

University of Nevada, Reno

America, The Last Colonial Power?

The Discomforting Legacy of Downes Versus Bidwell

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by

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Abstract

Delivered in 1901, the Supreme Court Decision in *Downes V. Bidwell* established the policy that dictates the relationship of the United States offshore territories vis a vis the United States federal government. A central tenet of the decision was the designation of the offshore territories of Puerto Rico, Guam, the Virgin Islands and the CNMI as unincorporated territories. The result has been a situation where the political status of the people of the territories has been held in has become perpetuity since 1901.

The court's decision was preceded by academic debates that were published in the *Harvard Law review* between 1898 and 1899. The debates presented competing views of American government and the role of the Constitution in limiting the reach of congressional rule beyond the states of the union. Furthermore, the debates previewed much of the theory and rationale that would come into play in *Downes V. Bidwell*

This research seeks to examine the competing opinions of both the academic debates and the ruling and dissenting opinions of *Downes V. Bidwell*. An analysis based on the political thought of the American founding finds that the decision to exercise power without constitutional restraints has created an embarrassing situation where America is now a long-standing colonial power. Indeed, America's promise of social compact has not reached the people of the offshore territories.

The United States of America was founded on a claim to justice. The Declaration of Independence remains the most succinct statement of the principles that the United States is dedicated to. The Constitution serves to secure those principles through institutional measures. That America as a nation has not always lived up to its principles is well known to most Americans. Slavery and segregation stand amongst the most notorious failures of the American regime to adhere to its own principles. Both Abraham Lincoln and Martin Luther King successfully challenged the country to bring its political practice and treatment of citizens in line with the principles of the Declaration, and of constitutional government.¹

Hence, it is regrettable that today, most Americans are unaware of one of the country's most blatant violations of its own animating principles. The undefined political status of the offshore territories may very well represent the final hurdle towards bringing all American under the rightful rule and protection of the Constitution. The offshore territories of Puerto Rico, Guam, the American Virgin Islands, and the Commonwealth of the Northern Mariana Islands, are all inhabited by people holding the title of American

¹ See for example, Lincoln's Gettysburg Address and Martin Luther King's "I have a dream" speech. Both essentially argue that constitutional justice is derivative of the principles of government stated in the Declaration of Independence.

citizen. Unfortunately, the title of American citizen has not given America's territorial inhabitants the rights and responsibilities that are the promise of the American founding.

Understanding the political status of the territories and its inhabitants requires an approach that encompasses the study of American history, American jurisprudence, and political philosophy. The history of America's acquisition of the territories is not familiar to many Americans. An overview of American territorial expansion and offshore territorial acquisition will therefore be necessary. However, the current legal and political status of the territories can best be understood through an examination of the central legal-political questions that led up to and were tenuously settled in a series of Supreme Court decisions known as the insular cases. One insular case in particular, *Downes v. Bidwell*, addressed the issue of America's dedication to the cause of human equality. Although the insular cases have rarely been looked at by the Court for precedence and statutory purpose, the ruling opinions still dictate current offshore policy. Furthermore, and central to this research, the insular cases were preceded by academic debates over the relationship between the United States federal government and the offshore territories. Focusing this research on the relevant academic debates and court decisions will help demonstrate the relationship between theory and practice as current offshore policy has had a very real impact on the people of the territories. Finally, cutting through the problematic nature of the legal theory and jurisprudence in question requires the discipline of political philosophy. The classics defined political philosophy as the attempt to move from opinion of the political to knowledge of the political. As applied to this work, the central political philosophical question is "what is the proper relationship

between the United States and its citizens?” The classical philosophers termed this relationship as that between the city and man.²

It is important to note that both the academic debates and the Supreme Court decisions offered competing opinions on what American offshore territorial policy should be. (All of the insular cases were decided by 5 to 4 margins.) It goes almost without saying that one opinion moved from the realm of “should be” to the actual “is” or practice. That the United States acquired offshore territories over one hundred years ago and failed to constitutionally settle the political status of the territories was not a historical inevitability. There were alternative courses of action to choose from. Each alternative was driven by competing views not only of the Constitution but also on the meaning and purpose of the American nation itself.

Examining both the winning/ruling opinions and the losing /dissenting opinions will make clear what alternatives the federal government was faced with. Briefly stated here, the United States faced two alternatives: First, they could have followed the principles of the Declaration of Independence and limited Constitutional government by recognizing that the right to government by consent applied to offshore inhabitants. Instead, the United States government moved forward with exercising arbitrary power, just as past imperial powers had up to that point in history. Following an examination and analysis of the academic debates and the opinions in *Downes V. Bidwell*, a

² See Leo Strauss, *The City and Man* (Chicago: The University of Chicago Press, 1964)

concurrent goal of this research will be to demonstrate that the legal scholars and Supreme Court justices on the opposing sides of the debate relied either on some understanding of enlightenment based social compact theory or a historical understanding that emerged in the nineteenth century.

In actual political practice the first alternative would have entailed either incorporating offshore territory into full equal status via statehood such as what was done with Hawaii, or granting the offshore territories independence such as in the case of the Philippines. Either option would have recognized the natural human equality of the territorial inhabitants. Furthermore, as the cases of Hawaii and the Philippines demonstrate, statehood and independence both settle the problem of political status.

Each option (statehood or independence) under the first alternative would have been congruent with the principles of limited constitutional government. Instead, the second alternative was exercised. The United States acquired the territories and decided that there was no compelling reason to help settle the political status of the territories and their inhabitants. What ultimately proved compelling was exercising the power to have and hold property for no express purpose.

As a result, the United States now stands as the world's most expansive colonial power. How has it happened that the first Nation founded upon and dedicated to the principles of liberty and equality now holds the political status of more than a million people in perpetuity? What follows is an attempt to answer this question.

Expansion of the American Republic

Following the ratification of the Constitution, the United States was composed of thirteen states with the understanding that there would be westward expansion into territory that was already annexed to the United States by the Continental Congress. The Northwest Ordinance of 1787 was the legal document that dictated the means by which the annexed territory was to be governed. Attorney and legal scholar Arnold Leibowitz has aptly categorized the states of territorial evolution envisioned by the Northwest Ordinance: “(1) total governmental authority in an appointed Governors; (2) continuance of an appointed governor but with an elected legislature and local courts and (3) Statehood.”³

This is important to bear in mind because whatever criticisms might be levied against the manner that particular continental territories were brought into the union, the achievement of statehood provides constitutional clarity for American citizens living in those States. Furthermore, the aforementioned evolutionary process respected a people’s ability to adapt and progress towards the republican form of government called for by the constitution. The following point by Leibowitz contrasts the experience of the offshore territories from the continental experience. “Only in the offshore areas...was this (evolutionary) practice to change; with all of them enduring the first stage for more than eight years and, in the case of Guam for example, staying in the first stage for almost 40

³ Arnold Leibowitz , *Defining Status: A comprehensive Analysis of United States Territorial Relations* (Dordrecht Netherlands Martinus Nijhoff Publishers 1989), 6

years”⁴ This leads to the historical question of how the United States grew beyond the continent.

The Spanish American war and its subsequent end in 1898 left the American Republic literally, in uncharted waters. Ceded to the United States by Spain as concessions of war through the Treaty of Paris were Cuba, Puerto Rico, the Philippines, Saipan, and Guam. Cuba and the Philippines, were to eventually regain independence. The remaining territories however, have all remained under the ultimate dominion of the United States.

Of course, living under American rule is not in and of itself a problem. In fact, many people see it as a blessing and countless numbers have sought and continue to seek American citizenship. The problem for territorial inhabitants is that the political and civil rights that are the reasons for so many people having immigrated to America are the exact things they are denied. The Treaty of Paris dictated the terms of the peace and concessions from Spain to America following the war. The treaty stated that the “civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be seen to be determined by the Congress.”⁵ Now that over 100 years has passed since the territories were annexed to the United States, what can we say about the current civil rights and political status of the territorial inhabitants?

⁴ Ibid 7

⁵ Treaty of Paris

The people of the offshore territories exercise neither the rights nor the responsibilities of American citizenship. They exercise no effective formal vote for the representation in the federal government. Offshore territorial inhabitants cannot cast a vote for the presidency. They possess no formal representation in congress, but instead are given token representation. Each territory sends a **non-voting** representative (locally elected) to Congress. For example, if Congress were to commence session on the question of whether the country should make a declaration of war, a representative of a territory can express his constituents' opinion on whether or not they support the declaration of war. The representative cannot, however, register an official vote on the measure.

As rights are concurrent with responsibility, the people of the territories accordingly do not exercise the basic responsibility of paying federal taxes. This can be a source of some confusion and there are differences between each territory as to how the United States tax code is applied. But what remains standard is that whatever individual residents of the territories pay in taxes remains in the local treasury. Put another way, any income tax paid by individual residents of the territories does not flow out to the federal treasury. This however does not affect the existence of federally funded programs in the territories, nor individual resident's eligibility for federally funded programs or entitlements. So federal benefits might be considered free. What apparently doesn't come free is political representation. Whereas the famous cry of the revolutionary Americans was, "no taxation without representation." The people of the territories have effectively been told by the United States federal government that since it has not been

deemed fit for them to exercise the right of representation in Congress, they shall be absolved of the responsibility of paying federal taxes.⁶

American citizens today may look at their right to vote for public servants in local, state, and federal elections as the fulfillment of their right to government by consent. However, from the point of view of enlightenment based social compact theory, particularly that of English philosopher John Locke, there requires an initial act of consenting to be governed that precedes participation in the ongoing democratic process. In the case of the United States, the Declaration of Independence quite literally declares the right to “government by the consent of the governed.”⁷ The Constitution stands as the successful attempt to secure that right. However, America’s territorial inhabitants cannot strictly speaking, trace in their various histories a point at which they as a people consented to be governed by the United States.

Taking the case of Guam for example, citizenship was conferred upon the people of the island through the organic act of 1950. The organic act was an act of Congress. Similarly, Puerto Ricans received their American citizenship, and their local republican form of government through the Jones act of 1917. In neither case, did the people of the islands ever formally declare their independence from a greater sovereign or consent to

⁶ On a practical level Leibowitz work in *Defining Status* remains the best repository of how tax policy developed in the various territories.

⁷ See John Locke *Second Treatise on Government and The Declaration of Independence*

be governed by the United States congress. Whereas Abraham Lincoln stated so eloquently at Gettysburg that the Civil war was fought to save government that is of by and for the people. The people of the territories effectively live under government of and by the United States Congress.⁸ It is difficult to square such federally conferred citizenship with the Lockean understanding of political society that influenced the American founders. One might make the argument that it has more in common with the relationship between a monarch and his subjects under the old common law. For example, political scientist Edward Erler put forth the following argument: “Under the common law, there were no citizens, only subjects, who owed allegiance by accident of birth. The Declaration of Independence was a revolution: it transformed subjects into citizens based on consent, not the accident of birth.”⁹ Erler directs readers to the following explanation of a subject’s allegiance to the crown provided by William Blackstone:

Natural allegiance is such as is due from all men born within the king’s dominions immediately upon their birth, for, immediately upon their birth, they are under the king’s protection...Natural allegiance is therefore a debt

⁸ Arnold Leibowitz provides the history of the conferring of U.S. citizenship to the people of the territories.

⁹ Edward Erler, *The United States in Crisis: Citizenship, Immigration, and the Nation State* (Claremont, Ca: The Claremont Institute) 40

of gratitude, which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by anything...¹⁰

This research will help answer the question of whether citizenship for the people of the territories created a “debt of gratitude” or was a matter of choice and consent.

The Declaration and the Constitution

In order to gain an understanding of the incongruence between offshore territorial policy and the principles of American government, it is necessary here to look even more closely at the Declaration of Independence and its relationship to the Constitution. The Declaration states that “all men are created equal” and that they are endowed with certain unalienable rights (life, liberty, and the pursuit of happiness) The Declaration goes on to state that these rights are secured by government that is instituted by men, “deriving their just powers from the consent of the governed.” The Constitution is the successful institution of a form of American government that derives its just powers from the consent of the governed. Hence, one can look at the relationship between the Declaration and the Constitution as a form of symbiosis. The Declaration provides the rational for social compact theory and the Constitution gives institutional form to a government that can secure the “unalienable rights” of a people through the exercise of a social compact. As Aristotle stated in his Politics, “...every partnership is constituted for the sake of some

¹⁰ William Blackstone, Commentaries on the Laws of England (Oxford: Clarendon Press, 1765 -69; reprint)

good.”¹¹ The good for which the Constitution was ratified is stated in the Declaration and further elaborated on in the Preamble. It follows that the American Constitutional project can be considered a success according to the degree to which it helps prove true, the propositions of natural liberty and equality asserted by the Declaration.

Although the above relationship is disputed in the fields of political and constitutional theory, the research put forward here is guided by a presumption of a logical and necessary connection between the Declaration and the Constitution. Although a full examination of the dispute lies outside the scope of this research, the fundamental standing of the declaration and the manner in which it informs American constitutionalism serves as a foundation this research, and therefore requires further explanation.

To begin, the Declaration of Independence is an organic law of the United States. Edward Erler has put forth the following explanation:

The Declaration of Independence is listed in Title I of the United States Statutes at Large as the first of the “Organic Laws of the United States.” The other three organic laws in Title I are the Articles of Confederation, the Northwest Ordinance, and the Constitution. The phrase “organic law”

¹¹ Aristotle, *The Politics*, trans. Carnes Lord (Chicago: University of Chicago Press, 1984), 35

was not commonly used during the founding, but the founders were clear about the relation of the Declaration to the Constitution.¹²

We can also find further support the relationship between the Declaration and the Constitution from James Madison in the 43rd Federalist Paper. In advocating for constitutional ratification, Madison was forced to pose the following question: “On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it?” To clarify, “the parties” referred to states or their representatives. Madison’s answer shot straight to the heart of the matter:

The first question is answered at once by recurring to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature and of nature’s God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.¹³

Erler has provided the following clarification of how Americans of the founding era would have understood Madison’s statement: “Everyone of course would have recognized this passage as a paraphrase of the Declaration of Independence. Madison

¹² Edward Erler, *Property and The Pursuit of Happiness: Locke, The Declaration of Independence, Madison and the Challenge of the Administrative State* (Lanham: Rowman and Littlefield 2019) 1

¹³ Hamilton, Madison, Jay, *The Federalist Papers* (Signet ed 1961)

aptly noted that the Declaration posits the ‘safety and happiness of society’ as the end and purpose of government.”¹⁴

To what degree the Congressionally conferred governments of the territories are for and by the people of the territories is an open question. More poignantly, do the principles of limited constitutional government and human equality bear any applicability to the situation of the territorial inhabitants? To try and gain insight into a possible answer it will be helpful to look at the theory underlying offshore territorial governance. There are two key sources that need to be examined. One is academic, and the other is legal. As the academic debates preceded the legal fiat of the Supreme Court decisions, so shall the examination of the sources start with the academic debates.

The Law of Nations vs. Constitutional Limits: The Academic Debate Over Offshore Territorial Policy

As the issue of the territories was hashed out in legal academia the overriding theme became the difference between those who believed the United States should conduct its territorial policy as other imperial powers had and those who believed that the Constitution placed limits on what the United States could do. This theme carried on through to the insular cases. It may seem an oversimplification of the case to say that one side simply wanted to ignore the Constitution. It would be easy to assume that American

¹⁴ Erler 5

constitutional scholars and Supreme Court justices would at the very least look to the Constitution as a guide for American foreign policy. However, at the end of the 19th century, the United States finally started to establish itself as a global political power. The previous global powers, France, Great Britain, and Spain, all made the practice of an exponentially expansive imperialism the hallmark of their power. The glory of the Ancient Roman Empire remained the model for the powers that be.

The American constitutional principles of limited government and government by consent of the governed stood in opposition to the tradition of imperial expansionism. In fact, the existence of the United States is the result of a revolt against an empire. Therefore, when the prospect of true imperial power loomed as a possibility for the United States, bringing that prospect into fruition required some sort of rationalization for setting aside the Constitution's anti imperial principles. What is striking is that while the defense of limited constitutional government is fairly consistent in its logic and reasoning, the proponents of American imperialism give varying reasons for American offshore expansion. But there are two consistent themes in the quest for American offshore expansion. One is the simple desire for conquest and greater power. Second as this research will demonstrate, is an emergent historical understanding of politics. As will further be explained, this historical strain helped justify theories of racial superiority that supported colonialism. The following examination of four Harvard Law Review articles on the topic of the offshore territories will help clarify the preceding analysis.

The four articles were written between 1898 through 1899. Each article argued either for or against unlimited congressional control respectively. In the first article,

Carman Randolph made the case for limits on congressional power as a form of American exceptionalism. Following him, Charles Langdell argued for essentially unlimited congressional control over the offshore territories. Then, Simeon Baldwin presented serious concern over granting congress an unprecedented level of authority over the people of the territories. Finally, James Bradley Thayer made no apologies in arguing that the right to acquire territory is incidental to the power of national sovereignty.

In “**Constitutional Aspects of Annexation**” Carman Randolph opens up by stating the difference between traditional European powers and the United States. This in many ways encapsulates the problem the United States was faced with and is hence worth quoting at length:

Whether a European power shall indulge the appetite for land is a question merely of ability and expediency. An Englishman, a Frenchman, a Russian, or a German would not presume to discuss the right of his government to seize land anywhere, hold it by any tenure, and rule it at will. For these governments however unlike in structure and purpose, enjoy alike sovereignty in its elementary form. What the government wills, that it may do without considering the act or its consequences in the light of an organic law of binding obligation. The Federal Government is in a different position. Its powers are conferred, and duties and restraints

are imposed upon it, by a written constitution interpreted by an independent Judiciary.¹⁵

The first part of Randolph's article then focuses on the history of territorial expansion on the North American continent. This early growth of the American Union is important because it demonstrates that there are constitutional principles that help govern territorial acquisition. More poignantly, it shows that whatever power Congress rightfully exercised over **land** that was construed as United States property, it could not exercise similar arbitrary power over the **people** that inhabited that territory. Randolph refers to judicial opinions from the country's formative years to show that the constitutional limits on congressional authority were not meant to be limited solely to congressional actions affecting states. Randolph cites Justice John Marshall as follows: "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 is not less within the United States than Maryland or Pennsylvania," Marshall further added, "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.

Randolph even cites justice Taney from the notorious Dred Scott case:

No one, we presume, will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise

¹⁵ Carman Randolph, "Constitutional Aspects of Annexation" Harvard Law Review 7, no. 5 (1898) 291

thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petitioning the Government for the redress of grievances. Nor can congress deny to the people there right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in criminal proceeding.¹⁶

Taney's ultimate decision in the Dred Scott case may be infamous but, Randolph points out that even in dissent, Justice Curtis agreed with Taney on the proper limits to constitutional authority in the territories. In reference to congressional authority over the territories Justice Curtis said, "in common with all the other legislative powers, it finds limits in the express prohibitions contained in the Constitution."¹⁷ Randolph sums up the meaning of the preceding judicial citations as follows: "the general and unqualified prohibitions imposed upon congress are absolute denials of power without regard to place." So far, all that has been cited only referred expressly to the continental territories.

The second part of Randolph's article focuses specifically on offshore territory that at the time was coming under United States control, specifically the Philippine islands. The issue that Randolph's analysis really brings to the forefront is the relationship between the natural rights principles of the American founding and the rule

¹⁶ Dred Scott V. Stanford, 60 U.S.393 (1856)

¹⁷ Ibid

of law. As noted earlier, there is some dispute about the place of natural rights in the rule of law. However, even if rights are viewed as simply conventional, most modern political scientists and legal scholars would agree that such rights require the rule of law for their protection. The acquisition of offshore territories brought life to a school of thought or argument that the rights of territorial inhabitants could be protected by human mercy and kindness as opposed to constitutional restraints on the power of congress. Randolph addresses the human mercy school of thought because this type of thinking permeated almost all arguments for the acquisition of offshore territories.

The rationale for this thinking started from the recognition on both sides that statehood was not a likely eventuality for any of the offshore territories. (This is now disputable, as Hawaii and Alaska, which were territories at the time, are now states.) Further, both sides also recognized that statehood is the political status that clarifies the constitutional relationship between citizens and the Congress. The annexation of offshore territory with no intention of eventual statehood would leave the territorial inhabitants with no clearly expressed constitutional relationship between citizens and Congress. Those who supported annexation for annexation's sake could only point to a faith in American benevolence as a guarantor of territorial inhabitant's rights. Randolph spoke to the fallaciousness of this thinking:

The disclaimer of any intention of carving new States out of the Philippines, whatever it may be worth, is not sufficient to render annexation palatable. It is supplemented by the announcement that the Constitution covers the States only, and that the Philippines can be ruled

with a free hand. A readiness to rule the Philippines arbitrarily is an unseemly feature of the annexation program, not mitigated by the promise that justice and mercy will temper force. It will be recalled that a strong objection to the original Constitution was the lack of a Bill of Rights, and that the omission was rectified by the adoption of the first ten amendments. Can it be said that these amendments are superfluous or that the barriers we built for self-protection are not needed for the protection of Asiatics? ¹⁸

Randolph's article brought clarity to the point that the United States' whole system of constitutional government is meaningless if any branch of government (Congress, in this case) is given authority to exercise power outside of constitutional confines. In his own words, "The Constitution is not at all the disposition of Congress. It is superior to Congress."

Indeed, Randolph's argument in his article makes certain key points. First territorial expansion on the United States continent always followed the principle of annexing territory for the purpose of eventually allowing that territory to be entered by congress as states of the Union in accordance with the Constitution. During the period of territorial status, the civil rights of the territorial inhabitants were recognized as constitutionally inviolable.

¹⁸ Randolph 305 - 306

Second, by ruling over a people while failing to apply the letter of the Constitution to its actions, Congress is not following the rule of law. Despite any intention to exercise that rule with mercy and prudence, that rule is strictly speaking the rule of will, which is the very definition of tyranny. Randolph however, did understand that certain circumstances could require that the United States exercise a certain degree of extra constitutional power over people and territory outside or even inside the United States. Such circumstances however, called for executive not legislative prerogative. Randolph was quite specific: “There is but one constitutional power that affords an excuse for discussing the question, and that is the power exerted in declaring war, which gives the President a roving commission to invade and hold enemy country.”¹⁹ The executive right to control enemy territory is a necessary part of the president’s responsibility as commander in chief. The territories however, were not following the Spanish American war, enemy territory. They were concessions of war.

Following Randolph’s article was one written by Christopher C. Langdell entitled **The Status of Our new Territories**. Langdell’s article provides a good example of the type of mesmerizing rationalization that obfuscates the simple desire to allow the arbitrary exercise of sovereign power. Langdell interestingly, is credited as the father of modern law school education. As a law professor and dean of Harvard Law school, he instituted and popularized the case law and “Socratic” method of instruction.

¹⁹ Ibid

Langdell commenced his article with an analysis of what he deemed to be the various meanings of the United States. He came up with three different meanings of the United States. According to him, only two of those meanings were recognized by the Constitution. His meanings are defined as follows: 1) “It is the collective name of the States which are united together by and under the Constitution, and subsequently to the Declaration of Independence, it was the collective name of the thirteen States which made that Declaration, and which, from the time of the adoption of the Articles of confederation to that of the adoption of the Constitution, were united together by and under the former.” 2) “Since the adoption of the Constitution, the term ‘United States’ has been the name of a sovereign, and that sovereign occupies a position analogous to that of the personal sovereigns of most European Countries.” 3) “Since the treaty with England of September 3, 1783, the term ‘United States’ has often been used to designate all territory over which that sovereignty of the United States extended.”²⁰

Langdell concluded that only the first and second meanings were “known to the Constitution.” He argued that referring to territory as part of the United States was simply a convention derived from an international political respect for sovereignty. What is really telling in Langdell’s analysis is his emphasis on the importance of sovereignty. To him sovereignty was tantamount to power, and as other nations had exercised

²⁰ Charles C. Langdell “The Status of Our New Territories” Harvard Law Review 12 no. 6 (1899) 366 - 368

sovereignty over territory so should the United States. In reference to his third meaning he stated:

It is very important, however, to understand that the use of the term 'United States' to designate all territory over which the United States is sovereign, is, like the similar use of the word "empire" in England and other European countries, purely conventional; and that it has therefore, no legal or constitutional significance. Indeed, this use of the term has no connection whatever, with the Constitution of the United States...The conclusion, therefore, is that, while the term 'United States' has three meanings, only the first and second of these are known to the Constitution; and that is equivalent to saying that the constitution of the United States as such does not extend beyond the limits of the States which are united by and under it.²¹

The sleight of hand in Langdell's argument is that he advocates Congressional rule over the territories yet insists through his definitions and logic that territorial possessions are constitutionally no part of the United States. The question he forces one to ask is what right does the United States have to hold sovereignty over a people and their property, who are constitutionally speaking, no part of the United States? Langdell however reveals a component of the concern over recognizing the basic civil rights of the

²¹ Ibid 371

territorial inhabitants. Although the rationale for annexing territory without regard for constitutional strictures was obfuscated by feigned concern with legal constitutional questions, the real issue was power. Alas, the concept of power has no meaning without an inferior or subordinate over which to exercise that power. The people of the territories were seen as inferior races, if not explicitly stated as being so by nature, at least culturally. Langdell went to great lengths to explain that the bill of rights was meant to place limitations upon the federal government's potential to encroach upon state's powers and therefore, inapplicable to the territories. In reference to the tenth amendment Langdell argued:

...the 10th Amendment provides that the powers not delegated to the United States...nor prohibited to the States are reserved to the States respectively or to the people (i.e., the people of the respective States); and there could not well be a stronger proof that the sole object of the first ten amendments was to limit the power of the United States in and over the several States.²²

This is a fair argument within the realm of legal analysis and the concept of federalism. Langdell however, did not leave his analysis strictly in that realm. He broached the issue of equality under the law and law's applicability to different people. He added:

²² Ibid 385 -386

Nor should the fact be lost sight of that these ten amendments as a whole are so peculiarly and so exclusively English that an immediate and compulsory application of them to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races, as our bitterest enemies could desire.²³

The type of reasoning showcased above probably grates against modern sensibilities, but the real problem is that it mischaracterizes the bill of rights. The bill of rights may well be a unique development of the British political tradition; however, the uniqueness of the American political tradition comes from the recognition of the universal character of certain unalienable rights. Asserting the Englishness of the bill of rights requires that one either ignores the very text of the Declaration of Independence or asserts explicitly or implicitly that there is no relationship between the rights held to be self-evident in the Declaration and those etched out in the bill of rights. Another rational would be to say that the authors and signers of the Declaration were not honest in stating that “all men are created equally.”

Furthermore, as Carman Randolph pointed out in the previous article the protections of the Bill of Rights was necessary for the “self-protection” of white men from the encroachment of their rights by a potentially despotic government. As

²³ Ibid386

Randolph further reasoned, why wouldn't "Asiatics" be in need of the same protection? Unfortunately, Langdell's racially based rationale for limiting rights was not merely academic theorizing. As will later be shown, his type of rationale found its way to the U.S. Supreme Court.

The next article addressing the offshore territories was written by Simeon Baldwin and was entitled, "**The constitutional questions incident to the Acquisition and Government By The United States of Island Territory.**" Baldwin distinguishes between the acquisition and keeping of territory. He posed the question, "If we should be unable or unwilling to hold them permanently as a colonial dependence, how could we get rid of such possessions?"²⁴ Baldwin's analysis showed no enthusiasm for colonization, and he demonstrated the skepticism (commonly held at the time) of the cultural fitness of the territorial inhabitants for life under constitutional government.

To give the half-civilized Moros of the Philippines or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from sharp and sudden justice or injustice ... would of course, be a serious obstacle to the maintenance there of an efficient government.²⁵

²⁴ Simeon Baldwin, "The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory" *Harvard Law Review* 12 no.6 (1899) 410

²⁵ *Ibid* 415

However, Baldwin's recognition of constitutional limitations upon congress allowed him to move past any ideas that the territorial inhabitants should be ruled as subjects, if even for their own supposed good. Baldwin recognized that there is a distinction between what can be accomplished by political will and what can be deemed constitutional. Baldwin harkened back to the constitutional convention. He recognized that one of the most important questions dealt with at the convention was the status of the western lands acquired by the Continental Congress. In the federalist papers, James Madison addressed the issue of the newly acquired western lands. His position on the matter can be applied to the offshore territories. He stated:

We may calculate, therefore, that a rich and fertile county, of an area equal to the inhabited extent of the United States, will soon become a national stock. Congress having assumed the administration of this stock, they have begun to render it productive. Congress have undertaken to do more: they have proceeded to form new states; to erect temporary government; to appoint officers for them; and to prescribe the conditions on which such states shall be admitted into the confederacy. All this has been done; and done without the least color of constitutional authority.²⁶

Madison saw it fit to address the lack of constitutional authority over the annexation of continental territory even though that annexation preceded the

²⁶ James Madison Federalist Papers #38

constitutional convention. The annexation of offshore territory however, occurred with the constitution in place. Did it then have some color of constitutional authority?

Baldwin's commentary addressed the actual territorial clause and some of the problems inherent in applying the clause to the offshore territories and more poignantly, to the people inhabiting the territories. Baldwin directly analyzed the territorial clause which states:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.²⁷

Baldwin pinpointed the logic of this clause. According to Baldwin,

The phrase 'Territory or other Property' certainly implies that 'Territory' is to be considered as 'property.' Thus read, congress would deal with it as representing the owner, rather than the sovereign."²⁸ The key here is that the application of the territorial clause to the territories and their inhabitants would put Congress in as Baldwin explains, a position of owner as opposed to sovereign. Although he didn't explain it explicitly, it seems reasonable to conclude that Baldwin was distinguishing between the powers of a sovereign in a republican form of people, which can otherwise be termed a slave master.

²⁷ The Constitution of The United States

²⁸ Ibid 394

If we look directly at the principles of government established in the Declaration and grant of power in the territorial clause, we run into challenge of trying to square the incongruency between the “power to dispose of and make all needful rules” and the “consent of the governed.”²⁹

In the final article of the series, entitled **Our New Possessions** James Bradley Thayer saw no conflict between the national powers conferred by the constitution and its built-in restraints. Thayer’s theory that power incidental to nationhood superseded any constitutional restraints also ran through the ruling opinions in *Downe’s v Bidwell*. Though Thayer may not have directly influenced the Supreme Court justices of the time, it is clear that at the very least, the preeminence of national power was a shared opinion amongst legal scholars and judges of the era.

Thayer explained his view of national power thus:

In my judgment , there is no lack of power in our nation, of legal, constitutional power, to govern them; that we have the same power that other nations have; and that we may, subject to the agreements of the treaty, sell them, if we wish, or abandon them, or set up native governments in them, with or without a protectorate, or govern them ourselves. I take it for granted that we shall not sell them or abandon

²⁹ See Constitution of the United States and Declaration of Independence

them; that we shall hold them and govern them, or provide governments for them.³⁰

Thayer's thinking is a kind of compartmentalization of the founding generation's concern with limiting power where necessary, and national growth and expansion beyond the continents. More specifically, the territorial clause gives congress the power to dispose of and make needful rules... respecting the territories. However, the bill of rights does not apply in acquired territories. But Thayer didn't even seem to think the territorial clause was necessary for the right to rule territories. Nationhood was all that mattered, in his words: "If you ask what this nation may do in prosecuting the ends for which it was created, the answer is, it may do what other sovereign nations may do."³¹

What Thayer was really saying is that victory in war gave the victor power to do as any country would or could do with its new possessions. Notice his emphasis on power with the diminishment of restraint:

The power of acquiring colonies is an incident to the function of representing the whole country in dealing with other nations and states, whether in peace or war. The power of holding and governing them follows, necessarily, from that of gaining them. Upon the power of

³⁰ James Bradley Thayer, "Our New Possessions" Harvard Law Review 12 no. 7 (1899) 467

³¹ Ibid 469

acquiring colonies the Constitution has no restraint upon the sound judgement of the political department of the United States.³²

Thayer was also very clear that in his opinion, all territories are simply colonies. He cited the Harvard history professor Albert Bushnell Hart,

The important thing about colonies is the co-existence of two kinds of government, with an ultimate control in one geographical region, and dependence in the other; and since 1784 there has never been a year when in the United States there has not been, side by side, such a ruling nation and such subject colonies; only we choose to call them territories.³³

This indicates that even before the turn of the twentieth century there was some embarrassment over the use of the term colony. Thayer however, seemed to know no shame. He lets the proverbial cat out of the bag in stating that the offshore possessions are for all effective purposes, colonies. Calling them territories is just an arbitrary choice that helped to avoid some embarrassment. In a certain sense, Thayer was the most truth telling of legal commentators on the territories. He clarified what the territories are, **colonies**. And he clarified what justified the acquisition of colonies, **power**. He stopped just short of saying explicitly what the United States had become, a **colonial power**.

³² Ibid 471

³³ Albert Bushnell Hart cited in Thayer 474

Downes Versus Bidwell and the Creation of Unincorporated Territories

We come now to the judicial reasoning behind *Downes v Bidwell*. The case was the last of the set of cases known as the insular cases, and probably the most consequential to the issue of the political status of the offshore territories. The goal here will be to analyze the key ruling opinions and the poignant dissenting opinions. The questions raised are what is incorporation as it relates to territorial inhabitants? Was the creation of an unincorporated status for the offshore territories constitutionally necessary? What were the alternatives if any, to applying the term unincorporated to the offshore territories?

The case was a suit brought to the circuit court by Downes, doing business under the firm name of S.B. Downes & Co. against the collector of the port of New York, to recover back duties upon oranges consigned to the plaintiff at New York, and from the port of San Juan in Puerto Rico during the month of November, 1900 after the passage of the act temporarily providing a civil government and revenues for the island of Puerto Rico, the Foraker act. The court ultimately decided against Downes, and that the duties Downes hoped to recover were not owed back to him. The court decided that article 1 section 8 of the constitution which states ‘all duties, imposts, and excises shall be uniform throughout the United States.’ Duties and tariffs have since faded as a commercial concern for movements of goods between the offshore territories and the 50 states. But the status of unincorporated territories holds strong over one hundred years later.

Justice Brown gave the primary decision of the court. Justice Brown sought to draw a clear distinction between states and territories. It seems that it was already

anachronistic for a Supreme Court Justice to somehow rehash such issues in a post-civil war case. He started with a founding theory that recalled John Calhoun's primacy of states:

The Federal government was created in 1777 by the union of thirteen colonies of Great Britain in 'certain articles of confederation and perpetual union.' The first one of which declared that 'the stile of this confederacy shall be the United States of America.' Each member of the confederacy was denominated a state. Provision was made for the representation of each state by not less than two nor more than seven delegates; but no mention was made of territories or other lands...³⁴

In arguing for the concept of incorporation he looked to the acquisition of continental territory early in the history of the United States. Most famously, the Louisiana purchase was the first case of the United States government acquiring territory that belonged to another sovereign. Brown cites Thomas Jefferson for the earliest mention of incorporation. In his address to congress Jefferson said, "with the wisdom of Congress it will rest to take those ulterior measures which may be necessary for the immediate occupation and temporary government of the country; for its **incorporation** into the Union."³⁵

³⁴ Downes V. Bidwell, 182 U.S. 244 (1901)

³⁵ Ibid

The next usage of the term incorporation that Brown cited came from the treaty with Spain for the purchase of Florida. “The same construction was adhered to in the treaty with Spain...which provided that the inhabitants should be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution.”

Justice Brown draws from the mentioning of incorporation in the early territorial purchases, the assumption that where a process of incorporation is not mentioned in a treaty or purchase agreement, the territory must be unincorporated. His colleague, Justice White expands on this idea more explicitly in his concurring opinion. For Brown, the constitutionality of the Foraker act depended on the status of Puerto Rico vis a vis the United States prior to the passage of the act. He stated:

The sole and only issue, then, is not whether Congress has taxed Porto Rico without representation, -for, whether the tax was local or national...but whether the particular tax 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?³⁶

³⁶ Ibid

In his concurring opinion, Justice White expressed the greatest concern for American imperial power. He seemed concerned that incorporation of Puerto Rico's inhabitants would hinder future American off shore expansion. His focus on imperial expansion and powers of acquisition was consistent with the arguments put forth by CC Langdell, and James Bradley Thayer in their Harvard Law Review articles. Justice White gave a judicial imprimatur to the idea that the law of nations provided a guide to American territorial policy that was not to be found expressly in the Constitution. Furthermore, he took care to emphasize the necessity of an explicit agreement to incorporate inhabitants of a territory. In his construction, a failure to state an intent to incorporate, either immediately or eventually, triggered the absolute power of a conquering or acquiring nation over the people of the acquired territory. We can see this in his statement:

It may be doubted that by 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 in the absence of stipulation upon the subject.³⁷

He spent a considerable part of his decision drawing upon Henry Halleck's 1878 treatise on international law as an authority for the reasoning above. But, both justices Brown and White were sure to go beyond what was the law of nations in an imperial era. They were clearly not completely comfortable in just saying that as a sovereign nation, the United States could decide as an incident of nationhood to incorporate an acquired territory's inhabitants. They both took the extra step of explaining why incorporation of certain groups of people may not be in the national interest. Here is justice Brown for instance:

... the natural gravitation of small bodies towards large ones in others, the result of a successful war in 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, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.

³⁷ Ibid

This concern led him to conclude the following:

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 peoples, and from differences of soil, climate, and productions, which may require action the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited by people of the same race, or by scattered bodies of native Indians.³⁸

Justice White, consistent with his concern for the future of American offshore expansion provided what he expressed as a hypothetical, but what was arguably a direct application to the case at hand:

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.³⁹

Yet despite Justices Brown and White characterizing the people of the territories as, (in their words) different, inferior, and uncivilized, they also thought it necessary to address

³⁸ Ibid

³⁹ Ibid

how and why there was no need to worry about violations to the civil and natural rights of territorial inhabitants. They both relied upon a similar argument that the legal scholars of the time made and was touched upon in the Harvard Law review articles. This was the idea that the mercy and character of Anglo Americans could insure the rights of alien race inhabiting American territory. Justice Brown found confidence in the character of the Anglo Saxon:

There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions of statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.⁴⁰

Justice White for his part took the terms of the 1898 peace treaty with Spain as determinant, it stated “The civil rights and political tatus of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”

Justice White agreed strongly with this part of the treaty: “It is obvious to me that the above-quoted provisions...expressly provide that the ‘civil rights and political status of the native inhabitants of the territories hereby ceded’ shall be determined by Congress.”

41

³⁸ Ibid

⁴¹ Ibid

To summarize, both Brown and White rely upon arguments that legal scholars in the Harvard law review had already made. There was the racial component that they both explicitly stated. Namely, that people of a different race from most of the United States could not immediately be brought under the full protections and responsibilities of the United States Constitution. The other repeated argument was that the civil and natural rights of alien races governed as territorial dependencies remained safe under congressional rule because Anglo Saxon character and principles of mercy ameliorated any encroachments of said rights.

What was novel in their opinions was the emphasis on incorporation and thus, unincorporated status. Indeed, it can be argued that the unincorporated status of the offshore territories is a judicial creation. But its power cannot be denied because however much modern popular opinion may look askance at the more explicitly racist portions of the court's opinions, the offshore territories remain, in name and in practice, unincorporated.

Judicial Dissent: The Case Against Imperialism

Dissenting opinions were given by the court's chief justice Melvin Fuller and John Harlan. Both Fuller and Harlan viewed the concept of incorporation as possessing some "occult" meaning. But it was Harlan who took on the ruling opinions point by point and presented a different view of the founding. Harlan argued for an understanding that the American founding was a creation of the people, and not the states. Furthermore, Harlan argued against extra constitutional xenophobia, and used the country's founding history to demonstrate that the Anglo-Saxon character was completely capable of tyranny

over other people of Anglo descent, and by logical conclusion non-Anglo – non-European people. Harlan finally argued that Congress really possessed no authority outside those that had been granted to it by the Constitution.

Harlan addressed Brown’s Calhounian states based argument of the founding by citing Justice story in *Martin v. Hunter*: ‘the Constitution of the United States was ordained and established, not by the states in their sovereign capacities but emphatically, as the preamble of the Constitution declares, by ‘the People of the United States.’ Harlan found further repudiation of a purely states-based understanding of the founding in John Marshall’s argument in *McCulloch v. Maryland*:

The government proceeds directly from the people; is ‘ordained and established’ in the name of the people; and is declared to be ordained ‘in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.’ The assent the of states, in their sovereign capacity, is implied in calling a convention...But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negated, by the state governments. ⁴²

⁴² *McCulloch V. Maryland*, 17 U.S. 316 (1819) The characterization of the “states based founding” as Calhounian is thoroughly explained by Harry Jaffa in the closing chapter of his *Crisis of the House Divided*. Most lengthy examinations of John Calhoun’s political theory come from a sympathetic

Justice Harlan summed things up thus: “Doubtless, the people of the several states, taken collectively, constitute the people of the United States. But it is in this their collective capacity, it is as all the people of the United States, that they established the Constitution.”⁴³

In this tit for tat over the essence of the American founding, some interesting questions arise. Why would a states-based view of the founding be more supportive of offshore territorial expansion? Didn't the leadership of the pro slavery confederate states view themselves as the opponents of an expansive federal government? Further elaboration of Harlan's dissent points to some answers.

Harlan addressed the then prevailing theory that there was something in the Anglo-Saxon character imbued with charity and mercy that would somehow keep safe the natural and civil rights of territorial inhabitants. His reasoning is devastating as it utilizes the very actions of the constitutional framers who were themselves men of Anglo descent. Harlan explains that the constitutional framers believed they were escaping the tyranny of an Anglo-English monarchy:

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

perspective. One is hard pressed to find a critic of Calhoun who gives him the respect necessary to take a deep look at his thought. A full citation of Jaffa's book is provided below, in text and bibliography.

⁴³ Downes V. Bidwell, 182 U.S. 244 (1901)

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 well remembered that Anglo-Saxons across the ocean had attempted, in defiance of law and justice, to trample upon the rights of Anglo Saxons on this continent, and had sought, by military force, to establish a government that could at will destroy the privileges that inhere in liberty.’⁴⁴

The ruling opinion’s separation of states from territories as areas of constitutional application served to free up Congress to act without limitation or constitutional guidance in governing over the territories. Justice Harlan’s retort against an existence of congressional authority recalls Thomas Paine both in his anti-monarchical Common Sense, and in his constitutionalist Rights of Man. Harlan stated: 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.

⁴⁴ Ibid

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...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. ⁴⁵

Finally, Harlan was not blind to uncloaked racist and xenophobic arguments put forth by Brown and White. His words furthermore, served almost as an admonishment of prevailing American foreign policy and expansionism. He proceeded thus:

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 acquisition of territory...cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. ⁴⁶

⁴⁵ Ibid

⁴⁶ Ibid

Finally, before moving on from the jurisprudence of *Downes V. Bidwell* it is helpful to ask why there was a point of contention amongst the justices regarding the manner of the founding. Of specific dispute was the question of whether the United States was founded by the people or the states. Justice Harlan argued that it was the people while Justice Brown had argued it was the states. The following questions were posed above: Why would a states-based view of the founding be more supportive of offshore territorial expansion? Didn't the leadership of the pro slavery confederate states view themselves as the opponents of an expansive federal government? It is possible to detect in the argument for expansion and imperialism an affinity for the rationale that the confederacy relied upon to justify secession and the expansion of slavery.

The political scientist Walter Berns provided a compelling case based on history and theory that a founding by the people as opposed to the states undermined the confederacy's goal. He provided the following argument for example:

More than anyone else, Abraham Lincoln was responsible for the defeat of this Confederate project. It was he who challenged its pretensions- ultimately, the right of its people to enslave black people and carry them into the territories of the United States; he who forged a political coalition that captured control of the national government.⁴⁷

Berns then explained the political theory that Lincoln relied on:

⁴⁷ Walter Berns, *Taking the Constitution Seriously* (Lanham: Madison Books 1987)

His argument was that the Union was older than any of the states and had created them as states. Before that, they had been ‘dependent colonies,’ and in this capacity they had created the Union that “threw off their dependence for them.” Not one of them had ever been a state “out of the Union.”⁴⁸

In other words, as Lincoln stated at Gettysburg, government in the United States was founded “by the people” not the states. A government by the people implies a social compact and its concomitant limitations on government power. A government formed by the states somehow skips over the people and empowers the state in seemingly unlimited fashion.

It seems then that the confederacy’s defeat on the battlefield was not decisive for Justice Brown, and he wished to appropriate some of its thought for the cause of imperial expansion. Credit is due to Justice Harlan for resuscitating Lincoln’s argument, even if he did so only indirectly in his dissent.

The Territories and the Demise of the Social Compact

Justice Harlan’s dissenting opinion on its own, provides one of the strongest admonitions of American imperialism and expansionism available to us. However, it is

⁴⁸ Ibid

possible to go deeper. There are at least two ways that political scientists can observe the relationship between theory and practice. One is when a political practice adheres to a theory. A second way is when practice completely disregards theory. Sound observation allows for the recording of the result of either approach. It is the position within this research that the political status created by the insular cases represents the second approach in which political practice disregards political theory. In reference to the offshore territories, it is the theory of the American founding that has been disregarded.

Indeed, the status of the offshore territories represents an incongruence with the political theory that informed the American founding. This incongruence is most glaring when one examines the theory of social compact and government by consent. However, the reality is that the situation in the offshore territories is not just a missed opportunity to live up to a theoretical ideal. The real and practical sense of an unsettled situation has been a way of life for the people of the territories for over one hundred years. Public debate over political status has been common political activity in the territories for close to fifty years. In Puerto Rico and Guam for example, local debate has centered on whether the local residents desire statehood, independence or the status quo. These debates are very local, in that they really only provide a gauge of local sentiment and have yet to impel the United States congress toward any action on the political status of the territories. What the ongoing debate demonstrates is that undefined political status leads to an unsettled citizenry. An unsettled citizenry is indicative of some sort of incompleteness. What can political theory tell us about the requirements of citizenship? Conversely, what can the dubious citizenship of the people of the territories tell political theorists?

In this case, political theory which as a subfield is often criticized for its lack of empiricism, is furnished with ongoing evidence that demonstrates the incompleteness of American citizenship when it is not coupled with a social compact and a concomitant commitment to consent of the governed. Indeed, it is the position here that much of the rancor over political status represents a pragmatist styled attempt to meet the necessary principles of social compact.

In discussing American citizenship as it relates to the people of the offshore territories, it is important to remind the reader that American citizenship for them was not required by *Downes v. Bidwell*, nor was it envisioned at the time of acquisition. What were they thinking? As the preceding might have demonstrated, up to the point of exercising the power to acquire, they weren't thinking much further. Citizenship for the people of the offshore territories without statehood represents a type of piecemeal fix not atypical of American politics. This won't come as a surprise to some observers of American politics and public policy. At least one American political scientist has termed such policy making, American pragmatism.⁴⁹

Ultimately, the granting of citizenship has not erased the embarrassment to American ideals caused by the unsettled status of territorial inhabitants. But the unsettled status of the territories is only one level embarrassment. It does not explain the failure to establish a political relationship between territorial inhabitants and the federal

⁴⁹ See for example, E Robert Statham, *Between Inquiry and Advocacy: A Critique of the Pragmatic Foundations of Academic Public Policy*. (Boone, NC Parkway Publishers) 1995

government that respects the unalienable rights that the Declaration of Independence proclaims as the very reason that governments are instituted.

The ideals of the Declaration of Independence are indeed lofty. The challenge of meeting such lofty ideals might explain why the legal scholars and the Supreme Court justices who favored annexation of the territories consistently refused to acknowledge the principles of human equality and government by consent. In other words, the principles of social compact. Previous to the acquisition of off shore territory the American experience demonstrated an inextricable relationship between the settling of territory and the establishment of statehood across the vast territory of the American continent. The American social compact is defined by a multi layered relationship between citizens, states, and the federal or national government. The Constitution is the law of the land in that it defines the rights, powers, and sovereignty of the governed and the government.

The theoretical perspective of social compact based on natural rights and human equality presented the pro annexation scholars and justices a challenge. Furthermore, the uniquely American style of a social compact guided by constitutionalism presented a practical complication. The only way around was to ignore or deny human equality and to subsequently remove constitutional limits on congressional power. Once again, it is important to remember that up to our current age, the people of offshore territories have no effective congressional representation and exercise no electoral influence on the executive. It is difficult to describe the territorial situation as anything other than government without consent.

But were the legal scholars and the justices who ultimately agreed with each other engaging in improvisation? Or was there something in their reasoning that found a kinship with justice Taney, John Calhoun, and Alexander Stephenson? The political philosopher and noted Lincoln scholar Harry Jaffa explained how the historical school of the first half of the nineteenth century supplanted natural rights thinking of the enlightenment. Human nature was no longer understood abstractly as applicable to all humans in all places. Specific cultures and communities were decisive. We can recall the legal scholar Simeon Baldwin's reference to the "half-civilized Moros of the Philippines or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila..." Baldwin's concern that such humans were not fit for constitutional justice coincides with the newer historical understanding that overtook the enlightenment understanding of human nature. Jaffa thoroughly summarized the post enlightenment historical understanding:

There were no such things as human rights or natural rights belonging to human individuals apart from the particular rights recognized in the laws of particular communities. Each political community, in virtue of its history and development, shaped the characters of those who lived within it and formed them into the kind of human beings that they were. There was no humanity possessed of a nature apart from these particular manifestations...The freedoms of speech, religion, association, and all other such freedoms of the Anglo-American political tradition could be claimed only within that tradition, and only by reason of the political tradition could be claimed only within that tradition, and only by reason of

the particular stage of maturity and political development arising from the unique circumstances of Anglo-American history. The idea that these freedoms or rights belonged by nature to any human beings anywhere – for example, to primitive savages or to servile subjects of Asiatic despotisms...was considered absurd.⁵⁰

Conclusion: Pragmatism and Principle

Although over 100 years has passed since the insular cases determined the political status of the offshore territories no fundamental progress toward settling the status of the territories has been made. As recently, as the 2020 presidential election the idea of statehood for Puerto Rico had been suggested (or threatened) by the congressional party that believes they stand to benefit politically by the addition of a new state presumed to be a reliable expansion of the Democratic party. That no mention was made of statehood for any of the other off shore territories demonstrates the instrumental nature of such propositions. Although the general reason given over the last five decades for Puerto Rican statehood, with no mention of Guam for example is the difference in population, furthermore one cannot miss the fact that not all the offshore territories are reliably democratic.

⁵⁰ Harry Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Coming of The Civil War* (Lanham: Rowman and Littlefield) 91

A principle-based policy addressing the offshore territories would be comprehensive in scope. For example, statehood for Puerto Rico based on principle would mean statehood for all the territories. Another option would be to attach the offshore territories to existing states. A guiding principle in this case would be that the United States should not possess any colonies, but neither does it need new states. The Constitution provides for the attaching of existing territory to existing states. Therefore, decolonization would occur without the creation of new states. It would require the consent of the people of any existing state that a territory is to be attached to.⁵¹

Finally, any movement toward statehood for the territories requires the option of independence for each respective territory. It is through the exercise of choosing between the two opposing options – statehood or independence, that the people of the territories can express their consent to be governed or not by the United States government.

A central goal of this research has been to demonstrate that our policy towards the offshore territories is rooted in an ideology that achieved an uneasy victory over the principles of natural right and social compact theory. The reason that political status remains tenuous and unsettled in all the offshore territories has little to do with population, and much more to do with an imperial ideology.

⁵¹ This is explained in 4 section 3 of the Constitution: New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States without the Consent of the Legislatures of the States concerned as well as of the Congress.

Despite the embarrassment of territorial status being governed by supreme court decisions that demonstrate greater imperialism, xenophobia, and racism than many more recent national controversies, there is no sign of an immediate direct challenge to the insular cases. However, even the mere suggestion of statehood for Puerto Rico demonstrates the ability to act on this matter. As the constitutional options for decolonization demonstrate, there is the possibility of countering pragmatic politics over the territories with a principle-based opportunity for all the people of all the territories to exercise their natural rights to government by consent of the governed.

It is an embarrassment that the United States can legitimately be branded a colonial power. That the colonial thinking that made the undefined and extra constitutional status of the offshore territories possible bloomed just shortly after the end of the American civil war should be distasteful to modern American sensibilities. Alas, this is why the situation of the territories begs for an examination that digs to the roots of the American founding. Any such exploration of the American founding leads to perennial questions about human equality and the political consequences of that equality. Current social science research is strongly driven by a distaste for inequality and injustice. This type of work is funneled out to political life through activism and political pressure. However, the problem with relying upon a distaste for something is that tastes can come and go. Furthermore, when inequalities and injustices simply become distasteful or unfashionable, confusion arises over how to remedy the situations. Competing political interests can obfuscate matters. This research was undertaken with the hope that clarity of thought can lead to clear alternatives and just solutions. The reader can decide whether good reason was provided for that hope.

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