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The following editors have received election to the JOURNAL Board: Harold Ridgeway Berry, Edward Thomas Canfield, Osborne Atwater Day, Charles Tressler Lark, John Thomas Smith, Eliot Watrous. At the regular meeting of the Board, held on June 15, Cornelius Porter Kitchel was elected Chairman and William Henry Jackson, Business Manager.

The Illinois Supreme Court has again emphasized the fact that the legislature can not regulate matters of sentiment and taste. In the case of *Ruhstrat* v. *People*, 57 N. E. (Ill.) 41, the act recently passed by the State legislature, prohibiting the use of our national flag for any commercial purposes or as an advertising medium, comes up for decision, and the court holds it unconstitutional. The court bases its decision on legal grounds; that it unduly interferes with personal liberty; that it does not tend to promote the health, safety or welfare of society; that it violates the 14th amendment; and that it is discriminative. The case stands on debatable ground, but perhaps is not so doubtful as it would be, were it Congress instead of the State legislature that had passed the law in question. The power that created our flag and laid down rules for its official use, logically at least, ought to have authority to say how it shall be used. That such regulations are a reflection on our

people, and that they are dealing with a subject best left to the individual common sense, is not now the point. The power to regulate the use of that which is given the people should not be denied, if the people have not the ability to regulate it themselves. Such regulation does not discriminate unless you can call forbidding what is wrong discrimination. The whole matter anyway is *malam prohibition* and not *malam in se.* The personal liberty of no one is interfered with. Those bounds only are set which create liberty, but do not limit it, and more remotely the safety of society is increased, unless we can believe American patriotism so dulled as not to take offense at what may almost be called an unholy use of our flag. But all this is more applicable to the general government than to the States. The flag belongs to the people of the United States, and only to the citizens of the individual States as they are citizens of the United States. To the United States government would seem to belong the right to legislate on this subject. While the whole matter should more properly be left to the good taste and sentiment of the people, for there is an adequate remedy for the more violent abuse of the flag, yet if the time does come, which God grant may never be, when such legislation may be necessary, we see no unsurmountable obstacle to prevent such an act from being held constitutional. Until then it is well this act has been held unconstitutional in the State courts.

EXTENSION OF THE CONSTITUTION TO PORTO RICO.

We approach with considerable diffidence a review of the kindred cases, *Ex parte Ortiz*, 100 Fed. Rep. 955, and *Goetz Bros.* v *U. S.* (not yet reported), involving the extension of the Constitution over Porto Rico, because of the intricacy of the problem, the importance of its solution, and the contrary results reached by the learned judges. In the first, Lochren, J., held that the Constitution *ex proprio vigore* extended to Porto Rico, but refused to release Ortiz because he was tried and convicted before the ratification of the treaty; in the second, Townsend, J., in deciding that duties could be collected in New York on goods imported from Porto Rico, reached the conclusion that the Constitutional provision as to uniformity in duties, imports and excises does not apply. Both are able expositions of their respective views; *Ex parte Ortiz* being discussed in the light of general principles, and *Goetz Bros.* v. *U. S.* more analytically, with a fuller review of authorities and historical precedents.

The ultimate question is, can the United States, a government of enumerated powers, granted expressly or impliedly by the Constitution,—and possessing none other,—govern territory as to foreign nations a part of the United States and yet to which the Constitutional limitations do not apply? It is clear there is no such express provision. It only remains, therefore, to consider, is it necessarily implied? and upon this, opinions will differ so long as ideas of the meaning, purpose and scope of the Constitution differ.

Preparatory to an affirmative inference, Townsend's, J., first proposition is that mere acquiring of the soil does not enlarge our Constitutional boundaries. That mere temporary acquisition by conquest does not is abundantly supported by *Fleming* v. *Page*, 9 Howard 603. But the next deduction that the status of Porto Rico depends not upon the sovereignty of the land, but upon the status of the inhabitants, gives rise to some doubt. It will be remembered that the Constitutional provision is that all duties, imports and excises shall be uniform throughout the United States. The limitation apparently is one of place and not citizenship, so that even if the Porto Ricans are not citizens, the New York importers might claim it as the privilege of a citizen. It is of the first importance, therefore, to ascertain if *Fleming* v. *Page*, *supra*, is authority for making the status of the country depend upon the status of its inhabitants. That case decided (1) that territory could not be acquired merely by conquest, (2) but could by treaty or legislative act, (3) that Tampica being in the exclusive possession of the United States by conquest was a part of the United States as to foreign nations, but was not an integral part of the Union. This is simply equivalent to saying Pretoria is not a part of the British Empire merely because the British war power controls it. The case of Porto Rico presents some points of difference especially in being held by treaty, and the real question as to whether a treaty stipulation leaving to Congress the determination of the civil and political status of its inhabitants, keeps Porto Rico from being included within our Constitutional boundaries, is still left open. Therefore it does not seem to follow as an illative consequence that the status of the islanders is decisive of the status of the island itself. Conceding that Porto Ricans are not citizens, may not Porto Rico still be a part of the United States? The inhabitants of Tampica never lost their Mexican citizenship, while their city was for all purposes no longer a part of Mexico. This was in war. But in the Alaskan treaty the uncivilized tribes are expressly excepted

from the privileges and immunities of citizens, yet it has never been broached that their lands were not part of the United States. Porto Rico was ceded to the United States. These seem to show that the status of inhabitants and the status of the land itself are separable. In the plain meaning of words, "ceding to" means making a part thereof, but it does not generally include special privileges. But owing to the character of our government, once it is granted that Porto Rico is a part of the United States, all the Constitutional guaranties and privileges would seem to follow.

This would defeat the manifest intention of the treaty, viz: to let Congress determine the status. The second proposition of Townsend, J., is that the treaty should not be held unconstitutional so far as it can fairly be upheld. But it is submitted that the only effect would be to take the discretion away from Congress and make the status depend upon the Constitution with a view to which the United States must be considered to have contracted. The ultimate question involves something more than the construction of a treaty. It goes to the root of the power of governing unhampered by the restrictions imposed by the Constitution, rather than to the effect of the expression of such power in a treaty stipulation. Conceding such was the intent, Lochren, J., denies that the United States have any such power. Their vitality is drawn from the Constitution from which they derive all their powers? How, then, can they provide by treaty for the exercise of a power not subject to the Constitution, without which they possess no power? In other words, his argument is that the United States cannot govern at all unless Constitutionally, and to govern Constitutionally, whether in New York or Porto Rico, means subject to the Constitution. If the Constitution does not extend to Porto Rico, the United States have no power to govern it.

On the other hand, Townsend, J., holds that the power to acquire territory without incorporation is an ordinary attribute of sovereignty. To deny it to the United States, since acquiring territory is apt to be a necessity, would be to cripple us severely in our foreign relations. Such an intention cannot be presumed in the framers of the Constitution. The argument is put with great force, and is one that is sure to receive great consideration when the question comes before the Supreme Court. The great cases of *McCullough* v. *Maryland*, 4 Wheat 316, and *The Legal Tender Cases*, 110 U. S. 421, turned upon this very question of implied powers within the scope of the Con-

stitution, and not expressly prohibited. But these involved the exercise of powers upon which the Constitution was silent; the argument against the present contention is that it trenches upon inhibited powers.

Summing up, then, the arguments against the extension are (1) the status of Porto Rico depends upon the status of its inhabitants, left expressly by the treaty to be determined by Congress, and until so determined, must be considered as foreign; (2) the clear intention of the treaty was to keep Porto Rico from being a part of the United States; (3) such power of exclusion is an ordinary attribute of sovereignty, which the United States possess.

In favor of the extension it is argued (1) that treaty cannot confer upon the United States prerogatives which it does not already possess; (2) that there is no inherent power in a Constitutional government of governing without the Constitution; (3) the Constitution must extend wherever the power of government extends, for without and beyond it, there is no power.

On the whole we incline to the belief that as a question of Constitutional law, apart from considerations of expediency, there is no power under the Constitution to govern territory outside of the Constitution. To hold that there is such a power logically puts Congress, the creature of the Constitution, above the source of its power, and gives to the provision for making necessary and needful rules respecting territories, a potency and application that is denied to the Constitution itself, without which the sweeping clause is of no effect. Such we think could not have been the intention of the founders of a Constitutional government, for it gives to Congress a power without control.

We have refrained from discussing seriatim the cases cited because of the serious conflict as to the proper construction of the cases involved. It gives rise to some regret, however, that *Scott* v. *Sanford*, 19 How. 393, finds no place in *Goetz Bros.* v. *U. S.* This is a strong case against the position taken by the court, and in which Taney, J., with whom eight justices concurred, held that there was no power under the Constitution to hold territories as colonies. This surely makes against the argument that to acquire territory without incorporating it, is an attribute of Constitutional sovereignty, and comes with singular force from the justice who wrote *Fleming* v. *Page*, upon which a great part of *Goetz Bros.* v *U. S.* rests.