what he calls "popular sovereignty in the Territories," Mr. Douglas undertakes to define the dividing line between federal and local authority; and he places it, in respect to the Territories, substantially where it is in respect to the States. He sums up the whole discussion in the following "principle," — "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."

A very important question, therefore, arises upon Mr. Douglas's proposition; namely, What does he mean when he says that the people of a Territory are "entitled" to all the rights of self-government? Are they "entitled" morally, or legally? as a matter of comity, or as a strict constitutional right? If Mr. Douglas were asked this question as a jurist, in a matter of private right involving a correct answer to it, would any man be disposed to risk a litigation upon the correctness of the views by which Mr. Douglas undertakes to guide and enlighten the political opinions of his countrymen? In our judgment, the dividing line between federal and local authority, in respect to the Territories, would have to be drawn more in accordance with settled principles than it is drawn by him, before it would be safe to admit the soundness of his very sweeping conclusion.

Nor is he any more satisfactory to us as a statesman than he would be as a jurisconsult. The importance of a clear and reliable answer to the question, "In what sense and how are the people of a Territory *entitled* to the full and absolute right of self-government?" will be apparent to any one who will consider that polygamy is an institution which must be within this right, if the right exists in the unqualified extent for which Mr. Douglas claims it. This, and a variety of other institutions which might be against the will of Congress and the entire policy of a Christian civilization, would come within his principle. The vast inconvenience of his doctrine, therefore, renders it in the highest degree necessary to ascertain where his opinions, if they are to become predominant in our government, are to lead us; for if it be true, as he seems to us to maintain, that the mere fact of their organization into a distinct political community entitles the people of one of the Territories of the United States, before they are admitted as a sovereign State of this Union, to make what laws or institutions they see fit, upon the plea that such laws or institutions relate to their internal concerns, it is quite essential to our peace and safety to know whether they are so "entitled" in a moral sense only, or in a strict constitutional and legal sense. If it is only as a moral claim that we are to regard the alleged

right, then, in each particular case, Congress can consider the expediency of yielding what is demanded. If, on the other hand, the right is a constitutional and legal one, Congress can exercise no volition in the matter. Still, it occurs to us to ask, if the latter is the true character of the supposed right, what was the necessity and what is the meaning of Mr. Douglas's grant, made in his own Kansas-Nebraska Act to the people of those Territories, of "perfect freedom to form and regulate their domestic institutions in their own way"? Why repeal the Missouri Compromise, and enact the principle of "non-intervention" by Congress, if the people of a Territory, after they are made a Territory, are "entitled" to say that Congress shall not "intervene" in respect to their domestic institutions?

But it is not our purpose to anticipate the course of Mr. Douglas's argument. We shall endeavor to state and to answer it fairly, and shall then suggest what seem to us to be the insuperable difficulties which surround it.

The first part of Mr. Douglas's paper is occupied with a statement that the American Colonies, in their struggle with Great Britain, placed themselves upon the assertion of a right to legislate in their Colonial Assemblies respecting their local concerns, free from all interference by the English Parliament. The use which he makes of this is sufficiently apparent from his proposition, that "the dividing line between federal and local authority was familiar to the framers of the Constitution" [of the United States], because they had had a controversy with their mother-country respecting the dividing line between the authority of Parliament and the authority of their Colonial Legislatures. Nothing can be more inaccurate than the idea of an analogy between the question which our fathers raised with the Imperial Government, and the question, under the Constitution of the United States, respecting the power of Congress over the Territories. In the first place, we are to remember that it was no easy matter, even for Englishmen of liberal principles of government and with just feelings towards their American brethren, to state what the true theory of the English Constitution then was on the subject of the right of Parliament to bind the Colonies. Lord Chatham, it is true, in one of the most magnificent periods ever uttered in St. Stephen's, undertook a distinction between the regulation of trade and the levying of taxes; and, in his haughty and daring dogmatism, he

went so far as to assert that "there is no such thing, no such idea, in this Constitution, as a supreme power operating upon property." Burke, on the contrary, refused to discuss the *right* of Parliament to bind the Colonies, in respect either to trade or to taxation. He regarded the abstract merits of the dispute as —

> "That great Serbonian bog,
> Betwixt Damiata and Mount Cassius old,
> Where armies whole have sunk;" —

and he bent the whole force of his splendid genius to the argument, that any exercise of the right, or attempt to exercise it, was inexpedient and dangerous. There is as little in the views maintained, in that controversy, on our side of the water, that can furnish a useful analogy, or aid us in determining what is the true relation of our Federal Government to those creatures of its legislation which we call the Territories. In the early stages of their contest with England, the people of the Colonies relied upon their charters and fundamental grants of political power, as so many assurances and guaranties of a limited right of independent local legislation. At a later period, when the contest grew closer, but when it was still necessary to secure a reconciliation if possible, they conceded the right of Parliament to bind them in matters of trade, but denied it in taxation. Soon, however, all consideration of their rights as British subjects, whether under charters or under the general principles of the Constitution of the Empire, was merged in the grand natural right of revolution, on which they constructed their "dividing line" between imperial and local authority. A triumphant Revolution, and an abrogation of all political power save their own, put an end to all disputes about their rights as subordinate or dependent communities. This portion of our history, therefore, can afford very little aid in drawing "the dividing line between federal and local authority" under a Constitution which no one has yet, happily, found it necessary to subject to any revolutionary process, but which all parties, by whatever name they are known, must administer upon rules that are consistent with the preservation of its just authority. The Constitution of the United States was not made for the purpose of embodying the principles of the Revolution. It was made in order that the fruits of that Revolution — the national independence — might not be lost in a state of anarchy, or in the tyranny to which anarchy inevitably tends. It was made in order that