

The Commoner.

ISSUED WEEKLY.

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Editor and Proprietor.

Terms—Payable in Advance.

One Year.....	\$1.00
Six Months.....	.50
Three Months.....	.25
Single Copy—At Newstands or at this Office.....	.05

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Advertising rates furnished upon application. Address all communications to

THE COMMONER, Lincoln, Neb.

Entered at the postoffice at Lincoln, Nebraska, as second class mail matter.

Porto Rico Case Opinions.

As the majority and minority opinions in the case of *Downes vs Bidwell* present the issue between those who favor and those who oppose imperialism, these opinions, so far as they relate to the merits of the case, are reproduced from the columns of the *Washington Post*. They will become campaign documents in the great struggle now before us and the reader will find it worth while to preserve them for future reference.

Majority Opinion.

(Delivered by Justice Brown, Justices Gray, Shiras and McKenna concurring—Justice White joined in the conclusion but read a separate opinion.) Justice Brown, after declaring that the exception to the jurisdiction was not well taken, said:

"In the case of *De Lima vs. Bidwell*, just decided, we held that upon the ratification of the treaty of peace with Spain, Porto Rico ceased to be a foreign country, and that duties were no longer collectible upon merchandise brought from that island. We are now asked to hold that it became a part of the United States within that provision of the constitution which declares that 'all duties, imposts, and excises shall be uniform throughout the United States.' (Article I, section 8.) If Porto Rico be a part of the United States, the Foraker act imposing duties upon its products is unconstitutional not only by reason of a violation of the uniformity clause, but because by section 9 'vessels bound to or from one state' cannot 'be obliged to enter, clear, or pay duties in another.'

NO ANSWER IN THE CONSTITUTION.

"The case also involves the broader question whether the revenue clauses of the constitution extend of their own force to our newly acquired territories. The constitution itself does not answer the question. Its solution must be found in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by congress and in the decisions of this court.

"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, except in Article XI., which authorized the admission of Canada, upon its 'acced-

ing to this confederation,' and of other colonies if such admission were agreed to by nine states. At this time several states made claims to large tracts of land in the unsettled west, which they were at first indisposed to relinquish. Disputes over these lands became so acrid as nearly to defeat the confederacy before it was fairly put in operation. Several of the states refused to ratify the articles, because the convention had taken no steps to settle the titles to these lands upon principles of equity and sound policy; but all of them, through fear of being accused of disloyalty, finally yielded their claims, though Maryland held out until 1781.

WITHOUT DELEGATES FROM TERRITORIES.

"The confederacy, owing to well-known historical reasons, having proven a failure, a new constitution was formed in 1787 by 'the people of the United States for the United States of America,' as its preamble declares. All legislative powers were vested in a congress consisting of representatives from the several states, but no provision was made for the admission of delegates from the territories, and no mention was made of territories as separate portions of the union, except that congress was empowered 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' At this time all of the states had ceded their unappropriated lands except North Carolina and Georgia,

"It is sufficient to observe in relation to these fundamental instruments that it can nowhere be inferred that the territories were considered a part of the United States. 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; and even the provision relied upon here that all duties, imposts and excises shall be uniform 'throughout the United States,' is explained by subsequent provisions of the constitution, that 'no tax or duty shall be laid on articles exported from any state,' and 'no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.' In short, the constitution deals with states, their people, and their representatives.

"The thirteenth amendment to the constitution, prohibiting slavery and involuntary servitude 'within the United States, or in any place subject to their jurisdiction,' is also significant as showing that there may be places within the jurisdiction of the United States that are no part of the union. To say that the phraseology of this amendment was due to the fact that it was intended to prohibit slavery in the seceded states, under a possible interpretation that those states were no longer a part of the union, is to confess the very point in issue, since it involves an admission that if these states were not a part of the union, they were still subject to the jurisdiction of the United States.

LIMITATIONS ON CITIZENSHIP.

"Upon the other hand, the fourteenth amendment, upon the subject of citizenship, declares only that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.' Here there is a limitation to persons born or naturalized in the United States which is not extended to persons born in any place 'subject to their jurisdiction.'

Justice Brown went exhaustively into the history of the purchase of the Louisiana territory and the subsequent legislation by congress, and drew the conclusion that congress then believed "that territory may be lawfully acquired by treaty, with a provision for its ultimate incorporation into the union; and, second, that a discrimination in favor of certain foreign vessels trading with the ports of a newly acquired territory is no violation of that clause of the constitution (Art. I, sec. 9), that declares that no preference shall be given to the ports of one state over those of another. It is evident that the constitutionality of this discrimination can only be supported upon the theory that ports of territories are not ports of states within the meaning of the constitution.

"The same construction was adhered to in the treaty with Spain for the purchase of Florida," added Justice Brown, "the sixth article of 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,' and the fifteenth article of which agreed that Spanish vessels sailing directly from Spanish ports and laden with productions of Spanish growth or manufacture should be admitted for the term of twelve years to the ports of Pensacola and St. Augustine 'without paying other or higher duties on their cargoes, or of tonnage, than will be paid by the vessels of the United States,' and that 'during the said term no other nation shall enjoy the same privileges within the ceded territories.'

PROVISION REGARDING HAWAII.

"So, too, in the act annexing the republic of Hawaii there was a provision continuing in effect the customs relations of the Hawaiian islands with the United States and other countries, the effect of which was to compel the collection in those islands of a duty upon certain articles, whether coming from the United States or other countries, much greater than the duty provided by the general tariff law then in force. This was a discrimination against the Hawaiian ports wholly inconsistent with the revenue clauses of the constitution, if such clauses were there operative.

"The very treaty with Spain under discussion in this case contains similar discriminative provisions, which are apparently irreconcilable with the constitution if that instrument be held to extend to these islands immediately upon their cession to the United States. By Article IV, the United States agrees 'for the term of ten years from the date of the exchange of the ratifications of the present treaty, to admit Spanish ships and merchandise to the ports of the Philippine islands on the same terms as ships and merchandise of the United States—a privilege not extending to any other ports. It was a clear breach of the uniformity clause in question, and a manifest excess of authority on the part of the commissioners, if ports of the Philippine islands be ports of the United States.

"So, too, by Article XIII, 'Spanish scientific, literary, and artistic works * * * shall be continued to be admitted free of duty in such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.' This is also a clear discrimination in favor of Spanish literary productions into particular ports.

COURT DECISIONS AT VARIANCE.

"The decisions of this court upon this subject have not been altogether harmonious. Some of them are based upon the theory that the constitution does not apply to the territories without legislation. Other cases, arising from territories where such legislation has been had, contain language which would justify the inference that such legislation was unnecessary, and that the constitution took effect immediately upon the cession of the territory to the United States. It may be remarked, upon the threshold of an analysis of these cases, that too much weight must not be given to general expressions found in several opinions that the power of congress over territories is complete and supreme, because these words may be interpreted as meaning only supreme under the constitution; nor upon the other hand, to general statements that the constitution covers the territories as well as the states, since in such cases it will be found that acts of congress had already extended the constitution to such territories, and that thereby it subordinated not only its own acts, but those of the territorial legislatures, to what had become the supreme law of the land."

Justice Brown cited the cases of *Hepburn vs. Ellzey*, *Loughborough vs. Blake*, and others to show the power of congress over territory not included in the states. *Loughborough vs. Blake* tested the right to impose direct taxes in the District of Columbia. It was held that such taxes could be imposed here, and Justice Brown's comment, which follows, is interesting, as comparing the local status with that of Porto Ricans:

"There could be no doubt as to the correctness of this conclusion, so far, at least, as it applied to the District of Columbia. This district had been a part of the states of Maryland and Virginia. It had been subject to the constitution, and was a part of the United States. The constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the states of Maryland and Virginia to the constitution could not be dissolved, without at least the consent of the federal and state governments to a formal separation. The mere cession of the District of Columbia to the federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the constitution. Neither party had ever consented to that construction of the cession. If, before the district was set off, congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the district was created, it would have been equally void; in other words, congress could not do indirectly by carving out the district what it could not do directly. The district still remained a part of the United States, protected by the constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the federal government.

REPUBLIC OF STATES AND TERRITORIES.

"In delivering the opinion, however, the chief justice made certain observations which have occasioned some embarrassment in other cases.