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THE PEOPLE OF THE UNITED STATES.

Some years ago an attempt was made in the YALE LAW JOURNAL* to ascertain the meaning of the term, "citizens of the United States." Recent political events have given that subject a new importance, and they are also such as to suggest an inquiry into what is denoted by another and still more important phrase of the Constitution, though used but once—that of "the People of the United States."

The preamble of the Constitution speaks in their name, and must be the text for any paper which aims to state what they are, and what may be their powers. It reads thus:

"We, the People of the United States, in order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

The Declaration of Independence was made by "the representatives of the United States of America in General Congress Assembled," but in the name and by the authority of the good people of certain "United Colonies" which, it was thereby asserted, "are and of right ought to be free and Independent States." It proceeded from the belief that "when in the course of human events it becomes necessary for one people to dissolve the political bonds which have connected them with another," they should publish "the causes which impel them to the separation."

*Of February, 1893.

The Articles of Confederation which constituted our original Constitution were a compact between the States as thirteen different and equal sovereignties. The only reference made to the people is in the following clause of Article IV:

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from Justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state of which the Owner is an inhabitant; provided also that no imposition, duties or restriction shall be laid by any state on the property of the united states, or either of them."

Each State by this article secured to its people certain privileges in the other States, and no people were mentioned or included other than those of the several States respectively, or the free inhabitants of each.*

When the Constitution of the United States speaks of the people of the United States, does it refer to any who are not the people of a particular State?

At the time when the Articles of Confederation were framed, in 1777, and also when they received the assent of the last state (Maryland), in 1781, the United States as a whole owned no territory whatever except such as they might have acquired by capture of military posts during the Revolutionary War. The first cession by the States of any western territory was that made by New York on March 1, 1781, a month after Maryland had passed her act to authorize the ratification of the articles by her delegates, and in immediate connection with their actually affixing their signatures to the document.†

There were, therefore, none in 1781 that belonged to the United States who did not also belong to a particular State. The few frontiersmen in Tennessee, or "Franklin," belonged to North Carolina, those of Kentucky to Virginia, those in Ohio to New York or Connecticut.

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*If this article is to be literally construed, a free inhabitant of any state, whether one of its citizens or not, could claim the privileges of a free citizen in any other state, an anomalous regulation commented on in the *Federalist*, No. 42. See Chief Justice Taney's remarks on this subject, and also those of Mr. Justice Curtis, in Scott v. Sandford, 19 How. 419, 584.

† Journals of Congress, VII, 33, 38, 48.

In 1787, when our present Constitution was framed, circumstances had changed. The United States, as a whole, now held sovereignty over large stretches of thinly settled western territory, and future acquisitions in other directions were contemplated as not improbable. There were, therefore, then those who might claim to be among its people and yet were domiciled beyond the limits of any State. Did the Constitution speak, in part, in their name?

It will assist in answering this question to consider from whom it proceeded. Its vitality depended on the ratification of at least nine States. That of each was to be given by the vote of a convention of delegates chosen for that purpose by its people. No one could vote for delegates who was not a settled inhabitant of a State. In like manner, the amendment of the Constitution could be accomplished by the consent of those representing the people of three-fourths of the States; and thus only. Evidently, therefore, the ultimate constituents of the United States originally were and ever have been those who were inhabitants of some particular State. They were the ones, in the language of Mr. Justice Wilson in Chisholm v. Georgia, who spoke the United States into existence.

"They were the citizens of thirteen States, each of which had a separate Constitution and government, and all of which were connected together by Articles of Confederation. To the purposes of public strength and felicity, that confederacy was totally inadequate. A requisition on the several States terminated its legislative authority: Executive or Judicial authority it had none. In order, therefore, to form a more perfect union, to establish justice, to insure domestic tranquillity, to provide for common defense, and to secure the blessings of liberty, those people, among whom were the people of Georgia, ordained and established the present Constitution." *

A year or two before, he had defined the term "people of the United States" in much the same way, while explaining the nature of our government, in the capacity of Professor of Law in the College of Philadelphia, where he filled the first chair of that science established in this country. His statement there was this:

"The people of the United States must be considered attentively in two very different views—as forming one nation, great and united; and as forming at the same time a number of separate States, to that nation subordinate, but independent as to their own interior government." †

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* Chisholm v. Georgia, 2 Dallas 462, 463.

† Wilson's Works, II, 7, Andrews' Ed.

Chief Justice Taney, speaking for the Supreme Court in the Dred Scott case, had occasion to consider the correspondence between the people and the citizens of the United States, and described it as follows:

"The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty."* * * * "It is true, every person and every class and description of persons who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body, but none other; it was formed by them and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members, according to the provisions of the Constitution and the principles on which it was founded."† * * * "The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the *people* of the United States; that is to say, by those who were members of the different political communities in the several States; and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the *people* of the United States, and of *citizens* of the several States when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary." ‡

Chief Justice Chase used quite similar language in discussing the citizenship of women, and its political effect.

"Looking at the Constitution itself we find that it was ordained and established by 'the people of the United States,' and then going further back, we find that these were the people of the several States that had before dissolved the political bands which connected them with Great Britain, and assumed a separate and equal station among the powers of the earth, and that had by Articles of Confederation and Perpetual Union, in which they took the name of 'the United States of America,'

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* Scott v. Sandford, 19 How. 404.

† Ibid., 406.

‡ Ibid., 410.

entered into a firm league of friendship with each other for their common defense, the security of their liberties and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever. Whoever, then, was one of the people of either of these States when the Constitution of the United States was adopted, became *ipso facto* a citizen—a member of the nation created by its adoption."*

That instrument grants certain of the rights and powers of sovereignty and reserves the rest. A reservation even in the technical law of real estate could not be made in favor of a stranger. The IXth and Xth Amendments, which declare that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," obviously refer to the same people who created the Constitution. Nothing is "retained," as this word is here used, except by that people which parted with something. These were the aggregate of the people of the several States. They had stripped the States of certain attributes of sovereignty and given them to the United States. They only could have done this.

The people of the United States granted certain legislative powers to a body consisting of two chambers. One was to represent them, and the other the States. The members of the House were to be "chosen every second year by the people of the several States,"† acting through certain electors, and each State was always to "have at least one representative"‡ and to dictate what should be the qualifications of the electors.

If, then, we may assume that the "people of the United States," who are the ultimate depositary and source of political power, are the sum of the men, women and children belonging to each of the several States, excluding only "Indians not taxed,"§ there is a familiar rule of construction that may help us to get at the meaning of the term "people" as used in the Ist, IId and IVth Amendments. It is that a word used more than once in any document shall be presumed always to be used in the same sense, if a reasonable effect can thus be given it, and the context does not lead to a different conclusion.

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*Minor v. Happersett, 21 Wall. 162, 166, 167. Cf. White v. Hart, 15 Wall. 650.

†Art. 1, Sec. 2.

‡Art. 1, Sec. 3.

§XIVth Amendment, Sec. 2.

The first amendment forbids Congress from "abridging * * * the right of the people peaceably to assemble and to petition the government for a redress of grievances." The second declares that "a well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The fourth provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."

Here certain rights are enumerated as belonging to the people and perpetually secured to them. They are rights which can only exist in favor of those living under a form of civil government. The people, who had them, must then have belonged to "a free State,"—to a government to which petitions could be addressed, and by which searches and seizures could be authorized.* In putting themselves under the power also of another government for certain purposes, they proposed that these particular rights should be secured against any possible infringement by this new sovereign.

If we read these amendments as using in each case the word "people" as equivalent to the term "all the people of the several States," the meaning thus derived is a reasonable and sensible one. If not thus confined, it might lead to serious inconveniences of administration, and even to danger to the public safety. The second certainly could not be read as extending to aliens not forming part of the people of any State. They could not expect to be members of a well-regulated militia organized for its protection. The exclusion or deportation of aliens is also a right of every sovereign, and may be accomplished by searches and seizures which would be clearly unreasonable in case of a peaceable citizen.† Our recent extension of territory by including Hawaii has probably made all the natives of that country citizens of the United States. They are not, however, and probably never will be, the people of a state. Would it be wise to invest them with a right to bear arms, which they never enjoyed by force of a similar guaranty, under their former government? We may incorporate Puerto Rico and the Philippines. Would it be safe to extend to all their population these immunities which Americans rightfully claim as their proper birthright?

It was Jefferson's view that the first Amendment made the free exercise of religion, as to all persons, citizens or not, "inde-

* United States v. Cruikshank, 92 United States Reports, 542 551.

† The Chinese Exclusion Cases, 130 U. S. 581.

pendent of the powers of the general government;"* and the practice of the nation has always been in conformity with this opinion.† This particular provision, however, is quite distinct from that respecting the right of assembly and petition. The former might well be of universal force, and yet the latter apply only to the people who were represented in the government to which they might look for a redress of grievances.

The right of petition, of bearing arms, of keeping one's house as his castle, and of immunity from arbitrary arrest, are all political, rather than mere civil rights. Where men were looked at simply as men, and their security against the improper exercise of the powers of government regarded apart from their political condition, as in the IIId, Vth, VIth, VIIth, VIIIth and XIIIth Amendments, and in parts of the Ist and XIVth, appropriate language is used, and the constitutional guaranties plainly made of universal application.‡

In the Dred Scott case, Chief Justice Taney declared that the citizens of our territories were entitled to all the privileges and immunities guarantied by the bill of rights.§ The attention of the court, however, was not drawn to any distinction between provisions for the people of the United States and provisions for persons generally, without reference to their political relations or allegiance.

It is a subtle distinction, but I am inclined to think that it is a real one, which would be found of substantial service should the Senate ratify the Spanish treaty as it stands.

Nor is it without foundation in the reason of things.

Every people looks primarily to its own benefit. Among the members of its own body there are differences of right and power. The sovereign people exercises its sovereignty through a small part of its number, generally not more than one in four, to whom it confides the electoral power; and they in turn select a few to represent all in making and executing the laws. The women and children are thus represented, not less than those

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* Second Inaugural Address, Richardson's Messages and Papers of the Presidents, I, 379.

† United States Revised Statutes, Sec. 1891; Reynolds v. United States 98 United States Reports, 145, 162.

‡ Yack Wo v. Hopkins, 118 United States Reports, 356, 369. This subject has been discussed by the writer in a paper read before the American Historical Association parts of which are published in the *Harvard Law Review* for January, 1899, in an article by him, to which this is complemental.

§ Scott v. Sanford, 19 Howard's Reports, 449, 450. See also Thompson v. Utah, 170 U. S. 343, 347.

who cast the votes at the election; but did they possess the elective franchise, their choice might often fall on different men.

While those who are authorized to speak for the people may be presumed to intend to do nothing which would not be for the interests of the people, it is not equally true that they must be presumed to intend to act also for the good of all mankind.

Every government is organized selfishness. It is constituted for the good of its constituents. The preamble of the Constitution of the United States states this explicitly as the object of its adoption. It is the embodiment of a scheme devised by the people of the United States to form a more perfect union of States then imperfectly united, to establish justice among themselves, to insure their domestic tranquillity, to provide for their own defense, to promote their own welfare, and to secure the blessings of liberty, not to the world at large, but to themselves and their posterity.

It is the assertion of some political philosophers, that every nation is a moral person. If this form of legal fiction, so liable to abuse and perversion under sentimental or ecclesiastical influences, can ever be usefully employed to determine the duties of a people towards other peoples, it can have but a limited and doubtful application to such a government as that of the United States. The States are moral persons, each for itself, in a far closer sense than the United States can ever be. Their sovereign power extends over a much wider field. Their history, as respects the older ones, has been largely a religious history. Some of them have had religious establishments, and it is not beyond the range of possibility that some may have them again. Their legislatures make appropriations from the public treasury, and authorize them on the part of municipal corporations, in many cases which could not be justified under the powers intrusted to the Congress of the United States.

The older States, or some of them, once owned large tracts of territory outside their settled limits. They ceded it to the United States for the benefit of all the States which were or might thereafter be so united, that is, of the people of those States, in their aggregated character as the people of the United States. It seems to be thus that the Supreme Court of the United States regarded them, in its opinion in one of the leading cases coming up from Utah, in the course of the long struggle of Congress against polygamy.

"The people of the United States, as sovereign owners of the national territories, have supreme power over them and

their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself; for it may well be admitted in respect to this, as to every power of society over its members, that it is not absolute and unlimited." * * * "The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was ordained, and to whom by its terms all power not conferred by it upon the government of the United States was expressly reserved. The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and national; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States." *

Under this construction of the Constitution, the people of the United States, acting through the legislative powers of the United States, could forbid the people of any of our new acquisitions to assemble for purposes of political discussion; to petition our government for a redress of grievances; to keep arms; or to bear them; and could provide for searches and seizures of their persons, houses, papers and effects, in modes that would be unreasonable and illegal if employed as to those belonging to any of our States. It is not improbable that such prohibitions and provisions will be quite necessary in dealing with the inhabitants of these possessions, and the power to resort to them may afford a new instance of the wise foresight of those in the first Congress who put our national bill of rights in form.

SIMEON E. BALDWIN.

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* Murphy v. Ramsey, 114 United States Reports, 44.