AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 7: The Republican Era – Powers of the National Government

**Insular Cases [Downes v. Bidwell, 182 U.S. 244** (1901)]

From the beginning of the Republic there was a strong shared conviction that the United States of America faced west and that it was inevitable that it would expand across the continent. By 1845 this sentiment found expression in the claim of journalist John O’Sullivan that it “is by the right of our manifest destiny to overspread and to possess the whole of the continent which Providence has given us for the development of the great experiment of liberty and federated self-government entrusted to us.”[[1]](#footnote-1) However, in 1890 the official report of the U.S. Census declared that there was no longer an American frontier—after a century the continent had been settled. In the wake of this finding, some (including future president Theodore Roosevelt) began to argue that the future of American expansion would be overseas—and, in fact, the United States soon embarked upon a period of overseas territorial acquisition. Hawaii was annexed in 1898 by a simple congressional resolution rather than a treaty of cession or conquest (as is usually required by international law). That same year, the Treaty of Paris, which ended the Spanish–American War, acknowledged American control over the Philippines, Puerto Rico, and Guam. Unlike the conquest of the continent, these territories had extensive populations of non-white people who could not be displaced or relocated.

The acquisition of these island-related, or insular, territories triggered an important debate over whether the protections and guarantees of the Constitution applied in these settings. In the language of the day, people argued over whether “the Constitution follows the flag.” For example, if these territories were considered part of the United States, then Congress could not impose tariffs on the importation of goods from these places because the tariff power only applied to “foreign” countries. More fundamentally, did the provisions of the Bill of Rights apply to these territories or was it acceptable to approach these areas as occupied foreign lands, controlled by the United States but not part of the United States? Dred Scott, among other antebellum cases, had made clear that the Constitution did apply to territories, and that conclusion had not been repudiated during the Civil War. Influencing all of these debates were assumptions about what it meant to be an American, and these assumptions were widely shaped by notions of racial and cultural superiority. For many, the view that the Constitution should not follow the flag was premised on the belief that the people in these territories were not “fit” for the blessings of liberty and self-government.

The Court addressed these issues in a series of thirty-five cases starting in 1901 that, collectively, became known as The Insular Cases. The most important early case was Downes v. Bidwell. By a 5–4 vote, the Court concluded that Congress could impose duties on goods imported from Puerto Rico; however, the justices could not agree on a rationale. Justice Brown issued a “statement” announcing the decision of the Court. Must it be true, in the words of one of the justices, that “whether savages or civilized” the people of these territories are “entitled to all the rights, privileges, and immunities of citizens”? Should we take comfort in the view that, even without constitutional protections, these people have nothing to fear because “there are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests”? A range of competing views is outlined in the following reading. As you consider who has the strongest case do not be influenced by the knowledge that years later, in Balzac v. Puerto Rico (1922), the justices unanimously embraced the approach suggested by Justice White. Is it fair to say that these decisions help facilitate policies of American imperialism? The legacy of these decisions reverberates in more modern debates about the relationship of territories such as Guantanamo Bay to the American constitutional tradition. The Court’s decision led Chicago editor Finley Dunne to quip, “No matter whether the country follows the flag or not, the Supreme Court follows the election returns.”

Statement by JUSTICE BROWN.

. . . The case also involves the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories. The Constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.

 . . . [A] new Constitution was formed in 1787 by “the people of the United States” “for the United States of America,” as its preamble declares. All legislative powers were vested in a Congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the Union, except that Congress was empowered “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.” . . .

 . . . [I]t can nowhere be inferred that the territories were considered a part of the United States. The Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states; . . . In short, the Constitution deals with states, their people, and their representatives.

The Thirteenth Amendment to the Constitution, prohibiting slavery and involuntary servitude “within the United States, or in any place subject to their jurisdiction,” is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the Union. . . .

Upon the other hand, the Fourteenth Amendment, upon the subject of citizenship, declares only that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside.” Here there is a limitation to persons born or naturalized in the United States, which is not extended to persons born in any place “subject to their jurisdiction.”

The question of the legal relations between the states and the newly acquired territories first became the subject of public discussion in connection with the purchase of Louisiana in 1803. . . . [The treaty] evidently committed the government to the ultimate, but not to the immediate, admission of Louisiana as a state, and postponed its incorporation into the Union to the pleasure of Congress. In regard to this, Mr. Jefferson, in a letter to Senator Breckinridge of Kentucky, of August 12, 1803, used the following language: “This treaty must, of course, be laid before both Houses, because both have important functions to exercise respecting it. . . . The Constitution has made no provision for holding foreign territory, still less for incorporating foreign nations into our Union. The Executive, in seizing the fugitive occurrence which so much advances the good of our country, have done an act beyond the Constitution.”

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 . . . [The] statutes [eventually passed by Congress] may be taken as expressing the views of Congress, first, that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the Union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the Constitution (Article I, Section 9) that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of state within the meaning of the Constitution. . . .

So, too, in the act annexing the Republic of Hawaii, there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. . . .

The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the Constitution, if that instrument be held to extend to these islands immediately upon their cession to the United States. . . .

The researches of counsel have collated a large number of other instances in which Congress has in its enactments recognized the fact that provisions intended for the states did not embrace the territories, unless specially mentioned. . . .

The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the Constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the Constitution took effect immediately upon the cession of the territory to the United States. . . .

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Eliminating, then, from the opinions of this court all expressions unnecessary to the disposition of the particular case, and gleaning therefrom the exact point decided in each, the following propositions may be considered as established:

1. That the District of Columbia and the territories are not states within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different states;

2. That territories are not states within the meaning of Rev. Stat. 709, permitting writs of error from this court in cases where the validity of a state statute is drawn in question;

3. That the District of Columbia and the territories are states as that word is used in treaties with foreign powers, with respect to the ownership, disposition, and inheritance of property;

4. That the territories are not within the clause of the Constitution providing for the creation of a supreme court and such inferior courts as Congress may see fit to establish;

5. That the Constitution does not apply to foreign countries or to trials therein conducted, and that Congress may lawfully provide for such trials before consular tribunals, without the intervention of a grand or petit jury;

6. That where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

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Indeed, the practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct. . . .

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the “American empire.” There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States. In all its treaties hitherto the treaty-making power has made special provision for this subject. . . . In all these cases there is an implied denial of the right of the inhabitants to American citizenship until Congress by further action shall signify its assent thereto.

Grave apprehensions of danger are felt by many eminent men,—a fear lest an unrestrained possession of power on the part of Congress may lead to unjust and oppressive legislation in which the natural rights of territories, or their inhabitants, may be engulfed in a centralized despotism. These fears, however, find no justification in the action of Congress in the past century, nor in the conduct of the British Parliament towards its outlying possessions since the American Revolution. Indeed, in the only instance in which this court has declared an act of Congress unconstitutional as trespassing upon the rights of territories (the Missouri Compromise), such action was dictated by motives of humanity and justice, and so far commanded popular approval as to be embodied in the Thirteenth Amendment to the Constitution. There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests. . . .

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It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

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 opinions 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 in-dispensable 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.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,—it does not follow that in the meantime, a waiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. . . . We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.

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 . . . A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

The judgment of the Circuit Court is therefore *affirmed*.

JUSTICE WHITE, with whom concurred JUSTICE SHIRAS and JUSTICE MCKENNA, uniting in the judgment of affirmance:

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The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation,—for, whether the tax was local or national, it could have been imposed although Porto Rico had no representative local government and was not represented in Congress,—but is whether the particular tax in question was levied in such form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had Porto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?

 . . .

While no particular provision of the Constitution is referred to, to sustain the argument that it is impossible to acquire territory by treaty without immediate and absolute incorporation, it is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States. But this reasoning is based on political, and not judicial, considerations. Conceding that the conception upon which the Constitution proceeds is that no territory, as a general rule, should be acquired unless the territory may reasonably be expected to be worthy of statehood, the determination of when such blessing is to be bestowed is wholly a political question, and the aid of the judiciary cannot be invoked to usurp political discretion in order to save the Constitution from imaginary or even real dangers. The Constitution may not be saved by destroying its fundamental limitations.

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A practical illustration will at once make the consequences clear. Suppose Congress should determine that the millions of inhabitants of the Philippine islands should not continue appurtenant to the United States, but that they should be allowed to establish an autonomous government, outside of the Constitution of the United States, coupled, however, with such conditions providing for control as far only as essential to the guaranty of life and property and to protect against foreign encroachment. If the proposition of incorporation be well founded, at once the question would arise whether the ability to impose these conditions existed, since no power was conferred by the Constitution to annex conditions which would limit the disposition. And if it be that the question of whether territory is immediately fit for incorporation when it is acquired is a judicial, and not a legislative one, it would follow that the validity of the conditions would also come within the scope of judicial authority, and thus the entire political policy of the government be alone controlled by the judiciary.

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 . . . [T]he sovereignty of the United States may be extended over foreign territory to remain paramount until, in the discretion of the political department of the government of the United States, it be relinquished. This method, then, of dealing with foreign territory, would in any event be available. Thus, the enthralling of the treaty-making power, which would result from holding that no territory could be acquired by treaty of cession without immediate incorporation, would only result in compelling a resort to the subterfuge of relinquishment of sovereignty, and thus indirection would take the place of directness of action,—a course which would be incompatible with the dignity and honor of the government.

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JUSTICE GRAY, concurring:

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The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as Commander in Chief. . . . There must, of necessity, be a transition period.

In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of the Congress of the United States. The office of a treaty of cession ordinarily is to put an end to all authority of the foreign government over the territory, and to subject the territory to the disposition of the government of the United States.

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So long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws; but those laws concerning “foreign countries” remain applicable to the conquered territory until changed by Congress. . . .

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The system of duties temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States.

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

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Conceding that the power to tax for the purposes of territorial government is implied from the power to govern territory, whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, these particular duties are nevertheless not local in their nature, but are imposed as in the exercise of national powers. The levy is clearly a regulation of commerce, and a regulation affecting the states and their people as well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the states can only exist if and as granted by the Constitution. And by the Constitution Congress is vested with power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The territories are indeed not mentioned by name, and yet commerce between the territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.

 . . .

The government of the United States is the government ordained by the Constitution, and possesses the powers conferred by the Constitution. “This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?” *Marbury v. Madison* (1803) . . .

From *Marbury v. Madison* to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are “not prohibited, but consist with the letter and spirit of the Constitution.”

The powers delegated by the people to their agents are not enlarged by the expansion of the domain within which they are exercised. When the restriction on the exercise of a particular power by a particular agent is ascertained, that is an end of the question.

To hold otherwise is to overthrow the basis of our constitutional law, and moreover, in effect, to reassert the proposition that the states, and not the people, created the government.

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The concurring opinion recognizes the fact that Congress, in dealing with the people of new territories or possessions, is bound to respect the fundamental guaranties of life, liberty, and property, but assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. . . .

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.

 . . .

But it must be remembered that, as Marshall and Story declared, the Constitution was framed for ages to come, and that the sagacious men who framed it were well aware that a mighty future waited on their work. The rising sun to which Franklin referred at the close of the convention, they well knew, was that star of empire whose course Berkeley had sung sixty years before.

They may not, indeed, have deliberately considered a triumphal progress of the nation, as such, around the earth, but as Marshall wrote: “It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.”

This cannot be said, and on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.

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Tested by those rules our conviction is that the imposition of these duties cannot be sustained.

JUSTICE HARLAN, dissenting:

I concur in the dissenting opinion of the Chief Justice. . . . I agree in holding that Porto Rico—at least after the ratification of the treaty with Spain—became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing the “all duties, imposts, and excises shall be uniform throughout the United States.”

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 . . . I take leave to say that if the principles thus announced [in the statement by Justice Brown] should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the government this court has held steadily to the view that the government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted (*Martin v. Hunter’s Lessee* [1816]) we are now informed that Congress possesses powers outside of the Constitution, and may deal with new territory, acquired by treaty or conquest, in the same manner as other nations have been accustomed to act with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them,—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.

 . . .

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as “certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.” They proceeded upon the theory—the wisdom of which experience has vindicated— that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. . . . Hence, the Constitution enumerates the powers which Congress and the other departments may exercise,—leaving unimpaired, to the states or the People, the powers not delegated to the national government nor prohibited to the states. That instrument so expressly declares in the 10th Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.

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 . . . Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make “concessions” that are inconsistent with its provisions. . . . The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve, because the import duty is many fold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. . . .

 . . .

We heard much in argument about the “expanding future of our country.” It was said that the United States is to become what is called a “world power;” and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that 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. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words “throughout the United States,” in the taxing clause of the Constitution, do not embrace a domestic “territory of the United States” having a civil government established by the authority of the United States. This is a distinction which I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

 . . .

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the “United States.” And this result comes from the failure of Congress to use the word “incorporate” in the Foraker act. . . .

I am constrained to say that this idea of “incorporation” has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.

1. . Quoted in Paul Kens, “A Promise of Expansion,” in The Louisiana Purchase and American Expansion, 1803–1898, eds. Sanford Levinson and Bartholomew H. Sparrow (Lanham, MD: Rowman & Littlefield, 2005), 139. [↑](#footnote-ref-1)