

CONSTITUTIONAL EXPANSION.

It seems to be an historical fact that any proposition to enlarge the territories of the United States, projects upon the mind of its opponents the gloomiest visions of national disaster. Happily, these have hitherto proved premature, and those of us who are disposed to be cheerful in matters of national concern may be permitted to accept the omen for the case now in hand.

When Louisiana was annexed, the New England Federalists were stirred up to a state of frenzy, which we see reproduced in speeches and newspaper articles to-day. Josiah Quincy the younger foresaw the end of the republic, and openly threatened in Congress that Massachusetts would save herself from the impending ruin by withdrawing from the Union if Louisiana were annexed.

Even Jefferson described Louisiana as a "foreign nation," and so it was—so foreign that even to-day its forms of legal procedure are modelled on a foreign system of law.

In 1848, when California and New Mexico (which then included also Utah, Nevada, Colorado and Northern Arizona), were acquired from Mexico by partial conquest and subsequent cession, Daniel Webster led the opposition in the Senate, and his speeches not only exhaust all the arguments now made against expansion, but reflect the same "undue sense of right," as Mr. Whistler calls it, under which Senators are now laboring.

The following quotation is from a speech delivered by Mr. Webster in the Senate, March 23, 1848, on the objects of the Mexican war:

"I say, sir, that, according to my conscientious conviction, we are now fixing on the Constitution of the United States, and its frame of government, a monstrosity, a disfiguration, an enormity! Sir, I hardly dare trust myself. I don't know but I may be under some delusion. It may be the weakness of my eyes that forms this monstrous apparition. But, if I may trust myself, if I can persuade myself that I am in my right mind, then it does appear to me that we in this Senate have been and are acting, and are likely to be acting hereafter, and immediately, a part which will form the most remarkable epoch in the history of our country. I hold it to be enormous, flagrant, an outrage upon all the principles of popular republican government and on the elementary provisions of the Constitution under which we live, and which we have sworn to support.

"I think I see a course adopted which is likely to turn the Constitution of the land into a deformed monster, into a curse rather than a blessing; in fact, a frame of an unequal government, not founded on popular representation, not founded on equality, but on the grossest inequality; and I think that this process will go on, or that there is danger that it will go on, until this Union shall fall to pieces. I resist it, to-day and always! Whoever falters or whoever flies, I continue the contest!"

Compare this stately and sonorous blast with the lighter, but not less vigorous note of Professor Sumner, under the title of the "Conquest of the United States by Spain" (YALE LAW JOURNAL for January, 1899):

"The question at stake is nothing less than the integrity of this (confederated) state in its most essential elements. The expansionists have recognized this fact by already casting the Constitution aside."

And again:

"That is the great fundamental cause of what I have tried to show throughout this lecture, that we cannot govern dependencies consistently with our political system, and that if we try it the state which our fathers founded will suffer a reaction which will transform it into another empire just after the fashion of all the old ones." * * *

And then, as if the republic were already fading from sight: "And yet this scheme of a republic which our fathers formed was a glorious dream which demands more than a word of respect and affection before it passes away."

There you have the same charge of violating the Constitution and the same prophecy of evil to come.

The charge may be answered categorically, but the prophecy can only be respectfully laid aside with Daniel Webster's to await results.

If space permitted, every objection—geographical, moral, racial and constitutional—now urged against the annexation of the Philippines could be extracted from Mr. Webster's speeches against the annexation of California.

And although distinctions may well be drawn in the light of what has happened since 1848, the fact remains that California looked just the same to Mr. Webster then as the Philippines now look to Senator Hoar, who is certainly no better equipped for prophecy.

Let us, then, keep both feet on the ground and consider what, if any, just reason exists for rejecting the agreements made by our accredited representatives at Paris, and for violating the

implied agreement to become responsible for the preservation of life and property in Manilla, which resulted from our refusal to allow any other power to interfere for that purpose.

Taking up the constitutional questions, it must in the first place be conceded that the constitutional right of conquest is either unlimited or limited only by the discretion of Congress.

All the cases agree to this, including the Dred Scott case, and as this case is now being quoted as holding that the right of Congress to acquire and govern distant territories is limited by the Constitution, it is worth while to state the facts briefly.

Two questions were involved: First, the jurisdiction of the court, which turned on the question whether Dred Scott, assuming him to be a free negro, was a citizen of Missouri, and as such entitled to sue in the United States Courts; and second, whether Dred Scott had been emancipated by the act of his master in carrying him into the territory of the United States known as Upper Louisiana, and this latter question turned on the constitutionality of the Missouri Compromise Act, which declared that neither slavery nor involuntary servitude should exist in said territory. The constitutionality of this act was challenged on two grounds: That the power of Congress to govern territories was not plenary, but limited; and on the specific ground that as the Constitution and laws of the United States recognized property in slaves, Congress had no right to deprive any person of such property without due process of law.

If the court had been content to rest its decision on the last named ground, its conclusions would have been irresistible, but the difficulty was that the court first held that it had no jurisdiction, and nevertheless proceeded to hold the Missouri Compromise Act invalid on both of the grounds stated. Its decision on this branch of the case has, therefore, been regarded as obiter; and as to so much of it as questions the plenary authority of Congress over the territories, the contrary doctrine has since been repeatedly announced.

It was in the course of that part of the decision which has since been overruled, that Mr. Chief Justice Taney made the remarks now quoted from, to the effect that the Constitution makes no provision for the acquisition or government of distant colonies. But what is not so often quoted is the admission on the next page (19 How. 447), that the question of what territory shall be acquired is "a question for the political department of the government, and not the judicial, and whatever the political department of the government shall recognize as within the limits of the United States, the judicial department is also bound to recognize," etc.

That is to say, that the right to acquire territory rests under the Constitution in the discretion of Congress, and not being subject to judicial review, is, therefore, practically unlimited.

So that the fact is that the Supreme Court has never questioned the right of Congress, under the war and treaty making powers, to acquire by conquest or purchase any territory which it sees fit to take.

But it is said that we have not actually conquered the Philippines, because a protest is now made against the claim of dominion by a government having some organization, of which Aguinaldo is the head.

What, then, was the situation of that government, or of the party now supporting it, at the time the United States interfered?

In a general way we know that Spain was then in full control of the islands, with no opposition, unless from scattered bands of insurgents beyond the control of Aguinaldo's example, and without pretense of civil organization.

There had been a formidable insurrection which had been suppressed after a two years' struggle, notable for the barbarity displayed on both sides; but it had been formally terminated. Aguinaldo, having sold out a desperate cause for a sum reported to be \$200,000, was then living in Hong Kong, whence he was conveyed by the United States authorities to Luzon. The agents of Aguinaldo now affirm that the United States authorities promised independence to the insurgents, and certain Senators describe them as our "allies."

These claims are sufficiently answered by the fact that they involve an accusation of treachery against the administration, and if, with apologies to the President, we inquire further, we find that one prerequisite of a treaty or alliance—namely, the existence of an organized party of the second part—was entirely lacking until within the last few months. Moreover the conduct of the admiral and commanding general in refusing to recognize the insurgents as belligerents is quite inconsistent with any such agreement.

The fact must, therefore, be that no agreement was made inconsistent with assertion of sovereignty by the United States.

Nor has any condition since arisen which forbids the United States from exercising dominion, or which would justify it in evading the responsibility. Our experience in Cuba should teach us to be cautious in accepting as accurate the valuation which governments of this character put upon themselves. It is easy for the opposition, which is not responsible for the con-

sequences, to allege that the Philippine government is capable of administering the affairs of the archipelago, but it must be conceded that no responsible administration could afford to take the risk of abandoning Manila to Aguinaldo.

The case is clearly one of a transfer of sovereignty from Spain to the United States, without a flaw in the title, and therefore the real moral right which Senators assert for the Philippines is the right of peaceable secession.

The next question is what is the constitutional authority of Congress to govern the ceded territory?

This question first came before the Supreme Court in 1828 in a case in which Daniel Webster argued that the Constitution did not extend into the then territory of Florida; the point in question being whether the judicial authority of the United States in the territory of Florida must be exercised in the manner defined in Article III of the Constitution. The court held that Article III of the Constitution was not operative in Florida, and Mr. Chief Justice Marshall, in delivering the opinion, used the following instructive language:¹

“The course which the argument has taken will require that in deciding this question, the court should take into view the relation in which Florida stands to the United States.

“The Constitution confers absolutely on the government of the Union the powers of making wars and of making treaties. Consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

“The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession or on such terms as its new master shall impose. On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the state.”

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: “The inhabitants of the territories which His Catholic Majesty cedes to the United States

¹ *Insurance Co. v. Canter*, 1 *Sct.* 511.

by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition independent of stipulation. They do not, however, participate in political power, they do not share in the government, till Florida shall become a state. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

The unlimited authority of Congress to govern the territories was, as already pointed out, questioned in the Dred Scott case; but it has since been re-examined in the famous controversy over the anti-Mormon acts, and is now well settled, as the following extracts show.

Murphy v. Ramsey involved the constitutionality of an act disfranchising persons guilty of polygamy in the territory of Utah, and the court said: ²

"It rests with Congress to say whether, in a given case, any of the people, resident in the territory, shall participate in the election of its officers or the making of its laws, and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it, as it may deem expedient. The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the states and the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, state and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

One more citation will bring the right of Congress to an exact definition. In 1890 Ward McAllister, Jr., a Judge of the United States District Court of Alaska, having been removed from office by President Cleveland, appealed to the Supreme Court a suit to recover salary due after his removal. Under

² 114 U. S. 15 (1884).

Section 1768 of the United States Statutes the President is given power during a recess of the Senate to suspend any officer appointed by and with the consent of the Senate, except judges of the courts of the United States. It was argued that *McAllister* came within the exception, and the court said: ³

"The whole subject of the organization of territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive, and the manner in which they may be removed or suspended from office, was left, by the Constitution, with Congress under its plenary power over the territories of the United States. How far the exercise of that power is restrained by the essential principles upon which our system of government rests, and which are embodied in the Constitution, we need not stop to inquire; though we may repeat what was said in *Mormon Church v. United States*, 136 U. S. 1, 44: 'Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but these limitations would exist rather by inference, and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions.'"

So far, then, as general legislation is concerned, the only limitations on the power of Congress over the territory of the United States are inferential limitations which rest on our conception of political right and wrong.

The question has been raised whether the provision of the Constitution that all duties shall be "uniform throughout the United States," requires that the tariff laws of the United States should be extended to the Philippines. And that brings up the question whether the phrase "United States" in the Constitution, includes territories. Doubtless the logic of the *Mormon* cases, in which the court came squarely to the point that the Constitution was for the states alone, would require this question to be answered in the negative. In 1820 Mr. Chief Justice Marshall, in upholding the right of Congress to lay direct taxes on the District of Columbia, held that the term "United States" denoted the great republic composed of states and territories. In many other cases, however, before and after, the same phrase has been construed as limited to the sovereign "states" who, alone, are parties to the contract, and a differential tariff applied to the territories would probably be upheld, provided that the equality of impost duties guaranteed to the several states was not directly or indirectly affected thereby.

³*McAllister v. U. S.* 141, U. S. 174.

The next interesting question is what are the personal rights of the inhabitants of the ceded territories. Are they citizens of the United States? Or entitled to all the privileges and immunities of such in the absence of any treaty stipulation to that effect?

They are not citizens of the United States, for, to become such, an alien born must be naturalized; and as it is not enough that an alien should come within the jurisdiction, it would seem to be not enough that the jurisdiction should be extended to take in the alien. Whether persons born in a territory are citizens of the United States, is a question which the Supreme Court has not decided, although it has recently decided that a person born of Chinese parents in a state is a citizen. In this connection, the interesting article of Professor Baldwin (*YALE LAW JOURNAL*, January, 1899), on the "People of the United States," should be consulted.

But the question is not so important as it seems, for citizenship in the United States does not imply any political rights, irrespective of residence. If a citizen of the United States moves into Alaska he loses the right of suffrage, has no voice in the local government, is ruled by officers appointed by the President, who enforce laws, made thousands of miles away by a Congress in which he is not represented, his house is liable to be searched for sealskins and liquor, and under Section 1955, General Statutes, the President may deprive him of the sacred right of bearing arms.

There are in fact five well recognized degrees of relationship which now exist between the inhabitant of the United States and the Federal Government:

First—Citizens of the United States who are also citizens of a state, and who possess, or may possess (under state regulations) the full measure of political privilege, participating both in the local and in the Federal Government.

Second—Citizens of the United States residing in the organized territories, Arizona, New Mexico, and Oklahoma, who have, by the grace of Congress, a certain measure of local self-government, but who do not participate in the Federal Government.

Third—Citizens of the United States residing in unorganized territories of the United States, such as Indian Territory and Alaska, who have no political privileges whatever, but who are governed by the President under the general direction of Congress.

Fourth—That large class of persons resident in the states and territories who are not citizens of the United States, but because they owe no other allegiance, are subjects.

Fifth—The Indians, whose position is defined as wards of the nation.

These various relations of the individual to the United States call for the exercise by Congress of a range of control and government extending from a military despotism to a democracy; and it is self-evident that a Constitution flexible enough to adapt itself to so wide a range of Congressional authority, is adequate to the government of Porto Rico and the Philippines; since whatever form such government may take, it must certainly be found between the extreme types already in force and already sanctioned by the highest constitutional authority.

Now, if right, we have reached the following conclusions:

First—That the United States as an incident of warfare or of the treaty-making power, has an unlimited power, controlled only by the discretion of Congress, to acquire territory by conquest or purchase.

Second—That the Constitution of the United States does not extend over territory thus acquired, but that Congress has plenary power to govern such territory, subject only to limitations existing by inference from the principles underlying our ideas of government.

Third—That in point of fact, Congress, in dealing with the different problems presented by the state, the organized territory, the unorganized territory, and the Indian, has for many years exercised an assortment of powers which includes all those necessary to the government of Porto Rico and the Philippines, without exceeding its constitutional authority.

And, finally, that the Philippines were originally occupied by the United States in the proper exercise of a constitutional right; that their subsequent purchase is a constitutional exercise of the treaty-making power, and that their future government is entirely possible within the constitutional limitations of congressional power.

Having thus fairly met the charge that the acquisition and retention of the Philippines is a violation of the Constitution, it must be admitted that if the United States has assumed any contractual or moral obligation in respect of them, it ought to be discharged. No one will deny that.

It seems clear that there is a contractual obligation arising from the refusal to allow other governments to interfere for the protection of the life and property of their subjects. The implied agreement behind our refusal to allow Germany, for example, to interfere, was that the United States was able and

willing to take care of German subjects. And the agreement is none the less real because it may not be possible for Germany to recover for a breach of it.

The moral obligation is not less obvious, although some persons deny its existence.

Montesquieu defined conquest as a "necessary, legitimate and unfortunate right, which always leaves an immense debt to be paid to humanity." The recognition of that truth marks the difference between civilization and savagery. To a civilized community the only justification of conquest is to see to it that the last state of that land is better than the first.

That is what we have begun to do in Cuba, and the results already achieved demonstrate that it would have been a national crime not to have undertaken the task.

Why, then, should we not do our duty in the Philippines? Is it because Aguinaldo and his alleged 40,000 men stand in the way? That is a difficulty, but it does not lessen the duty. And it is to be regretted that this difficulty is largely due to the open encouragement to resistance afforded by the opponents of expansion.

In their anxiety to cross a bridge before they get to it Congressmen and Senators are increasing the difficulty of doing something which must be done and is going to be done, and has nothing to do with the indefinite retention of the Philippines; namely, the restoration of order and security to life and property in the Philippines. That is a duty which, wisely or unwisely, we have taken upon ourselves and which we cannot unload upon the conscience of Spain or Aguinaldo, or anybody else. The rejection of the treaty would not discharge it.⁴ Even the recognition of Philippine independence would not discharge it, for the case would then be exactly like the case of Cuba, and the same necessity of asserting authority for the purpose of establishing a stable government would remain.

Any opposition which tends to obstruct this inevitable task is, therefore, to be deplored. If it is expedient that we should retire from the Philippines, let us wait until we can retire with honor and with our obligations to Spain, to civilization and to ourselves, performed.

In the meantime let us do our present duty as we see it plainly, hoping that as the work approaches completion some light will appear to guide our future course.

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⁴ This paper was written before the treaty was ratified.