

### DESPOTIC POWER VERSUS DELEGATED AUTHORITY.

*For The Conservative by Edwin Burrill Smith, of the Chicago Bar.*

"In vain we call old notions fudge,  
And bend our conscience to our dealing;  
The ten commandments will not budge,  
And stealing will continue stealing."

—LOWELL.

The Union, under the leadership of Abraham Lincoln, ceased to be divided. Shall we voluntarily again divide it? Shall we permit despotic power to be set up at Washington, there to compete with delegated authority for final supremacy?

"We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution of the United States of America."

—PREAMBLE.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."—FOURTEENTH AMENDMENT.

"It was in the oath I took that I would, to the best of my ability, preserve, protect, and defend the constitution of the United States. \*\*\* Nor was it my view that I might take an oath to get power, and break the oath in using that power. \*\*\* I did understand \*\*\* that my oath imposed upon me the duty of preserving, to the best of my ability, by every indispensable means, that government, that nation, of which the constitution was the organic law."—LINCOLN.

"The late M. Guizot once asked me how long I thought our republic would endure? I replied: 'So long as the ideas of the men who founded it continue dominant' and he assented."—LOWELL.

National expansion involves "a greater danger than we have encountered since the Pilgrims landed at Plymouth—the danger that we are to be transformed from a republic, founded on the Declaration of Independence, guided by the counsels of Washington, into a vulgar, common-place empire, founded upon physical force."—SENATOR HOAR.

### NATIONAL EXPANSION UNDER THE CONSTITUTION.

The new policy of national expansion, into which we are drifting, calls for a re-examination of the essential conditions of free government. What will our new possessions do with us, not what shall we do with them? is, as Bishop Potter suggests, the real question. Our institutions rest upon the proposition that governments derive their just powers from the consent of the governed. This consent means more than mere acquiescence. It contemplates the active participation by the governed in a government which is their own and which they alone control. Our governments, local, state and national, exercise only such authority as is conferred upon them by the people. None of them claims or exercises original or arbitrary power. All, as the agents of the governed, execute none but delegated authority.

The president and the congress of the United States must govern all new acquisitions of territory under and by

virtue of the constitution, or by self-assumed and arbitrary power. The constitution created a nation of states, "an indissoluble union of indestructible states." It called into being a United States of America, not a United States of America and Asia. Every person born or naturalized within its borders was to be a citizen of the nation and of the state of his residence. All the people of the nation were to constitute a brotherhood of citizens having equal rights before the law, which might not be denied or abridged because of race or color. There were to be no subjects, but only citizens. Congress might organize territorial governments for the administration of the sparsely settled national domain outside the states; but the territorial form of government was to be but temporary and merely preparatory to statehood. Such was our noble scheme of popular government; such was our splendid vision; and until now there has been no desire among us to have it different.

The power to acquire new territory has long since ceased to be a subject of controversy; but all our acquisitions heretofore made in its exercise have been of contiguous and unoccupied or but sparsely settled territory. Our people have rushed into these empty spaces and planted there our institutions without let or hindrance. The widely assumed analogy between such acquisitions and those now proposed of distant islands, already occupied by half-civilized races of different languages and institutions and having a climate in which white men can not or will not live, is purely fantastic. The precedent of our earlier acquisitions has already been greatly overworked as a justification for a policy which is in fact entirely novel. If this is not so, and the proposed acquisition of the Philippines is but an incident of an accepted national policy, it follows that these islands are to be acquired and promptly admitted to statehood, as all our prior acquisitions of sufficient population have been; or at least that they shall be given temporary territorial governments preparatory to their early admission as states.

The power to acquire territory being admitted, whether it shall now be exercised—especially in the case of the Philippines—is for Americans the gravest question of our time. Can these islands be acquired without their becoming the property, the territory, of the United States? If such territory, they will at once be subject to the constitution and general laws of the United States. The moment new territory is incorporated into the national domain its inhabitants become citizens of the United States, and as such "entitled to all privileges and immunities of citizens in the several states." The supreme court has held that "the provisions of the constitution relating to trials by jury for crimes and to criminal prosecutions apply to the

territories of the United States;"\* that congress in legislating for the territories and District of Columbia is subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments;† and that all citizens of the United States have "the right to come to the seat of government," to have "free access to its seaports," and to pass freely from one part of the country to every other part.‡ The supreme court has also, as late as March last, held that under the fourteenth amendment, which provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." American born Chinamen of alien parentage are citizens and free from the provisions of the exclusion treaties and acts; also that congress has no authority "to restrict the effect of birth, declared by the constitution to constitute a sufficient and complete right to citizenship."§

The inhabitants of annexed territory become citizens of the United States and of the several states without naturalization. This rule of international law has always been accepted by us without question until this year. The attempt by congress to prevent its application to Hawaii will fail. To sustain it, the supreme court must hold that congress may acquire territory conditioned that it shall not be subject to the constitution: that it may determine whether acquired territory shall be its private possession or the property of the United States; in a word, that it may in its discretion assume and exercise arbitrary power.

The constitutional power of congress to "make all needful rules and regulations respecting the territory or other property of the United States" thus appears to have important limitations. The few national expansionists who seem to have considered how we shall govern remote islands inhabited by mixed and half-civilized races, have too lightly assumed that the power of congress to make such rules and regulations is sufficient warrant for any kind of administration whatever. The truth is that the bill of rights must be applied to all the territory of the United States. The mere acquisition of territory renders it subject to the constitution and general laws of the United States. To realize something of what this means, imagine the administration of the criminal code among the half-civilized and savage races of the Philippines by the complex methods prescribed by the fifth and sixth amendments.

The attempt to impose free institutions from without upon half-civilized

\*Thompson vs. Utah, 170 U. S. 343, 346.

†The American Publishing Society vs. Fisher, 166 U. S. 464, 466.

‡Crandall vs. Nevada, 6 Wall., 35.

§United States vs. Wong Kim Ark, 169 U. S. 649, 705.