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THE STATUS OF OUR NEW POSSESSIONS — A THIRD VIEW.

ONLY one excuse can be offered for adding another to the many articles that have already appeared upon this theme. It is that the subject is of such supreme importance that any suggestion from a new point of view may have a value out of proportion to its own intrinsic merit. The questions presented are as novel as the conditions under which they arise, and will have to be worked out from the existing law much as the courts developed the law of railroads from the earlier law of common carriers; not by reversing established principles, but by seeking how far they are applicable to the new conditions.

The general canon for the interpretation of legal authorities is well known. It requires the search for a principle which shall reconcile all the authorities, or, if this is out of the question, a principle which shall reconcile as large a part of them as possible, so that those only are rejected which cannot by any theory be brought into accord with the rest. Of two propositions of which one is consonant with all or nearly all the authorities, and of which the other agrees only with a part of them and contradicts another part, the former is always to be preferred. Legal authorities are no doubt of different weight; the most important being actual decisions, that is judgments in cases where the point in question was so involved that the judgment could not have been rendered without

passing upon it. But although an actual decision is the most weighty, it is not the sole source of legal authority. Every opinion expressed by the court is entitled to consideration, even if it is merely a dictum. Moreover there is a difference to be observed among dicta. Those which are a part of the *ratio decidendi*, which are treated by the court itself as an essential link in the chain of reasoning by which the decision is reached, are certainly more important than those which are purely *obiter*, that is which are consciously superfluous for the purpose of deciding the case. In the interpretation of a Constitution some weight must also be attributed to the conditions under which it was framed; to previous Constitutions; to the steps by which it attained its final form; and finally to generally accepted legal opinion. The balance of authorities in any case cannot be measured with mathematical accuracy; yet their relative weight may be roughly estimated.

Two opposing theories of the application of the Constitution to our new dependencies have been put forward, and both have been very ably advocated. One opinion, represented by Professors Langdell and Thayer, in the HARVARD LAW REVIEW for February and March of this year, and by Mr. Gardiner in the "American Law Review" for March–April, holds that the limitations imposed by the Constitution upon the federal government apply only to the States, and that the term United States, when used in a territorial sense, includes the States alone. The other opinion, represented by Mr. Randolph and Judge Baldwin, in the HARVARD LAW REVIEW for January and February, holds that these limitations apply wherever the jurisdiction of the government extends, and that all territory in the possession of the nation is a part of the United States. Both of these theories reject a certain number of decisions, and it may not be impossible to formulate a third opinion which reconciles a larger proportion of the authorities than either of them.

If the two prevalent theories are examined closely each of them presents serious objections. The narrower view of the Constitution, that which limits its provisions to the area of the States, besides contradicting many judicial opinions, which will be considered in detail at a later stage of the argument, leads to conclusions sharply at variance with commonly received opinion. It allows Congress to confiscate property in the District of Columbia or in a Territory without compensation, or to take it arbitrarily from the owner and bestow it upon another person. It suffers the government to pass a bill of attainder against a resident of Washington

or of Arizona, and order him hung without trial. According to this view, moreover, a person born of alien parents in a Territory is not a citizen of the United States either by the Constitution or by statute,[1] and residence there is not residence within the United States for the purpose of subsequent qualification for a seat in Congress. These results are certainly opposed to the ideas that have prevailed hitherto.

Objections may be raised in like manner to the broader construction which extends the provisions of the Constitution over our new dependencies. This construction assumes that the interpretation given by the courts to the Constitution in the case of the older Territories applies to all places subject to the jurisdiction of the United States, an assumption for which there is no judicial sanction, and which actually contradicts a couple of decisions. It may be urged also that this construction is irrational, because it extends the restrictions of the Constitution to conditions where they cannot be applied without rendering the government of our new dependencies well-nigh impossible, and surely no provision ought to be given an interpretation which leads to an irrational result, if the language will bear equally well a different construction.

In seeking an interpretation of the Constitution it is proper to go backward and examine the Articles of Confederation. These created a league or union of States, and their form is that of articles of partnership. They commonly use the term "United States" to denote the States collectively. Thus, they speak of "the United States, or either of them"[2] "any of the United States,"[3] "each of the United States,"[4] "from one State to another, throughout all the United States,"[5] and their regular method of referring to the organ of federal government is "the United States in Congress assembled." In fact, they use the term "United States" in such a way that it often clearly denotes, and always may denote, the States collectively. At this time, it may be observed, the Union contained no territory not included within the limits of the several States. Hence Congress was given no power to legislate for any Territories,[6] and in the clause regulating the decision of disputed boundaries it is expressly provided that "no State shall be deprived of

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[1] Rev. Stats., Sects. 1992–93.

[2] Art. 4. [3] Art. 4. [4] Art. 9. [5] Art. 9.

[6] In the "Federalist," No. 38, Madison remarks that, in legislating for the western lands ceded to it by the States, Congress acted "without the least color of Constitutional authority."

territory for the benefit of the United States." [1] In a territorial sense, therefore, the term United States covered of necessity the area of the States and that alone. For this reason the expressions "throughout the United States" and "throughout all the United States" were strictly synonymous, and were so used.[2]

The Constitution brought about a new relation between the States and the federal government, and the expressions suitable for articles of partnership gave way before those adapted to the charter of a corporation. It is, of course, impossible in most cases to determine with certainty whether the term United States is used to denote the States collectively, or the nation as a political entity. When the Constitution speaks of the Congress, the President, the officers, the Constitution, or the laws, of the United States, the term may be used in either sense; but certainly its constant use in a sense that is obviously collective is discarded. The only instances to be found are in the provision forbidding the President to receive "any other Emolument from the United States, or any of them;" [3] and in the eleventh Amendment which speaks of "one of the United States." In view of the general absence of such expressions, which recur constantly in the Articles of Confederation, these instances may perhaps be attributed to inadvertence.[4] In the preamble, the expression "We, the people of the United States," is manifestly used vaguely, for the Constitution was established not by a people at all, but by the States in their corporate capacity. On the other hand, the term is sometimes used in a way that can denote only a national political entity, as where the Constitution speaks of "a citizen of the United States." [5] A man may be a citizen of a State or of the nation, but he cannot be a citizen of several states collectively.

The position of the Confederation had changed in another way. Several of the States had ceded their claims over the Western lands to the federal government, which had thus become the possessor of territory, and provision for its management was made in the Constitution. Moreover the cession of other districts, for a federal capital, for forts, arsenals, and dockyards, was contemplated, and Congress was given power to rule them also. Now in view of these new conditions what territorial conception did the framers of the

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[1] Art. 9.

[2] Art. 9, Cl. 5.

[3] Art. II., Sect. 1, Cl. 7.

[4] Prof. Langdell agrees to this in the case of Art. II., Sect. 1, Cl. 7, HARVARD LAW REVIEW, Feb. 1899, p. 375 and note 10.

[5] Art. I, Sect. 2, Cl. 2, Sect. 3, Cl. 3. Art. II., Sect. 1, Cl. 5.

Constitution attach to the term United States? Did they mean it to cover only the members of the Union that had a share of political power, that is, the original thirteen States, diminished as they had been by the cession of their Western lands; or did they mean it to include the whole territory then belonging to the nation, territory all of which had formerly been a part of the United States by being a part of the States?

In view of the existence of territory belonging to the nation, but not forming part of any State, it might be supposed that the careful draftsmen of the Constitution would have avoided, as at least ambiguous, the use of the term United States in provisions that were not intended to apply outside of the States; and it would not have been difficult so to do. Thus in the first clause of Art. I., Sec. 2, for example, the Constitution speaks of "the People of the several States," and in the next clause a representative is required to be a "Citizen of the United States." Why this change of expression if a different meaning is not intended? The framers of the Constitution recognized citizens of a State and spoke of them as such when they wanted to,[1] while in other places they spoke of citizens of the United States; just as they spoke of judicial officers of the several States in contradistinction to those of the United States.[2] Again, it is provided that "direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers;"[3] but that "all Duties, Imposts, and Excises shall be uniform throughout the United States."[4] If the intention had been merely that these last taxes should be uniform throughout the States, while direct taxes were apportioned among them according to population, the framers of the Constitution would no doubt have said so. The same remark applies to the provisions requiring laws of naturalization and bankruptcy to be uniform throughout the United States,[5] and to the clause prescribing that the President shall have "been fourteen Years a Resident within the United States."[6] It may be ob-

[1] Art. IV., Sect. 2, Cl. 1. [2] Art. VI., Cl. 3.

[3] Art. I., Sect. 2, Cl. 3. It may be noted that the expression is not the States of which this Union may consist or be composed, but the States which may be included within this Union.

[4] Art. I., Sect. 8, Cl. 1. [5] Art. I., Sect. 8, Cl. 4.

[6] Art. II., Sect. 1, Cl. 5. In the provision that Presidential Electors shall be chosen on the same day "throughout the United States" (Art. II., Sect. 1, Cl. 4), the use of the term United States in the sense of the whole national territory, although the election takes place only in those parts which enjoy political rights, certainly creates no ambiguity and does not seem inappropriate.

served in this connection that if no one can be a citizen of the United States unless he is a citizen of one of the States, then foreigners can become citizens only by being naturalized in a State, and Congress either had no power to extend the naturalization laws over the Territories, or persons naturalized there acquire none of the rights of citizens.

A similar question is presented by the limitations that guarantee personal rights. Were these imposed merely for the benefit of the States, or were they intended to protect all parts of the nation? They are certainly not expressly confined to the States, and some of them were clearly meant to have a broader application. Art. III., Sect. 2, Cl. 3, provides, for instance, that "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, the Trial shall be at such Place or Places as the Congress may by Law have directed." This by its very terms applies to crimes committed outside of any State, and the provision was so framed with that very object.[1] Another clause, speaking of members of Congress, provides that "for any Speech or Debate in either House, they shall not be questioned in any other Place."[2] Surely this cannot mean only any place within a State, for it would lose its whole value if a member could be sued or prosecuted in the District of Columbia on a charge of Libellous statements in Congress. A third example is furnished by the fifteenth amendment. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." This must apply beyond the States, because it is only outside of the States that Congress can have power to deny or abridge the right to vote.

A consideration of the political status of the Territories at the adoption of the Constitution leads to similar conclusions. At the very time when the Constitutional Convention was sitting Congress adopted the Ordinance of 1787 for the Government of the North West Territory. This concluded with a series of articles which it declared "shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent." The fourth article, — taken, by the way, from Jefferson's

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[1] Madison Papers, p. 1441.

[2] Art. I., Sect. 6.

earlier Ordinance of 1784, — provided that "The said territory and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made." So that the North West Territory, at least, had been made by compact a part of the United States; and that this was the understanding of the framers of the Constitution is evident from the proceedings of the Convention, for on June 5, 1787, it adopted a Resolution "that provision ought to be made for the admission of States, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise."[1] This clearly refers not only to Vermont, but also to proposed States to be formed in the western territory, which is thus described as within the limits of the United States.[2]

The Ordinance of 1787 throws light in several ways on the application to the Territories of the provisions of the Constitution. The second of the articles already referred to provided that "the inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury;" that they shall be free from immoderate fines, and cruel or unusual punishments; that they shall not be deprived of liberty or property, but by the judgment of their peers, of the law of the land; and that their property shall not be taken for public purposes without full compensation. Now these are among the very rights guaranteed in the body of the Constitution and in the amendments of 1789, and as the Ordinance declared that its articles should be considered "articles of compact, between the original States and the people and the States of the said territory, and forever remain unalterable, unless by common consent," it is hardly credible that the framers of the Constitution and the amendments should immediately have broken faith, by guaranteeing those rights to the original States alone, and refusing to extend the guarantee to the Territories. The fourth article of compact further provided that the inhabitants of the Territory should be subject to pay "a proportionate part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States." This became, of course,

[1] Madison Papers, p. 794.

[2] "The Federalist," No. 14, speaks of the "limits, as fixed by the treaty of peace" as "the actual dimensions of the Union."

obsolete when the Constitution did away with apportionments upon the States, but it has a bearing upon the extension to be given to the provision that "all Duties and Excises shall be uniform throughout the United States." If this involved no restriction on the power of Congress to tax the North West Territory there would surely have been another breach of faith. It would seem, therefore, that both the text of the Constitution and contemporary political history lead to the conclusion that the limitations of that instrument were meant to extend beyond the boundaries of the States.

In considering the judicial authority upon the question a distinction may be drawn between the territory belonging to the United States at the time of the adoption of the Constitution and that which has been acquired subsequently. The status of the former has been brought before the courts only in the case of the District of Columbia. The first allusion to it is in Loughborough *v.* Blake,[1] which involved the right of Congress to impose a direct tax upon the District, and where Chief Justice Marshall, in the course of the decision, gave his famous dictum on the meaning of the provision that duties, imports, and excises shall be uniform throughout the United States.

"Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other."

Many years later the question was presented whether the provision for trial by jury applied to the District of Columbia, and the Supreme Court decided that it did,[2] saying, in the course of the opinion: —

"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 of the constitutional guarantees of life, liberty, and property — especially of the privilege of trial by jury in criminal cases."

Within the current year the court has reaffirmed this principle, and said: —

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[1] 5 Wheat. 317.

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

"It is beyond doubt at the present day that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia." [1]

Finally, in the case of Bauman *v.* Ross,[2] the court assumed that the Fifth Amendment applied, so that Congress could not take land for public purposes without just compensation.

The status of the territory acquired since the adoption of the Constitution has given birth to more abundant litigation; but in regard to this, three distinct questions arise: First, has the United States the right to acquire possessions? second, do they have the same standing as those which belonged to the nation at the time of the adoption of the Constitution? and, third, what in either case is their constitutional position?

The Constitution makes no provision for the acquisition of territory; and although Gouverneur Morris, in the letters quoted by Campbell, J., in the Dred-Scott case,[3] says that he contemplated such action, he certainly gave no intimation of it in the Constitution. The purchase of Louisiana was, however, a political necessity; and while at first Jefferson was doubtful of his own authority, and desired the sanction of a constitutional amendment, his precedent has been followed so often, and has been so thoroughly confirmed by judicial decisions and by the practice of every department of the government, that its legality is no longer a subject of dispute.[4]

The status of the territory after it has been acquired is quite a different matter. In the debates in Congress on the subject of the Louisiana purchase,[5] the Federalists took the ground that territory could be constitutionally acquired, but that it could not be made a part of the Union without the universal consent of the States. Of the Republicans, on the other hand, some prudently avoided this issue, while others boldly asserted that Louisiana became by the treaty a part of the United States on a parity with

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[1] Capital Traction Co. *v.* Hof, 19 Sup. Ct. Rep. 580.

[2] 167 U. S. 548.

[3] Scott *v.* Sandford, 19 How. 393, 507.

[4] In Jones *v.* United States, 137 U. S. 202, 212, Mr. Justice Gray said: "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as other officers, citizens and subjects of that government. This principle has always been applied by this court, and has been affirmed under a great variety of circumstances."

[5] See Adams, Hist. of U. S., Vol. II. Chap. V.

the older territories. When the question of providing a government for the new possessions came up, the attitude of the parties was to a great extent reversed. Although in direct violation of their instructions,[1] the American commissioners had inserted in the treaty this article: —

"Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

In spite of this, the first Act for the government of Louisiana conferred on the President arbitrary powers, without regard to any restrictions in the Constitution; and, in fact, continued in his hands the despotic system that had prevailed under the Spanish dominion. The Federalists objected that the powers given to the President were unconstitutional, and were met with the reply that the limitations of power found in the Constitution are applicable to States and not to Territories,[2] a doctrine which was certainly acted upon for a couple of years, when, after vigorous complaints by the inhabitants, a system of government was obtained based on that of the older Territories.

The question whether the Territories acquired by a treaty of this kind stand on the same footing as those which belonged to the United States at the time of the adoption of the Constitution has been passed upon by the courts on two or three occasions. It was first presented in the case of Florida, in Amer. Ins. Co. *v.* Canter.[3] In the Circuit Court, Johnson, J., was of opinion that there was a distinction between the two classes of territory, and that the States, together with the original territory, were the sole objects of the Constitution.[4] In arguing the case before the Supreme Court, Webster

[1] Adams, Hist. of U. S., Vol. II. p. 45.

[2] Id., pp. 119–120.

[3] 1 Pet. 511.

[4] Speaking of territory acquired after the adoption of the Constitution, he said (p. 517, note): "We have the most explicit proof, that the understanding of our public functionaries is, that the government and laws of the United States do not extend to such territory by the mere act of cession. . . . At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognized. These limits consisted, in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These

took, in a more incisive way, the old position of the Federalists at the time of the Louisiana purchase. "What is Florida?" he asked. "It is no part of the United States. How can it be? . . . Florida was to be governed by Congress as she thought proper. What has Congress done? She might have done anything. She might have refused the trial by jury, and refused a legislature." [1] It was, no doubt, on account of these statements that Chief Justice Marshall took occasion to refer to the matter in his opinion. After saying that the government of the Union possessed the power of acquiring territory by conquest or by treaty, he referred to the sixth article of the treaty of cession, which was copied in substance from the article in the treaty ceding Louisiana, and said, "This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation." [2]

The same question arose after the cession of Mexican territory by the treaty of Guadaloupe Hidalgo. In a case involving the collection of customs duties the Supreme Court held that "by the ratifications of the treaty, California became a part of the United States," and as such subject to the provision in the Constitution that duties, imports, and excises shall be uniform throughout the United States.[3] This principle that the status of the new Territories was precisely the same as that of the original ones seems thereafter to have been universally and tacitly assumed, except in the Dred-Scott case. In that instance Chief Justice Taney drew a distinction between the two, but for the purpose, curiously enough, not of confining the restrictions on the power of Congress to the original territory, but of making them more stringent in their application to the new possessions than to the old.[4] He was confronted by the prohibition of slavery in the Ordinance for the

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states, this territory, and future *states* to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

"The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new states into the Union, and the government of such acquisitions is, of course, left to the legislative power of the Union, so far as that power is uncontrouled by treaty."

[1] 1 Pet. 538. Webster maintained in the Senate twenty years later that the Constitution had no operation in the Territories.

[2] Id., p. 542.

[3] Cross *v.* Harrison, 16 How. 164, 197–198.

[4] Scott *v.* Sandford, 19 How. 393, 432–442.

North West Territory, and he wanted to deny to Congress the right to extend that measure beyond the Mississippi. Judge Curtis in his dissenting opinion rejects this doctrine,[1] and it has received no support in later decisions of the court.

Assuming, therefore, that the Territories ceded to us by France, Spain, and Mexico stand on the same footing as those originally possessed, it remains to inquire what that position has been held to be; how far, in other words, the limitations in the Constitution have been held to apply to them.

The provision that duties, imposts, and excises shall be uniform throughout the United States has been held, in accordance with the dictum of Chief Justice Marshall,[2] to apply to the possessions ceded by Mexico; and although the decision in the case of Cross *v.* Harrison[3] can, no doubt, be supported on the ground that, until Congress organized the government, the President had authority to collect duties under his general powers, still the doctrine that the provision in question applies to the Territories was by no means a mere *obiter dictum.* It was the *ratio decidendi* of the case.

The provisions securing trial by jury for crime[4] have been held, as we have seen, to apply to the District of Columbia,[5] and in a couple of other cases they have been held to operate in Utah also.[6] In neither of these two last cases, it is true, was the principle absolutely necessary to the decision; but in the most recent one at least, where the judgment was in favor of the prisoner, the court based its opinion upon that ground; so that, while the decision may be sustained in other ways, this principle was a part of the *ratio decidendi.* The doctrine is, moreover, reinforced by dicta in other cases.[7]

The Seventh Amendment, preserving the right of trial by jury in civil cases has likewise been held to be binding in the Territories. In Webster *v.* Reid,[8] where this question was first raised,

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[1] Scott *v.* Sandford, 19 How. 611–614.

[2] Loughborough *v.* Blake, 5 Wheat. 317.

[3] 16 How. 164.

[4] Art. III., Sect. 2, Cl. 3, and Amend. VI.

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

[6] Reynolds *v.* United States, 98 U. S. 145, 154; Thompson *v.* Utah, 170 U. S. 343, 347.

[7] That Art. III., Sect. 2, Cl. 3, applies, see United States *v.* Dawson, 15 How. 467, 487; Cook *v.* United States, 138 U. S. 157, 181.

[8] 11 How. 437.

the court based its decision very briefly upon this among other grounds.[1] Many years afterwards, in Amer. Publishing Co. *v.* Fisher,[2] the question was treated as an open one; but later still, in another case reported at the end of the same volume, the court again declared distinctly that the amendment was binding in Utah,[3] and although the question was not strictly essential to the decision of the case, the court could hardly avoid an opinion upon it, because the sole foundation of its jurisdiction was a contrary opinion given in the Territorial court. Finally, in a very recent opinion upon the subject, the Supreme Court said: —

"That the provisions of the Constitution of the United States relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question."[4]

The protection to property outside of the States has given rise to much less discussion. In Bauman *v.* Ross,[5] referred to once before, the court assumed that private property could not be taken for public use in the District of Columbia without just compensation, and decided that the method of fixing the compensation in the case at bar was just. On the other hand, in the earlier case of Mormon Church *v.* United States,[6] which will be discussed more fully later, the court said that Congress would be restrained, but rather by the spirit of the Constitution than by any express provisions.

Besides the cases already cited, there are others in which dicta are found to the effect that the restrictions of the Constitution are not confined to the States;[7] and in the decisions relating to citizenship, under the Fourteenth Amendment, it is commonly assumed

[1] This case has since been cited by the Supreme Court as an authority to that effect in Callan *v.* Wilson, 127 U. S. 540, 550; Thompson *v.* Utah, 170 U. S. 343, 346; Capital Traction Co. *v.* Hof, 19 Sup. Ct. Rep. 580.

[2] 166 U. S. 464.

[3] Springville *v.* Thomas, 166 U. S. 707. Fuller, C. J.: "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common cases, and the Act of Congress could not impart the power to change the constitutional rule."

[4] Thompson *v.* Utah, 170 U. S. 343, 346. See also the language already quoted from Capital Traction Co. *v.* Hof, 19 Sup. Ct. Rep. 580.

[5] 167 U. S. 548.

[6] 136 U. S. 1.

[7] Murphy *v.* Ramsay, 114 U. S. 15, 44; Wong Wing *v.* United States, 163 U. S. 228, 238. That the limitations of the Constitution apply to the Territories is assumed in Scott *v.* Sandford, 19 How. 393, both in the opinion of Chief Justice Taney (pp. 449–450), and in the dissenting opinion of Mr. Justice Curtis (p. 614.)

that a person born in the Territories is a citizen of the United States. This is clearly true of United States *v.* Wong Kim Ark,[1] where the court bases citizenship upon birth within the allegiance; and it is no less true of Elk *v.* Williams,[2] where the citizenship of an Indian was in question, for it nowhere appears whether he was born in a State or a Territory, and hence we may presume that the court considered it immaterial.

Against this array of authorities there is little to oppose. The question whether the limitations of the Constitution apply to the Territories was treated as an open one in Benner *v.* Porter,[3] and Amer. Pub. Co. *v.* Fisher.[4] But of course these cases are not authorities against a theory which they do not controvert, and upon which the court has since pronounced a favorable opinion. The case of Mormon Church *v.* United States[5] is more important, for there Mr. Justice Bradley said: —

"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."

This dictum is certainly an authority of a certain weight against the current of opinion; but its force is much weakened by the dissent of three of the judges,[6] and is pretty well destroyed by the case of Thompson *v.* Utah, where it is, in fact, cited by the court as supporting the principle that the limitations of the Constitution are operative in the Territories.[7]

The recent case of Endleman *v.* United States,[8] in the Circuit Court of Appeals, which sustains the constitutionality of an Act of Congress forbidding the importation, manufacture, and sale of liquor in Alaska, is often cited as an authority against the application of the limitations to the Territories. But the opinion hardly warrants that interpretation. It is clearly settled that a State,

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[1] 169 U. S. 649.

[2] 112 U. S. 94.

[3] 9 How. 235, 242.

[4] 166 U. S. 464.

[5] 136 U. S. 1, 44.

[6] In the dissenting opinion, Chief Justice Fuller says: "In my opinion Congress is restrained, not merely by the limitations expressed in the Constitution, but also by the absence of any grant of power, expressed or implied, in that instrument."

[7] 170 U. S. 343, 349.

[8] 57 U. S. App. 1; 86 Fed. Rep. 456.

under its police power, can forbid the manufacture of liquor and the sale at retail, in spite of provisions for the protection of property similar to those in the Constitution of the United States; and a State could forbid its importation also were it not for the control over commerce by the United States. Now the federal government possesses in the Territory both the national and the local authority, and hence although the limitations of the Constitution may apply, it can forbid the importation, manufacture, and sale of liquor altogether. This is all that it was necessary for the court to decide, and the language of the judge does not seem to justify the belief that he intended to decide anything more.[1]

There is one well established doctrine which is commonly supposed to militate against the extension to the Territories of the restrictions in the Constitution. It is that the territorial courts are not courts of the United States within the meaning of the article on the judicial power. This doctrine is put upon the ground that "the jurisdiction with which they are invested, is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States."[2] The doctrine has no connection with the

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[1] After rehearsing the reasons advanced for holding the Act invalid, the court said: "The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well established doctrine that the Territories of the United States are entirely subject to the legislative authority of Congress. 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 creation exclusively of the legislative department and subject to its supervision and control. Benner *v.* Porter, 9 How. 235, 242. The United States having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, Federal and State. Insurance Co. *v.* Canter, 1 Pet. 511, 542; Cross *v.* Harrison, 16 How. 164, 193; National Bank *v.* Yankton Co., 101 U. S. 129, 133; Murphy *v.* Ramsey, 144 U. S. 15, 44; Mormon Church *v.* U. S., 136 U. S. 1, 42, 43; McAllister *v.* U. S., 141 U. S. 174, 181; Shively *v.* Bowlby, 152 U. S. 1, 48. Under this full and comprehensive authority, Congress has unquestionably the power to exclude intoxicating liquors from any or all of its Territories, or limit their sale under such regulations as it may prescribe. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local police regulation, or within State control under some other power, it is immaterial to consider. In a Territory all the functions of government are within the legislative jurisdiction of Congress, and may be exercised through a local government, or directly by such legislation as we have now under consideration."

[2] Amer. Ins. Co. *v.* Canter, 1 Pet. 511, 546; McAllister *v.* United States, 141 U. S. 174, and cases cited.

protection accorded to individual rights by the Constitution. It merely leaves to Congress the same freedom in the organization of the judiciary as in that of the executive and legislature, of a territory. That it is not inconsistent with the protection of the people of the Territories by the bill of rights, and by other constitutional limitations upon the power of Congress, is shown by the fact that Chief Justice Marshall, in the very case in which it was first asserted, declared that the inhabitants of Florida enjoyed the privileges, rights, and immunities of citizens of the United States; and held in Loughborough *v.* Blake[1] that the provision requiring duties, imposts, and excises to be uniform throughout the United States, applied to the Territories as well as to the States.

It would seem, therefore, that the overwhelming weight of judicial authority sustains the proposition that, except for the provision regulating the organization of the courts, the limitations in the Constitution extend to the continental territory ceded to the United States by France, Spain, and Mexico. We have still to consider whether this is due to the form in which those cessions were made, or whether all possessions of the United States, however acquired, are of necessity in the same position. The treaty for the cession of Louisiana provided in Article III.: —

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States."

And the treaty with Spain for the cession of Florida, which Chief Justice Marshall said admitted its inhabitants to the enjoyments of the privileges, rights, and immunities of citizens, contained a similar clause.[2] It may be suggested that these provisions were not meant to confer any immediate rights upon the inhabitants of the country ceded, but were intended merely to provide for the admission of States to be formed out of that country in the future. To this it can be answered that, although such an interpretation of the clause is certainly possible, the other construction, which was put upon it by Marshall, has not been questioned; and it is not necessary for

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[1] *Op. cit.*

[2] Art. VI. The inhabitants of the territories which His Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.

the purpose of this argument to show that these treaties necessarily conferred the rights of citizenship, but merely that they were susceptible of that construction, and have in fact received it.

The treaty of Guadaloupe Hidalgo, whereby, according to Cross *v.* Harrison,[1] California was made a part of the United States, was even more full in its terms. It provided that persons in the ceded districts might remain Mexicans, or acquire the title and rights of citizens of the United States if they preferred to do so;[2] and that in the latter case they should "be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution."[3] Moreover it referred to "the limits of the United States, as about to be established by the following article;"[4] and spoke "of the territories, which, by the present treaty, are to be comprehended for the future within the limits of the United States."[5] The same form was followed six years later in the treaty for the Gadsen Purchase, where "the Mexican Republic agrees to designate the following as her true limits with the United States for the future;"[6] and where the provisions of the Treaty of Guadaloupe Hidalgo, giving the inhabitants the rights of citizens of the United States, are expressly referred to and adopted.[7] Finally the treaty with Russia for the cession of Alaska provided that the inhabitants who preferred to remain in the ceded territory, "with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."[8]

All the treaties for the acquisition of territory on the continent of North America have therefore provided that the people should be incorporated into the union, or admitted to the rights of citizens, and some of them have professed in terms to extend the limits of the United States. The joint resolutions for the annexation of Hawaii may, perhaps, have the same effect, for they declare that the islands "be and they are hereby annexed as a part of the territory of the United States." But the recent treaty with Spain makes no such provision. It merely cedes Porto Rico and the Philippines to this country without any stipulation in regard to the relation in which

[1] 16 How. 164.
[2] Art. VIII.
[3] Art. IX.
[4] Art. IV.
[5] Art. XI.
[6] Treaty of June 30, 1854, Art. I.
[7] Art. V.
[8] Treaty of June 20, 1867, Art. III.

the islands or their inhabitants shall stand towards the United States. In fact, the ninth article — after providing that Spanish subjects, natives of the Peninsula and residing in the ceded territory, may preserve their allegiance to the Crown of Spain or renounce it — substitutes for the clause in earlier treaties that in the latter case they shall acquire, or be admitted to, the right of citizens of the United States, the provision that they shall be held "to have adopted the nationality of the territory in which they may reside;" and adds, "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Hence it is clear that if the government can acquire possessions without making them a part of the United States, it has done so in this case.

Upon the question whether such a course is legally admissible or not, no light can of course be obtained from the language of the original Constitution, because it did not contemplate any enlargement of territory at all, and naturally does not prescribe or suggest on what terms an acquisition should be made. The wording of the Thirteenth Amendment and the history of its enactment are, however, significant. As introduced into the Senate the first article of this amendment read simply: —

> "Slavery or involuntary servitude, except as a punishment for crime, shall not exist in the United States";

but the Committee on the Judiciary reported it in its present form: —

> "Sect. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

In view of the universal popular use of the term United States, to include both States and Territories, and of the judicial sanction which that usage had received, it does not seem probable that the last seven words were added to cover the Territories. What, then, was their object? In the debate upon the Amendment in the House of Representatives I can find nothing about its wording, and in the Senate nothing that explains its meaning. Mr. Sumner[1] objected to the form used, and preferred a far less forcible expression drawn from one of the French Revolutionary constitutions. It ended with the expression "everywhere within the United States and the juris-

[1] Cong. Globe, April 8, 1864, p. 1482.

diction thereof." "The words in the latter part," he said, "supercede all questions as to the applicability of the declaration to States." What he meant by this I cannot conceive, for no one has ever doubted that the term United States included at the least all the States. In replying to him, Mr. Trumbull, the Chairman of the Committee, said he did not know that he should have adopted the precise words used, but that after some difference of opinion the majority of the Committee thought them the best words.[1] He did not, however, explain what the difference of opinion had been, or why the amendment was given its present form. Perhaps some member of the Committee is now living who could tell why the last seven words were added. But in the absence of such evidence, a reason may be suggested. On their face, these words contemplate the existence of places not within the United States, but subject to their jurisdiction. Now the Act of August 18, 1856, had provided that guano islands discovered by citizens of this country "may, at the discretion of the President, be considered as appertaining to the United States." How many of these islands were in our possession in 1864 I do not know, but a circular of the Secretary of the Treasury issued five years later, on February 12, 1869, enumerates sixty-nine such islands or groups of islands, and as they were all between the equator and fifteen degrees of north latitude, and would therefore offer a natural temptation to the use of slave labor, the Committee may very well have them in mind.

So much for the light shed by the Constitution itself upon the question whether possessions can be acquired without making them a part of the United States. The judicial authority upon the subject is somewhat meagre. The earliest opinion touching the subject has already been quoted. It is that of Mr. Justice Johnson in the Circuit Court, in Amer. Ins. Co. *v.* Canter,[2] where he said that present and future States, together with the Territory possessed at the adoption of the Constitution, were the sole objects of that instrument, and formed the limits over which it was to operate. The government of any other acquisition was, he thought, "left to the legislative power of the Union, so far as that power is uncontrouled by treaty." That territory might be so ceded by treaty as to become a part of the United States he did not deny; but he asserted that if this were not done it would not come within the operation of the Constitution. In the Supreme Court, Chief Justice

[1] Cong. Globe, April 8, 1864, p. 1488.

[2] Pet. 511, 517, note.

Marshall, while sustaining the decision of the Circuit Court, seems to have disagreed with it about the effect of the treaty of cession, for he thought its terms were such as to admit the inhabitants of Florida to the enjoyment of the rights of citizens of the United States. Upon Mr. Justice Johnson's statement that apart from treaty such a result would not follow he expressed no opinion, merely saying, "It is unnecessary to inquire, whether this is not their condition, independent of stipulation."

An analogous question arose in Fleming *v.* Page,[1] which decided that a vessel sailing to Philadelphia from Tampico, after its occupation by our troops in the Mexican war, was liable to pay duties, on the ground that Tampico was a foreign port within the meaning of the tariff laws, although subject for the time to the sovereignty of the United States. In delivering the opinion of the court, Chief Justice Taney said:[2] "As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries. But yet it was not a part of this Union. . . . The boundaries of the United States, as they existed when the war was declared against Mexico, were not extended by the Conquest," because this could be done only by the treaty-making power or the legislative authority; and he went on to point out[3] that English authorities were of no value because the question was one where "our own Constitution and form of government must be our only guide." In short, he drew a distinction between national possessions from the point of view of international law, and incorporation into the United States, the latter being accomplished only by legislation or by treaty. It would clearly have made no difference, according to the principle enunciated in the opinion, if Tampico had been occupied by our troops for an indefinite period, or if the sovereignty over it had been ceded by a treaty which did not make it a part of the United States.

The relation between the operation of the Constitution and the jurisdiction of the government was presented in a different form in the case of In re Ross.[4] Here the court decided that a statute regulating capital trials before a consular court, under the treaty with Japan, was not unconstitutional on account of failing to provide for an indictment and a trial by jury. The court said: —

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[1] 9 How. 603.
[2] Id. 615-616.
[3] Id. 618.
[4] 140 U. S. 453, 464.

"By the Constitution a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or other infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad."

In other words, the court held that although the legislative power of Congress might extend beyond the limits of the United States, the limitations imposed upon legislation for the benefit of individuals did not accompany and restrain it.

The doctrine to be deprived from these cases is not altogether unopposed by authority. In the Dred-Scott case Chief Justice Taney remarked: [1]—

"A power, therefore, in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form."

But the political circumstances under which this dictum was uttered deprived it of most of its weight.

It may also be objected that in United States *v.* Wong Kim Ark [2] the court based citizenship upon birth within the allegiance; but the question whether the nation could hold possessions which were not a part of the United States, so that persons born in them would not be citizens within the meaning of the Fourteenth Amendment, was not before the court, and there is nothing in the opinion to suggest that it was present in the minds of the judges.

One would suppose that the question might have arisen in a definite and concrete form in connection with the guano islands, but although these islands have been in court on more than one occasion,[3] the judges have refrained from giving an opinion on their constitutional status. In the last of these cases, however, the court in deciding upon a claim to dower in the right to exploit the island, remarked,[4] "Congress has not legislated concerning any civil rights

[1] 19 How. 393, 448.

[2] 169 U. S. 649.

[3] Petrel Guano Co. *v.* Jarnette, 25 Fed. Rep. 675; Jones *v.* United States, 137 U. S. 202; Duncan *v.* Navassa Phosphate Co., 137 U. S. 647.

[4] 137 U. S. 647, 651.

upon guano islands; but has left such rights to be governed by whatever laws may apply to citizens of the United States in countries having no civilized government of their own" — a somewhat strange expression if the court considered the island an integral part of the United States.

The authority upon this question is certainly meagre, but the weight of it, such as it is, inclines decidedly to the view that, apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States. It follows that the incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or the treaty-making authorities, although it may, of course, happen, where the language of a treaty or statute is ambiguous, that the court is obliged to interpret its meaning.

The theory, therefore, which best interprets the Constitution in the light of history, and which accords most completely with the authorities, would seem to be that territory may be so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it, save those on the organization of the judiciary; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply. It may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people whose social and political evolution has been consonant with our own.

Abbott Lawrence Lowell.

BOSTON, May, 1899.