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EDITOR AND PROPRIETOR.

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CONGRESSIONAL.

DEFERRED DEBATE.

IN SENATE—*Monday, February 26, 1849.*

The question being upon Mr. DAYTON's amendment to the general appropriation bill, as modified by himself,

Mr. DOWNS said: Mr. President, I know that but very little time is left, and that the Senate has much to do, and that, consequently, there is no time to enter into anything like a general discussion of this subject. I shall, therefore, offer a few remarks on two points only. The first is the position assumed by the honorable senator from New Jersey, [Mr. DAYTON,] that the constitution of the United States either does not extend, *proprio vigore*, to the new territories, or that it is incompetent for Congress to extend it thither.

I shall not enter into a discussion of the subject, as it has been already pretty extensively discussed. I wish only to express my astonishment at the extraordinary position assumed by the honorable senator from New Jersey. It seems to me that it totally changes the position heretofore assumed by that senator, and others from his section, on this slave question. Why, sir, we have been discussing here, during the last session, about what rights the southern section of the United States, or the people of that section, have in the new territories under the constitution of the United States. The senator from New Jersey entered into that discussion as fully and as ably as any senator on this floor. Various views of the operation of the constitution in those territories were presented. Everybody seemed to consider that the constitution must necessarily extend there. I say that, after all this, I cannot but express my astonishment that the senator has brought forward a new light upon that subject, and has now found out that all our discussions heretofore have been absurdities; that all that was said at the last session about the operation of the constitution of the United States in those territories was useless, because we have no power to extend the constitution at all.

I am astonished, Mr. President, on another ground. I have heard the suggestion frequently made—and I lament that the suggestion was ever made—that it is not by the mass of the people of the North, but only by certain fanatics there, that the constitution was sought to be amended, so as to strike out of it that provision which guaranties the institution of slavery in the South. I must congratulate those fanatics, and those who support them, that a new light has beamed on this subject; that it is not necessary to amend the constitution in order to deprive it of that operation in favor of the South so far as it regards the new territories—that it is only necessary to adopt this new construction of the extent of the operations of the constitution, and the rights of the South are at once swept away, so far as the territories are concerned.

I am astonished at this suggestion for another reason. We of the South are frequently taunted with a disregard of the constitution and want of attachment to the Union, which charges are utterly without foundation. We have been told that, however objectionable the institution of slavery might be, yet, so far as it was guarantied by the constitution, we should have it to the fullest extent. Now, however, I regret to see one of the leading men of the North—still more I regret to see two, yea perhaps more—take the ground, in connexion with this subject, that we shall not have the full extent of the provisions of the constitution. But, sir, while I regret that such a position has been taken on this subject, I rejoice at it on one account. I wish it to be recorded, that it may stand in judgment against these gentlemen hereafter. I consider the ground which they have taken on this subject, and the particular reason which the honorable gentleman from New Jersey has given for his objection, as a retraction of what was said by gentlemen at the last session as to the operation of the constitution in those territories. I understand the principal ground of objection of the honorable senator from New Jersey to be, that the extension of the constitution over those territories would give to the South rights which they could not otherwise possess. As I do not wish to mistake or to misrepresent him, I will quote his own language, as published in the papers. He says:

"In the third place, and more especially, it is objectionable because it assumes to extend by present enactments the constitution of the United States over the territories of California and New Mexico."

"Now, sir, in the first place, this is objectionable because of its changing the present condition of things in reference to the question of carrying slaves into these territories."

There are other clauses in the same paragraph which I will not read. The senator then objects to extending the constitution over California, because it changes the state of things there; because it changes the issue; because it places those who hold southern views on a different footing. Mr. President, I am glad, because it is an implied admission that we were right and they were wrong in the discussion here last session, and that we have a right under the constitution to remove with our slaves to California and New Mexico. But has the senator considered the ultimate and inevitable consequences of the doctrine which he advocates? I should like to know from that senator, if the constitution of the United States does not extend to those territories, by what kind of authority we go there? What authority have we over them? What right has Congress at all, either in the Territories or elsewhere, except under the constitution? What right has the senator himself to a seat here except under it? Can we exercise any authority with regard to that territory, unless it is brought within the control of the constitution? If the constitution does not extend over it, pray what does extend over it? I have understood that our treaties made in accordance with the constitution of the United States, and the constitution itself, were the supreme law of the land. If we have no constitution there, we have no law nor right there. What right have we to hold that country as our property, unless the constitution has operation there? None, sir, none whatever. If the constitution, if the treaty made under the authority of the constitution, does not extend there, there is no law there; and if this be true, then it is declarative that we have no more right to that country than to any foreign country. I regret to hear such a declaration, for I consider it, coming from the very high authority that it does, as an annunciation that we have no right to that territory; that every foreigner—Frenchman, Englishman, South American, or any one else—has as much right as we have to go there and carry off the gold with which it abounds. If we have no greater right under the constitution, I cannot see that we have any right at all. But I will not dwell upon the subject.

It seems to me that the senator could not have been very positive in his own conviction on the subject, for, in the succeeding part of the same speech, he assumes a position which is utterly in conflict with the idea that no constitution or constitutional law exists there. In speaking of the difficulties which the South would encounter in taking their slaves thither, which I think was a very unnecessary caution, he describes the process by which, if slaves are taken there, a *habeas corpus* would be sued out and the slaves released, and depicted the consequences that would ensue if the South should attempt to resist the process. Now, I would like to have the honorable senator tell me how a *habeas corpus* could be issued in California, unless the constitution of the United States were in operation there. I do not understand that there is any such right in operation now, under the laws of the Mexican government, and I cannot see how it could be extended thither, unless the constitution of the United States be in operation there. But I will not dwell on this point. My principal object was to consider another branch of the senator's argument, and that is, upon the subject of the competency of Congress to admit States into this Union without their having framed a constitution and organized a State government.

I feel myself called on, anxious as I am to avoid trespassing upon the time of the Senate, to offer some remarks upon this subject from the constant allusion that has been made on all sides to the action of the Committee on the Judiciary on it, and the misunderstanding which prevails in some quarters in regard to the position which I, as the minority of that committee, hold upon this subject. I think it is clear, and that it can be demonstrated, and I wish it to be so understood, that it is competent for Congress to admit a State into the Union before it has formed a constitution and State government. And I will say that the speech of the honorable senator from New Jersey seems to admit that Congress has this power. He says: "Now, sir, permit me to say, as to this mode of admitting a State, if within the letter, it is in my judgment against the spirit and intent of the constitution." He seems to admit, then, that it is within the letter, but against the spirit of the constitution. Again he says: "But, sir, there are other objections to admitting this country as a State, aside from these constitutional or legal difficulties. This matter of admitting a State into the Union is a matter, to a great extent, of *discretion*." He puts discretion in italics; "and in this case it is expressly made by the treaty with Mexico matter of discretion."

Mr. President, I understand from this that the honorable senator from New Jersey abandons the ground taken by the committee, that it was not "competent" for Congress to admit California as a State, and puts it on the ground of "expediency" alone. That is a very different question, and I do not intend to take up the time of the Senate in discussing it. Although the majority of the committee went upon the point that it was not competent for Congress to admit a State until she had formed a constitution and State government, yet from the resolution which was the result of their investigations it appears that they came to the same conclusion that I did—namely, that it was a question of expediency. Incompetency is left out of the question. For at the close of their report, they offer the following resolution:

"*Resolved*, That it is *inexpedient* to pass the bill entitled 'A bill for the admission of California into the Union as a State.'"

So the committee seems to have come back to the question of expediency. I think, then, it is clear that it is competent for Congress to admit a State under such circumstances. The expediency of this act is another question.

There are some other of the remarks of the gentleman upon this branch of the subject which require notice. He says:

"Again: why should we overstep that system of legislation which we have acted upon heretofore on all and every occasion? First, a temporary government; then the lowest grade of territorial government; then the second in degree; then admitting the Territory into the Union as a State."

Mr. President, although this general statement may be correct in many cases, it is not correct in detail. There has been no uniform practice which has been adopted in every case. The senator says, "First, in every case, a temporary government." This is a mistake; there was no temporary government, in the sense the senator understands it—that is, authorized by Congress, in Vermont, and in some other cases. And it is not a fact that in any case a territorial government was established and the State admitted after she had formed a constitution. In the act authorizing Louisiana to form a constitution, it was provided that she should submit her constitution to Congress, and if it was not disapproved during the next session of Congress, she should be a State in the Union. Congress did approve of it; but if this had not been done, Louisiana would have been in the Union under the previous act.

Mr. DAYTON (interposing.) The honorable gentleman will please recollect that I applied that remark altogether to the States acquired from foreign governments, and not to States constructed from our original territory, or from parts of other States.

Mr. DOWNS. Perhaps the gentleman did confine his remarks to that class of cases; but, for my part, I cannot see the least difference between the two. I consider that when any territory is acquired from a foreign country it becomes a part of the United States. We have the same control over it as we have over territory transferred by a State. The question of power is the same in both cases. The question of expediency may be very different. It may not be expedient to bring a new people into the Union at once, whereas it may be expedient to give the people of a State formed from some other State instant admission into the Union. In the case of a foreign country, you must obtain the consent of the foreign government, and in the case of a State we must obtain the consent of the State government. And whenever that consent is gained, all difference as to power ceases to exist. In the case of Kentucky we could not act until we obtained the consent of Virginia, and in the case of Louisiana we could not act until we obtained the consent of the foreign power to which she belonged; but the moment that consent was obtained all difference as to the power of Congress to admit those territories into the Union as States ceased. But it is not a fact that the course laid down by the senator from New Jersey has been followed in every instance of the acquisition of foreign country. It was not adopted in the case of Texas. Texas had no preliminary government of that kind. She had a government of her own.

Now, Mr. President, the gentleman has admitted at last that Kentucky is an exception. That is a question that was much mooted, at the time this question was first brought before the Senate. The gentleman now admits that Kentucky was brought into the Union before she had formed a State constitution. The facts are so clear that it cannot be doubted. But the gentleman says that the case of Kentucky is no rule on this subject, because it has not been followed in other cases; that it is no precedent. And he says, in direct and strong language, that "it is one which the conduct of the government for fifty years has repudiated. It stands alone."

Mr. President, however high the authority of the gentleman on this subject may be, and however disposed he may be to repudiate the precedent of Kentucky, I now present to the Senate an authority which I think the senator from New Jersey will not repudiate when he shall come to reflect upon it. It is not an idea of my own, it is the authority of the Father of his Country. The very opinion which has been advanced upon this subject by the minority of the committee, has been sanctioned by the very highest authority, by Washington himself, in a case very similar to this. In 1790, when this question was opening in Kentucky, when Virginia had given her consent that Kentucky should form a separate State, but when there was no State government there, no organization of any kind, except the convention which assembled to decide whether they would agree to accept the terms of Virginia or not—that convention did assemble merely for the purpose of expressing the opinion of the people of that district that they would become a State—when, having obtained the consent of Virginia, they sent a memorial to Congress and to the President of the United States, (Washington,) requesting that this proceeding might be sanctioned, and that they might be permitted to come into the Union as a State. On that occasion, and under these circumstances, Washington, in his annual address to Congress, used the following language:

"Since your last session I have received communications by which it appears that the district of Kentucky, at present a part of Virginia, has concurred in certain propositions contained in a law of that State, in consequence of which the district is to become a distinct member of the Union, in case the requisite sanction of Congress be added. For this sanction application is now made. I shall cause the papers in this very important transaction to be laid before you. The liberality and harmony with which it has been conducted will be found to do great honor to both the parties; and the sentiments of warm attachment to the Union and its present government expressed by our fellow-citizens of Kentucky, cannot fail to add an affectionate concern for their particular welfare to the great national impressions under which you will decide on the case submitted to you."

This is the authority of one whose opinions are not often doubted, and whose authority is seldom questioned, that, in a case not stronger than the one now before us, it is not only competent for Congress to admit a State into the Union, but he recommended it on high national considerations, as well as peculiar considerations applicable to that country. This case is analogous, in many respects, to that of Kentucky. The settlement of Kentucky at that time was the first step the United States were making west of the Alleghany mountains. The great national considerations then connected with it were very similar to those now applicable to California—the great emigration to that country, the settlement of that mighty region. I shall not dwell on this point; but, if it were necessary to go through all the cases of the admission of States into the Union, senators would find that there has been no uniformity upon the subject. Perhaps there have been more cases where Territories have been first organized as Territories and then admitted into the Union, than any other, but there has been no rule upon the subject whatever.

I do not wish the honorable senator from New Jersey, or anybody, to suppose that by the admission of a State I understand the creation of a State. I have taken no such ground. It is only necessary that Congress should give their consent, and that they can do before the constitution is formed as well as after it. But the senator seems to think that there will be great difficulty in admitting a State at once. It was not the idea or intention of those who advanced the opinion that a State could be admitted, that she could be brought into the Union by Congress and put into full operation at once. On the contrary, they expressly disclaimed all such idea and intention. She cannot be brought in at once. She must have a State organization before she can elect her senators and representatives, and until they are elected she cannot be practically in the Union. The position I assumed was, that the consent of Congress might be given before her constitution and State government was formed; and in the very bill which the minority of the committee reported, provision was made that Congress should, in the first instance, give their consent to the formation of a constitution and State government, and that, when they had formed their constitution and government, they should be admitted. It provided nothing but what was usual in such cases.

Mr. President, before leaving this subject, I would state that, notwithstanding the doubts which gentlemen have; notwithstanding the aversion they may have to giving the people of California a government at the present session, I think that that people will form a constitution and present it here; that it will become proper for Congress to act upon it, and I think they will act upon it. I will not enter further into the question of expediency.

I believe that the ground taken by senators, concerning the character and number of the population of California, is altogether wrong. I believe that the population of that country in a year hence will astonish the senator from New Jersey himself. I believe it will turn out that his calculations have been the furthest from correctness of any calculations he ever made. There is already a large population in that country. The number is rapidly increasing, and the desire to go there is increasing every day. I have seen no calculation that I think comes up to the number that will pour into that country during the next year; and whether we give them a government or not, I believe they will form their own laws and constitution. Perhaps they have done so already. I believe they will send their senators and representatives here, and they will demand to be admitted, and they will be admitted notwithstanding the difficulties of senators.

Mr. President, I have done all that I have desired. I have said all that I have wished to say upon this subject on this occasion. I think I have shown that the position assumed by myself, namely, that it is competent for Congress to admit California into this Union as a State, is correct. As in all other cases, the question of expediency is for Congress to decide. And I wish it to be distinctly and clearly known everywhere, that those who object to this amendment do so on the ground that it throws the broad shield of the constitution over the rights of the southern section of this confederacy in those territories.

Mr. BELL. This I deem a proper time to call the attention of the Senate to some of the statements made in a reported speech delivered a few days since by the honorable senator from Georgia, [Mr. BERRIEN.] I think it due to my own self-respect, as well as to the position in which I stand in relation to an important question, that I should take some notice of the misrepresentations in the reply of the senator from Georgia to the argument submitted by me on the amendment I thought proper to propose to the one now under consideration.

There are several misstatements of my argument contained in the printed speech of the senator from Georgia, which I propose to notice, not in their natural order, but as they are printed. The honorable senator, after some preliminary remarks, not necessary to be read, proceeds as follows:

"They (meaning the Committee on the Judiciary, whose report I had been combatting) have examined the question first with reference to the constitution, and secondly to the interpretation which has been given to its provisions in the usage of the government. The proposition of the senator from Tennessee is, on the other hand, that Congress alone, and no other power, has authority to create a State.

"Mr. BELL (in his seat.) Of this Union.

"Mr. BERRIEN. That is a limitation of the proposition. Be it so. Certainly nobody but Congress can admit a State into this Union; and so far the sole power to create a State may be said to belong to Congress."

Now I deny that I ever advanced any such argument as that Congress alone can create a State, except with a qualification, which was not stated by the senator. I contended that Congress alone can create a State of the Union, and that that is the only description of States known to the constitution.

I might have said, *in arguendo*, after having laid down my proposition, that Congress alone can create a State; but I submit to the honorable senator whether it was fair to take my remarks disjointedly and assume the argument which he has ascribed to me?

Mr. BERRIEN (in his seat.) Will the senator please read the concluding sentence?

Mr. BELL. The senator asks me to read the succeeding sentence. I will do so:

"But the argument of the honorable senator for the power of Congress went further, and applied to the condition of a people who before their admission into the Union, claimed to constitute a State. Now, there are two propositions of the senator which I wish to consider. First, nobody but Congress can create a State."

I do not deny that my argument was addressed to that point, but it was not in connexion with the question of the power of Congress to do anything else than to create a State of the Union. What I complain of is, that the honorable senator chose to consider the correction I made of his original statement as a limitation of my original proposition; and after receiving the correction, and admitting the soundness of the proposition as then stated by me, persisted in an argument extending over more than two-thirds of a column in a newspaper, founded mainly upon the assumption that my proposition had been such as he first stated it to be. I deny that I ever entertained or uttered such a proposition.

The next passage to which I will call the attention of the Senate reads thus:

"The proposition is, that nobody but Congress can create a State. Now, sir, in considering this, look first to the constitution. I presume that I misunderstood the honorable senator, or that it was a mere *lapsus linguæ*, when he said that Congress could do anything not prohibited by the constitution.

"Mr. BELL, (in his seat.) It was not so.

"Mr. BERRIEN. Very well. Then I understand the proposition to be that Congress may do whatever is not prohibited by the constitution. I thought at the moment that it was a misapprehension of terms, but the senator acquiesces in my understanding of it."

Here, sir, we find a reassertion of the same proposition. I repeat, sir—and I think every senator who did me the courtesy to listen to my remarks must have so understood me—that no other power but Congress can create a State out of any of the territories belonging to the Union. I had no reference in my argument to any of the original States of the Union, they being parties to the federal compact.

I am also represented in the passage just read as having replied to his remark, suggesting a *lapsus linguæ*, when, as he understood me, I had asserted the proposition that Congress could do anything not prohibited by the constitution. "It was not so." Now, sir, I made no such remark. What I did say was, "go on." And then the senator, after assuming that I had acquiesced in his understanding of my proposition, proceeded to demonstrate that the government of the United States was one of limited powers; a proposition which needed no argument to support it.

I have to remark, that I did not correct the senator upon this point, when he misstated my proposition, because he had, in his preceding remarks, misrepresented my statement as to the character of the inhabitants of California; and perceiving that he was misrepresenting my views upon other points, I thought proper to permit him to proceed, intending to answer him when he closed his remarks. I did not do so, however, as the hour was late, and the Senate manifested a disposition to take the vote upon my amendment before it adjourned, not doubting that an occasion would soon be presented when I could reply under more favorable circumstances.

I call the attention of the Senate to another passage in the senator's speech, reading as follows:

"But there is another proposition of the senator which may require a moment's examination. It is, that Congress has a controlling power over the people of the territories; that they cannot form a constitution without the consent of Congress, unless it be in the exercise of what the senator denominates the right of revolution."

Sir, I laid down no such proposition as that the people of a territory cannot form a State constitution except in the exercise of the right of revolution. There was nothing in my argument inconsistent with the perfect right of the people of any of the territories, even without the assent of Congress, to peaceably assemble in convention and *form* a State constitution. My argument did not touch that point. What I stated was, that a constitution *framed* by the inhabitants of a Territory, assembled in convention with the consent of Congress, did not constitute the Territory a State. It would be merely a constitution on paper or parchment, and would have no vitality; it would not be a living constitution until it was admitted into the Union as a State. In all the cases known in the practice of the government, and in which the inhabitants living under a Territorial government had been authorized by Congress to hold a convention and form a State constitution, the Territorial government and laws existed in full vigor until the State constitution, as thus formed, had life and energy breathed into them by the act of Congress admitting the people who formed them into the Union as States.

Again: the senator asks, in another part of his speech, "If Congress possessed the power of creating a State, why do they depute the power to another, and not exercise it themselves? Could they exercise it? Could they form a constitution for the new State, and compel the people of the Territory to accept it, and become a State?"

Here we again find the honorable senator founding his argument upon the assumption that I had asserted for Congress the power to create a State, other than a State of the Union—to form a State constitution—to create a State government for the people of a territory first; and then, by admitting it into the Union, create a State of the Union. My argument was, that there can be no State in any of the territories, except it be made so by admission into the Union.

In another paragraph of the printed speech of the honorable senator, I find the position contained in the following sentence imputed to me:

"The senator still insists that a State cannot have existence until her delegates are received in Congress."

Sir, I distinctly contended for the reverse of the proposition. I assumed the position that a State of this Union might exist without any representation in Congress. I think I repeated the same idea over and over again, in the illustrations I gave of the proposition. I said that a State when admitted into the Union was only *felt* in the national legislation, when her senators and representatives presented their credentials, and showed that they had been elected or chosen in the manner prescribed by the constitution of the United States. I took this view of the question in answer to the argument which I supposed would be urged against the proposition to admit these territories as a State of the Union before a regular State constitution should be adopted by the inhabitants, and when neither senators nor representatives could be appointed or elected in conformity with the provisions of the constitution of the United States. I said, be it so. It could not detract much from the weight of the public councils, nor be any great detriment to the public interest, if they should not send their representatives here for forty years to come; and though they should not do so, they would still be a State of this Union. It has so happened before now that a State has failed to be fully represented in the Senate during an entire Congress, and yet no one supposed that a State so in default was not a State of the Union. That is a matter of choice to them. They could send their representatives here whensoever they think proper. My argument was, that the necessity of adopting a State constitution before senators and representatives could be chosen, would act as a sort of lever to prize the citizens of these new territories into active exertion upon this point. And if human nature in that region is the same as here, and elsewhere, the desire to be represented in Congress would soon provide a State constitution in regular form.

I now desire the attention of the Senate to another passage in the speech of the honorable senator:

"I should regret to believe that the people of the several States of this Union could be led to suppose that such power as is claimed for Congress, on this occasion, does in fact belong to them, or that we are disposed to depart from the uniform understanding of our predecessors, in the interpretation of the power which the senator desires us to exercise; that it was to be enlarged into a constructive power to *create* the *States* of this Union, and that in this age of progress, when it is perhaps impossible to limit the extent of territory which may be acquired by this government, that Congress would assume the power which it is proposed now to exercise."

Who, sir, has claimed such a power? Who has maintained the argument that Congress has a right to prescribe—to form a State constitution for the people of these or of any other Territories of the Union? Not I, sir. My argument, I repeat, went upon the ground that we have the power to admit these Territories into the Union before they have any regularly-organized State government. I have never assumed that Congress, or any other authority, can dictate the particular form of their State government, provided it be republican.

I will now notice another misrepresentation of my argument, found near the close of the printed speech before me.

"The senator maintains another proposition, or rather he illustrates his principle by an argument of this sort: that a State is not a State until it is admitted into this Union.

"Mr. BELL, (in his seat, in a low tone of voice.) I said that no State can exist in any Territory of this Union, unless it be created by Congress, until it is admitted into the Union.

"Mr. BERRIEN. I will state the proposition in the senator's own words: No State can exist in any Territory of this Union, *unless it be created by Congress*, until it is admitted into the Union.

"Mr. BELL, (in his seat.) Unless we relinquish our sovereignty over it.

"Mr. BERRIEN. With this limitation, I think the argument of the honorable senator is yielded."

Here, sir, I may remark, I have a further evidence of the honorable senator's perseverance in misstating my views. I could not at any time have said, either in a low or a loud voice, "that no State can exist in any territory *unless it be created by Congress*, until it is admitted into the Union." The words, "unless it be created by Congress," are an interpolation. I maintained that no State could exist in any of the territories, no matter by whom attempted or formed, while they continue to be a part of the territorial possessions of the United States. I am aware that this interpolation was necessary to sustain the position on which the argument of the honorable senator himself was founded. He contends that when the inhabitants of a territory *form* a State constitution, with the assent of Congress, they become a State from that time forward—though not a State of the Union; that it was so intended by the framers of the federal constitution; but when he finds in the constitution no recognition of the idea of such a State as he maintains actually exists in a territory in the period intermediate between the *forming* of a State constitution and the subsequent admission of it into the Union by Congress, he takes shelter under a *casus omissus*. I denied the proposition that there could be any such State—that in fact, there was no description of State known or recognised by our system, as part of it, except it becomes one by being admitted into the Union.

The whole of the senator's argument is founded upon a misrepresentation of the entire drift and tenor of my remarks, in affirming that I asserted the proposition "that Congress alone can create a State," without the qualification necessary to give any sense or consistency to my argument—that is, a State of the Union.

When in the course of my argument I stated that Congress could do anything not prohibited by the constitution, the proposition was stated in reference to the power given to Congress to admit new States into the Union. My argument was, that the clause of the constitution giving Congress the power to admit new States contained no such condition as that there should be a pre-existing State constitution, either in form or in actual operation.

My argument went to show that a people living under any form of civil organization whatever, might be admitted into the Union as a State; and that there was no prohibition in the constitution to prevent it. I remember that to illustrate my position, I put the supposed case of the conquest of a neighboring kingdom, if any such there should be on our borders. In such an event, I contended that when the monarchy was overthrown, and the country should become a part of our possessions, Congress might, if in session, *eo instanti*, admit it into the Union as a State; and when thus admitted, the guarantee of a republican form of government, provided in the constitution for the States of the Union, would insure the formation of a republican constitution by the inhabitants of the new State. These were the positions I assumed, and I still adhere to them.

Before closing my remarks, I desire to call the attention of the senator from New Jersey [Mr. DAYTON] to the assumption made in his speech founded on the same proposition assumed as mine, so much harped upon by the senator from Georgia. That senator, in his speech, remarks:

"How can you make California a State government? Can Congress create a State? Congress create a State! Sir, I never thought, until I heard it here a day or two since from the senator from Tennessee, [Mr. BELL,] that such a proposition could have entered the mind of any human being."

That would be a wonderful conception, indeed, for the senator from Tennessee to bring forth. Create a State! Congress to create a State—and yet that State not a State of the Union! Who, sir, I repeat, has ever advanced such a proposition?

I have felt, sir, that these misrepresentations of my course of argument demanded a public correction at my hands. Both of the honorable gentlemen who have thus misstated my argument upon a question of great importance, are members of the Judiciary Committee. The opinions of the senator from Georgia, especially, are much deferred to upon all legal and constitutional questions in this body, and in the country. The senator from New Jersey has a like deference paid to his opinions—though, perhaps, not to so great an extent at present as he may expect at some future time. I do not desire to do any discredit to the legal and constitutional learning of the senator from New Jersey. He is the junior of the distinguished senator from Georgia, (some remark by the senator from Georgia.) Not so much his junior, either. There is no great disparity between them. [Laughter.]

The senator from New Jersey, in another part of his speech, thus takes off my assumed argument:

"If we had this power to create, all we would have to do would be to pass a law and resolve that California was a State, and it would become one. A schoolboy may cut a man out of a bit of paper and say it is a man; but is it a man? Has it the blood, bone, and sinews of a man?"

Now, sir, I congratulate the honorable senator upon the self-complacency which he must have felt when he hit upon this notable illustration. It is felicitous and beautiful in the extreme. He presents it to show the absurdity of an argument which he himself puts into my mouth. There is another passage in the senator's speech in which my argument is attempted to be *refuted*, which I cannot now put my eye on. It is in relation to the guaranty of the constitution of a republican form of government to each of the States of the Union.

I do not know precisely how the gentleman conceived my argument on this point. My argument was, that the gurantee in the constitution could only apply to States already in the Union; and hence that there was no obligation even *implied* in the power which gave Congress the authority to admit a State into the Union to require, as a condition precedent, that there should be a State constitution previously formed and in operation.

Mr. President, I have now done with the comments I intended to make upon the speech of the honorable senator from Georgia. I have felt it to be a duty which I owed to myself, and to the position I occupied in relation to a most important public question, to vindicate it against the misrepresentations I have pointed out. But, sir, I cannot close my remarks without asking the indulgence of the Senate while I state in a more distinct form, some of the more material of the propositions I attempted to enforce in the remarks I had the honor to submit to the Senate the other day, on the proposition to admit the territories of New Mexico and California into the Union as a State, or as States, taken from original notes. I still adhere to the opinion that by no other measure can we so effectually heal the existing dissensions, and others more serious which may grow out of the present condition of the country in relation to these territories.

The Committee on the Judiciary, in their report on the bill of the senator from Illinois, proposing to admit the territories of New Mexico and California into the Union as a State, assumed the ground that the bill proposed to do what the constitution did authorize Congress to do—that is, *to create a State*.

I renewed the proposition of the senator from Illinois, by way of amendment to the civil and diplomatic bill, as I was warranted by usage in doing in cases of emergency and great public importance.

In the course of my argument I stated and attempted to sustain the following propositions in opposition to the report of the Committee on the Judiciary:

That a State, in common acceptance, was one thing, and a State of the Union quite another thing.

I defined a State, in common acceptance, and as defined by writers upon the law of nations, to be any number, great or small, of men of free condition, who lived together as one community for their mutual protection and convenience, in a territory of which they are the exclusive possessors, under any form of society or of civil government or regulation they may think proper to adopt or acquiesce in—that a State, in this sense, requires no distinct organization by the adoption of a *written constitution*. It may exist as a separate society or State under customary or unwritten laws. The executive and legislative powers may be assigned by common consent to the senior members of the society, or to the elders generally, or to the judicial functionaries. That it is not essential to this idea of a State that its political organization shall be either wise, energetic, or effective for *all* the purposes of good government. It may be very defective, very feeble; but if it is sufficient to maintain a separate existence independent of all foreign control over its affairs, foreign and domestic, it is a *State*—a commonwealth.

I maintained that if the present inhabitants of California, with their present laws and imperfect civil organization, were the *undisputed* possessors of that territory, holding exclusive control and dominion over it, they would be a State or nation, sovereign, free, and independent—entitled to be regarded one of the community of nations, and as such subject to the law of nations.

I further maintained that a State of this Union was altogether different; that for its definition we must look to the constitution; that Congress alone can create a State in the sense in which that term is employed in the constitution; and that Congress always creates a State in this sense when one is admitted into the Union.

I further maintained that the inhabitants of California, while the United States asserted its sovereignty over that territory, neither with their present imperfect form of civil society, nor in the most perfect form which they can devise, can become a State until they are admitted into the Union as such.

I maintained that there is nothing in that clause of the constitution giving Congress the power of admitting new States, prescribing as a condition that any particular form, or any form whatever, of civil or political organization, shall exist in the Territory admitted as a new State of the Union prior to its admission; and consequently that there is no impediment in the constitution to the admission of the inhabitants and territories of California and New Mexico forthwith into the Union as a State, if we think it expedient, in the present exigency, to do so; or, if it is thought more advisable to pass an act for the admission of these territories at some future day—allowing time to the inhabitants to settle upon the form of a State government in the mean time, to take effect on the day provided for their admission into the Union—the constitution does not prohibit such a course.

I further maintained that no State can exist in any of the *territories* over which the United States continue to assert their sovereignty and jurisdiction, except by the assent of Congress declared by an act admitting such territory into the Union as a State. That the consent of Congress given to the inhabitants of a territory to hold a convention, and to form a State constitution, does not thereby authorize the carrying such form of government into effect, and that any constitution so formed and agreed upon, exists only in *form* and upon paper, until Congress gives it vitality by admitting such territory into the Union as a State, by an act either precedent or subsequent.

I further maintained that the clause of the constitution which guaranties a republican form of government to the States of the Union, applies only to States in the Union, and that this power of the federal government can only be exercised over States already in the Union; there being no State, known to the constitution, but one already admitted into the Union.

[NOTE.—Mr. BELL desires to say, that upon a more careful review of the remarks of the senator from New Jersey, (Mr. DAYTON,) he is satisfied that he did that senator injustice in supposing that he had treated his (Mr. B.'s) argument unfairly; and although his (Mr. B.'s) remarks upon the speech of the senator were perfectly respectful, yet he regrets having made them.]

Mr. BERRIEN. I am very sorry, sir, that the recollection of the discussion, the other day, with the senator from Tennessee [Mr. BELL] has rested so unpleasantly upon his mind as to have induced him to make these observations. He is perfectly aware that I could not have had the smallest disposition to misconceive, and certainly none to misrepresent him. The argument to which he has referred was in vindication of the report of the Judiciary Committee, for which I was individually responsible. It was pronounced in the presence of the honorable senator in respect to the argument which he had just addressed to the Senate. If he supposed I had misconceived his argument, it would have been appropriate to make his correction at the moment. I have listened to the senator, and I find myself still unable to discover how it is, and in what particular, I have misconceived the argument he has submitted to the Senate. Sir, I really cannot consent, having made this disclaimer of any intention to misrepresent the senator, to occupy any portion of the little remnant of time which is allowed to us, by endeavoring to explain to the senator what I did mean in the speech I delivered the other day. The senator has occupied a very considerable portion of the time of the Senate in a manner very interesting to us all, in explaining his views. These views have been published in the ordinary mode. With my reply the same course of publication has taken place. Now, sir, I am willing at leave it to the Senate and the community to look at his argument as reported, and look at mine, to say whether I have conceived correctly or misconceived the senator. If I have, in any particular, misconceived him, I should regret it much; but the honorable senator will stand acquitted, for the judgment of the public will be with him. In respect to the remark reported, which he styles an interpolation, I can only say that I have no sort of responsibility for that. I believed the senator did answer as the reporter has stated, and made my commentary accordingly. If he did not, I misconceived the answer of the senator, as well as the reporter. I replied under the impression which the answer of the senator made upon me, and I think it would be unjust to the Senate to occupy any further time in this explanation. I repeat, simply, that I had not the slightest intention to misrepresent the senator, and I doubt whether, in the judgment of the Senate, I did misconceive him. If the senator wishes to make any observation now, I will yield to him, because I desire to speak on another subject.

Having been thus called to the floor, Mr. President, I avail myself of the occasion to state the views I entertain upon the amendment offered by the senator from New Jersey, [Mr. DAYTON.] I am sincerely and conscientiously disposed to see some termination brought to this agitating question. My first impression was that I would be enabled to accept the amendment proposed by the senator from New Jersey, with that modification in which he has acquiesced, namely, extending the time of the operation of the act, so as to relieve us from the necessity of the certain recurrence of this same agitating question at the next session of Congress. I suggested to the honorable senator another modification, which it was not his pleasure to accept, and not in my power to offer to the consideration of the Senate, because we have attained to the last stage to which we can proceed by way of amendment. My objection to the amendment of the senator from New Jersey, with the modification which is proposed, is that, in my judgment, we assume to exercise a power beyond the constitution of the United States. If it be said that the legislation in regard to Florida and Louisiana has gone to the whole extent with that which is adopted by the senator from New Jersey, I answer that, in my humble judgment, that is loose legislation, more to be honored in the breach than in the observance.

The modification which I suggested to the senator from New Jersey—and his statement of it will explain at once why I did it—proposes to adopt the laws of the Mexican republic; those existing in California and New Mexico anterior to the cession. I suggested to him this modification, also—"so far as the same are consistent with the constitution of the United States." The senator declined accepting that modification, and therefore I decline to support the amendment.

Now, sir, that brings me to a very brief consideration of the question which was discussed here the other day—the question whether the constitution of the United States operates within the territories of the United States; and if it operates *in quo modo*, whether by its own force or by the legislation of Congress? When the honorable senator from Massachusetts, [Mr. WEBSTER,]—who is called to attend to other duties, I believe, to-day—suggested to us the propriety of having an accurate comprehension of terms, I presumed, from my brief remarks, that I was included in that admonition. I accept it; and upon all subjects of this sort, I believe it to be of the utmost importance: but there is another admonition, and that is this—not merely to have a clear conception of the terms in which a proposition is expressed, but also to have some reasonable estimate of the value of the proposition itself.

Now, sir, the next question which was considered and discussed the other day—whether the constitution operates within a territory—is in itself, in my estimation, comparatively valueless in this discussion. If I were not averse to using the language of paradox, I would say that those who advocate the opposite sides of this proposition are both right and both wrong; that the constitution does, and that it does not, operate within the territories. Certainly, as it is contended by the senator from Massachusetts, it does not operate in the territories *proprio vigore*, as a whole, in its totality—does not operate as a compact, to create governments within those territories. Whether you adopt one mode of expression with reference to the constitution or another; whether you say it is a compact between confederated States, or whether you say it is an act between the people of the sovereign States of this Union by which they ordain and establish the constitution, still it is very certain that the constitution in itself cannot operate in the territories of the United States. The great object of that constitution was the formation of a system of government; and so far as that was its object, it does not extend to the territories of the United States, for whom, under the authority of that constitution, we are about to organize a government.

But it was not the sole object of that constitution to form a government for the thirteen States by whose delegates it was formed. It contained certain principles of public liberty which were implanted in that constitution, and those principles of public liberty may be extended to the territories of the United States. When, therefore, it is said that the constitution does not operate in the territories of the United States, the answer is—Yes, that is true; as a whole it does not operate: and when it is said that the constitution does operate in the territories of the United States—Yes, it is true; there are portions of the constitution which do, and must of necessity, operate in the territories of the United States. Why, sir, by what authority are we about to organize a government for this territory? We are told that it is under that clause of the constitution which gives us power to make the needful rules and regulations for the government of territories or other property of the United States. Now, sir, I doubt whether that be the source of the authority. I think it too limited. I think the object of those rules and regulations is clearly implied, by the expression "or other property," to be, that the territories are there dealt with as property, and not as the habitations of freemen, whose municipal regulations are to be regulated by this compact. But I find an additional power in the constitution to organize a government for the territories, which, though it be not expressed, is still as distinct as if it had been expressed. Since under the constitution we have power to acquire territory, we must have power to do that which may result from the acquisition of territory—we must have power to govern the territory we acquire; and although that be but an incident to an express clause, yet it is as emphatic as if stated in so many words. Well, then, sir, whether it result from this little clause which has been referred to, or be deduced as an incident of the war and treaty-making power in the constitution, it is still a power derived from the constitution; and when, in virtue of that power, whether you look for it from one or the other source, you legislate for the establishment of a government in the territories of the United States, do you not bring the constitution of the United States to operate within the territories of the United States? Is not the mere act of the establishment of a government, your sole authority to do which you derive from the constitution, an evidence of the fact that that constitution, *quo ad hoc*, is operative within the territories to which you apply it in the organization of the government under the power you derive from the constitution?

But, sir, the point which has been made in this argument goes further. It is said by the senator from Massachusetts, that although the constitution does not operate as a whole in the territories—though it does not operate at all in the territories—yet it operates upon us, and we are bound by the principles of that constitution; we are bound to regulate ourselves by the principles of that constitution, in organizing a government for the territories. What then? To what does this question come, sir? To the question whether the constitution shall operate by its own inherent force within the territories, or whether it shall operate by our legislation—we acting under the obligations imposed upon us by the constitution in extending its principles to the territories. Mr. President, I confess I have been somewhat surprised by the course pursued in this discussion. It began in the outset by the declaration, reiterated in the progress of the argument, that this question had been solemnly and repeatedly decided by the Supreme Court of the United States. I said—willing to admit my want of recollection—that I had no remembrance of such a decision; and yet the proposition was reiterated: such decisions were said to have been repeated for thirty years past. Now, sir, I can only say, if there has been *non mi recordo*, I know the case to which the gentleman has referred—that of the American Insurance Company against Tanter. But it is very certain that that case decides no such proposition.

Mr. BUTLER made a remark, which was not heard by the reporter.

Mr. BERRIEN. The case of Tanter, which is brought to sustain the naked proposition that the constitution does not extend to the territories, is simply this. It was a question whether the decision of a court of admiralty, created by the Territorial legislature of Florida, operated to vest the property in certain specific articles. The objection was, that the Territorial legislature of Florida could not vest in a court of that province the admiralty jurisdiction which was exercised in the adjudication of the court. The constitution of the United States was referred to for the purpose of showing that admiralty jurisdiction was vested in the district courts of the United States. Therefore, the argument was, that it could not be exercised by the local judiciary of a territory; and in illustration of that argument and proposition, the judge who delivered his decision in the circuit court, or the justice of the Supreme Court, by whom that decision was pronounced, in the illustration of his proposition upon that subject, referred to the judiciary under the constitution of the United States within a State and Territory. Now, sir, the whole extent of the decision in the case of Tanter was this: that it was competent to Congress under one or the other of the two sources of authority to which I have referred; but the judges do not decide whether it is under the clause stated which authorizes Congress to make the needful rules and regulations for the government of the territories of the United States, or under the authority extending the right of acquiring territory. Under one or the other source of authority, it was decided that Congress had a right to establish a government for the Territory of Florida.

A SENATOR. Perhaps so.

Mr. BERRIEN. Yes; the question is still left open; It is not decided to which source of authority this exercise of power was to be referred; but the Supreme Court have decided that under one or the other of these sources of authority Congress had a right to establish a territorial government for Florida; and having the right to establish that territorial government, they had a right to vest the jurisdiction in such a case in the tribunal constituted by the State legislature. They have decided therefore, nothing in regard to the question whether the constitution operates in territories excepting *inferatur*, from the particular that the admiralty does not operate in the territories. He illustrated that by referring to the difference of tenure between judicial officers in the United States and the territories. It was said that in the United States, all the judicial power thus conferred by the constitution is vested in a Supreme and such inferior courts as Congress may, from time to time, ordain and establish, and that by that constitution the tenure of office of all those judges is during good behavior. Then the decision amounts to this: the utmost extent of the inference which can be deduced from it would be limited to this—that the judicial power granted by the constitution to be exercised within the limits of the States, is not the judicial power which is exercised by Congress—which is established, created by Congress, within the territories. That judicial power vests the right of determining the question in the district court, but the judicial power which Congress, in its general power to make a government for the territories, conferred upon the court which it had established in the territories, was not a portion of the judicial power established by the constitution to be exercised within the States. Now, I suppose nothing can be more clear than that; but that falls very far short of establishing the proposition that no portion of the constitution operates, even of its own force, within the territories of the United States. The whole extent of the operation of that decision is simply this: that the judicial power conferred by the constitution of the United States is to be exercised within the limits of the United States, and does not of necessity operate within the territories.

Well, sir, here is a proposition by this amendment to put in force the laws of the Mexican republic with regard to the constitution and laws of the United States. I drew up a modification of the amendment, to say that that constitution, that those laws, shall be allowed to operate in subordination to the constitution of the United States. The argument of one gentleman is, that the constitution does not extend to a territory. The argument is, that the laws prevailing in a territory which is acquired by the United States under the government which theretofore existed in that territory must continue to operate until they are suppressed by laws enacted by the United States. Now, sir, I confess I am unwilling that the citizens of the United States who may be in that territory shall be subjected unlimitedly to the laws which shall prevail there under the authority of the Mexican government. It is said that this is left to the discretion of the President of the United States; that he is to enforce the laws which exist there. First, I am not willing that the citizens of the United States residing in that territory shall be subjected to all the laws which prevail there, for there are laws there which conflict with their rights as individuals and as freemen; and in the next place, when it is said that this is in the discretion of the President of the United States, and he will enforce those laws so as to make them conform to the constitution of the United States, I answer, that it is the duty of every department of the government to bear its own burden. When we consent to an act giving authority to create a government, we must impose the limitation which the constitution requires. If the senator from New Jersey had been disposed to accept the modification, "so far as they may be consistent with the constitution of the United States," we