AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 7: The Republican Era—Foundations/Scope/Extra-Territoriality

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Hawaii v. Mankichi, 190 U.S. 197 (1903)

Osaki Mankichi in 1899 was tried and convicted of murder by a trial court in Hawaii. Mankichi had not been indicted by a grand jury and only nine of twelve jurors voted to find him guilty. Two years later, Mankicki filed a federal habeas corpus suit claiming that his trial court conviction violated the Fifth and Sixth Amendment to the Constitution of the United States. In his view, both amendments governed his case because Congress was always bound to respect the Constitution when governing territories and because federal law in 1898 had mandated that "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution nor contrary to the Constitution of the United States . . . shall remain in force." The district court agreed with these contentions and reversed Mankichi's conviction. The United States appealed to the Supreme Court of the United States.

The Supreme Court by a 5–4 vote ruled that Mankichi had been constitutionally convicted. Justice Brown's plurality opinion maintained that Congress had the power to determine criminal procedure in the territories and that Congress had not intended to require the territorial government in Hawaii to conduct criminal trials consistent with the Fifth and Sixth Amendments. Justice White agreed with this conclusion on the ground that Hawaii was an unincorporated territory, not a part of the United States. Chief Justice Fuller and Justice Harlan, in their dissenting opinions, insisted that Congress was bound by the Constitution when governing all territories. Hawaii v. Mankichi *compelled the justices to determine which constitutional rights were fundamental? How did the justices in the majority make that decision? Compare the analysis of fundamental rights in the* Insular Cases *to the analysis of fundamental rights in such incorporation cases as* Hurtado v. California *(1884) and* Twining v. New Jersey *(1908). What are the most important similarities and differences? What explains those similarities and differences?*

JUSTICE BROWN delivered the opinion of the Court.

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The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands and to substitute immediately, and without new legislation, the common law proceedings by grand and petit jury which had been held applicable to other organized territories, . . . though we have also held that the states, when once admitted as such, may dispense with grand juries, *Hurtado v. California* . . . and perhaps also allow verdicts to be rendered by less than a unanimous vote.

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847, they had enjoyed the blessings of a civilized government and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges.

By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the Fifth and Sixth Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands Resolution, adopting the municipal legislation of Hawaii, "*not contrary to the Constitution of the United States,*" be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires, Amendment 5, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and, Amendment 6, that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

But there is another question underlying this and all other rules for the interpretation of statutes, and that is what was the intention of the legislative body? . . . [t]he books are full of authorities to the effect that the intention of the lawmaking power will prevail even against the letter of the statute. . . .

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Of course, under the Newlands Resolution, any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability, the contingency which has actually arisen occurred to no one at the time. . . .

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a constitution which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large, and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely such a result could not have been within the contemplation of Congress. . . .

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It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. . . .

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 which sixty years of practice had shown to be suited to the conditions of the islands and well calculated to conserve the rights of their citizens to their lives, their property, and their wellbeing.

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JUSTICE WHITE and JUSTICE McKENNA, concurring:

. . . [A]s a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the Fifth and Sixth Amendments of the Constitution concerning grand and petit juries were not applicable to that territory, because, whilst the effect of the resolution of annexation was to acquire the islands and subject them to the sovereignty of

the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States, and make them an integral part thereof. . . .

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti,* but, on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the government of the United States to await the subsequent determination of Congress. By the resolution, the islands were annexed, not absolutely, but merely "as a part of the Territory of the United States," and were simply declared to be subject to its sovereignty. The minutest examination of the resolution fails to disclose any provision declaring that the islands are incorporated and made a part of the United States, or endowing them with the rights which would arise from such relation. . . .

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The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. . . .

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JUSTICE McKENNA authorizes me to say that he also concurs in the result for the foregoing reasons.

CHIEF JUSTICE FULLER, with whom concurred JUSTICE HARLAN, JUSTICE BREWER, and JUSTICE PECKHAM, dissenting:

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By the specific language of this resolution, no legislation which was contrary to the Constitution of the United States remained in force.

The language is plain and unambiguous, and resort to construction or interpretation is absolutely uncalled for. To tamper with the words is to eliminate them.

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It was said at the bar that the words "contrary to the Constitution of the United States" were inserted as a declaration that certain "fundamental rights and principles, the basis of all free government, which cannot with impunity be transcended," were to be protected in Hawaii; that certain limitations of the Constitution applied "wherever the jurisdiction of the United States extends." But, in that view, the insertion of the phrase was superfluous and accomplished nothing.

Nor were we informed what those fundamental rights are. This is not a question of natural rights, on the one hand, and artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.

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JUSTICE HARLAN, dissenting:

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. . . [T]he Republic of Hawaii ceded, absolutely and without reserve, to the United States of America all rights and sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies. . . . Necessarily, therefore, if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States.

. . . Practically, under the view taken by the Court and so far as those guarantees were concerned, if Congress had not chosen to provide a system of criminal procedure—as it did by the act of 1900—for the government, tribunals, and people of Hawaii, then, for an indefinite time—it may have been for a century—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 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.* In other words, neither the life nor the liberty of any person can be taken under the authority of the United States except in the mode thus prescribed. Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii at any time prior to the act of 1900, although that country was an integral part of the United States, and, with its inhabitants, was subject in all respects to our sovereign dominion. It follows under the view of the Court that Congress, by nonaction simply, could have kept in force even such municipal legislation of the Hawaiian Islands relating to criminal trials as was in palpable conflict with the Constitution of the United States.

I dissent altogether from any such view. It 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—who, to use the words of the United States minister, have become our fellow-countrymen, and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment, neither the life nor the liberty nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States. If the accused had committed the crime of murder in the Territory of Arizona; if he had been convicted in any court in that territory except under a presentment or indictment of a grand jury and by the unanimous verdict of a petit jury, and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder. . . .

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The petit jury system existed in Hawaii long before the passage of the joint resolution. But it was inconsistent with the Constitution of the United States in that it allowed a verdict of guilty in a criminal case by a majority of the jurors. Where was the difficulty in applying in Hawaii the constitutional provision forbidding such a verdict? To have applied that provision to Hawaii would not in any essential sense have imposed upon that country a new system for the trial of crimes. It would have only enforced the existing mode of trial so as to conform to the constitutional requirement in respect of petit juries. . . .

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to those islands. It then, at least, became controlling beyond the power of Congress to prevent. From the moment when the government of Hawaii accepted the joint resolution of 1898 by a formal transfer of its sovereignty to the United States—when the flag of Hawaii was taken down by authority of Hawaii, and in its place was raised that of the United States—every human being in Hawaii charged with the commission of crime there could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process or as the result of any mode of procedure that was inconsistent with the Constitution of the United States. Can it be that the Constitution is the supreme law in the states of the Union, in the organized territories of the United States, between the Atlantic and Pacific oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in territories and among peoples situated as were the territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves, would place Congress above the Constitution. 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 for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory be cession, conquest, or treaty, and that Congress may exercise sovereign dominion over it, outside of and in

violation of the Constitution and under regulations that could not be applied to the organized territories of the United States and their inhabitants. 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. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires nor as the people governed may wish. Thus, will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution. . . .

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But it is said that, while 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,*" yet 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.

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Nevertheless it is contended that the constitutional provisions in question are not fundamental in their nature; that whether a person charged, for instance, with murder, shall be convicted and hung pursuant to a verdict rendered by a majority of the petit jury, rather than by all the jurors, is only "a method of procedure." My judgment refuses assent to this doctrine. I believe it to be most mischievous in every aspect. The provisions as to grand and petit juries and in the Constitution, and the mandatory character of that instrument ought not to be disregarded.

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I am of pinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and therefore it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or an indictment of a grand jury, and by the unanimous verdict of a petit jury.

2. That if the legality of such trial and conviction is to be tested alone by the joint resolution of 1898, then the law is for the accused, because Congress, by that resolution, abrogated, or forbade the enforcement of, any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States, and that any other construction of the resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret, the law.