Downes v. Bidwell on unincorporated territories (1901)

Early in the 20th century, the Supreme Court handed down a series of rulings known as the "insular cases." ("Insular" means having to do with islands.) These cases ruled on the question: Did the Constitution apply to territories such as Puerto Rico and the Philippines, which the United States had acquired after the Spanish-American War of 1898?

The justices were divided, but the majority held that in order for the Constitution to fully apply, a territory must have been not only ***acquired by*** *the United States but also* ***incorporated into*** *the United States by act of Congress. That second step, incorporation, had not occurred—the Court held—with the Philippines, Puerto Rico, and other post-1898 acquisitions, and therefore the US government was not bound by the Constitution in ruling these territories. Certain basic rights applied in all US territories, incorporated or unincorporated. Religious freedom, the Court decided, was one of those basic rights; trial by jury was not. The legal doctrine that the Constitution does not fully apply in unincorporated territories continues, today, to govern the legal status of Puerto Ricans, US Virgin Islanders, Northern Mariana Islanders, Guamanians, and American Samoans.*

The quotations presented here come from different justices' opinions in Downes v. Bidwell, *a 1901 insular case involving taxes, in which the distinction between incorporated and unincorporated territories was expounded at length. The case was decided by a 5-4 split among the justices. Henry Brown and Edward White represent views within the 5-person majority; John Harland expresses a minority view.*

Eight of the nine justices who decided Downes v. Bidwell*—including Brown, White, and Harlan—had also been sitting on the Supreme Court five years earlier, when the Court handed down its now infamous pro-segregation ruling in* Plessy v. Ferguson. *Brown, who wrote the Court's official decision in* Downes v. Bidwell, *also wrote the official decision in* Plessy v. Ferguson. *White was part of the majority in both of those cases; Harlan dissented in both cases.*

CONSTITUTION DOES NOT APPLY

Henry Brown, lead opinion

Summary: *The Constitution applies in a territory only if Congress has said so. There is no danger of oppression in this, because Anglo-Saxons are inclined by nature to be just.*

[T]he power to acquire territory by treaty implies not only the power to govern such territory, but [also] 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 [thus] entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. [...]

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. [...] 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. [...] It is safe to say that if Congress would venture upon legislation manifestly dictated by selfish interests, it would receive quick rebuke at the hands of the people. [...]

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.

Edward White, concurring opinion

Summary: *The Constitution fully applies only if the United States has "incorporated" a territory, a step beyond mere acquisition. Uncivilized races are not ready for the burdens of citizenship.*

It may not be doubted that, by the general principles of the law of nations, every government which is sovereign within its sphere of action possesses, as an inherent attribute, the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that, as a general rule, wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the acquiring power [...]

Take a case of discovery. Citizens of the United States discover an unknown island, peopled with an uncivilized race, yet rich in soil and valuable to the United States for commercial and strategic reasons. Clearly, by the law of nations, the right to ratify such acquisition and thus to acquire the territory would pertain to the government of the United States. [...] Can it be denied that such right could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States and to subject them not only to local [taxes] but also to an equal proportion of national taxes, even although the consequence would be to entail ruin on the discovered territory and to inflict grave detriment on the United States, to arise both from the dislocation of its fiscal system and the immediate bestowal of citizenship on those absolutely unfit to receive it? [...]

[There are] various [past] acts of the government [in acquiring and administering territories] which to me are wholly inexplicable except upon the theory that it was admitted that the government of the United States had the power to acquire and hold territory without immediately incorporating it. [...] The result of what has been said is that while, in an international sense, Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States but was merely appurtenant thereto as a possession. As a necessary consequence, [...] the provision of the Constitution [at issue in this case] was not applicable to Congress in legislating for Porto Rico.

John Harlan, dissenting opinion

Summary: *The Constitution fully applies in all territories that the United States acquires. To hold otherwise is colonialism, which betrays the Founders' intent for the nation.*

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. [...]

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. [...]

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.

Source: *Downes v. Bidwell*, 182 U.S. 244 (1901), https://www.loc.gov/item/usrep182244/. Quotations taken from pages 279-280, 283, 286-287 (Brown); 306, 336, 341-342 (White); 380, 386, 391 (Harlan).

Excerpts edited and summarized by John-Charles Duffy. Punctuation emended for readability. The spelling *Porto Rico* reproduces the usage of the source publication. The words *empire*, *government*, and *people*, capitalized in the source, have been converted here to lowercase for the sake of modernization. Italics have been retained from the source publication when used there for emphasis, but have been omitted in the case of a Latin word now commonplace in English usage (*status*).

These edited excerpts from *Downes v. Bidwell* are intended for ***teaching*** purposes only. For ***research*** purposes, you should consult, quote, and cite the source publication listed above.