places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

It will be noted that the language is that Congress shall exercise exclusive power, not absolute. The limitations upon the power of Congress, express and implied, fully apply. Congress has power, subject to these limitations, to exercise all legislation proper within the District of Columbia. States legislate under their reserved powers exclusively within the States; but the territories ceded under this clause to the United States are subject to the exclusive legislation of Congress. It is further to be noted, that while Congress may acquire this territory for governmental purposes and the like, it has no power to exercise exclusive legislation until such territory is acquired as a matter of title to land, and is ceded by the States in which it lies as to all jurisdiction.[1]

Congress may buy property, or condemn it for public use, under the fifth amendment of the Constitution, and when acquired for Federal use it is exempt from State taxation. But Congress cannot have exclusive jurisdiction for legislation except by cession from the State where the land lies.[2] In the case referred to in 135 U. S. Reports, the government had built a fort within the Territory of Kansas, and held it as being a part of that Territory, subject to its control. After the admission of Kansas into the Union, the question arose whether Congress had jurisdiction to legislate within the limits of this fort. The Supreme Court decided that upon the admission of Kansas the jurisdiction to legislate had passed to the State, and that Congress had never acquired the right to legislate except by the consent of the new State as to this fort so established by Congress prior to its admission.

§ 293. The nature and extent of this power over the District of Columbia may now be considered. The language of the clause is, "over such district as shall be acquired by

[1] People v. Godfrey, 17 Johns. 225; Fort Beavenworth R. R. Co. v. Lowe, 114 U. S. 558, 538; Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641.

[2] Fort Leavenworth R. R. Co. v. Lowe, 114 U. S. 538.

Congress, with the consent of the State, for a 'seat of government.'" Congress did so acquire the District with the consent of the States of Maryland and Virginia.[1] The District is its habitat, its home.

Under the next clause of the Constitution Congress has power to pass all laws necessary and proper to carry into effect the powers granted by the seventeenth clause. It therefore has the power to do what is necessary and proper to fit the District as the home of the government of the Union. Its power to do so is exclusive, because all State power over it is surrendered. Hence Congress may do within the District what a State may do for a like purpose within its territory, namely, all things necessary for keeping it well fitted for a seat of government. A large part of Washington, its streets, etc., belong to the government. To make the city a suitable home for the government, it may lay out parks, erect buildings for government use, place fitting adornments, statues, pictures, etc., and may further incorporate banks and other institutions by municipal law, as a State may do within its own territory; may establish asylums for its poor, for its blind and deaf, and may establish schools and colleges for the benefit of the people of the District, just as a State may do for the use of its own people. The limitation upon the power of Congress to do this is, that the purposes in view must be necessary and proper for its own use and for that of the people of the District.[2]

Furthermore, as Washington is a seat of government for all the States of the Union, it should be kept for their equal benefit. It is the seat of government to which citizens from all the States may come, and to which the members of Congress and the officers of the government are required and entitled to come. For this reason it was a mooted question, and one never decided, but held with great tenacity by many, that their family institutions and servants (slaves in the old time) could be brought by officers, senators and representa-

[1] Cohens v. Virginia, 6 Wheat. 264, 424.

[2] District of Columbia Commissioners v. B. & P. R. R. Co., 114 U. S. 453.

tives from their respective States for their use while residing in the District of Columbia.

Congress after the formation of the District perpetuated the laws of Virginia and Maryland in the parts respectively ceded by those States. Thus Maryland had before the District was formed a law forbidding slaves to be brought into it from any other State. It was held that this inhibition against slaves being brought into Maryland applied to that part of the District, and that a slave was freed by removing from the Virginia to the Maryland part of the District.[1] A citizen of the District is not a citizen of a State within the jurisdictional power of the courts of the United States,[2] and a citizen of the District loses some of the civil as well as the political capacities which belong to the citizens of the States. The same jurisdictional and exclusive power, where ceded by the States, belongs to Congress over forts, and other places acquired for necessary buildings, etc.

The Co-efficient Power.

§ 294. The words used in this clause, that Congress shall have power "to make all laws, which shall be necessary and proper,"[3] etc., have been already so fully explained, as to powers which may be implied as necessary and proper, that they need not be especially referred to here.[4]

Congress shall have power to make all laws which shall be necessary and proper to carry into effect, 1st, "the foregoing powers;" that is, those already enumerated in this article, and especially in this section. It seems proper to call this the co-efficient power, because it is a power which, in conjunction with the enumerated powers, is essential to make them efficient. Like an algebraic co-efficient, it may therefore be termed a co-efficient power. The laws necessary to collect revenue, to borrow money, to regulate commerce, to

[1] Rhodes v. Bell, 2 How. 397.

[2] Const. U. S., Art. III, sec. 2; Hepburn v. Ellzey, 2 Cr. 445; Barney v. Baltimore, 6 Wall. 280.

[3] Art. I, sec. 8, clause 18.

[4] Federalist, No. XXXIII; Cooley on the Constitution, 91, 97, and *ante*, on Canons of Construction.

establish postoffices, and the like, are passed in the exercise of this co-efficient power, because the power in its abstraction, without some such legislative machinery, would not be effectual. These words apply by fair construction not only to the strictly foregoing powers, but to all the powers vested in Congress, and which may be regarded as the foregoing, because the first clause of the first article vests in Congress all legislative powers "herein granted."

2d. The co-efficient power to make necessary and proper laws applies to all powers "vested by this Constitution in the government of the United States;" 3d, "or in any department;" 4th, "or officer thereof;" that, is of the United States. This makes this co-efficient power very comprehensive. This device of legislative machinery for carrying into execution legislative power is not in the same way given to the government of the United States as a government, nor to the judicial or executive department of the United States nor to any officer thereof.

These last three divisions have no self-sufficient power. The powers vested in them need co-efficient machinery to carry them into effect, if the Constitution does not give them power by their own action to carry their granted powers into effect. If powers are to be implied, or if action is to be taken by any of them, they must look to the legislative department to devise the methods and machinery by which it is to be done. This view of this clause was taken with great power and clearness by Mr. Webster and Mr. Calhoun sixty years ago in the discussion of the exclusiveness of the legislative authority in making efficient the executive power without action on the part of the executive; and the decisions of the judiciary department have always maintained that its jurisdiction, the limits upon it, and the mode of exercising it, must be determined by a rigorous construction of the law vesting the jurisdiction, etc., and not upon inferential or implied powers of the courts themselves. This makes the government not only the government of the Constitution as to the delegation of powers, but a government of laws as to the

means necessary and proper for carrying these powers in the several departments into full execution.

Having thus examined with care and fullness the enumerated powers of this eighth section, it is proper now to consider some other powers vested by the Constitution in Congress in other clauses than this particular section.

Power to Admit New States.

§ 295. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress."[1]

A sketch of the condition of things in respect to matters in this section will not be out of place. An immense western domain belonging chiefly to Virginia, but in respect to which there were claims by other States, stretched to the west of the Alleghanies. Virginia, during the Revolution, had, by the genius and valor of George Rogers Clarke and his men, not only secured Kentucky on the south of the Ohio, but planted the flag of Virginia on the British posts in what is now the State of Illinois, and captured the Governor of that region and his command and sent them prisoners to Richmond. Great uneasiness had existed among many of the States after peace at the possession of this immense territory by the Commonwealth of Virginia. Accordingly, in 1784, in accordance with an act passed by her General Assembly October 20, 1783, she conveyed the whole of that territory to the United States, in Congress assembled, upon condition that it was to be laid out into five States. The deed was executed on March 1, 1784.[2] During the session of the Federal Convention on the 13th of July, 1787, the Congress of the Confederation, after debate, adopted an ordinance for the government of the territory of the United States northwest of the

[1] Art. IV, sec. 3, clause 1.

[2] 9 Journal of Congress, 47–51.

river Ohio.[1] It was adopted with but one dissentient, Mr. Yates of New York, and by the unanimous vote of eight States, Virginia being unanimous and included among the eight.

In that celebrated ordinance, six articles were inserted to be considered as articles of compact between the original thirteen States and the people of the said territory, to remain forever unalterable, unless by common consent. In the sixth of these articles was a clause which forbade slavery in said territory, and provided for the surrender of fugitive slaves escaping into the same from any one of the original States.

The fifth article provided for forming from said territory not less than three nor more than five States, and the boundaries of the States were to be fixed by the articles "as soon as Virginia shall alter her act of cession to consent to the same." And further, the said fifth article provided that any of said States might form a permanent Constitution and State government, provided the Constitution and government was republican, and "conformed to the principles contained in said articles;" one of which articles so mentioned, the sixth, had a provision prohibiting slavery. Thus it appears that the distinct consent of Virginia, as the grantor in the deed of 1784 to this territory, was requisite, not only to the change of boundaries proposed, but also to the clause prohibiting slavery.

The General Assembly of Virginia, on the 30th of December, 1788, reciting that the Congress of the United States had declared the following as one of the articles of compact between the original States and the people of the States of said territory, recited the fifth article, before referred to, and consented to the said article of compact, and ratified and confirmed it against anything to the contrary in the original deed of cession; and thus ratified and confirmed the provision so as to ratify the articles of compact for the admission of such new States, when their government and Constitution should be republican and in *conformity to the principles contained in these articles;* that is, in the

[1] 12 Journal of Congress, 58–63.

sixth fundamental article in the Ordinance of 1787. History shows that the States represented in the Congress of the Confederation, at the instance of Mr. Carrington, a prominent Virginia member, put into the Ordinance of 1787 the clause prohibiting slavery, not so much as an act of Congress, but as a fundamental compact between the States who were represented in Congress in respect to the new States to be formed out of the northwestern Virginia territory. In so far as it was an act of Congress it claimed no validity, unless Virginia, the grantor of the territory, consented. Virginia did in terms consent, and with her own hand put upon the Northwest Territory and the States created out of it the character of free States, in which slavery was never to exist.

This transaction not only estops the other States to deny the exclusive and paramount title of Virginia, but estops all others and Virginia to deny that by her own sovereign act as owner of the territory she consented that it should be free territory forever thereafter. It will be found from the learned opinion of Chief Justice Taney in *Dred Scott v. Sanford*,[1] concurred in by Justices Wayne, Grier, Daniel, Campbell and Catron, in all six judges out of nine, that these historical views are fully sustained, though it does not bring out the point, so necessary, of Virginia's consent to the prohibition clause of the articles, and of her unqualified consent to it as a condition of the change proposed. The act was not an act of Congress under the Articles of Confederation, but an act of the several States, Virginia consenting, to the establishment of this ordinance.

§ 296. It will be noted that the ordinance was passed during the sessions of the convention. On the 18th of August, 1787, up to which time no provision in respect to the territory of the United States having yet found a place in the proposed Constitution, Mr. Madison proposed to give Congress power "to dispose of the unappropriated lands of the United States," and "to institute temporary governments for new States arising therein." This was referred to a committee, and offered in the report of the Committee of Style on the 12th of September very much in the form finally adopted in the Constitution. At the final adoption of the Constitution, the territory ceded by Virginia belonged as common property to the Confederated States. The grant of power in the clause of the Constitution under consideration was designed, therefore, to empower Congress to dispose of, and make rules and regulations respecting, this territory. The joint beneficial ownership of the States would be held in the hands of Congress, under constitutional grant. The whole language of this article was obviously framed to meet the case of the territory of the United States acquired as aforesaid, and this seems to have been the idea of Congress in the passage of the act of August 7, 1789.

[1] 19 How. 393.

The meaning of these clauses may now be considered. The deed of Virginia looking to the sale of these public lands, and also to the formation of new States to be admitted into the Union, and the Ordinance of 1787, point directly to these conclusions:

1st. That the sale of the lands for revenue purposes, and needful rules and regulations respecting the management thereof, as well as property other than this, should be provided for by Congress.

2d. That as the territory belongs in terms to the United States, and Congress has the power to dispose of and make rules and regulations concerning it, this power must be directed to the interests of the co-owners.

3d. That as Congress is vested only with a trust power to manage said territory for the benefit of the co-owners, all legislation concerning it must be directed to that purpose.

Some interesting questions have been raised in our history, and, while practically settled in the affirmative, it is proper to consider the constitutional grounds on which they have been settled.

§ 297. Can the United States acquire new territory under this Constitution? The affirmative is sustained by a number of considerations.

(*a*) Each State remaining by itself would have had the

power to acquire by treaty, or conquest or cession. It would seem reasonable, therefore, when all confided their several powers over foreign relations to the Confederated Congress by treaty, war and the like, the implication would be natural that it could acquire by treaty or conquest. The settlement of boundaries would involve this as an incident, even if it was not expressly given.

(*b*) The Congress of the Confederation without any express power did acquire large territory from the States, and the final ratification of the articles by Maryland was conditioned on the cession of her territory by Virginia.

(*c*) The eleventh article provided for the admission of Canada into the Union, and for any other colony, if agreed to by nine States. The Constitution itself by this clause sanctioned the previous power of acquisition, and could not be held to disaffirm the same power to the new government against the treaty-making power so vested in the present government, and without restriction. The power to acquire by treaty was the usual use of the treaty-making power, and without a negation would at least give ground to believe that such was the purpose of its framers.

(*d*) The history of the clause is very instructive upon this point. Mr. Randolph's proposition was that States "lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise," etc., might be admitted.[1] In Pinckney's plan there was a general power to admit new States into the Union on the same terms with the original States.[2] Randolph's proposition, after discussion, was not changed, and the admission of new States was limited to those "arising within the limits of the United States." After further discussion this clause in Randolph's plan retained the previous form.[3] And Rutledge, from the Committee of Detail, reported to the convention the same form for the clause. This article was reported and discussed on August 30th, when various amendments were proposed, several of which were

[1] Madison Papers, 734.
[2] Id. 745.
[3] Id. 1224.

directed, as Mr. Madison reports, to saving to Vermont the right of admission, though it was claimed to be a part of New York. Vermont had never been a part of the Confederation. Mr. Martin then proposed a substitute under which new States might be erected within, as well as without, the territory claimed by the several States, or either of them. Mr. Morris's proposition then took this form: "New States may be admitted by the Legislature into the Union; but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the legislature of such State, as well as of the general Legislature." This was intended to embrace the case of Vermont, because she had been already formed into a State; and so it stood.[1] The Committee of Style reported the amended plan, only modified by striking out the word "hereafter" after the words "new States," as being unnecessary;[2] and so the clause was finally adopted. It is clear, therefore, that after very earnest debate, the limitation of new members to be admitted to the Union to those framed out of territory within the limits of the United States was stricken out, leaving it without limit for the admission of States out of what ever territory remained.

(*e*) The correspondence of that day, and even the debates of the convention, show that the navigation of the Mississippi, which was not within our borders, except "*ad medium filum aquæ*," was a matter to which the founders of the Constitution looked with great interest.[3] It is hardly conceivable that the framers of the Constitution excluded the States from the navigation of the Mississippi, especially as its mouth was in the hands of the enemy.

(*f*) Another question concerned the scope of the power as to the needful rules and disposition which are prescribed in the clause. Territory is not only landed property, but its chief use to the people who own it is as a domain for colonization. This is obvious from the language of the deed of

[1] Id. 1460–65.
[2] Id. 1558.
[3] Id. 1446, 1525.

cession by Virginia, and from the purpose to form States of the Union out of such territory.

§ **298.** Again, we have seen that pending the session of the convention, in July, 1787, the Confederation Congress passed the Ordinance of 1787, which showed what was deemed necessary not only in the disposition of the property, but in the organization of the territory for settlement and colonization. This trust as to the land as property, and as the seat of civilized life, was intended by this clause to be the disposition and regulation of the territory prescribed in this clause. The view is strengthened by the associated clause as to new States. Congress was to admit new States formed out of this very territory, for which the ordinance had been passed. Congress, as the trustee for the States, may dispose of the property as a common fund for the United States, as provided for in Virginia's deed of cession. But it must do more; it must so rule the territory as a domain for colonization by all the States, who are co-owners, as to enable them to form civil Bodies-politic, self-sufficient and autonomous, to enter into the Union as free States and co-equal members. Congress could exercise a double power: that of regulating the property and that of aiding the communities who had bought and settled upon it, to organize Bodies-politic for the government of their society. Scattered over this territory, how can the embryo societies organize themselves without the superintending aid of those to whom the territory belongs? Can any one State do this? That would be to exclude the power of others equally entitled. Can all do this as separate distinct States undertaking to do it together? That is impracticable. Who must do it? The organ, the trustee of the States under the power granted to them by the Constitution. And by the terms of this clause, as the mere property right does not reach the case, then the right and duty of admitting these communities, when completely organized as States, into the Union, makes the duty of Congress to control them by its governmental power an inevitable inference. If this were not done, the temporary

squatters upon the territory would have to improvise an organization, and regulate the affairs of the territory according to their own will. This course of reasoning has led to a conclusion which has had the largest judicial sanction. The power of Congress to govern the Territories of the United States, whether or not based on the same course of reasoning in all cases, has been adopted as an undoubted conclusion.[1] This being so, what limitation may be admitted upon the power of Congress in the government of this common territory held by Congress in trust for all the States equally? It belongs to the United States; Congress is a trustee to manage it for these equal partners.

§ **299.** This question was adjudicated upon the fullest consideration in the great case of *Dred Scott v. Sanford.* Congress, by the Missouri Compromise Act, enacted that in no part of the territory of the United States acquired by the Louisiana treaty of 1803 should slavery be permitted north of the line of latitude 36° 30′; but that south of that line

[1] Green v. Biddle, 8 Wheat. 1; American Ins. Co. v. Canter, 1 Pet. 511; United States v. Gratiot, 14 id. 526; United States v. Rogers, 4 How. 567; Fleming v. Page, 9 id. 603; Cross v. Harrison, 16 id. 164; Dred Scott Case, 19 id. 393; Jackson v. Steamboat Magnolia, 20 id. 330; Beall v. New Mexico, 16 Wall. 535; Ferris v. Higley, 20 id. 375; National Bank v. County of Yankton, 101 U. S. 129; Mormon Church Case, 136 id. 1; Cope v. Cope, 137 id. 682; Report on Polygamy, H. of R. 2568, 49th Cong., 1st Sess.

These pages were written in the fall of 1895, and therefore before the burning question of territorial expansion, as involved in the acquisition of Cuba, Puerto Rico and the Philippine Islands by the United States, and the questions of citizenship, statehood, etc., incident thereto, had arisen. In addition to those cited by the author, the following authorities confirmatory of those cited may be consulted with interest: Murphy v. Ramsey, 114 U. S. 44; McAllister v. United States, 141 id. 174–188; Thompson v. Utah, 170 id. 346; In re Sah Quah, 31 Fed. Rep. 329; Jones v. United States, 137 U. S. 202; Loughborough v. Blake, 5 Wheat. 317; Reynolds v. United States, 98 U. S. 145; Callan v. Wilson, 127 id. 540; Ex parte Bollman, 4 Cranch, 75; Shively v. Bowlby, 152 U. S. 48; United States v. Wong Kim Ark, 169 id. 705; Boyd v. Thayer, 143 id. 135; Wong Wing v. United States, 163 id. 228; American Publishing Co. v. Fisher, 166 id. 464; Springville v. Thomas, id. 707.—[Editor.

citizens from all the States, without limitation, should be allowed to colonize and settle. The court held that this French territory was not within the operation of the clause of the Constitution, because not then acquired, and that the peculiar form of the clause under consideration was adapted to the territory which had been acquired from Virginia and the other States; but that where territory was acquired by a treaty of the United States with a foreign power, the trust which devolved upon Congress in the regulation of that territory was measured by the fact that the territory was acquired by the common treasure and enterprise, and perhaps the blood, of the people of all the States; and that it was not competent for Congress to deny to any part of the Union, or to any State in the Union, the equal right of colonization upon such acquired territory. This was the opinion of the court, concurred in by Justices Wayne, Grier, Daniel, Campbell and Catron. Justice Nelson concurred in the judgment of the court, but on another ground. The decision went a step further, and held that Congress could not confer upon the Territories, and that the settlers in the Territories could not assume for themselves, the power to do what the court decided Congress had no power to do. It may be well to add that the power to dispose of territory has been considered, and perhaps fairly, broad enough to justify grants to any States for their public buildings, colleges and schools. These consist with the trust confided to Congress, because they sustain the communities in which all the States are interested, and for which Congress is trustee; but the words do not include the power of Congress to grant lands for personal or corporate benefit.

New States; of What Constituted, and How Admitted.

§ 300. What has already been said will leave little to be added under this head.

The first question is: Can a State not formed of territory originally within the limits of the Union be admitted? We have seen that the territory may be acquired and the State

be formed out of it; but can an independent State already formed be admitted into the Union? The answer is clear.

(*a*) The terms are unrestricted. What right have we to restrict them by interpretation?

(*b*) The Confederation provided for the admission of Canada and other colonies. Why presume less power under the more extended terms of the Constitution?

(*c*) We have seen that the first draft limited the States to be admitted to existing territory, but was advisedly changed.

(*d*) The case of Vermont is very interesting. It was a State free, sovereign and independent during the whole Revolution. Its territory was claimed by New York and New Hampshire, but it asserted its independence of any. The Constitution provides: "But no new State shall be formed or erected within the jurisdiction of any other State . . . without the consent of the legislatures of the States concerned, as well as of the Congress." Had Vermont been held to be a part of New York, she could not have been admitted without the consent of New York. But it will be seen, by reference to the debate in the convention,[1] that the purpose was to admit Vermont on its own motion without the consent of New York, and as no part of that State. If it was no part of New York, then it was a free and independent State, and not included in the territory within the limits of any of the States. Vermont was therefore admitted into the Union as a free, sovereign and independent State, and not as formed out of any other State. As the framers of the Constitution provided for such action, it is obviously intended to allow new States not formed out of the territory within the limits of the United States to be admitted into the Union. Vermont, therefore, is a clear precedent for the admission of Texas, which had established its independence, and was admitted into the Union, though not formed out of the territory belonging to any State in the Union. These views led to the acquisition of the Louisiana territory and of the Mexican territory, and to the admission of Vermont and Texas as independent commonwealths.

[1] Madison Papers, 1459–63.