Downes v. Bidwell, 182 U.S. 244, 375 (1901)

Mr. Justice Harlan, dissenting:

I concur in the dissenting opinion of the Chief Justice. The grounds upon which he and Mr. Justice Brewer and Mr. Justice Peckham regard the Foraker act as unconstitutional in the particulars involved in this action meet my entire approval. *376 Those grounds need not be restated, nor is it necessary to re-examine the authorities cited by the Chief Justice. I agree in holding that Porto Rico-at least after the ratification of the treaty with Spain-became a part of the United States within the meaning of the section of the Constitution enumerating the powers of Congress, and providing the ' all duties, imposts, and excises shall be uniform throughout the United States.'

In view, however, of the importance of the questions in this case, and of the consequences that will follow any conclusion reached by the court, I deem it appropriate-without rediscussing the principal questions presented-to add some observations suggested by certain passages in opinions just delivered in support of the judgment.

In one of those opinions it is said that 'the Constitution was created by the people of the United States, as a union of states, to be governed solely by representatives of the states;' also, that 'we find the Constitution speaking only to states, except in the territorial clause, which is absolute in its terms, and suggestive of no limitations upon the power of Congress in dealing with them.' I am not sure that I correctly interpret these words. But if it is meant, as I assume it is meant, that, with the exception named, the Constitution was ordained by the states, and is addressed to and operates only on the staes, I cannot accept that view.

In Martin v. Hunter, 1 Wheat. 304, 324, 326, 331, 4 L. ed. 97, 102, 104, this court speaking by Mr. Justice Story, said that '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."

In McCulloch v. Maryland, 4 Wheat. 316, 403-406, 4 L. ed. 579, 600, 601, Chief Justice Marshall, speaking for this court, said: '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 tranquillity, and secure the blessings of liberty to themselves and to their posterity.' The assent of the states, in their sovereign capacity, is implied in calling a convention,*377 and thus submitting that instrument to the people. 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 negatived, by the state governments. The Constitution, when thus adopted, was of complete obligation, and bound the state sovereignties. . . . The government of the union, then (whatever may be the influence of this fact on the case) is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit. This government is acknowledged by all to be one of enumerated powers. . . . It is the government of all; its powers are delegated by all; it represents all, and acts for all.'

Although the states are constituent parts of the United States, the government rests upon the authority of the people of the United States, and not on that of the states. Chief Justice Marshall, delivering the unanimous judgment of this court in Cohen v. Virginia, 6 Wheat. 264, 413, 5 L. ed. 257, 293, said: 'That the United States form, for many and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. . . . In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests . . . is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for those objects it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory.'

In reference to the doctrine that the Constitution was established by and for the states as distinct political organizations, Mr. Webster said: 'The Constitution itself in its very front refutes that. It declares that it is ordained and established by *378 the People **822 of the United States. So far from saying that it is established by the governments of the several states, it does not even say that it is established by the people of the several states. But it pronounces that it was established by the people of the United States in the aggregate. 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.'

In view of the adjudications of this court I cannot assent to the proposition, whether it be announced in express words or by implication, that the national government is a government of or by the states in union, and that the prohibitions and limitations of the Constitution are addressed only to the states. That is but another form of saying that, like the government created by the Articles of Confederation, the present government is a mere league of states, held together by compact between themselves; whereas, as this court has often declared, it is a government created by the People of the United States, with enumerated powers, and supreme over states and individuals with respect to certain objects, throughout the entire territory over which its jurisdiction extends. If the national government is in any sense a compact, it is a compact between the People of the United States among themselves as constituting in the aggregate the political community by whom the national government was established. The Constitution speaks, not simply to the states in their organized capacities, but to all peoples, whether of states or territories, who are subject to the authority of the United States. Martin v. Hunter, 1 Wheat. 327, 4 L. ed. 103.

In the opinion to which I am referring it is also said that the 'practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct;' that while all power of government may be abused, the same may be said of the power of the government 'under the Constitution as well as outside of it;' that 'if it once be conceded that we are at liberty to acquire foreign territory, a presumption arises that *379 our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them;' that 'the liberality of Congress in legislating the Constitution into all our contiguous territories has undoubtedly fostered the impression that it went there by its own force, but

there is nothing in the Constitution itself and little in the interpretation put upon it, to confirm that impression;' that as the states could only delegate to Congress such powers as they themselves possessed, and as they had no power to acquire new territory, and therefore none to delegate in that connection, the logical inference is that 'if Congress had power to acquire new territory, which is conceded, that power was not hampered by the constitutional provisions;' that if 'we assume that the territorial clause of the Constitution was not intended to be restricted to such territory as the United States then possessed, there is nothing in the Constitution to indicate that the power of Congress in dealing with them was intended to be restricted by any of the other provisions;' and that 'the execuive and legislative departments of the government have for more than a century interpreted this silence as precluding the idea that the Constitution attached to these territories as soon as acquired.'

These are words of weighty import. They involve consequences of the most momentous character. I take leave to say that if the principles thus announced should ever receive the sanction of a majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.

Although from the foundation of the government this court has held steadily to the view that the government of the United States was one of enumerated powers, and that no one of its branches, nor all of its branches combined, could constitutionally exercise powers not granted, or which were not necessarily implied from those expressly granted (Martin v. Hunter, 1 Wheat. 326, 331, 4 L. ed. 102, 104) we are now informed that Congress possesses powers outside of the Constitution, and may deal with new erritory,*380 acquired by treaty or conquest, in the same manner as other nations have been accustomed to act with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. If that instrument had contained a word suggesting the possibility of a result of that character it would never have been adopted by the people of the United States. The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces,-the people inhabiting them to enjoy only such rights as Congress chooses **823 to accord to them,-is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.

The idea prevails with some-indeed, it found expression in agruments at the bar-that we have in this country substantially or practically two national governments; one to be maintained under the Constitution, with all its restrictions; the other to be maintained by Congress outside and independently of that instrument, by exercising such powers as other nations of the earth are accustomed to exercise. It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions.

It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution. The glory of our American system *381 of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power, and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. 'To what purpose,' Chief Justice Marshall said in Marbury v. Madison, 1 Cranch, 137, 176, 2 L. ed. 60, 73, 'are powers limited, and to what purpose is that limitation committed to writting, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.'

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon what, in the opinion referred to, is described as 'certain principles of natural justice inherent in Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests.' They proceeded upon the theory-the wisdom of which experience has vindicated-that the only safe guaranty against governmental oppression was to withhold or restrict the power to oppress. 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. They believed that the establishment here of a government that could administer public affairs according to its will, unrestrained by any fundamental law and without regard to the inherent rights of freemen, would be ruinous to the liberties of the people by exposing them to the oppressions of arbitrary power. Hence, the Constitution enumerates the powers which Congress and the other departments may exercise,-leaving unimpaired, to the states or the People, the powers not delegated to the national government nor prohibited to the states. That instrument so expressly declares in *382 the 10th Article of Amendment. It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution.

Again, it is said that Congress has assumed, in its past history, that the Constitution goes into territories acquired by purchase or conquest only when and as it shall so direct, and we are informed of the liberality of Congress in legislating the Constitution into all our contiguous territories. This is a view of the Constitution that may well cause surprise, if not alarm. Congress, as I have observed, has no existence except by virtue of the Constitution. It is the creature of the Constitution. It has no powers which that instrument has not granted, expressly or by necessary implication. I confess that I cannot grasp the thought that Congress, which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution.

By the express words of the Constitution, every Senator and Representative is bound, by oath or affirmation, to regard it as the supreme law of the land. When the constitutional convention was in session there was much discussion as to the phraseology of the clause defining the supremacy of the Constitution, laws, and treaties of the United States. At one stage of the proceedings the convention adopted the following clause: 'This Constitution, and the laws of the United States made in pursuance

thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several states and of their citizens and inhabitants, and the judges of the several states shall be bound thereby in their decisions, anything in the constitutions or laws of the several states to the contrary notwithstanding.' This clause was amended, on motion of Mr. Madison, by inserting after the words 'all treaties made' the words 'or which shall be made.' If the clause, so amended had been inserted in the Constitution as finally adopted, perhaps*383 there would have been some justification for saying that the Constitution, laws, and treaties of the United States constituted the supreme law only in the states, and that outside of the states the will of Congress was supreme. But the framers of the Constitution saw the danger of such a provision, and put into that instrument in place of the above clause the following: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme **824 law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' Meigs's Growth of the Constitution, 284, 287. That the convention struck out the words 'the supreme law of the several states,' and inserted 'the supreme law of the land,' is a fact of no little significance. The 'land' referred to manifestly embraced all the peoples and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority.

Further, it is admitted that some of the provisions of the Constitution do apply to Porto Rico, and may be invoked as limiting or restricting the authority of Congress, or for the protection of the people of that island. And it is said that there is a clear distinction between such prohibitions 'as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states.' In the enforcement of this suggestion it is said in one of the opinions just delivered: 'Thus, when the Constitution declares that 'no bill of attainder or ex post facto law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description.' I cannot accept this reasoning as consistent with the Constitution or with sound rules of interpretation. The express prohibition upon the passage by Congress of bills of attainder, or of ex post facto laws, or the granting of titles of nobility, goes no more directly to the root of the power of Congress than does the express prohibition against the imposition by Congress of any *384 duty, impost, or excise that is not uniform throughout the United States. The opposite theory, I take leave to say, is quite as extraordinary as that which assumes that Congress may exercise powers outside of the Constitution, and may, in its discretion, legislate that instrument into or out of a domestic territory of the United States.

In the opinion to which I have referred it is suggested that conditions may arise when the annexation of distant possessions may be desirable. 'If,' says that opinion, '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.' In my judgment, the Constitution does not sustain any such theory of our governmental system. Whether a particular race will or will not assimilate with our people, and whether they can or cannot with safety to our institutions be brought within the operation of the Constitution, is a matter to be thought of when it is proposed to acquire their territory by treaty. A mistake in the acquisition

of territory, although such acquisition seemed at the time to be necessary, cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions. The Constitution is not to be obeyed or disobeyed as the circumstances of a particular crisis in our history may suggest the one or the other course to be pursued. The People have decreed that it shall be the supreme law of the land at all times. When the acquisition of territory becomes complete, by cession, the Constitution necessarily becomes the supreme law of such new territory, and no power exists in any department of the government to make 'concessions' that are inconsistent with its provisions. The authority to make such concessions implies the existence in Congress of power to declare that constitutional provisions may be ignored under special or *385 embarrassing circumstances. No such dispensing power exists in any branch of our government. The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the government was ordained. Its authority cannot be displaced by concessions, even if it be true, as asserted in argument in some of these cases, that if the tariff act took effect in the Philippines of its own force, the inhabitants of Mandanao, who live on imported rice, would starve, because the import duty is many fold more than the ordinary cost of the grain to them. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries or of this country. We cannot violate the Constitution in order to serve particular interests in our own or in foreign lands. Even this court, with its tremendous power, must heed the mandate of the Constitution. No one in official station, to whatever department of the government he belongs, can disobey its commands without violating the obligation of the oath he has taken. By whomsoever and wherever power is exercised in the name and under the authority of the United States, or of any branch of its government, the validity or invalidity of that which is done must be determined by the Constitution.

In De Lima v. Bidwell, just decided, 181 U. S. --, ante, 743, 21 Sup. Ct. Rep. 743, we have held that, upon the ratification of the treaty with Spain, Porto Rico ceased to be a foreign country and became a domestic territory of the United States. We have said in that case that from 1803 to the present time there was not a shred of authority, except a dictum in one case, 'for holding that a district ceded to and in possession of **825 the United States remains for any purpose a foreign territory;' that territory so acquired cannot be 'domestic for one purpose and foreign for another;' and that any judgment to the contrary would be 'pure judicial legislation,' for which there was no warrant in the Constitution or in the powers conferred upon this court. Although, as we have just decided, *386 Porto Rico ceased, after the ratification of the treaty with Spain, to be a foreign country within the meaning of the tariff act, and became a domestic country,-'a territory of the United States,'-it is said that if Congress so wills it may be controlled and governed outside of the Constitution and by the exertion of the powers which other nations have been accustomed to exercise with respect to territories acquired by them; in other words, we may solve the question of the power of Congress under the Constitution by referring to the powers that may be exercised by other nations. I cannot assent to this view. I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that all duties, imposts, and excises imposed by

Congress 'shall be uniform throughout the United States.' How Porto Rico can be a domestic territory of the United States, as distinctly held in De Lima v. Bidwell, and yet, as is now held, not embraced by the words 'throughout the United States,' is more than I can understand.

We heard much in argument about the 'expanding future of our country.' It was said that the United States is to become what is called a 'world power;' and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it must be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government*387 by mere judicial interpretation. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words 'throughout the United States,' in the taxing clause of the Constitution, do not embrace a domestic 'territory of the United States' having a civil government established by the authority of the United States. This is a distinction which I am unable to make, and which I do not think ought to be made when we are endeavoring to ascertain the meaning of a great instrument of government.

There are other matters to which I desire to refer. In one of the opinions just delivered the case of Neely v. Henkel, 180 U. S. 119, ante, 302, 21 Sup. Ct. Rep. 302, is cited in support of the proposition that the provision of the Foraker act here involved was consistent with the Constitution. If the contrary had not been asserted I should have said that the judgment in that case did not have the slightest bearing on the question before us. The only inquiry there was whether Cuba was a foreign country or territory within the meaning, not of the tariff act, but of the act of June 6th, 1900 (31 Stat. at L. 656, chap. 793). We held that it was a foreign country. We could not have held otherwise, because the United States, when recognizing the existence of war between this country and Spain, disclaimed 'any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof,' and asserted 'its determination, when that is accomplished, to leave the government and control of the island to its people.' We said: 'While by the act of April 25th, 1898, declaring war between this country and Spain, the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several states, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the government, by the joint resolution of April 20th, 1898, expressly disclaimed any purpose to exercise sovereignty jurisdiction,*388 or control over Cuba 'except for the pacification thereof,' and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain. Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a military governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under

which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the **826 people of Cuba. It is true that as between Spain and the United States,-indeed, as between the United States and all foreign nations,-Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba, that island is territory held in trust for the inhabitants of Cuba to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.' In answer to the suggestion that, under the modes of trial there adopted, Neely, if taken to Cuba, would be denied the rights, privileges, and immunities accorded by our Constitution to persons charged with crime against the United States, we said that the constitutional provisions referred to 'have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.' What use can be made of that case in order to prove that the Constitution is not in force in a territory of the United States acquired by treaty, except as Congress may provide, is more than I can perceive.

There is still another view taken of this case. Conceding *389 that the national government is one of enumerated powers, to be exerted only for the limited objects defined in the Constitution, and that Congress has no power, except as given by that instrument either expressly or by necessary implication, it is yet said that a new territory, acquired by treaty or conquest, cannot become incorporated into the United States without the consent of Congress. What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished. Of course, no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government; for only Congress is given power by the Constitution to admit new states. But it is an entirely different question whether a domestic 'territory of the United States,' having an organized civil government established by Congress, is not, for all purposes of government by the nation, under the complete jurisdiction of the United States, and therefore a part of, and incorporated into, the United States, subject to all the authority which the national government may exert over any territory or people. If Porto Rico, although a territory of the United States, may be treated as if it were not a part of the United States, then New Mexico and Arizona may be treated as not parts of the United States, and subject to such legislation as Congress may choose to enact without any reference to the restrictions imposed by the Constitution. The admission that no power can be exercised under and by authority of the United States except in accordance with the Constitution is of no practical value whatever to constitutional liberty, if, as soon as the admission is made,-as quickly as the words expressing the thought can be uttered,-the Constitution is so liberally interpreted as to produce the same results as those which flow from the theory that Congress may go outside of the Constitution in dealing with newly acquired territories, and give them the benefit of that instrument only when and as it shall direct.

Can it for a moment be doubted that the addition of Porto Rico to the territory of the United States in virtue of the treaty with Spain has been recognized by direct action upon the part of Congress? Has it not legislated in recognition of that treaty, *390 and appropriated the money which it required this country to pay?

If, by virtue of the ratification of the treaty with Spain, and the appropriation of the amount which that

treaty required this country to pay, Porto Rico could not become a part of the United States so as to be embraced by the words 'throughout the United States,' did it not become 'incorporated' into the United States when Congress passed the Foraker act? 31 Stat. at L. 77, chap. 191. What did that act do? It provided a civil government for Porto Rico, with legislative, executive, and judicial departments; also, for the appointment by the President, by and with the advice and consent of the Senate of the United States, of a 'governor, secretary, attorney general, treasurer, auditor, commissioner of the interior, and a commissioner of education.' §§ 17-25. It provided for an executive council, the members of which should be appointed by the President, by and with the advice and consent of the Senate. § 18. The governor was required to report all transactions of the government in Porto Rico to the President of the United States. § 17. Provision was made for the coins of the United States to take the place of Porto Rican coins. § 11. All laws enacted by the Porto Rican legislative assembly were required to be reported to the Congress of the United States, which reserved the power and authority to amend the same. § 31. But that was not all. Except as otherwise provided, and except also the internal revenue laws, the statutory laws of the United States, not locally inapplicable, are to have the same force and effect in Porto Rico as in the United States. § 14. A judicial department was established in Porto Rico, with a judge to be appointed by the President, by and with the advice and consent of the Senate. § 33. The court so established was to be known as the district court of the United States for Porto Rico, from which writs of error and appeals were to be allowed to this court. § 34. All judicial process, it was provided, 'shall run in the name of the United States of America, ss: the President of the United States.' § 16. And yet it is said that Porto Rico was not 'incorporated' by the Foraker act into the United States so as to be part of the United States within the *391 meaning of the constitutional requirement that all duties, imposts, and excises imposed by Congress shall be uniform 'throughout the United States.'

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, **827 it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the 'United States.' And this result comes from the failure of Congress to use the word 'incorporate' in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act: ' Be it enacted by the Senate and House of Representatives in Congress assembled, That Porto Rico be and is hereby incorporated into the United States as a territory,' would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

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

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