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Paul Fuller

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Expansion of Constitutional Powers

BY

INTERPRETATION:

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BY

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EXPANSION OF CONSTITUTIONAL POWERS BY INTERPRETATION.[1]

What explanation or apology is to be offered for undertaking to talk to lawyers of the Constitution of the United States and its interpretation? Is this a legal subject, or a political subject? Is it a subject that lies at the very foundation of all our law, and order, and justice, and with which as an initial necessity every student must have made himself familiar before receiving the sheepskin that evidences his right to set himself as a guide to the unwary and inexperienced; or, on the other hand, does it concern only those who are privileged to govern the country, so that it may be safely put aside and left out of present consideration by the profession whose daily task is mainly confined to unravelling and smoothing out the differences and controversies between private citizens, and enforcing the respect of private rights? It is, however, in neither of these categories. Admission to the Bar may unfortunately be had, with the faintest modicum of acquaintance with the instrument upon whose sound interpretation the growth of this powerful and unique Federation rests, and though the subject is largely political, it concerns so closely and so widely the questions of individual rights that it is not possible to set it aside or leave it out of an ever present consideration; and it behooves all members of the profession to be abreast of the judicial work which is unceasingly remodelling and altering the familiar features of this unrivalled charter.

A recent distinguished member of the Department of Justice who has come to practice his profession among us, told a body of assembled merchants some time ago that the Supreme Court was a perpetual convention for the amendment of the Constitution. If this be so, and for the moment I am not disposed to question it, then we may well give heed to the statement of the late Lord Chief Justice Russell, who called attention to the peculiar opportunities of the American Bar whose members alone have the privilege of a formative influence upon the constitutional framework of their government. As indicating the importance of such

[1] Address delivered before the Dwight Alumni Association, New York.

opportunity at the present moment it is germain to cite a remark reported to have been made by Mr. Justice Harlan of the Supreme Court at the Columbian University Law School at Washington:

> "Let us hope that this great instrument which has served so well, will weather the storms which the ambitions of certain men are creating, in an effort to make this country a World Power."

The earliest doubts as to the powers conferred, and the earliest attempts to embody the gift of these powers in language which should disguise, instead of revealing, their ultimate possibilities may be traced to the discussions in the convention that framed the Constitution. I will content myself with one pregnant illustration.

The First Article of the Constitution contains the grant of legislative powers, provides for the organization of "a Congress of the United States" and defines the powers of that Congress with minuteness and certainty. The Fourth Article has for its purpose to define the status and the rights of States and of the citizens of each State, and in this connection to provide for the admission of new States; at the time there had been pending a controversy as to the ownership of vast tracts included in the relinquishment of sovereignty, "proprietary and territorial rights" made by Great Britain in the Treaty of 1783; this territory was claimed by several of the States under the colonial grants to the respective Colonies; the dispute had been in large part settled by the surrender of the claims of various States, to the Federal Government, under the conditions of the famous Northwest Ordinance, but the dispute was still alive as to a vast portion of such territory to which claim was laid by the Federal Government and by various States. Provision had to be made for the territory already surrendered by the States and for the reservation of outstanding claims as to the remainder, and it was accordingly provided in this Article, designed to define the rights and privileges of States, that

> "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State."[1]

[1] Art. 10, Sec. 3, Subd. 2.

This language seems plain enough as we read it now, without any other purpose than to understand it, not seeking to find in it the support of some preconceived theory, or by its aid to overturn some claim which threatens the subversion of sectional relations, and yet when, fifteen years later, the acquisition of Louisiana made vital the question of the civil and political rights of its inhabitants, Gouverneur Morris, the draftsman of that section, in a letter to Henry Livingston, gave this account of its covert intention:

> "I always thought that when we would 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. Candor obliges me to add my belief that had it been more pointedly expressed a strong opposition would have been made."

Twenty-five years later, the Supreme Court in American Insurance Co. *v.* Canter, sustaining the jurisdiction of territorial courts erected in Florida by Congressional action, without reference to the provisions of the Judiciary article, gave additional force to this expansive interpretation of an occult purpose, by holding that until Florida became a State it continued "to be a territory of the United States governed by virtue of that clause in the Constitution, which empowers Congress to make all needful rules and regulations respecting the territory of other property belonging to the United States."[1]

The Court was apparently unwilling to rest the power altogether upon the clause under consideration and added:

> "Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

Notwithstanding this reservation, the seed was sown. But to return to Gouverneur Morris' candid statement of the cautious methods used in the framing of the section in question, and the use for which this statement was elicited.

[1] (1828) 1 Pet. 511.

When Jefferson in his wise anxiety to secure the free navigation of the Mississippi began his negotiations to acquire New Orleans, he was finally met by a sudden proposal from Bonaparte, then First Consul, for the cession of the entire territory of Louisiana, coupled, however, with the condition that such territory should be admitted into the Union,—that its inhabitants should, according to the principles of the Constitution, be endowed with all the rights of citizens.

Jefferson was fully alive to the incalculable importance of the acquisition; he never doubted the right of the United States to acquire territory under its inherent rights of sovereignty and the power to make treaties, and he had accordingly opened the negotiations for the acquisition of the port of New Orleans which should command the mouth of the Mississippi; but he was satisfied that under the Constitution, Congress could only admit new States from the territory already under the jurisdiction of the government, and that compliance with the terms of the treaty, which the commissioners had signed, was impossible without usurpation of power or an amendment of the Constitution. He felt the value of the acquisition and dreaded to reopen the treaty and endanger that result; he valued a strict construction of the Constitution and dreaded any strained interpretation to cover and encourage assumption of powers which had not been clearly conferred.

Jefferson writes to Breckenridge on the 12th of August, 1803:

> "This treaty must, of course, be laid before both Houses, because both have important functions to exercise respecting it. They, I presume will see their duty to their country in ratifying and paying for it, so as to secure a good which would otherwise probably be never again in their power. But I suppose they must then appeal to the nation for an additional article to the Constitution approving and confirming an act which the nation had not previously authorized."

And to Gallatin he wrote:

> "There is no constitutional difficulty as to the acquisition of territory and whether when acquired it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution."

And to William Dunbar he writes that Congress "will be obliged to ask from the people an amendment of the Constitution authorizing their receiving the province into the Union and providing for its government, and limitations of power which shall be given by that amendment will be unalterable but by the same authority."

When his friend Nicholas wrote him that he found the power under the Constitution as broad as it could well be made, Jefferson replied:

"I am aware of the force of the observations you make on the power given by the Constitution to Congress to admit new States into the Union without restraining the subject to the territory then constituting the United States. But when I consider that the limits of the United States are precisely fixed by the treaty of 1783, that the Constitution expressly declares itself to be made for the United States, I cannot help believing that the intention was to permit Congress to admit into the Union new States which should be formed out of the territory for which and under whose authority alone they were then acting. * * * When an instrument admits two constructions, the one safe, the other dangerous, the one precise, the other indefinite, I prefer that which is safe and precise. I had rather ask an enlargement of power from the nation where it is found necessary, than to assume it by a construction which would make our powers boundless. Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

He took advice of Gallatin, Levi Lincoln, Dunbar and Breckenridge; he drafted two proposals of amendment to the Constitution, and finally yielded to the advice of his counsellors, repeating to the last his dread of the broad construction which the magnitude of the prize and the manifest honesty of purpose in the transaction were covering.

He writes to Breckenridge:

"The legislature, in casting behind them metaphysical subtleties and risking themselves like faithful servants, must ratify (the treaty) and pay for it and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. * * * But we shall not be disavowed by the nation and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines."

And his last word to Nicholas was this:

"I confess, then, I think it important, in the present case, to set an example against broad construction, by appealing for new power to the people. If, however, our friends think differently, certainly I shall acquiesce with satisfaction, confident that the good sense of our country will correct the evil of construction when it shall produce ill effects."

Twenty-five years later, as we have seen, Jefferson's great Federalist antagonist, speaking for the Supreme Court, partly set his doubts at rest by the decision in American Insurance Co. *v.* Canter.

Another seed of the bamboo tree of expansive interpretation which was laid in the Convention was the provision in reference to the imposition of direct taxes. Article I, Sec. 2, treating of the membership of the House of Representatives, provides that "Representatives and direct taxes shall be apportioned among the several States, according to their respective numbers," while Sec. 9 of the same article, treating of the limitations on Congress, provides that: "No capitation or other direct tax shall be laid unless in proportion to the census," &c.

The Constitution was yet in its infancy, one of the members of the Convention was on the bench, Hamilton at the Bar, and Madison a philosophic onlooker. A tax on carriages had been imposed by Congress without regard to the rule of apportionment. Madison opposed its passage as being contrary to the constitutional rule, which required such a direct tax to be apportioned. The legality of the tax being questioned, it came before the Court in Hylton *v.* United States,[1] where Hamilton maintained that it was not a direct tax, and was sustained by the Court, upon the assumption that the only taxes intended by the Convention to be included in the term "direct," were capitation taxes and taxes on land. If this was the intention, it is a subject of reasonable and unsatisfied conjecture as to why the Convention did not adopt so ready a phraseology as "capitation taxes and taxes on land" instead of adopting a phrase which so early afforded an opportunity of judicial enlargement of the constitutional meaning. This seed grew, blossomed and bore fruit until, a century later, under its influence Congress passed the Income Tax Act of 1894, which in the Income Tax cases,[2] was, after two hearings, held void, not only as imposing a direct tax by taxing income on lands, but as imposing a direct tax, by taxing the income of personalty.

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[1] (1796) 3 Dall. 171.

[2] Pollock *v.* Farmers' Loan & Trust Co. (1895) 157 U. S. 429; 158 U. S. 601.

In the meantime the Veazie Bank case[1] had come before the Court in which the power of taxation was upheld,—not to raise money for the general welfare,—but to extinguish the exercise of an admitted power of the States in the creation of Banks. There, in the effort to sustain the tax and to confine the term direct tax to capitation and realty, the Court was brought face to face with two Acts of Congress including in the embrace of a direct tax a tax on negro slaves.

The first of these Acts (1798) fixed a tax of 50¢ a head on slaves, and Mr. Chief Justice Chase found that in that Act the slaves were subjected to a capitation tax, in this way holding the term "direct tax" to be applicable only to capitation and realty. But in the subsequent acts of 1815 and 1816 slaves were again made the subject of a direct tax and this time not at 50¢ a head but according to valuation by assessment. Here we will see that the law did not consider them as persons but graded the tax upon them according to their value, very clearly, even very grossly qualifying them as property. But this was disposed of by Mr. Chief Justice Chase in the statement that it was plain that in these latter statutes the slaves were taxed as realty. There is nothing to show that the nature or the legal status of the slave had changed from 1798 to 1815, and it is difficult to find the ground for thus shifting these unfortunates from the status of persons, the proper subjects of a capitation tax, to realty, especially as the acts of Congress in question provided for a direct tax upon realty and in addition upon slaves.

This is one of the fruits,—and one of the necessities,—of expansion of power by interpretation.

These fruits are emphasized in some of the dissenting opinions in the Income Tax Case:

> "I cannot resist the conviction that its opinion and decree in this case virtually annuls its previous decisions in regard to the powers of Congress on the subject of taxation, and is therefore fraught with danger to the court, to each and every citizen, and to the republic. * * * There is no great, principle of our constitutional law * * * which has not been ultimately defined by the adjudications of this court after long and earnest struggle. If we are to go back to the original sources of our political system, or are

[1] Veazie Bank *v.* Fenno (1869) 8 Wall. 533.

to appeal to the writings of the economists in order to unsettle all these great principles, everything is lost and nothing saved to the people. The rights of every individual are guaranteed by the safeguards which have been thrown around them by our adjudication. If these are to be assailed and overthrown, the rights of property, so far as the Federal Constitution is concerned, are of little worth." WHITE, J.

"The decree now passed dislocates—principally, for reasons of an economic nature—a sovereign power expressly granted to the general government and long recognized and fully established by judicial decisions and legislative actions. It so interprets constitutional provisions, originally designed to protect the slave property against oppressive taxation, as to give privileges and immunities never contemplated by the founders of the government." HARLAN, J.

"By resuscitating an argument that was exploded in the Hylton case and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. * * *

"As I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportions of a national calamity, I feel it a duty to enter my protest against it." BROWN, J.

"It is greatly to be deplored that, after more than one hundred years of our national existence, * * * this court should consider itself compelled to go back to a long repudiated and rejected theory of the Constitution, by which the government is deprived of an inherent attribute of its being, a necessary power of taxation." WHITE, J.

Thus we have seen that the germ of expansion of constitutional powers by judicial interpretation is to be found in the proceedings of the convention which framed the Constitution. We have purposely ambiguous language used in the Territorial Rules and Regulations Clause and we have in the clause on taxation the use of a phrase as to which the question was asked in the Convention; "What are direct taxes?" A question which remained unanswered; a phrase as to the limits and meaning of which there was evident disaccord, and to this day it is contended by some judges that the meaning was well understood, and by others that it was uncertain.

The nature of the Constitution itself of necessity opened the door to a very broad exercise of such an interpretation as should serve to sustain, and vitalize and enlarge governmental powers, rather than any narrow construction tending to curtail authority.

While the Constitution was under scrutiny in the various States whose assent was requisite to its promulgation, the dread of usurpation of authority was an element of peril as to its fate, and during that interim all that wisdom, knowledge and strong conviction could bring to bear on the States by way of argument was presented in the letters of Madison, Hamilton and Jay, since gathered together and known as the Federalist. As early after the adoption of the Constitution as 1791, the question arose upon Hamilton's project for a United States Bank and in defence of such a charter, answering the arguments of Jefferson and Randolph, Hamilton laid down the rule of implied powers afterwards adopted by Chief Justice Marshall.

To this I will recur shortly, stopping for a moment to show that the nature of the Constitution itself was such as to require latitude of interpretation. It was but a framework of governmental timbers, leaving the inner construction to be completed in actual experience under the ultimate supervisory check of the Supreme Court. Here at the outset is a vast area within which contraction and expansion can operate in sufficient freedom, without venturing outside of the boundary so rigorously fixed by the framers to the operations and powers of the central government.

"A Constitution," says Chief Justice Marshall, "to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then we must never forget that it is a *Constitution* we are expounding."[1]

The "great outlines" therefore and the designation of the "important objects" are the guides to and the restraints upon interpretation.

[1] McCulloch *v.* Maryland (1818) 4 Wheat. 316, 407.

Hamilton's argument in favor of the power of Congress to incorporate a bank, although no such specific power was enumerated in the Constitution rested upon the right of the government to provide the best means to carry out the powers admittedly conferred, and admirably states the extent and the limitations of the rule of construction.

"Difficulties on this point," he says, "are inherent in the nature of the Federal Constitution; there will be cases clearly within the power of the national government; others clearly without its powers; and a third class, which will leave room for controversy and difference of opinion, and concerning which a reasonable latitude of judgment must be allowed."

How shall that third class be defined and limited? That question is as much alive to-day as when Hamilton suggested it and suggested the answer. The doctrine he contended for, he adds:

"Does not affirm that the national government is sovereign in all respects, but that it is sovereign to a certain extent; that is to the extent of the objects *of its specified powers.* Every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power, and which are not precluded by restrictions and exceptions specified in the Constitution or not immoral, or not contrary to the essential ends of political society.

"All government is a delegation of power. But how much is delegated in each case, is a question of fact to be made out by fair reasoning and construction, upon the particular provisions of the Constitution.

"It is not denied that there are implied as well as express powers and that the former are as effectually delegated as the latter. * * * Then it follows that the only question is in every case, whether the means to be employed has a natural relation to any of the acknowledged objects or lawful ends of government. * * *

"To this mode of reasoning respecting the right of employing all the means requisite to the execution of the specified powers of the government, it is objected that none but necessary and proper means are to be employed. * * * Necessary often means no more than needful, requisite, incidental, useful or conducive to * * *. The whole turn of the clause containing it (the term) indicates that it was the intent of the Convention, by that clause, to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. * * *

"To be necessary is to be incidental and may be denominated the natural means of executing a power. * * *

"The doctrine of implied powers is equivalent to the proposition that the government, as to its specified powers and objects, has plenary and sovereign authority, in some cases paramount to the States; in others, co-

ordinate with it. For such is the plain import of the declaration that it may pass all laws necessary and proper to carry into execution those powers. The doctrine * * * leaves a criterion of what is constitutional and what is not so. This criterion is the *end*, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority."

The value of this exposition is enhanced if, in immediate connection with it, we read the few sections of the Constitution upon which the controversies turn, and the opinions of Chief Justice Marshall a quarter of a century later and note how absolutely he followed the great Federalist leader.

These are the constitutional provisions:

"Art. I, § VIII, Subd. 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

"Art. X, Amndt. All powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, or to the people.

"Art. IX, Amndt. The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted. *But* the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist. * * *

"But it may with great reason be contended, that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution."

"That instrument does not profess to enumerate the means by which the powers it confers may be executed. * * * It is, then, the subject of fair inquiry, how far such means may be employed. * * *

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the

object is excepted, take upon themselves the burden of establishing that exception."

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."[1]

"What do gentlemen mean by a strict construction?

"If they contend only against *that enlarged construction, which would extend words beyond their natural and obvious import*, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the Government those powers which the words of the grant, as usually understood, import and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the Government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then, we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded."[2]

It is safe to say that if this rule of construction had been strictly adhered to, and to repeat the words of Hamilton, if the action of Congress had only been "deemed to come within the compass of the national authority," when the end to be accomplished was "clearly comprehended within any of the specified powers, the measure having an obvious relation to that end, *and not forbidden by any particular provision of the constitution*," the Supreme Court would not today be characterized by a government official as a constitutional convention in permanent session, and therefore subject to dissensions and animadversions inseparable from all conventions, and scarcely advantageous in courts of justice.

In 1848, while the question of the government of the territory which had been wrested from Mexico was still under discussion and in abeyance, Mr. Webster was moved to use this language in the Senate:

"Arbitrary governments may have territories and distant possessions, because arbitrary governments may rule them by different laws and different systems. Russia may rule in the Ukraine provinces of the Caucasus and Kamchatka by different codes, ordinances or ukases. We can do no such thing. They must be of us—part of us—or else strangers.

"I think I see that in progress which will disfigure and deform the

[1] McCulloch *v.* Maryland (1818) 4 Wheat. 316, 405, 408, 409.

[2] Gibbons *v.* Ogden (1824) 9 Wheat. 1, 188.

Constitution. * * * I think I see a course adopted that is likely to turn the Constitution under which we live into a deformed monster—into a curse rather than a blessing—in fact, a frame of an unequal government, not founded on popular representation, not founded on equality, but founded on the grossest inequality; and I think that this process will go on, or that there is danger that it will go on until this Union shall fall to pieces."

And yet it was Mr. Webster who had argued the case of American Insurance Co. *v.* Canter,[1] contending that federal courts could be established there without reference to constitutional prescriptions. The situation of California, without even a territorial government, appealed to him as a responsible legislator somewhat more directly than did the condition of Florida, twenty years earlier when his interest was solely that of advocate, and he exclaimed:

"What is Florida? It is no part of the United States. How can it be? How is it represented? Do the laws of the United States reach Florida? * * * Congress has the *jus coronae* in this case, and Florida is to be governed by congress as she thought proper. What has Congress done? She might have done anything—she might have refused the trial by jury."

And the citation above (of 1848) was his protest against the Congressional interpretation which so enlarged its powers over territory of the United States as to permit the government of such territory without any of the safeguards or limitations imposed by the Constitution.

The senatorial views of Mr. Webster, rather than his views as counsel, received the approval of the Supreme Court in Pollard's Lessee *v.* Hagan,[2] in this language:

"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. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the Constitution and laws of its own Government, and not according to those of the Government ceding it."

And in Cross *v.* Harrison,[3] relating to the status of California, where it held, that upon the conclusion of the treaty of peace, military occupants of the territory became the organs of a *de facto* civil government. "This government

[1] (1828) 1 Peters 511. [2] (1845) 3 How. 212, 225.
[3] (1853) 16 How. 164, 185.

de facto will, of course, exercise no power inconsistent with the powers of the Constitution of the United States, which is the supreme law of the land."

The legal tender decisions afford another instance of the expansion of constitutional powers by interpretation. The law making notes of the government a legal tender for all debts public and private, was first brought in question before the Supreme Court and declared unconstitutional.[1]

The question arising a second time, this earlier case was overruled and the acts were held constitutional as a war measure.[2]

This step gradually led to another, when the reissue of those notes in a time of peace under the Act of 1878 was upheld, not as the exercise of a war measure, but as one of the attributes of sovereignty which appertains to all governments at all times; so that by interpretation the power to coin money has been made to include the power to stamp paper.

After the acquisition which followed the Spanish war, the questions which had been suggested in the cases of Florida, of Louisiana and of California were again brought forward, and the doctrine so tersely stated in the extracts quoted from Pollard's Lessee *v.* Hagan, and from Cross *v.* Harrison, indicating that all civil government in any territory under the jurisdiction of the United States was to be controlled, not by any supposed powers of its previous sovereigns, but solely by the Constitution of the United States, was again questioned and again enlarged. By the various decisions known as the Insular Cases,[3] it is now the constitutional privilege of Congress to govern acquired territory very much as Mr. Webster contended in the American Insurance Company *v.* Canter, to-wit, by the "*jus coronae*, or as Congress may think fit and proper," so that Congress may lawfully impose a different rate of taxation, a different order of duties, a different degree of civil liberty, a different rule as to criminal prosecutions, search warrants, and all the other guaranties, which hold good only for the States and organized Territories.

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[1] Hepburn *v.* Griswold (1869) 8 Wall. 603.

[2] Legal Tender Cases (1870) 12 Wall. 457.

[3] (1900) 182 U. S.

The power now consecrated to Congress allows it to put this annexed territory in the position of foreign countries so far as its commerce with the rest of the United States is concerned, and to impose duties to and from such territories precisely as it does with reference to England or France. Indeed, a little more than it could do with reference to those countries, for while Congress cannot impose any duties upon exportations to England or France, it may lawfully authorize a tax or duty not only upon merchandise coming to the United States from the acquired territories, but also upon property going from the United States to our new possessions.

It would prolong this paper too greatly to go any further into the consideration of these cases, but it is well to indicate that they were scarcely considered as an easy step from what preceded, but as in the cases of the Income tax, they were considered, by members of the court, as a very dangerous advance upon the prerogatives hitherto recognized in Congress.

"Although as we have just decided,[1] Porto Rico ceased, after the ratification of the treaty with Spain, to be a foreign country within the meaning of the Tariff Act, and became a domestic country,—'a territory of the United States'—it is said that if Congress so wills it may be controlled and governed outside of the Constitution, and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations.

"I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution.

"The fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our Government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interpretation."[2]

The last instance of expansion by interpretation which

[1] DeLima *v.* Bidwell (1900) 182 U. S. 1.

[2] Downes *v.* Bidwell (1900) 182 U. S. 362–7.

I shall mention is one, the growth of which can be followed through various decisions of the Supreme Court beginning in 1897 and culminating in 1903.

The case of Holden *v.* Hardy[1] came before the court in 1897 upon complaint of some citizens of Utah that the statute regulating the employment of working men in underground mines and smelters was an abridgment of the privileges and immunities of the citizen and contrary to the provisions of the Constitution which prohibit any State from depriving any person of life, liberty or property without due process of law. The validity of the law was sustained as a proper exercise of the police power of a State, and in so doing the court used this language:

"In passing upon the validity of State legislation under that amendment (XIV) this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary. Even before the adoption of the Constitution, the earlier practice of the common law, which denied the benefit of witnesses to a person accused of felony, had been abolished by statute, though so far as it deprived him of the assistance of counsel and compulsory process for the attendance of his witnesses, it had not been changed in England. But to the credit of her American colonies, let it be said that so oppressive a doctrine had never obtained a foothold there."

"The present century has originated legal reforms of no less importance. * * *

"Of course, it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, aud the law be forced to adapt itself to new conditions of society.

"They (these changes) are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuation."

"In the future growth of the nation, as heretofore, it is not impossible that Congress may see fit to annex territories whose jurisprudence is that of the civil law. One of the considerations moving to such annexation might be the very fact that the territory so annexed should enter the Union

[1] (1897) 169 U. S. 366.

with its traditions, laws and systems of administration unchanged. It would be a narrow construction of the Constitution to require them to abandon these, or to substitute for a system, which represented the growth of generations of inhabitants, a jurisprudence with which they had had no previous acquaintance or sympathy."[1]

In 1901 the case of Downes *v.* Bidwell, already commented on, was decided, in which it was held that the territories then recently acquired under the treaty of peace with Spain could be governed by Congress without regard to that limitation upon its powers which the Constitution phrases in these words:

"All duties, imposts and excises shall be uniform throughout the United States.[2]"

The suggestion was made that if Congress was not bound in the government of these territories by that limitation, then none of the limitations upon the power of Congress were of any avail in such territories. Upon this possibility the opinion of the Court uses this language:

"We suggest *without intending to decide*, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals."

Shortly following this pregnant suggestion there came before the Court the case of an inhabitant of the Hawaiian Islands. The Hawaiian Islands had been annexed to the United States under a joint resolution of Congress which continued in force the municipal laws of the Hawaiian Republic, "not contrary to the Constitution of the United

[1] Holden *v.* Hardy (1897) 169 U. S. 386, 7, 9.

[2] Art. 1, Sec. 8, Subd. 1.

States." The Constitution of the United States provides that:

"No person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury," and that "in all criminal prosecutions the accused shall enjoy the right to speedy and public trial by an impartial jury."[1]

One Mankichi, an inhabitant of Hawaii was prosecuted for murder, without any indictment by a grand jury, but solely upon the accusation of the Government, that is by an "information." In other words, he was put in jeopardy not by an accusation of the people but by the procedure of an official, and it was clearly this latter proceeding which the settled rules of the common law had abolished and which the Constitution had forbidden. The accused party was then put upon his trial and convicted, not by the jury known to the common law, but by the vote of nine out of twelve of the jurors who tried him. These proceedings, it was claimed on behalf of Mankichi were "inconsistent with the Constitution of the United States" and became unlawful in Hawaii after its annexation under the terms of the resolution which are above quoted.

It had been decided by the United States Supreme Court that the protection of a grand jury was guaranteed by "the positive and restrictive language of the great fundamental instrument by which the national government is organized" and that "an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."[2]

Mankichi's indictment by information and his conviction by a jury unknown to common law were, however, upheld and the distinction was made between fundamental rights and the right to what was characterized as "merely a method of procedure." The opinion of the court states:

"It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless.

Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by

[1] Art. 5, Amdts. Art. 6, Amdts.

[2] *Ex Parte* Bain (1886) 121 U. S. 6, 13.

the will of the legislature and without process, or confiscating private property for public use, without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure."

We have, therefore, as the last stage in the expansion of constitutional powers by interpretation the doctrine that the constitutional prohibition against any prosecution under authority of the federal government "for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is a mere method of procedure, not vesting the citizen with any right but which, in the progress of the science of law, may lawfully be dispensed with, and the further proposition that "the right to a speedy and public trial by an impartial jury," guaranteed by Article VI. of the Amendments, is satisfied by a trial before any such jury as a remodeled procedure may find available, and does not give to any person accused of crime any right to the common law jury of twelve or to a unanimous verdict before condemnation.

This pronouncement, it is submitted, is not only an extension of powers, but a departure from the doctrine laid down by the Supreme Court in a great number of other cases from 1850 to the present day.[1]

It is proper to observe that the new doctrine met with the dissent of four members of the highest court; the ground of the dissent may be best stated in the language of these justices:

"Practically, under the view taken by the court, and so far as those guarantees were concerned,[2] the courts in Hawaii, although acting under and by the authority of the United States, might have tried persons there for capital or infamous crimes in a mode confessedly 'contrary to the Constitution of the United States.' The Constitution, speaking with commanding authority to all who exercise power under its sanction, declares

[1] Callan *v.* Wilson (1887) 127 U. S. 540; Mormon Church *v.* U. S. (1889) 136 U. S. 1; Thompson *v.* Utah (1897) 170 U. S. 343; Webster *v.* Reid (1850) 11 How. 437; *Ex Parte* Bain (1886) 121 U. S. 1; *Ex Parte* Milligen (1866) 4 Wall. 2.

[2] P. 235.

that '*no* person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury'; and it as clearly forbids a conviction in any criminal prosecution except upon the unanimous verdict of a petit jury. * * * Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii, although that country is an integral part of the United States, and with its inhabitants was subject in all respects to our sovereign dominion. * * * (This view) assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction."[1]

"It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. It would mean that the will of Congress, not the Constitution, is the supreme law of the land only for certain peoples and territories under our jurisdiction. * * * It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of or become indifferent to principles which had been supposed to be essential to real liberty."[2]

"Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution, full of restrictions upon Congress."[3]

"But it is said that * * * the two rights created by the constitutional provisions as to grand and petit jurors 'are not fundamental in their nature but concern merely a method of procedure.'

"It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution of the United States did not regard those provisions, and the rights secured by them, as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement, by any Federal tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time, were those secured by the provisions relating to grand and petit juries."[4]

You have now had laid before you examples of the extension of constitutional powers by the Executive, Legislative and Judiciary Departments.

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[1] P. 236. [2] Pp. 239, 240. [3] P. 240. [4] P. 244.

I have neither the authority nor the disposition to enter upon any comment on this growth, or to class it as healthy or unhealthy. It has been said by an eminent jurist that:

> "The life of the law has not been logic, it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which the judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed," and that "the substance of the law at any given time pretty nearly corresponds so far as it goes with what is then understood to be convenient."[1]

Whether this method is necessary to the growth of our country and of our institutions and can be properly applied to the fundamental instrument upon which our Government is based, and which was quite as much intended to limit powers as to confer them, is a question which I will do no more than suggest, and, at the same time, quoting from distinguished authorities, suggest further whether or not, as heretofore stated by the Supreme Court, it is not unwise to "recognize the doctrine, that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of its framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it, and amended by judicial decision without action by the designated organs in the mode by which alone amendments can be made,"[2] and whether it is not wiser, as said by the Supreme Court in the Income Tax Cases, when it is found that the Constitution should have been framed so as to permit of the exercise of a power to-day deemed desirable, to have the instrument amended in the way in which it itself prescribes with great and far seeing sagacity,[3] and again whether if any "of the guarantees of life, liberty and property, which at the time of the adoption of the National Constitution were regarded as fundamental, and as absolutely essential to the enjoyment of freedom, have in the judgment of some ceased to be of practical value, it is (not) for the people of

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[1] Holmes on the Common Law.

[2] McPherson *v.* Blacker (1892) 146 U. S. 36.

[3] (1894) 158 U. S. 635.

the United States so to declare by an amendment of that instrument."[1]

Upon this subject, however, to aid the formation of your own judgment, I may well conclude these remarks by quoting the advice of Washington, who said;

"If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates, but let there be no change by usurpation, for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

PAUL FULLER.

[1] Maxwell *v.* Dow (1899) 176 U. S. 617.