

WHY THE CANON SHOULD BE EXPANDED TO INCLUDE *THE INSULAR* CASES AND THE SAGA OF AMERICAN EXPANSIONISM*

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I. INTRODUCTION: THE "CANON"

All disciplines are constituted by their canons—that series of “set texts” that comprises the core materials of any given academic area. As Jack Balkin and I have written elsewhere, debates about the canon are rife in many contemporary disciplines, most notably, perhaps (at least in terms of public attention), in English and American literature, but most certainly including legal studies.¹ One can ask very generally what legal materials all law students should be exposed to, or one can ask the more limited question as to what students studying constitutional law should be expected to read. That is, what should constitute the canon of constitutional law?

Even this way of putting the question may be too broad, though, for we argue that one cannot begin constructing a set of

* Material drawn from this essay will appear in the forthcoming book from Duke University Press, Christina Duffy Burnett and Burke Marshall, eds., *Foreign in A Domestic Sense: Puerto Rico, American Expansion, and the Constitution*. This book is a treasure trove of essays written by people far more expert about Puerto Rico than I am, and anyone persuaded by this essay as to importance of *The Insular Cases* and of continuing constitutional conundrums concerning Puerto Rico should certainly consult the book when it appears.

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1. See J.M. Balkin and Sanford Levinson *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963 (1998). I have also examined one subset of the canon in *Slavery in the Canon of Constitutional Law*, 68 Chicago-Kent L. Rev. 1087 (1993).

canonical materials without first addressing the purpose of the proposed canon. Is it, for example, to teach students within the legal academy those cases (and other materials) most likely to structure their own practice of constitutional law, assuming, contrary to fact, of course, that many—let alone most—students will ever find themselves litigating a constitutional issue? Still, one could begin with the “legal fiction” that students must be aware of the most lively issues currently before courts and of the various doctrines likely to prove interesting (or at least useful) to adjudicators called upon to decide cases involving those issues. Or, again focusing on the specific needs of students preparing to become practicing lawyers, should we pick materials that are especially useful in teaching the arts of lawyering, i.e., those cases that offer especially useful examples of legal reasoning that can serve as models of the lawyers’ rhetorical arts? Even cases involving no-longer-live issues could, nonetheless, serve as paradigms of such reasoning.² Both of these criteria, whatever their differences, involve candidates for what we call the “pedagogical canon,”³ i.e., the preparation of students for their professional lives as practicing lawyers.

But one might have aims other than preparing persons, even those persons called “law students,” for the actual practice of constitutional law.⁴ After all, many undergraduate and graduate students take courses in constitutional law without intending to become lawyers. Indeed, some law students even attend law

2. I should note that “useful” does not necessarily mean “admirable.” One might, of course, select canonical cases on the basis of their admirability as exercises in legal reasoning. This is one rationale, for example, for teaching *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which includes what I regard as the greatest single opinion ever written by a Supreme Court justice, Robert Jackson’s concurrence in that case, *id.* at 634. See Sanford Levinson, *Introduction [to Favorite Case Symposium]: Why Select a Favorite Case?* 74 *Texas L. Rev.* 1195, 1197-1200 (1996). Obviously, the issue of “inherent” presidential power could arise again in our own time, but, just as obviously, this is not at the forefront of contemporary constitutional controversy, and the rationale for including it within the canon would be something other than preparing students for the most likely subjects of litigation.

3. Balkin and Levinson, 111 *Harv. L. Rev.* at 975 (cited in note 1). During the recent impeachment brouhaha, it might have been useful if the ordinary lawyer knew more about presidential impeachment than is likely to be the case. The reason surely is not the empirical likelihood of any given lawyer being asked to represent the President or his adversaries, but, rather, the joint propensities of non-lawyers to ask lawyers about the legal merits of impeachment and of lawyers to answer such questions, whether or not they are truly knowledgeable about the matter.

4. Which, perhaps, suggests that the term “vocational canon” would be more precise than “pedagogical canon” insofar as *any* canon taught to students is, by virtue of that fact, a “pedagogical” one, but, of course, the content of canons could differ substantially based on the purposes of the teacher.

school without envisioning themselves as future legal practitioners. Yet all may well view some familiarity with the materials of American constitutional development as part of what constitutes their being educated citizens. And "official" lawyers may see themselves (and are often treated as) charged with the special task of serving as "delegates" of a sort from the particular world of law to lay outsiders, as when they are asked to give "Law Day" speeches to local schools or, more commonly, to opine at dinner parties about the propriety of what the Supreme Court is doing these days. Their teachers are thus charged with the task of identifying the canon of such materials. We label this the "cultural literacy canon."⁵

Finally, there is what we denominate the "academic theory canon," by which we identify those crucial episodes within American constitutional history that must be confronted by legal academics who wish to be taken seriously within the community of constitutional scholars.⁶ Here, one is not at all concerned with what is best for one's students, treated either as pre-professionals or future citizens, but, rather, what is best for oneself as someone who wishes to establish his or her presence within an ongoing conversation among trained academics.

I want to argue that *The Insular Cases*⁷ deserve an important place within each of these canons, though, as one might expect, the reasons are different depending on the canon to which one is referring. I should confess that I speak a bit with the zeal of a convert, for prior to an April, 1998, Yale Law School conference on Puerto Rico that I attended, I had never read the cases.⁸ Neither in my graduate studies at Harvard prior to writ-

5. Balkin and Levinson, 111 Harv. L. Rev. at 976 (cited in note 1).

6. Id.

7. See *Downes v. Bidwell*, 182 U.S. 244 (1901). This is, obviously, only one of the many cases that, taken together, comprise "the insular cases." Others decided the same Term include *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huss v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); and *De Lima v. Bidwell*, 182 U.S. 1 (1901). See also *Ocampo v. United States*, 234 U.S. 91 (1914); *Dowdell v. United States*, 221 U.S. 325 (1911); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S. 197 (1903). Most discussants of the cases seem to agree that *Downes* is the most significant single case. As shall be seen below, it certainly contains a treasure trove of issues for those interested in constitutional law and theory. A comprehensive treatment of the issues is Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (1985).

8. One might well wonder why I was invited to participate in the conference. One answer, I strongly suspect, is that its remarkable organizer, a law student from Puerto Rico, "went after" casebook editors—Mark Tushnet was another invitee—with the aim of educating us to the importance of the issue. She certainly succeeded in my case!

ing a dissertation on Justices Holmes and Frankfurter nor at the Stanford Law School, where I received my J.D., were they ever assigned; I have also managed to teach constitutional law for almost two decades at the University of Texas (and co-edit what I immodestly believe is a first-rate casebook in the field⁹) without filling in this blank. One factor encouraging this public confession is that conversation with other adepts in constitutional law, including editors of competing casebooks, leads me to believe that my story is not in the least unusual.

At the present time, few cases can be said to be *less* canonical, regardless of criterion, than *Downes* (or any of the other *Insular Cases*).¹⁰ Balkin and I present a practical test of what is, or is not, a canonical case: Just play the wonderful game, “Humiliation,” invented by the British novelist David Lodge as part of his academic novel *Changing Places*, in which one wins points by naming, in a group of presumably sophisticated fellow academics, books that one has *not* read that have, in fact, been read by the rest of the group. The “winner” of the game, in the novel, was a hapless, overly competitive, untenured professor of English who could not resist using *Hamlet* as his trump.¹¹ The constitutional law equivalent would presumably be the admission that one had never read *McCulloch v. Maryland*.¹² Somewhere there may be a legal academic who has never pored through this most important of all constitutional law opinions, but one would truly risk one’s reputation (and one’s job) by admitting it. *That* is the operational test of a case’s being canonical. *The Insular Cases*, on the other hand, might be taken, at least at the present time, as exemplifying the “anti-canon” (just as matter is complemented by anti-matter) insofar as no ostensible constitutional scholar risks sullyng his or her reputation—save, presumably, in Puerto Rico itself!—by admitting to one’s ignorance.

9. Paul Brest and Sanford Levinson, *Processes Of Constitutional Decisionmaking* (Little, Brown & Co., 3d ed. 1992).

10. Obviously, there are many obscure cases that would be equally uncanonical. The difference between them and *Downes* is that it, and the other *Insular Cases*, were once at the center of American constitutional debate, whereas many cases are deservedly obscure insofar as no one really cared about them at the time (other than the particular litigants) or afterward. What has to be explained in regard to *Downes* and its companion cases is why an issue that was once deemed so vital to American constitutionalism has almost entirely disappeared from view. One cannot even take refuge in the answer that is sometimes given in regard to, say, the disappearance of many slavery cases from the canon—“we don’t have slavery anymore”—because we most certainly *do* continue to have Puerto Rico as a live issue of American politics and constitutional inquiry.

11. See David Lodge, *Changing Places: A Tale of Two Campuses* 136 (Penguin Books, 1992). He “won” the game, though, subsequently, was not awarded tenure.

12. 17 U.S. (4 Wheat.) 316 (1819).

Evidence of this proposition can be found not only in personal anecdote. Just look at contemporary constitutional law casebooks or treatises, where one will find almost literally no mention at all of the cases. No casebook that I have examined has even the briefest reference to the cases and to the issues raised by them. One will search in vain for index entries to, say, "Puerto Rico," "territories," or "expansion." In addition to the "standard" constitutional law casebooks, I searched as well Derrick Bell's *Race, Racism, and American Law*,¹³ inasmuch as one might well view *The Insular Cases* as central documents in the history of American racism. It was absent there as well. Indeed, the principal reason for my "almost" in the first sentence above is a two-page discussion, in John Nowak's and Ronald Rotunda's hornbook on constitutional law, of "To What Extent Does the Constitution Follow the Flag; Does the Constitution Apply to the Territories?"¹⁴ Professor Laurence Tribe also cites *Downes* in the second edition of his magisterial *American Constitutional Law*, but it occurs at the conclusion of a single footnote concerning congressional power over aliens.¹⁵ There was, as implied, no mention at all in the first edition, as is the case in the competing treatise authored by Erwin Chemerinsky.¹⁶ The cases would never constitute an intelligent play in "Humiliation," assuming there is nothing truly unusual about the group within which one is playing (such as their being Puerto Ricans).

It is more than time to change this situation. I have played my own part by adding a new section, "American Expansionism, Race, Ethnicity, and the Constitution," to the new edition of *Processes of Constitutional Decisionmaking*,¹⁷ including a 10-page excerpt from *Downes*. My hope is that its inclusion will come to be regarded less as yet another idiosyncrasy of our book (which, in the past, included taking seriously the Second Amendment), but, rather (as is perhaps occurring with the Second Amendment), something to be emulated in our competitors as well. Perhaps I should mention as well that I have now taught *Downes* in introductory courses at both the University of Texas

13. Derrick Bell, *Race, Racism and American Law* (Little, Brown & Co., 3d ed. 1992).

14. See John E. Nowak and Ronald D. Rotunda, *Constitutional Law* 210-11 (West, 5th ed. 1995).

15. See Laurence Tribe, *American Constitutional Law* 361 n.41 (Foundation Press, 2d ed. 1988).

16. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (Aspen Law and Business, 1997).

17. Brest and Levinson, *Processes* at 297-309 (cited in note 9).

and the New York University schools of law, sparking in both instances good discussions among students.¹⁸ Thinking about the issues raised in that case has also led me to offer, again for the first time, a seminar on “The Constitution and American Expansion,” a topic that is remarkably understudied by constitutional scholars, much to our detriment.

II. WHAT CAN *DOWNES v. BIDWELL* TEACH?

So let me now try to answer the central question: What justifies imposing upon students, especially first-year law students, even an edited version of a very, very long case dealing, at a formal level, with the meaning of Article I, § 8, clause 1 and its requirement that “all duties, imposts, and excises shall be uniform throughout the United States”? For those who have not read the decision, the conclusion of the Court, in two plurality opinions, is that Puerto Rico is not within “the United States” even though it is, as decided in another of the “Insular Cases,”¹⁹ certainly not a “foreign country.” Instead, it is a territory, and Congress has the power to regulate territorial tariffs in a way that would be absent were Puerto Rico a state. To reduce the case to its specific holding about a notably obscure clause of the Constitution is, however, to miss the forest for the trees: The importance of the *Cases* did not lie in the particular resolution of tariff policy, but, rather, in deciding whether the United States could emulate the European nations and conquer and possess colonial territories. And what it meant to be such a territory—the term that comes out of *Downes* is “unincorporated territory,” in contrast to “incorporated territories” like, say, the Dakotas, Alaska, Hawaii, and the like—is, among other things, that there is simply no pretense that the colonized entity was being held in trust until, on the one hand, it could become independent or, on the other, until it was absorbed into the United States as an equal member of the federal Union, with whatever “sovereign” prerogatives continued to be possessed by the states. Territories do not even possess the fictive elements of

18. I also note, for what it is worth, I do *not* assign *Marbury v. Madison*, because of my belief that it isn't worth taking the time necessary to teach it in a course in which many issues and cases compete with one another for time in a course that meets only forty-two times the entire semester. It is true, though, that I do assign Robert McCloskey, *The American Supreme Court* (U. of Chicago Press, 3d ed. 2000), the second chapter of which is a presentation of *Marbury*, so it is not the case that my students emerge completely ignorant about the importance, within our conversational legal culture, of the case.

19. *De Lima v. Bidwell*, 182 U.S. 1 (1901).

do not even possess the fictive elements of "sovereignty" retained by Indian tribes.²⁰

The answer to my question above surely doesn't lie in what undergirds the first version of the pedagogical canon, i.e., the high probability that students will be faced with "uniformity clause" issues. It is not self-evident what the relationship should be between likelihood of actual cases and presence in the pedagogical canon; after all, even though the field of taxation of interstate commerce, especially by states, continues to generate significant cases,²¹ the general subject has disappeared from almost all contemporary casebooks. Whatever explains the presence (or absence) of cases in constitutional law casebooks, it is not likely to be a predictive judgment as to what precise areas are most likely to be of practical relevance to our students, most of whom will address a constitutional issue, if they ever do, in the course of representing a business-related client faced with a dormant commerce clause problem or, indeed, the taxation of interstate commerce.

Nor am I really concerned to prepare students for possible cases concerning the particular (and perhaps peculiar) constitutional status of Puerto Rico, Guam, and the Virgin Islands, though, to be sure, there is certainly opportunity for some lawyers to litigate such issues.²² Again, though, if prediction of litigation is at all relevant, one should note that it is far more likely that students will address in their practice the First Amendment implications of regulating cigarette advertising than whether, for example, Puerto Ricans are properly regarded as 14th Amendment birthright citizens rather than citizens only because of congressional grace as manifested in a 1917 statute conferring that status.²³

20. On retained Indian sovereignty, see *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). An excellent historical examination is Sidney L. Harring, *Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century* (1994). The minimal nature of Indian sovereignty is underlined in *United States v. Kagama*, 118 U.S. 375 (1886), recognizing plenary power in Congress to do basically whatever it wished with regard to Indian tribes.

21. See Nowak and Rotunda, *Constitutional Law* § 8.11 at 311-14 (cited in note 14), for a recent overview of the caselaw.

22. See generally Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* (Nijoff, 1989). The Court very recently summarily affirmed a decision of a three-judge district court holding that *The Insular Cases* are alive and well, with the consequence that the one-person—one-vote doctrine of *Reynolds v. Sims*, 377 U.S. 533 (1964), did not apply to the Northern Mariana Islands. See *Torres v. Sablan*, No. 99-475, 2000 WL 29242, 68 USLW 3178 (January 18, 2000) (affirming unreported decision).

23. See the Jones Act, Act of March 2, 1917, 39 Stat. 353, discussed in Leibowitz,

One could easily justify assigning *Downes* in terms of the second notion of the pedagogical canon, for the debates among the contending justices are indeed carried on at a high level of professional ability, and students can certainly learn a lot about legal rhetoric from the close study of the various opinions. For someone like me, who emphasizes in my course learning the “modalities” of legal argument,²⁴ the case is almost a treasure trove. After all, the formal question before the Court is whether Puerto Rico, ceded to the United States by Spain in the aftermath of the Spanish-American War of 1898 and thus fully subject to American sovereignty, is within “the United States” for purposes of the uniformity Clause. One might think this would be an easy question, but students (and their teachers) are consistently surprised by the fundamental questions that the Constitution leaves unanswered. Presidents must be “natural born citizens,”²⁵ but the Constitutional text gives nary a clue as to how one discovers who is, with certainty, within that status.²⁶ Similarly, one might think that the question as to what constitutes “the United States” that is, after all, presumptively structured by the Constitution would have a clear constitutional answer, but that, just as obviously, is untrue. If Puerto Rico is not part of “the United States,” then what (or where) is it, and how does one derive the answer? One answer is that offered by the plurality opinion authored by Justice White, which has proved the “winning” opinion in subsequent cases. It is an “unincorporated territory,” a term that, of course, appears nowhere in the constitutional text or anywhere in the various debates surrounding the formation of the Constitution. So where does it come from? Perhaps from prior case law, as suggested in the plurality opinion, though the very fact that it is *only* a plurality opinion sug-

Defining Status at 144-46 (cited in note 22).

24. The term comes from Philip Bobbitt's seminal work. See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford U. Press, 1982); *Constitutional Interpretation* (Basil Blackwell, 1991). For Bobbitt there are six “modalities,” i.e., constitutive rhetorics of constitutional analysis: textualism, historical analysis, structuralism, doctrinalism, prudentialism, and what he calls “ethical” analysis, by which he means attention to the underlying assumptions of the American “ethos” captured in the overall nature of the constitutional enterprise. For further analysis (and critique), see J.M. Balkin and Sanford Levinson, *Constitutional Grammar*, 72 Tex. L. Rev. 1771 (1994).

25. Art. II, § I, cl. 5.

26. And, as Jordan Steiker, Jack Balkin, and I have shown elsewhere, the presidential eligibility clause, if read extremely closely, has some very surprising consequences indeed. See Steiker, et al., *Taking Text and Structure Really Seriously: Constitutional Interpretation and the Crisis of Presidential Eligibility*, 74 Tex. L. Rev. 237 (1995) (demonstrating, through careful textual analysis, the ineligibility of any President since Zachary Taylor to occupy the office).

gests that the case law is less than overwhelming on this point. But no one can plausibly believe that *Downes* was decided as a detached, dispassionate exegesis of prior opinions. The doctrine of "unincorporated territories," one may confidently assert, was the product, far more importantly, of the perceived exigencies of the moment, which made Puerto Rico and the Philippines at once highly desirable as possessions of the United States yet, it was thought, unsuitable for genuine membership in the American Union. I shall return to this theme presently.

Of course, even if Puerto Rico had been treated as a full-fledged, first-class "Territory" of the United States, that would still invite further discussion of the implications of the distinction drawn in the Constitution between States and Territories. Some of the ramifications are obvious and unproblematic. Only States can have voting representatives in Congress or representation in the Electoral College.²⁷ But what about, for example, the Privileges and Immunities Clause of Article IV,²⁸ specifically limited in its language to "[t]he Citizens of each State." Would, then, a state be free to discriminate against citizens of the United States who were not, however, citizens of any particular state, i.e., those citizens of the United States living in territories, at least in the absence of Equal Protection limitations.²⁹ New Hampshire might have to allow Vermonters to become members of its bar, but does this extend to domiciliaries of Puerto Rico or the Virgin Islands?³⁰ And § 4 of Article IV guarantees "a Republican Form of Government" only to "every State in this Union,"³¹ just as the United States apparently must protect only "each of them against Invasion."³² Can the United States blithely govern, indefinitely, any Territory in a decidedly non-Republican manner

27. The District of Columbia, which is not a state, does have representation in the College (and, like Puerto Rico, non-voting representation in the House of Representatives), but it took a constitutional amendment, see U.S. Const., Amend. XXIII, to gain the electoral votes enjoyed by the District.

28. "The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States."

29. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

30. I note that *Thorstenn v. Barnard*, 842 F.2d 1393 (3d Cir. 1988), rev'd 489 U.S. 546 (1989), held that the Privileges and Immunities Clause was applicable to the Virgin Islands and, therefore, invalidated the Islands' residency requirement, but this still doesn't seem to dispose of the reverse problem, where a Virgin Islander, though a citizen of the United States, is not a citizen of "a State."

31. U.S. Const., Art. IV, § 4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

32. *Id.* (emphasis added).

and cite the text of Article IV as licensing such governance? This is, of course, no idle question, not only in regard to territories like Puerto Rico and Guam but also with regard to the District of Columbia, which continues in basic ways to be under the iron fist of a Congress in which it has no voting representation.³³ Surely one task of any first-year constitutional law course is to teach the techniques of close textual analysis, including the importance of reading the Constitution in its entirety and discerning from the language used in one part implications for analysis of other parts.³⁴

All of these pedagogical goals are amply furthered by *Downes*. Yet, in all candor, my own interest in adding it to the syllabus or my zeal in urging that other teachers do likewise, comes less from its potential utility as part of the pedagogical canon than from its importance for those interested in constructing the best cultural-literacy canon, which goes to creating citizens who are well informed about key episodes in American constitutional development or, indeed, for the value it would have within the academic theory canon in directing constitutional scholars toward important questions that have tended to be ignored within contemporary scholarship.

The culturally literate citizen should be aware of the particularities of American expansionism found in the late 19th century, on which *The Insular Cases* throw immense light. Earlier moments of expansionism—the move Westward, in the name of what would be denominated “Manifest Destiny,”³⁵ toward the Pacific as evoked so powerfully in Marshall’s opinion in *McCulloch*³⁶—involved lands that were clearly meant to become, after

33. See e.g., Francis X. Clines, *\$1.64 May Block Medical Use of Marijuana in Capital*, N.Y. Times A22 (Nov. 13, 1998), which details the attempt by Congress to prevent the District of Columbia from counting the ballots in an initiative about the medical use of marijuana in what is described as an “11th-hour move to void the Nov. 3 marijuana initiative by passing an appropriations amendment that bars the city from spending even the smallest amount of money to tally and promulgate the result.” Clines refers to this episode as part of “this city’s perennial home-rule struggle with Congress.” (It would, apparently, cost only about \$1.64 to push the computer button that would tally the results.)

34. This methodology is probably most identified these days with Akhil Reed Amar. Indeed, Amar draws on *The Insular Cases* in his recent article, *Intratextualism*, 112 Harv. L. Rev. 747, 782-88 (1999) (discussing varying approaches of C.C. Langdell and A. Lawrence Lowell in their articles on the constitutional status of Puerto Rico).

35. See, e.g., Frederick Merk, *Manifest Destiny and Mission in American History* (1963).

36. “Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. . . . Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous and expensive?” 17 U.S. (4

settlement and development by whites, full members of the United States of America, with concomitant full rights of participation in the House, Senate, and electoral college. Permanent colonization was not viewed as “the American way,” save, of course, for American Indians, whose story—also, one might note, excluded from the current canon of constitutional law—is vital to any narrative of American expansionism and whose legal history is linked in important ways to that of the Puerto Ricans whose fate is ultimately at issue in *Downes*.

What I now realize, in a way that was simply not part of my consciousness prior to my immersion in *Downes*, is how much the entire story of American expansionism has been ignored within the currently operative canon(s) of constitutional law. The central narratives of American constitutional history tend to be those sketched out in Robert McCloskey’s classic work *The American Supreme Court*,³⁷ which features three organizing story-lines: The first describes the complex (and, of course, ultimately violent) grappling with the implications of federalism, a story that begins with the 1787 drafting of the Constitution and lasts at least until Appomattox. At that point, although the issue of federalism obviously does not disappear, it moves to the background, to be replaced in the starring role by the constitutional issues generated by the development of industrial capitalism and a national economy. To what extent will government, both at the state and national levels, be deemed to have the power to regulate the new forms of business enterprise that had developed? This legal struggle, of course, culminated in the New Deal Revolution that removed the doctrinal obstacles that had been created by the “Old Court” in the earlier half-century. Again, issues of economic regulation have not entirely disappeared, but they, too, have moved substantially into the shadows, as the central story shifts to the Constitution’s role as guarantor of the civil rights and liberties of vulnerable minorities, what might be termed the “footnote 4” narrative featuring the Court as vigorous protector of the politically and socially down-

Wheat.) 316, 408 (1819). Professor LaRue aptly describes the basic rhetoric of *McCulloch* as “The Story of Growth,” see Lewis H. LaRue, *Constitutional Law as Fiction: Narrative in the Rhetoric of Authority* 90 (Penn. State U. Press, 1995). The “growth” involved is not only that of the Court (or even of the Constitution as a regulator of state or national politics), but also of the Nation itself.

37. Robert McCloskey, *The American Supreme Court* (U. of Chicago Press, 1960). I have prepared an updated version of this book, which was published in 1994. It did not, however, revise any of McCloskey’s original analysis.

trodden.³⁸ Or, as I have suggested in my own revisions to McCloskey's text, the post-Great Society Court has taken on the task of monitoring the operation of the significantly enlarged welfare state that emerged in the 1960s.³⁹ What is notably absent from McCloskey's account—and, of course, the point is that he is not in the least unique—is the epic story of American expansionism that pervades our entire 19th-century history.⁴⁰

The Insular Cases, of course, deal with one important episode in the history of expansionism, the aftermath of the Spanish-American War of 1898 that represented, among other things, the forthright decision by American ruling elites—and the electorate in the 1900 presidential contest between William McKinley and William Jennings Bryan—to join European countries in becoming a frankly imperialist power. This meant, among other things, the capture and subsequent politico-legal control by the United States of hitherto foreign territory that would not, in any way, be viewed as a potential member of the organic entity known as The United States of America. But one of the marvelous things about *Downes*, pedagogically speaking, is that it contains within it a capsule history of some other crucial chapters in the expansionist saga.

The most important example surely involves the Louisiana Purchase.⁴¹ Students can learn from *Downes* of Thomas Jeffer-

38. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). An especially interesting account of the jurisprudence of Footnote Four is J.M. Balkin, *The Footnote*, 83 Nw. U. L. Rev. 275 (1989). I do not want to be read as necessarily endorsing the descriptive accuracy of the standard narrative and its tendency to praise the Court as a fearless protector of the downtrodden. My colleague Lucas Powe challenges this conventional wisdom in *The Warren Court and American Politics* (Harvard U. Press, 2000), which argues that even this Court most esteemed by political liberals scarcely proved particularly protective of truly vulnerable minorities (i.e., those minorities who did not enjoy significant support from the wider polity).

39. See McCloskey, *The American Supreme Court* 174 (revised by S. Levinson, U. of Chicago Press, 1994).

40. Helen Hershkoff has suggested that American expansionism might well be part of the story of political economy, including the state's attempts to regulate (and, of course, to promote) capitalism. And, insofar as *The Insular Cases* arise at the very height of McCloskey's second period, they might especially warrant being woven into the epic story of the relationship between capital and government. Helen Hershkoff to Sanford Levinson, Feb. 3, 2000. Although I am in general sympathy with Prof. Hershkoff's point, an anomaly of the absorption of Puerto Rico is that it is harder to explain in terms of classic economic imperialism than is, say, the rather ruthless takeover of the formally independent monarchy of Hawaii during the same period.

41. This, too, now appears in the new edition of *Processes of Constitutional Decisionmaking* at 73-75 (cited in note 9). Can anyone seriously question that the decision to go ahead with the Purchase was of far more significance, both politically and constitutionally, than *Marbury* and, probably, any single one of the "great cases" linked with the Marshall period? Put it this way: Marshall only talked about the American empire that

son's belief that the Louisiana Purchase was unconstitutional, though this was quite irrelevant to his decision to go ahead with the decision that fundamentally transformed the Union and put in place, because of the existence of vast new territories to be settled by Americans moving westward, the issue that would ultimately trigger dissolution and conflagration in 1861. At one level, Jefferson's skepticism is probably known to most reasonably well-informed students of American history. But most people, I dare say, assume that the only problem involved presidential authority to commit the United States to the purchase of foreign territory prior to congressional authorization. That, to be sure, was no small issue, but, at the end of the day, it was far from the far more profound problem, which indeed involved the radical transformation generated by the Purchase in the very nature of the United States as a socio-political entity.

Most obviously, it greatly increased the size of the United States, more than doubling it. This could be no small point for anyone at all committed to the classical republican belief that republican government could not be successfully achieved in an "extended" territory. This was, of course, the subject of a classic essay by James Madison in *The Federalist*,⁴² which displayed little patience for the small-area theory of republicanism espoused by many anti-Federalists. But Madison's argument was written to justify what from our own perspective is a remarkably modest extended republic of thirteen states (and attached territories that would be ceded to the new United States as the seedbed for expansion west of the Alleghenies) consisting of approximately 3 million people, the majority of whom (or, more to the point, the overwhelming majority of the people permitted to participate in the polity) were white, Protestant, and English-speaking. It requires a substantial leap of faith to assume that even Madisonians, let alone Jeffersonians fearful of potential tyranny from an impersonal government far removed from local networks, would necessarily applaud a vastly larger country, the most important city of which, New Orleans, was dominated by French-speaking Catholics whose legal elites were untrained in the mysteries of the common law. Indeed, the Orleans legislature in March, 1808, signified the triumph of the civilian over the common law-

existed in 1819 (and perhaps he envisioned a greater one to come), whereas Jefferson had actually made it happen (and his Democratic successors would be the heartiest supporters of future expansionism).

42. See *The Federalist* No. 14 (James Madison) at 150 (Benjamin F. Wright, ed., Harvard U. Press, 1961).

yer's sensibility by adopting the *Digest of the Civil Laws Now in Force in the Territory of Orleans*, modeled on the Code Napoleon, which to this day informs at least some legal practice in Louisiana.⁴³ And, of course, it could readily be predicted that many of the new lands would be conducive to the expansion of slavery and, just as importantly, the creation of new states committed to maintaining (and expanding) chattel slavery; the explicit terms of the Purchase seemed to guarantee the eventual (but not too-long deferred) admission as full-fledged, and equal, states of the territories that would be carved out of the Purchase.

It is little wonder that Jefferson believed that a constitutional amendment was necessary to justify the expansion instantiated in the Louisiana Purchase. "Our Confederation is certainly confined," he wrote John Dickinson, a fellow signer of the Declaration of Independence, "to the limits established by the revolution. The general government has no powers but such as the constitution has given it; and it has not given it a power of holding foreign territory, and still less of incorporating it into the Union. An amendment of the constitution seems necessary for this."⁴⁴ Ironically enough, his Federalist opponents professed to

43. See George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 156-57 (Harvard U. Press, 1975). It is indicative of the complexities of New Orleans' colonial past that Spanish courts exercised jurisdiction over New Orleans until November 30, 1803, when the Territory was retroceded from Spain to France (and then, on December 20, transferred to the United States). The French prefect, though abolishing the existing Spanish courts, did not put in their place French substitutes, presumably because of the short time remaining during which France would exercise even formal sovereignty. This in turn led to an extensive debate about the proper legal system for Louisiana. Although Jefferson was an ardent believer in a uniform legal system, *id.* at 107, he was notably unsuccessful in substituting Anglo-Saxon common law for the existing continental approach to law. The local legislature passed in May 1806 a bill declaring "the civil law in force and projecting a Spanish code," but it was vetoed by the Governor. *Id.* at 116. Needless to say, English-speaking settlers had little sympathy for attempts of the French-speaking community to maintain the traditional legal ways. Finally, after much debate (and recrimination), the Orleans legislature, on March 31, 1808, adopted the *Digest*.

George Dargo concludes his interesting book on the controversy by writing: Louisiana saw the exercise of American cultural and political imperialism, but it was also a kind of model of how that imperial thrust was once partially blunted. As a result of the Louisiana encounter, the new American nation was compelled to elevate the level of tolerance it was willing to display toward a foreign population caught in its midst.

Id. at 174.

How much tolerance would necessarily be shown toward "foreign" populations caught up in the expansionist epic would, of course, remain to be seen. At the very least, though, Drago usefully captures the sense in which the aftermath of the Louisiana Purchase can be understood as an exercise in applied "multiculturalism."

44. Thomas Jefferson to John Dickinson, quoted in David N. Mayer, *The Constitutional Thought of Thomas Jefferson*, 247 (U. Press of Virginia, 1994). See generally Everett Somerville Brown, *The Constitutional History of the Louisiana Purchase, 1803-*

share such constitutional doubts, presumably because of the obvious increase in Southern power presaged by the Purchase. Obviously, Jefferson changed his mind, not least because of what Holmes would well label "the felt necessities of the times." If the United States appeared to tarry in taking advantage of Napoleon's remarkable offer, there was a danger that Spain would attempt to undo the deal, to the severe detriment of American national interests.⁴⁵ There is, therefore, no amendment licensing the purchase, and executive-congressional power under the treaty clause was expanded in a *coup d'main*. Even more to the point, this champion of strict construction and constitutional fidelity wrote one correspondent that "whatever congress shall think it necessary to do, should be done with as little debate as possible, & particularly so far as respects the constitutional difficulty," while another was told that "the less that is said about the constitutional difficulties, the better."⁴⁶ His most famous rationalization of the Purchase is surely his 1810 letter to John Colvin, in which Jefferson explained that "A strict observance of the written law is doubtless *one* of the high duties of a good citizen but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation."⁴⁷ Even if one agrees with Jefferson, it remains well worth asking precisely how salvation of the country required the Purchase (or the other expansionist acts that would be carried out with questionable constitutional provenance). In any event, the Louisiana Purchase is a wonderful topic for considering the varied imperatives that must be considered by any president, and we must ultimately confront the question whether we care about Jefferson's (in)fidelity to the Constitution any more than we care about whether the Philadelphia framers and the later ratifiers were really faithful to the Articles of Confederation or, in a perhaps more volatile example, whether the supporters of the Fourteenth Amendment paid due heed to the requirements of Article V.

Downes also contains extensive discussions of Chief Justice Taney's opinion in *Dred Scott*.⁴⁸ For understandable reasons, the case is usually treated, when it is found at all in canonical mate-

1812 (U. of California Press, 1920).

45. *Id.* at 250.

46. Both quoted in Mayer, *The Constitutional Thought of Thomas Jefferson* at 230 (cited in note 44).

47. Quoted in Gerald Stourzh, *Alexander Hamilton and the Idea of a Republican Government* 34 (Stanford U. Press, 1970).

48. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

rials,⁴⁹ as a case only about slavery and, even more so, about the status of Blacks, deemed by Taney to have “no rights which the white man was bound to respect.”⁵⁰ With the demise of slavery—and the solution to the problem of citizenship provided by the first sentence of the Fourteenth—*Dred Scott* is thought to be a case with little “gravitational weight” in the Dworkinian sense. But the meta-issue, as it were, of *Dred Scott*, is whether Congress possesses “plenary,” i.e., unconstrained, power in regard to the territories of the United States, and no issue, obviously, was more relevant at the turn of the 20th century.

Taney’s conclusion that Congress did not enjoy plenary power rendered unconstitutional the Missouri Compromise of 1820, with its prohibition of slavery in the northern regions of the Louisiana Purchase. Although Article IV gives Congress the power to make “all *needful* rules” (emphasis added), it takes only minimal acquaintance with the issues surrounding the exegesis of the “necessary and proper” clause to realize that this can easily be read as considerably less than an assignment of plenary power to Congress to do whatever it thinks desirable concerning the territories. To speak somewhat anachronistically, Taney can be viewed as a “premature anti-imperialist” who rejected the notion of the United States as a country that could conquer territory and govern it indefinitely at the behest of Congress. Instead, for Taney, all territory was in effect held in trust for those Americans who would settle it and then establish full and equal States within the American polity. And, while in the territory, they maintained a full set of constitutional rights. To be anachronistic once more, Taney would presumably have answered yes to the question surrounding *The Insular Cases*: Does the Constitution follow the flag? It is a useful exercise to ask whether Taney was wrong in his entire theory of the case, or “only” in the absolutely disastrous application of his theory to protect the purported property rights of slaveowners.

To be sure, *Downes* does not present a comprehensive overview of American expansionism. There is, for example, no discussion of the significant constitutional issues surrounding the annexation of Texas⁵¹ (perhaps because the Lone Star Republic was never a “territory” of the United States). Anyone interested, though, in the meaning of the Treaty Clause as a signifi-

49. As a matter of fact, *Dred Scott* just barely hangs on to canonical status. See Sanford Levinson, 68 *Chicago-Kent L. Rev.* at 1087, 1090-91 (cited in note 1).

50. *Dred Scott*, 60 U.S. at 407.

51. See Frederick Merk, *Slavery and the Annexation of Texas* 121-51 (Knopf, 1972).

cant procedural hurdle to foreign entanglements should certainly be interested in the rather remarkable process surrounding Texas's entry into the union. The annexation of Texas was first presented to the Senate in the form of a treaty between two sovereigns, requiring ratification by two-thirds of the Senate. However, upon the realization of the impossibility of securing such support, given the antagonism of anti-slavery northerners to this boon to slaveowners, the admission of Texas as a State was transformed into ordinary legislation admitting a new State, which requires only the approval of a majority of each House of Congress. The fact that all prior states were carved out of territory belonging to the United States was deemed constitutionally irrelevant. *Downes* is also silent on the particular history of the United States in relation to conquered tribes of American Indians. All of these are parts of the expansionist epic, and all deserve placement that is now lacking in the canon.

The Insular Cases should be placed not only in the context of American expansionism, but also within the sadly rich history of American racism or, perhaps more to the point, the history of American "ascriptivism," the view that to be a "true American," one had to share certain racial, religious, or ethnic characteristics.⁵² No one can read *Downes* without realizing the extent to which the "unAmericanness" of the people in the new American territories is fundamental to the outcome. Thus Justice Brown, denying that Puerto Rico is within the United States, notes the implications of a contrary decision for "what Chief Justice Marshall termed the 'American empire.' There seems to be no middle ground between [Brown's] position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, [then at least] their children thereafter born, *whether savages or civilized*, are such, and entitled to all the rights, privileges and immunities of citizens."⁵³ This was, apparently, unthinkable. Yet there was no doubt in Brown's mind that annexation of what he termed "outlying and distant"⁵⁴ lands might serve American national (and imperial) interests.

52. See generally Rogers Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (Yale U. Press, 1997). Smith notes, for example, the presence of an influential ideology, especially prevalent during the period of *The Insular Cases*, that "America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors." *Id.* at 3. Smith specifically discusses the treatment of Puerto Rico (and Puerto Ricans) at 438-39.

53. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (emphasis added).

54. *Id.* at 282

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 [presumably instantiated in the Constitution], 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.⁵⁵

It is almost needless to add that Justice Brown authored the egregious opinion in *Plessy v. Ferguson*,⁵⁶ which can be understood only against a background assumption that it was entirely reasonable for racially superior whites to wish to avoid the prospect of association as presumptive social equals with African-Americans. Students should realize that these cases arise out of a common intellectual milieu. Similarly, cases at the time involving American Indians featured similar assumptions. Thus the Court in *Elk v. Wilkins*⁵⁷ had refused to recognize American Indians as birthright citizens.⁵⁸ For certain purposes, then, Indian lands were also viewed as not being within the United States, though, of course, this had no effect on the extent of the governing authority Congress would claim vis-à-vis the Indian nations.⁵⁹ And, in a 1913 decision, a unanimous Court described the Pueblo Indians of New Mexico as “adhering to primitive modes of life, . . . and chiefly governed according to the crude customs inherited from their ancestors[;] they are essentially a simple, uninformed and inferior people,” thus much in need of “special consideration and protection, like other Indian communities.”⁶⁰

One ought, of course, not treat the Court as some kind of deviation from an otherwise more enlightened universalism found in the other branches, for that was surely not the case.

55. Id. at 287.

56. 163 U.S. 537 (1896).

57. 112 U.S. 94 (1884).

58. I should note the genuine political (as well as constitutional) complexities of the issue. One may well think that *Elk*, which involved an American Indian who clearly wished to assimilate, was wrongly decided without at the same time necessarily endorsing the view that American citizenship should automatically have attached, say, to any Sioux born in the Dakota Territory or Montana. The reason is simple: There is no reason to believe that all Indians *wished* to be American citizens (anymore, say, than West Bank Palestinians would view absorption into Israel, with Israeli citizenship, as acceptable).

59. See *United States v. Kagama*, 118 U.S. 375 (1886) (enunciation of the plenary power doctrine in regard to congressional power to regulate tribes).

60. *United States v. Sandoval*, 231 U.S. 28, 39 (1913).

Congress was, during this era, passing laws excluding the immigration of Asians.⁶¹ Indeed, Justice Harlan, in his famous dissent in *Plessy v. Ferguson*, after arguing that “the destinies of the two races, in this country, are indissolubly linked together,” went on to note, alluding to “the Chinese race,” that “[t]here is a race so different from our own that we do not permit those belonging to it to become citizens of the United States.”⁶² Lest one believe this is simply an empirical description of existing law, even more telling—and shocking to those for whom Harlan has become an icon of anti-racist sensibility—is his joining in Chief Justice Fuller’s dissent in *United States v. Wong Kim Ark*.⁶³ The majority had held that persons of Chinese descent born in the United States were indeed birthright citizens under the Fourteenth Amendment. Fuller and Harlan, on the other hand, accepted the argument made by the United States that “[t]here certainly should be some honor and dignity in American citizenship that would be sacred from the foul and corrupting taint of a debasing alienage.”⁶⁴ Fuller, joined by Harlan, agreed and denounced “the presence within our territory of large numbers of Chinese laborers, of a distinct race and religion, remaining strangers in the land, residing apart by themselves, tenaciously adhering to the customs and usage of their own country, unfamiliar with our institutions and apparently incapable of assimilating with our people.”⁶⁵ It can, then, occasion no surprise that they were not willing to admit “that the children of persons so situated become citizens by the accident of birth.”⁶⁶

I may be misleading the reader insofar as I have framed the issue as one of “plenary congressional authority” versus “possession of constitutional rights” (i.e., “the Constitution following the flag”). As a matter of fact, the two plurality opinions that constitute the Court’s response to questions about Puerto Rico’s status both *reject* the suggestion that Congress possesses truly “plenary”—i.e., constitutionally unfettered—power over the ter-

61. Upheld in *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

62. 163 U.S. 537, 561 (1896).

63. 169 U.S. 649 (1898). See generally Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 Iowa L. Rev. 151 (1996).

64. Brief for the United States at 37, reprinted in Philip Kurland and Gerhard Casper, eds., 14 *Landmark Briefs And Arguments of the Supreme Court of the United States: Constitutional Law 37* (U. Publications of America, 1975).

65. 169 U.S. at 731 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893)) (Fuller, C.J., joined by Harlan, J., dissenting).

66. *Id.*

ritories.⁶⁷ Thus Justice Brown distinguished between constitutional “prohibitions as go to the very root of the power of Congress to act at all, irrespective of time and place, and such as are operative only ‘throughout the United States’ or among the several States.”⁶⁸ Thus he suggests that Congress could not grant titles of nobility in the territories any more than in the rest of the United States.⁶⁹ More interesting is his somewhat cryptic comment that “[p]erhaps, the same remark may apply to the First Amendment . . .,” though he quickly adds that “[w]e do not wish, however, to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.”⁷⁰ Later in the opinion Brown distinguishes “between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence.”⁷¹ As examples of the former, he offers

the rights to one’s own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one’s own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government.⁷²

The latter, “artificial rights,” include “rights to citizenship, to suffrage . . . and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence.”⁷³ It should not occasion surprise, then, that the Court, in 1922, held that Puerto Ricans, though by then admitted to citizenship by act of Congress, were not entitled to

67. I am grateful to Larry Sager for pressing this point with me. He uses the Court’s language, quoted in this and the following paragraphs, to support the proposition that the plurality opinions, though concededly containing some troublesome language, can also be read as vindicating of the roles of both the Constitution and the Court as guarantors of (at least some measure of) liberty for all.

68. *Downes v. Bidwell*, 182 U.S. 244, 277 (1901).

69. *Id.*

70. *Id.* (emphasis added).

71. *Id.* at 282

72. *Id.* at 282-83. See, for a more modern restatement of the same basic point, *Examining Board v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976): only “‘fundamental’ constitutional rights [are] guaranteed to the inhabitants” of unincorporated territories.

73. *Id.* at 283.

trial by jury, though, interestingly enough, residents of Alaska had been held in 1905 to enjoy such a right.⁷⁴ Nor, of course, is it likely that any Court would deem the citizens of an “unincorporated territory” as possessing the “right to keep and carry arms wherever they went” which Taney, in *Dred Scott*, appeared to view as one of the hallmarks of American citizenship.⁷⁵

The basis of the distinction between Alaskans and Puerto Ricans was the doctrine of “unincorporated” territories enunciated in Justice White’s plurality opinion, though White agrees that “there are general prohibitions in the Constitution in favor of the liberty and property of the *citizen* which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts.”⁷⁶ Even if one ignores the limitation of these protections to “the citizen,” it should remain clear that *Downes* is (or should be) almost literally a textbook example of how members of the Court came to consider themselves authorized to pick and choose among constitutional norms on the basis of notions of importance or “fundamentality.”

Lest one be too critical of this, one should note the implications for a legal doctrine that takes “multiculturalism” seriously. That is, it is debatable what constitutional norms must be universalised (even within the territorial boundaries of jurisdictions controlled by the United States) and how many of them should indeed be viewed and expressive only of “local” or, in Justice Brown’s word, “particular” norms. It is hard to argue, for example, that trial by jury *does* constitute some kind of “fundamental” human right; most legal cultures reject it or, at the very least, use juries far less than does the United States. The same variation may be seen, of course, with regard to important aspects of what we see as “First Amendment” issues, such as, say, the regulation of “hate speech” or commercial advertising.

Nor, if one is to be honest, can one simply dismiss as irrelevant the questions asked by Justice Brown, even if they are phrased in a decidedly odious manner. Only the most naïve, and indeed chauvinistic, American could believe that our particular Constitution is a one-size-fits-all model of how *all* societies,

74. Compare *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), with *Rasmussen v. United States*, 197 U.S. 516 (1905).

75. 60 U.S. (19 How.) 393, 417 (1857).

76. *Downes*, 182 U.S. at 294 (emphasis added).

whatever their particular histories, social structures, traditions, or state of economic development, should be governed. One must recognize that to this day Puerto Ricans are scarcely undivided in regard to the basic issue underlying *The Insular Cases*, i.e., the complete absorption of the island into "the United States." A (slim) majority of Puerto Ricans, after all, reject statehood in favor of alternatives, either retention of commonwealth status or independence, that presuppose a certain lack of "fit," as it were, between full membership in the Union, with all attendant constitutional obligations, and the particular interests of Puerto Rico. Moreover, to this day the Constitution does not truly follow the flag in regard to Indian nations within the territorial United States. The Bill of Rights has never been formally "incorporated" against Indian nations, and even the Indian Civil Rights Act, which extends most of the protections of the Bill of Rights to members of Indian tribes, nonetheless omits the Establishment Clause of the First Amendment.⁷⁷ Indian nations are thus allowed to be theocracies in a way that would be wholly impermissible in any other institution of American governance.

It is also worth paying attention to the politics of statehood in regard to the New Mexico and Arizona territories, which were very much affected by concerns about the prevalence of Spanish-speaking Mexican-Americans in the former. An initial proposal that New Mexico and Arizona be admitted together as one state was rejected in a "Protest" by the Arizona territorial legislature, which referred to "the decided racial difference between the people of New Mexico, who are not only different in race and largely in language, but have entirely different customs, laws and ideals and would have but little prospect of successful amalgamation." Describing the people of Arizona, the Protest stated that "95 percent . . . are Americans," which suggest an unwillingness to treat most of their fellow American citizens in New Mexico as "real" Americans because of these differences.⁷⁸ The good news, of course, is that New Mexico was in fact admitted to the Union in 1912, with Arizona as a separate state, but the concern about difference, especially of language, has certainly not disappeared. Indeed, any discussion of the prospects of Puerto

77. See *Talton v. Mayes*, 163 U.S. 376 (1896). As to the Indian Civil Rights Act, see Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, *American Indian Law* 384-85 (Michie, 3d ed. 1991).

78. The Protest is quoted in "Language Rights and New Mexico Statehood," in James Crawford, ed., *Language Loyalties: A Source Book on the Official English Controversy* 59 (U. of Chicago Press, 1992).

Rican statehood today quickly turns to the fact that most Puerto Ricans speak only (or, certainly, principally) Spanish and that Puerto Rico, if a state, might take advantage of the "equal footing doctrine"⁷⁹ to emulate other states who have declared an "official" language,⁸⁰ though in Puerto Rico's case the official language would presumably be Spanish.

In any event, I suggest the following thought experiment: Imagine that a majority of Puerto Ricans vote to petition Congress for admission to the Union as a State. What proper reasons could Congress give to deny that request? That most Puerto Ricans are non-white? That they are Catholic? That they are poor? That they do not speak English? That admission as a state would "dilute" the voting power of the present states in the Senate and, if the House were not expanded, in the House as well? Few scholars remain active who remember the politics of admission with regard to Alaska and Hawaii. It is not at all unthinkable that even those of us who are now (relative) "old-timers" will be able to observe (and even to offer advice) on the admission of Puerto Rico.

Few cases, then, offer so much as *Downes* in learning about the interplay of general American political ideologies and the development of constitutional doctrine. Moreover, insofar as the lessons are sometimes unpleasant, *Downes* can serve as an important corrective against some of the more cheerleading views of constitutional history (and the Supreme Court) as necessarily progressive in its thrust.

I have ignored so far the third canon, those paradigm cases (or non-judicial episodes) that constitute the subject matter for those academics who are self-consciously engaging in the enterprise of constitutional theory. Here, too, *The Insular Cases* amply pay their way, especially if one agrees with such leading figures as Bruce Ackerman⁸¹ and Stephen Griffin⁸² that the duty of the constitutional theorist is to explain the actual mechanisms of constitutional change that have undoubtedly occurred in the American polity. Both sharply reject the altogether naïve—indeed, literally incredible—notion that the Constitution over the

79. On "equal footing," see *Ward v. Race Horse*, 163 U.S. 504, 514-15 (1896).

80. See, e.g., Crawford, *Language Loyalties* at 132-35 (cited in note 78), for the texts of nine such declarations from various states.

81. See generally Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991); *We the People: Transformations* (Belknap Press, 1998).

82. See Stephen Griffin, *American Constitutionalism: From Theory to Politics* (Princeton U. Press, 1995).

past 200 years can be understood in terms of a canonical text drafted in 1787 plus those written textual additions we call “amendments” and “interpretations” of these canonical texts proffered by the Supreme Court. Both argue, and I strongly agree, that significant “amendment” has taken place outside the confines of Article V.⁸³

Ackerman, of course, is famous for his notion of “constitutional moments,” whereby an aroused American public, confronting issues of great import, make a conscious decision to strike out on transformative constitutional paths. Although his initial writings suggested that there were only three such moments—the Founding in 1787, Reconstruction immediately after 1865, and then the New Deal—his more recent work has acknowledged the possibility of additional such moments. Indeed, Ackerman has recognized that his own earlier work was too much focused on domestic events; a book co-authored with David Golove, on the other hand, argues that an important lesson of World War II was the inutility of the Treaty Clause as a constraint on foreign agreements, so that broad notions of “executive agreement,” coupled with majority approval of both houses of Congress, in effect substituted for the far more onerous requirement of the Treaty Clause (shades of Texas annexation!).⁸⁴

It is, I think, easy to view *The Insular Cases* as the product of just such an Ackermanian “moment.” Although historians differ on the extent to which the Election of 1900 was a referendum on American imperialism,⁸⁵ it is clear that the 1898 War and its aftermath was one of the central issues placed before the public. The two sides could hardly have been more clear in their views, the Republican McKinley embracing the duty to “educate the Filipinos [and, presumably, Puerto Ricans], and uplift and civilize and Christianize them,”⁸⁶ while William Jennings Bryan

83. See Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* 13 (Princeton U. Press, 1995).

84. See generally Bruce Ackerman and David Golove, *Is NAFTA Constitutional?* (Harvard U. Press, 1995).

85. See Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 *Miss. Valley Hist. Rev.* 43 (1937), discussed in Owen M. Fiss, 8 *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910* at 229 (Macmillan, 1993). Fiss has an excellent chapter focusing on *The Insular Cases*, id. at 225-56.

86. Quoted in Fiss, *History of the Supreme Court* at 227 n.5 (cited in note 85) (quoting James F. Rhodes, *The McKinley and Roosevelt Administrations, 1897-1909* at

pressed the anti-imperialist cause. McKinley obviously won, and *The Insular Cases* decided accordingly. It was, indeed, these cases that generated Finley Peter Dunne's immortal aphorism, "no matter whether th' constitution follows th' flag or not, th' Supreme Coort [sic] follows th' iliction returns."⁸⁷ For many, this is a cynical observation. For Ackerman, though, following the election returns, at least when the electorate has been properly primed by political leaders as to what is at stake, is precisely what the Supreme Court should do in order to recognize the successful culmination of a constitutional moment. The importance of Ackerman's argument, relative to *The Insular Cases*, is this: Even if one concedes the validity of the dissenters' analysis that the distinction between "incorporated" and "unincorporated" territories is made up of whole cloth and that Taney was basically correct in his anti-imperialist (albeit, in this instance, pro-slavery) reading of the initial Constitution, the Constitution had in effect been amended as the result of the events of 1898 and the ratifying election that took place two years later. Thus the majority was perhaps right on the merits, though not for the reasons they gave.

CONCLUSION

In many ways, this essay should be regarded as a "brief," making the case for inclusion of *Downes v. Bidwell* (and, through it, the more general saga of American expansionism) into the various canons of American constitutional law. Its intended audience is by no means the already well-informed scholar, such as Alex Alenikoff⁸⁸ or Gerald Neuman,⁸⁹ who have long been aware of the importance of the case and the broader issues surrounding it and who have tried, with extremely limited success, to educate the rest of us.⁹⁰ Instead, I am writing for those

106-07 (Macmillan, 1922)).

87. Quoted in Fiss, *History of the Supreme Court* at 229 (cited in note 85).

88. See generally T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 Const. Comm. 15 (1994) | see also Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 Cal. L. Rev. 853 (1990).

89. See generally Gerald Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton U. Press, 1996).

90. I am also informed by my NYU colleague Helen Hershkoff that she teaches *The Insular Cases* in her Federal Courts class. "Together with *McCulloch* and the Louisiana Purchase, I regard them as integral to what has come to be called a functional, as opposed to formalist, approach to separation of powers. I enlist the insular cases in teaching a number of topics, including Congressional control of jurisdiction; the establishment of Article I courts and agency structure; and the relation between the constitutional conditions doctrine and structural protections." Helen Hershkoff to Sanford

readers like myself, sadly underinformed about the case and its profound implications. I hope that I have said enough to whet their (or, more accurately, your) own appetites and to encourage the welcoming of *Downes* and linked materials into the various canons of American constitutional inquiry. If not, then I hope, at the very least, to have encouraged a more explicit discussion of what *does* explain the construction of our casebooks and syllabi beyond the decision simply to keep presenting the materials that one studied in one's own law school education.