AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 5: The Jacksonian Era – Powers of the National Government

Stephen A. Douglas, **Popular Sovereignty in the Territories** (1859)[1]

Stephen Douglas (1813–1861) was the longtime senator from Illinois, a leader of the northern Democrats, and the champion of "popular sovereignty." In the context of the controversy over the regulation of slavery in the territories, advocates of popular sovereignty held that the Constitution vested territorial legislatures with the power to determine whether to prohibit slavery. Congress, in this view, had the constitutional power to establish territorial legislatures but not the constitutional power to regulate domestic affairs in the territories. Douglas defended the theory of popular sovereignty during his 1858 debates with Abraham Lincoln and famously in an 1859 article in Harper's Magazine.

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[T]here are cases in which Congress may establish tribunals and local governments, and invest them with powers which Congress does not possess and cannot exercise under the Constitution. 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 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 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 confer but cannot exercise, are such as relate to the domestic affairs and internal polity of the Territory, and do not affect the general welfare of the Republic.

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. . . . 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 principlesof 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

[1] Excerpt taken from Stephen A. Douglas, *Popular Sovereignty: The Dividing Line between Federal and State Authority* (New York: Harper & Brothers Publishers, 1859).

> 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. . . .

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[I]nasmuch as the Constitution has conferred on the Federal Government no right to interfere with the property, domestic relations, police regulations, or internal polity of the people of the Territories, it necessarily follows, under the authority of the Court, that Congress can rightfully exercise no such power over the people of the Territories. For this reason alone, the Supreme Court were authorized and compelled to pronounce the eighth section of the Act approved March 6, 1820 (commonly called the Missouri Compromise), inoperative, and void there being no power delegated to Congress in the Constitution authorizing Congress to prohibit slavery in the Territories.

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This exposition . . . shows conclusively that the founders of our system of government . . . 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. . . .

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.