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THE CONSTITUTIONAL QUESTIONS INCIDENT TO THE ACQUISITION AND GOVERNMENT BY THE UNITED STATES OF ISLAND TERRITORY.

ONE of the most important questions with which the Convention that framed the Constitution of the United States had to deal was that as to the disposition and government of the Western lands, with which the new nation was to be endowed. The Congress of the Confederation had undertaken to determine it for all time in 1784 and again in 1787, but by what authority? Let us turn to the "Federalist" for an answer. Madison there answers very plainly and very truly that they had none. After saying that the cessions of territory then made and which might reasonably be expected, would place a mine of vast wealth in the hands of the new government, he proceeds thus: —

"We may calculate, therefore, that a rich and fertile country, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress having assumed the administration of this stock, they have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new States; to erect temporary governments; to appoint officers for them; and to prescribe the conditions on which such States shall be admitted into the confederacy. All this has been done; and done without the least color of constitutional authority." [1]

In the discussions of the constitutional convention there was a decided difference of opinion as to the measure of local self-government to which the settlers on this frontier ground ought to be held entitled. Some favored the policy of the Confederation by which certain fundamental principles were laid down as Articles of compact between the old States and the new territory. Some were for admitting no new States on a footing of equality with the original thirteen. The men of Vermont and of "Franklin" were a rough and turbulent set. There were many who thought they needed to be held in check by a strong government.

The result was the adoption of a clause drafted with the diplomatic skill which was possessed in so rare a degree by Gouverneur Morris. He meant it, he tells us in two striking letters to which

[1] Federalist, No. 38.

Mr. Justice Campbell called attention in the Dred Scott case, to serve as a warrant to the new Congress to treat the Western territory and any other that we might acquire in the future as absolute sovereigns. He contemplated as probable the ultimate inclusion of the whole continent of North America in the limits of the United States, and possibly that we might reach out still further, though it was a possibility that he deplored. He meant, to quote his words, that as to all territory outside the original States, we should "govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article, I went as far as circumstances would permit, to establish the exclusion. Candor obliges me to add my belief, that had it been more pointedly expressed, a strong opposition would have been made."[1]

This section, it is important to remember, is not put in that part of the Constitution which is specially concerned with the legislative department, and in which most of the powers of Congress are particularly specified.

Each of the three great departments is made the subject of a separate article, and then comes the fourth where are gathered together certain rules to govern the relations of the States to each other, the character of their government, and the privileges of their citizens. The third section of this article begins with regulations as to the admission of new States into the Union, and then follows the clause now especially under consideration, which is that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State." It is evident that this might not unfairly be understood to refer to the public lands mainly in their character as public property. The phrase "Territory or other Property" certainly implies that "Territory" is to be considered as property. Thus read, Congress would deal with it as representing the owner, rather than the sovereign. In one of its opinions the Supreme Court of the United States seems to look at it from this point of view. "The term Territory," it was remarked, "as here used is merely descriptive of one kind of property; and is equivalent to the word lands."[2]

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[1] Scott *v.* Sandford, 19 Howard, 507

[2] United States *v.* Gratiot, 14 Peters, 526, 527.

A broader scope, however, had plainly been given it, in an earlier case, while Chief Justice Marshall was on the bench. He was called upon to decide, first, whether foreign territory could be acquired by the United States, and then how, when acquired, it was to be held and governed. These questions had, a quarter of a century before, been hotly disputed in the political department of the government: they were to be hotly disputed again, a quarter of a century later, in the courts before his successors in office. He had no difficulty in confirming, as incident to the executive power, what his great adversary in national politics, who had recently passed away, President Jefferson, had at first hesitated to claim as a right, — the prerogative of acquiring new territory either by conquest or cession from a foreign power.

The legislative department had not shared in Jefferson's doubts. The Louisiana purchase was a political event of far greater importance to the country than any of those which have marked the year 1898. It gave rise to animated discussion in both houses of Congress, but it may fairly be said that neither of the great parties of the day put in question the right of the President and Senate to make the treaty, and so bring the vast territory which it embraced under the sovereignty of the United States. The controverted points were, first, the policy of the measure, and, second, the nature of the relation created between the inhabitants whose allegiance was transferred and the soil itself, on the one hand, and the United States, on the other. It was claimed by some, in debate, to bring them under the flag but not into the Union; to make the people subjects rather than citizens, and the land on which they dwelt the property of our government, but no part, properly speaking, of the United States. We could hold it, they said, and control it, as a man can hold and control a farm which he has bought, by right of proprietorship, to be kept or sold, tilled or left fallow, at pleasure: it was, in short, a proper field for a strictly colonial government. A few asserted that the United States could set up no laws anywhere that were not founded on the consent of the governed.[1]

The question thus debated in the Fall of 1803 was a practical and pressing one. France had appointed, in June, a commissioner to deliver possession, and was anxious to get the purchase money into her treasury. The people who were the subject of the transfer

[1] The debates are well summarized in Adams, Hist. of the United States, ii, 100–115.

were uneasy and dissatisfied. Expedition was necessary. If in the presence of such conditions all political parties were in agreement as to the main doctrine to be applied, the precedent, as a record of legislative construction on a point of constitutional law is of all the more importance.

The Act of Congress of Oct. 31, 1803, passed by large majorities in each house, to meet the case, was a brief one. It gave the President *carte blanche*. He was authorized to take possession and occupy, using such force as might be necessary to maintain the authority of the United States, and calling out not exceeding 80,000 of the State militia, if he thought proper. Then followed this plenary grant of general authority:

"That, until the expiration of the present session of congress, unless provision for the temporary government of the said territories be sooner made by congress, all the military, civil, and judicial powers exercised by the officers of the existing government of the same shall be vested in such person and persons, and shall be exercised in such manner, as the President of the United States shall direct, for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion."

Jefferson immediately despatched commissioners to New Orleans to receive the surrender of possession, and invested one of them, Governor Claiborne, of the Territory of Mississippi, with all the powers theretofore exercised over the Louisiana territory by the Governor General and Intendant under the authority of Spain. This made him a temporary king, and constituted the system of government under which Louisiana remained until October of the following year.

The Governor General, under the laws and usages of Spain, had almost royal authority. He promulgated ordinances which had the force of a statute. He appointed and removed at pleasure commandants over each local subdivision of territory.[1] He presided over the highest court. The Intendant, however, was a counterpoise. He was chief of the departments of Finance and Commerce. He acted as a Comptroller General, on whose warrant only could payments be made from the treasury.[2] He was also Judge of the courts of admiralty and exchequer. Both these offices Jefferson put in the hands of one man.

[1] Public Documents, 8th Congress. An account of Louisiana, being an Abstract of Documents in the Offices of the Department of State, and of the Treasury, Nov. 1803, 39, 40.

[2] *Ibid.*, 33, 41.

Judicial proceedings were conducted in the forms of the civil law. A son, whose father was living, could not sue without his consent, nor persons belonging to a religious order, without that of their superior.[1] He who reviled the Saviour or the Virgin Mary, had his tongue cut out and his property confiscated.[2] A married woman convicted of adultery and her paramour were to be delivered up to the will of the husband, with the reserve, however, that if he killed one he must kill both.[3]

All travellers, previous to circulating any news of importance, were bound to relate it to the syndic of the district, who might forbid it to go farther if he thought such prohibition would be for the public good.[4]

There was a religious establishment. Two canons and twenty-five curates received salaries from the public treasury.[5]

A considerable code of laws, of which those to which I have referred are not unfair examples, was thus left to be administered or superseded and replaced by others, for an uncertain period, at the will of one man, an agent of the executive power.

The Federalists in Congress, while willing, if not anxious, that Louisiana should be governed as a colonial dependence, objected to the passage of this Act, on the ground that it set up a despotism incompatible with the Constitution. The answer of the leaders of the party in power was that Congress had an authority in the territories which it had not in the States, and that the United States were acting in the rightful capacity of sovereigns, precisely as Spain and France had acted before them.[6]

In the case decided by Chief Justice Marshall twenty-five years later, to which allusion has already been made, that of the American Insurance Company against Canter, the counsel for the defendant, one of whom was Daniel Webster, claimed in argument that the Constitution and laws of the United States did not extend over Florida upon its cession by Spain. The usages of nations, they said, had never conceded to the inhabitants of either conquered or ceded territory a right to participate in the privileges of the Constitution of the country to which their allegiance had been transferred. Congress might therefore govern them at its will.[7]

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[1] An Account of Louisiana, &c., App. xxviii.

[2] *Ibid.*, xlv.

[3] *Ibid.*, xlvi.

[4] *Ibid.*, lxxi.

[5] *Ibid.*, 38.

[6] Adams' Hist., ii, 119.

[7] 1 Peters, 533, 538.

The Court, in its opinion, went with them to a certain point, but no farther. Marshall declared that these inhabitants, though made by the treaty of cession citizens of the United States, acquired no right to share in political power; and also that the provision of the Constitution that the judicial power of the United States should be vested in courts of a certain description did not apply to such courts as Congress had provided for Florida. His argument on this, the turning-point of the case, was hardly worthy of so great a judge. The Constitution, he said, required that the Judges of the courts which it contemplated should hold office for good behavior. The Act of Congress for the government of the Territory of Florida set up courts, the Judges of which were to hold office only for four years. Therefore the Constitution did not apply to them. What were they, then? Legislative courts, not exercising any of the judicial power conferred by the people in the grant made and defined in the third article of the Constitution, but having a jurisdiction "conferred by Congress in the execution of those general powers, which that body possesses over the territories of the United States." . . . "In legislating for them, Congress exercises the combined powers of the general and of a State government."

The other legislative powers granted by the people, so far at least as the express terms of the Constitution are concerned, are either limited in scope or else confined to some narrow field of operation. The right to regulate the territories, so far as may be "needful," is given with no other definition of its bounds; and who but Congress is to say how far that need extends? As to them, Congress has, and it was meant by Morris that it should have,[1] every power incident to an independent sovereignty, unless limitations are to be read into the grant from its collocation, and by force of the fundamental principles on which the whole Constitution rests, or of certain of its general prohibitions and guaranties.

The judicial powers granted to the courts of the United States are carefully enumerated, and cover comparatively few of the ordinary controversies that become the subject of litigation. Those which Congress can put in the hands of its deputies for the territories extend over the whole domain of jurisprudence.

The executive power of the United States alone stands as to the Territories on the same footing which it occupies as respects the

[1] Scott *v.* Sandford, 19 Howard, 507.

States. Congress may create territorial offices, but it cannot fill them. Appointments must come from another source, and, so far at least as the leading positions are concerned, are ineffectual until commissions are signed by the President.[1] Probably also he has a power of removal at will even of the judges.[2] Certainly he has a far greater prerogative. Until Congress acts for the regulation of any particular territory which the United States may acquire, the President is under the constitutional duty to see that the authority of the United States is recognized there and the peace of the United States maintained. If the acquisition be by conquest, its government falls to him from the first as the commander-in-chief of the national forces. If it be by treaty, he must take possession, and control it through such temporary agencies as he may think proper, until Congress sees fit to act.[3]

Whether there are any provisions in the Constitution, or principles that underlie it, which operate as partial restrictions upon the sovereign authority of Congress over the Territories, is a question which has repeatedly been presented to the Supreme Court of the United States, and to which its response has had a somewhat uncertain sound. In 1850, in a case, turning upon the effect of a territorial statute of Florida, the court spoke thus of territorial governments in general.

"They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the Federal and State authorities. There is but one system of government, or of laws operating within their limits, as neither is subject to the constitutional provisions in respect to State and Federal jurisdiction. They are not organized under the Constitution, nor subject to its complex distribution of the powers of government, as the organic law; but are the creations, exclusively, of the legislative department, and subject to its supervision and control. Whether or not there are provisions in that instrument which extend to and act upon these territorial governments, it is not now material to examine." [4]

This opinion was delivered while political discussion was still rife as to whether Congress could prohibit slavery in the Territories.

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[1] Constitution, Article II, Section 3.

[2] McAllister *v.* United States, 141 U. S. 174, 178; Parsons *v.* United States, 167 U. S. 324, 333.

[3] Fleming *v.* Page, 9 Howard, 602; Cross *v.* Robinson, 16 Howard, 164, 193.

[4] Benner *v.* Porter, 9 Howard, 242.

The Mexican war had stretched our boundaries to the Pacific. The Wilmot proviso, in 1846, brought the question we are now considering into sharp and sudden prominence. General Cass had been made the Democratic candidate for the Presidency in 1848, in view and in no small part in consequence of an open letter to his political friends, written the year before, in which he told them that the right of Congress to regulate the territory and other property of the United States would naturally be construed as merely designed to embrace property regulations; that it had been pushed farther in practice "by rather a violent implication;" but that it was "a doubtful and invidious authority," and "should be limited to the creation of proper governments for new countries, acquired or settled, and to the necessary provision for their eventual admission into the Union; leaving in the meantime to the people inhabiting them to regulate their internal concerns in their own way."[1]

The question was a troublesome one for politicians, as well as for jurists. If the Missouri compromise of 1820 was to be upheld, it must be because Congress could rightfully legislate as to the domestic institutions of the Territories. If it was to be broken through by the Wilmot proviso, it was also because Congress had that power.

Some of the Whig leaders now took the ground that the power to legislate for Territories in this and all other matters existed; but was rather one resting on implication than upon express grant. John Davis of Massachusetts defended this doctrine in the Senate, but said that the exercise of the power was to be controlled by the fundamental maxims of the Constitution. Calhoun came nearly to the same position. The "needful rules and regulations clause," he said, "conferred no governmental power whatever." But the Constitution recognized slavery. Slaves were therefore property, so far as the United States were concerned. The citizens of the United States were entitled to free access to every part of its unoccupied territories. They must be allowed to take their property with them. A sovereign State might abolish slavery within its limits. Into that State a slaveholder could not thereafter take this kind of property and hold it in possession. But the Constitution shielded him in the Territories, for they took their political

[1] Letter of Dec. 24, 1847, to A. O. P. Nicholson.

character solely from the United States, and the Constitution was their supreme law.

Davis's colleague was Daniel Webster. He met the issue, in the line of his argument at the bar before Marshall, twenty years before, by denying that the Constitution had any operation in the territories, until Acts of Congress were made to enforce it: it was made for the States, and not for territorial possessions. Benton took the same ground, and maintained it in his "Thirty Years' View," published in 1856.[1]

Calhoun had, at an earlier stage of the controversy, in 1848, inveighed in the Senate, in most impressive terms, against all measures looking to the acquisition of new territory to be governed as a political dependency, and had introduced a resolution declaring that to conquer and hold Mexico, "either as a province or to incorporate it in the Union would be a departure from the settled policy of the government, in conflict with its character and genius, and in the end subversive of our free and popular institutions."

While the political anvil was so hot, the Supreme Court wisely confined itself to disposing of the cases before them, without pronouncing upon academic questions, however important. Six years later, however, it adopted a different policy. In the Dred Scott case, Chief Justice Taney announced his adhesion and, so far as he could, committed the court to the doctrine advocated by Calhoun. The "needful rules and regulations clause," he declared, had no operation on territory acquired since the adoption of the Constitution. Such territory was subject to such laws as Congress might enact as the legislative arm of the government; but these must be confined within the limits assigned by the Constitution for the protection of person and property. A power to rule it without restriction, as a colony or dependent province, would be inconsistent with the nature of our government. Slaves might therefore be taken and held there, because slavery was a *status* recognized by the Constitution.[2]

The court, as reconstituted during the civil war which the Dred Scott decision had done so much to produce or to accelerate, reverted to the doctrine of Chief Justice Marshall, and in 1871 reinstated the "needful rules and regulations clause" as the primary authority for our territorial legislation.[3] The right of a sovereign

[1] ii, 714. [2] Scott *v.* Sandford, 19 Howard, 447, *et seq.*

[3] Clinton *v.* Engelbrecht, 13 Wallace, 434, 441, 447.

to rule his possessions, in later decisions has also been relied on, and has perhaps been most emphatically expressed in dealing with the various Acts of Congress passed to suppress polygamy in Utah. The fullest statement of the present view of the court was given by Mr. Justice Matthews, in one of these Utah cases, in which after saying that the question of the power of Congress to legislate for the Territories as to matters of domestic concern is no longer open for controversy, the opinion proceeded thus: —

"It has passed beyond the stage of controversy into final judgment. The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited. But in ordaining government for the territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. 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 to 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. This doctrine was fully and forcibly declared by the Chief Justice, delivering the opinion of the court in National Bank *v.* County of Yankton, 101 U. S. 129. See also American Ins. Co. *v.* Canter, 1 Pet. 511; United States *v.* Gratiot, 14 Pet. 526; Cross *v.* Harrison, 16 How. 164; Dred Scott *v.* Sandford, 19 How. 393. If we concede that this discretion in Congress is limited by the

obvious purposes for which it was conferred, and that those purposes are satisfied by measures which prepare the people of the Territories to become States in the Union, still the conclusion cannot be avoided, that the Act of Congress here in question is clearly within that justification. For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the co-ordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement. And to this end no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment." [1]

It will be remarked that the Dred Scott opinion is here cited as an authority. Mr. Justice Matthews' statement of the law was quoted with approval in 1889, by Mr. Justice Bradley, in deciding the greatest of all the Utah cases — that which held that Congress, as representing the *parens patriæ* of the territory, could annul the charter of the Mormon Church, confiscate its property, and devote it to public uses. He added, however, this important observation of his own: —

"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." [2]

It will be perceived that these few but pregnant words, repeated later with approval in an Alaska case by Mr. Justice Harlan,[3] substantially reaffirm a position on which the Dred Scott decision was rested by all the justices but three, and from which none of the other three dissented.[4] This is that Congress, in making rules for the Territories, is subject to some or all of the restrictions and prohibitions imposed upon it by the Constitution as respects other legislation affecting person or property. A difference is indeed

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[1] Murphy *v.* Ramsey, 114 U. S. 44, 45.

[2] Mormon Church *v.* United States, 136 U. S. 1, 42, 44, 58, 67.

[3] McAllister *v.* United States, 141 U. S. 17:, 188.

[4] Scott *v.* Sandford, 19 Howard, 542, 614.

made in the mode of statement. In 1850, the court considered the letter as well as the spirit of the Constitution to have a controlling force. In 1884 what is to be implied or derived from its spirit is treated as the main if not the only source of restraint. This mode of expression may have been adopted in order to leave the way open to hold, should occasion arise, that the United States could not lawfully acquire territory to hold permanently or for an indefinite period as a dependent province or colony. If, however, it means what it seems to declare, and is of general application, then the utterance of Taney on this point seems intrinsically entitled to the most respect. That is in line with what Chief Justice Marshall said in the great case of Cohens against Virginia,[1] in discussing the not dissimilar power of Congress to legislate for the District of Columbia, and meeting the objection that such legislation had simply a local effect. "Congress," he observed, "is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution. Whether any particular law be designed to operate without the district or not, depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument. In such cases the Constitution and the law must be compared and construed."

Any other construction leaves the rights of the citizen too much at the will of the judiciary, and ignores the natural meaning of our bill of rights.[2] The main privileges and immunities guaranteed by the amendments to the Constitution, which serve that office, are shared by every foreigner who may be found within our jurisdiction.[3] They must then certainly be the heritage of every settled inhabitant of the land. Such is their force in every organized Territory by Act of Congress (Revised Statutes, Section 1891) and I believe it to be the same in every unorganized territory

[1] 6 Wheaton, 264.

[2] See Pomeroy, Constitutional Law, § 498; Cooley, Principles of Constitutional Law, 36.

[3] Wong Wing *v.* United States, 163 U. S. 228, 238, 239, 242.

which is subjected to civil government, by virtue of the Constitution itself.[1]

If the laws of Congress as to the Territories are laws of the United States and subject in all respects to the Constitution of the United States, how can we justify the long established practice of investing the Territorial legislatures with general legislative power? Here, again, we may turn to Chief Justice Marshall for an answer. The "needful rules and regulations clause," he said in McCulloch against Maryland,[2] authorizes the organization of a territorial government which constitutes a corporate body. Precisely as a State may incorporate a city, with its city council, the United States may incorporate a Territory with a territorial council or a legislature. The statutes of such a body will not be laws of the United States, but laws of that part of it lying within the corporate limits, so far as Congress may have left the field open for their adoption. They are like the laws of our chartered colonies before the Revolution.

Assuming, then, that the Constitution is the supreme law wherever the flag of the Union floats over its soil, are there any of its provisions which are likely to embarrass us in dealing with our new possessions?

That they are islands and not part of the mainland of North America is, of itself, an immaterial circumstance, so far as the right to acquire them is concerned. Islands that fringe a continent are part of it. Puerto Rico and Cuba are American islands.[3] Hawaii is in a position to command our coast, and lies nearer to us than the outer Aleutian Island, the acquisition of which has been confirmed by general acquiescence during thirty years. For temporary commercial purposes, indeed, we have the warrant of the Supreme Court for saying that the President, with the authority of Congress, can acquire any island, however remote, and make it, while retained, a part of the United States.[4] If there is any difficulty in our accepting the cession of the Philippines, it is not that they are islands, but that they are not appurtenant to the American continent.

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[1] See Reynolds *v.* United States, 98 U. S. 145, 154, 162; Thompson *v.* Utah, 170 U. S. 343, 346; *In re* Sah Quah, 31 Fed. Rep. 329, 330.

[2] 4 Wheaton, 316.

[3] See a discussion of the Historic Policy of the United States as to Annexation in the Report of the American Historical Association for 1893, page 379.

[4] Jones *v.* United States, 137 U. S. 202, 212, 221.

Are we then — should the Spanish treaty be ratified — to meet any constitutional difficulty in holding and governing whatever it may bring us?

The XIV. and XV. Amendments must certainly prove a source of embarrassment. The latter declares that the right of citizens of the United States to vote shall not be denied or abridged by the United States on account of race or color. By Section 1992 of the Revised Statutes of the United States, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States." This statute was passed, on April 9, 1866, by the same Congress which framed and on June 16, 1866, proposed to the States for ratification the XIV. Amendment, with which, therefore, it may fairly be assumed to have been intended to be in harmony. The first words of that Amendment are 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." If this stood alone and unexplained by contemporary legislation, it might be argued that it applied only to persons residing in one of the States. But read in the light of Revised Statutes, Section 1992, it would seem a more natural construction to treat it as adding to that the farther step to which the consent of the States was necessary, that those thus born or naturalized, if they then or afterwards resided in a State, should be citizens of that State, as well as of the United States. It will be observed that the State among whose citizens they are thrust is not necessarily that of their birth. It is any State in which citizens of the United States may at any time reside.

Whether therefore Revised Statutes, Section 1992, should be repealed or not, the XIV. Amendment would seem to make every child, of whatever race, born in any of our new territorial possessions after they become part of the United States, of parents who are among its inhabitants and subject to our jurisdiction, a citizen of the United States from the moment of birth. The Indian tribes on our own continent are held not to be subject to our jurisdiction in the sense in which those words are here employed. They were until 1871 (Revised Statutes, Section 2079) considered as separate nations with which we dealt as treaty powers.[1] Their present condition has been described by the Supreme Court of the United States

[1] The Cherokee Nation *v.* Georgia, 5 Peters, 1.

as "a dependent condition, a state of pupilage, resembling that of a ward to his guardian." [1] Can this same position be assigned to the Malays, the Moros, and the many savage tribes in the Philippines? This will be a grave question for Congress and the courts to meet.[2] But, however that may be decided, the people of Puerto Rico and the natives of Hawaii will certainly be fully subject to our jurisdiction. Their children, born after the ratification of the Spanish treaty, if it should be ratified, will all be citizens of the United States. They must, therefore, by the XV. Amendment have the same right of suffrage which may be conceded in those territories to white men of civilized races. One generation of men is soon replaced by another, and in the tropics more rapidly than with us. In fifty years, the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form part of the United States, will be claiming the benefit of the XV. Amendment.

The provision in the first Article of the Constitution that "all Duties, Imposts and Excises shall be uniform throughout the United States" will also prove an awkward obstacle to any policy of the "open door," if our protective system is to be maintained. It requires that any customs duties we may impose on imported goods shall be of one and the same form and at one and the same rate at every port of entry throughout the United States.[3] If there is a duty of forty per cent collectible on woollen cloth brought to New York from a foreign port, the same percentage must be collected on woollen cloth brought to Manila from a foreign port, subject only to any temporary reservations of a right to entry on more favorable terms which may be made in the treaty of cession.

On this point the Supreme Court of the United States had occasion to speak soon after the Mexican war, when California became ours by the treaty of peace, and a contest arose over the right of the temporary government set up by the United States to exact duties on imported goods landed at San Francisco.

"By the ratifications of the treaty," says the opinion, "California became a part of the United States. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which

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[1] Elk *v.* Wilkins, 112 U. S. 94, 99.

[2] See United States *v.* Kagama, 118 U. S. 375, 380, 384.

[3] Head Money Cases, 112 U. S. 580, 594.

Congress had passed to raise a revenue from duties on imports and tonnage."[1]

It was contended by the importers that as Congress had not yet made San Francisco a port of entry or constituted any collection district in California the tariff law could not apply. To this the court replied as follows:

"Can any reason be given for the exemption of foreign goods from duty because they have not been entered and collected at a port of delivery? The last became a part of the consumption of the country, as well as the others. They may be carried from the point of landing into collection districts within which duties have been paid upon the same kinds of goods; thus entering, by the retail sale of them, into competition with such goods, and with our own manufactures, and the products of our own farmers and planters. The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision in the Constitution which enjoins that all duties, imposts, and excises, shall be uniform throughout the United States. Indeed, it must be very clear that no such right exists, and that there was nothing in the condition of California to exempt importers of foreign goods into it from the payment of the same duties which were chargeable in the other ports of the United States. As to the denial of the authority of the President to prevent the landing of foreign goods in the United States out of a collection district, it can only be necessary to say, if he did not do so, it would be a neglect of his constitutional obligation 'to take care that the laws be carefully executed.'"[2]

Many other difficulties of a constitutional character must be encountered, and more than can be noticed in the limits appropriate for an article like this. I will note two which address themselves particularly to the consideration of the political departments of our government.

1. The XIV. Amendment declares that should any State abridge or deny the right of suffrage as to any of its adult male inhabitants who are citizens of the United States, except for crime, its representation in Congress shall be correspondingly reduced.

This applies in terms only to the States; but does it not state a constitutional principle — that of manhood suffrage for every citizen — which the spirit of this Amendment requires us to observe in dealing with our Territories? Such would seem to have been its legislative construction in the Title of the Revised

[1] Cross *v.* Harrison, 16 Howard, 197. [2] Cross *v.* Harrison, 16 Howard, 198.

Statutes relating to that subject (Sections 1859, 1860). Can we properly leave the restriction upon the States, and relieve Hawaii from its operation?

It is true that it has never been enforced against the States, but it may be, at the pleasure of Congress, at any time.

2. An objection against the permanent incorporation of the Philippines into the United States remains for consideration which, if sound, is insurmountable.

This nation is the United States of America. That name was assumed on July 4, 1776, by the "Representatives of the United States of America in General Congress assembled," who signed the Declaration of Independence. The first Article of our first Constitution, the Articles of Confederation, is that "The Stile of this Confederacy shall be 'The United States of America.'" The preamble of our present Constitution states its adoption by "the People of the United States in order to form a more perfect Union . . . and secure the Blessings of Liberty" to themselves and their "Posterity." What they did was summarized at the close of the preamble. It was to "ordain and establish this Constitution for the United States of America."

The United States of America is a plural term. The union of separate States in one political body does not extinguish their separate existence, nor vary the force of their having formed this "more perfect union" in order to promote their several as well as their common interests. Can the United States *of America* ever include a State erected on islands off the coast of Asia, and having no possible tie of connection with the American continent? I believe that to this a negative answer may be safely given. Can they, then, annex such islands to a union into which they can never enter on equal terms?

This question cuts deeper than the one propounded to the Supreme Court of the United States in the Dred Scott case. The opinion given there was that we could not acquire any American territory to hold permanently as a dependent province. If that position be unsound, it would not follow that islands appertaining to another continent could be so acquired and held.

To acquire, of course, is one thing, and to keep, another.

I believe we have unquestionable power to acquire the Philippines as the spoils of war; but a conqueror is not bound and may not be able to retain what he receives.

If we should be unable or unwilling to hold them permanently as a colonial dependence, how could we get rid of such possessions?

It would seem logical to hold that the treaty-making branch of the government, by which they were acquired, could by similar proceedings convey them to some other power. So far as a transfer of sovereignty is concerned it could not be accomplished otherwise, unless successful revolt or other political change had made the Filipinos an independent people. To make a grant, there must be some one with whom to close the contract.

But it is the right of Congress to dispose of the territory of the United States, considered in the character of property. To sell or give away any part of the national domain reduces by so much the national resources. As all measures to raise revenue must originate in the House of Representatives, and to stop the revenues from any territory by its alienation would require raising more revenue by taxation, it would seem proper, if not necessary, that the whole of Congress and not merely the President and Senate should concur in any measure that reduced the area of the republic.

Could such a reduction be made either through Congress by law or the President and Senate by treaty, or both together, if it took the shape of a gift to the Filipinos, under which our ownership and sovereignty would pass to them as an independent power? No authority for such a transaction is expressly given in the Constitution. If implied, it would probably have to rest on the assumption that the Philippines had proved a *damnosa hereditas*. There would be greater difficulty in defending it on the ground that we had taken them as an act of humanity to spread the blessings of independent liberty over an oppressed people, after we had elevated and educated them sufficiently to make them fit to use it aright. For foreign missionary work of this kind in another continent, our Constitution contains no provision.

The case of Cuba is, of course, far different. That lies at our doors. It has not been ceded to the United States. Spain has relinquished her sovereignty, but she has not transferred it to us. Our position is to be that of a custodian, or receiver. The sovereignty is, in effect, in abeyance, but it is to pass, by our pledged consent, to the Cuban people, whenever they organize a government for themselves, and show that they can maintain it, and with it the peace and order to which Cuba has been so long a stranger.

Let me briefly summarize the conclusions which, it would seem to me, we must accept.

There is no constitutional objection to the acquisition of any or all of our new possessions, or to subjecting them to a temporary government of military or colonial form.

There is no constitutional objection to our taking temporary possession of Cuba, as a friend of the Cubans, and maintaining peace and order by a military occupation, under the President of the United States, until such time as we may deem its people fit to govern themselves. It is a practical application of the Monroe Doctrine in its modern form.

Until Congress acts, the President can govern our new possessions with no other authority than that with which his great office is clothed by the Constitution in its grant of executive power.[1]

If the Spanish treaty should be ratified, Congress could replace the temporary government which the President has set up in Puerto Rico by whatever form of administration it may think proper, not inconsistent with the principles and provisions of the Constitution of the United States, and maintain it until the inhabitants may be fit to govern themselves. No fixed limit of time can be assigned for the duration of such a *régime*. We have held Alaska under such conditions already for thirty years, and she is hardly more deserving of autonomy now than when she was a Russian province. We have held New Mexico, under different forms of administration, for nearly fifty years, and the character and traditions and laws of a Latin race are still so deeply stamped upon her people and her institutions that no demand of party exigency has been strong enough to secure her admission to the privilege of statehood. Here, as in so many other matters where constitutional law and legislative policy may come in conflict, every presumption is to be made in favor of the good faith of Congress and the wise exercise of its discretion.

Upon the ratification of the treaty, Puerto Rico would become (and for the first time become) a part of the United States, but our customs laws would not have full operation there until Congress created the necessary collection districts and ports of entry.[2] Until then, the temporary government of the President would con-

[1] Leitensdorfer *v.* Webb, 20 Howard, 176, 178.

[2] Fleming *v.* Page, 9 Howard, 602, 616, 617; Hamilton *v.* Dillin, 21 Wallace, 73, 88, 97.

tinue; duties on imports could be lawfully collected by his agents; and whatever courts of a municipal character he may have set up would continue in the discharge of their functions, with the power of life and death.[1]

And here such certainty as can be derived from judicial precedent or settled legislative construction and popular acquiescence comes to an end.

Whether Puerto Rico can be held permanently and avowedly as a colonial dependence; whether the Philippines could be held permanently, whether with or without a view of ultimately dividing them into States to be admitted as such into the Union; whether they could be given over to their inhabitants; whether all trials for crimes committed there must be by jury; whether Cuba, which we have taken in the capacity of a friend or protector, for the benefit of its people, through a war, at the outset of which the public faith was pledged not to acquire it for ourselves by right of conquest, could, should we come at last to despair of their capacity for self-government, be kept as part of the territory of the United States; whether in this republic there can be settled inhabitants of civilized or semi-civilized races owing allegiance to the United States alone, but who can be regarded as subjects and not citizens,[2] — these are questions unsettled so far as we can consult the oracles of the past, and in view of which the Senate must act, in dealing with the great issue now presented to it as the executive council with which the States have surrounded the President to protect their interests against an undue exercise of executive power.

The last in the list, however, and not the least in importance, while never adjudicated upon by the Supreme Court of the United States, received an answer from one of its most illustrious Judges, by way of an *obiter dictum*, in the first great case in which the construction of the Constitution was involved. This was Chisholm *v.* Georgia, in which the matter in issue was as to how far the ordinary immunity from suit belonging to a sovereign had been stripped from the States by the grant of judicial power to the United States. Mr. Justice Wilson in his opinion, when discussing what sovereignty is, had occasion to consider what is subject to it and used these words:

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[1] Jecker *v.* Montgomery, 13 Howard, 498, 515; The Grapeshot, 9 Wallace, 129, 133.

[2] See on this point Boyd *v.* Thayer, 143 U. S. 135, 162, 169; *In re* Look Ting Sing, 10 Sawyer, 353; 21 Fed. Rep. 905.

"In one sense, the term *sovereign* has for its correlative, *subject*. In this sense, the term can receive no application; for it has no object in the Constitution of the United States. Under that Constitution there are citizens, but no subjects. 'Citizen of the United States.' 'Citizens of another State.' 'Citizens of different States.' 'A State or citizen thereof.' The term subject occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed." [1]

In respect to the mode of trial for crimes committed in Puerto Rico and the Philippines, should they be annexed and civil government established there by Act of Congress, I think it probable though not certain that a jury would be indispensable. Article IV, Section 2, declares expressly that "the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and this was clearly intended to embrace those committed outside of any State. But this provision is contained in a section dealing exclusively with the subjects of judicial power particularly granted. It is settled (whether logically or illogically) that the courts of Territories do not exercise the power thus conferred. Congress finds its warrant for them in quite different parts of the Constitution, and it is a sufficient warrant for investing them with jurisdiction over every kind of act against the peace of the United States which the laws of the United States may forbid. True, jurisdiction of similar extent may be and has been given under this particular section to the regular courts of the United States; but the source of power under which the different tribunals act is different. The source of power for the ordinary courts gives it with a limitation in favor of trial by jury. The source of power for territorial courts might, I think, be read as giving it with no such limitation. While this would give rather a strict construction to the constitutional guaranty, it would be quite in line with that which the Supreme Court has assigned to other provisions hardly less important, such as that securing the tenure of judicial office during good behavior.

The court, however, made a decision a few years since, which tends strongly in the opposite direction. A man was convicted of a misdemeanor, in the police court of the District of Columbia, upon a trial before the Judge, after a demand for a jury had been refused. He sought relief, by a writ of *habeas corpus*, from confinement under the sentence. The Act of Congress, passed under its authority "to exercise exclusive Legislation in all Cases what-

[1] 2 Dallas, 419, 456.

soever" over the District, which constituted the police court, denied a jury in such proceedings. The Supreme Court of the District had sustained the validity of this statute, and refused to release the prisoner. This judgment was reversed by the Supreme Court of the United States on the sole ground that he had a constitutional right to a jury trial, and their reasons were thus stated:

"There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any one of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases. In the Draft of a Constitution reported by the Committee of Five on the 6th of August, 1787, in the convention which framed the Constitution, the 4th section of article XI read that 'the trial of all criminal offences (except in cases of impeachment) shall be in the States where they shall be committed; and shall be by jury.' 1 Elliott's Deb., 2d ed., 229. But that article was, by unanimous vote, amended so as to read: 'The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the legislature may direct.' Id. 270. The object of thus amending the section, Mr. Madison says, was to 'provide for trial by jury of offences committed out of any State.' 3 Madison papers, 144. In Reynolds *v.* United States, 98 U. S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions; and it had been previously held in Webster *v.* Reid, 11 How. 437, 460, that the Seventh Amendment secured to them a like right in civil actions at common law. We cannot think that the people of this District have, in that regard, less rights than those accorded to the people of the Territories of the United States." [1]

If the views thus expressed are not overruled (and they were reaffirmed with equal positiveness during the last year [2]), they must lead to the conclusion that no conviction for crime could be had in any of our new possessions, after the establishment there of an orderly civil government, except upon a jury trial.

I think also that by the ordinary rules of construction, the provisions of the third, fifth, and eighth Amendments must be regarded in any form of territorial government which Congress may construct for any part of the United States; including, of course,

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[1] Callan *v.* Wilson, 127 U. S. 540, 550.

[2] Thompson *v.* Utah, 170 U. S. 343, 346.

Puerto Rico and the Philippines, should the pending treaty be ratified, and if, as I have taken for granted, it cedes to us the sovereignty over both.

If not, it must be on the theory that the guaranties which they afford to personal liberty refer only to proceedings had in the exercise of the judicial power of the United States. To read them thus would seem to me to violate the ordinary rule that constitutional provisions for the safety of the individual and the security of property should be favorably and liberally construed.[1] It would also lead to what I should say was the inadmissible assumption that the Amendments set up no checks against executive and legislative power.[2] The fourth amendment, which guards the people against unreasonable arrests and general warrants, was successfully invoked in an early case before Chief Justice Marshall, arising in the Territory of Orleans. General Wilkinson, who was then in command of the army of the United States, and superintending the fortifications at New Orleans, arrested two men implicated in the Burr conspiracy, and sent them on to Washington for trial. There was a Territorial court at New Orleans before which they might have been prosecuted. Arrived at Washington, they applied for a writ of *habeas corpus*, and were discharged by order of the Supreme Court of the United States, mainly on the ground that they could only be prosecuted where their offence was committed, and so that their arrest was unwarranted by the Constitution.[3] Judge Story, in commenting on the decision, remarks that as the arrests were made without any warrant from a civil magistrate, they were in violation of the third amendment.[4]

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice — or injustice — which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government.

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[1] Boyd *v.* United States, 116 U. S. 616.

[2] State *v.* Griswold, 67 Conn. 290, 309.

[3] *Ex parte* Bollman, 4 Cranch, 75.

[4] Story, Commentaries on the Constitution, § 1895, note.

Every people under a written Constitution must experience difficulties of administration that are unknown to nations like Great Britain, which are unfettered by legal restraints imposed by former generations. It is part of the price it pays for liberty, that new conditions must be dealt with, in fundamentals, under old laws.

The people of the United States, when they framed this Constitution for themselves and their posterity, had they contemplated a day when the Executive might negotiate a treaty of cession embracing an archipelago in the waters of Asia, might have relaxed some of the restrictions which they were laying down to limit the legislative power. They might also have strengthened and multiplied them. They may now be asked to declare their will, through the slow process of constitutional amendment; but until they speak, we must take the Constitution as it is.

Simeon E. Baldwin.