QUESTIONS OF THE DAY.—No. XCIII.

OUR RIGHT TO ACQUIRE AND HOLD FOREIGN TERRITORY

BY

CHARLES A. GARDINER

OF THE NEW YORK BAR

G. P. PUTNAM'S SONS

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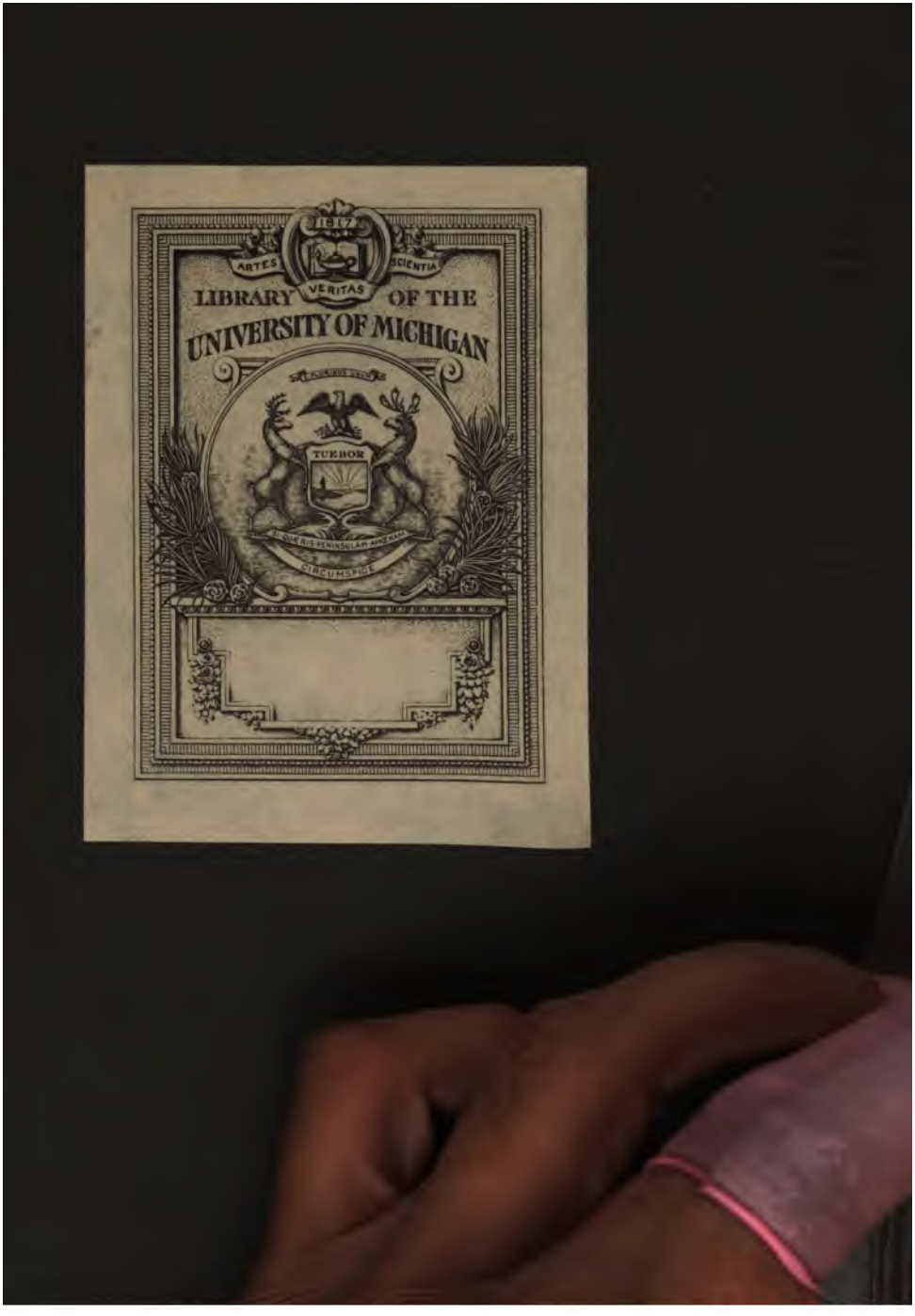
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OUR RIGHT TO ACQUIRE AND HOLD FOREIGN TERRITORY

AN ADDRESS DELIVERED BEFORE THE NEW YORK STATE BAR ASSOCIATION AT ITS ANNUAL MEETING AT ALBANY JANUARY 18TH, 1899

BY

CHARLES A. GARDINER

OF THE NEW YORK BAR

Author of "The Race Problem in the United States," "National Aid to Education," "The Proposed Anglo-American Alliance," etc.

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OUR RIGHT TO ACQUIRE AND HOLD FOREIGN TERRITORY

THE sovereign nations of the world possess equal rights and equal powers. Their equality is perfect, their independence absolute. Between them, national constitutions are unknown. In all international relations the United States is assumed by other sovereignties to possess absolute powers unrestrained by constitutional limitations. That assumption is correct, based upon the fundamental canon of the law of nations. The United States may ratify the proposed treaty with Spain, and no other nation has the right to question its political or constitutional authority to do so.

Are there, therefore, no limitations on our national sovereignty? During the

colonial period, as Mr. Justice Iredell explained, the British monarchs were sovereign and the colonists their subjects; but after the Revolution, sovereignty passed to and vested in the sovereign people (3 Dall. 93)—and there it remains vested to-day, in the seventy-five million American citizens, not as individuals but as a political and sovereign unit. Historically, this unit preceded both State and Federal constitutions. It created them. The Declaration of Independence, the supreme act of sovereignty, gave birth to the Nation, while the Constitution gave form to its government. The Constitution is but a law of the people distributing, not creating, sovereign powers among the several organs of sovereignty. A vast residuum of power, not disposed of by the Constitution, is "reserved to the States, respectively, or to the people." (Art. X.)

Although the distinction is not expressly made in the Constitution, the consensus of decisions for a century, as well as the logic of the situation, makes the following

deductions irresistible: In all internal and domestic relations the States possess the sovereignty originally vested in the people, except such as the Constitution specifically grants to the Federal government; where there is no such grant the national government has no power; authority resides in the State governments exclusively. In all external and international relations the rule is reversed. The Federal government possesses every sovereign power not expressly prohibited by the Constitution. If the Constitution is silent the Federal government, directly representing the sovereign people, is duly constituted agent and trustee to exercise such sovereignty. The States have no national powers whatever.

Early in the century, Chief Justice Marshall announced as a proposition, which should "command the universal assent of mankind," that the government of the Union "is supreme within its sphere of action. * * It is the government of all; its powers are delegated by all; it represents all; and acts for all."

(4 Wheat. 405.) Chief Justice Chase reiterated this sentiment: "The people of the United States constitute one nation under one government, and this government, within the scope of its power, is supreme." (7 Wall. 76.) The idea was elaborated by Mr. Justice Bradley: "The United States is not only a government, but it is a national government. * * It is invested with power over all the foreign relations of the country, war, peace and negotiations and intercourse with other nations, all which are forbidden to the State governments." (12 Wall. 565.) In the Chinese Exclusion cases the court held: "The United States in their relation to foreign countries are one Nation invested with powers which belong to independent nations." (130 U. S. 604.) And Mr. Justice Lamar, in the Neagle case, used this language: "The Federal government is the exclusive representative and embodiment of the entire sovereignty of the Nation in its united character. * * In our intercourse with foreign Nations, States and State govern-

ments and the internal adjustment of Federal power with its complex system of checks and balances are unknown, and the only authority those Nations are permitted to deal with is the authority of the Nation as a unit." (135 U. S. 84.)

I. RIGHT TO ACQUIRE.—The United States, possessing every attribute of the most potential sovereignty, and, in the felicitous language of Mr. Justice Lamar, the Federal government, in all external relations, being "the exclusive representative and the embodiment of the entire sovereignty of the Nation," it follows that any power possessed by any sovereignty is possessed by the United States; and unless specifically prohibited by the Constitution, can be exercised without restriction by the Federal government.

The war and treaty-making powers are not created by the Constitution; it merely designates agencies to exercise them. No one assumes that, had such agencies not been designated, this Nation could not have waged the wars and made the treaties of our history. The Nation

needs no express grant of power for any international act, and it has specific authority for extremely few. It had none when it laid the Embargo of 1807, nor when it extended sovereignty a hundred miles over Behring Sea, nor when it annexed Navassa and other Guano Islands.

The right to acquire territory irrespective of its *situs*, contiguous or foreign, by conquest, treaty, purchase or discovery, is an acknowledged and well-established attribute of sovereignty and has been exercised by sovereigns from the beginning of recorded history. No one pretends that the right is specifically renounced in the Constitution. Hence it remains an attribute of the sovereign people, and Congress and the President, the sole agents and trustees of that sovereignty, have exclusive and unrestricted power to exercise it.

I advance the proposition with deference that this right is itself a primary and substantive attribute of sovereignty, as is the right of national existence or self-

defence; and I shall regard it in this discussion as the primary and fundamental authority for territorial expansion.

The right to acquire is also derived from the enumerated constitutional powers to declare war and to make treaties. "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties," said Chief Justice Marshall, first advancing the theory; "consequently that government possesses the power of acquiring territory either by conquest or by treaty." (1 Pet. 542.) "The power of the United States to acquire new territory by cession or conquest," in the opinion of Mr. Justice Story, "does not depend upon any specific grant in the Constitution to do so, but flows as an incidental power from its sovereignty over war and treaties." (Story, Const., § 1287.) And Mr. Justice Bradley, in the Mormon Church case, said: "The power to acquire territory * * is derived from the treaty-making power and the power to declare and carry on war. The incidents of these

powers are those of national sovereignty and belong to all independent governments." (136 U. S. 42.)

The right to acquire was also derived by Chief Justice Taney from the express power of Congress to admit new States. "The power to expand the territory of the United States by the admission of new States is plainly given," he said. "It has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission." (19 How. 447.)

II. RIGHT TO HOLD AND GOVERN.—Possessing the right to acquire territory, it follows as an inevitable consequence that we also possess the right to hold and hence to govern it. (Story, Const., § 1324.) In 1810 the Supreme Court announced these views: "The power of governing and of legislating for a territory is the inevitable consequence of the right to *acquire* and to *hold* territory." (6 Cranch, 336.) "And whatever may be the source whence the power is derived,"

it stated in a later case, "the possession of it is unquestioned." (1 Pet. 542.) "It would be absurd," was the opinion of Mr. Justice Bradley, "to hold that the United States has power to acquire territory and no power to govern it when acquired." (136 U. S. 42–44.) Mr. Justice Matthews said of our right to hold and govern: "That question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment." (114 U. S. 44.) And Mr. Justice Gray, in a recent case, thus summarized the law: "The United States having rightfully acquired the territories, * * have the entire dominion and sovereignty, national and municipal, federal and state, over all the territories." (152 U. S. 48.)

The right to acquire being a primary attribute of sovereignty, and the right to hold and govern being ancillary thereto, it follows that wherever our sovereignty extends there our right to acquire, and hence to hold and govern, extends also. The *situs* of the territory is immaterial;

it may be contiguous or remote, on the American continent or in foreign lands. Our abstract right to acquire and hold is as plenary and sovereign in the Philippines as in Alaska or Arizona.

III. ALL PROBLEMS OF EXPANSION ARE POLITICAL, NOT CONSTITUTIONAL OR JUDICIAL.—Before considering the concrete application of these rights, it is important to determine their precise governmental character. Are they political or judicial? The public mind is so confused on all problems of expansion that it bases every objection thereto on assumed violations of the Constitution. Political questions differ from judicial in that none but the sovereign can determine them. A sovereign decides by his own will, *sic volo, sic jubeo.* A court decides according to the law prescribed by the sovereign. Political power is that which a sovereign exerts by its own authority; judicial power is that which a sovereign grants to its own courts. Political power is sovereign and plenary, while judicial power is derivative and limited.

The "maintenance and extension of our national dominion" is a political and not a judicial problem. The reasons are thus stated: "The President and Congress are vested with all the responsibility and powers of the government for the determination of questions as to the maintenance and extension of our national dominion. It is not the province of the courts to participate in the discussion or decision of these questions, for they are of a political nature and not judicial. Congress and the President having assumed jurisdiction and sovereignty, * * all the people and courts of the country are bound by such governmental acts." (50 Fed. Rep. 110.)

The acquisition of territory by treaty is, therefore, political and not judicial. The Senate can ratify, reject or modify any treaty. There is no limitation upon its treaty-making powers. It modified a draft treaty with England in 1795, with France in 1801, with Norway and Sweden in 1818, with Mexico in 1848, and with Bolivia in 1862. It rejected many, among

them the treaty of arbitration with England in 1896; and many it has ratified without change. The action of the President and Congress will be final as to all international and political phases of the pending treaty. As suggested by Mr. Justice Miller, if a court could modify or annul a treaty in these respects, it could annul declarations of war, suspend the levy of armies, and become a great international arbiter, instead of a court of justice for the administration of the laws of the United States." (1 Woolw. 156.) And referring particularly to the acquisition of new territory by treaty, the Supreme Court said: "This court has solemnly and repeatedly declared that this was a matter peculiarly belonging to the cognizance of the legislative and executive departments, and that the propriety of their determination was not within the province of the judiciary to contravene or question." (9 How. 153.)

All questions also incident to acquisition and preliminary to government—whether the territory be contiguous or

remote; whether our tenure be temporary or permanent; whether we keep or give back, or sell, or lease; these are all political problems entrusted without appeal to the discretion of Congress. (14 Pet. 538; 9 How. 242; 18 Wall. 320; 101 U. S. 133.)

The same is emphatically true of the government of new territory. It belongs, as the Supreme Court has ruled, "primarily to Congress, and secondarily to such agencies as Congress may establish." (18 Wall. 319.) "Territories are not organized under the Constitution, * * but are creations exclusively of the legislative department and subject to its supervision and control." (9 How. 242.) "Congress has full and complete legislative authority over the people of the territories and all the departments of the territorial governments." (101 U. S. 132.) In ordaining territorial governments "all the discretion which belongs to legislative power is vested in Congress." (114 U. S. 44.) Also, "In a territory all the functions of government are within

the legislative jurisdiction of Congress." (86 Fed. Rep. 459.) And finally all territorial powers "are created by Congress," and all territorial acts "are subject to congressional supervision." (139 U. S. 446.)

Hence, again, whether our new territory be organized or unorganized, governed directly or indirectly, temporarily or permanently; whether the Constitution and Federal statutes be made operative, or new rules and regulations be enacted—these and all other problems of government are political and not judicial.

IV. Concrete Application of Rights; Extent and Means of Exercise.—Our abstract rights and their governmental character being thus determined, the concrete application of such rights and the extent to which and the means by which they can be exercised, should next be considered.

The power to "dispose of territory" under Art. IV, § 3 of the Constitution, is not alternative to the power to rule and regulate. Both powers are granted and

are unlimited. (8 Wheat. 589.) Congress can "dispose of" Porto Rico or the Philippines as unreservedly as it can dispose of personal property, the prizes, for example, captured in the late war. (14 Pet. 538.) We may cede the Philippines to the inhabitants thereof, as a gift, or on such terms as may be agreed. We may let them to tenants, as China is leasing its ports to European powers. We may sell them to any bidder, England, Germany, Japan, as Russia sold Alaska to us.

The right to acquire territory being a primary attribute of sovereignty, and being, therefore, general and plenary, and the right to hold and hence to govern being a corollary thereof, it follows that the latter right, irrespective of the Constitution, belongs to the United States as fully and completely as a similar right could belong to any sovereign nation. So far as rights are concerned, if England can hold and hence govern colonies, so can we. If Russia has the right to exercise sovereignty over Port Arthur, we have an equal right of sovereignty to rule the Philippines.

In the absence of constitutional provision, this attribute of sovereignty might have been exercised by the Executive, by Congress, or by both. But the Constitution specifically designates Congress as the sole agent of sovereignty "to make all needful rules and regulations respecting the territory of the United States" (Art. IV, § 3); and the decisions of the Supreme Court are uniform that these words alone empower Congress to regulate or rule territories in the manner and by the means it chooses—ranging from a joint protectorate such as we extend over Samoa, to a fully organized territorial government such as we maintain in Arizona.

In 1872 Pango-Pango harbor, by a treaty of cession, was "given up to the American government," but until recently we had not even established our sovereignty over that harbor, merely exercising a protectorate over Samoa, *jointly* with England and Germany. (1 Whart. Dig. 436.) The Guano Act declares that any island discovered by an American citizen

shall be "considered as appertaining to the United States." (U. S. Rev. Stat., § 5570.) Under this act we exercise not merely a protectorate, but actual, though tenuous, governmental authority over Navassa, Roncados, Howland, Baker and several other guano islands. (137, U. S. 206, 647 ; 25 Fed. Rep. 675 ; 44 Barb. 23.)

The President now maintains provisional military governments in Cuba, Porto Rico and the Philippines — provisional upon the ratification of the treaty and upon the subsequent action of Congress. Upon ratification, and until Congress makes "rules and regulations," the President may continue these governments. Many precedents are furnished by our history — during and after the Mexican War, in Tamaulipas and California; and after the Rebellion, in Florida, Alabama and Arkansas from 1865 to 1868, in Mississippi and Georgia from 1865 to 1869, and in Virginia and Texas from 1865 to 1870.

The President may, also, in his discretion, abolish military rule and establish

provisional civil governments—provisional again until Congress enacts "rules and regulations." Such was the first and only American civil government established in California prior to statehood. Concerning it, the Supreme Court said: The civil government of California "had its origin in the lawful exercise of a belligerent right over a conquered territory. * * It did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President *might have dissolved* it by withdrawing the army and navy officers who administered it but he did not do so. Congress *could have put an end to it* but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. * * It must be presumed that the delay was consistent with the true policy of the government." (16 How. 193.) This provisional civil government was continued after the treaty of peace, until California was admitted to the Union and its legality and powers

were sustained by the Supreme Court. (16 How. 190.) Until Congress acts, it will be the duty of the President under his war power to maintain in the ceded territory such military or civil rule as he chooses (20 Wall. 394; 16 How. 190), and the precedents furnish him ample political and judicial support.

Congress, however, whenever it determines to exercise its prerogatives, can govern the new acquisitions as "organized" or "unorganized" territories, directly or indirectly, temporarily or permanently. "Dependencies" or "provinces," as defined by our courts, are territories already partially or wholly settled, distinct from the sovereign State, but belonging to it and subject to the laws and regulations it may prescribe. (3 Wash. C. C. R. 286.) "Colonies" are territories settled by citizens of the sovereign or parent State (3 Wash. C. C. R. 286); "unions of citizens or subjects who have left their country to people another and remain subject to the mother country." (Bouv. Tit. Colony.) Porto Rico

and the Philippines, already densely populated and affording little opportunity for American colonization, cannot, under our decisions, be strictly designated "colonies."

"Organized territories" are portions of the public domain over which Congress has extended our Constitution and laws, and has established a system of organized local government; such are Arizona, New Mexico and Oklahoma. (Rev. Stat. §§ 1839–95.) "Unorganized territories" possess no organized local government, are usually not subject to our Constitution and laws, and are ruled directly by Congress. Such are Alaska and Indian Territory. Territories, dependencies and provinces are, in our jurisprudence, practically synonymous terms. "Territories," in legal contemplation, are organized or unorganized dependencies or provinces. The phrase has been incorporated in our political and juridical history for a century, and if we should designate Hawaii, Cuba, Porto Rico and the Philippines as "territories," it would be more in harmony with

American institutions than to style them "colonies."

Congress has the same power over its public domain as over any other *property* belonging to the United States. (29 Fed. Rep. 205; 14 Pet. 537; 18 Wall. 319; 136 U. S. 42.) "This power," said the Supreme Court, "is vested in Congress without limitation, and has been considered the foundation upon which territorial governments rest." (14 Pet. 537.) The Supreme Court early announced the comprehensive principle that "territories 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." (9 How. 242.) Chief Justice Waite, sustaining this power of Congress, said: "All territory within the jurisdiction of the United States not included in any State must, necessarily, be governed by or under the authority of Congress. * * It has full and complete legislative authority over the people

of the territories and all the departments of the territorial governments." (101 U. S. 132.) In a later case the court decided that, "in ordaining government for the territories, all the discretion which belongs to legislative power is vested in Congress." (114 U. S. 44.) "The power of Congress over the territories is general and plenary," said Mr. Justice Bradley (136 U. S. 42.) And the court, summarizing the whole matter, announced this opinion through Mr. Justice Brewer: "A territory is a political community, organized by Congress, all whose powers are created by Congress, and all whose acts are subject to Congressional supervision. (139 U. S. 446.)

Under this full and comprehensive authority, the *form* of local civil government first compels attention. It is absolutely in Congressional discretion. "All the discretion which belongs to legislative power is vested in Congress," said the Supreme Court, "and that extends * * to determining by law from time to time the form of the local govern-

ment, in a particular territory." (114 U. S. 44.) "There can be no question," said Judge Dawson, "of the authority of Congress to enact such *forms* of territorial government within the territories as it may choose or deem best." (29 Fed. Rep. 205.)

All the functions of government being within legislative discretion, Congress may exercise them *directly* from Washington, or *indirectly* through organized local rule. (86 Fed. Rep. 459; 18 Wall. 319; 114 U. S. 44.) It may, as succinctly put by Judge Morrow, "legislate in accordance with the separate needs of each locality, and vary its regulations to meet the conditions and circumstances of the people." (86 Fed. Rep. 459.) In the language of Chief Justice Waite, "Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial Legislature valid and a valid act void." (101 U. S. 132.) It is true that Congress, with few exceptions, has not directly

enacted the municipal laws of territories; but this is a matter of legislative discretion, not a constitutional obligation, and Congress may, if it chooses, enact at Washington all municipal laws for Hawaii, Porto Rico and the Philippines, as it does now for the District of Columbia and Alaska. (152 U. S. 48; 101 U. S. 133; 114 U. S. 44; 1 Deady, 31; 86 Fed. Rep. 459.)

Under the Ordinance of 1787, as subsequently modified, the territories of Ohio, Mississippi, Indiana, Michigan and Illinois, had a governor, judges and council appointed or selected by Congress; governments as purely colonial, except for a delegate in Congress, as any to-day maintained by England, Germany or France.

Orleans Territory, a part of the Louisiana Purchase, existed from 1804 to 1812, and furnished another example of colonial administration,—a local Legislature, a governor exercising the functions of the the old Spanish Intendant, a judiciary administering the old Spanish Code,—all

appointed by the President; Federal statutes operative only in criminal cases, and a separate port law for New Orleans. (2 How. 344.) Of it Nicholson of Delaware said: "It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution." Concerning the statute organizing the territory, Benton remarks: "It was a startling bill, continuing the existing Spanish government, putting the President in the place of the King of Spain, putting all the territorial officers in the place of the King's officers, and placing the appointment of all these officers in the President alone." (Adams' U. S. Hist., Vol. 2, p. 119.) Yet the validity of the Orleans government was repeatedly sustained by the Supreme Court. (2 How. 344; 3 How. 589; 13 Wall. 434.) In many respects it might furnish an acceptable model of civil rule by Congress for Porto Rico, the Philippines, and even Hawaii.

Alaska was ceded to us in 1867 without any treaty covenants for future admission

as a State. The Constitution and Federal laws have not been made operative therein, and only such statutes have been extended over it as circumstances gradually required. It is an unorganized territory, governed directly from Washington. (U. S. Rev. Stat., § 1954.) Physically it is foreign, its nearest point being 400, and its farthest 2,400 miles from Seattle. The Aleutian islands extend even into the geographical limits of another continent. For thirty-two years a few judicial and executive, but no legislative, functions of government have been conferred upon the inhabitants. "Congress," said Judge Dawson, "could confer upon Alaska such powers, judicial and executive, as they deemed most suitable to the inhabitants. It was unquestionably within the constitutional power of Congress to withhold from the inhabitants of Alaska the power to legislate and make laws. (29 Fed. Rep. 205.)

The right to govern territories temporarily or permanently is equally in the discretion of Congress. The opponents of

expansion urge, however, that every foot of soil acquired by this Nation is impressed with a trust or franchise of statehood, and that the Constitution prohibits its acquisition except for such ultimate purpose. The permissive language of Art. IV, § 3, is construed as mandatory. It is said to be unconstitutional to hold territory even temporarily except "in a state of pupilage," as Judge Bradley expressed it, in preparation for eventual statehood.

This objection is based upon the decision of the Supreme Court in the Dred Scott case. Chief Justice Taney's words are now historic: "There is certainly no power given by the Constitution to the Federal government," he said, "to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure, nor to enlarge its territorial limits in any way except by the admission of new States. That power is plainly given. * * It has been held to authorize the acquisition of territory not fit for admission at the time, but to be admitted. * * It is ac-

quired to become a State and not to be held as a colony." (19 How. 446, 447.)

1. I am of opinion that this declaration is not a dictum, as often contended, but a vital part of the decision; an essential step in an elaborate argument; a point necessarily involved in deciding that the Missouri Compromise was unconstitutional and Dred Scott a slave and not a citizen.

2. The Dred Scott decision has never been judicially reiterated. No court ever concurred in it. It precipitated the Civil War; it is stamped with the bad eminence of ante-bellum conflicts; its very title is odious and sends a shudder through a reunited people. Such is the only decision quoted to-day against territorial expansion.

3. The decision is either law or not law. It cannot be valid as to colonies, a secondary consideration, and invalid as to slavery, a primary issue. It must stand or fall as a whole. Hence we have this dilemma: If to-day the Dred Scott decision is law, then the 13th, 14th and 15th Amendments are not law; the results of the

Rebellion are nullified; the Missouri Compromise was unconstitutional; slavery can be maintained in all our territories; and the negro has "no rights which the white man is bound to respect." (19 How. 407.) This dilemma has been overlooked.

4. The major premise of Judge Taney's argument against colonies is that our *sole* authority to acquire territory is derived from the power to admit States. That proposition has never been accepted by any other judge or court. On the contrary, unanimous benches have declared our right to acquire territory, irrespective of its *situs*, and irrespective also of any franchise of statehood, as a primary attribute of sovereignty and as a corollary of the war and treaty powers. Judge Taney's major premise has been specifically overruled three times. (16 Wall. 434; 136 U. S. 42; 137 U. S. 212.) The Supreme Court having held it utterly fallacious, all his arguments fall with it. His conclusion, therefore, that we cannot hold territories *per se*, falls also, and is as

dead to the American people as the Stamp Act or statutes against witchcraft.

5. The utter futility of the declaration should be observed. It is without practical value. What right had the court to make it? What jurisdiction had it over the subject? Can an injunction restrain the Senate? Can the President be enjoined? How will the Supreme Court prohibit this sovereign nation from extending its sovereignty over conquered territory? The error is fundamental. Judge Taney's decision was intended to and did encroach upon the political power of the government. He had no authority to do so. His decision *pro tanto*, judged even by his own clear and logical utterances in other cases, was not law when uttered and is not law to-day.

6. An exhaustive investigation of the writings and speeches of the founders of our government, and a scrutiny of the proceedings attending our acquisition of the Northwest, Louisiana and Florida Territories, establish beyond dispute the historic inaccuracy of Judge Taney's

assertion that it was intended to impress a trust or franchise of statehood upon all newly acquired territory. Edmund Randolph submitted to the Federal Convention the first propositions relative to new States and territories. Madison offered amendments, and then the present language was introduced into the Constitution on motion of Gouverneur Morris. During the controversy over the Louisiana cession in 1803 he was appealed to for information in regard to the meaning of the third section of the fourth article. He answered: "I am very certain I had it not in contemplation to insert a decree *de coercendo imperio* in the Constitution. I knew then, as well as I do now, that all North America must at length be annexed to us." (3 Mor. Writ. 185.) A few days later, he again replied: "I mistook the drift of your inquiry, which substantially is, whether Congress can admit, as a new State, territory which did not belong to the United States when the Constitution was made. In my opinion, they cannot. I always thought, when we should acquire

Canada and Louisiana, it would be proper to 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." (3 Mor. Writ. 192.)

The opposition to acquiring Louisiana was based upon the treaty covenants guaranteeing ultimate statehood. No opposition developed to acquiring and holding territories or dependencies *per se.* That right seems to have been assumed without discussion. (Story, Const., § 1286.) The resolution of the Massachusetts Legislature is one of many similar public expressions: "The annexation of Louisiana to the Union transcends the constitutional power of the government of the United States. It forms a new confederacy to which the States united by the former compact are not bound to adhere." (Life of Quincy, p. 206.) The Supreme Court has long since overruled these objections. I cite them merely to show that at the beginning of the century

anti-expansionists acknowledged the Nation's right to expand, insisted that new territory be governed permanently as such, and objected to its ultimate admission to statehood. At the close of the century anti-expansionists deny our right to expand, if territory be governed permanently as such, and insist that all acquisitions must be converted into States.

Both legal and historic precedents are thus established for governing new acquisitions, as organized or unorganized territories, directly or indirectly, temporarily or permanently. All such questions, also, are political, subject to the discretion and power of Congress, and foreign to the jurisdiction of the Constitution and courts.

V. CIVIL RIGHTS AND POLITICAL STATUS OF INHABITANTS.—The civil rights and political status of inhabitants of ceded territory are those guaranteed by treaty and conferred by Congress. They acquire no rights under our Constitution and Federal statutes, *ex proprio vigore*. The Constitution makes "all treaties the supreme

law of the land." (Art. VI, § 2.) Treaties, as Chief Justice Marshall held, are obligatory upon the people of the United States (1 Pet. 542); and binding "as a constitutional law." (16 How. 657; 19 How. 372.) The pending treaty with Spain provides: "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." (Art. IX.) Hence if Congress should ratify the treaty and do no more, that document alone would measure the civil rights and political status of the inhabitants of the ceded territory.

Originally the Constitution was operative in the thirteen States which ratified the document. (Art. VII, § 1.) As new States were admitted, the Constitution became operative therein *ex proprio vigore*, even if, as in the case of Texas, it had not previously been extended over the annexed territory. (143 U. S. 69.) The geographical limits of Federal statutes are the national boundaries on the day of enactment. If our domain is expanded, our

statutes are not *ex proprio vigore* expanded also.

Statutes possess no innate power of expansion. The Dingley Tariff, for instance, is limited strictly to the area of the United States as it existed July 24, 1897. To make it operative over Porto Rico, the Philippines, or a single foot of new territory, a special act extending it is necessary. Even when new States are admitted, two statutes are required—one admitting to statehood and hence to the rights of the Constitution—the other extending our laws over the admitted territory. The thirteen original States were a mere fringe along the Atlantic. By conquest, annexation and purchase, within a hundred years, we expanded our territory on this continent over 3,250,000 square miles, and over all this vast domain, with the exception of Alaska, the Constitution and laws of the United States have been made operative by more than a hundred special acts of Congress. Prior to 1850, there was no uniformity of legislative expression; but every organized territory

then existing, and every territory subsequently organized, became subject to the following section of the Revised Statutes: "The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and in every territory hereafter organized, as elsewhere within the United States." (§ 1891.)

In an early case, Chief Justice Marshall decided that territory annexed did not *ipso facto* derive rights from the Constitution. Its only rights, he said, were those "stipulated in the treaty," or granted by "its new master." (1 Pet. 542.) Mr. Justice Nelson, in a subsequent case, suggested a potent reason therefor. Territories "are not," he said, "organized under the Constitution." "They are the *creations* exclusively of the legislative department of the government, and subject to its supervision and control." (9 How. 252.) If territories are neither created, nor organized, nor supervised, under authority of the Constitution, how can it be urged that

they acquire rights from the Constitution *ex proprio vigore?* Consider also the remarks of Mr. Justice Bradley: "The extent of the power thus granted (to territories) depends entirely upon the organic act of Congress in each case, and it is at all times subject to such alterations as Congress may see fit to adopt." (18 Wall. 319.) Also the words of Mr. Justice Brewer: "A territory is a political community organized by Congress, *all* whose powers are created by Congress, and *all* whose acts are subject to Congressional supervision." (139 U. S. 446.) If *all* territorial rights and powers are created by Congress, then none is created by the Constitution; if *all* are subject to alteration and supervision by Congress, then none is fixed and unalterable by virtue of the Constitution.

Not only are the Constitution and laws not operative, but Congress, in creating, organizing and supervising territories, is not bound to grant the inhabitants any of our so-called "inalienable rights," not even those enumerated in the Constitution

and its amendments and commonly called the "Bill of Rights." This principle was distinctly announced by the court in an elaborate opinion in the Mormon Church case, in which all the authorities were thus summarized: "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.*" (136 U. S. 44.) Although this doctrine may startle humanitarians, it was reiterated with approval by Mr. Justice Harlan, in a decision of the Supreme Court on April 25th last (170 U. S. 349). Ex-Senator Edmunds' recent statement is not necessarily in conflict with these views. "The Constitution," he said, "does operate and have full force in our territories in the respects that affect the personal and civil rights of all." That is unqualifiedly

true of every organized territory since 1850. The Constitution has been specifically made *operative* therein. For forty-nine years the inhabitants of Arizona and New Mexico have enjoyed the same "personal and civil" rights under the Constitution as the inhabitants of New York. But if Senator Edmunds intends his statement to apply to Alaska or Porto Rico or the Philippines, or any other unorganized territory over which the Constitution and Federal statutes shall not have been specifically extended by Congress, he is opposed by uniform decisions of the Supreme Court.

But the "inalienable rights" of the inhabitants of conquered territory, even if not guaranteed by the Constitution, are secured by those fundamental, unwritten laws, characterized in the Declaration of Independence as "the laws of nature and of nature's God." They are synonymous with the "general spirit of the Constitution," referred to in the Mormon Church case; they are but another name for the enlightened moral sentiment of the Na-

tion; they constitute the higher laws of American civilization, superior to the Constitution, more potent than written precepts, pervading all our institutions, and vitalizing not only our statutes but the Constitution itself.

And these higher laws of right and justice are not without means of enforcement. As Chief Justice Marshall said: "Humanity, acting on public opinion, has established as a general rule that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. * * Public opinion, which not even the conqueror can disregard, imposes these restraints upon him, and he cannot neglect them without injury to his fame and hazard to his power." (8 Wheat. 589.) And Chancellor Kent maintained that these laws were "under the protection of public opinion," and "enforced by the censures of the press." No nation, he said, could violate them "without being subjected to the penal consequences of reproach and disgrace." (Kent's Com.,

Vol. I, 181.) To the sacred moral obligations imposed by the higher laws of our Nation may be safely entrusted the inalienable rights of the Filipinos and Porto Ricans.

It may be assumed, therefore, as incontrovertible that the inhabitants of ceded territory acquire no rights from the Constitution, Federal statutes, or treaties, except such as are specifically granted. This principle has been overlooked in all pending discussions, but its logical application will solve the most perplexing problems of expansion, and among them the following:

(1) It is urged that the inhabitants of ceded territory possess implied rights to a republican form of government. Even our Constitution guarantees only "to every *State* in this Union, a republican form of government." (Art. IV, § 4.) It guarantees no form of government whatever to a territory. We cannot put the inhabitants to the sword, but we can banish them entirely from the country and confiscate their property (8 Cranch, 122; 143

U. S. 356), or grant them any *quantum* of rights even to statehood. Natural rights of barbarians to a republican form of government—who can define them? None exists outside of Utopia or Plato's Republic. Whatever is granted, is an act of sovereign grace. Any government, or no government, rests with Congress. Any right, or no right, is in sovereign discretion.

(2) Taxation without representation is an equally fallacious doctrine. In an early case the Court decided that the power of Congress to tax the territories as well as States, irrespective of representation, was "incontrovertible." "If it were true," it further said, "that, according to the spirit of our Constitution, the power of taxation must be limited by the right of representation, whence is derived the power to lay and collect duties, imposts and excises?" (5 Wheat. 325.)

(3) Inhabitants of the States of the Union have a dual citizenship, State and Federal. Art. IV, § 2, guarantees to "the citizens of each *State* all the privileges and immunities of citizens of the

several States." But this interstate citizenship is granted only to citizens of a State, not to citizens of the United States. There is no citizenship of a territory, and the only citizenship Congress can confer is national. (92 U. S. 542.) The Fourteenth Amendment provides that, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States." Children of ambassadors and consuls born here are not "subject to our jurisdiction," and do not become citizens. (16 Wall. 73.) "This section," said the Supreme Court, "contemplates two sources of citizenship and two sources only, birth and naturalization." (112 U. S. 101; 169 U. S. 702.) Persons may be naturalized either individually under the naturalization acts, or "collectively," as the court explained, "by the force of a treaty by which foreign territory is acquired." (112 U. S. 102.) Inhabitants of Porto Rico and the Philippines not being naturalized, and the pending treaty not providing for the naturalization of either natives or

Spanish subjects, it follows that they can only become citizens by a specific act of Congress. The pending bill for Hawaii contains such naturalization provisions.

The only other source of American citizenship is birth, and that must be within American territory, over which the Constitution and laws shall have been specifically extended. No Constitution, no Fourteenth Amendment; hence no citizenship by birth. (169 U. S. 693.) Therefore, if Congress ratifies the treaty and does no more, neither present nor future native inhabitants will be citizens; but if Congress extends our Constitution and laws over the annexed domain, all present and future native inhabitants will be endowed with Federal citizenship.

(4) The inhabitants of ceded territory, not being citizens, will have no right to immigrate to this country. Their rights will be no more nor less than those of aliens of like race, immigrating from any foreign land. The Chinese in the Philippines and Hawaii will be excluded absolutely under our Chinese Exclusion Acts.

(130 U. S. 581.) Malays, constituting a considerable proportion of the Filipinos, being neither black nor yellow, but brown, the fifth subdivision of the human race, can be excluded as absolutely as the Chinese. It has been repeatedly suggested by the Supreme Court that the 13th, 14th and 15th Amendments apply only to whites and blacks and not to Chinese, and hence Malays. (16 Wall. 73; 100 U. S. 306; 112 U. S. 101; 21 Fed. Rep. 909; 5 Sawy. 155; 71 Fed. Rep. 274; 169 U. S. 697.) White and black inhabitants migrating to this country can be admitted on the same terms, and no other, as white and black immigrants from any foreign land. Citizenship and that alone prevents exclusion. Any United States citizen, whatever his race or origin, may, under protection of the 14th Amendment, re-enter the United States and pass from one State to another, and Federal or State governments cannot deny him that right except in punishment for crime. (21 Fed. Rep. 910; 130 U. S. 581; 169 U. S. 649.)

Hence unless Congress confers citizenship, Caucasians and Negroes will be admitted under our immigration laws; while Mongolians and Malays may be debarred absolutely; and threatened incursions of cheap labor will not imperil the interests of American workmen.

(5) In construing the provision of the Constitution that "all duties, imposts and excises shall be uniform throughout the United States" (Art. I, § 8), Chief Justice Marshall, in 1820, defined "United States." "Does this term," he said, "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." (5 Wheat. 319.) In its ultimate analysis, it included all the land owned by the Nation in 1820. It includes all the land owned to-day—even Alaska and Hawaii. It will include every foot of soil

that may be ceded by the pending treaty. The islands will no longer be a part of Spain ; they will not be independent ; they will be ours, ceded, annexed, their very soil forming a constituent portion of the physical area of the United States. Our national entity is coterminous with our physical domain, and will any one assert that our physical domain is not coextensive with our national entity? Judge Marshall's views are thought to favor free trade. It is assumed that the uniform tariff provisions of the Constitution will become operative and compel free trade within all our borders. But are not protectionists and free traders zealously quoting Marshall and Taney and Webster and Calhoun, while they overlook a principle which renders their dispute purely academic?

How will tariff regulations become operative? There is no provision in the treaty ; hence that document does not apply. The Constitution and statutes do not operate *ex proprio vigore ;* hence they do not apply. We find ourselves again

relegated to Congress. If it makes operative the Constitution and Dingley Tariff, they will be operative,—otherwise not. If it enacts new tariff laws, those laws will prevail. If, however, Congress ratifies the treaty and does nothing more, leaving the adjustment of tariffs to the President as a war power, such course is equally within Congressional discretion.

These principles have been applied on several occasions in our history. Louisiana was ceded in 1803 ; Orleans Territory was organized therefrom in 1804 ; and in 1812 it was admitted as the State of Louisiana. Our tariff imposed a lower duty by twenty-five per cent. on goods imported in American than in foreign bottoms. The Louisiana treaty gave a similar reduction to French and Spanish merchantmen trading to New Orleans, thus establishing lower duties there on French and Spanish imports by twenty-five per cent. than elsewhere in the Union. For eight years the Territory of Orleans had an essentially different tariff system from the rest of the United States.

Florida was ceded to us in 1819. After we had taken possession, it was decided by the Treasury Department that goods imported from Florida, before Congress had made our laws operative therein, were liable to duty. "That is," said Chief Justice Taney, "although Florida had by cession actually become a part of the United States, and was in our possession, yet, under our revenue laws, its ports must be regarded as foreign until they are established as domestic by act of Congress." (9 How. 617.)

In 1846 the Mexican State of Tamaulipas was conquered by us. During our military and civil rule therein, and prior to the treaty of peace in 1848, there arrived at Philadelphia an American vessel cleared from Tampico, upon whose cargo duties were exacted as from a foreign country. The Supreme Court, sustaining the tariff, said: "There was no act of Congress establishing a custom house at Tampico, nor authorizing the appointment of a collector. The regulations the collector adopted were not those pre-

scribed by law but by the President in his character of commander-in-chief. The permit and coasting manifest granted by an officer thus appointed, and thus controlled by military authority, could not be recognized in any port of the United States, nor could they exempt the cargo from the payment of duties." (9 How. 616.) Commenting generally upon this and other instances, Chief Justice Taney made this decisive utterance: "The Treasury Department, in no instance that we are aware of since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, unless it had been previously made so by act of Congress. The principle thus adopted and acted upon by the executive department of the government has been sanctioned by the decisions in this Court and the Circuit Courts, whenever the question came before them. And all of them maintain that under our revenue laws every port is regarded as a foreign one unless the custom house from which the vessel clears is within a collec-

tion district established by act of Congress, and the officers granting the clearance exercise their functions under the authority of the laws of the United States." (9 How. 617.)

A separate tariff may be provided for the new territory by the simple means of continuing the present military governments. Their ports may thus remain foreign for tariff purposes (9 How. 615); they may levy a tariff on imports from us, and their goods continue to be subject to our import duties. As the Supreme Court specifically decided relative to the provisional governments of the South, such governments can "prescribe the revenues to be paid and apply them to their own use or otherwise." (20 Wall. 390.) And these governments, as we have seen, may continue indefinitely, and be terminated only in Congressional discretion. (16 How. 164.)

New territory, therefore, may be acquired without becoming subject to the tariff provisions of our Constitution and laws. Sugar from Cuba and Hawaii, to-

bacco from Cuba and Porto Rico, and the products of the Philippines and Ladrones will not be admitted duty free, unless Congress so determines. Hence the vast sums invested in our sugar and tobacco industries need not be imperilled, nor need colonial imports reduce our customs revenue or disturb our economic status.

(6) The commerce of our territories with foreign States involves the international trade problem of the "open door." The President's recent proclamation to the Filipinos has been misunderstood. "All ports," he says, "will be opened to the commerce of all friendly nations. All goods * * will be admitted upon payment of such duties and other charges as shall be in force at the time of the importation." If no duties are in force, none will be exacted. If Dingley Tariff duties or any other exist, they must be paid. This is no "open door," nor even free trade. It is, moreover, only a military order, and may at any time be rescinded by the President. But when Congress makes "rules and

regulations" for the new territory, what then? If it should extend our Constitution and laws over the islands, free trade would then, as now, prevail within all our borders, and theoretically the Dingley Tariff between us and the rest of the world. The uniform tariff clause of the Constitution being operative, Congress would have no more authority to admit English goods free at Manila than at New York or Philadelphia. It must not be forgotten, however, that such action, while conclusive within our boundaries, is not final in our international relations. The President and Senate have, under the Constitution, unlimited power to make trade treaties. If we are not prepared to adopt free trade in its entirety, we must continue in the future, as in the past, to regulate our open doors by treaty and not by statute. As matter of fact there has been no uniformity of tariff with foreign nations since our government began. The "favored nation" clause has not prevented trade treaties, for nations have uniformly ignored the clause in their trade wars. A