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THE INSULAR CASES.[1]

THIS year of our Lord has been one of unusual significance to the legal profession. It has seen universal and spontaneous homage paid by bench and bar and country to "the great Chief Justice," "the greatest judge in the language." He is conceded to be the greatest authority upon the construction of the Constitution that ever adorned the most august tribunal known to our institutions. All agree that, more than any other man realizing that our "Constitution is formed for ages to come, and is designed to approach immortality as nearly as human institutions can approach," he expounded and developed it, with scientific accuracy, upon enduring lines, buttressed by accurate reasoning, "establishing those sure and solid principles of government on which our constitutional system rests." The Supreme Court of the United States suspended its sittings in order that through its distinguished chief it might witness "to the immortality of the fame of this sweet and virtuous soul, whose powers were so admirable and the results of their exercise of such transcendent importance." It is certainly an interesting and significant fact that, at the same term during which these ever memorable exercises occurred, that court rendered a judgment by a disagreeing majority of one, overruling a case which had withstood unimpaired the assaults of time for eighty years. A case decided by the same tribunal by a unani-

[1] Address delivered before the American Bar Association, August 22, 1901, at Denver, Col.

mous court, whose reasons therefor were luminously stated with his usual accuracy and ability by the incomparable Marshall. A judgment clearly inconsistent with other judgments rendered on the same day, without any opinion of the court upon which to rest, endeavored to be sustained by the opinions of different justices, in irreconcilable conflict with each other. A judgment involving fundamental constitutional questions of more vital and transcendent importance than any hitherto determined.

The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without a parallel in our judicial history. It is unfortunate that the cases could not have been determined with such a preponderance of consistent opinion as to have satisfied the profession and the country that the conclusions were likely to be adhered to by the court. Until some reasonable consistency and unanimity of opinion is reached by the court upon these questions, we can hardly expect their conclusions to be final and beyond revision. A statement of the cases is essential to show what was actually decided. The cases were: De Lima *v.* Bidwell; Downes *v.* Bidwell; Huus *v.* New York and Porto Rico Steamship Company; Goetze *v.* United States; Crossman *v.* United States; and Armstrong *v.* United States.

In De Lima *v.* Bidwell the question was whether after the cession of Porto Rico to the United States, by the treaty of Paris, it remained a foreign country within the meaning of the tariff laws, the action being brought to recover duties collected prior to the passage of the Foraker Act, under the Dingley Act, which provided that "there shall be levied and collected and paid upon all articles imported from *foreign countries*," etc., certain duties therein specified. The court held "that at the time these duties were levied, Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back." Mr. Justice Brown delivered the opinion of the court, and with him concurred Mr. Chief Justice Fuller, Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham. Mr. Justice McKenna dissented, and drew an opinion in which Mr. Justice Shiras and Mr. Justice White concurred, and Mr. Justice Gray dissented in a short note. Downes *v.* Bidwell was an action to recover duties collected under the Foraker Act, upon "merchandise coming into the United States from Porto Rico," to use the pecu-

liar and somewhat ungainly language of that act. It involved the constitutionality of that part of the act, and five members of the court concurred in a judgment holding that part of the act constitutional. Mr. Justice Brown announced the conclusion and judgment of the court, affirming the judgment of the court below. He did not pronounce its opinion, but rendered one of his own. Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, rendered an opinion uniting in the judgment of affirmance. Referring to Mr. Justice Brown's opinion, he stated that the reasons which caused him to concur in the result "are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived." Mr. Justice Gray concurred in substance with the opinion of Mr. Justice White, but summed up so as to "indicate" his "position in other cases now standing for judgment."

Technically speaking, there is no opinion of the court to sustain the judgment. Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham, delivered a dissenting opinion, and Mr. Justice Harlan delivered a dissenting opinion giving some additional considerations. Dooley *v.* United States was a suit to recover duties collected upon goods exported from New York to Porto Rico, partly before and partly after the ratifications of the treaty, but in every instance prior to the passage of the Foraker Act. As to the duties collected prior to the ratifications of the treaty, the court were unanimous in holding that they were legally exacted "under the war power." The same justices who concurred in the De Lima case concurred in this as to the duties collected after ratifications. Mr. Justice Brown delivered the opinion of the court, holding that the "authority of the President as commander-in-chief to exact duties upon imports from the United States ceased with the ratification of the treaty of peace, and her right to the free entry of goods from the ports of the United States continued until Congress should constitutionally legislate upon the subject." The justices who dissented in the De Lima case dissented in this. Mr. Justice White delivered the dissenting opinion. Huus *v.* New York and Porto Rico Steamship Company raised the question as to whether trade between the United States and Porto Rico was, after the passage of the Foraker Act, "coasting trade," and the court were unanimous in holding that it was. Goetze *v.* United States and Crossman *v.* United States involved the questions determined in the De Lima case, and were controlled by that case. Armstrong *v.* United States

was controlled by the Dooley case. Two cases argued at the same term remain undecided. Fourteen Diamond Rings *v.* United States, — rings brought from the Philippines into the United States after the ratification of the treaty of peace, without the payment of duty, and seized for non-payment, — and Dooley *v.* United States, raising the validity of duties collected upon goods "coming into Porto Rico from the United States" after the passage of the Foraker Act.

In the unsettled condition of the court it is hardly worth while to speculate as to the results in these cases. The Diamond Rings case no doubt depends upon what the court holds the status of the Philippines to be, whether civil or military. If the Dooley case is controlled by the Downes case, there would seem to be no good reason why it should not have been decided. That it was not, raises the inference that it would have been decided adversely to the government, or that there was a greater difference of opinion than usual with reference to it. Mr. Justice Gray is the only one who indicates his "position" in this case. In his opinion in the Downes case he says, after referring to duties "established on merchandise and articles going into Porto Rico from the United States, or coming into the United States from Porto Rico," as temporary: —

> "The system of duties [clearly including imports and exports] temporarily established by that act during the transition period was within the authority of Congress under the Constitution of the United States."

No other member of the majority is prepared to indicate that Porto Rico, while a foreign territory as to the revenue clause of the Constitution, so that imports therefrom are dutiable, is not also foreign within the meaning of that other clause of the Constitution, relating to revenue, which reads, "No tax or duty shall be laid on articles exported from any state." The converse must be true as to goods going the other way, and they would be exports from some state to "such island," and hence obnoxious to this clause. Apprehending this, perhaps, Mr. Justice White in the same case always follows the ungainly language of the act in describing this commerce.

Just how goods "coming into Porto Rico from the United States" can be other than exports from some state we cannot well see, but with these opinions before us it will not do to say that it will not be so held, and some inconsistent reasoning given therefor. Upon

this point the language of Mr. Justice Miller in Woodruff *v.* Parham,[1] is suggestive: —

"Is the word 'impost' here used intended to confer upon Congress a distinct power to levy a tax upon all goods or merchandise carried from one state into another? Or is the power limited to duties on foreign imports? If the former be intended, then the power conferred is curiously rendered nugatory by the subsequent clause of the ninth section, which declares that no tax shall be laid on articles exported from any state, for no article can be imported from one state into another which is not, at the same time, exported from the former."

It is difficult to see how refusing to call a duty an export duty, when it is in fact such, can change its character.

The Downes Case.

The Downes case is the only one that passes upon questions that apply to permanent conditions, or that attempts to furnish a foundation for a permanent government policy. All that is decided by that case is that as to "merchandise coming into the United States from Porto Rico" Congress is not restrained by the Constitution in imposing a discriminating tariff against Porto Rico. In other words, as to imports from Porto Rico Congress can constitutionally discriminate. It may be said that the case involves other absolute powers, but that is as far as the case itself goes. Whether all the other constitutional restrictions apply, and if not, which apply, remains to be determined. Four of the majority (and I include Mr. Justice Gray, as he says that in "substance" he agrees with the opinion of Mr. Justice White) are evidently appalled by the enormity of the argument that would deprive Porto Rico of all the constitutional guarantees as to civil rights. They repeatedly so declare in the opinion of Mr. Justice White, as though fearful that it might be inferred that they entertained that view, as appears from the following excerpts: —

"Hence it is that wherever a power is given by the Constitution, and there is a limitation imposed on the authority, such restriction operates upon and confines every action on the subject within its constitutional limits."

. . . . . .

"As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject. It follows, also, that every provision of the

[1] 8 Wall. 123.

Constitution which is applicable to the territories is also controlling therein." . . .

"From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island, was potential in Porto Rico."

. . . . . .

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizens, which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power." . . .

"The doctrine that those absolute withdrawals of power which the Constitution has made in favor of human liberty are applicable to every condition or status has been clearly pointed out by this court." . . .

"There is in reason, then, no room in this case to contend that Congress can destroy the liberties of the people of Porto Rico by exercising in their regard powers against freedom and justice, which the Constitution has absolutely denied." . . .

"The fact that the act directs the officers to swear to support the Constitution does not militate against this view, for, as I have conceded, whether the island be incorporated or not, the applicable provisions of the Constitution are there in force."

It is unfortunate that Mr. Justice White, with his keen appreciation of the sacredness of constitutional rights, in order to sustain his conclusions in this case was obliged to use a train of reasoning that manifestly kept pressing upon him the idea of despotic power, and thus required this continual negation. It required him to "protest too much." Nevertheless just what will be held "applicable provisions" we do not know, but as the four dissenting justices hold that the Constitution now applies to Porto Rico to that extent, we can feel confident that at least as to applicable provisions eight justices will concur. Mr. Justice Brown is not as sensitive as his brethren, who agree with him as to *what* in the Downes case, but disagree as to *how*. He comes the nearest to the contention of the government, citing with approval: —

"Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Consti-

tution, from which Congress derives all its powers, than by any express and direct application of its provisions."

He says: —

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states."

He proposes to be cautious: —

"We do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application."

Again: —

"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. . . . 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. . . . It does not follow that in the mean time, awaiting 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."

"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."

He has certainly left the door sufficiently open. Just how "certain principles of natural justice" could be used in court to invalidate an act of Congress, unrestrained by any constitutional provision, we are not informed. The inconsistency on the part of Mr. Justice Brown in the De Lima and Downes cases is obvious, and tends to impair our confidence in his conclusions. On the other hand, the consistency of the dissenting justices in the Downes case, and the manner in which their reasoning without distortion answers the various conditions, tend to establish its correctness. It is true that magazine and newspaper editors, who feel bound to sustain the conclusions, say, to quote one of them: "They appear to us entirely consistent with each other, and entirely clear in themselves."

This is not an assertion that they are "consistent," but that "they appear to us." On this point I will assume that the court knows at least as much as any one else, and let it speak for itself.

Mr. Justice Gray, in his note in the De Lima case, dissents because, "It appears to me irreconcilable . . . with the opinions of the majority of the justices in the case, this day decided, of Downes *v.* Bidwell." Mr. Justice White in his dissenting opinion in the Dooley case, in which Mr. Justice Gray, Mr. Justice Shiras, and Mr. Justice McKenna concurred, stated the inconsistency thus: —

> "Now, this court has just decided in Downes *v.* Bidwell that, despite the treaty of cession, Porto Rico remained in a position where Congress could impose a tariff duty on goods coming from that island into the United States. If, however, it remained in that position, how then can it be now declared that it ceased to be in that relation because it was no longer foreign country within the meaning of the tariff laws?" . . .

The fact that somebody does not see the inconsistency makes it none the less obvious. The inconsistency of itself does not tend to demonstrate which conclusion was wrong, and is only material as tending to detract from the weight to be given to the reasoning generally. Is the conclusion in the Downes case sustained by such reason and authority as to justify us in assuming that it is the deliberate and final judgment of the court upon this great question; that it has laid down the rule which will govern the Republic for all time, so that although new territory may be acquired, the Republic will not expand, but will simply accumulate property? It seems to me more than doubtful.

Mr. Justice Brown holds that under that provision of the Constitution which declares that "all duties, imposts, and excises shall be uniform throughout the United States," the term "United States" is confined to the several states, and that the territories and the District of Columbia are not "states" and not included therein, and therefore Porto Rico, being a territory, is not protected thereby.

Hepburn *v.* Ellzey.

The earliest case upon which he relies is Hepburn *v.* Ellzey,[1] where it was held that under the clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of the different states, a citizen of the District of Columbia could not maintain an action in the circuit

[1] 2 Cranch, 445.

court of the United States. It is true that Mr. Chief Justice Marshall there said: —

"It becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the members of the American confederacy only are the states contemplated in the Constitution."

It is also true that Mr. Justice Marshall, recognizing the distinction between the term "state," as used in that provision, and the "United States," said, in speaking of the same man that he had just held was not a citizen of a "state": —

"It is true that as *citizens of the United States*, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the Union, should be closed upon *them*. But this is a subject for legislative, not for judicial consideration."

It seems that Marshall could see how a man could be within the "United States" and not be in a "state." It will be observed that the learned justice does not quote this remark.

An examination of the Downes case requires the consideration of at least four great leading cases: Loughborough *v.* Blake,[1] Insurance Co. *v.* Canter,[2] Cross *v.* Harrison,[3] and Dred Scott *v.* Sandford.[4]

In the first three cases the court were unanimous, and in the last case as to the proposition here involved there was no dissent, and as to that proposition the authority of these cases prior to the Downes case had never been denied or questioned. One is directly and two are practically overruled by a disagreeing majority of one.

Loughborough *v.* Blake.

Loughborough *v.* Blake is directly in point. The provision of the Constitution in question was considered by the court, and Mr. Chief Justice Marshall delivered the unanimous opinion, in which he said: —

"The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of states and territories. The District of Columbia, or the territory west of the Missouri,

[1] 5 Wheat. 317, 1820.
[2] 1 Pet. 511, 1828.
[3] 16 How. 164, 1853.
[4] 19 How. 393, 1856.

is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one, than in the other."

Mr. Justice Brown says these are "certain observations which have occasioned some embarrassment in other cases," but I submit in none so great as in the Downes case. The extraordinary ingenuity manifested in this case by the earnest effort to escape from that authority constitutes one of its most striking features. The learned Attorney General examined the original files, and found that it was uncertain whether the suit related to "one black gelding about nine years old" or "to ten cows and ten oxen," and therefore it was "scarcely more than a moot case." Upon an analysis of the case he found that "the point argued in the case was whether the District of Columbia **could*[1] be taxed, seeing that it had no representative in Congress. **That* was the question argued and **that* is what was decided." Although these arguments were presented with all of his accustomed vigor and ability, he does not appear to have succeeded in convincing anybody but himself, as these contentions were not even alluded to by any justice. Mr. Justice Brown is entitled to the credit of introducing in an opinion for the first time a new method of disposing of that case. I do not say he discovered it, for it is true that there were statesmen who, in groping about for a way of escape from Marshall's logic, had blazed out this path. He admits that the conclusion is correct, "so far at least as it applies to the District of Columbia." He cannot quite get up to denying the case *in toto*. He then gives the reason why he concedes so much: —

"This district had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States, or from under the ægis of the Constitution."

This reasoning is inconsistent with the theory upon which the

[1] Wherever words are printed in *italics*, only those in which an * is used are italicized in the original.

whole case is based, *i. e.*, that the "United States" is composed only of "states." We have here a part of the "United States" which is not a state. Therefore, it is quite possible for the term "United States" to include territory outside of the states. "Neither party," he says, "had ever consented to that construction of the cession." Inasmuch as the question was never even dreamed of until invoked by the exigencies of this case, it is quite evident that it was not an element of "the cession."

Again, "if before the district was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the district was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the district, what it could not do directly." With all due respect to the learned justice, this illustration suggests a contingency that is impossible. Congress desires to affect certain persons by unconstitutional legislation who now live in a state. This it cannot do. Therefore, it creates the District of Columbia out of the territory on which they live in order that it may legislate with reference to them unrestrained by the Constitution. Could anything be more finical? He says: —

> "The district still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government."

Therefore he says the conclusion was right in Loughborough *v.* Blake, but the reasons were wrong, mere *dicta.*

This appears to be the adhesive feature of the Constitution. Like a way appendant or appurtenant, or certain covenants in a deed, the Constitution runs with the land, and is inseparably united thereto. The proposition has the merit of novelty. It is submitted that no sufficient reason is given for its existence, and that it rests upon the unsupported assertion of the learned justice that it is so. He does not inform us how, but it is.

If this adhesive proposition is sound, what becomes of the decision in Hepburn *v.* Ellzey? Prior to the creation of the District of Columbia, it is clear that any citizen of either state, living in the territory afterward made the district, had the constitutional right to bring an action in the circuit court of the United States. Being a constitutional right, it "had attached to it irrevocably." Therefore no power could deprive a citizen of the district of that right. It seems that Mr. Chief Justice Marshall, notwithstanding

all this, disconnected the citizen in that case from the Constitution. Perhaps he had not heard of this theory, or can it be that only a part of the Constitution adheres? Only so much as is necessary to escape Loughborough *v.* Blake? This may be the case, in view of the fact that in 1897 in Hooe *v.* Jamieson,[1] a case turning on the precise point decided in Hepburn *v.* Ellzey, the court still persisted in disconnecting a citizen of the District of Columbia from the Constitution, and affirmed Hepburn *v.* Ellzey, and Mr. Justice Brown concurred in the opinion. Moreover, in the Downes opinion he cites with approval those cases for the purpose of showing that the District of Columbia is not a "state," and, therefore, no part of the United States, and then on the next page asks us to believe that having once been a part "it still remained a part of the United States." Is not this asking too much, and will not some new and more universally operating theory have to be evolved before Loughborough *v.* Blake is disposed of?

Mr. Justice White in his opinion undertakes with great diligence, research, and ability to establish the doctrine that "the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress," and that "Congress is vested with the right to determine when incorporation arises." His idea is that undesirable territory otherwise would be "without the consent of the American people as expressed by Congress, and without any hope of relief, indissolubly made a part of our common country." In other words, once incorporated territory cannot afterwards be alienated or disposed of. His object undoubtedly is to establish a condition during which "when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate," that is, during which it can be disposed of. He holds that Porto Rico has not been "incorporated," and, therefore, the uniformity clause does not apply. Mr. Justice Harlan most pertinently suggests: "What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished." Mr. Justice White's opinion is unfortunately lacking in perspicuity upon both of these points. He repudiates Mr. Justice Brown's method of disposing of Loughborough *v.* Blake. He cites that case to support the following proposition: —

"But the power just referred to, as well as the qualification of uniformity, restrains Congress from imposing an impost duty on goods

[1] 166 U. S. 395.

coming into the United States from a territory which has been incorporated into and forms a part of the United States."

Assuming that prior to 1820 the District of Columbia, in the sense in which he uses that term, had been "incorporated into" the United States, the case from his view would clearly apply. He fails to inform us when or how it was so "incorporated," but he undoubtedly assumes it to be a fact. He then makes this criticism of Mr. Justice Brown's treatment of that case, saying:—

"To question the principle above stated, on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in Loughborough *v.* Blake were mere *dicta*, seems to me to be entirely inadmissible."

Here four of the majority justices concede the authority of Loughborough *v.* Blake, and it clearly controls the Downes case unless it can be made to appear, not assumed, that the District of Columbia had at that time been "incorporated," and no single fact is stated that it is claimed even tends to show incorporation. In the absence of such showing the decision in the Downes case should be reversed. If the understanding of Congress were entitled to control, which fortunately it is not, it clearly had not been "incorporated," as in 1871 Congress passed an act extending the Constitution to the district, an idle ceremony if it had been "incorporated" into "the United States" for fifty years. To be sure, Mr. Justice Brown says this was done "to put at rest all doubts regarding the applicability of the Constitution," but our attention is not directed to anything in the act that indicates such a purpose, or in the facts connected with its passage. If this act had no real significance, how much significance is to be attached to similar legislation in connection with the territories, which is relied upon to answer the case that holds that the territories are a part of the United States, and that the Constitution was operative therein without the aid of legislation? The inconsistencies of the court lead them into difficulties whichever way they turn. It is submitted that the majority have not succeeded in escaping from the "embarrassment" of Loughborough *v.* Blake.

Insurance Co. *v.* Canter.

The Canter case, which turned upon the power of the territorial legislature to create a court exercising admiralty jurisdiction, is erroneously supposed to establish the fact that the territories are not a part of the United States. This case is misquoted and misconceived. Mr. Justice Brown states that Mr. Chief Justice Mar-

shall held "that territory ceded by treaty becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or upon such as its new master shall impose." The context shows that this is a misapprehension, as Mr. Chief Justice Marshall was simply stating a general rule of international law as to which there is no question, and not the law of that case. He said: —

"*The usage of the world is*, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory become a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."

That he did not state it as the law of that case is clear also from the fact that immediately following a full statement of these general principles, he refers to the fact that the treaty provided that "as soon as may be consistent with the principles of the Federal Constitution," the inhabitants of Florida "shall be incorporated in the Union of the United States; . . . and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." Note the language, "*shall be* incorporated," "*and admitted.*" Apparently all *to be* done, not a fact accomplished by the cession. The act of Congress creating the territorial legislature enumerated certain constitutional privileges and immunities which it conferred upon Florida. Mr. Whipple, in his argument, insisted that there was no occasion for this enumeration "if the inhabitants of Florida were entitled to them upon the act of cession," and Mr. Justice Johnson, in his opinion in the case in the circuit court, took the same view. Notwithstanding all this "the great Judge," speaking for a unanimous court, denied this contention and said: —

"This treaty is the law of the land, *and admits the inhabitants of Florida* to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

Mark it, not the act of Congress, as was urged by counsel and Mr. Justice Johnson, but the "*treaty . . . admits* the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States." The fact that privileges and immunities were conferred by act of Congress is not even mentioned. When the inhabitants had all the "privileges, rights,

and immunities of citizens" they were clearly citizens, and if Mr. Chief Justice Marshall is correct they became such *by the act of cession*, and the territory was also "incorporated in the Union" by the same act, without the aid or consent of Congress. He expressly declines to pass upon the question as to whether "its new master" can "impose" terms, as in the next sentence he says: —

"It is unnecessary to inquire whether this is not their condition, independent of stipulation."

If "independent of stipulation" they acquired these constitutional rights, certainly, if Mr. Justice Brown's adhesive theory is sound, they could not be deprived of them by any terms "such as its new master shall impose," and it was not so held. Mr. Whipple and Mr. Webster both contended that the right of representation was the supreme test of incorporation and citizenship. Mr. Whipple said: "If the Constitution is in force in Florida, why is it not represented in Congress?" Mr. Webster said: "What is Florida? It is no part of the United States. How can it be? How is it represented?" This is Webster's only reason, and this remark is cited by Mr. Justice Brown, as well as by Mr. Justice McKenna, in the De Lima case, apparently as entitled to weight. It may be remarked in passing that at the most this was merely Webster's *argument* in the discharge of his professional duty, bound to make the most effective presentation of his client's case, and does not necessarily indicate his own opinion. The "great judge" clearly apprehended, however, the broad distinction which exists between civil rights and political rights, and that one by no means involves the other, as he denied this contention, and held that "they do not, however, participate in political power; they do not share in the government, till Florida shall become a state." He had just held that the inhabitants had all the "privileges and immunities" of citizens. Therefore representation was not one of them. The right of representation necessarily stands or falls with the right to the elective franchise, as they who cannot vote cannot be said to be represented. That citizenship does not involve the right of suffrage is well settled.

In Minor *v.* Happersett [1] the court held: —

"The word 'citizen' in the Constitution of the United States conveys the idea of membership of a nation and nothing more. Women are citizens of the United States. The right of suffrage is not one of the necessary privileges of a citizen of the United States. The United States

[1] 21 Wall. 162, 1875.

Constitution did not add the right of suffrage to the privileges and immunities of citizenship as they existed at the time the Constitution was adopted. Suffrage was not coextensive with the citizenship of the states at the time of its adoption. It was not intended to make all citizens of the United States voters. The Constitution of the United States *does not confer the right of suffrage upon any one.*" United States *v.* Cruikshank,[1] Murphy *v.* Ramsey.[2]

What becomes then of Webster's only test? When his sole reason fails, how can his conclusion be sustained? There is much confusion of thought, and many erroneous conclusions are reached, by the failure to bear in mind this clear distinction. I notice that the advocates of legislative absolutism, while they do not deny this distinction, fail to make conspicuous, in the discussion of the insular questions, that the *only* question is one of *civil* and not of *political* rights. It is undoubtedly the popular impression that to hold that the Porto Rican, or the Filipino, is a citizen of the United States, is at once to vest him with the right of suffrage, and create a disturbing element in our political economy, when nothing could be further from the fact. The elective franchise is popularly supposed to be the distinguishing badge of citizenship, but it is not even one of the elements of citizenship of the United States. Voting, representation, and the consent of the governed, are not guaranteed by the Constitution of the United States, or involved in this discussion. This misapprehension, no doubt, contributes in a large degree to whatever popular support absolutism may have. It is akin, though much more general, to that other idea that so long as these possessions can be held as colonies, "territory appurtenant and belonging to the United States," "disembodied shades," in some way the possibility of states being created out of them is made more remote. But the fact is that the Constitution requires no intermediary, preparatory, or territorial stage for an intending state. It is equally as competent to create one out of Porto Rico as out of Oklahoma. Given a President, Senate, and House of Representatives of the same party, and if desired a "disembodied shade," by a mere act of Congress, becomes one or more sovereign states, the number limited only by political exigency. If our Democratic friends obtained power, and desired to intrench themselves therein on the line of free trade against protection, how long would it take them to bespangle the Orient with states? These are pleasing but inherent contingencies.

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[1] 92 U. S. 542. [2] 114 U. S. 15.

Mr. Justice Brown seems to derive aid and comfort from the opinion of Mr. Justice Johnson in the Canter case in the circuit court, as does Mr. Justice McKenna in the De Lima case. Two propositions are cited from his opinion, and thought to be significant: —

First. The fanciful distinction between "territory acquired from the aborigines," also "by the establishment of a disputed line," and that which "was previously subject to the jurisdiction of another sovereign," the Constitution immediately attaching, it is supposed, to one and not to the other.

Second. The fact that certain "privileges and immunities" were "enumerated in the Act of Congress," showing that they were not acquired by treaty.

While the court reached the same conclusion as did Mr. Justice Johnson, his first proposition was entirely ignored, and his second, as we have seen, distinctly denied by the court. Inasmuch as Mr. Justice Johnson did not file any separate opinion, we must infer that he was satisfied with the reasoning of the court, and conceded his own reasoning to be wrong. Under these circumstances how can his opinion as to these points be relied on as an authority? Mr. Justice Brown states that the result of the Canter case is that Congress, when authorizing the creation of a territorial court, "must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution." He also says: "But if they be a part of the United States it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution." With all due respect to the learned justice, I submit that no such conclusion follows from that case, that it does not even tend to establish it, and that the decision does not necessarily show that Florida either did or did not become a "part of the United States" by the act of cession.

If it became a "part of the United States" by the act of cession, it is clear that the territorial legislature could pass no valid law that would be "inconsistent with the laws and Constitution of the United States." But the act of Congress creating the territorial legislature provided that "no law shall be valid which is inconsistent with the laws and Constitution of the United States," and Mr. Chief Justice Marshall expressly held that the powers of the legislature "were *subject to the restriction* that their laws shall not be inconsistent with the laws and Constitution of the United States," so that in either case, whether by act of cession, or by

act of Congress, the provisions of the Constitution equally controlled the territorial legislature. In either case, so far as the operation of the Constitution was concerned, this territory was to all legal intents and purposes a "part of the United States." It matters not how the Constitution reached the territory, so far as that case was concerned, so long as it was there. The court not only recognized the application of the Constitution by citing that provision of the act of Congress and expressly so declaring, but by holding after expressly examining that question that the judiciary clause of the Constitution *did not apply* to the territory. If the Constitution had not been operative the inquiry as to whether the judiciary clause applied to the territory would have been entirely unnecessary.

Notwithstanding the fact that Mr. Justice Brown thinks "it is difficult to see how Congress could create courts in such territories, except under the judicial clause of the Constitution," that is precisely what the "great judge" held they could do. Instead then of holding that this territory was not a "part of the United States," the case proceeds altogether upon the theory that it was, and bound by the Constitution, but that the power exercised was not inconsistent with any of its provisions. This analysis disposes of the reflection which is made upon the court when Mr. Justice Brown says: —

"In delivering his opinion in this case Mr. Chief Justice Marshall made no reference whatever to the prior case of Loughborough *v.* Blake,[1] in which he had intimated that the territories were part of the United States."

"Intimated" is inadequate when characterizing an express declaration. He had no occasion to refer to that case, as in the opinion being rendered he had not even "intimated" either directly or indirectly the contrary. All of the territorial cases are based upon the Canter case, and they, therefore, have no more tendency to show that a territory is not "a part of the United States." As to this point they fall with it. My view of this case is not new, as Mr. Whipple contended for the legality of the court "to the same extent if the Constitution is, or if it is not, *per se* in force in Florida."

Cross *v.* Harrison.

It is submitted that Cross *v.* Harrison is inconsistent with and is virtually overruled by the judgment in the Downes case. It is

[1] 5 Wheat. 317.

the only "case from the foundation of the government" where "the revenue laws of the United States have been enforced in acquired territory without the action of the President or the consent of Congress, express or implied." After the ratification of the treaty ceding the territory of California, and before any act of Congress, the duties prescribed by the general tariff laws were collected in California, and the principal question was whether the proceeding was legal. The court sustained it, saying on the precise point in question: —

"But after the ratifications of the treaty, California became a part of the United States, or a ceded, conquered territory."

As to the precise time they are more specific: —

"*By the ratifications of the treaty*, California became *a part of the United States*. And as there is nothing differently stipulated in the treaty with respect to commerce, it became instantly bound and privileged by the laws which Congress had passed to raise a revenue from duties on imports and tonnage."

A fortiori, then, was it "bound and privileged" by the Constitution, the supreme law.

It was not only contended that California was not "a part of the United States," but that as no collection district had been established the duties were illegally imposed. The court answered these suggestions construing the provision of the Constitution now under consideration, saying: —

"The right claimed to land foreign goods within the United States at any place out of a collection district, if allowed, would be a violation of that provision of the Constitution which enjoins that all duties, imposts, and excises shall be uniform throughout the United States."

The case turned on this point, and the court felt that it had been demonstrated, as they said: —

"It having been shown that the *ratifications of the treaty* made California *a part of the United States*, and that as soon as it became so the territory became subject to the acts which were in force to regulate foreign commerce with the United States."

The court cited with approval a letter from Secretary Buchanan, containing this statement: —

"This government *de facto* will, of course, exercise no power inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles the growth, produce, or the manufacture of the United States, as no such duties can be imposed in any

other part of our Union on the productions of California, . . . for the obvious reason that California *is within the territory of the United States.*" . . .

This is the precise question involved here.

Bearing in mind that this was a unanimous opinion, these express declarations would seem to justify Mr. Justice White's cautious statement that the "opinion undoubtedly expressed the thought that *by the ratification of the treaty* . . . the territory had become a part of the United States," and would require some answer before a majority of one would be justified in rendering a judgment inconsistent therewith.

Mr. Justice Brown's method is to be commended for its ease. While he cites the case with approval in the De Lima case, in the Downes case he does not even refer to it. He simply ignores it. Mr. Justice White sees that this case is utterly inconsistent with his theory that a territory cannot become a part of the United States without "the express or implied assent of Congress," and makes an earnest effort to reconcile it.

He does not go so far as to assert that the fact that the treaty "accomplished the cession, **by changing the boundaries of the two countries,*" in other words, "**by bringing the acquired territory within the described boundaries of the United States,*" may have had some weight, but so intimates. It cannot be soberly contended that by the simple expedient of running a line by description around a territory, the treaty-making power can make that territory a part of the United States, when by describing the process as an annexation it would be beyond their constitutional power to thus incorporate it. By indirection they would be able to easily work direction out. Of such a principle it could be well said, "I am become as a sounding brass or a tinkling cymbal." To hold that in using such language there was any purpose, other than convenience of description, is to impeach the intelligence of those who were responsible for the treaty. His propositions are, —

First: "After the ratification of the treaty various laws were enacted by Congress, which in effect treated the territory as acquired by the United States, and the executive officers of the government, conceiving that these acts were an implied or express ratification of the provisions of the treaty by Congress, acted upon the assumption that the provisions of the treaty were thus made operative, and hence incorporation had become efficacious."

Second: Inasmuch as the law contained no intimation as to ratification, and the executive officers acted before they were

passed, another hypothesis was necessary. He says "that as the treaty provided for incorporation in express terms, and Congress had acted without *repudiating it*, its provisions should be at once enforced." This proposition, shorn of its rhetoric, is: First: Territory cannot be incorporated without the consent of Congress; second, the consent may be express or implied; and, third, it may be assumed if the treaty is not repudiated. Whatever else may be said of this, its convenient, flexible, and universal character must be conceded, as no state of facts can be conceived that would be inconsistent with its application. A proposition of this character is necessary to answer Cross *v.* Harrison.

After having stated that the treaty "included the ceded territory within the boundaries of the United States, but also expressly provided for incorporation," Mr. Justice White says: "The decision of the court . . . undoubtedly took the fact I have first stated into view." That is of course possible, but it is absolutely certain that the opinion does not contain a line or word that sustains the suggestion. While other treaties were discussed in the opinion and by counsel (the original briefs are not on file), there is not the slightest intimation that in this particular any distinction was made between the treaty under discussion and the other treaties. Its peculiarity as to "boundaries" and "incorporation," now so absolutely essential to a correct conclusion on the new theory, are not even mentioned, and the discussion was elaborate and exhaustive. Moreover, the treaty did not provide for immediate "incorporation in express terms," as is thought. Inasmuch as Mr. Justice White does not quote the article relating to incorporation, I give it here in connection with the similar clause in the treaties ceding Florida and Porto Rico, and in their order.

FLORIDA TREATY. Feb. 22, 1819.

ARTICLE VI.

"The inhabitants of the territories which His Catholic Majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States as soon as may be consistent with the principles of the federal Constitution, and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

TREATY WITH MEXICO. Feb. 2, 1848.

ARTICLE IX.

"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what

is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted, *at the proper time (to be judged of by the Congress of the United States)*, to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution, and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

TREATY OF PARIS. April 11, 1899.

ARTICLE IX.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

The Mexican treaty, it will be seen, does not attempt immediately *by the treaty* to incorporate the territory into the Union; it expressly remits that question to Congress. "Shall be incorporated into the Union of the United States and be admitted," — when? Now, at once? No. "*At the proper time.*" By whom? Who is to determine the time? ("To be judged of by the Congress of the United States") — "to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution" — "and in the mean time," that is, until "incorporated" by the Congress, "shall be maintained and protected," etc., clearly postponing citizenship. In what substantial respect does this differ from the like clause in the Treaty of Paris? In the Paris treaty, civil rights were to "be determined by the Congress." In the Mexican treaty they were to be "admitted to" those rights when Congress should so judge. Notwithstanding the express reference of those questions to Congress by the treaty, the court held that "*by the ratification of the treaty* California became *a part of the United States.*" No good reason has been shown why the same result did not follow from the same facts in the case of Porto Rico.

Charles E. Littlefield.

[*To be continued.*]