

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

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

The Foraker Act (1900)

All branches of the United States at the turn of the twentieth century determined that Congress did not have to extend the provisions of the Bill of Rights to the territories acquired after the Spanish-American War. The Supreme Court reached that conclusion in the Insular Cases (1901–1923). Congress reached that conclusion when passing the Foraker Act, the bill that provided a government for Puerto Rico. In addition to establishing a governor, executive council, a legislature and a court system, the Foraker Act declared that all federal laws applied to Puerto Rico and that, as a matter of statutory grace, Puerto Ricans should be granted American citizenship.

*The excerpt below is from a committee report on the Foraker Act. What reasons did the committee give for refusing to extend the Bill of Rights to the territories? Are these reasons similar or different to the reasons given by the justices in *Downes v. Bidwell* (1901). Why did Congress nevertheless believe that Puerto Ricans should be citizens of the United States? What rights did Congress believe were entailed by American citizenship?*

“Temporary Civil Government for Porto Rico”¹

...
The questions that gave the committee the most concern were, first, as to whether or not the Constitution should be extended to Porto Rico. ...

With respect to the first of these questions, an examination of the various acts of Congress establishing Territorial governments, commencing with the act of April 7, 1798, establishing a Territorial government for Mississippi, shows that Congress did not extend the Constitution of the United States to the Territories in any case prior to the act of September 9, 1850, by which, a Territorial government was established for New Mexico.

[the report then reviewed legislation establishing territorial governments]

Attention is called in detail to this legislation to show that there is abundant precedent for not extending the provisions of the Constitution to territory of the United States for which Congress may be called upon to legislate. That it is within the constitutional power of Congress to either extend or withhold the Constitution in all such cases, as it may deem advisable, will appear from the authorities hereinafter cited in support of the proposition that Congress has constitutional power to legislate according to the provisions of this bill with respect to import duties, to which provisions attention is now called.

...
The committee recognize that in not extending the Constitution and making it apply to Porto Rico, and especially by the provisions they report in this bill with respect to tariff duties, they raise important questions as to the constitutional power of Congress to enact such legislation. Notwithstanding all that has been said to the contrary, a majority of the committee are of the opinion that Congress has such power. It is not thought necessary to do more in this report than simply indicate the grounds upon which they hold that opinion.

¹ Senate Committee on Pacific Islands and Porto Rico, *Temporary Civil Government for Porto Rico*, 56th Cong., 1st Sess. (1900), Sen. Rep. 249.

Speaking for the majority of the committee, it is no longer open to question that the United States has complete sovereign power to acquire territory; that it is the political equal in that respect of any other Government.

It may acquire territory by discovery, by conquest, or by treaty. If it acquire territory in any of these ways, it follows as a necessary consequence that it has a right to govern such territory and the inhabitants thereof; and also it follows that the government so to be established by it must be such as meets the requirements of the case. If we should acquire territory populated by an intelligent, capable, and law-abiding people, to whom the right of self-government could be safely conceded, we might at once, with propriety and certainly within the scope of our constitutional power, incorporate that territory and people into the Union as an integral part of our territory, and, by making them a State, as a constituent part of the United States, and extend to them at once the Constitution and laws of the United States; but if the territory should be inhabited by a people of wholly different character, illiterate, and unacquainted with our institutions, and incapable of exercising the rights and privileges guaranteed by the Constitution to the States of the Union, it would be competent for Congress to withhold from such people the operation of the Constitution and the laws of the United States, and, continuing to hold the territory as a mere possession of the United States, so govern the people thereof as their situation and the necessities of their case might seem to require.

In other words, the Constitution and laws of the United States do not, *ex proprio vigore*, extend to territory acquired by the United States, but only by Congressional action. And so long as Congress may see fit to withhold the operation of the Constitution from a Territory it is not bound in legislating for the Territory except by its positive prohibitions.

...
It will be observed that the power to acquire territory is not an express power of the Constitution, but is simply an inherent power of sovereignty necessarily implied from and incident to the power to make discoveries (about which nothing is said in the Constitution), and the power to make treaties, and make war, with respect to which transactions the Constitution does not confer any power, but simply designates the agencies by which the inherent powers shall be exercised. . . .

...
From these authorities, and many more that might be cited, it is clear that Territories are not created, organized, or supervised under the Constitution as a constitutional right, but that they are on the contrary created, organized, and supervised by Congress by virtue of both the inherent and constitutional power with which Congress, as the political department of the Government, is vested, to rule and regulate the Territories of the United States; and the rights, powers, privileges, and immunities granted to the inhabitants of the Territories, whatever they may be, are all given by Congress and do not flow from the Constitution beyond what Congress may declare. In other words, the provisions of the Constitution do not operate beyond the States, unless Congress shall so enact. There is no guaranty in the Constitution that a Territory shall even have a republican form of government, or that the civil and political status of the inhabitants of a Territory shall be of any particular character.

But while this power of Congress to legislate for newly acquired territory does not flow from, and is not controlled by, the Constitution as an organic law of the Territory, except when Congress so enacts, yet as to all prohibitions of the Constitution laid upon Congress while legislating they operate for the benefit of all for whom Congress may legislate, no matter where they may be situated, and without regard to whether or not the provisions of the Constitution have been extended to them; but this is so because the Congress, in all that it does, is subject to and governed by those restraints and prohibitions. As, for instance, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; no title of nobility shall be granted; no bill of attainder or ex post facto law shall be passed; neither shall the validity of contracts be impaired, nor shall property be taken without due process of law; nor shall the freedom of speech or of the press be abridged; nor shall slavery exist in any place subject to the jurisdiction of the United States.

These limitations are placed upon the exercise of the legislative power without regard to the place or the people for whom the legislation in a given case may be intended; and for this reason they inure to the benefit of all for whom Congress may undertake to legislate, without regard to whether the

provisions of the Constitution, as such, have been expressly extended to them. It is not, therefore, a denial of any of these personal privileges, immunities, and guaranties to withhold their extension and application of the Constitution of the United States. Their enjoyment does not depend on such action. Congress can not deny them.

...

The committee have seen fit, by the provisions of this bill, to make [residents of Puerto Rico] citizens of the United States, not because of any supposed constitutional compulsion, but solely because, in the opinion of the committee, having due regard to the best interests of all concerned, it is deemed wise and safe to make such a provision.

The effect of conferring citizenship on the inhabitants of Porto Rico is well stated by Judge [Thomas] Cooley. . . .

These things are beyond question among the privileges and immunities of citizens of the States: To be protected in life and liberty by the law; to acquire, possess, and enjoy property, to contract and be contracted with under general laws; to be exempt from inequality in the burdens of government; to establish family relations under the regulation of law; to choose from those which are lawful the occupation of life; to institute and maintain actions of every kind in the courts; and to make defense against unlawful violence.

Surely the inhabitants of Porto Rico should have all these rights.

...

It was necessary to give to these people some definite status. They must be either citizens, aliens, or subjects. We have no subjects, and should not make aliens of our own. It followed that they should be made citizens, as the bill provides.

If, for any reason, the committee had thought it wise or unsafe, they might have withheld that quality, and as it is within our discretion to make the inhabitants of Porto Rico citizens of the United States or not, so it is within the power and discretion of the Congress to make the inhabitants of the Philippines and other islands we may acquire citizens or withhold that quality from them. . . .

...

OXFORD
UNIVERSITY PRESS