Eighty-sixth Year. Tros Tyriusque mihi nullo discrimine agetur. Vol. 172: No. 1.

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THE STATUS OF ANNEXED TERRITORY AND OF ITS FREE CIVILIZED INHABITANTS.

BY BENJAMIN HARRISON, FORMERLY PRESIDENT OF THE UNITED STATES.

A LEGAL argument upon this subject is quite outside of my purpose, which is to consider, in a popular, rather than a professional, way, some of the questions that arise, some of the answers that have been proposed, and some of the objections to these answers.

We have done something out of line with American history, not in the matter of territorial expansion, but in the character of it. Heretofore, the regions we have taken over have been contiguous to us, save in the case of Alaska—and, indeed, Alaska is contiguous, in the sense of being near. These annexed regions were also, at the time of annexation, either unpeopled or very sparsely peopled by civilized men, and were further, by their situation, climate and soil, adapted to the use of an increasing American population. We have now acquired insular regions, situated in the tropics, and in another hemisphere, and hence unsuitable for American settlers, even if they were not, as they are, already populated, and their lands already largely taken up.

We have taken over peoples rather than lands, and these chiefly of other race stocks—for there are "diversities of tongues." The native labor is cheap and threatens competition, and there is a total absence of American ideas and methods of life and government among the eight or more millions of inhabitants in the Philippines. We have said that the Chinese will not "homologate"; and the Filipinos will certainly be slow. Out of the too late contemplation of these very real and serious problems has arisen the proposition to solve them, as many think, by wresting our government from its constitutional basis; or at least, as all must agree, by the introduction of wholly new views of the status of the people of the territories, and of some startlingly new methods of dealing with them. It is not open to question, I think, that, if we had taken over only the Sandwich Islands and Porto Rico, these new views of the status of the people of our territories, and these new methods of dealing with them, would never have been suggested or used.

The question of the constitutional right of the United States to acquire territory, as these new regions have been acquired, must, I suppose, be taken by every one to have been finally adjudged in favor of that right. The Supreme Court is not likely to review the decision announced by Chief Justice Marshall.

It is important to note, however, that the great Chief Justice derives the power to acquire territory, by treaty and conquest, from the Constitution itself. He says:

> "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties: consequently that government possesses the power of acquiring territory either by conquest or by treaty."

While this decision stands, there is no room for the suggestion that the power of the United States to acquire territory, either by a conquest confirmed by treaty, or by a treaty of purchase from a nation with which we are at peace, is doubtful, and as little for the suggestion that this power is an extra-constitutional power. The people, then, have delegated to the President and Congress the power to acquire territory by the methods we have used in the cases of Porto Rico and the Hawaiian and Philippine Islands. But some have suggested that this power to acquire new territory is limited to certain ends; that it can only be used to acquire territory that is to be, or is capable of being, erected into States of

the Union. If this view were allowed, the attitude of the courts to the question would not be much changed; for they could not inquire as to the purposes of Congress, nor, I suppose, overrule the judgment of Congress as to the adaptability of territory for the creation of States. The appeal would be to Congress to limit the use of the power.

The islands of Hawaii, of Porto Rico and of the Philippine Archipelago have been taken over, not for a temporary purpose, as in the case of Cuba, but to have and to hold forever, as a part of the region over which the sovereignty of the United States extends. We have not put ourselves under any pledge as to them, at least not of a written sort. Indeed, we have not, it is said, made up our minds as to anything affecting the Philippines, save this: that they are a part of our national domain and that the inhabitants must yield obedience to the sovereignty of the United States, so long as we choose to hold them.

Our title to the Philippines has been impeached by some upon the ground that Spain was not in possession when she conveyed them to us. It is a principle of private law that a deed of property adversely held is not good. If I have been ejected from a farm to which I claim title and another is in possession under a claim of title, I must recover the possession before I can make a good conveyance. Otherwise, I sell a law suit and not a farm, and that the law counts to be immoral. It has not been shown, however, that this principle has been incorporated into international law; and, if that could be shown, there would still be need to show that Spain had been effectively ousted.

It is very certain, I suppose, that if Great Britain had, during our revolutionary struggle, concluded a treaty of cession of the colonies to France, we would have treated the cession as a nullity and continued to fight for liberty against the French. No promises of liberal treatment by France would have appeased us.

But what has that to do with the Philippine situation? There are so many points of difference. We were Anglo-Saxons! We were capable of self-government. And, after all, what we would have done under the conditions supposed has no bearing upon the law of the case. It is not to be doubted that any international tribunal would affirm the completeness of our legal title to the Philippines.

The questions that perplex us relate to the status of these

new possessions, and to the rights of their civilized inhabitants who have elected to renounce their allegiance to the Spanish crown, and either by choice or operation of law have become American—somethings. What? Subjects or citizens? There is no other status, since they are not aliens any longer, unless a newspaper heading that recently attracted my attention offers another. It ran thus: "Porto Ricans not citizens of the United States *proper*." Are they citizens of the United States *improper*, or improper citizens of the United States? It seems clear that there is something improper. To call them "citizens of Porto Rico" is to leave their relations to the United States wholly undefined.

Now, in studying the questions whether the new possessions are part of the United States, and their free civilized inhabitants citizens of the United States, the Constitution should, naturally, be examined first. Whatever is said there, is final—any treaty or act of Congress to the contrary notwithstanding. The fact that a treaty must be constitutional, as well as an act of Congress, seems to have been overlooked by those who refer to the treaty of cession as giving to Congress the right to govern the people of Porto Rico, who do not retain their Spanish allegiance, according to its pleasure. Has the Queen Regent, with the island, decorated Congress with one of the jewels from the Spanish Crown?

In Pollard *vs.* Hogan, 3 Howard, the court says:

> **"It cannot be admitted that the King of Spain could by treaty, or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them."**

A treaty is a part of the supreme law of the land in the same sense that an act of Congress is, not in the same sense that the Constitution is. The Constitution of the United States cannot be abrogated or impaired by a treaty. Acts of Congress and treaties are only a part of the "supreme law of the land" when they pursue the Constitution. The Supreme Court has decided that a treaty may be abrogated by a later statute, on the ground that the statute is the later expression of the sovereign's will. Whether a statute may be abrogated by a later treaty, we do not know; but we do know that neither a statute nor a treaty can abrogate the Constitution.

If the Constitution leaves the question open whether the in-

habitants of Porto Rico shall or shall not upon annexation become citizens, then the President and the Senate may exercise that discretion by a treaty stipulation that they shall or shall not be admitted as citizens; but if, on the other hand, the Constitution gives no such discretion, but itself confers citizenship, any treaty stipulation to the contrary is void. To refer to the treaty in this connection is to beg the question.

If we seek to justify the holding of slaves, in a territory acquired by treaty, or the holding of its civilized inhabitants in a condition less favored than that of citizenship, by virtue of the provisions of a treaty, it would seem to be necessary to show that the Constitution, in the one case, allows slavery, and, in the other, a relation of civilized people to the government that is not citizenship.

Now the Constitution declares (14th Amendment) that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States." This disposes of the question, unless it can be maintained that Porto Rico is not a part of the United States.

But the theory that any part of the Constitution, of itself, embraces the Territories and their people, is contested by many. Congress seems to have assumed the negative, though among the members there was not entire harmony as to the argument by which the conclusion was reached. It is contended, by most of those who defend the Porto Rican bill, that the Constitution expends itself wholly upon that part of the national domain that has been organized into States, and has no reference to, or authority in, the Territories, save as it has constituted a government to rule over them.

No one contends that every provision of the Constitution applies to the Territories. Some of them explicitly relate to the States only. The contention of those who opposed the Porto Rican legislation is that all of those general provisions of the Constitution which impose limitations upon the powers of the Legislative, Executive and Judicial Departments must apply to all regions and people where or upon whom those powers are exercised. And, on the other hand, those who deny most broadly that the Constitution applies to the Territories seem practically to allow that much of it does. The powers of appointment and pardon in the Territories, the confirmation of Territorial officers, the

methods of passing laws to govern the Territories, the keeping and disbursement of federal taxes derived from the Territories, the veto power, and many other things, are pursued as if the Constitution applied to the cases.

But, in theory, it is claimed by these that no part of the Constitution applies except the 13th Amendment, which prohibits slavery, and that only because the prohibition expressly includes "any place subject to their jurisdiction." This Amendment was proposed by Congress on February 1st, 1865—the day on which Sherman's army left Savannah on its northern march; and the words "any place subject to their jurisdiction" were probably added because of the uncertainty as to the legal status of the States in rebellion, and not because of any doubt as to whether Nebraska, then a Territory, was a part of the United States.

The view that some other general limitations of the Constitution upon the powers of Congress must relate to all regions and all persons was, however, adopted by some members of the Senate Committee in the report upon the Porto Rican bill, where it is said:

> "Yet, as to all prohibitions of the Constitution laid upon Congress while legislating, they operate for the benefit of all for whom Congress may legislate, no matter where they may be situated, and without regard to whether or not the provisions of the Constitution have been extended to them; but this is so because the Congress, in all that it does, is subject to and governed by those restraints and prohibitions. As, for instance, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; no title of nobility shall be granted; no bill of attainder or ex post facto law shall be passed; neither shall the validity of contracts be impaired, nor shall property be taken without due process of law; nor shall the freedom of speech or of the press be abridged; nor shall slavery exist in any place subject to the jurisdiction of the United States. These limitations are placed upon the exercise of the legislative power without regard to the place or the people for whom the legislation in a given case may be intended."

That is to say, every general constitutional limitation of the powers of Congress applies to the Territories. The brief schedule of these limitations given by the committee are all put in the negative form, "Congress shall not"; but surely it was not meant that there may not be quite as effective a limitation by the use of the affirmative form. If a power is given to be used in one way only, all other uses of it are negatived by necessary implication. When it is said, "All duties, imposts and excises shall be

uniform throughout the United States," is not that the equivalent of "No duty or excise that is not uniform shall be levied in the United States." And is not the first form quite as effective a limitation of the legislative power over the subject of indirect taxation as that contained in the fourth clause of the section is upon the power to lay direct taxes?

In the latter the negative form is used, thus:

> "No capitation or other direct tax shall be laid, unless in proportion to the census of enumeration hereinbefore directed to be taken."

This discrimination between express and implied limitations, benevolently attempted to save for the people of the Territories the bill of rights provision of the Constitution, will not, I think, endure discussion.

There are only three views that may be offered, with some show of consistency in themselves:

First, that Congress, the Executive and the Judiciary are all created by the Constitution as governing agencies of the nation called the United States; that their powers are defined by the Constitution and run throughout the nation; that all the limitations of their powers attach to every region and to all civilized people under the sovereignty of the United States, unless their inapplicability appears from the Constitution itself; that every guaranty of liberty, including that most essential one, uniform taxation, is to be allowed to every free civilized man and woman who owes allegiance to the United States; that the use of the terms "throughout the United States" does not limit the scope of any constitutional provision to the States that would otherwise be applicable to the Territories as well; but that these terms include the widest sweep of the nation's sovereignty, and so the widest limit of Congressional action.

Second, that the terms, "The United States," define an inner circle of the national sovereignty composed of the States alone; that, whenever those terms are used in the Constitution, they must be taken to have reference only to the region and to the people within this inner circle; but that, when these terms of limitation are omitted, the constitutional provisions must, unless otherwise limited, be taken to include all lands and people in the outer circle of the national sovereignty.

Third, that the Constitution has relation only to the States

and their people; that all constitutional limitations of the powers of Congress and the Executive are to be taken to apply only to the States and their citizens; that the power to acquire territory is neither derived from the Constitution, nor limited by it, but is an inherent power of national life; that the government we exercise in the Territories is not a constitutional government, but an absolute government, and that all or any of the things prohibited by the Constitution as to the States, in the interest of liberty, justice and equality, may be done in the Territories; that, as to the Territories, we are under no restraints save such as our own interests or our benevolence may impose.

I say "benevolence"; but must not that quality be submerged, before this view of the Constitution is promulgated? It seems to have had its origin in a supposed commercial necessity, and we may fairly conclude that other recurring necessities will guide its exercise. Is it too much to say that this view of the Constitution is shocking?

Within the States, it is agreed that the powers of the several departments of the national government are severely restrained. We read that Congress shall have power, and again that Congress shall not have power. But neither these grants nor these inhibitions have, it is said, any relation to the Territories. Against the laws enacted by the Congress, or the acts done by the Executive, there is no appeal, on behalf of the people of the Territories, to any written constitution, or bill of rights, or charter of liberty. We offer them only this highly consolatory thought: a nation of free Americans can be trusted to deal benevolently with you.

How obstinately wrong we were in our old answer to the Southern slave-holder! It is not a question of kind or unkind treatment, but of human rights; not of the good or bad use of power, but of the power, we said. And so our fathers said, in answer to the claim of absolute power made on behalf of the British Parliament. As to the States, the legislative power of Congress is "all legislative powers herein granted." (Art. 1, sec. 1.) As to the Territories, it is said to be all legislative power—all that any Parliament ever had or ever claimed to have, and as much more as we may claim—for there can be no excess of pretension where power is absolute. No law relating to the Territories, passed by Congress, can, it is said, be declared by the

Supreme Court to be inoperative, though every section of it should contravene a provision of the Constitution.

An outline of a possible law may aid us to see more clearly what is involved:

Sec. 1. Suspends permanently the writ of Habeas Corpus in Porto Rico.

Sec. 2. Declares an attainder against all Porto Ricans who have displayed the Spanish flag since the treaty of peace.

Sec. 3. Grants to the native mayors of Ponce and San Juan the titles of Lord Dukes of Porto Rico, with appropriate crests.

Sec. 4. Any Porto Rican who shall speak disrespectfully of the Congress shall be deemed guilty of treason. One witness shall be sufficient to prove the offense, and on conviction the offender shall have his tongue cut out; and the conviction shall work corruption of blood.

Sec. 5. The Presbyterian Church shall be the Established Church of the Island, and no one shall be permitted to worship God after any other form.

Sec. 6. All proposed publications shall be submitted to a censor and shall be printed only after he has approved the same. Public meetings for the discussion of public affairs are prohibited and no petitions shall be presented to the government.

Sec. 7. No inhabitant of Porto Rico shall keep or bear arms.

Sec. 8. The soldiers of the Island garrison shall be quartered in the houses of the people.

Sec. 9. The commanding officer of the United States forces in the Island shall have the right, without any warrant, to search the person, house, papers and effects of any one suspected by him.

Sec. 10. Any person in Porto Rico, in civil life, may be put upon trial for capital or other infamous crimes upon the information of the public prosecutor, without the presentment or indictment of a grand jury; may be twice put in jeopardy for the same offense; may be compelled to be a witness against himself, and may be deprived of life, liberty or property without due process of law, and his property may be taken for public uses without compensation.

Sec. 11. Criminal trials may, in the discretion of the presiding judge, be held in secret, without a jury, in a district prescribed by law after the commission of the offense, and the accused shall, or not, be advised before arraignment of the nature or cause of

the accusation, and shall, or not, be confronted with the witnesses against him, and have compulsory process to secure his own witnesses, as the presiding judge may in his discretion order.

Sec. 12. There shall be no right in any suit at common law to demand a jury.

Sec. 13. A direct tax is imposed upon Porto Rico for federal uses without regard to its relative population; the tariff rates at San Juan are fixed at fifty per cent. and those at Ponce at fifteen per cent. of those levied at New York.

New Mexico, or Arizona, or Oklahoma might be substituted for Porto Rico in the bill; for, I think, those who affirm that the Constitution has no relation to Porto Rico do so upon grounds that equally apply to all other Territories.

Now, no one supposes that Congress will ever assemble in a law such shocking provisions. But, for themselves, our fathers were not content with an assurance of these great rights that rested wholly upon the sense of justice and benevolence of the Congress. The man whose protection from wrong rests wholly upon the benevolence of another man or of a Congress, is a slave—a man without rights. Our fathers took security of the governing departments they organized; and that, notwithstanding the fact that the choice of all public officers rested with the people. When a man strictly limits the powers of an agent of his own choice, and exacts a bond from him, to secure his faithfulness, he does not occupy strong ground when he insists that another person, who had no part in the selection, shall give the agent full powers without a bond.

If there is anything that is characteristic in American Constitutions, State and national, it is the plan of limiting the powers of all public officers and agencies. "You shall do this; you may do this; you shall not do this"—is the form that the schedule of powers always takes. This grew out of our experience as English colonies. A government of unlimited legislative or executive powers is an un-American government. And, for one, I do not like to believe that the framers of the National Constitution and of our first State Constitutions were careful only for their own liberties.

This is the more improbable when we remember that the territory then most likely to be acquired would naturally be peopled by their sons. They cherished very broad views as to the rights

of men. Their philosophy of liberty derived it from God. Liberty was a Divine gift to be claimed for ourselves only upon the condition of allowing it to "all men." They would write the law of liberty truly, and suffer for a time the just reproach of a departure from its precepts that could not be presently amended.

It is a brave thing to proclaim a law that condemns your own practices. You assume the fault and strive to attain. The fathers left to a baser generation the attempt to limit God's law of liberty to white men. It is not a right use of the fault of slavery to say that, because of it, our fathers did not mean "all men." It was one thing to tolerate an existing condition that the law of liberty condemned, in order to accomplish the Union of the States, and it is quite another thing to create a condition contrary to liberty for a commercial profit.

In a recent discussion of these questions, sent me by the author, I find these consolatory reflections: "And yet the inalienable rights of the Filipinos, even if not guaranteed by the Constitution, are amply secured by the *fundamental, unwritten* laws of our civilization." Does this mean that the specific guarantees of individual liberty found in our Constitution have become a part of "our civilization," and that they apply in Porto Rico and the Philippines in such a sense that, if there is any denial of them by Congress or the Executive, the courts can enforce them and nullify the law that infringes them? If that is meant, then as to all such rights this discussion is tweedledum and tweedledee—the Constitution does not apply, but all these provisions of it are in full force, notwithstanding.

Perhaps, however, it should be asked further, whether the rule of the uniformity of taxation is a part of the "law of our civilization"; for, without it, all property rights are unprotected. The man whose property may be taxed arbitrarily, without regard to uniformity within the tax district and without any limitation as to the purposes for which taxes may be levied, does not own anything; he is a tenant at will.

But if these supposed "laws of our civilization" are not enforcible by the courts, and rest wholly for their sanction upon the consciences of Presidents and Congresses, then there is a very wide difference. The one is ownership; the other is charity. The one is freedom; the other slavery—however just and kind the master may be.

The instructions of the President to the Taft Philippine Commission seem to allow that any civil government under the authority of the United States, that does not offer to the people affected by it the guarantees of liberty contained in the Bill of Rights sections of the Constitution, is abhorrent. Speaking of these, he said:

"Until Congress shall take action, I directed that, upon every division and branch of the government of the Philippines, must be imposed these inviolable rules:

" 'That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offense, or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder, or ex post facto law shall be passed; that no law shall be passed abridging the freedom of speech or of the press, or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

The benevolent disposition of the President is well illustrated in these instructions. He conferred freely—"until Congress shall take action"—upon the Filipinos, who accepted the sovereignty of the United States and submitted themselves to the government established by the Commission, privileges that our fathers only secured after eight years of desperate war. There is this, however, to be noted, that our fathers were not content to hold these priceless gifts under a revocable license. They accounted that to hold these things upon the tenure of another man's benevolence was not to hold them at all. Their battle was for rights, not privileges—for a Constitution, not a letter of instructions.

The President's instructions apparently proceed upon the theory that the Filipinos, after civil government has superseded the military control, are not endowed under our Constitu-

tion, or otherwise, with any of the rights scheduled by him; that, if he does nothing, is silent, some or all of the things prohibited in his schedule may be lawfully done upon, and all the things allowed may be denied to, a people who owe allegiance to that free Constitutional government we call the United States of America.

It is clear that those Porto Ricans who have not, under the treaty, declared a purpose to remain Spanish subjects, have become American citizens or American subjects. Have you ever read one of our commercial treaties with Great Britain or Germany, or any other of the kingdoms of the world? These treaties provide for trade intercourse, and define and guarantee the rights of the people of the respective nations when domiciled in the territory of the other. The descriptive terms run like this: "the subjects of Her Britannic Majesty" on the one part, and "the citizens of the United States" on the other. Now, if the commercial privileges guaranteed by these treaties do not, in their present form, include the Porto Ricans who strewed flowers before our troops when they entered the Island, we ought at once to propose to our "Great and Good Friends," the Kings and Queens of the Earth, a modification of our conventions in their behalf.

Who will claim the distinction of proposing that the words "and subjects" be introduced after the word "citizens"? There will be no objection on the part of the King, you may be sure; the modification will be allowed smilingly.

We have never before found it necessary to treat the free civilized inhabitants of the Territories otherwise than as citizens of the United States.

It is true, as Mr. Justice Miller said, that the exclusive sovereignty over the Territories is in the national government; but it does not follow that the nation possesses the power to govern the Territories independently of the Constitution. The Constitution gives to Congress the right to exercise "exclusive legislation" in the District of Columbia; but "exclusive" is not a synonym of "absolute." When the Constitution says that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," there is a limitation of the legislative power; and it necessarily extends to every venue where the crime of treason against the United States may be laid, and to every person upon whom its penalties may be imposed.

This constitutional provision defining the crime of treason and prescribing the necessary proofs is a Bill of Rights provision. In England, under Edward II., "there was," it was said, "no man who knew how to behave himself, to do, speak or say, for doubt of the pains of such treasons." The famous statute of Edward III., defining treasons, James Wilson declares, "may well be styled the legal Gibraltar of England." (Wilson's Works [Andrews] v. 2, p. 413.)

Mr. Madison, speaking of this section of the Constitution, says in the "Federalist":

> "But as new fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their malignity on each other, the convention have with great judgment opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime," etc.

Mr. Madison believed that there was a real danger that statutes of treason might be oppressively used by Congress. What have we been doing, or what have we a purpose to do, that we find it necessary to limit the safeguards of liberty found in our Constitution, to the people of the States? Is it that we now propose to acquire territory for colonization, and not, as heretofore, for full incorporation? Is it that we propose to have Crown Colonies, and must have Crown law? Is it that we mean to be a World Power, and must be free from the restraints of a Bill of Rights? We shall owe deliverance a second time to these principles of human liberty, if they are now the means of delivering us from un-American projects.

The particular provision of the Constitution upon which Congress seems to have balked, in the Porto Rican legislation, was a revenue clause, viz., the first paragraph of section 8 of Article 1, which reads:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

There was only one door of escape from allowing the application of this clause to Porto Rico. It was to deny that the Territories are part of the United States.

It will be noticed that the descriptive term, "The United States," is twice used in the one sentence—once in the clause defining the purposes for which only duties and imposts may be

levied, and once in the clause requiring uniformity in the use of the power. Is there any canon of construction that authorizes us to give to the words, "The United States," one meaning in the first use of them and another in the second? If in the second use the Territories are excluded, must they not also be excluded in the first? If the rule of uniformity does not apply to the Territories, how can the power to tax be used in the United States, to pay the debts and provide for the defense and general welfare of the Territories? Can duties be levied in New York and other ports of the States, to be expended for local purposes in Porto Rico, if the Island is not a part of the United States?

Are the debts that may be contracted by what the law calls the body politic of "The People of Porto Rico" for local purposes, part of the debt of the United States—notwithstanding that the Island is no part of the United States and the people are not citizens of the United States? But some one will say that the Island is one of our outlying defenses, and that fortifications and naval stations and public highways there are necessary to the "common defense." Well, is it also true that education and poor relief, and fire and police and health protection, and all other agencies of local order and betterment in Porto Rico, are included in the words "the general welfare of the United States"? It would seem that a region of which it can be said that its general welfare is the general welfare of the United States, must be a part of the United States, and its people citizens of the United States.

For the first time Congress has laid tariff duties upon goods passing from a Territory into the States. The necessity for this radical departure from the established practice of the government seems to have been to find a safe basis for the holding and governing of regions, the free introduction of whose products might affect the home industries unfavorably, and the admission of whose people to citizenship might imply future Statehood—or at least the right of migration and settlement in the States of an undesirable population. That the diversity of tongues in the Philippines, and the utter lack of the American likeness in everything there, presented strong reasons against the acquisition of the islands, I freely admit.

It must also be conceded that when, as we are told, Providence laid upon us the heavy duty of taking over and governing these islands, it was very natural that we should seek to find a way of

governing them that would save us from some of the unpleasant consequences which a discharge of the duty in the old way involved. But do we not incur a greater loss and peril from the new doctrine, that our Congress and Executive have powers not derived from the Constitution, and are subject to no restraints or limitations in the Territories, save such as they may impose upon themselves?

Are the civil rights of the dwellers on the mainland well secured against the insidious under-wear of greed and ambition, while we deny to the island dwellers, who are held to a strict allegiance, the only sure defense that civil rights can have—the guarantees of constitutional law? Burke saw in the absolute powers claimed for Parliament, in the American colonies, danger to the liberties of Parliament itself. As so often quoted, he said:

> "For we are convinced, beyond a doubt, that a system of dependence which leaves no security to the people for any part of their freedom in their own hands, cannot be established in any inferior member of the British Empire without consequentially destroying the freedom of that very body in favor of whose boundless pretensions such a scheme is adopted. We know and feel that arbitrary power over distant regions is not within the competence, nor to be exercised agreeably to the forms or consistently with the spirit, of great popular assemblies."

Are we, in this day of commercial carnival, incapable of being touched by such considerations, either in our fears or in our sense of justice? Is it not likely to be true that the moral tone of the Republic—our estimation of constitutional liberty—will be lessened by the creation of a body of civilized people over whom our flag waves as an emblem of power only? The flag cannot stand for the benevolent policies of an administration. It stands for more permanent things—for things that changing administrations have no power to change. Is it not in the nature of a mockery to raise the flag in Porto Rico and bid its hopeful people hail it as an emblem of emancipation, while the Governor we have sent them reads a proclamation, from the foot of the staff, announcing the absolute power of Congress over them?

How would the pioneers of the West have regarded a declaration that they were not citizens of the United States, or a duty laid upon the furs they sent to the States, or upon the salt and gunpowder sent from the States in exchange, even if a preference of 85 per cent. had been given them over the people of Canada?

It is safe to say that no such interpretation of the Constitution, or of the rights of the people of a Territory, will ever be offered to men of American descent.

If the Constitution, so far as it is applicable, attaches itself, whether Congress will or no, to all territory taken over as a part of the permanent territory of the United States, it is there to stay as fundamental law. But if it is not so, an act of Congress declaring that the Constitution is "extended" is not fundamental law, but statute law, and may be repealed; and is repealed by implication, *pro tanto,* whenever Congress passes a law in conflict with the provisions of the "extended" Constitution. If the Constitution as such, as fundamental law, is extended over new territory, it must be the result of an act done—an act the effect of which is in itself, not in any accompanying declaration.

If the act of annexation does not carry the Constitution into a Territory, I can think of nothing that will, save the act of admitting the Territory as a State.

The situation of the Porto Rican people is scarcely less mortifying to us than to them; they owe allegiance but have no citizenship. Have we not spoiled our career as a delivering nation? And for what? A gentleman connected with the beet-sugar industry, seeing my objections to the constitutionality of the law, and having a friendly purpose to help me over them, wrote to say that the duty was absolutely needed to protect the beet-sugar industry. While appreciating his friendliness, I felt compelled to say to him that there was a time for considering the advantages and disadvantages of a commercial sort involved in taking over Porto Rico, but that that time had passed; and to intimate to him that the needs of the beet-sugar industry seemed to me to be irrelevant in a constitutional discussion.

The wise man did not say there was a future time for everything; he allowed that the time for dancing might be altogether behind us, and a less pleasant exercise before us. We are hardly likely to acquire any territory that will not come at some cost.

That we give back to Porto Rico all of the revenue derived from the customs we levy, does not seem to me to soften our dealings with her people. Our fathers were not mollified by the suggestion that the tea and stamp taxes would be expended wholly for the benefit of the colonies. It is to say: We do not need this money; it is only levied to show that your country is no part of

the United States, and that you are not citizens of the United States, save at our pleasure. When tribute is levied and immediately returned as a benefaction, its only purpose is to declare and maintain a state of vassalage.

But I am not sure that the beet-sugar objection is not more tenable than another, and probably more controlling consideration, which ran in this wise: "We see no serious commercial disadvantages, and no threat of disorder, in accepting Porto Rico to be a part of the United States—in that case it seems to be our duty; but we have acquired other islands in the Orient, of large area, populated by a turbulent and rebellious people; and, if we do by the Porto Ricans what our sense of justice and of their friendliness prompts us to do, some illogical person will say that we must deal in the same way with the Philippines. And some other person will say that the free intercourse was not given by the law but by the Constitution."

I will not give a license to a friend to cut a tree upon my land to feed his winter fire, because my enemy may find in the license a support for his claim that the wood is a common!

If we have confidence that the Constitution does not apply to the Territories, surely we ought to use our absolute power there with a view to the circumstances attending each call for its exercise. Not to do this, shows a misgiving as to the power.

The questions raised by the Porto Rican legislation have been discussed chiefly from the standpoint of the people of the Territories; but there is another view. If, in its tariff legislation relative to merchandise imported into the Territories and to merchandise passed from the Territories into the States, Congress is not subject to the law of uniformity prescribed by the Constitution, it would seem to follow that it is within the power of Congress to allow the admission to Porto Rico of all raw materials coming from other countries free of duty, and to admit to all ports of the "United States proper," free of duty, the products manufactured from these raw materials. As the people of the "United States proper" choose the Congressmen, there may be no great alarm felt over this possibility; but it is worth while to note that a construction of the Constitution adopted to save us from a competition with the Territories on equal grounds, is capable of being turned against us and to their advantage.

The courts may not refuse to give to the explicit words of a

law their natural meaning, by reason of the ill consequences that may follow; but they may well take account of consequences in construing doubtful phrases, and resolve the doubts so as to save the purpose of the law-makers, where, as in the case of the constitutional provision we are considering, that purpose is well known. They will not construe a doubtful phrase so as to allow the very thing that the law was intended to prevent.

These constitutional questions will soon be decided by the Supreme Court. If the absolute power of Congress is affirmed, we shall probably use the power with discrimination by "extending" the Constitution to Porto Rico and by giving to its people a full Territorial form of government, and such protection in their civil rights as an act of Congress can give. If the court shall hold that the Constitution, in the parts not in themselves inapplicable, covers all territory made a permanent part of our domain, from the moment of annexation and as a necessary part of the United States, then we will conform our legislation, with deep regret that we assumed a construction contrary to liberty, and with some serious embarrassments that might have been avoided.

There has been with many a mistaken apprehension that, if the Constitution, of its own force, extends to Porto Rico and the Philippines, and gives American citizenship to their free civilized people, they become endowed with full political rights; that their consent is necessary to the validity and rightfulness of all civil administration. But no such deduction follows. The power of Congress to legislate for the Territories is full. That is, there is no legislative power elsewhere than in Congress, but it is not absolute. The contention is that all the powers of Congress are derived from the Constitution—including the power to legislate for the Territories—and that such legislation must necessarily, always and everywhere, be subject to the limitations of the Constitution.

When this rule is observed, the consent of the people of the Territories is not necessary to the validity of the legislation. The new territory having become a part of the national domain, the people dwelling therein have no reserved legal right to sever that relation, or to set up therein a hostile government. The question whether the United States can take over or continue to hold and govern a territory whose people are hostile, is not a question of

constitutional or international law, but of conscience and historical consistency.

Some one must determine when and how far the people of a Territory, part of our national domain, can be entrusted with governing powers of a local nature, and when the broader powers of Statehood shall be conferred. We have no right to judge the capacity for self-government of the people of another nation, or to make an alleged lack of that faculty an excuse for aggression; but we must judge of this matter for our Territories. The interests to be affected by the decision are not all local; many of them are national.

These questions are to be judged liberally and with strong leanings to the side of popular liberty, but we cannot give over the decision to the people who may at any particular time be settled in a Territory. We have, for the most part, in our history given promptly to the people of the Territories a large measure of local government, and have, when the admission of a State was proposed, thought only of boundaries and population. But this was because our Territories have been contiguous and chiefly populated from the States.

We are not only at liberty, however, but under a duty, to take account also of the quality and disposition of the people, and we have in one or two instances done so. The written Constitution prescribes no rule for these cases. The question whether the United States shall hold conquered territory, or territory acquired by cession, without the consent of the people to be affected, is quite apart from the question whether, having acquired and incorporated such territory, we can govern it otherwise than under the limitations of the Constitution.

The Constitution may be aided in things doubtful by the Declaration of Independence. It may be assumed that the frame of civil government adopted was intended to harmonize with the Declaration. It is the preamble of the Constitution. It goes before the enacting clause and declares the purpose of the law; but the purpose so expressed is not the law unless it finds renewed expression after the enacting clause. We shall be plainly recreant to the spirit and purpose of the Constitution, if we arbitrarily deny to the people of a Territory as large a measure of popular government as their good disposition and intelligence will warrant. Necessarily, the judgment of this question, however, is

with Congress. The Constitution prescribes no rule—could not do so—and the courts cannot review the discretion of Congress.

But we are now having it dinned into our ears that expansion is the law of life, and that expansion is not practicable if the Constitution is to go with the flag. Lord Salisbury, some years ago, stated this supposed law of national life. In a recent address, Mr. James Bryce says, by way of comment:

> "He thinks it like a bicycle, which must fall when it comes to a standstill. It is an awkward result of this doctrine that when there is no more room for expansion, and a time must come, perhaps soon, when there will be no more room, the Empire will begin to decline."

If Great Britain, with her accepted methods of territorial growth, finds the problem of growth by expansion increasingly hard, it will be harder for us, for we are fettered by our traditions as to popular rights, at least—if not by our Constitution.

But expansion is not necessarily of a healthy sort; it may be dropsical. If judgment is passed now, the attempted conquest of the Boer Republics has not strengthened Great Britain. She has not gained esteem. She has not increased her loyal population. She has created a need for more outlying garrisons—already too numerous. She has strained her military and financial resources, and has had a revelation of the need of larger armies and stronger coast-defenses at home. The recent appeal of Lord Salisbury at the Lord Mayor's banquet for more complete island defenses is most significant. Did the South African war furnish a truer measure of the Empire's land strength than the familiar campaigning against half-savage peoples had done? The old coach, with its power to stand as well as to move, may after all be a safer carriage, for the hopes and interests of a great people, than the bicycle.

Some one will say, increasing years and retirement and introspection have broken your touch with practical affairs and left you out of sympathy with the glowing prospects of territorial expansion that now opens before us; that it has always been so; the Louisiana and the Alaskan purchases were opposed by some fearful souls. But I have been making no argument against expansion. The recent acquisitions from Spain must present widely different conditions from all previous acquisitions of territory, since it seems to be admitted that they cannot be allowed to become a part of the United States without a loss that overbalances the

gain; that we can only safely acquire them upon the condition that we can govern them without any constitutional restraint.

One who has retired from the service, but not from the love of his country, must be pardoned if he finds himself unable to rejoice in the acquisition of lands and forests and mines and commerce, at the cost of the abandonment of the old American idea that a government of absolute powers is an intolerable thing, and, under the Constitution of the United States, an impossible thing. The view of the Constitution I have suggested will not limit the power of territorial expansion; but it will lead us to limit the use of that power to regions that may safely become a part of the United States, and to peoples whose American citizenship may be allowed. It has been said that the flash of Dewey's guns in Manila Bay revealed to the American people a new mission. I like rather to think of them as revealing the same old mission that we read in the flash of Washington's guns at Yorktown.

God forbid that the day should ever come when, in the American mind, the thought of man as a "consumer" shall submerge the old American thought of man as a creature of God, endowed with "unalienable rights."

BENJAMIN HARRISON.