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# THE UNITED STATES, PUERTO RICO, AND THE TERRITORIAL INCORPORATION DOCTRINE: REACHING A CENTURY OF CONSTITUTIONAL AUTHORITARIANISM

GABRIEL A. TERRASA \*

## INTRODUCTION

Nearly a hundred years ago, Spain ceded Puerto Rico, Guam, and the Philippine Islands to the United States as part of the peace settlement ending the Spanish-American War.<sup>1</sup> Unlike any territory previously acquired by the United States, Puerto Rico, Guam, the Philippines and Hawaii<sup>2</sup> comprised extra-continental expanse thickly settled by peoples of different cultures, languages, and customs.<sup>3</sup> The prospect of expanding the "American Empire" to possessions overseas renewed the imperialist spirit in the chil-

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\* B.S.M.E., 1992, University of Maryland College Park; J.D., 1997, University of Baltimore School of Law. Many thanks are due to my father José G. Terrasa, who introduced me to the wonders of legal reasoning and analysis; to my mother Sara and my brothers José and Arturo, whose opposing views on this subject provided me with a formidable court in which to play and bounce my ideas; and to my wife, colleague, and friend Jennifer—my drive and inspiration. I am greatly indebted to Professors Eric B. Easton and Michael I. Meyerson of the University of Baltimore School of Law for their comments and encouragement.

1. Treaty of Peace between the United States of America and the Kingdom of Spain, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 [hereinafter Treaty of Paris]. The parties signed the peace protocol ending all hostilities on August 12, 1898. *Id.* at 1756. The United States and Spain signed the Treaty of Paris on December 10, 1898, and exchanged ratifications on April 11, 1899. *Id.* at 1762.

2. See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, July 7, 1898, U.S.-Haw., 30 Stat. 750 (providing for U.S. annexation of Hawaii). The United States acquired Hawaii, as well as Puerto Rico, during the Spanish-American War. *Id.*

3. See ARTURO MORALES CARRION, PUERTO RICO, A POLITICAL AND CULTURAL HISTORY, 136-37 (1983); 33 CONG. REC. 1948 (1900):

The chief objection to having [Puerto Rico] annexed, to my mind, consists in the fact that there is so little room there for an increase in the population. It is already far more densely populated than our own territory, and there is no room or but little room for more people in the island.

*Id.* (remarks by Rep. Richardson).

dren of the "Manifest Destiny"<sup>4</sup> and seduced public opinion.<sup>5</sup> Once the euphoria of the victory in the "splendid little war"<sup>6</sup> settled, however, the American people began to question the wisdom of annexing territory heavily settled and inhabited by wholly alien people.<sup>7</sup> Racial animus and commercial protectionism prompted politicians, scholars, and jurists to devise a colonial policy to provide that the newly acquired territories be kept as "dependencies" without granting them statehood or all the protections afforded American citizens under the Constitution.<sup>8</sup> The Supreme Court of the United States sanctioned this new colonial regime in the *Insular Cases*.<sup>9</sup>

The *Insular Cases* are the longest standing constitutional ab-

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4. "Manifest Destiny" was the mid-19th Century belief that it was God's will that the United States expand its territory from the Atlantic to the Pacific bringing democracy and liberty to the world. For an analysis of the American expansionist era see: WALTER LAFEBER, *THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898* (1963); RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* (1944); ALBERT K. WEINBERG, *MANIFEST DESTINY* (1963).

5. See CARMELO ROSARIO NATAL, *PUERTO RICO Y LA CRISIS DE LA GUERRA HISPANOAMERICANA* 58-68 (1975).

6. Letter from John Hay, United States Ambassador to England, to President Theodore Roosevelt (1898), quoted in Jose A. Cabranes, *Citizenship and the American Empire*, 127 U. PENN. L. REV. 391, 392 n.3 (1978) (quoting F. FREIDEL, *THE SPLENDID LITTLE WAR* 3 (1958)). In his letter to Theodore Roosevelt, Hay stated that the Spanish-American War "has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favored by that fortune which loves the brave." *Id.*

7. Compare SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 805 (1965) with Cabranes, *supra* note 6, at 395.

8. See discussion *infra* notes 32-69 and accompanying text.

9. *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). Justice Brown, in his prologue to *De Lima*, stated that the cases "may be collectively designated as the 'Insular Tariff Cases.'" *De Lima*, 182 U.S. at 2. The *Insular Cases* have been characterized as the most important and controversial decisions touching the Bill of Rights during Chief Justice Fuller's era. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT, THE SECOND CENTURY 1888-1986*, 59-60 (1990) (discussing the disparate opinions in *Downes*, *Dooley* and *De Lima*); 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 708 (1926) (describing the disagreement among the Court regarding Puerto Rico's status). See *infra* Section II for a detailed discussion of the *Insular Cases*.

Note that from 1898 to 1932 the United States government officially referred to Puerto Rico as "Porto Rico." The misuse originated with a misspelling in the English version of the Treaty of Paris, *supra* note 1, 30 Stat. 1754. Judge José A. Cabranes, Remarks at the Judicial Conference of the First Circuit 1986, in 110 F.R.D. 475, 477 (1986). On May 17, 1932, Congress changed the Island's name back to "Puerto Rico." See Act of May 17, 1932, 47 Stat. 158 (1932). Throughout this Article, the Author has kept references to "Porto Rico" as stated in case names and quoted materials for accuracy.

erration in the history of the Supreme Court. The *Insular Cases* and their progeny vested with constitutional legitimacy the existence of a second class of citizens not entitled to all the protections afforded other citizens on the mainland, an effect comparable only with such cases as *Scott v. Sandford*,<sup>10</sup> *Plessy v. Ferguson*,<sup>11</sup> and *Korematsu v. United States*.<sup>12</sup> Yet today, very few scholars and law students know about the century-old Territorial Incorporation Doctrine and its impact on the lives of over four million American citizens.<sup>13</sup>

This article analyzes the historical development of the political relationship between the United States and Puerto Rico and the role the Supreme Court has played in placing the "territory" outside the Constitution. Section I reviews the events leading up to the acquisition of Puerto Rico by the United States and the political debates that ensued in Congress regarding expansion to this new frontier. Section II analyzes the *Insular Cases* and their progeny, assessing the impact of these cases on United States constitutional theory in the context of federalism, equal protection and the universality of the Bill of Rights. Finally, Section III explores recent developments arising out of the Territorial Incorporation Doctrine developed by the Supreme Court.

## I. THE COLONIAL EXPERIMENT AND THE BIRTH OF THE AMERICAN EMPIRE

### A. Historical Background

Early in the morning of July 25, [1898,] the U.S.S. *Gloucester* sailed boldly into the bay of Guánica and landed a few troops who symbolically raised the Stars and Stripes for the first time on Puerto Rican soil. The *Gloucester* was soon followed by the *Massachusetts*, and by a convoy of ten transports with a total of 3,415 men. The invasion of Puerto Rico had started, and with it an American experiment in colonialism.<sup>14</sup>

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10. 60 U.S. (19 How.) 393 (1856).

11. 163 U.S. 537 (1896).

12. 323 U.S. 214 (1944).

13. Justice William H. Rehnquist, Edward Douglass White Lecture at Louisiana State University, Part II, 20 (March 11, 1983) (transcript available in the Supreme Court of the United States, Public Information Office). In that respect, Justice Rehnquist once remarked, "Even the most astute law student of today would probably be completely unfamiliar with these cases; indeed, even when I went to law school more than 30 years ago, they rated only a footnote in a constitutional law case book." *Id.*

Commenting on Justice Rehnquist's remarks, Judge José A. Cabranes noted that "Justice Rehnquist's observation was equally true when I went to law school more than 20 years ago—only then I (who searched diligently) had difficulty finding that footnote." See Cabranes, *supra* note 9, at 392 n.1.

14. MORALES CARRION, *supra* note 3, at 129 (citing ANGEL RIVERO

After the Mexican War ended and the Union exhausted expansion to the west by annexing the last of the western territories,<sup>15</sup> the children of the "Manifest Destiny" turned their attention to the Caribbean and the Pacific.<sup>16</sup> Cuba, because of its growing commercial ties with the United States and its geographical proximity, became the next target on the expansionist agenda.<sup>17</sup> The American press, led by William Randolph Hearst, Joseph Pulitzer, and Charles A. Dana, used civil unrest on the Island to promote military intervention by the United States.<sup>18</sup> The Cuban situation became the central issue in the 1896 presidential elections, and William McKinley, running on a pro-intervention platform, won the Presidency.<sup>19</sup>

During the first months of his administration, President McKinley attempted to buy Cuba from Spain.<sup>20</sup> When Spain rejected the offer, and the United States received reports of the draconian methods Spanish authorities utilized to pacify the revolutionaries, McKinley decided to take stronger measures.<sup>21</sup> In September 1897, President McKinley sent an ultimatum; if the

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MENDEZ, CRONICA DE LA GUERRA HISPANOAMERICANA EN PUERTO RICO, 125-44 (1922)).

15. Treaty of Guadalupe, 9 Stat. 922 (1848). The Mexican War ended in 1848 with the signing of the Treaty of Guadalupe, resulting in the annexation of California and New Mexico. *Id.*

16. See JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL, 7 (1985) (advocating equality for Puerto Rican peoples); Carmelo Delgado Cintrón, *Historia Política de Puerto Rico*, in 2 LA GRAN ENCICLOPEDIA DE PUERTO RICO 39 (1976).

17. See TORRUELLA, *supra* note 16, at 7 (explaining expansionist attention to noncontiguous lands). The southern expansionists were particularly interested in Cuba because of their desire to annex another slave-holding state to the Union. *Id.* at 8. Between 1845 and 1861, three Democratic Presidents, James K. Polk, Franklin Pierce and James Buchanan, attempted to buy Cuba from Spain. *Id.* After the Civil War, President Grant attempted once more to purchase Cuba, but civil unrest on the Island thwarted the negotiations. *Id.* at 9.

18. See Delgado Cintrón, *supra* note 16, at 44. The sensationalist press of the time was a significant driving force behind the expansionist movement. The effect the press had on public opinion, and thus the political process, has been the subject of considerable study. See, e.g., WILLIAM GROSVENOR BLEYER, MAIN CURRENTS IN THE HISTORY OF AMERICAN JOURNALISM (1927); ROSARIO NATAL, *supra* note 5, at 60, 64-65, 95; MARCUS M. WILKERSON, PUBLIC OPINION AND THE SPANISH-AMERICAN WAR (1932); JOSEPH E. WISAN, THE CUBAN CRISIS AS REFLECTED IN THE NEW YORK PRESS, (1895-1898) (1965). The extent of its influence in the decision-making process of the government of that time is beyond the scope of this work. It is worth noting, however, that some commentators consider the press's inflammatory accounts of the sinking of the *Maine* and its demands for retaliation as the precipitating cause of the Spanish-American War. Cf., e.g., ROSARIO NATAL, *supra* note 5, at 174.

19. TORRUELLA, *supra* note 16, at 12.

20. See Delgado Cintrón, *supra* note 16, at 47.

21. See *id.*

Spanish government did not peacefully resolve the Cuban crisis by October 31, 1897, the United States would intervene.<sup>22</sup> Spain attempted to pacify the rebels by granting substantial political reforms, including local autonomy, but the revolutionary movement was unstoppable.<sup>23</sup> President McKinley sent the battleship *Maine* to Havana to "protect American interests" on the Island. On February 15, 1898, the *Maine* mysteriously exploded and sank in Havana Bay.<sup>24</sup> The United States accused Spain of sabotaging the battleship.<sup>25</sup> Spain denied the allegations and accused the United States of conspiring to take over Cuba.<sup>26</sup>

On April 19, 1898, recognizing that the annexation of Cuba could not be accomplished without damaging its international reputation, the United States Congress passed a resolution declaring Cuba independent, disclaiming any interest in exercising sovereignty over the Island, and demanding that Spain relinquish its authority over Cuba.<sup>27</sup> Spain responded by declaring war against the United States on April 21st, and on April 25th, Congress declared war against Spain.<sup>28</sup>

The Spanish-American War lasted less than a year, ending with the exchange of ratifications and proclamation of the Treaty of Paris on April 11, 1899.<sup>29</sup> Through the Treaty of Paris, Spain relinquished all claims of sovereignty over Cuba, and ceded Puerto Rico,<sup>30</sup> Guam and the Philippines to the United States.<sup>31</sup> The colo-

22. See ROSARIO NATAL, *supra* note 5, at 155-56.

23. See *id.* at 156-63.

24. See *id.* at 170; TORRUELLA, *supra* note 16, at 16.

25. See ROSARIO NATAL, *supra* note 5, at 170.

26. See *id.* at 17-18.

27. See *id.*; Cabranes, *supra* note 6, at 409; Manuel Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REVISTA JURIDICA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO [REV. JUR. U.I.P.R.] 13 (1984). Senator Henry M. Teller sponsored the resolution, explaining that its purpose was to avoid suggestions by European powers that "when we go out to make battle for the liberty and freedom of Cuban patriots . . . we are doing it for the purpose of aggrandizement for ourselves or the increasing of our territorial holdings." Cabranes, *supra* note 6, at 409-10 (quoting 35 CONG. REC. 3897, 3899 (1898) (remarks of Sen. Teller)).

28. See Del Valle, *supra* note 27, at 17.

29. Treaty of Paris, *supra* note 1, at 1762.

30. At the time the United States troops landed in Guánica, Puerto Rico was a Spanish autonomous colony. See generally ROSARIO NATAL, *supra* note 5, at 151-72; David M. Helfeld, *The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO [REV. JUR. U.P.R.] 135 (1952). Less than a year prior to the American invasion, Spain had granted Puerto Rico an autonomous constitution, the Autonomic Charter of 1897, which authorized the newly created insular government to rule on all matters of local concern, including the formulation of the local budget and limited power to enter into international commercial agreements. *Charter of Autonomy*, in THE COMMONWEALTH OF PUERTO RICO, DOCUMENTS ON THE LEGAL HISTORY OF PUERTO RICO (1962). See also ROSARIO NATAL, *supra* note 5, at 151-72; Helfeld, *supra*, at 136-37;

Jorge Morales-Yordan, *The Constitutional and International Status of the Commonwealth of Puerto Rico*, 18 REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO [REV. COL. AB. P.R.] 5, 8-10 (1957).

The Autonomic Charter of 1897 has been characterized as the most significant political development in Puerto Rican history. See, e.g., Alfonso L. García Martínez, *La Constitución Autonómica de 1897, Un Desarrollo No Igualado en Nuestra Historia Política*, 35 REV. COL. AB. P.R. 387 (1974). The mechanisms and complexities of the form of government it established are beyond the scope of this work. For an exhaustive analysis of the Autonomic Charter see José Trías Monge, *La Carta Autonómica de 1897*, 43 REV. JUR. U.P.R. 179 (1974).

One particular provision of the Autonomic Charter, however, merits further discussion in this Article because it had a significant impact on the United States-Puerto Rico political relations during the first half of the century. Additional Article 2, arguably the most controversial and most cited provision of the Autonomic Charter, provided the following, "[w]hen the present constitution shall be once approved by the Cortes of the Kingdom for the islands of Cuba and Porto Rico, it shall not be amended except by virtue of a special law and upon the petition of the insular parliament." Additional Article 2, translated in José López Baralt, *Is the Paris Treaty Null "Ab Initio" as to the Cession of Puerto Rico?*, 7 REV. JUR. U.P.R. 75, 76 (1937).

During the early 1930's, the Puerto Rican Nationalist Party argued that, through Additional Article 2 of the Autonomic Charter, Spain limited her sovereignty over Puerto Rico and renounced her right to unilaterally alter the political status of the Island. Delgado Cintrón, *supra* note 16, at 52. The Nationalists contended that since Spain could not unilaterally alter Puerto Rico's political status directly, neither could she do so indirectly by cession of the Island to the United States. The Nationalists thus concluded that the Treaty of Paris was null *ab initio* as to the cession of Puerto Rico, and thus the United States had no claim of right over the Island.

This view was highly criticized by Dr. José López Baralt who argued that Spain retained her sovereignty over Puerto Rico despite Additional Article 2. López Baralt, *supra*, at 90. According to López Baralt, Additional Article 2 did not give Puerto Rico international personality and, as such, Spain only exercised her right to dispose of her territory by cession. López Baralt, *supra*, at 90-103. Under accepted principles of international law, he insisted, the exercise of that right did not require the consent of the inhabitants of the territory ceded. *Id.* at 103 (quoting HALL, INTERNATIONAL LAW 53-54 (8th ed.)). "The principle that the wishes of the population are to be consulted when the territory which they inhabit is ceded has not been adopted into International Law, and cannot be adopted into it until title by conquest has disappeared." *Id.*

The First Circuit adopted López Baralt's view in *Ruiz Alicea v. United States*, 180 F.2d 870 (1st Cir. 1950). Ruiz Alicea had been convicted of violating the Selective Service Act of 1948. *Id.* at 871. On appeal, Ruiz Alicea contended that the Treaty of Paris was null and void as to the cession of Puerto Rico and, thus, the United States had no jurisdiction to impose selective service over the inhabitants of the Island. *Id.* In an opinion by Chief Judge Magruder, the court of appeals held, without further analysis, that "by the ratification of the [T]reaty of Paris[, Puerto Rico] became territory of the United States." *Id.* (quoting *De Lima v. Bidwell*, 182 U.S. 1, 196 (1901)). Chief Judge Magruder concluded that "the historical and juridical arguments which [Ruiz Alicea advanced] in this connection have been fully and convincingly demolished." *Id.* (citing as sole authority López Baralt, *supra*, reprinted in 6 REV. DERECHO LEGIS. JURIS. COL. AB. P.R. 60 (1941)). See also Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 2-3 (1953);

nial experiment had begun, and it would not be long before its constitutionality would be challenged.

### B. The Political Debate

The McKinley administration originally planned to annex the newly acquired territories into the Union.<sup>32</sup> At the time, it was generally believed that all the inhabitants of the territories had become United States citizens upon cession and that annexation was the natural consequence of acquisition.<sup>33</sup> Racism towards Filipinos and concerns about foreign competition with local products, however, prompted some politicians, jurists and scholars to challenge these presumptions and to search for alternative ways to deal with the territories.<sup>34</sup>

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Morales-Yordan, *supra*, at 12.

Although today this argument is only of historical interest, it is relevant to note that one of the claims advanced by the pro-independent faction in Puerto Rico regarding the current colonial status of the Island, rests on the idea that the United States Congress continues to have plenary power to dispose of Puerto Rico and its inhabitants, just as Spain did in the Treaty of Paris.

31. See Treaty of Paris, *supra* note 1, 30 Stat. at 1755-56.

32. See Cabranes, *supra* note 6, at 412; 33 CONG. REC. 1951 (remarks by Rep. Richardson), 3682-83 (remarks by Sen. Clay), 3685 (remarks by Sen. Bacon), 3690 (remarks by Sen. Foraker) (1900).

33. See Cabranes, *supra* note 6, at 412-13.

34. The academic debate, staged in a series of articles published by the *Harvard Law Review* between December 1898 and November 1899, developed three different views: (1) The Constitution applied to the Territories *ex proprio vigore* and Congress therefore lacked the power to permanently hold Territories without annexing them into the Union, see Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); (2) The Constitution only applied to States and thus Congress had plenary power over the Territories, see Charles C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 364 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); (3) The document effecting the transfer of sovereignty over a territory determined whether the Constitution applied to the acquired territory (the "incorporation theory"), see Abbott L. Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

Ironically, all of the authors, perhaps with the exception of Lowell, shared a common view: Filipinos and Puerto Ricans were not worthy of American citizenship. The first four articles were written prior to the ratification of the Treaty of Paris. Langdell and Thayer were in favor of the ratification, believing that because Congress had plenary power to act over the Territories, Filipinos and Puerto Ricans could be permanently held as subjects of the Union. See Langdell, *supra*, at 391; Thayer, *supra*, at 479-80. Randolph and Baldwin, however, believing that Congress was bound to annex the new possessions into the Union, opposed the ratification of the treaty. See Baldwin, *supra*, at 409-12; Randolph, *supra*, at 304. Randolph commented, for example, that:

After many of the islanders had been relegated to the condition of undesirable, troublesome, and expensive "wards," there would remain



probably several millions whose claims to citizenship by allegiance might not be rejected, and whose children would be unquestionably citizens of the United States [that the] Malays [could] be induced to come here in sufficient numbers to lower the rate of wages in any part of the country [or that] they may gain a residence in any State, and cannot be refused the suffrage therein on account of "race, color, or previous condition of servitude."

Randolph, *supra*, at 309-10.

Langdell noted:

None of these islands have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they never will be so admitted, *i.e.*, that they will never be permitted to share in the government of this country, and especially to be represented in the United States Senate.

*Id.* at 391.

Like Randolph and Langdell, Judge Baldwin's interpretation of the Constitution and his motive for writing his article were influenced by racial animus and a desire to influence the debate over the ratification of the Treaty of Paris. Judge Baldwin, for example, expressed his concern about granting the right to vote to the people of the Territories:

[T]he people of Puerto Rico and the natives of Hawaii will certainly be fully subject to our jurisdiction. Their children, born after the ratification of the Spanish treaty, if it should be ratified, will all be citizens of the United States. They must, therefore, by the XV Amendment have the same right of suffrage which may be conceded in those territories to white men of civilized races. One generation of men is soon replaced by another, and in the tropics more rapidly than with us. In fifty years, the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form a part of the United States, will be claiming the benefit of the XV Amendment.

Baldwin, *supra*, at 407. He further explained:

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would . . . be a serious obstacle to the maintenance there of an efficient government.

*Id.* at 415.

Finally, Thayer, comparing the newly acquired territories to the Northwest Territory commented that "[w]hat was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other." Thayer, *supra*, at 481. Thayer concluded by noting:

Let us beware, at every step, promising to the islands, not excepting Hawaii, any place in the Union. Here, as elsewhere, we shall find England's *sensible* policy our best guide. We cannot imagine Great Britain's letting in her colonies to share the responsibility of governing the home country and all the rest of the empire . . . Never should we admit any extra-continental State into the Union; it is an intolerable suggestion.

*Id.* at 484 (emphasis added).

Regarding the racist sentiment in Congress towards Filipinos, the Congressional Record is replete with comments such as those of Senator Bate stating:

Let us not take the Philippines in our embrace to keep them simply be-

In his message to Congress on December 5, 1899, President McKinley proclaimed that it was "[o]ur plain duty . . . to abolish all custom tariffs between the United States and Puerto Rico and [to] give her products free access to our markets."<sup>35</sup> President McKinley also recommended that civil government be established on the Island.<sup>36</sup>

On January 9, 1900, responding to President McKinley's "call of duty," Senator Joseph B. Foraker introduced a bill to provide civil government for Puerto Rico and United States citizenship to its inhabitants.<sup>37</sup> Ten days later, Representative Sereno Payne introduced similar legislation providing for free trade between the United States and Puerto Rico.<sup>38</sup> The bills were referred to their respective congressional committees for further study and recommendations.<sup>39</sup> The Republican administration apparently intended to call for the annexation of Puerto Rico into the Union.

President McKinley, however, miscalculated the impact that his policy would have on American public opinion. The prospect of assimilating the "half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest[ed] Puerto Rico"<sup>40</sup> was enough to tame the wildest of the expansionist spirits. The greatest opposition came from the private sector. The beet sugar and tobacco industries, fearing competition from the cheaper Puerto Rican and Filipino products, launched a massive lobbying cam-

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cause we are able to do so. I fear it would prove a serpent in our bosom. Let us beware of those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.

33 CONG. REC. 3616 (1900). Representative Thomas Spight made similar comments in the House:

How different the case of the Philippine Islands, 10,000 miles away . . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes and mixed blood. They have nothing in common with us and centuries can not assimilate them . . . . They can never be clothed with the rights of American citizenship nor their territory admitted as a State of the American Union . . . .

33 CONG. REC. 2162 (1900).

35. 33 CONG. REC. 36 (1899) (message from President William McKinley to Congress, December 5, 1899).

36. *Id.*; MARIA D. LUQUE DE SANCHEZ, *LA OCUPACION NORTEAMERICANA Y LA LEY FORAKER* 83 (1986). President McKinley based his recommendations on the Secretary of War, Elihu Root's reports, and on a commission specially appointed to study the situation in Puerto Rico. See LUQUE DE SANCHEZ, *supra*, at 83; ELIHU ROOT, *THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES* 161-84 (1916).

37. See 33 CONG. REC. 702 (1900).

38. *Id.* at 1010.

39. See LUQUE DE SANCHEZ, *supra* note 36, at 95. The Senate submitted its bill to the Committee on Pacific Islands and Puerto Rico, which was chaired by Senator Foraker. *Id.* The House submitted its bill to the Ways and Means Committee, chaired by Representative Payne. *Id.*

40. Baldwin, *supra* note 34, at 415.

paign against the free trade measure.<sup>41</sup> The status of the territories quickly became a prominent issue in the 1900 presidential campaign.<sup>42</sup> President McKinley, who had won the 1896 presidential elections on a Republican protectionist platform, reneged on his support for the free trade bill.<sup>43</sup> Representative Payne then substituted his bill with a new one providing for a tariff on goods imported into the United States from Puerto Rico and vice versa.<sup>44</sup>

The House of Representatives commenced floor debates on Payne's trade bill on February 19, 1900.<sup>45</sup> The advent of the electoral year, coupled with President McKinley's change in posture on the trade issue, forced the debate along party lines.<sup>46</sup> The floor debate became a conglomerate of long-winded speeches, often appearing to be addressed to the press rather than to members of the House.<sup>47</sup> The Democrats fiercely criticized the Republican administration's sudden change of policy and accused the Republicans of legislating for the benefit of the beet sugar and tobacco industries.<sup>48</sup> The Democrats maintained that the Constitution applied with equal force to the territories and that Congress did not have the power to enact a tariff bill for Puerto Rico in violation of the constitutional mandate of uniformity of taxation.<sup>49</sup>

41. See LUQUE DE SANCHEZ, *supra* note 36, at 88, 110-18. The American sugar and tobacco producers were not concerned with the Puerto Rican production; the Puerto Rican yield was negligible compared to the total size of the market. *See id.* at 116. These industries were afraid, however, that a grant of free trade to the Island would set a precedent that would bind Congress when legislating for the Philippines. *See id.*; MARGARET LEECH, *IN THE DAYS OF MCKINLEY* 396-97 (1959).

42. *See* TORRUELLA, *supra* note 16, at 33.

43. *Cf.* MORALES CARRION, *supra* note 3, at 155. *See also* LUQUE DE SANCHEZ, *supra* note 36, at 98; Cabranes, *supra* note 6, at 155.

44. 33 CONG. REC. 1940 (1900); Cabranes, *supra* note 6, at 417.

45. 33 CONG. REC. 1940 (1900).

46. *Cf.* LUQUE DE SANCHEZ, *supra* note 36, at 132-33.

47. *See, e.g.*, 33 CONG. REC. 1941, 1944, 1951 (1900).

48. *See, e.g.*, 33 CONG. REC. 1951, 1952 (1900) (remarks by Rep. Richardson). Representative Payne himself conceded to this point in his opening address:

I want to . . . declare to the country and to the world that when we legislate for this island, when we propose a tariff, we have the duty and the power and the privilege, under the Constitution, of imposing a tariff on all articles going to the territory belonging to the United States from the United States, or coming to the United States from the territory belonging to the United States. I want to make a precedent that all men can read with reference to the Philippine Islands; and if Cuba shall come, I want to give notice to Cuba that we propose to protect [the U.S. sugar] industry when it comes to the question of admitting the 1,000,000 tons that will come from Cuba.

*Id.* at 1944 (remarks by Rep. Payne) (emphasis added).

49. 33 CONG. REC. 1947 (1900) (remarks by Rep. Richardson). The Constitution provides that, "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common De-

The Republicans, on the other hand, contended that the term "United States," as used in the Constitution, did not encompass the territories, and that Congress had plenary power under the Territory Clause<sup>50</sup> to levy import and export taxes on the Island.<sup>51</sup> Moreover, the Republicans argued that in legislating for the territories, "Congress ha[d] all the powers of the State and of the United States combined," and thus, all the powers enjoyed by a sovereign nation under international law.<sup>52</sup> Because the law of nations recognized the power of a sovereign to acquire and to dispose of territory, the Republicans concluded, Congress had absolute power to govern its new possessions as "dependencies."<sup>53</sup> The Republicans urged Congress to pass the tariff bill and to avoid any action that could impair Congress's flexibility to legislate for the Philippines and, if necessary, Cuba.<sup>54</sup> If the bill was unconstitutional, the Republicans insisted, the Supreme Court would so declare.<sup>55</sup>

On February 28, 1900, the substitute Payne Bill passed by a vote of 172 to 160.<sup>56</sup> The Senate discarded the original Foraker Bill and amended the Payne Bill to provide a civil government for Puerto Rico.<sup>57</sup> The new Foraker-Payne Bill also contained a provision granting United States citizenship to Puerto Ricans.<sup>58</sup> The citizenship provision was deleted early in the debate, however, because the Republican majority recognized that it would jeopardize

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fence and general Welfare of the United States; *but all Duties, Imposts and Excises shall be uniform throughout the United States.*" U.S. CONST. art. I, § 8, cl. 1 (emphasis added). In Representative Richardson's opinion, "unequal taxation of the island as a portion of the United States is the baldest form of imperialism." 33 CONG. REC. 1947 (1900) (remarks by Rep. Richardson).

50. U.S. CONST. art. IV, § 3, cl. 2.

51. 33 CONG. REC. 1945, 1946, 1953 (1900) (remarks by Reps. Payne and Dalzell).

52. 33 CONG. REC. 1945 (1900) (remarks by Rep. Payne). Representative Payne further argued that the power to dispose of a territory was incidental and inherent to the power to acquire it, a power which, in his view, had been universally recognized as within Congress's purview. *Id.*

53. 33 CONG. REC. 1954 (1900) (remarks by Rep. Dalzell).

54. 33 CONG. REC. 1946 (1900) (remarks by Rep. Payne).

55. *Id.* (remarks by Rep. Payne). Representative Payne commented:

It may be an important question to be considered in the future when we come to legislate for the Philippine Islands, when we come to legislate, if we have to, with respect to Cuba, and I think it would be a good proposition to submit that question now to the Supreme Court. If you [Democrats] are right, gentlemen, in your contention we shall have difficulty when we come to legislate for our other islands. We shall have difficulty in protecting the interests of the people, the manufacturers, the farmers of the United States.

*Id.*

56. 33 CONG. REC. 2429-30 (1900).

57. Cabranes, *supra* note 6, at 427 (citing 33 CONG. REC. 2264 (1900)).

58. *Id.*

the passage of the tariff bill.<sup>59</sup>

The floor debate in the Senate was similar in substance to the debate in the House of Representatives. As in the House, the Democrats criticized the Republican administration's sudden change of policy and questioned the Republicans' motives for the change.<sup>60</sup> The Democrats, and a handful of dissident Republicans,<sup>61</sup> attacked the tariff bill as unconstitutional, conjuring up memories of imperial impost duties on colonial tea, the Boston Tea Party and the Revolutionary War.<sup>62</sup> For the opponents of the bill, Puerto Rico had become part of the United States upon ratification of the Treaty of Paris, and; therefore, Congress's power to legislate for the Island was limited by the Constitution.<sup>63</sup>

The Republican majority in the Senate argued that Congress had plenary power to act over the territories.<sup>64</sup> This power, they contended, remained absolute even if Puerto Ricans were granted citizenship.<sup>65</sup> The tariff bill, in their opinion, was the only effective way to raise revenue for the Island.<sup>66</sup>

59. 33 CONG. REC. 3690 (1900) (remarks by Sen. Foraker). Senator Teller argued that the status of the inhabitants of the territory was critical to the question of whether Congress could impose the tariff. Teller contended:

If [the Puerto Ricans] are a part of the United States, if their people are citizens of the United States, you have no right to put a duty upon their goods. If they are not citizens of the United States, then it is a question of policy and not a question of justice.

33 CONG. REC. 2875 (1900) (remarks by Sen. Teller).

60. 33 CONG. REC. 3681-82, 3685 (1900) (remarks by Senators Clay, Teller, and Bacon).

61. 33 CONG. REC. 3667, 3687 (1900) (remarks by Senators Mason and Wellington).

62. 33 CONG. REC. 3669, 3673, 3688 (1900) (remarks by Senators Mason and Wellington). According to Senator Mason, the Constitution mandates that "when you levy an impost duty, that duty which the fathers were afraid of, that duty which they went to war about, that duty which invited the Boston tea party—it says when you levy that sort of a duty you must make it uniform throughout the United States." *Id.* at 3669 (remarks by Sen. Mason).

63. 33 CONG. REC. 3668, 3677, 3688 (1900).

64. 33 CONG. REC. 2475 (1900) (remarks by Sen. Foraker).

65. 33 CONG. REC. 2473 (1900). Senator Foraker remarked:

We did not want to treat our own as aliens, and we do not propose to have any subjects. Therefore, we adopted the term "citizens." In adopting the term "citizens" we did not understand, however, that we were giving to those people any rights that the American people do not want them to have. "Citizens" is a word that indicates, according to [Justice] Story's work on the Constitution of the United States, allegiance on the one hand and protection on the other.

*Id.*

66. 33 CONG. REC. 3683-84, 3690-91 (1900). The bill provided that the revenue collected from the import/export tariff was to be placed in a special account at the disposal of the President for the benefit of Puerto Rico. S. 2264, 56th Cong., 1st Sess. (1900). This provision was also bitterly criticized by the Democrats, who asserted that the Constitution explicitly required that all revenues collected on "Imposts or Duties on Imports or Exports . . . be for the

On April 3, 1900, the amended Foraker-Payne Bill passed by a vote of forty to thirty-one.<sup>67</sup> The House of Representatives adopted the bill as amended by the Senate on April 11, 1900, by a vote of 161 to 153.<sup>68</sup> President McKinley signed the bill into law on April 12, 1900.<sup>69</sup>

The significance of the Foraker Bill transcended the confines of its economic and protectionist façade. The bill was an open challenge to the Supreme Court to decide whether the Constitution applied with equal force to the territories, and whether Congress had the power to hold territories indefinitely without annexing them into the Union.<sup>70</sup> Nearly forty-five years earlier, in *Scott v. Sandford*,<sup>71</sup> the Supreme Court had declared that the Constitution applied *ex proprio vigore* over the territories. Chief Justice Taney explained:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. That power is plainly given; and if a new State is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the State and the citizens of the State, and the Federal Government. But no power is given to acquire a Territory

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Use of the Treasury of the United States." U.S. CONST. art. I, § 10, cl. 2.; 33 CONG. REC. 3676 (1900). See generally LUQUE DE SANCHEZ, *supra* note 36, at 95-133.

67. 33 CONG. REC. 3697-98 (1900). Sixteen senators abstained. *Id.*

68. 33 CONG. REC. 4071 (1900).

69. An Act Temporarily to Provide Revenues and Civil Government for Porto Rico, and for Other Purposes (Foraker Act), 31 Stat. 77 (1900). An analysis of the form of government established by the Foraker Act is beyond the scope of this article. It is sufficient to note that the Foraker Act created a government consisting of a Governor appointed by the President, an Executive Council of eleven members also appointed by the President and out of which at least five were to be Puerto Ricans, and a House of Delegates of thirty-five Puerto Ricans elected by the People of Puerto Rico. Foraker Act, 31 Stat. 81-82. All laws had to be approved by a majority of both houses, the Governor and the United States Congress. *Id.* at 83.

70. Representative Payne acknowledged this much during the House debate, stating that:

If this bill is passed it will give the Supreme Court of the United States the first opportunity it has ever had to meet that question fairly and squarely and say whether the limitation of uniform taxation in the United States refers to the United States or the United States and the territory belonging to the United States. It may be an important question to be considered in the future when we come to legislate for the Philippine Islands, when we come to legislate, if we have to, with respect to Cuba, and I think it would be a good proposition to submit that question now to the Supreme Court.

33 CONG. REC. 1946 (1900).

71. 60 U.S. (19 How.) 393 (1856).

to be held and governed permanently in that character.

We do not mean, however, to question the power of Congress in this respect. The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority . . .*<sup>72</sup>

Although the Reconstruction Amendments abrogated the main holding of *Dred Scott*, the issue of the applicability of the Constitution to the territories remained intact.<sup>73</sup>

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72. *Dred Scott*, 60 U.S. (19 How.) at 446-47 (emphasis added). See *infra* note 112 for a discussion of how the Court handled the *Dred Scott* precedent in the *Insular Cases*.

73. Note that in *Downes v. Bidwell*, 182 U.S. 244 (1901), the Court dismissed this part of the *Dred Scott* opinion as *obiter dictum*. See *infra* note 112. Chief Justice Taney, however, addressed this contention in the *Dred Scott* opinion itself, stating:

[B]efore we proceed to examine this part of the case, it may be proper to notice an objection taken to the judicial authority of this court to decide it; and it has been said, that as this court has decided against the jurisdiction of the Circuit Court on the plea in abatement, it has no right to examine any question presented by the exception; and that anything it may say upon that part of the case will be extra judicial, and mere *obiter dicta*.

This is a manifest mistake; there can be no doubt as to the jurisdiction of this court to revise the judgment of a Circuit Court, and to reverse it for any error apparent on the record, whether it be the error of giving judgment in a case over which it had no jurisdiction, or any other material error; and this, too, whether there is a plea in abatement or not.

. . . .  
The plea in abatement is not a plea to the jurisdiction of this court, but to the jurisdiction of the Circuit Court. And it appears by the record before us, that the Circuit Court committed an error, in deciding it had jurisdiction, upon the facts in the case, admitted by the pleadings. It is the duty of the appellate tribunal to correct this error; but that could not be done by dismissing the case for want of jurisdiction here—for that would leave the erroneous judgment in full force, and the injured party without remedy. . . .

The correction of one error in the court below does not deprive the appellate court of the power of examining further into the record, and correcting any other material errors which may have been committed by the inferior court. There is certainly no rule of law—nor any practice—nor any decision of a court—which even questions this power in the appellate tribunal.

*Dred Scott*, 60 U.S. (19 How.) at 427-29. The validity of this reasoning may no longer be accurate today under our modern system of pleadings and our present understanding of binding precedent. Nevertheless, it is unquestionable

With the passage of the Foraker Bill, the stage was set for the Supreme Court to decide the applicability of the Constitution to the new territories. No one knew with certainty what the Court would decide; there was ample precedent to support either side.<sup>74</sup> During the Senate debate, Senator Mason, perhaps overly optimistic about the purity of the political process, posed the following rhetorical question to the floor:

Do you think that the fever of imperial expansion has so overtaken the people that we will abandon the doctrine of American protection that we may put the flag over an unwilling and an unhappy people; or do you dream that the Supreme Court is so tainted with partisanship that it will descend from its upper atmosphere of a pure jurisprudence to carry out the dictates of a party caucus?<sup>75</sup>

The Supreme Court would soon answer Senator Mason's question.

## II. THE *INSULAR CASES* AND THEIR PROGENY

### A. *The Insular Cases*

The Supreme Court of the United States first addressed the

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that the Supreme Court of the United States addressed the challenge to its power to review the issue and decided that it could correct the error of the lower court with the force of binding precedent. It is important to note that the dissenters in *Dred Scott* agreed with Chief Justice Taney's conclusion that the Constitution applied with equal force to the territories. *Id.* at 544 (McLean, J., dissenting) ("I would here simply remark, that the Constitution was formed for our whole country. An expansion or contraction of our territory required no change in the fundamental law."), 614 (Curtis, J., dissenting) (asserting that Congress's power to legislate over the territories "finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an ex post facto law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution").

74. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints (Mormon Church) v. United States*, 136 U.S. 1, 44 (1890) (noting that "in legislating for the Territories, [Congress] would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution . . . than by any express and direct application of its provisions"); *Clinton v. Engelbrecht*, 80 U.S. (13 Wall.) 434, 447 (1871) (reinstating, after the Civil War, the applicability of the Territorial Clause as source of power of Congress to legislate over new territories); *Dred Scott*, 60 U.S. (19 How.) at 447 (holding that Territory Clause did not apply to territories acquired after the adoption of the Constitution and that Congress was bound by constitutional constraints when legislating for new territories); *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850) (noting that in legislating for the territories, Congress exercises the combined powers of the general and of a state government); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 534 (1828) (stating that Congress has power over territories similar to federal and state legislative authority over states).

75. 33 CONG. REC. 3671 (1900) (remarks by Sen. Mason).



question of the applicability of the Constitution to the new territories in a series of cases decided on May 27, 1901, collectively known as the *Insular Cases*.<sup>76</sup> In the first of these cases, *De Lima v. Bidwell*,<sup>77</sup> the plaintiff brought action against the impost collector of the port of New York to recover duties paid on sugar products imported from Puerto Rico after the ratification of the Treaty of Paris.<sup>78</sup> The single question raised in the case was "whether territory acquired by the United States by cession from a foreign power remain[ed] a 'foreign country' within the meaning of the tariff laws."<sup>79</sup> The Court held that, upon ratification of the Treaty of Paris, Puerto Rico became a territory of the United States and, therefore, was not 'foreign' within the meaning of the tariff laws.<sup>80</sup>

Justice Brown, writing for a majority of five,<sup>81</sup> examined all prior acquisitions of territory in which the tariff issue arose and concluded that in all cases except Louisiana, the political branches had treated the ceded territory as domestic rather than foreign.<sup>82</sup> The precedent of Louisiana was repudiated under the weight of more recent and consistent authority.<sup>83</sup> The majority specifically rejected the notion that a territory remained foreign until acted upon by Congress.<sup>84</sup> Justice Brown noted that because the Constitution placed a treaty on equal footing with an act of Congress, a treaty could effect the annexation of a territory "as absolutely as if the annexation were made . . . by an act of Congress."<sup>85</sup> Justice Brown finally noted:

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the customs union presupposes that a country may be domestic for one purpose and foreign for another. . . . This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; . . . that everything may be done which a government can do within its own boundaries, and yet that the territory may still

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76. *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

77. 182 U.S. 1 (1901).

78. *Id.* at 2.

79. *Id.* at 174.

80. *Id.* at 196, 200.

81. Chief Justice Melville W. Fuller, and Justices John Marshall Harlan, Rufus W. Peckham, and David J. Brewer joined in the opinion of Justice Brown. *Id.* at 174.

82. *Id.* at 187-94. Justice Brown analyzed the prior acquisitions of Louisiana (1803), Florida (1820), Texas (1845), California (1848), and Alaska (1867). *Id.*

83. *De Lima*, 182 U.S. at 192.

84. *Id.* at 194-96.

85. *Id.* at 196.

remain a foreign country. . . . To hold that this can be done as a matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court . . . . *We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic.*<sup>86</sup>

Justice McKenna, joined by Justices Shiras and White, dissented, arguing that the majority opinion was irreconcilable with Justice Brown's own opinion in *Downes v. Bidwell*,<sup>87</sup> another of the *Insular Cases*.<sup>88</sup> The dissenters disagreed with the majority representation that a territory must be either domestic or foreign.<sup>89</sup> Justice McKenna contended that there were other degrees of allegiance between domestic and foreign, and that Puerto Rico occupied one of these mid-levels.<sup>90</sup> Moreover, in Justice McKenna's view, the question of what laws of Congress were applicable to the territories was one exclusively for the political branches, and a rule that made all laws instantly applicable upon cession was too impracticable to be entertained.<sup>91</sup> Justice McKenna concluded his dissent with an admonition to the plaintiff's counsel for not "foreseeing" the extent of their argument:

It is only true to say that counsel shrink somewhat from the consequences of their contention, or if "shrink" be too strong an expression, deny that it can be carried to the nationalization of uncivilized tribes. . . . Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial.

....

[Our position] does more than declare the legality of the duties which were levied upon the sugars of the plaintiff in error. It vindicates the government from national and international weakness [, and it] enable[s] the United States to have—what it was intended to have — "an equal station among the Powers of the earth,"

and to do all "Acts and Things which Independent States may of right do . . . ."<sup>92</sup>

In the second of the *Insular Cases*, *Goetze v. United States*,<sup>93</sup>

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86. *Id.* at 198-99 (emphasis added).

87. 182 U.S. 244 (1901).

88. *De Lima*, 182 U.S. at 200-01 (McKenna, J., dissenting). Justice Gray wrote a separate opinion dissenting on the grounds that the majority's opinion was irreconcilable with *Downes*, decided the same day. *Id.* at 220.

89. *Id.* (McKenna, J., dissenting).

90. *Id.* (McKenna, J., dissenting).

91. *Id.* at 208 (McKenna, J., dissenting).

92. *Id.* at 219-20 (McKenna, J., dissenting).

93. 182 U.S. 221 (1901).

the Supreme Court addressed the question of whether Puerto Rico and Hawaii were foreign countries within the meaning of tariff laws prior to the enactment of the Foraker Act.<sup>94</sup> In an opinion by Justice Brown, the Court rejected the contention that Puerto Rico and Hawaii were foreign countries, basing its decision entirely on *De Lima*.<sup>95</sup>

In *Dooley v. United States*,<sup>96</sup> the plaintiff brought an action to recover duties paid on goods imported from New York to Puerto Rico after the American occupation of the Island but before the ratification of the Treaty of Paris, and also after the ratification of the Treaty of Paris but before the passage of the Foraker Act.<sup>97</sup> The Court held that during the military occupation of the Island and prior to the ratification of the Treaty of Paris, Puerto Rico continued to be a foreign country within the meaning of the tariff laws, and that the President had the authority, under the war powers, to levy impost duties on goods arriving from the United States.<sup>98</sup> The Court, reaffirming its holding in *De Lima*, also held that upon the ratification of the Treaty of Paris, Puerto Rico ceased to be a foreign country and that duties collected after that time were unconstitutionally levied.<sup>99</sup>

Four members of the Court dissented in a single opinion by Justice White.<sup>100</sup> The dissenters renewed their disagreement with the premise that a territory could become domestic upon ratification of the treaty of cession, absent any act of Congress effectuating the "incorporation."<sup>101</sup> Moreover, Justice White objected to the majority reliance on previous cessions of territory, noting that, unlike any prior ceding document, the Treaty of Paris specifically provided that the rights and privileges of the inhabitants of Puerto Rico were to be determined by Congress.<sup>102</sup> Justice White finally noted that the majority opinion, as well as the Court's decisions in *De Lima* and *Goetze*, was irreconcilable with *Downes v. Bidwell*.<sup>103</sup>

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94. *Id.* at 221-22.

95. *Id.*

96. 182 U.S. 222 (1901).

97. *Id.* at 223.

98. *Id.* at 230. Justice Brown authored the opinion of the Court, which was joined by Chief Justice Fuller, and Justices Harlan, Peckham, and Brewer. *Id.* at 223.

99. *Id.* at 233-34.

100. *Id.* at 236 (White, J., dissenting). Justice White was joined by Justices Gray, Shiras, and McKenna. *Id.*

101. *Id.* at 237-38 (White, J., dissenting).

102. *Dooley*, 182 U.S. at 237 (White, J., dissenting). Article IX of the Treaty of Paris states in pertinent part, "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Treaty of Paris, *supra* note 1, 30 Stat. at 1759.

103. *Dooley*, 182 U.S. at 239-40 (White, J., dissenting) (citing *Downes v. Bidwell*, 182 U.S. 244 (1901)).

*Armstrong v. United States*,<sup>104</sup> the fourth case in the series, presented the same legal issue as *Dooley*, and was summarily decided on the same basis.<sup>105</sup>

Following *Armstrong*, the Court decided *Downes v. Bidwell*.<sup>106</sup> In *Downes*, the plaintiff brought an action to recover imposts paid for goods shipped from Puerto Rico to New York after the passage of the Foraker Act.<sup>107</sup> The Court held that the tariffs imposed by the Foraker Act on goods imported from Puerto Rico to the United States, and vice versa, were constitutional.<sup>108</sup>

Justice Brown authored the opinion for a different majority of the Court in what appeared to be a complete reversal of his position in the first four *Insular Cases*.<sup>109</sup> Justice Brown first examined the history of the drafting of the Constitution and concluded that nothing in the historical development of that instrument justified a finding that the Constitution was directly applicable to the territories.<sup>110</sup> Justice Brown then analyzed prior Supreme Court cases addressing the issue, which he acknowledged were not "altogether harmonious,"<sup>111</sup> and concluded that no binding precedent existed holding the Constitution applied to the territories immediately upon cession and prior to congressional action.<sup>112</sup>

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104. 182 U.S. 243 (1901).

105. *Id.* at 244.

106. 182 U.S. 244 (1901).

107. *Id.* at 247.

108. *Id.* at 287.

109. *Id.* at 244. Justice Brown was joined by Justices Shiras, McKenna, White, and Gray, concurring in the judgment. *Id.*

110. *Id.* at 250-51. Justice Brown asserted that "it can nowhere be inferred that the territories were considered a part of the United States" at the time of the drafting. *Id.* "The Constitution," he continued, "was created by the people of the United States, as a union of states, to be governed solely by representatives of the states . . . . In short, the Constitution deals with states, their people, and their representatives." *Id.*

111. *Id.* at 258.

112. *Id.* at 258-71. Two of the cases Justice Brown analyzed and distinguished in his discussion are worth noting because of the relevance they had to the issue under consideration and because of the singular way in which they were distinguished or repudiated.

The first of these cases, *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317 (1820), addressed the issue of whether Congress had the power to levy taxes on the District of Columbia. *Downes*, 182 U.S. at 259-60. The Court held that Congress was empowered to tax the District of Columbia, as this power extended to all places where the government extended. *Id.* at 260 (citing *Loughborough*, 18 U.S. (5 Wheat.) at 319-20). In delivering the opinion of the Court, Chief Justice Marshall noted:

The power to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit but of one answer. It is the name given to our great Republic which is composed of states and territories. The District of Columbia, or the territory west of the Missouri, is

Justice Brown next analyzed the express language of the Constitution and held that its provision mandating uniformity of taxa-

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not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that the uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other.

*Id.* at 261 (quoting *Loughborough*, 18 U.S. (5 Wheat.) at 319). Justice Brown first noted that, because the case only addressed taxation over the District of Columbia, these remarks were "sound" inasmuch as they related to the District of Columbia, but were merely dicta as to the rest of the territories. *Id.* at 262. Justice Brown then distinguished the District of Columbia from the rest of the territories in that the "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." *Id.* at 260-61. Thus, Justice Brown distinguished *Loughborough* by characterizing Chief Justice Marshall's remarks as dicta, and by analogizing the Constitution to an encumbrance on the land.

The second of these cases was *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Dred Scott claimed that he had become a free man after residing two years in the Territory of Louisiana where slavery was prohibited by Act of Congress, 3 Stat. 545 (1820) (embodying the Missouri Compromise). *Id.* at 432. Sandford, on the other hand, argued that Congress lacked the power to outlaw slavery in the territories. *See id.* Scott countered that Congress did have absolute power to act over the territories and that such power stemmed from the Territory Clause. *Id.* (citing U.S. CONST. art. IV, § 3, cl. 2). The Court held that the Territory Clause only applied to territory owned by the United States at the time the Constitution was adopted; "[i]t was a special provision for a known and particular territory, and to meet a present emergency, and nothing more." *Id.* at 432. The Constitution, in Chief Justice Taney's opinion, applied in full force to all territory subsequently acquired. *Id.* at 447.

[A]s there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed.

*Id.* Addressing the significance of this precedent to the *Downes* case, Justice Brown conceded that it was "a strong authority in favor of the plaintiff, and if the opinion of the Chief Justice be taken at its full value it is decisive in his favor." *Downes*, 182 U.S. at 273-74. Justice Brown, however, dismissed its significance stating that:

[B]efore the Chief Justice gave utterance to his opinion upon the merits, he had already disposed of the case adversely to the plaintiff upon the question of jurisdiction, and that, in view of the excited political condition of the country at the time, it is unfortunate that he felt compelled to discuss the question upon the merits, particularly so in view of the fact that it involved a ruling that an act of Congress which had been acquiesced in for thirty years was declared unconstitutional. . . . It is sufficient to say that the country did not acquiesce in the opinion, and that the Civil War, which shortly thereafter followed, produced such changes in judicial, as well as public, sentiment as to seriously impair the authority of this case.

*Id.* at 274.

tion "throughout the United States"<sup>113</sup> was not binding on Congress when legislating for the territories.<sup>114</sup> Moreover, Justice Brown insisted that:

If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed. Instead of 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.<sup>115</sup>

Justice Brown finally concluded that the Constitution did not apply to the territories *ex proprio vigore*.<sup>116</sup>

Justice White, joined by Justices McKenna and Shiras, concurred in the judgment.<sup>117</sup> In Justice White's opinion the true issue was not whether the Constitution applied to the territories, for that was "self-evident," but whether the particular provision under consideration was appropriate.<sup>118</sup> This determination, in turn, hinged on the particular "situation of the territory and its relations to the United States."<sup>119</sup> In this respect, Justice White distinguished "incorporated" from "unincorporated" territories.<sup>120</sup> Incorporated territories—those destined to become states—were an integral part of the United States and, as such, were entitled to equal treatment under the Constitution.<sup>121</sup> Unincorporated territories, on the other hand, were not part of the United States but "merely appurtenant thereto as a possession."<sup>122</sup> When legislating for an unincorporated territory, Congress was bound only by those "general prohibitions" in the Constitution protecting the liberty and property of the people, which are not mere regulations of power, "but which are an absolute denial of all authority under

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113. U.S. CONST. art. I, § 8, cl. 1.

114. *Downes*, 182 U.S. at 287.

115. *Id.* at 285.

116. *Id.* at 286. In Justice Brown's opinion, "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." *Id.* Justice Brown did acknowledge, however, that there might be "certain natural rights enforced in the Constitution by prohibitions against interference with them" to which the inhabitants of the territories would be entitled regardless of whether the Constitution was applicable or not. *Id.* at 282. This notion played a role in later cases in determining which guarantees of the Bill of Rights were to be extended to the Island. See *infra* notes 188-210 and accompanying text.

117. *Downes*, 182 U.S. at 287 (White, J., concurring).

118. *Id.* at 292 (White, J., concurring).

119. *Id.* at 293 (White, J., concurring).

120. *Id.* at 319-33 (White, J., concurring).

121. *Id.* at 291-92, 299, 317 (White, J., concurring).

122. *Id.* at 341-42 (White, J., concurring).

any circumstances or conditions."<sup>123</sup>

Justice White, thus, believed that the United States had the power to claim a territory without allowing it into the Union.<sup>124</sup> This power, in Justice White's opinion, was a necessary consequence of the power to acquire territory, and it resided exclusively with the political branches of government.<sup>125</sup> Justice White concluded:

It is, then, as I think, indubitably settled . . . that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause the incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, . . . expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form part of the American family.<sup>126</sup>

Because the Treaty of Paris did not provide for the incorporation of Puerto Rico into the Union, the Island remained an unincorporated territory, and the constitutional requirement of uniformity of taxation did not apply.<sup>127</sup>

Justice Gray filed a short opinion concurring in judgment with Justice Brown and in substance with Justice White.<sup>128</sup> Justice Gray wrote separately to underscore his belief that "if Congress [was] not ready to construct a complete government for the conquered territory, it [could] establish a temporary government, which [was] not subject to all the restrictions of the Constitution."<sup>129</sup> Thus, while agreeing with Justice White that incorporation did not take place without congressional action, Justice Gray appeared to believe that nonincorporation was only a temporary

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123. Downes, 182 U.S. at 294 (White, J., concurring).

124. *Id.* at 336 (White, J., concurring).

125. *Id.* at 305-06, 336 (White, J., concurring). According to Justice White: To concede to the government of the United States the right to acquire, and to strip it of all power to protect the birthright of its own citizens and to provide for the well being of the acquired territory . . . is, in effect, to say that the United States is helpless in the family of nations, and does not possess that authority which has at all times been treated as an incident of the right to acquire.

*Id.* at 306 (White, J., concurring).

126. *Id.* at 338-39 (White, J., concurring).

127. *Id.* at 339-42 (White, J., concurring).

128. *Id.* at 345 (Gray, J., concurring).

129. Downes, 182 U.S. at 346 (Gray, J., concurring).

stage preceding the Congress' establishment of a "complete" civil government.<sup>130</sup>

Chief Justice Fuller, joined by Justices Harlan, Brewer, and Peckham, dissented.<sup>131</sup> Chief Justice Fuller argued that "the national government [was] a government of enumerated powers" and that "the powers delegated by the people to their agents [were] not enlarged by the expansion of the domain within which they are exercised."<sup>132</sup> In the Chief Justice's view, the fact that international law recognized a sovereign's right to hold dependencies was inconsequential to the issue of the status of Puerto Rico, because the general government did not derive its powers from international law but from the Constitution.<sup>133</sup> The sovereignty of the United States, he asserted, was to be measured by the Constitution and not by the law of nations.<sup>134</sup> Addressing the "incorporation theory" advanced by Justice White, Chief Justice Fuller argued that the federal government could not enlarge its jurisdiction through the unconstitutional exercise of its treaty-making power.<sup>135</sup> The Chief Justice further noted:

[The incorporation] theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.<sup>136</sup>

Congress, he concluded, was bound by the Constitution when legislating for the territories.<sup>137</sup>

Justice Harlan wrote a separate dissenting opinion to underscore the extent of his disagreement with the majority of the Court.<sup>138</sup> Justice Harlan first contended that Congress, as a crea-

130. *Id.* at 345-46 (Gray, J., concurring).

131. *Id.* at 347 (Fuller, C.J., dissenting).

132. *Id.* at 359 (Fuller, C.J., dissenting).

133. *Id.* at 369 (Fuller, C.J., dissenting).

134. *Id.* (Fuller, C.J., dissenting).

135. *Downes*, 182 U.S. at 369-70 (Fuller, C.J., dissenting).

136. *Id.* at 373 (Fuller, C.J., dissenting).

137. *Id.* at 373-74 (Fuller, C.J., dissenting). The Chief Justice also alluded to the political pressure that private interest groups were attempting to exert on the Court's decision:

Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That however, furnishes no basis for judicial judgment, and if the producers of staples in the existing states of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished.

*Id.* at 374 (Fuller, C.J., dissenting).

138. *Id.* at 375 (Harlan, J., dissenting).



ture of the Constitution, had no existence or power outside of that instrument.<sup>139</sup> It was absurd to presume, he insisted, that Congress could acquire territory pursuant to the powers conferred upon it by the Constitution, and with the same stroke of the pen it could exclude its creator from operating in the territory so acquired.<sup>140</sup> In Justice Harlan's opinion:

the idea that this country may acquire territories anywhere upon the earth . . . and hold them as mere colonies or provinces, the people inhabiting them to enjoy only such rights as Congress chooses to accord to them, is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution.<sup>141</sup>

Justice Harlan concluded that Puerto Rico became part of the United States upon ratification of the Treaty of Paris; that such incorporation was confirmed by the act of Congress that created a civil government for the Island; and that, after being so incorporated, the impost created by the Foraker Act violated the constitutional requirement of uniformity of taxation.<sup>142</sup>

In the last of the *Insular Cases*, *Huus v. New York & Porto Rico Steamship Co.*,<sup>143</sup> the Court answered the question of whether Puerto Rico was part of the domestic, or "coasting," trade within the meaning of the Federal cabotage laws.<sup>144</sup> The Court, in an unanimous opinion by Justice Brown, held that "trade with [Puerto Rico was] properly a part of the domestic trade of the country since the treaty of annexation, and [was] so recognized by the . . . Foraker act."<sup>145</sup>

Thus, by the end of the day on May 27, 1901, the Supreme Court had issued six companion cases, which held Puerto Rico to be domestic within the meaning of the tariff and cabotage laws, yet not a part of the United States within the meaning of the Constitution. Most notably, it appeared that only the author of the six

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139. *Id.* at 380 (Harlan, J., dissenting).

140. *Id.* at 382 (Harlan, J., dissenting).

141. *Downes*, 182 U.S. at 382 (Harlan, J., dissenting). Justice Harlan was particularly critical of the majority's implication that the national government was "a government of or by the states in union," rather than for and by the People. *Id.* at 378 (Harlan, J., dissenting).

142. *Id.* at 391 (Harlan, J., dissenting). Justice Harlan condemned the majority's concern with incorporating possessions "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought," asserting that:

[W]hether a particular race will or will not assimilate with our people . . . is a matter to be thought of when it is proposed to acquire their territory by treaty . . . . 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.

*Id.* at 384 (Harlan, J., dissenting).

143. 182 U.S. 392 (1901).

144. *Id.* at 392-93.

145. *Id.* at 396.

majority opinions, Justice Brown, thought all six cases were reconcilable with each other. The cases failed to settle the question of the status of the new territories and proved, once again, that the Fuller Court was not above the prejudices of the time.<sup>146</sup> A commentator noted the Court's concern that a different ruling in *Downes* would have set a precedent binding Congress later when legislating for the Philippines:

[I]n a conversation subsequent to the decision [Justice White] told me of his dread lest by a ruling of the Court it might have become impossible to dispose of the Philippine Islands and of his regret that one of the great parties had not adopted his doctrine of incorporation in its platform as providing the solution for the then (as now) much mooted matter of the ultimate disposition of the Philippine Islands. It is evident that he was much preoccupied by the danger of racial and social questions of a very perplexing character and that he was quite as desirous as Mr. Justice Brown that Congress should have a very free hand in dealing with the new subject populations.<sup>147</sup>

Perhaps this "preoccupation" was the cause of Justice Brown's indecision. It is apparent from the opinions and Justice White's own admission, however, that racial animus and imperialist fever were significant factors behind the invention of a judicial doctrine that constitutionalized American colonialism.<sup>148</sup>

#### B. From the Insular Cases to *Balzac v. Porto Rico*<sup>149</sup>

From May 27, 1901 to April 10, 1922, when *Balzac v. Porto Rico* was decided, the Supreme Court heard at least nine cases addressing the status of the new territories and the constitutional protections to be afforded their inhabitants.<sup>150</sup> Highly divisive

146. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (majority opinion also by J. Brown).

147. Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 832 (1926).

148. Commentators of the time were quite candid about the origins of the Territorial Incorporation Doctrine. Frederic R. Coudert, for example, noted:

I do not believe that [the Territorial Incorporation Doctrine] existed in our constitutional law until it was evolved by [Justice White's] powerful mind. It was a doctrine created by circumstances. It had the advantage of reconciling American reverence for the Constitution, the theory of a government everywhere limited by its constituent act, with large discretion left to Congress regarding the amount of liberty to be given to the new peoples. The very vagueness of the doctrine was valuable in that while the doctrine admitted that the Constitution was everywhere applicable to the actions of Congress, it failed anywhere to specify what particular portions of the Constitution were applicable to the newly acquired possessions.

Coudert, *supra* note 147, at 850.

149. 258 U.S. 298 (1922).

150. See, e.g., *Porto Rico v. Muratti*, 245 U.S. 639 (1918) (per curiam) (holding right to grand jury indictment inapplicable to Puerto Rico); *Porto*

opinions, and *ad hoc* determinations of which rights were sufficiently "fundamental" to be applicable to the territories, characterized these cases.<sup>151</sup> Also characteristic of these cases was Justice White's persistence on his incorporation theory, opposed by Justice Harlan's insistence on the applicability of the Constitution to the territories.<sup>152</sup> The significance of these cases is mostly historical, and a detailed discussion of them is beyond the scope of this work. One case in particular, however, *Dorr v. United States*, merits further consideration because in that case a majority of the Court adopted for the first time Justice White's incorporation theory.<sup>153</sup>

In *Dorr*, the Supreme Court was asked to decide whether residents of the Philippine Islands were entitled to trial by jury, absent congressional action extending the constitutional protection to the territory.<sup>154</sup> The Court held, in an eight-to-one decision, that the constitutional guarantee of trial by jury did not apply to the Philippines.<sup>155</sup> Justice Day, writing for a five-member majority, reaffirmed the holding of *Downes*<sup>156</sup> that, in legislating for the territories, Congress had plenary power, bound only by those "general prohibitions" in the Constitution protecting the fundamental rights of liberty and property of the people.<sup>157</sup> According to the

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*Rico v. Tapia*, 245 U.S. 639 (1918) (per curiam) (supporting *Muratti* holding); *Ocampo v. United States*, 234 U.S. 91 (1914) (holding right to grand jury indictment inapplicable to Philippines); *Rasmussen v. United States*, 197 U.S. 516 (1905) (holding Alaska to be an incorporated territory and, thus, right to jury trial applied); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that right to jury trial was not a fundamental right and, thus, not automatically applicable to Philippines); *González v. Williams*, 192 U.S. 1 (1904) (holding that with ratification of Treaty of Paris, citizens of Puerto Rico ceased to be "aliens" within the meaning of immigration laws); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that right to grand jury indictment and jury trial were not fundamental rights and, thus, not automatically applicable to territories; Newlands Resolution did not extend those rights to the Hawaiian Islands); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901) (holding that after ratification of Treaty of Paris the Philippines became domestic territory within the meaning of the customs laws); *Dooley v. United States* [*Dooley I*], 183 U.S. 151 (1901) (holding that tax imposed by Foraker Act on goods imported from the United States to Puerto Rico was constitutional).

151. See cases cited *supra* note 150.

152. See, e.g., *Dorr*, 195 U.S. at 149 (holding that right to jury trial was not a fundamental right and, thus, not automatically applicable to Philippines); *Mankichi*, 190 U.S. at 218 (holding that right to grand jury indictment and jury trial were not fundamental rights and, thus, not automatically applicable to territories and that Newlands Resolution did not extend those rights to the Hawaiian Islands); *Dooley II*, 183 U.S. at 156-57 (holding that tax imposed by Foraker Act on goods imported from the United States to Puerto Rico was constitutional).

153. *Dorr*, 195 U.S. at 138.

154. *Id.* at 139.

155. *Id.* at 149.

156. See *supra* notes 106-142 and accompanying text.

157. See *Dorr*, 195 U.S. at 142.

majority, the right to trial by jury was not a fundamental right, but "merely a method of procedure," and as such, Congress was not bound to provide the Philippines with a system of laws guaranteeing that right.<sup>158</sup> At the close of the majority opinion, Justice Day embraced Justice White's incorporation theory:

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory not made part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated.<sup>159</sup>

Justice Peckham, joined by Chief Justice Fuller and Justice Brewer, concurred in the judgment.<sup>160</sup> Justice Peckham disagreed with the views expressed by the majority, but believed the result was compelled by the holding in *Hawaii v. Mankichi*.<sup>161</sup> Justice Peckham, however, criticized the majority for adopting the incorporation theory, noting that those views "were not concurred in by the majority of the [Downes] court, [and] are plainly not binding."<sup>162</sup>

Justice Harlan filed a dissenting opinion bitterly criticizing the majority characterization of the right to trial by jury as non-fundamental.<sup>163</sup> In Justice Harlan's opinion:

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158. *Id.* at 144-45 (quoting *Mankichi*, 190 U.S. 197 (1903)). One of the most disturbing features of Justice Day's majority opinion was his apparent belief that expediency and necessity determined which rights guaranteed by the Constitution were fundamental:

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing the laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice.

*Id.* at 148.

159. *Id.* at 149.

160. *Id.* at 153 (Peckham, J., concurring).

161. *Id.* at 153-54 (Peckham, J., concurring) (citing *Mankichi*, 190 U.S. 197 (1903)).

162. *Id.* at 154 (Peckham, J., concurring).

163. *Durr*, 195 U.S. at 154 (Harlan, J., dissenting).

[G]uaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the states composing the Union, or in any territory, however acquired, over the inhabitants of which the government of the United States may exercise the powers conferred upon it by the Constitution.<sup>164</sup>

Justice Harlan condemned the majority opinion as "an amendment of [the Constitution] by judicial construction" and noted that "no power exist[ed] in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States."<sup>165</sup>

The second decade of American rule in Puerto Rico witnessed a series of political changes in the federal government that culminated in the undisputed adoption by the Supreme Court of the Territorial Incorporation Doctrine. In 1908, William H. Taft was elected President of the United States. Taft was very familiar with the issues surrounding the new territories.<sup>166</sup> He had served as civil Governor of the Philippines from 1900 to 1904, and as President Roosevelt's Secretary of War from 1904 to 1908.<sup>167</sup> President Taft's views regarding the applicability of the Constitution to the territories and the power of Congress to govern them were in line with Justice White's beliefs.<sup>168</sup> During Taft's tenure as President, the four dissenters in *Downes*, Chief Justice Fuller and Justices Peckham, Brewer, and Harlan, died.<sup>169</sup> President Taft elevated Justice White to Chief Justice, and filled the four vacancies in the Court with Justices sympathetic to the incorporation theory.<sup>170</sup>

On March 2, 1917, Congress enacted a second organic act for Puerto Rico: the Jones Act.<sup>171</sup> The Jones Act created a new civil government for the Island and granted United States citizenship

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164. *Id.* (Harlan, J., dissenting).

165. *Id.* at 155 (Harlan, J., dissenting).

166. TORRUELLA, *supra* note 16, at 94 n.332.

167. *Id.*

168. *Id.*

169. *Id.* at 78-83.

170. *Id.* See also Rehnquist, *supra* note 13, at 21. President Taft was not the only President to appoint Justices to the Supreme Court based, at least partially, on their stand on the "insular question." As Justice Rehnquist noted:

Theodore Roosevelt, who appointed Oliver Wendell Holmes as an Associate Justice of the Supreme Court in 1902, did not finally make the appointment until he sent Senator Henry Cabot Lodge as an intermediary to Holmes to see whether he was "sound" on the so-called "insular question." After having received the necessary assurances, Roosevelt went ahead with the appointment.

*Id.* at 20.

171. See An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones Act), 39 Stat. 951 (1917).

to Puerto Ricans.<sup>172</sup> The act also provided a Bill of Rights for Puerto Rico, and continued the tariff laws established by the Foraker Act.<sup>173</sup>

The enactment of the Jones Act raised new questions regarding the status of Puerto Rico. Many believed the grant of citizenship was sufficient to incorporate the territory into the Union.<sup>174</sup> After all, Justice White had defined an incorporated territory as one destined for eventual statehood;<sup>175</sup> a grant of citizenship was "undoubtedly" a move towards that end. Additionally, the constitutionality of the tariff laws created by the Foraker Act was questionable in light of the newly acquired citizenship. The questions raised by the Jones Act were resolved in *Balzac v. Porto Rico*.<sup>176</sup>

### C. *Balzac v. Porto Rico*

In *Balzac*, the editor of a daily newspaper in Puerto Rico was charged and convicted on two counts of libel.<sup>177</sup> The defendant appealed his conviction to the Supreme Court of Puerto Rico alleging that his Sixth Amendment right to a jury trial had been violated.<sup>178</sup> The Supreme Court of Puerto Rico affirmed the conviction, and writ of error was taken to the Supreme Court of the United States.<sup>179</sup> The Supreme Court, in a unanimous opinion by Chief Justice Taft, affirmed, holding that Puerto Rico remained an unincorporated territory after the enactment of the Jones Act, and that Congress had not made the Sixth Amendment right to jury trial applicable to Puerto Rico.<sup>180</sup>

The Court began its analysis by noting that since *Dorr v. United States*<sup>181</sup> the Territorial Incorporation Doctrine had become the settled law of the land.<sup>182</sup> The Court then examined the Jones Act to determine whether Congress, through its enactment, had incorporated Puerto Rico.<sup>183</sup> Turning first to the plain language of the Act, the Court found no indication of an intent to incorporate the Island into the Union.<sup>184</sup> Absent plain declaration of congres-

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172. See Jones Act, 39 Stat. 951. An analysis of the form of government established by the Jones Act is beyond the scope of this work. For a historical analysis of the events leading up to the enactment of the Jones Act, see Cabranes, *supra* note 9.

173. See Jones Act, 39 Stat. at 951-55.

174. See generally TORRUELLA, *supra* note 16; Cabranes, *supra* note 6.

175. See *supra* notes 117-27 and accompanying text.

176. 258 U.S. 298 (1922).

177. *Id.* at 300.

178. *Id.*

179. *Id.*

180. *Id.* at 305-11.

181. 195 U.S. 138 (1904).

182. *Balzac*, 258 U.S. at 305.

183. *Id.* at 305-08.

184. *Id.* at 306.

sional intent the Court held that Puerto Rico remained an unincorporated territory of the United States.<sup>185</sup>

The Court found Congress's grant of citizenship to Puerto Ricans to be "entirely consistent with nonincorporation."<sup>186</sup> According to the Court, it was "locality that [was] determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."<sup>187</sup> The Sixth Amendment right to jury trial, therefore, was not applicable to Puerto Rico.

### III. THE AFTERMATH

Ever since *Balzac v. Porto Rico*,<sup>188</sup> the Supreme Court recognizes as applicable to Puerto Rico the Fourth Amendment right against unreasonable searches and seizures,<sup>189</sup> the Due Process Clause of *either* the Fifth or the Fourteenth Amendment,<sup>190</sup> the equal protection guarantee of *either* the Fifth or the Fourteenth Amendment,<sup>191</sup> the First Amendment Free Speech Clause,<sup>192</sup> and

185. *Id.* at 306-08.

186. *Id.* at 308.

187. *Id.* at 309. This "locality" rule is one of the most absurd side-effects of the Territorial Incorporation Doctrine. In essence, a United States citizen enjoys all the protections of the Bill of Rights while he lives in any of the 50 states, but loses that protection by operation of the "locality rule" upon moving to an Unincorporated Territory. *Id.* at 308. The discriminatory effect of this rule was first noted hypothetically by Justice Harlan in his dissent in *Dorr v. United States*, 195 U.S. 138, 156 (1904), and later became a reality in *Califano v. Gautier Torres*, 435 U.S. 1 (1978). The "locality rule" defies the basic principle that our government, and thus our Constitution, is a government for and by the People, rather than for and by the States. See *Downes v. Bidwell*, 182 U.S. 244, 377-78 (1901) (Harlan, J., dissenting).

188. 258 U.S. 298 (1922).

189. See *Terrol Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979). In *Terrol Torres*, the Court stated that:

[B]ecause the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.

*Id.* at 470. The Court thus embraced the notion that, at least with respect to the territories, Constitutional protections may be withheld from the people for the sake of expediency and convenience. Justice Harlan bitterly condemned this notion in his dissent in *Dorr v. United States*, 195 U.S. 138, 155 (1904).

190. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-69 n.5 (1974). The Court found it "unnecessary to determine which Amendment applied to Puerto Rico." *Id.*

191. See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976). The Court declined to determine which amendment applied noting:

[W]e need not resolve that precise question because, irrespective of which Amendment applies, the statutory restriction on the ability of

the constitutional right to travel.<sup>193</sup>

Puerto Ricans, on the other hand, are denied the Sixth Amendment right to trial by jury,<sup>194</sup> the right to vote for the President and Vice-President of the United States,<sup>195</sup> and the right to equal treatment with respect to welfare benefits.<sup>196</sup> The welfare cases deserve further treatment because they underscore the amount of deference given to Congress by the Supreme Court when legislating for the territories.

#### A. The Welfare Cases

In *Califano v. Gautier Torres*,<sup>197</sup> plaintiffs, formerly residents of Connecticut, Massachusetts, and New Jersey, received Supplemental Security Income (SSI) aid for aged, blind, and disabled persons.<sup>198</sup> The United States discontinued these SSI benefits pursuant to 42 U.S.C. § 1381, which limits these benefits to "the 50 States and the District of Columbia," when the Plaintiffs moved to Puerto Rico.<sup>199</sup> Plaintiffs challenged the SSI statute alleging that the exclusion of Puerto Rico's residents from eligibility for these benefits violated their constitutional right to travel.<sup>200</sup> The government advanced three reasons for the exclusion of residents of Puerto Rico from the SSI program: (1) under Puerto Rico's unique tax status, residents do not contribute to the public treasury; (2) such inclusion would require an estimated three hundred million dollar annual expenditure; (3) exposure to the SSI program would possibly engender future economic disruption in Puerto Rico.<sup>201</sup> The United States District Court for the District of Puerto Rico agreed with the plaintiffs, however, and held that the SSI Act vio-

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aliens to engage in the otherwise lawful private practice of civil engineering is plainly unconstitutional. If the Fourteenth Amendment is applicable, the Equal Protection Clause nullifies the statutory exclusion. If, on the other hand, it is the Fifth Amendment and its Due Process Clause that apply, the statute's discrimination is so egregious that it falls within the rule of *Bolling v. Sharpe*, 347 U.S. 497 (1954).

*Id.* at 601.

192. *Balzac v. Porto Rico*, 258 U.S. 298, 314 (1922).

193. *Califano v. Gautier Torres*, 435 U.S. 1, 4 (1978) (assuming without deciding).

194. *Balzac*, 258 U.S. at 313-14.

195. See *Igartua de la Rosa v. United States*, 32 F.3d 8, 12 (1st Cir. 1994) (per curiam); *Attorney General of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984); *Sanchez v. United States*, 376 F. Supp. 239, 242 (D.P.R. 1974). See generally GREGORIO IGARTUA, U.S. DEMOCRACY FOR PUERTO RICO: A DENIAL OF VOTING RIGHTS IN PRESIDENTIAL ELECTIONS TO OVER 3.5 MILLION AMERICAN CITIZENS (1996).

196. *Harris v. Rosario*, 446 U.S. 651 (1980); *Califano*, 435 U.S. 1, 4 (1978).

197. 435 U.S. 1 (1978) (per curiam).

198. *Id.* at 2-3.

199. *Id.* at 2 (quoting 42 U.S.C. § 1382c(e) (1970 ed., upp. V)).

200. *Id.* at 3.

201. *Id.* at 5 n.7.



lated plaintiffs' constitutional right to travel.<sup>202</sup>

The Supreme Court of the United States reversed, holding that the constitutional right to interstate travel is implicated only when new residents are denied "the same right to vital governmental benefits and privileges in the State to which they migrate as are enjoyed by other residents."<sup>203</sup> Because all residents of Puerto Rico were denied SSI benefits, the Court concluded, there was no violation of plaintiffs' constitutional right to interstate travel.<sup>204</sup> Although the Court did not perform an equal protection analysis, it noted that "a law providing for governmental payments of monetary benefits . . . 'is entitled to a strong presumption of constitutionality.' 'So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional strait-jacket.'"<sup>205</sup>

Two years later, the plaintiffs in *Harris v. Rosario*,<sup>206</sup> challenged the lower level of assistance provided to the poor and needy residents of Puerto Rico by the Aid to Families with Dependent Children program (AFDC). In *Harris*, AFDC recipients residing in Puerto Rico brought a class action suit against the Secretary of Health and Human Services claiming that the lower level of AFDC assistance provided to Puerto Rico violated the Fifth Amendment's equal protection guarantee.<sup>207</sup> The United States District Court for

202. *Id.* at 4.

203. *Califano*, 435 U.S. at 4 (quoting *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 261 (1974)). The Court assumed, for the purpose of the opinion, that the right to travel between Puerto Rico and the 50 states, like the constitutional right to interstate travel, was virtually unqualified. *Id.* at 5 n.6.

204. *Id.* at 4. The Court noted that the District Court:

[H]eld that the Constitution requires that a person who travels to Puerto Rico must be given benefits superior to those enjoyed by other residents of Puerto Rico if the newcomer enjoyed those benefits in the State from which he came. This Court has never held that the constitutional right to travel embraces any such doctrine, and we decline to do so now. Such a doctrine would apply with equal force to any benefits a State might provide for its residents, and would require a State to continue to pay those benefits indefinitely to any persons who had once resided there. And the broader implications of such a doctrine in other areas of substantive law would bid fair to destroy the independent power of each State under our Constitution to enact laws uniformly applicable to all of its residents.

*Id.* at 4-5. The flaw in the Court's rationale is that in *Califano* it was the federal government, not a state, that was discriminating against the migrating citizen. Thus, under the Court's rationale the federal government can interfere with a citizen's constitutional right to travel as long as it discriminates against the *entire* state to which the migrating citizen is moving.

205. *Id.* at 5 (citations omitted) (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)).

206. 446 U.S. 651 (1980) (*per curiam*) (citation omitted).

207. *Id.* at 651.

the District of Puerto Rico held that the AFDC statute was unconstitutional.<sup>208</sup>

The Supreme Court of the United States reversed, holding that "Congress, which is empowered under the Territory Clause to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."<sup>209</sup> The reasons the government advanced for treating Puerto Rico residents different from residents of the fifty states mirrored those advanced in *Califano*.<sup>210</sup>

In a vigorous dissent, Justice Marshall questioned the continuing validity of the Territorial Incorporation Doctrine and condemned the majority's hastiness in resolving the equal protection question without affording the litigants full briefing and oral argument.<sup>211</sup> Justice Marshall noted:

[T]he Court suggests today, without benefit of briefing or argument, that Congress needs only a rational basis to support less beneficial treatment for Puerto Rico, and the citizens residing there, than is provided to the States and citizens residing in the States. Heightened scrutiny under the equal protection component of the Fifth Amendment, the Court concludes, is simply unavailable to protect Puerto Rico or the citizens who reside there from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause. Such a proposition surely warrants the full attention of this Court before it is made part of our constitutional jurisprudence.<sup>212</sup>

Moreover, Justice Marshall doubted that the AFDC statute survived rational review.<sup>213</sup> Justice Marshall noted that under the government's three-pronged rationale for discriminatory treatment of Puerto Ricans—that is: (1) the amount contributed by its citizens to the federal treasury; (2) cost of implementing the program in the area; and (3) fear of disruption of local economy—those geographic units in the country with the strongest economies would get the most financial aid from the federal government.<sup>214</sup> "Such an approach to a financial assistance program," Justice Marshall concluded, "is not so clearly rational as the Court sug-

208. *Id.*

209. *Id.* at 651-52 (quoting U.S. CONST. art. IV, § 3, cl. 2) (alteration in original).

210. *Id.* at 652.

211. *Harris*, 466 U.S. at 652 (Marshall, J., dissenting).

212. *Id.* at 654 (Marshall, J., dissenting). The majority also failed to evaluate the law under the standard of *Washington v. Davis*, 426 U.S. 229 (1976). Under *Washington v. Davis*, a facially neutral law that has a "racially disproportionate impact" may be invalidated if there is sufficient evidence of discriminatory intent. *Washington*, 426 U.S. at 240-41.

213. *Harris*, 446 U.S. at 656 (Marshall, J., dissenting).

214. *Id.* at 655-56 (Marshall, J., dissenting).

gests.<sup>215</sup>

Ironically in both *Harris* and *Califano* the Supreme Court of the United States, like Congress, treated the residents of Puerto Rico differently: the Court decided the rights of Puerto Ricans without affording them the benefit of full briefing and oral argument, and thus, refused the opportunity to be heard.

*B. Is a Fundamental Right in a State a Fundamental Right in an Unincorporated Territory?*

The *Insular Cases* and their progeny stand for the proposition that Congress's power to legislate for unincorporated territories is limited only by those provisions in the Constitution guaranteeing fundamental rights "indispensable to a free government."<sup>216</sup> What exactly constitutes a "fundamental right" in the context of an unincorporated territory, however, has been the subject of considerable debate and controversy.<sup>217</sup>

In *Dorr v. United States*<sup>218</sup> and *Balzac v. Puerto Rico*,<sup>219</sup> for example, the Supreme Court of the United States held that the Sixth Amendment right to a trial by jury was not applicable to unincorporated territories.<sup>220</sup> These decisions were based on the notion that the right to trial by jury was not a "fundamental right" but merely a method of procedure inherent to the Anglo-American judicial system.<sup>221</sup> Nearly fifty years after *Balzac*, however, the Supreme Court held in *Duncan v. Louisiana*<sup>222</sup> that the right to trial by jury was "fundamental" and applicable to the states via the Fourteenth Amendment.<sup>223</sup>

215. *Id.* at 656 (Marshall, J., dissenting).

216. *Downes v. Bidwell*, 182 U.S. 244, 282-83 (1901). See also *Dorr v. United States*, 195 U.S. 138, 147 (1904); *Acevedo Montalvo v. Hernandez Colon*, 377 F. Supp. 1332, 1336-42 (D.P.R. 1974). See generally TORRUELLA, *supra* note 16, at 54-56; Marybeth Herald, *Does the Constitution Follow the Flag Into the United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 709 (1995); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 459 (1992).

217. Compare *Wabol v. Villacrucis*, 958 F.2d 1450, 1460 (9th Cir. 1992) (finding that "fundamental rights" for the purposes of the Fourteenth Amendment are not the same as "fundamental rights" in the territorial context, the latter being "fundamental in [the] international sense") with *Acevedo Montalvo*, 377 F. Supp. at 1341 (finding that "fundamental rights" found applicable to the states through the Fourteenth Amendment are equally applicable to Puerto Rico through the Territorial Incorporation Doctrine).

218. 195 U.S. 138 (1904).

219. 258 U.S. 298 (1922).

220. *Id.* at 313; *Dorr*, 195 U.S. at 149.

221. *Balzac*, 258 U.S. at 304-05, 310-11 (quoting *Dorr*, 195 U.S. at 148 (construing the jury system as a product of tradition rather than a constitutional creation)).

222. 391 U.S. 145 (1968).

223. *Id.* at 149-50 n.14.

In *Northern Mariana Islands v. Atalig*,<sup>224</sup> a resident of the Commonwealth of the Northern Mariana Islands, relying on *Duncan*, challenged a local law denying him the right to trial by jury. The Appellate Division of the United States District Court for the District of the Northern Mariana Islands held that *Duncan* was controlling and that the right to trial by jury, as a "fundamental right," was applicable to the territories.<sup>225</sup> The United States Court of Appeals for the Ninth Circuit reversed, holding that the right to trial by jury was not "fundamental" within the context of the Territorial Incorporation Doctrine.<sup>226</sup> The Ninth Circuit distinguished "fundamental rights" incorporated into the Fourteenth Amendment from "fundamental rights" in the context of territorial incorporation and noted that *Duncan* only expanded the definition of "fundamental rights" for the purpose of applying the Bill of Rights to the states.<sup>227</sup> The Ninth Circuit appeared to suggest, as the Supreme Court had in the *Insular Cases*,<sup>228</sup> that necessity, expediency, and convenience determined which rights were "fundamental" for the purpose of territorial incorporation:

[H]istory reveals that the [Supreme] Court proceeded cautiously with [the] incorporation [of the Bill of Rights under the Due Process Clause]. Through this gradual process in the century following ratification of the Fourteenth Amendment, nearly all the rights guaranteed in the Bill of Rights have been found applicable to the states. We believe that a cautious approach is also appropriate in restricting the power of Congress to administer overseas territories. Were we to apply sweepingly *Duncan's* definition of "fundamental rights" to unincorporated territories, *the effect would be immediately to extend almost the entire Bill of Rights to such territories*. This would repudiate the *Insular Cases*. We are not prepared to do so nor do we think we are required to do so.<sup>229</sup>

In *Wabol v. Villacrusis*,<sup>230</sup> the Ninth Circuit further expounded the dual meaning of "fundamental rights" noting that "[i]n the territorial context, the definition of a basic and integral freedom must narrow to incorporate the shared beliefs of diverse cultures. Thus, [an] asserted constitutional guarantee . . . applies only if [it] is fundamental in this international sense."<sup>231</sup> When,

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224. 723 F.2d 682 (9th Cir. 1984).

225. *Id.* at 689.

226. *Id.*

227. *Id.*

228. See *supra* notes 147, 158 and accompanying text.

229. *Northern Marina Islands*, 723 F.2d at 690 (footnotes omitted, emphasis added).

230. 958 F.2d 1450 (9th Cir. 1992).

231. *Id.* at 1460. It is interesting to note, however, that the court did not examine any international materials to determine if the particular right in question was indeed a "fundamental right" in the "international sense." Rather, the court based its decision on a determination that the application of

then, is a constitutional right "fundamental" in the international sense?

In *Igartua de la Rosa v. United States*,<sup>232</sup> residents of Puerto Rico brought suit claiming that their inability to participate in presidential elections violated their constitutional rights. The plaintiffs alleged, *inter alia*, that the International Covenant on Civil and Political Rights,<sup>233</sup> to which the United States is a signatory, secured them the right to vote in presidential elections.<sup>234</sup> In holding that United States citizens residing in Puerto Rico were not entitled to vote in presidential elections, the First Circuit noted that even if the Covenant could be read to guarantee such

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the right in question was not "impractical or anomalous" in the Northern Mariana Islands. *Id.* at 1461.

The *Wablol* decision is also significant from the standpoint of equal protection. The issue in *Wablol* was whether a race-based restriction on the acquisition of permanent and long-term interest in land in the Commonwealth of the Northern Mariana Islands was constitutionally permissible. *Id.* at 1451. The court held that it was, and noted that it was:

[I]mportant to distinguish between the right claimed under the equal protection clause and the right to equal protection itself. *Atalig* held that not every right subsumed within the due process clause can ride the fundamental coattails of due process into the territories. The same must be true of the equal protection clause. It is the specific right of equality that must be considered for purposes of territorial incorporation, rather than the broad general guarantee of equal protection.

*Id.* at 1460 n.19. Suffice it to say that the Supreme Court has held otherwise. See *Examining Bd. of Eng'rs, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976).

232. 32 F.3d 8 (1st Cir. 1994).

233. International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 I.L.M. 368 [hereinafter *Covenant*] (effective Sept. 8, 1992).

234. *Igartua*, 32 F.3d at 10 n.1. Article 25 of the *Covenant* states:

Every citizen shall have the rights and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access on the general terms of equality to public service in his country.

*Covenant*, supra note 233, Article 25. Article 2 states:

1. Each State Party to the present *Covenant* undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present *Covenant*, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.

*Id.* Article 2 (emphasis added). See generally *Study of Discrimination in the Matter of Political Rights*, U.N. Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/213 Rev.1 (1962).

right the provision in question was not self-executing.<sup>235</sup> The First Circuit thus concluded that a right made "fundamental" in the international sense, through the purest form of international law-making, was not applicable to an unincorporated territory until Congress acted upon it.

Thus, nearly a hundred years after the courts were first asked to determine whether the Constitution applied to the territories, and after a myriad of cases defining fundamental and non-fundamental rights, the jurisprudence has come full circle: Congress has plenary, unbridled power to legislate over unincorporated territories.<sup>236</sup>

### CONCLUSION

Nearly a hundred years ago, American troops landed in Guánica, Puerto Rico, and promised to bestow upon the inhabitants of that Island "the immunities and blessings of the liberal in-

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235. *Igartua*, 32 F.3d at 10 n.1.

236. Some commentators have questioned the continuing validity of the Territorial Incorporation Doctrine in light of the Commonwealth status of Puerto Rico (1952) and the Northern Mariana Islands (1986) and cases such as *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Reid v. Covert*, 354 U.S. 1 (1957). See, e.g., Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 979 (1991); Rehnquist, *supra* note 13, at 23. But see, e.g., Cabranes, *supra* note 6, at 477-78; Herald, *supra* note 216, at 713-21; Van Dyke, *supra* note 216, at 468-80.

The Territorial Incorporation Doctrine is still alive and Congress has as much power to act over Unincorporated Territories now as it did 95 years ago. Suffice it to say that the status of Puerto Rico under the Commonwealth Constitution is far from clear and has been the subject of extensive debate. See, e.g., Jose A. Axtmayer, *Non-Self-Governing Territories and the Constitutive Process of the United Nations: A General Analysis and the Case Study of Puerto Rico*, 45 REV. JUR. U.P.R. 211 (1976); Juan M. García-Passalacqua, *La Legalidad de la Estadidad Asociada de Puerto Rico*, 23 REV. COL. AB. P.R. 173 (1962); Juan M. García-Passalacqua, *Prognosis Constitucional del Nuevo Pacto*, 36 REV. COL. AB. P.R. 905 (1975); Arron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REV. JUR. U.I.P.R. 275 (1992); Bruce J. Hector, *Puerto Rico: Colony or Commonwealth?*, 35 REV. COL. AB. P.R. 287 (1974); Helfeld, *supra* note 30, at 25; David M. Helfeld, *Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 135 (1952); Rafael Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COL. AB. P.R. 207 (1959); Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211 (1981); Magruder, *supra* note 30, at 1; Jorge Morales-Yordan, *The Constitutional and International Status of the Commonwealth of Puerto Rico*, 16 REV. COL. AB. P.R. 5 (1957); Helen Silving, *In the Nature of a Compact*, 20 REV. COL. AB. P.R. 159 (1960). See generally JUAN M. GARCÍA-PASSALACQUA & CARLOS RIVERA LUGO, *PUERTO RICO Y LOS ESTADOS UNIDOS: EL PROCESO DE CONSULTA Y NEGOCIACION DE 1989 Y 1990* (1992). In the author's opinion, the nature of the current political status of Puerto Rico was best described by Judge Jose A. Cabranes in the phrase "colonialism with the consent of the governed." Cabranes, *supra* note 7, at n.26.

stitutions of [their] government."<sup>237</sup> Expansionist fever and dreams of the "American Empire," however, led the children of the framers to devise for the Island a form of government so contrary to the spirit and the genius of the Constitution as to emulate the same tyrannical regime their parents rebelled against and set out to prevent when drafting the Constitution. This tyrannical regime lives and breathes in the Territorial Incorporation Doctrine invented by the Supreme Court in the *Insular Cases*.

Under the Territorial Incorporation Doctrine, the basic principles of federalism, government by consent, equal protection of the laws, and the guarantees of a republican form of government have been disregarded for the sake of expediency and convenience. Puerto Rico, as an unincorporated territory, remains under the plenary power of Congress, with no representation and no participation in the political process. Its children, as citizens of the United States, are drafted to fight in wars they have no power to declare, under a Commander-in-Chief they have no right to elect. Their rights are dictated by a body to which they cannot join and which is not accountable to them.

The role that imperialism and racial animus played in the decision not to incorporate the Island into the Union, and to deviate from over a century of precedent, further accentuates the illegitimacy of the doctrine. Even after the Philippine Islands became independent, Puerto Rico was granted free trade with the United States, and Puerto Ricans became United States citizens, the Supreme Court continues to uphold Congress's plenary power over the Island. The Territorial Incorporation Doctrine is an obsolete vestige of a racist, imperialist era of our Country which serves no purpose other than to differentiate between continental and non-continental American citizens.<sup>238</sup> Unequal treatment on this ground is permissible, the Supreme Court says, as long as Congress has a "rational basis for its actions."<sup>239</sup>

The plenary power of Congress to act over Puerto Rico is said to stem from the Territory Clause, from the treaty-making power of Congress, and as a necessary consequence of Congress's power to acquire new territory. Reading the Constitution as a whole, however, one can only conclude that Congress's exercise of absolute, unbridled power over the territories is irreconcilable with the idea of a federal government of enumerated powers.

Some commentators, while acknowledging Congress's power

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237. MORALES CARRION, *supra* note 3, at 132 (quoting General Miles's message to the People of Puerto Rico, July 28, 1898).

238. Note that Hawaii started as an unincorporated territory, see *supra* Section III, but was later admitted into the Union. The citizens of Hawaii are the only non-continental United States citizens enjoying the full protection of the Constitution.

239. See *supra* notes 197-215 and accompanying text.

to unilaterally alter the status and the rights of Puerto Ricans, have suggested that Congress could not act that way because such actions would "convict the United States of hypocrisy and insincerity."<sup>240</sup> The answer to this argument can be found in Justice Harlan's dissent in *Downes*:

The wise men who framed the Constitution, and the patriotic people who adopted it, were unwilling to depend for their safety upon . . . principles of natural justice inherent in Anglo-Saxon character . . . . 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.<sup>241</sup>

Every United States citizen, whether in the continent or in the territories, deserves full protection of their constitutional rights. The Territorial Incorporation Doctrine must be overturned.

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240. Magruder, *supra* note 30, at 16. Calvert Magruder was at the time Chief Judge of the United States Court of Appeals for the First Circuit. He asserted that:

Congress, even if it has the power, could not afford by a unilateral act to pass a new Organic Act for the internal government of Puerto Rico, supplanting the existing constitution of the commonwealth. That would be an act resting on naked power alone, without any basis of moral justification.

*Id.*

241. *Downes v. Bidwell*, 182 U.S. 244, 381 (Harlan, J., concurring).



