THE ORIGIN OF THE THEORY OF THE EXTENSION OF THE CONSTITUTION TO THE TERRITORIES *EX PROPIO VIGORE*

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At different times the query has been raised whether the Constitution extends to the territories of its own force, i. e. *ex propio vigore,* or whether it has to be legislated expressly to them. This point was dwelt upon in Downes v. Bidwell,[1] but the extraordinary division of even the majority of the Court, which arrived at the same results but by a different *rationale dicidendi,* did not close the question in a final way at the time.

It is not the purpose of this paper to discuss the validity of the theory, but to trace its origin, believing it to be of historical interest.

During the preceding decades to the Civil War the acquisition of territories was of unprecedented importance in sectional politics. Slavery was a vexing problem of itself in the states. The extension of slavery to the new territories became a most vexing problem.

Up to a few years before the Civil War, the North and the South, whose economic interests had grown so quite apart, were working on the theory that an equilibrium of their forces, represented by an evenly divided Congress, was the immediate solution to the problem of disunion. This was a solution of compromises and by its very nature only temporal. When the equilibrium was broken by a rapidly growing preponderance of non-slaveholding states, the South had to face the problem of sectional inequality. It was John C. Calhoun, the most brilliant expounder of Southern interests and Southern rights, who sought to conjure with that problem of inequality, which meant inferiority and even annihilation to them, by setting up a doctrine under which slavery was bound to exist in all the territories of the nation.

The war with Mexico in 1846 brought along with it a renewal of the problem of the extension of slavery. California and New Mexico were obtained from the southern neighbor. The North was ready to see to it that slavery would not flourish

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[1] 182 U. S. 244.

there. The South had earnest hopes to be able to make the Southwest a prolongation of the South. The Wilmot Proviso represented the North's attitude. It was a brief clause attached to the famous Two Million dollars Bill—a bill appropriating money to carry on the war—by which is was provided slavery should not exist in the territories to be obtained from Mexico, if any was obtained. The South's answer to the Wilmot proviso is embodied in the resolutions of Calhoun of February, 1847.[1] I shall quote them as they are a concise statement of the claims of the South at that time:

> Resolved, That the territories of the United States belong to the several States composing the Union, and are held by them as their joint and common property.
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> Resolved, That Congress, as the joint agent and representative of the States of this Union, has no right to make any law, or do any act whatever, that shall directly or by its effects, make any discrimination between the States of this Union, by which any of them shall be deprived of its full and equal rights in any territory of the United States acquired or to be acquired.
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> Resolved, That the enactment of any law which should directly, or by its effects, deprive the citizens of any of the States of this Union from emigrating, with their property, into any of the territories of the United States, will make such discrimination, and would, therefore, be a violation of the Constitution, and the rights of the States from which such citizens emigrated, and in derogation of that perfect equality which belongs to them as members of this union, and would directly tend to subvert the Union itself.
>
> Resolved, That it is a fundamental principle in our political creed, that people, in forming a constitution, have the unconditional right to form and adopt which they may think best calculated to secure their liberty, prosperity and happiness; and that, in conformity thereto, no other condition is imposed by the Federal Constitution on a State, in order to be admitted into this Union, except that its Constitution shall be republican; and that the imposition of any other by Congress would not only be in violation of the Constitution, but in direct conflict with the principles on which our political system rests.

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[1] Congressional Globe, p. 455, Feb. 19, 1847; 29 Cong. 2nd Sess.

After making an earnest pleading on behalf of these resolutions, (which were not voted upon, Congress closing its session before they were considered) Calhoun finished his speech by moving that the resolutions be taken up the next day. The dialogue which followed between him and Senator Benton, from Missouri, is quoted at some length, because it adequately represents the attitude of the public men from North and South, for although Benton was from Missouri and Missouri was a slave-holding state, he did not favor the extension of slavery.

> "Mr. Benton rose and said: Mr. President, we have some business to transact. There is something yet to be done to give effect to the ten regiment bill, and other important measures require our attention. Now, if anybody thinks that I am going to lay aside the necessary business of the session to vote on such a string of abstractions, he is greatly mistaken.
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> Mr. Calhoun: The Senator says he cannot take up abstractions. The Constitution is an abstraction. Propriety is an abstraction. All the great rules of life are abstractions. The declaration of independence was made on an abstraction; and when I hear a man declare that he is against abstract truth in a case of this kind, I am prepared to know what his course will be! I certainly supposed that the Senator from Missouri, the representative of a slave-holding state, would have supported these resolutions.
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> Mr. Benton: I will pursue my own course when the time comes. I know what are abstractions, and what are not. I am for going on with the business of the session, and I say, I shall not vote for abstractions years ahead, to the exclusion of business. The Senator from South Carolina says he calculated on my support. He is mistaken. He knows very well from my whole course in public life that I never would leave public business to take up firebrands to set the world afire.
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> Mr. Calhoun: The Senator does not at all comprehend me. I expressed a hope that he would be ready to support the principles presented in my resolutions.
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> Mr. Benton: I shall be found in the right place. I am on the side of my country and the Union.[1]

[1] Benton's Thirty Years' View, 2 vol. p. 729 et seq.

The reader will have noticed that in the last resolution of Calhoun, an effort was made to deny Congress power to prohibit slavery in the new territory, and a plea was made in favor of the right of the territory to decide for itself whether it was to be a slave-holding territory or not. But after the war with Mexico was over and the territories were finally acquired, the Southern statesmen found themselves in quite a predicament, because they had been denying the power of Congress to legislate in regard to slavery for the territories, and now that the territories belonged to the Union, they were found to be free. In 1829, Mexico had abolished slavery, and the institution had not been allowed in any of its provinces thereafter. As the United States had not overruled the legislation prevailing in the conquered country at the time of the cession, the new lands were non-slave-holding. What to do in such a difficult position?

The idea came to Calhoun and his associates that the only way to extricate themselves and the South of the new difficulty was to extend the Constitution to the territories, because that instrument, which was the supreme law of the land recognized slavery, and therefore, as soon as it was extended there, it would legally allow slavery. Accordingly, in July, 1848, a special committee appointed to bring a bill for the government of the territories acquired, in which Calhoun and his associates were in control, reported a very long bill, and at the end of it, in a place of very little prominence, a short clause was included extending the Constitution of the United States to the territories. Webster discussed the bill and never noticed it, and Benton even voted for the bill. I don't know whether this is a reflection on them as legislators, but fortunately for their viewpoint, the bill failed and nobody appeared to have been aware of the meaning and intention of the harmless clause.

In the last day of the session of 1849, when the general appropriation bill was sent from the House to the Senate, Senator Walker, of Wisconsin, introduced by request an amendment to it, providing for the extension of the Constitution to the territories.[1] It is interesting to notice that it was not Calhoun, the recognized leader of the South, who moved the amendment. This fact is rather significant in showing perhaps that the southern senators intended to surprise their opponents.

[1] Benton, Examination of the Dred Scott Case, p. 14.

Probably they did not want to have attached to the amendment, the sectional color which undoubtedly it would have acquired if Mr. Calhoun himself had introduced it. The fact that recourse was had to the form on an amendment to the general appropriation bill on the very last day of the session would tend to show that the Southern senators were willing to force it through by any means.

Webster, on hearing the amendment, opposed it on the ground that the Constitution was made for the States and could not be extended to the territories. Webster's opposition necessitated a southern reply. It was not Walker who rose to defend it, but Calhoun. Immediately it became quite evident that the real intention behind the amendment was to carry slavery to the territories, as the Constitution recognized such an institution.[1] The Senate was at the time controlled by a very slim southern majority, and the amendment was carried on the face of Webster's opposition, although as Senator Benton said, "by a close vote and before the object had been understood by all senators," proving again that southern tactics were not completely defeated by Webster's opposition.

The Bill was sent to the House and the amendment there was immediately voted down. A violent discussion ensued between the two Houses. It was March 3, 1849, in the evening. The President, following a tradition, had remained in the Capitol signing last minute bills. At 12 o'clock he returned to the White House, the appropriation bill not being yet agreed to. The House adjourned and left it up to the Senate to withdraw the amendment, or leave the government without any appropriation to carry on. It was well past midnight, and some senators refused to vote on the ground that Congress had finished its labors when the clock struck 12. Senator Cass expressed himself in this way:

> "As I am among those who believe that the term of this session has expired, and that it is incompetent for us now to do business, I cannot vote upon any motion. I have sat here as a mere looker on. I merely desire to explain why I took no part in the proceedings." [2]

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[1] The 3/5 ratio for taxation and representation purposes; the return of fugitive slaves to their owners etc.

[2] Benton's Thirty Years' View, 2 vol. p. 732.

And Senator Turney, of Tennessee:

> "I am one of those who believe that we have no right to sit here. The time has expired; one third of this body are not present at all, and the others have no right to sit here as a part of Congress." [1]

"It was 4 o'clock in the morning" narrates a senator present, "and the greatest confusion and disorder prevailed." It took a desperate effort on the part of Webster to bring a reconsideration of the obnoxious clause. It was then voted down, and the appropriation bill passed. It was signed by Mr. Polk, and I don't say President Polk purposely, because he had ceased to be President on the 12th hour of the 3rd., but was antedated the 3rd of March, to validate the law on its face.

Thus ended Calhoun's and his associates' effort to carry the Constitution to the territories. Being thus defeated, the old predicament arose, but in a more difficult form: the territories recently acquired were free; Congress was denied power to deal with slavery there by their very own assertion, and now, the amendment extending the Constitution to the territories, which was to save the day for them, was defeated. What was to be done, then?

Calhoun's brains were too powerful to be overcome by the difficulty. If the amendment to extend the Constitution to the territories had failed, why should not the Constitution extend *ex propio vigore,* by its own force, without need of being legislated to them? His affirmative assertion, to that effect is, as far as I have been able to ascertain, the first time that the doctrine of *ex propio vigore* was propounded. These are Mr. Calhoun's own words:

> "I deny that the laws of Mexico can have the effect attributed to them (that of keeping slavery out of New Mexico and California). As soon as the treaty between the two countries is ratified, the sovereignty and authority of Mexico in the territory by it becomes extinct, and that of the United States is substituted in its place, conveying the constitution with its overriding control over all the laws and institutions of Mexico inconsistent with it." [2]

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[1] Ibid.

[2] Nile's Register, vol. LXXIV p. 61; Curtis' Constitutional History of the U. S., vol. 2, p. 364.

The bill which finally provided for governments in the territories of California and New Mexico, permitted them to come into the Union as free or slaveholding states, as determined by their own constitutions.

The Dred Scott decision [1] which followed shortly thereafter, settled the controversy along the lines of Calhoun's contentions. That decision, however, must be looked upon as reversed in many points, if not directly by posterior adjudications, by the blood and iron of the Civil War. Mr. Thomas H. Benton, the Missouri Senator of 30 years standing, of whom President Roosevelt wrote a biography in admiration, wrote an "Examination of the Dred Scott Case" [2] attacking the decision on legal grounds and because it was a political decision. It is from that author that I now quote:

> "A new dogma was invented to fit the case—that of the transmigration of the Constitution—(the slavery part of it) into the territories, overriding and overruling all the anti-slavery laws which it found there, and planting the institution there under its wing, and maintaining it beyond the power of eradication, either by Congress or the people of the territory. Before this dogma was proclaimed, efforts were made to get the Constitution extended to these territories by act of Congress; failing in these attempts, the difficulty was leaped over by boldly assuming that the Constitution went itself—that is to say, the slavery part of it. History cannot class higher as a vagary of a diseased imagination this imputed self-acting and self-extension of the Constitution. No part of it can reach a territory unless imparted to it by act of Congress." [3]

Before closing, a few considerations in regard to the extension of the Constitution to the territories in our days, seem in point.

A study of the territorial decisions of the Supreme Court of the United States has shown that Congress has enormous powers in legislating for its territories. But this power is by no means unlimited. Certain constitutional restrictions attach to this power. In order to answer the question, How far is Congress

[1] Dred Scott v. Sanford (1856) 19 Howard 393.

[2] Examination of the Dred Scott Case by Thomas H. Benton, New York, 1858, Appleton & Co.

[3] Op. Cit. Introduction; Thirty Years' View, 2 vol. p. 713.

limited by the Constitution, it is imperative that this other query be answered, How far does the Constitution extend or apply to the territories.

Obviating decisions of minor importance, or decisions which stand alone, and taking into consideration only the preponderance of decisions, which in our judgment form the law in this point, it would be safe to state that the Constitution extends or applies to the territories.

(a) when the territories are *incorporated* into the Union, in so far as the nature of things permit.

(b) to the *unincorporated* territories, only and in so far as it protects the fundamental rights, privileges and immunities of the inhabitants of the territory.

These "fundamental" rights have never been determined in a clear cut way by the court, although in more than one occasion it has intimated that most of the privileges and immunities contained in the Bill of Rights are "fundamental," with the exception of the right to jury trial, which in Hawaii v. Mankichi (190 U. S. 197) was decided not to be so.

In a rather recent case, Balzac v. Porto Rico,[1] the Supreme Court has made a nice distinction between *extending* and *applying* the Constitution to the territories. The Court has maintained there that the Constitution is coextensive with sovereignty, and therefore it extends wherever the United States has jurisdiction. This really amounts to say that the Constitution follows the flag.

Granted that the Constitution extends, the question is to determine which of its provisions are applicable. Applicable in the sense of limiting the legislative or executive departments of the federal government when legislating or acting for the territories. Justice White, of the concurrent majority in Downes v. Bidwell, seems to have taken the same view, and in the Balzac case the Supreme Court affirms that theory as the correct one. Per Chief Justice Taft it said:

> "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted. * * * The real issue in the Insular Cases was not whether the Constitution extended to the Philippines or Porto Rico when we went there,

[1] 258 U. S. 298.

> but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with the new conditions and requirements."

It will be observed that this adjudication does not alter the substantial issues determined in the Insular Cases. It is merely using a somewhat different language, which perhaps results in a better constitutional fiction, without modifying the fundamentals of the constitutional mechanics. In practice, if not in theory, there is very little difference, if any, between stating that only the applicable portions of the Constitution extend to the territories, and that the Constitution extends to the territories, but only the proper provisions apply.

One thing is certain, however, in either case. The Constitution need not be legislated for the territories. *A fortiori,* the Constitution extend *ex propio vigore.* Accepting the language of the Court in the Balzac case, therefore, it would seem that after all Calhoun was not so much astray when he maintained such doctrine, even if Senator Benton called it the product of a "diseased imagination".