

ARTICLES

THE INSULAR CASES: THE ESTABLISHMENT OF A REGIME OF POLITICAL APARTHEID

BY JUAN R. TORRUELLA*

*What's in a name?*¹

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¹ "What's in a name? That which we call a rose / By any other name would smell as sweet." WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 1 (Richard Hosley ed., Yale Univ. Press 1964) (1917).

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1. INTRODUCTION

In 1832 the German military theorist Carl von Clausewitz asserted that "war is simply a continuation of political intercourse, with the addition of other means."² This sentiment was echoed over one hundred years later in a similar context but by a very dissimilar political thinker, the Chinese leader Mao Zedong.³

It can be argued that this kind of logical progression between politics and war is also present in the relationship that exists between politics and the law, particularly between politics and public law, and most especially between politics and constitutional law.

I will elaborate on this thesis in support of my contention that the linkage between politics and constitutional law is clearly apparent in the history and outcome of the Supreme Court's decisions in the *Insular Cases*⁴ and their progeny.⁵ With the Court

² CARL VON CLAUSEWITZ, ON WAR, bk. 8, ch. 6B, at 731 (Michael Howard & Peter Paret eds. & trans., Alfred A. Knopf 1993) (1832).

³ See 2 MAO TSE-TUNG, *On Protracted War*, in SELECTED WORKS OF MAO TSE-TUNG 153 (2d prtg. 1967) ("[P]olitics is war without bloodshed while war is politics with bloodshed.").

⁴ See generally *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that once Puerto Rico was acquired by the United States through cession from Spain it was not a "foreign country" within the meaning of tariff laws); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that Puerto Rico and Hawaii were not foreign countries within the meaning of tariff laws); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that the right of the President to exact duties on imports into the United States from Puerto Rico ceased with the ratification of the peace treaty between the United States and Spain); *Armstrong v. United States*, 182 U.S. 243 (1901) (invalidating tariffs imposed on goods exported from the United States to Puerto Rico after the ratification of the treaty between the United States and Spain); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, section 8 of the Constitution); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901) (holding that a vessel engaged in trade between Puerto Rico and New York is engaged in the coasting trade and not foreign trade).

⁵ Of these, *Balzac v. Porto Rico*, 258 U.S. 298 (1922), holding that because Puerto Rico had not been incorporated into the United States—notwithstanding

echoing the popular sentiments then prevalent, the *Insular Cases* translated the salient political dispute of the times, regarding the acquisition and governance of the foreign territories acquired as a result of the Spanish-American War of 1898, into the vocabulary of the Constitution. This Article contends that the *Insular Cases* are a display of some of the most notable examples in the history of the Supreme Court in which its decisions interpreting the Constitution evidence an unabashed reflection of contemporaneous politics,⁶ rather than the pursuit of legal doctrine.⁷ There are, of course,

the granting of U.S. citizenship to its residents in 1917—a U.S. citizen living in Puerto Rico did not have the right to trial by jury, is the most relevant to our discussion. See also *Rasmussen v. United States*, 197 U.S. 516 (1905) (holding that Alaska was incorporated into the United States by the treaty of acquisition from Russia and thus the Constitution applied therein); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that the Philippines were not incorporated into the United States by the treaty of acquisition from Spain and thus there was no constitutional right to trial by jury therein); *Gonzales v. Williams*, 192 U.S. 1 (1904) (holding that after annexation from Spain a resident of Puerto Rico was not an “alien immigrant” but a U.S. national); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that Hawaii did not become incorporated into the United States until Congress enacted the Newlands Resolution); cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to a search by U.S. authorities of a Mexican citizen’s home in Mexico); *Harris v. Rosario*, 446 U.S. 651 (1980) (finding no Fifth Amendment violation by reason of U.S. citizens in Puerto Rico receiving disparate treatment in the granting of Social Security benefits); *Califano v. Torres*, 435 U.S. 1 (1978) (same as to Supplemental Security Income benefits). But see *Reid v. Covert*, 354 U.S. 1 (1957) (holding that civilian dependents of members of the armed forces who are overseas in times of peace have a constitutional right to a jury trial and cannot be tried by military tribunals for capital offenses). To the extent that the *Insular Cases* stand for the principle that “the Constitution does not follow the flag,” see also *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), cert. granted, 127 S. Ct. 3078 (2007) (upholding a statute which strips federal courts of jurisdiction over habeas petitions of aliens held at Guantánamo Bay). But see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that Common Article 3 of the Geneva Conventions requires that an alien held at Guantánamo Bay be tried by a “regularly constituted court” and not a special military tribunal created by the Detainee Treatment Act); cf. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that Congress had authorized the President to detain citizen enemy combatants at Guantánamo Bay, but that these combatants are entitled to a meaningful opportunity to challenge the factual basis of their detention).

⁶ When the *Insular Cases* were decided, a political humorist of the time quipped, “[N]o matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ iliction returns.” FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901).

⁷ If one accepts the validity of Clausewitz’s theorem regarding the extension of politics and war, and my observation regarding politics and constitutional law, one is led to the inevitable conclusion that the *Insular Cases* in effect constitute an

others. Another conspicuous instance of this socio-political phenomenon, one that is in fact intimately related to the *Insular Cases* and that will be touched upon, is demonstrated by the case of *Plessy v. Ferguson*.⁸ As in the instance of the legal framework established by *Plessy*, the *Insular Cases* have had lasting and deleterious effects on a substantial minority of citizens.⁹ The "redeeming" difference is that *Plessy* is no longer the law of the land, while the Supreme Court remains aloof about the repercussions of its actions in deciding the *Insular Cases* as it did, including the fact that these cases are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor.

This Article argues that the *Insular Cases* were wrongly decided because, at the time of their ruling, they squarely contradicted long-standing constitutional precedent. Their skewed outcome was strongly influenced by racially motivated biases and by colonial governance theories that were contrary to American territorial practice and experience. Further evidence of this contention, as will be demonstrated, is the discriminatory manner in which the Supreme Court has thereafter applied the doctrines of the *Insular Cases*,¹⁰ even in more modern times.¹¹ This Article proposes to establish that the dogma of the *Insular Cases* constitutes an outmoded anachronism when viewed within the framework of present-day constitutional principles and, additionally, that it contravenes international commitments entered into by the United States since then, which constitute superceding "Law of the Land." Ultimately, the present legitimacy of the *Insular Cases* is untenable. The system of governance promoted thereunder can no longer be

extension of the politics of the Spanish-American War, something that will become more apparent when these cases are discussed in more detail, *infra*.

⁸ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁹ See JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 117-265 (1985) (arguing that the colonial relationship between the United States and Puerto Rico, which was approved by the Supreme Court in the *Insular Cases*, created unrest and had lasting negative socioeconomic effects in Puerto Rico).

¹⁰ See, e.g., *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that because Puerto Rico had not been incorporated into the United States, a U.S. citizen living in Puerto Rico did not have the right to trial by jury).

¹¹ See, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (holding that a U.S. citizen accompanying her husband who was in the armed forces overseas cannot be tried by military court-martial, but is guaranteed indictment by a grand jury and a civil trial before a petit jury, as required by the Constitution).

reconciled with a rule of law in which all citizens are entitled to equality.

2. SETTING THE STAGE FOR THE *INSULAR CASES*

2.1. *The Historical Context*

When placed in their historic context, the *Insular Cases* represent a constitutional law extension of the debate over the Spanish-American War of 1898¹² and the imperialist/manifest destiny causes which that conflict promoted.¹³ That war was the culmination of a national expansionist process that commenced almost from the day that the War for Independence ended in 1783,¹⁴ and proceeded thereafter in predictable progression with the acquisition, by diverse means, of the continental lands that were contiguous to the United States as it was variously configured during the course of the nineteenth century. It was a process that climaxed in 1848 with the signing of the Treaty of Guadalupe Hidalgo,¹⁵ which ended the Mexican War, and resulted

¹² See generally FRANK FREIDEL, *THE SPLENDID LITTLE WAR* (1958) (noting that after Puerto Rico was conquered by American troops many Puerto Ricans expressed joy at the prospect of joining the United States); IVAN MUSICANT, *EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY* (1998) (discussing the conscious and strategic measures taken by the United States in expanding through Hawaii, the Philippines, Puerto Rico, Guam, the Panama Canal, and Guantánamo Bay); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006) (arguing that the Supreme Court gave disparate constitutional treatment to inhabitants of United States territories).

¹³ See JAMES E. KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* (1982) (discussing the Supreme Court's creation of the expansionist doctrine that Congress, not the Court, should determine when an acquired territory becomes part of the union and receives the full benefits of the Constitution); WILLIAM L. LANGER, *THE DIPLOMACY OF IMPERIALISM 1890-1902* (2d ed. 1951) (characterizing the period between 1890 and 1902 as dominated by imperialism and competition for territory); JULIUS W. PRATT, *EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS* (Peter Smith 1959) (1936) (discussing the various motives, techniques, and propaganda employed by politicians, journalists, the church, and the military to influence the expansion of imperialism in 1898 that ultimately resulted in the American acquisition of Hawaii, Puerto Rico, and the Philippines).

¹⁴ See Northwest Territory Ordinance of 1787, 1 Stat. 51 (1789) (providing the process by which territories west of the Ohio River would be admitted as states into the union).

¹⁵ Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and The United Mexican States, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (ending the armed conflict between the United States and Mexico).

in the annexation by the United States of what are today the states of California, Arizona, New Mexico, Nevada, and Utah.

With this annexation the territory of the United States within the continent proper was consolidated within its present contours, and our borders with Mexico¹⁶ and Canada were permanently defined. Nevertheless, the political forces¹⁷ that had promoted the expansion from "sea to shining sea"¹⁸ were still restless and looked for further growth in two geographic areas of obvious interest to the United States: the Caribbean and the Pacific. A moribund Spanish Empire presented tantalizing targets of opportunity in both areas. Thus came about the "splendid little war,"¹⁹ known to us as the Spanish-American War, leading to new additions to the "American Empire."²⁰

There were, however, important differences between the territorial acquisitions that preceded the Spanish-American War and the territories that were annexed as a result of that clash. The first difference, of course, was geographical in that these new territories, namely Puerto Rico, the Philippine Islands, and Guam,²¹ were not only noncontiguous with the United States proper but, in fact, were separated from the mainland by considerable oceanic

¹⁶ The Gadsden Purchase in 1853, leading to minor alterations of our border with Mexico, still remained to be completed.

¹⁷ See generally PRATT, *supra* note 13 (discussing the influence of expansionists concerned with strengthening U.S. trade prospects, like James G. Blaine, Benjamin Harrison, and John W. Foster, on the decision to pursue territory in the Caribbean).

¹⁸ Katharine Lee Bates, *America the Beautiful*, reprinted in AMERICA THE BEAUTIFUL AND OTHER POEMS 3-4 (1911) (usually sung as a hymn to the tune of *Materna*, by Samuel A. Ward).

¹⁹ A phrase taken from a letter to Theodore Roosevelt, the quintessential exponent of manifest destiny expansion, by the United States Ambassador to Great Britain shortly after the war ended: "It has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favoured by that fortune which loves the brave." Letter from John Hay to Theodore Roosevelt, reproduced in HUGH THOMAS, CUBA: THE PURSUIT OF FREEDOM 404 (1971).

²⁰ As first used by Chief Justice Marshall in *Loughborough v. Blake*, 18 U.S. 317, 319 (1820), and again by Justice Brown in *Downes v. Bidwell*, 182 U.S. 244, 286 (1901). See generally MUSICANT, *supra* note 12 (providing a comprehensive history of the Spanish-American War of 1898 and its contributions to the emergence of the United States as a world power).

²¹ Acquired from Spain as a result of the Treaty of Paris which ended the war. See Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754 (detailing the cession of various Spanish territories to the United States).

distances.²² This statement is not totally accurate in that Alaska, which was purchased from Russia in 1867,²³ and technically part of the mainland North American continent, was not physically connected to United States proper but separated by Canada's Pacific fringe. By 1898, however, the United States had settled its differences with Great Britain regarding the Canadian Pacific territories and thus noncontiguity was not an issue. The case of Hawaii is closer to that of the Spanish islands in that it is also a group of islands several thousand miles from the mainland United States. Furthermore, its annexation as a result of the Newlands Resolution of 1898 was contemporaneous with the Spanish-American War.²⁴

There were, however, other differences that further distinguished the Spanish-American War acquisitions from those of Alaska and Hawaii. In the case of the Spanish islands of Puerto Rico, the Philippines, and Guam, there were almost no United States citizens residing therein when the change in sovereignty took place,²⁵ and *sub silentio*, but perhaps most importantly in the real-politics of the times, much if not most of the large native populations inhabiting these islands were non-white. Thus, for the first time in its history, the United States acquired sovereignty over noncontiguous lands separated by thousands of miles from the political and economic epicenter of the American polity, and inhabited by large numbers of subject peoples of different races, languages, cultures, religions, and legal systems than those of the then-dominant Anglo-Saxon society of the United States.

Equally important were two significant but unannounced reasons for the carrying out of these territorial expansions: the contemplated economic exploitation of these new territories by the

²² Puerto Rico is approximately 850 miles from Florida, and the Philippine Islands and Guam are approximately 7,000 and 5,000 miles from the U.S. west coast, respectively.

²³ See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of all the Russias to the United States of America, U.S.-Russ., Mar. 30, 1867, 15 Stat. 539.

²⁴ See Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1898).

²⁵ In the case of Hawaii not only was there a large U.S. expatriate population, but it was instrumental, as in the case of Texas, in fomenting the local revolution that led to intervention and eventual annexation by the United States. See PRATT, *supra* note 13, at 74-109 (outlining the events in January 1893 that comprised the "revolution" in Hawaii). Alaska, of course, was almost empty of any significant population when acquired by the United States.

ruling metropolises,²⁶ and the establishment of strategic coaling and naval bases therein.²⁷

This set of facts provided the basic ingredients of a typical European colonial relationship of the late nineteenth century. Thus, it is not surprising that the ruling groups of the time in the United States looked to European colonial solutions for these new American imperial relationships. Nevertheless, because it was for use by Americans, to whom for historical reasons the term "colonialism" was anathema, the answer to this conundrum had to be cloaked in an American constitutional mantle of facial respectability. The de facto colonial status had to be validated by a legal regime that would de jure allow the United States to govern the new lands and their people with a free hand, untethered by the constitutional constraints that normally restrained the governmental structures of the continental United States. To this purpose there came to the aid of the political branches the think-tanks of the day, principally at Harvard University, but also at Yale,²⁸ with what would emerge as the ideological underpinnings

²⁶ As an example, the value of goods sent to Puerto Rico from the United States increased from \$2.8 million in 1892 to \$8.7 million in 1901, making it the fifth largest market for U.S. goods in Latin America and twenty-seventh in the world, a ranking which went to fourth largest in Latin America and eleventh in the world by 1910. SPARROW, *supra* note 12, at 65. In 2006, the value of goods shipped to Puerto Rico from the United States had increased to \$21.98 billion, making Puerto Rico the second ranking U.S. market in Latin America and twelfth in the world. DEP'T OF COMMERCE, PUBL'N NO. FT895/06, U.S. TRADE WITH PUERTO RICO AND U.S. POSSESSIONS 2006: FOREIGN TRADE STATISTICS tbl. 1, at A-1 (Mar. 2007).

²⁷ See, e.g., A. T. MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783*, at 83 (13th ed. 1897) ("Colonies . . . afford . . . the surest means of supporting abroad the sea power of a country.").

²⁸ See, e.g., Elmer B. Adams, *The Causes and Results of Our War with Spain from a Legal Stand-Point*, 8 YALE L.J. 119 (1898) (arguing that the acquisition of territories is undemocratic, yet objecting to statehood for acquired territories on policy grounds); John Kimberly Beach, *Constitutional Expansion*, 8 YALE L.J. 225, 234 (1899) (evaluating the constitutionality of U.S. occupation, acquisition, and control of the Philippines and concluding that acquisition is a "duty" of the United States, in the name of "the restoration of order and security to life and property in the Philippines."); William Bradford Bosley, *The Constitutional Requirement of Uniformity in Duties, Imposts and Excises*, 9 YALE L.J. 164 (1900) (examining Congress's power to levy duties, imposts, and excises on the territories newly acquired from Spain for local, not national, purposes, and arguing that while Congress can levy taxes for local purposes, the Constitution requires that Congress also levy taxes on the Territories for national purposes); William W. Howe, *The Law of Our New Possessions*, 9 YALE L.J. 379 (1900) (examining the evolution of Spanish laws that governed Louisiana before U.S. acquisition and suggested that the civil codes of Puerto Rico, Guam, and the Philippines should

of the *Insular Cases* and the dogma which I have elsewhere referred to as the “doctrine of separate and unequal.”²⁹

2.2. *The Academic Debate*

The academic groupings for a plausible justification for the retention and governance of the new island territories first came to light in a series of articles published in 1898–1899 in the *Harvard Law Review*.³⁰ They were the precursors of the various theories later echoed in Congress and, eventually, by the Supreme Court in the *Insular Cases*. The basic issue being explored was how these new territories were to be governed, whether the Constitution applied therein, and if so, to what extent.

In the first of these articles Carman Randolph argued that, as in the case of all territorial acquisitions up to that point, not only did the Constitution apply to these territories with regard to the

not be disturbed, while their criminal legal systems should be modified); Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 206 (1900) (evaluating Webster’s opinions on the acquisition of Puerto Rico and the Philippines, referring to the territories as “incurables,” and suggesting that the Constitution be modified if necessary to control the populations in the territories); Edward B. Whitney, *The Porto Rico Tariffs of 1899 and 1900*, 9 YALE L.J. 297 (1900) (evaluating the right of the U.S. government to levy duties on trade with Puerto Rico and concluding that Congress must impose import taxes on Puerto Rico).

²⁹ TORRUELLA, *supra* note 9.

³⁰ See, e.g., Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 412 (1899) (arguing that the acquisition of Puerto Rico and the Philippines was constitutional, stating that Congress could establish governments therein once the treaty with Spain is ratified, but also stating that there were several open questions including “[w]hether Puerto Rico can be held permanently and avowedly as a colonial dependence”); C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899) (discussing the definition and scope of the term “United States,” and arguing that while the term might encompass the Territories, “the use of the word . . . has . . . no legal or constitutional significance.”); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899) (examining the legal status of territories acquired by conquest or cession, and differentiating between territory acquired with the intention of incorporating it into the United States and territory acquired without that purpose, and stating that constitutional rights do not apply to territory acquired without that purpose); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898) (arguing that the Constitution applies to Filipinos, and that because upon annexation Filipinos owed allegiance to the United States, that they ought to be considered citizens); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 484 (1899) (discussing the constitutional powers over the newly acquired Hawaii and Philippines and urging caution with respect to settling the territorial fate of the Philippines, but less caution with respect to Hawaii).

personal rights of their inhabitants, but furthermore, because these peoples upon annexation owed allegiance to the United States, they automatically became citizens of this nation.³¹ As authority for these propositions Randolph relied on two Supreme Court decisions: *Loughborough v. Blake*³² and the *Dred Scott* case.³³

In *Loughborough* the question presented was whether Congress had the power to impose a direct tax on the District of Columbia. The answer to that question depended on the more immediate issue of whether the Constitution and its Uniformity Clause³⁴ applied in the District of Columbia, a territory, and thus a non-state. As we shall see below, this issue is in all respects precisely the question later decided in the key *Insular Case* of *Downes v. Bidwell*.³⁵ In *Loughborough*, Chief Justice Marshall answered this query thus:

Does [the] term [United States] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but 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 not less within the United States, than Maryland or Pennsylvania [and thus the Constitution applies].³⁶

Chief Justice Marshall was thus patently clear in his view that the Constitution applied to all of the "American empire," regardless of whether it involved a state or territory, as in the case of the District of Columbia.

In *Dred Scott*, discredited for other reasons, the question before the Court was whether an act of Congress prohibiting slavery in the Territory of Missouri was a proper exercise of congressional power under the Territorial Clause³⁷ of the Constitution, a

³¹ Randolph, *supra* note 30, at 299-301.

³² 18 U.S. 317 (1820).

³³ *Scott v. Sandford (Dred Scott)*, 60 U.S. 393 (1856).

³⁴ "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

³⁵ 182 U.S. 244 (1901).

³⁶ *Loughborough*, 18 U.S. at 319.

³⁷ "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. CONST. art. IV, § 3, cl. 2.

provision which lies at the heart of the theoretical basis of the *Insular Cases*. In ruling that Congress lacked such authority, Chief Justice Taney wrote:

[P]laintiff has laid much stress upon that article in the Constitution which confers on Congress the power “to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;” but, in the judgment of the court, that provision has no bearing on the present controversy . . . and was intended to be confined, to the territory which at that time [of its independence from Great Britain] belonged to, or was claimed by, the United States . . . and can have no influence upon a territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.³⁸

Perhaps of greater importance to the fundamental issues raised by the continued vigor of the *Insular Cases* are the further comments of Chief Justice Taney, which unfortunately have become lost in the aftermath of this otherwise disfavored opinion:

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 [N]o power is given to acquire a Territory to be held and governed [in a] permanently [colonial] character

. . . .

. . . [C]itizens of the United States who migrate to a Territory belonging to the people of the United States, cannot be ruled as mere colonists, dependent upon the will of the General Government, and to be governed by any laws it may think proper to impose.³⁹

³⁸ *Dred Scott*, 60 U.S. at 432.

³⁹ *Id.* at 446–47.

It is nothing short of ironic that *Dred Scott* is remembered only for the negative proposition that the Missouri Compromise, prohibiting the extension of slavery to a territory, was a violation of the Due Process Clause of the Constitution, when in fact its basic holding was to the effect that the Constitution *fully applied* in a territory to the same extent as in the states, a holding that was in consonance with Chief Justice Marshall's ruling in *Loughborough*.

In an attempt to refute Randolph's endorsement of this constitutional logic, an article by Professor Christopher Columbus Langdell sought to minimize Chief Justice Marshall's language in *Loughborough* as mere dicta. Langdell reasoned that the Constitution applied to the District of Columbia because the District was created from states, where the Constitution had already attached, and thus "it may not be easy to show that it has ever ceased to extend over it."⁴⁰ He argued that application of the Bill of Rights to the newly acquired lands was inapposite because: "these ten amendments as a whole are so peculiarly and so exclusively English that an immediate and compulsory application of them to ancient and thickly settled Spanish colonies would furnish as striking a proof of our unfitness to govern dependencies, or to deal with alien races . . ."⁴¹ Later echoed in the *Insular Cases*, this racist rhetoric would become a significant component of the mantra running throughout these cases and their progeny.⁴²

Although taking sides with Randolph, an article by Judge Simeon E. Baldwin placed its emphasis on the *Dred Scott* decision, arguing that the territorial clause did not grant Congress authority to "rule . . . without restriction, as a colony or dependent province, [because that] would be inconsistent with the nature of our

⁴⁰ Langdell, *supra* note 30, at 383.

⁴¹ *Id.* at 386.

⁴² See RUBIN FRANCIS WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1983-1946, at 15 (1972) ("Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern 'counterrevolutionary' point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.") (citation omitted).

government.”⁴³ Writing as he was before the ratification by the Senate of the Treaty of Paris, Baldwin was of the view that although it might be unwise “[t]o give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico”⁴⁴ the benefits of the Constitution, this was inevitable in the event of annexation. Although annexation was a purely political decision, once it was accomplished, the Constitution would “follow the flag” *ex proprio vigore*.

In the fourth academic sally, Professor James Bradley Thayer, in an article singularly lacking in any reference to supporting authorities, minced no words in asserting that “America [should not] forget her precedence of teaching nations how to live.”⁴⁵ Reflecting a belief that was dear to the hearts of manifest destiny exponents of the time,⁴⁶ Thayer argued that “there is no lack of power in our nation,—of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them.”⁴⁷ Cavalierly disposing of Marshall’s and Taney’s opinions as mere dicta, he concluded that not only did the Constitution not cover the territories, but also that, “except as to one or two particulars, [the power of Congress to govern the territories was] to be measured only by the terms of the cessions which it has accepted, or of the treaty under which a territory may have come

⁴³ Baldwin, *supra* note 30, at 401.

⁴⁴ *Id.* at 415.

⁴⁵ Thayer, *supra* note 30, at 466. To be clear, Thayer was not suggesting that the application of U.S. constitutional law to the territories would help in “teaching nations how to live.” *Id.* Rather, Thayer’s was a condescending point of view reminiscent of Kipling’s contemporary poem about the “white man’s burden.” See Rudyard Kipling, *The White Man’s Burden*, MCCLURE’S MAG., Feb. 1899 (“[S]erve your captives’ need; / To wait, in heavy harness, / On fluttered folk and wild— / Your new-caught sullen peoples, / Half devil and half child.”).

⁴⁶ See John Fiske, *Manifest Destiny*, 70 HARPER’S NEW MONTHLY MAG. 578 (1885) (explaining that the civilization of societies depends on “the general diminution of warfare,” and that ultimately, such a diminution is made possible only by the integration of small political groups into larger groups); see also Julius W. Pratt, *John L. O’Sullivan and Manifest Destiny*, 14 NEW YORK HISTORY 213, 221 (1933) (discussing O’Sullivan’s contributions to *Democratic Review* and the development of the notion of “manifest destiny,” which “was a perfect expression of the current enthusiastic belief in American democracy and in the mission of the United States to carry it throughout the North American continent”); THOMAS, *supra* note 19, at 211 (explaining that O’Sullivan “coined the phrase ‘manifest destiny’ to describe the expectation that the U.S., thanks to the superior qualities of the Anglo-Saxons as such . . . and to their democratic institutions, would inevitably absorb their neighbors”).

⁴⁷ Thayer, *supra* note 30, at 467.

in."⁴⁸ Beyond these restraints the territories were "subject to the absolute power of Congress."⁴⁹ As we shall see, this was a viewpoint that was to gain adherents in high judicial circles.

One last article in the *Harvard Law Review*, written by Abbott Lawrence Lowell, would most influence the outcome of the *Insular Cases*. In addition to being the most scholarly of these articles, it also provided the nomenclature for the legal theory that finally prevailed. Although expanding on Thayer's proposal regarding the texts of the treaties of cession, Lowell rejected Thayer's view that these documents established the *rights* of the inhabitants of the annexed lands, arguing instead that the treaties determined the *relationship of the territories* to the United States, and that it was this relationship that would determine what rights were possessed by the inhabitants under the Constitution.⁵⁰ After analyzing all of the territorial acquisitions, from the Articles of Confederation to the treaty of cession of Alaska, Lowell concluded that the reason the Constitution had been applied *ex proprio vigore* was because the treaties of acquisition provided for the incorporation of these territories into the Union.

2.3. *A Change of Venue: The Political Scenario*

In 1899, toward the end of the academic debate, a report was filed by the Carroll Commission, which was formed by President McKinley to study conditions in Puerto Rico. The Commission took for granted that Puerto Rico would become an integral part of the United States, destined for statehood.⁵¹ The report was principally based on the first-hand observations gathered during the course of an extensive visit to Puerto Rico by the Commission's chairman, Henry Carroll. It was highly favorable to Puerto Rico

⁴⁸ *Id.* at 480.

⁴⁹ *Id.*

⁵⁰ See Lowell, *supra* note 30, at 170 ("It may be suggested that these provisions [in the treaties for the cession of Louisiana and Florida] were not meant to confer any immediate rights upon the inhabitants of the country ceded, but were intended merely to provide for the admission of States to be formed out of that country in the future.").

⁵¹ See HENRY K. CARROLL, REPORT ON THE ISLAND OF PORTO RICO 58-64 (1899) (maintaining that the existing institutions and laws of Puerto Rico did not demand drastic reform, only modification, and that therefore the "Constitution and laws of the United States" should be extended to the territory). But the military governor of Puerto Rico at the time, Gen. George W. Davis, was of the view that "[t]he people of [Puerto Rico] have no conception of political rights combined with political responsibilities." H.R. DOC. NO. 56-2, at 19-20 (1900).

and its inhabitants. Carroll concluded that the island's people possessed the qualities necessary to develop a "high type of citizenship"⁵² and he had no hesitation in affirming that the people had "good claims to be considered capable of self government."⁵³ He further recommended that territorial status be given to Puerto Rico, with an organized government and the necessary requisites, as in the case of other territories.

President McKinley's annual message to Congress in December 1899 echoed the Commission's sentiments, and as a result Senator Joseph B. Foraker introduced a bill to grant Puerto Ricans citizenship and to establish a civil government for the island.⁵⁴ The debate that ensued in Congress as a result of Senator Foraker's proposal set the stage for the events leading to the *Insular Cases*.

Unfortunately for Puerto Rico and its inhabitants, shortly after the President's message and the introduction of the Foraker Bill, a sea change took place in the administration's views toward Puerto Rico that had little to do with Puerto Rico itself. The issue was the Philippines, where a major insurrection broke out when the Filipinos learned that the United States had unilaterally decided to annex the archipelago against the wishes of a substantial portion of the native Filipino population, many of whom had already been fighting a protracted war for independence against Spain. During the ensuing struggle, which lasted from 1899 until 1902, the United States suffered several thousand more casualties than it did during the entire Spanish-American War, while an untold number of Filipino civilians were killed or injured, in addition to the major losses suffered by the Filipino economy.⁵⁵

The congressional debates surrounding the Foraker Bill reflected the divided views that were debated throughout the nation. Concerned about the future implications of granting citizenship, Congressman Newlands of Nevada stated that he objected to:

[T]he establishment of a precedent which [would] be invoked to control our action regarding the Philippines

⁵² CARROLL, *supra* note 51, at 57.

⁵³ *Id.*

⁵⁴ S. 2264, 56th Cong., 33 CONG. REC. 702 (1900).

⁵⁵ See generally BRIAN MCALLISTER LINN, *THE PHILIPPINE WAR: 1899-1902* (2000) (advocating a new interpretation of the Philippine War that considers the multitude of competing factors and the high degree of complexity involved in explaining the motives and ultimate outcome of the war).

later on; such action, embracing not simply one island near our coast, easily governed, its people friendly and peaceful [i.e., Puerto Rico], but [rather] embracing an archipelago of seventeen hundred islands 7,000 miles distant, of diverse races, speaking different languages, having different customs, and ranging all the way from absolute barbarism to semicivilization.⁵⁶

To this statement, Congressman Jacob H. Bromwell responded, "We propose, in this way, to establish a precedent for the Filipinos, the unruly and disobedient, by disciplining and punishing Puerto Rico, the well-behaved and well-disposed."⁵⁷ Congressman George B. McClellan of New York, perhaps under the influence of the articles by Randolph and Baldwin, argued that "Puerto Rico belongs to us It is a part of the United States; the Constitution extends over it; its territory is our territory; its people are our citizens. . . . The case of Puerto Rico is very different from that of the Philippines" ⁵⁸ The racist viewpoint was openly raised by Congressman Thomas Spight of Mississippi:

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 Union⁵⁹

Senator Bate of Tennessee referred to Filipinos as "physical[]weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet,"⁶⁰ and warned his colleagues in Congress: "[B]eware 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. Charity begins at home, Mr. President, and let us beware!"⁶¹

⁵⁶ 33 CONG. REC. 1994 (1900).

⁵⁷ *Id.* at 2043.

⁵⁸ *Id.* at 2067.

⁵⁹ *Id.* at 2105.

⁶⁰ *Id.* at 3613 (citing a report of the Philippine Commission to the President).

⁶¹ *Id.* at 3616.

Although the Foraker Bill was approved finally on April 12, 1900, it was not until major amendments had been made to the original bill, including the deletion of the citizenship provisions for the inhabitants of Puerto Rico. As approved, the Foraker Act, which became known in Puerto Rico as the "Organic Act," provided for the establishment of a civil government composed of a presidentially-appointed governor, a supreme court, and an upper house of an elected bicameral territorial legislature.⁶² Importantly, the Act also established a tax on goods imported into Puerto Rico from the mainland United States that was to be used to meet the expenses of the new territorial government.⁶³ As in *Loughborough*, it was litigation regarding the imposition of this tax that led to the *Insular Cases*.

But first came the national elections of 1900. One of the issues fueling this political contest was the future status of the island colonies.⁶⁴ President McKinley, the Spanish-American War president, ran for reelection with "Rough Rider" Theodore Roosevelt, the Spanish-American War hero and quintessential manifest destiny standard-bearer, as his vice-presidential running mate.⁶⁵ The presidential candidate of the Democrats, William Jennings Bryan, ran on a platform that opposed the acquisition of the Spanish islands. Bryan was thoroughly trounced in what many considered to be a national plebiscite approving the annexations of these lands.⁶⁶

Thus, on the eve of the *Insular Cases* being argued before the

⁶² Foraker Act, ch. 191, § 4, 31 Stat. 77, 81-82, 84 (1900).

⁶³ See *id.* at 78 (1900) (establishing that taxes and duties collected in Puerto Rico would be "placed at the disposal of the President to be used for the government and benefit of Porto Rico").

⁶⁴ See Walter F. Pratt, Jr., *Insular Cases*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 500 (Kermit L. Hall et al. eds., 2d ed. 2005) (contending that the Supreme Court "echo[ed] the popular sentiment" by "translat[ing] the political dispute into the vocabulary of the Constitution").

⁶⁵ See Walter LaFeber, *The Election of 1900*, in 3 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1968, at 1878 (Arthur M. Schlesinger, Jr. et al. eds., 1971) (discussing McKinley's platform in the election of 1900).

⁶⁶ See Pratt, *supra* note 64, at 500 ("[T]he acquisition of foreign territories, received overwhelming popular endorsement in the presidential election of 1900."). But see Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 MISS. VALLEY HIST. REV. 43, 45-46 (identifying Bryan's support of the silver standard, rather than the gold standard, as the primary cause of his defeat in the 1900 elections rather than McKinley's belief in imperialism, as many anti-imperialists voted for McKinley due to a fear of economic chaos that could result from implementation of the silver standard).

Supreme Court, the nation was divided on the proper status of Puerto Rico. On one side were those of the view that the inhabitants of the new territories were unfit to become citizens or to be integrated in a path towards eventual statehood, a position that was largely racially motivated and fueled by Filipino-phobia. On the other side were those who adhered to the century-old tradition and practice that the Constitution automatically attached to all territories over which the United States gained sovereignty, and brought with it a path to eventual statehood.

3. THE *INSULAR CASES* ARE DECIDED

Two general observations must be made about the *Insular Cases* themselves, *De Lima*, *Goetz*, *Armstrong*, *Downes*, and *Huus*. First, they all arose from controversies involving commercial operations with the new territories, although obviously the issues raised required interpretation of the Constitution. Second, with the exception of *Huus*, none of the decisions resulted in unanimous opinions of the Court; in fact, all were five-to-four outcomes. On this last point, it is important to consider the composition of the Court that decided this first round of the *Insular Cases*.⁶⁷ Since 1888 its Chief Justice had been Mellville Weston Fuller, a Democrat from Maine. Although conservative on economic matters,⁶⁸ he was generally opposed to imperialist expansion. He was a member of the majority in *Plessy v. Ferguson*, decided in 1896, shortly before the Spanish-American War.

The *Plessy* majority opinion was written by Justice Henry Billings Brown, a Yale graduate from Massachusetts who was appointed to the Court in 1890, and whose views toward "Spanish-Americans" were not favorable.⁶⁹ Justice Rufus Wheeler Peckham, another Democrat appointed to the Court in 1895, was from New

⁶⁷ See generally THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969 vols. 2 & 3, at 1471-95, 1281-95, 1379-89, 1515-34, 1553-63, 1577-92, 1633-57, 1685-1703, 1719-36 (Leon Friedman & Fred L. Israel eds., 1969) (providing biographies of Chief Justice Fuller and Justices Harlan, Gray, Brewer, Brown, Shiras, White, Peckham, and McKenna).

⁶⁸ See *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (holding the federal income tax unconstitutional); *Lochner v. New York*, 198 U.S. 45 (1905) (holding wage and hours laws to be a violation of the Due Process clause).

⁶⁹ CHARLES A. KENT, MEMOIR OF HENRY BILLINGS BROWN 136 (1915). Shortly before the Spanish-American War he wrote: "There is but one way in which the Spanish-American people are united. They all hate us—always *have*, and always *will*, and the more we do for them the more bitter their hatred. I dislike the idea of intervention [in Cuba], but we may be driven to it yet." *Id.*

York and also was a member of the *Plessy* majority. Other members of the *Plessy* court who also took part in these early *Insular Cases* included Justices Joseph McKenna, George Shiras, Jr., Edward Douglas White, and Horace Gray.

Justice McKenna, a native of Pennsylvania, previously had become a political ally of President McKinley during overlapping tenures in Congress. When McKinley became President, he named McKenna as the Attorney General of the United States, and shortly thereafter, appointed him to the Court in 1896. Of McKenna it has been said that “[h]is mind [was] uncluttered by the complex dicta of legal scholarship.”⁷⁰ Justice Shiras, another Yale graduate, was from Pittsburgh and became a member of the Supreme Court in 1892. A former railroad and mining lawyer, he voted regularly in favor of these interests.⁷¹ Justice White came from a prominent Louisiana family, and became a senator from that state in 1890. While in the Senate he became a well-known sugar tariff protectionist and an active opponent of the annexation of Hawaii as being against the interests of his sugar producing state. His loyalty to the sugar trust was such that he refused to be sworn into the Court in 1894 until after he had voted on the passage of a pending bill that added a forty percent ad valorem tax on imported sugar. Justice Gray, another Justice from Massachusetts, attended Harvard Law School where he was a classmate of Professor Langdell. In addition to voting with the majority in *Plessy*, Justice Gray was a member of the majority in *Elk v. Wilkins*,⁷² which held that Native Americans were not citizens of the United States.

The two remaining members of the court for these early *Insular Cases*, Justices David J. Brewer and John Marshall Harlan, were not part of the *Plessy* majority. Justice Brewer, born in Asia Minor to missionary parents, and another Yale graduate, was appointed to the Court in 1888. He was an outspoken anti-imperialist,⁷³ yet

⁷⁰ James F. Watts, Jr., *Joseph McKenna*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, *supra* note 67, at 1727.

⁷¹ See *Cincinnati, New Orleans & Tex. Pac. Ry. Co. v. Interstate Commerce Comm’n*, 162 U.S. 184 (1896) (voting on behalf of railroad company plaintiff); *Interstate Commerce Comm’n v. Ala. Midland Ry. Co.*, 168 U.S. 144 (1897) (voting to restrict the ICC’s influence over railroad companies).

⁷² 112 U.S. 94 (1884).

⁷³ See, e.g., David J. Brewer, *Assoc. Justice of the U.S. Supreme Court, The Spanish War: A Prophecy or an Exception?*, Address at the Third Dinner of the Liberal Club (Feb. 16, 1899) (on file with the Harvard Law Library) (arguing that America’s becoming a colonial power would be contrary to the ideals of the Declaration of Independence).

believed in encouraging the spread of Christian principles.⁷⁴ Although a member of the Court when *Plessy* was decided, Justice Brewer did not participate in the decision.

The last of the Court's members was Justice Harlan, who was born in Kentucky. A Republican, he was appointed to the Court in 1877. Thereafter he served for thirty-four years during which he became known as a champion for civil rights, and as such was a dissenter in *Plessy*.⁷⁵

⁷⁴ See MICHAEL J. BRODHEAD, DAVID J. BREWER: THE LIFE OF A SUPREME COURT JUSTICE 1837-1910, at 129 (1994) (stating that while Brewer generally opposed imperialism, his support of missionary activities led him to approve of American military intervention in China to protect missionaries during the Boxer Rebellion); David J. Brewer, Assoc. Justice of the U.S. Supreme Court, *Our Duty as Citizens*, Lecture at Haverford College, in DAVID J. BREWER, THE UNITED STATES: A CHRISTIAN NATION 69-70 (1905) ("I do not stop to discuss . . . whether it is wise wholly to forget Washington's farewell advice to avoid entangling alliances with other nations. . . . But of one thing I am sure. In no other way can this republic become a world power than by putting into her life and the lives of her citizens the spirit and principles of the great founder of Christianity."). It should be noted that the manifest destiny movement was at least partially based on the duty to spread Christianity, particularly the Protestant versions, to other lands and peoples. See PRATT, *supra* note 13, at 5 (discussing Congregational clergyman Josiah Strong's views of Christian expansion in his work, *Our Country: Its Possible Future and Its Present Crisis*).

⁷⁵ See 163 U.S. 537, 559 (Harlan, J., dissenting) ("Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."); *The Civil Rights Cases*, 109 U.S. 3, 26-61 (1883) (Harlan, J., dissenting) (supporting the view that by passing the Thirteenth and Fourteenth Amendments, Congress intended to prevent racial discrimination in private as well as public contexts); *Berea Coll. v. Kentucky*, 211 U.S. 45, 58-69 (1908) (Harlan, J., dissenting) (arguing that states do not have a right to prohibit private integrated educational institutions); *Hurtado v. California*, 110 U.S. 516, 538-57 (1884) (Harlan, J., dissenting) (contending that to maintain consistency with due process in capital cases, a state may not convict a person unless a grand jury has presented an indictment); *Twining v. New Jersey*, 211 U.S. 78, 114-27 (1908) (Harlan, J., dissenting) (arguing that the Fourteenth Amendment protection of the right to freedom from self-incrimination does not apply only to federal court cases); *Standard Oil Co. v. United States*, 221 U.S. 1, 82-106 (1911) (Harlan, J., dissenting) (objecting to the Court's relaxation of antitrust scrutiny by adopting the "rule of reason"); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 189-93 (1911) (Harlan, J., dissenting) (same); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 608-53 (1895) (Harlan, J., dissenting) (contending that public instrumentalities for federal tax collection are exempt from paying taxes while private corporations are not); *Lochner v. New York*, 198 U.S. 45, 65-74 (1905) (Harlan, J., dissenting) (arguing that states' general police power enables them to interfere with private contracts in order to limit workers' hours); see also Alan F. Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637 (1957) (contending that Harlan's support for civil rights on the Supreme Court

Before this judicial lineup all five *Insular Cases* were argued from January 8 through 11, 1901, with all of the decisions being handed down on May 27, 1901. In the first of these cases, *De Lima v. Bidwell*,⁷⁶ an importer of goods from Puerto Rico sought to recover duties paid on goods brought into the port of New York from Puerto Rico in September 1899. As the collector of customs in that port, Mr. Bidwell was of the view that Puerto Rico was a “foreign country” within the meaning of the tariff laws and thus taxed the goods accordingly.

A majority of five justices, including Chief Justice Fuller, and Justices Brown, Peckham, Harlan, and Wheeler thought otherwise, stating that upon ratification of the Treaty of Paris, Puerto Rico “became territory of the United States – although not an organized territory in the technical sense of the word.”⁷⁷ Perhaps more surprising, when considered in retrospect, is the language that followed:

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. . . . [B]ut no act is necessary to make it domestic territory . . . once it has been ceded to the United States. . . . 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 laws may be enacted and enforced by officers of the United States sent there for that purpose . . . that everything may be done which a government can do within its own boundaries, and yet that the territory may still remain a foreign country. That this state of things may continue for years, for a century even, but that until Congress enacts otherwise, it still remains 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.*⁷⁸

flowed from a desire to protect citizens from government oppression).

⁷⁶ 182 U.S. 1 (1901).

⁷⁷ *Id.* at 196.

⁷⁸ *Id.* at 198 (emphasis added).

As we shall see, this was not a majority that would hold firm. Several of its members would switch before the day was over and engage in their own brand of "judicial legislation," or "judicial activism," as it is now called.

The route eventually taken was forecast by the dissent in *De Lima*, in which Justice McKenna expounded, for the first time in American constitutional jurisprudence, Lowell's *Third View* theory of incorporation. McKenna proposed that because "the treaty with Spain, instead of providing for incorporating the ceded territory into the United States, as did the treaty with Mexico, expressly declares that the *status* of the ceded territory is to be determined by Congress,"⁷⁹ the same criteria for determining the application of U.S. laws did not apply as in the case of the territories acquired from Mexico. In Justice McKenna's opinion, based on his own construction of both the powers of the government and of the treaty with Spain, "the danger of the nationalization of savage tribes cannot arise."⁸⁰ From this minority view in *De Lima* we see the emergence of what will become the eventual doctrine of the *Insular Cases*, encompassing the three key components of American colonial law: (1) plenary congressional authority over the Spanish island territories and their inhabitants, (2) a distinction between these territories and all other prior acquisitions, based on a newly discovered theory of incorporation, and (3) rules to deal with the "Philippine problem," which once established would continue to be the decisive criteria for the consideration of the issues arising from all the territories, even after the Philippine problem had passed.

Goetze v. United States,⁸¹ joined for procedural reasons with *Crossman v. United States*, followed *De Lima*. They too concerned tariff impositions, with *Goetze* involving goods from Puerto Rico and *Crossman* involving products from Hawaii; thus, the Court summarily decided them in accordance with *De Lima*. As we shall see, decisions involving Hawaii and Puerto Rico thereafter would proceed along different paths, at least in the eyes of the Supreme Court and the political cabals of the nation, with Hawaii directed

⁷⁹ *Id.* at 214. See Treaty of Peace between the United States of America and the Kingdom of Spain, *supra* note 21, art. IX, para. 2 ("The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.").

⁸⁰ *De Lima*, 182 U.S. at 219.

⁸¹ 182 U.S. 221 (1901).

toward statehood and Puerto Rico toward its present status of political limbo.

*Dooley v. United States*⁸² was factually the reverse of these prior cases in that it involved goods imported into Puerto Rico from the mainland United States during the three judicially-distinct pre-Foraker Act periods that existed prior to the enactment of this statute: (1) the period from July 26, 1898 to August 19, 1898, when U.S. troops were in Puerto Rico and the United States and Spain were still at war, during which time a military order issued by General Nelson Miles, the commander of the U.S. forces in Puerto Rico, directed that former Spanish and Puerto Rican taxes be exacted; (2) the period from August 19, 1898 to February 1, 1899, during which a customs tariff for goods entering Puerto Rico was established by presidential proclamation; and (3) the period from February 1, 1899 to May 1, 1900, during which the Foraker Act was in effect. As in the earlier cases, the opinion in *Dooley* was divided five-to-four, with Justice Brown again writing for the majority and with the same dissenters, led this time by Justice White.⁸³ The majority identified April 11, 1899, the date of ratification of the Treaty of Paris, as the date on which Puerto Rico ceased being part of Spain.⁸⁴ Prior thereto, goods were subject to being taxed as before that date; thereafter Puerto Rico was within the U.S. customs union.⁸⁵ As it involved the same question as *Dooley*, *Armstrong v. United States*⁸⁶ was summarily decided following the same reasoning.

With the issuance of *Downes v. Bidwell*, however, the views of the Court became more complicated. In what would prove to be the central case in establishing Puerto Rico's status within the American polity, as well as that in all other areas acquired contemporaneously or thereafter, no majority opinion was delivered;⁸⁷ instead, the various opinions constituted a kaleidoscope of views regarding the status of the new territories. With Justice Brown delivering an opinion upholding the Foraker Act, Justice White writing a concurrence joined by Justices Shiras and Gray, and Justice McKenna reaching the same result in a

⁸² 182 U.S. 222 (1901).

⁸³ *Id.* at 236 (White, J., dissenting).

⁸⁴ *Id.* at 234.

⁸⁵ *Id.*

⁸⁶ 182 U.S. 243 (1901).

⁸⁷ *Downes v. Bidwell*, 182 U.S. 244, 244 n.1 (1901).

separate opinion of his own, a majority of five votes upheld the validity of the Foraker Act against a challenge that it violated the Uniformity Clause. Meanwhile, a dissent by Chief Justice Fuller was joined by Justices Harlan, Brewer, and Peckham. Thus, by a five-to-four plurality, in which a dissenting opinion garnered the most votes, and against all precedent, the Supreme Court sanctioned a colonial regime that has existed for over one hundred years to the present day, and as to which there is no legal or political alternative yet in sight.

Justice Brown saw the issue presented as one involving not only the issue of whether the Foraker Act ran contrary to the Uniformity Clause of the Constitution, but also one which concerned "the broader question whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories."⁸⁸ In what must be considered a strict constructionist's worst nightmare, Brown concluded that the answer was to be found, not in the Constitution itself but rather "in the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress and in the decisions of this court."⁸⁹ Clearly, he was leaving himself ample room to wiggle. Furthermore, in its discussion of both Chief Justice Marshall's alleged dicta in *Loughborough*, and in its similar treatment of Chief Justice Taney's views in *Dred Scott*, Brown's opinion undoubtedly reflects the influence of Professor Langdell's "theory of attachment."⁹⁰

In a contemporaneous article in the *Harvard Law Review*, Charles E. Littlefield severely criticized Justice Brown's views:

Mr. Justice Brown says these are "certain observations [in *Loughborough*] which have occasioned some embarrassment in other cases," but I submit in none so great as the Downes case. The extraordinary ingenuity manifested in this case

⁸⁸ *Id.* at 249.

⁸⁹ *Id.*

⁹⁰ *See id.* at 292-93, 361 (agreeing with Marshall's statement in *Loughborough* that Article I, Section 9 of the Constitution grants the federal government power to tax the District of Columbia and disputing Justice Taney's assertion in *Dred Scott* that the Territorial Clause was not meant to enable the federal government to establish political power over territories); *cf.* Langdell, *supra* note 30, at 382-83 (arguing that because the District of Columbia was created from states, where the Constitution had already attached, it may be difficult to demonstrate that the Constitution ever stopped applying to it).

by the earnest effort to escape from that authority constitutes one of its most striking features. . . . Mr. Justice Brown is entitled to the credit of introducing in an opinion for the first time a new method of disposing of that case. I do not say he discovered it, for it is true that there were statesmen who, in groping about for a way to escape from Marshall's logic, had blazed out this path. He admits that the conclusion [in *Loughborough*] is correct, "so far at least as it applies to the District of Columbia." He cannot quite get up to denying the case *in toto*.⁹¹

Justice Brown's opinion evidences the racism and Filipino-phobia of the times when he stated:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.⁹²

His parting shot is an oft-quoted passage that shows his unequivocal support for the expansionist forces of the times:

A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire. . . . If [distant] possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may *for a time* be impossible; and the question at once arises whether large concessions ought not to be made *for a time*, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

⁹¹ Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 178 (1901).

⁹² *Downes*, 182 U.S. at 282.

We are therefore of opinion that the Island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution [and] that the Foraker Act is constitutional⁹³

One cannot but surmise what was visualized by Justice Brown when he indicated that these were rules for governing these territories "for a time," considering that they are still in effect 106 years after they were established.⁹⁴

The opinion in *Downes* by Justice White, joined by Justices Shiras and McKenna, proposed what was to be dubbed the "incorporation doctrine," and would eventually prevail as the rule of the *Insular Cases*. As previously noted, it was a theory first espoused by Lowell in his *Third View* article.⁹⁵ In Justice White's opinion, whether a particular constitutional provision applied in a territory was determined by the kind of territory involved, a determination that was itself established by the treaty of acquisition.

[W]here a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, 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 a part of the American family.⁹⁶

Because Puerto Rico was an "unincorporated territory," Congress was limited only by "restrictions . . . so fundamental [in] nature that they cannot be transgressed, although not expressed in so many words in the Constitution."⁹⁷ With regard to this case, however:

⁹³ *Id.* at 286–87 (emphasis added).

⁹⁴ *Cf. Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc) (holding that residents of Puerto Rico do not have a constitutional right to vote in U.S. presidential elections, consistent with *Downes*, which held that the revenue clause of the U.S. Constitution does not extend to Puerto Rico).

⁹⁵ See Lowell, *supra* note 30, at 176 (introducing the incorporation doctrine).

⁹⁶ *Downes*, 182 U.S. at 339 (White, J., concurring).

⁹⁷ *Id.* at 291.

The result of what has been said is that whilst in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the *island has not been incorporated into the United States*, but was merely appurtenant thereto as a possession. . . . [I]n other words, the provision of the Constitution just referred to [i.e., the Uniformity Clause] was not applicable to Congress in legislating [the Foraker Act] for Porto Rico.⁹⁸

Chief Justice Fuller's dissent, joined by Justices Harlan, Brewer, and Peckham, followed a strict construction of the Constitution as well as the precedent established by Chief Justice Marshall in *Loughborough* that the uniformity required by Article I, Section 8 in legislating taxes was geographical uniformity "[throughout all the] States and territories."⁹⁹ Fuller further disputed the assertion that the Treaty of Paris could contravene what was established in the Constitution, arguing that no treaty could enlarge the powers of Congress in contravention of the Constitution:

[T]he contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

. . . .

Great stress is thrown upon the word 'incorporation,' as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States. . . .

⁹⁸ *Id.* at 341–42 (emphasis added).

⁹⁹ *Id.* at 353 (Fuller, J., dissenting).

The concurring opinion . . . assumes that Congress is not bound, in those territories or possessions, to follow the rules of taxation prescribed by the Constitution. . . .

....

That 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.¹⁰⁰

In Chief Justice Fuller's view, such unrestricted power was negated by "the language of the Constitution [which] is too plain and unambiguous to permit its meaning to be thus influenced."¹⁰¹ To thus "distort" may more accurately characterize what the *Downes* majority did to the Constitution.

Justice Harlan's separate dissent is of singular importance because he focuses on the principal flaw of the doctrine established by the *Insular Cases*: their failure to give due weight to the fact that the Constitution "speaks . . . to all *peoples*, whether of States or territories, who are subject to the authority of the United States."¹⁰² This emphasis on *people*, rather than on other points of reference, such as geography, procedures, or legislation, is a typical Harlan approach, reflecting his concern for the civil liberties of the individual. It is in contrast to the dogma of the *Insular Cases*, by which the constitutional rights of U.S. citizens are determined by the status of the *land* on which the citizens are located,¹⁰³ rather than by their status as *citizens*. As will be seen, this is a rule which

¹⁰⁰ *Id.* at 372-73.

¹⁰¹ *Id.* at 374.

¹⁰² *Id.* at 378 (Harlan, J., dissenting) (emphasis added).

¹⁰³ See *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding that the constitutional guarantee of a jury trial does not apply to territories of the United States that have not been incorporated into the Union); see also *Califano v. Torres*, 435 U.S. 1 (1978) (holding that a provision of the Social Security Act which limits benefits to United States residents is constitutional); *Harris v. Rosario*, 446 U.S. 651 (1980) (holding that Puerto Rico can be treated differently than the states by the Aid to Families with Dependent Children program so long as there is a rational basis for the different treatment).

the Supreme Court would apply in a clearly discriminatory fashion.¹⁰⁴

In his dissent Harlan vehemently chastises the views of the majority as promoting “a radical and mischievous change in our system of government.”¹⁰⁵ Specifically, he points out that the holding is contrary to long established principles that the branches of government are authorized to exercise only enumerated powers, and thus do not possess any powers outside of the Constitution:

Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. . . . Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. . . . The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.¹⁰⁶

These are words whose worth transcends the subject of the *Insular Cases* and that period in our history.

The last decision in this first round of cases, *Huus v. New York & Porto Rico Steamship Co.*,¹⁰⁷ was an oddly unanimous¹⁰⁸ holding in

¹⁰⁴ Compare *Balzac*, 258 U.S. at 309 (“It is locality that is determinative of the application of the Constitution . . . not the [citizenship] status of the people who live in it.”), with *Reid v. Covert*, 354 U.S. 1, 5 (1957) (“[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”).

¹⁰⁵ *Downes*, 182 U.S. at 379.

¹⁰⁶ *Id.* at 380.

¹⁰⁷ 182 U.S. 392 (1901).

¹⁰⁸ Another unanimous *Insular Cases*-related decision was *Gonzalez v. Williams*, 192 U.S. 1 (1904), in which the Court, with the judicial inventiveness that typified the whole *Insular Cases* era, ruled that the inhabitants of Puerto Rico became U. S. *nationals* after the Treaty of Paris was signed, owing allegiance to the

which the issue was whether the vessel *Ponce*, engaged in trade between Puerto Rico and the United States, had to pay pilotage fees upon entering the port of New York. Pilotage fees were only required of vessels engaged in foreign trade. The Court thus ruled that the *Ponce* need not pay pilotage fees because Puerto Rico was not foreign territory but “properly a part of the domestic trade of the [United States] since the treaty of annexation”¹⁰⁹

In the long run the *Huus* decision would have important economic consequences not only for Puerto Rico but also for all noncontiguous U.S. lands, including Hawaii and Alaska, in that it essentially required the application of the cabotage laws of the United States to all marine transportation between those U.S. areas and the U.S. mainland (or even between the U.S. mainland ports). Thus, only U.S. flag carriers could engage in this “coastwise” trade, driving the cost of this interstate commerce high in comparison to foreign commerce.

4. THE PROGENY OF THE *INSULAR CASES*

4.1. *The Further Application of the Incorporation Theory*

As is evident from the history above, the *Insular Cases* left the constitutional law to be applied in the newly created “unincorporated territories” in an uncertain nebula. This uncertainty was soon dispelled as the composition of the Court changed and a clear majority was consolidated that favored the incorporation doctrine promoted by the *Downes* plurality. The catalysts that allowed for this consolidation were the respective replacements of Justice Gray by Oliver Wendell Holmes in 1902, and Justice Shiras by William R. Day in 1903.

Justice Holmes, who was born in Boston, attended Harvard College before fighting as an officer in the Union Army in the Civil War, during which he was wounded on three occasions.

United States notwithstanding their not being citizens thereof. As nationals they could enter the United States without impediment, as they were not aliens. Dick Thornburgh commenting on this decision states that in engaging in this judicial legislation the Supreme Court created a “limbo status for . . . noncitizens in [the] newly acquired overseas territories . . . demonstrat[ing] that once the courts start making political and social policy, they often have to make yet more political and social policy to sustain those court-created policies that are not sustained by measures adopted by the political branches of government.” DICK THORNBURGH, *PUERTO RICO'S FUTURE: A TIME TO DECIDE* 49 (2007).

¹⁰⁹ *Huus*, 182 U.S. at 396.

Thereafter he attended Harvard Law School and eventually sat for almost twenty years on the Supreme Judicial Court of Massachusetts before his appointment to the Supreme Court of the United States, where he served for twenty-nine years. He would be a recurrent dissenter on a patently conservative Court.¹¹⁰ In his famous essay, *The Common Law*, written before his appointment to the Supreme Court, he said:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.¹¹¹

These are observations well worth keeping in mind when considering the subject at hand and in explaining how he voted in *Insular Cases* matters.

Justice Day, an Ohio native, attended the University of Michigan Law School, where he became associated with another young lawyer by the name of William McKinley. In 1897, Day was appointed First Assistant Secretary of State by then-President McKinley, and soon became the de facto Secretary, a role which led to his presiding over the negotiations that culminated in the signing of the Treaty of Paris that ended the Spanish-American War. He later served on the Sixth Circuit Court of Appeals, which was presided over by William Howard Taft, the future President and later Chief Justice of the United States when the seminal *Insular*-related case of *Balzac v. Porto Rico*¹¹² was decided. Day was appointed to the Supreme Court by Theodore Roosevelt, a kindred Spanish-American War spirit who had become President after McKinley was assassinated in 1901.

¹¹⁰ See FELIX FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 77-87 (2d ed. 1961) (discussing Holmes' unwavering belief in freedom of speech in the post-World War I era while the majority of the court frequently upheld administrative restrictions thereon but disallowed restraints on economic power).

¹¹¹ OLIVER WENDELL HOLMES, *Lecture I: Early Forms of Liability*, in THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

¹¹² 258 U.S. 298 (1922).

The first *Insular*-related case in which the two new Justices participated was *Hawaii v. Mankichi*.¹¹³ Mankichi was accused of and tried for murder after the annexation of the Hawaiian Islands by the United States pursuant to the Newlands Resolution of July 7, 1898, but prior to the enactment of the Hawaiian Organic Act, which provided that Hawaiian law would continue in effect if not "inconsistent with the Constitution."¹¹⁴ Mankichi, who was found guilty by a nine-to-three vote of a petit jury, claimed that his conviction violated the Fifth, Sixth, and Fourteenth Amendments because he had neither been indicted by a grand jury nor convicted unanimously by a petit jury. With Justice White writing a five-judge majority that included the two new Justices, the Supreme Court rejected Mankichi's claims. The Court concluded that Hawaii was not incorporated into the United States until 1900,¹¹⁵ when U.S. citizenship was granted to its inhabitants. Because Mankichi's charge and trial preceded that date, the Court ruled that, pursuant to *Downes*, the Constitution did not provide Mankichi with the protections to which he claimed to be entitled.

The crucial holding of *Mankichi* was that it was the *granting of citizenship* that was the determinative factor in deciding whether a territory had been incorporated into the United States. This criterion not only made logical sense, but was in keeping with our national history as demonstrated by the practice that had been uninterruptedly followed since the days of the Northwest Ordinance of 1787 upon the acquisition of new territories.¹¹⁶

A somewhat embarrassing point is raised by Chief Justice Fuller in his dissent, in which he argues that Mankichi is correct in his constitutional arguments because in fact Hawaii had been incorporated into the United States by reason of the language in the preamble to the treaty of annexation, one which was actually forwarded for ratification by the then-Secretary of State, now Justice Day, and which stated that "those islands should be incorporated into the United States as an integral part thereof and under its sovereignty."¹¹⁷

¹¹³ 190 U.S. 197 (1903).

¹¹⁴ Hawaiian Organic Act, ch. 339, § 6, 31 Stat. 141, 142 (1900).

¹¹⁵ *Mankichi*, 190 U.S. at 215-18.

¹¹⁶ See JUAN R. TORRUELLA, GLOBAL INTRIGUES 27-35 (2007) (analyzing the strong expansionist agenda of the United States in the eighteenth and nineteenth century that resulted in increased U.S. citizenship).

¹¹⁷ S. REP. No. 55-681, at 96 (1898).

Justice Harlan wrote a dissent in *Mankichi* that was more in keeping with the fundamental issues raised by the theory of incorporation. He not only agreed with the Chief Justice's views, but pointed out further that the majority's holding had the effect of:

[E]ngraft[ing] upon our republican institutions, controlled by the supreme law of a written Constitution, a *colonial* system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States, one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law to be declared from time to time by Congress, which is itself only a creature of that instrument.¹¹⁸

Although these are irrefutable arguments, they have remained unattended.

Nevertheless, the majority's views in *Mankichi*, regarding the granting of citizenship to the residents of acquired territories as being indicative of incorporation of the territory into the United States, were reinforced in 1905 by *Rassmussen v. United States*.¹¹⁹ That case arose out of a misdemeanor conviction in Alaska by a jury composed of six persons pursuant to a federal statute allowing such a procedure in Alaska. In a decision written by Justice White, a majority of the Justices concluded that Alaska had been incorporated into the United States because the treaty of cession with Russia specifically declared that "[t]he inhabitants of the ceded territory shall be admitted to the enjoyment of all the rights,

¹¹⁸ *Mankichi*, 190 U.S. at 240 (Harlan, J., dissenting).

¹¹⁹ See *Rassmussen v. United States*, 197 U.S. 516, 516 (1905) ("The treaty with Russia concerning Alaska, instead of exhibiting, as did the treaty with Spain regarding the Philippine Islands, the determination to reserve the question of the status of the acquired territory for ulterior action by Congress, manifested a contrary intention to admit the inhabitants of the ceded territory to the enjoyment of citizenship, and expressed the purpose to incorporate the territory into the United States.").

advantages and immunities of *citizens of the United States*.”¹²⁰ The Constitution thus attached, and the conviction was set aside. *Rassmussen* reaffirmed *Makichi* not only as to the validity of the incorporation theory, but also, and more important as regards a central theme of this Article, as to what was the determining criterion for concluding whether a territory had been incorporated into the United States. Although Justices Harlan and Brown concurred in the outcome, Harlan continued to insist that the Constitution applied *ex proprio vigore* to all territories whether incorporated or not.

In the context of these endorsements of the incorporation doctrine there arose a case from the other side of the American Empire, the Philippine Islands, at a time when the Philippine insurrection, a prolongation there of the Spanish-American War, was still at its height. That case was *Kepner v. United States*,¹²¹ in which the question presented was whether the double jeopardy prohibition in the U.S. Constitution applied in the Philippines. Obviously, there was not much interest on the part of the U.S. government in extending the Constitution to this territory, considering the hostile conditions that prevailed at that time. Justice Day, writing for the majority, avoided the issue altogether by ruling that the Philippine Organic Act¹²² was sufficient to prohibit that practice.¹²³

But the question of the applicability of the Constitution to the Philippines could not be avoided indefinitely. Two years later the matter was squarely presented before the Court in *Dorr v. United States*,¹²⁴ in which a criminal defendant claimed the right to trial by jury. The results were predictable. Justice Day, writing for the majority, concluded that pursuant to *Downes*, the Constitution did not apply to the Philippines, which was deemed an unincorporated territory. Clearly as an occupying power in the Philippines at a time shortly after the conclusion of a serious armed insurrection, the United States was concerned about having to hold jury trials with juries picked from a population presumed to be at least partially hostile. But as Justice Harlan pointed out in his cogent

¹²⁰ *Id.* at 522 (emphasis added).

¹²¹ 195 U.S. 100 (1904).

¹²² Philippine Organic Act, ch. 1369, 32 Stat. 691 (1902).

¹²³ *Kepner*, 195 U.S. at 134.

¹²⁴ 195 U.S. 138 (1904).

dissent, this was an outcome that could prove to have unintended consequences:

There are many thousands of American soldiers in the Philippines They carry the flag of the United States, and have not lost their American citizenship. Yet, if charged in the Philippines with having committed a crime against the United States of which a civil tribunal may take cognizance, they cannot, under the present decision, claim of right a trial by jury.¹²⁵

As we shall see, the Supreme Court would work its way around this perceived problem by its double-standard application of the *Insular Cases* doctrine in the Second World War cases of *Kinsella v. Krueger*¹²⁶ and *Reid v. Covert*.¹²⁷

4.2. *The Extension of the Incorporation Doctrine: Balzac v. Porto Rico*

4.2.1. *The Jones Act and the Granting of U.S. Citizenship to Puerto Ricans*

After *Kepner*, the Court changed composition several times,¹²⁸ and several other cases, spawned by the *Insular Cases* were decided.¹²⁹ However, the most significant event related to the

¹²⁵ *Id.* at 156 (Harlan, J., dissenting).

¹²⁶ 351 U.S. 470 (1956), *rev'd on reh'g sub nom. Reid v. Covert*, 354 U.S. 1 (1957).

¹²⁷ 351 U.S. 487 (1956), *rev'd on reh'g*, 354 U.S. 1 (1957).

¹²⁸ William Henry Moody replaced Justice Henry Billings Brown in 1906; Justice Rufus Wheeler Peckham died in 1909 and was substituted by Horace Harmon Lurton; Justice David Brewer died the following year and Charles Evans Hughes was appointed in his place; Chief Justice Fuller also died in 1910, and Justice White was elevated to Chief Justice by President Taft; meanwhile Justice Moody resigned, to be replaced by Joseph Rucker Lamar and Willis Van Devanter was appointed to fill White's position as Associate Justice, and in 1911, Justice Harlan, the last remaining opponent of the inequality promoted by the *Insular Cases*, died to be replaced by Mahlon Pitney. In 1914 Justice Lurton died, and James Clark McReynolds was appointed to the Court by President Woodrow Wilson. See generally HALL, *supra* note 64, at 105, 371, 419–22, 478, 569, 597, 649, 725, 736, 1045, 1086; 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 1633–57, 1685–1703, 1801–22, 1847–63, 1893–1915, 1945–53, 1973–89, 2001–09, 2023–33 (Leon Friedman & Fred L. Israel eds., 1969).

¹²⁹ See *Ocampo v. United States*, 234 U.S. 91 (1914) (holding that the Philippine Bill of Rights “contains no specific requirement such as is contained in the Fifth Amendment of a presentment or indictment by grand jury, nor is such a

Insular Cases was the passage of the Jones Act by Congress in 1917,¹³⁰ the most important provision of which was the granting of U.S. citizenship to the residents of Puerto Rico.

Starting in 1901, shortly after the enactment of the Foraker Act, and through 1917, a total of twenty-one bills had been filed in Congress proposing the granting of citizenship to the residents of Puerto Rico.¹³¹ These efforts received varied degrees of enthusiasm from the various intervening administrations. For example, in his 1905 message to Congress, President Theodore Roosevelt described his wish to “earnestly advocate the adoption of legislation which will explicitly confer American citizenship on all citizens of Porto Rico. There is, in my judgment, no excuse for failure to do this.”¹³² Somewhat less supportive, the Taft administration also endorsed several citizenship proposals,¹³³ with the reservation, however, that the proposal be “entirely disassociated from any thought of statehood.”¹³⁴ This *political* position of *President Taft* is worth keeping in mind in considering his *judicial* position years later, when as *Chief Justice* he wrote *Balzac v. Porto Rico*, interpreting the Jones Act, and determined the constitutional rights that attached to Puerto Ricans by virtue of their gaining that citizenship.

Nevertheless, after Taft and his party were swept from office by the Democrats in the elections of 1912, the new President, Woodrow Wilson, in his message to Congress endorsed “giving [Puerto Ricans] the ample and familiar rights and privileges accorded our own citizens in our territories,”¹³⁵ that is, the same

requirement included within the guaranty of due process of law”); *Dowdell v. United States*, 221 U.S. 325 (1911) (holding that “[t]he ‘face to face’ provision of the Philippine Bill of Rights does not prevent the judge and clerk of the trial court from certifying as additional record to the appellate court what transpired on the trial of one convicted of a crime without the accused being present when the order was made”); *Grafton v. United States*, 206 U.S. 333 (1907) (holding that a person acquitted of a crime committed in the Philippines by a military court of the United States “cannot subsequently be tried for the same offense in a civil court in that territory”); *Trono v. United States*, 199 U.S. 521 (1905) (holding that the Supreme Court of the Philippines did not commit an error in convicting a defendant on appeal for a crime for which he was acquitted at trial).

¹³⁰ Jones Act, ch. 145, 39 Stat. 951 (1917).

¹³¹ See TORRUELLA, *supra* note 9, at 85 n.287 (providing citations for these proposed bills).

¹³² 40 CONG. REC. 23, 36 (1905).

¹³³ E.g., H.R. 22554, 61st Cong., 45 CONG. REC. 2932 (1910).

¹³⁴ H.R. REP. NO. 62-341, at 2 (1912).

¹³⁵ 51 CONG. REC. 75 (1913).

U.S. citizenship as was accorded to those in Hawaii and Alaska, without any mention being made of the restrictions previously insisted upon by Taft. In all probability these were not totally altruistic proposals, considering the other interests of the United States in the region,¹³⁶ and the fact that the winds of the Great War were already blowing on our shores.¹³⁷

In any event, on March 2, 1917, with almost no debate on the floor of Congress regarding the granting of citizenship to Puerto Ricans,¹³⁸ President Wilson signed the Jones Act into law. In addition to the citizenship provision, the statute contained a bill of rights similar to that in the U.S. Constitution.¹³⁹ Also included were revisions to the structure of the civil government originally established under the Foraker Act. Although the offices of governor, attorney general, commissioner of education, and territorial supreme court justices continued to be appointed by the

¹³⁶ Adroitly verbalized by Congressman Cooper during the Jones Act debate: "We are never to give up Porto Rico for, now that we have completed the Panama Canal, the retention of the island becomes very important to the safety of the canal, and in that way to the safety of the Nation itself. It helps to make the Gulf of Mexico an American lake." 54 CONG. REC. 4170 (1917); see also JORGE RODRÍGUEZ BERUFF, STRATEGY AS POLITICS: PUERTO RICO ON THE EVE OF THE SECOND WORLD WAR 28 (2007) (noting military presence in Puerto Rico and the twin American aims of securing the Panama Canal and ensuring national security by guarding the Gulf of Mexico).

¹³⁷ Compare RODRÍGUEZ BERUFF, *supra* note 136, at 31-32 (discussing Puerto Rico's enhanced strategic importance during World War I because of its "perceived naval importance in the Caribbean" and potential "as a source for military recruits," on President Wilson's decision to sign the Jones Act), ARTURO MORALES CARRIÓN, PUERTO RICO: A POLITICAL AND CULTURAL HISTORY 193 (1983) ("More was involved than the relations between the United States and Puerto Rico or the vagaries of colonial tutelage. Much of the world was at war, and defense considerations now impinged on many decisions of the Administration."), and EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 147 (2001) (exploring why the United States granted citizenship to Puerto Ricans and concluding that "certainly wider strategic preoccupations figured principally among the considerations borne in mind by American decision makers."), with José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 406 (1978) ("The author is unaware of any evidence of a design by anyone in the American government during this period to make extensive use of Puerto Ricans in the armed services or to make Puerto Ricans citizens on the theory that they might then be conscripted.").

¹³⁸ See 53 CONG. REC. 1753, 4021-22, 7281-82, 7468-94, 8409-25, 8457-79 (1916); 54 CONG. REC. 1324-29, 2162-64, 2221-23, 2248-65, 3005-11, 3069-74, 3467-79, 3666-67 (1917) (chronicling the debates over the Jones Act and containing little meaningful discussion about granting citizenship to Puerto Ricans).

¹³⁹ Jones Act, ch. 145, § 2, 39 Stat. 951, 951-52 (1917).

President, subject to Senate confirmation, the statute established a bicameral legislature which was thereafter to be elected by popular suffrage.¹⁴⁰ A non-voting member of Congress, referred to, as in the Foraker Act, by the title of "Resident Commissioner," was to be elected to a four-year term.¹⁴¹ Also provided for was an Article I federal district court, with "jurisdiction of all cases cognizable in the district courts of the United States."¹⁴² All "statutory laws of the United States not locally inapplicable . . . [would] have the same force and effect in Porto Rico as in the United States, except the internal revenue laws . . ."¹⁴³

4.2.2. Chief Justice Taft Enters the Scene

At about the same time that Congress was considering the Jones Act for Puerto Rico,¹⁴⁴ the composition of the Supreme Court changed once again during the years leading up to the pivotal case of *Balzac v. Porto Rico*. Taking the place of Justice Lamar was John M. Clarke, a progressive liberal who had opposed imperialism and

¹⁴⁰ *Id.* § 25, 39 Stat. at 958.

¹⁴¹ *Id.* § 29, 39 Stat. at 959.

¹⁴² *Id.* § 41, 39 Stat. at 965.

¹⁴³ *Id.* § 9, 39 Stat. at 955.

¹⁴⁴ Two other events in America's colonial empire were also taking place in 1917. The first is that the Philippine Jones Act was enacted into law declaring the intention of the United States to grant independence to this territory. See An Act to Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and to Provide a More Autonomous Government for Those Islands, ch. 416, pmb., 39 Stat. 545 (1917) (seeking to achieve the "speedy" independence of the Philippine Islands). This is significant in that it clearly signaled that in Congress's eyes Puerto Rico and the Philippines were taking different routes towards their destiny. Independence was thus proclaimed for the Philippines in 1946, after the Japanese occupation of the Islands during World War II. See Proclamation No. 2695, 3 C.F.R. 64 (1946 Supp.), 60 Stat. 1352 (declaring the independence of the Philippine Islands); 22 U.S.C. § 1394 (2000) (affirming the same). Puerto Rico is, of course, still in the fold with a modicum of additional local self-government having been granted by Congress in 1950. See An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, ch. 446, 64 Stat. 319 (1950); see also Juan R. Torruella, *¿Hacia dónde vas Puerto Rico?*, 107 YALE L.J. 1503, 1511-12 (1998) (reviewing JOSÉ TRIAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997)) (discussing the enactment of the Jones Act).

The second event was the acquisition of the Danish Virgin Islands by the United States. See Convention Between the United States and Denmark for Cession of the Danish West Indies, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706. Thus, while the United States was planning to reduce its formal empire in the Far East, it was expanding it closer to home in the Caribbean by purchasing from Denmark the islands of St. Thomas, St. John, and St. Croix.

had joined presidential candidate William Jennings Bryan in demanding independence for the Philippines. Then, in 1916, the resignation of Justice Hughes occasioned the appointment of Louis D. Brandeis, a brilliant but controversial selection. Brandeis had been considered “not fit” by seven former presidents of the American Bar Association, including soon-to-be Chief Justice William Howard Taft, with whom Brandeis was at odds ideologically.¹⁴⁵ Taft would join the Court in 1921 to replace Chief Justice White, the last survivor of the original *Insular Cases* lineup and the principal advocate of the incorporation doctrine.¹⁴⁶

In addition to being a life-long crusader of the status quo and an active opponent of social democracy,¹⁴⁷ more importantly, Taft had an extensive background in insular and colonial affairs. In January 1900, when the Philippine insurgency was at its height, Taft had resigned as Chief Judge of the Sixth Circuit to become the first civilian governor of the Philippines, a post that he occupied until 1904. By that time, the Filipino insurgents had been crushed and Taft had returned to Washington to become the Secretary of War in Theodore Roosevelt’s administration. Nevertheless, he continued to maintain his involvement in Philippine affairs in that capacity, in addition to which he also was intimately active in matters related to the Panama Canal and Puerto Rico. In 1906, he was sent to Cuba to deal with unrest there under the provisions of

¹⁴⁵ Of Justice Brandeis’s 528 opinions while on the Court, 84 were dissents, many of them from Chief Justice Taft’s views. See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 354 (1921) (Brandeis, J., dissenting) (disagreeing with Taft’s decision to invalidate an Arizona law that protected striking laborers from court injunctions).

¹⁴⁶ Two obscure but *Insular Cases*-related decisions were handed down by the Supreme Court in 1918 while Chief Justice White still held tenure: *Porto Rico v. Tapia*, 245 U.S. 639 (1918) (per curiam) and *Porto Rico v. Muratti*, 245 U.S. 639 (1918) (per curiam). In both cases, the lower courts in Puerto Rico had concluded that defendants had not been properly charged because they had not been indicted by grand juries, and thus, presumably the Sixth Amendment had been violated. In a cryptic per curiam the Supreme Court reversed, citing *Downes*, *Mankichi*, and *Dorr*, an inscrutable conclusion at the time considering what the Court had said regarding the granting of citizenship in *Mankichi* and *Rasmussen*, but understandable with the benefit of the hindsight that *Balzac* would soon provide. *Id.*

¹⁴⁷ See, e.g., William H. Taft, *The Right of Private Property*, 3 MICH. L. J. 215, 218 (1894) (noting that “security of property and contract and liberty are indissolubly linked” and, as a result, “with [our government’s] many checks and balances,” we are better able to protect those intrinsic rights because the United States is “much further removed from the gusty and unthinking passions of temporary majorities” than England).

the Platt Amendment to the Cuban Constitution,¹⁴⁸ which authorized such interventions by the United States whenever its interests in that island were deemed threatened. In 1909, during his tenure as President, Taft became disenchanted with Puerto Ricans generally as a result of a budgetary crisis caused by the refusal of its popularly elected lower house to approve the annual budget for the insular government, in protest against various judicial designations made by the presidentially appointed governor. Taft took umbrage at the situation and retaliated with the Olmstead Act,¹⁴⁹ placing Puerto Rico under the supervision of the Bureau of Insular Affairs of the War Department.¹⁵⁰ Thereafter, during a message to Congress, President Taft accused Puerto Rico's elected leaders of irresponsibility and political immaturity,

¹⁴⁸ The Platt Amendment respecting Cuba was added to the army appropriations bill for 1901-02. Act of Mar. 2, 1901, ch. 803, paras. I-VII, 31 Stat. 895, 898 (1901). The Cubans incorporated the amendment into the Cuban constitution on June 12, 1901, as a condition of American withdrawal from the island. In it, Cuba agreed not to impair its independence by treaty with foreign powers, not to assume public debt beyond the ability of its ordinary revenues to liquidate, to permit U.S. intervention for the protection of Cuban independence, and to sell or lease to the United States land necessary for naval or coaling stations. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA art. III (1901).

¹⁴⁹ See Truman R. Clark, *President Taft and the Puerto Rican Appropriation Crisis of 1909*, 26 THE AMERICAS 152, 153 (1969) ("Taft's strong reaction to the Puerto Rican appropriation crisis and his subsequent manipulations of some of the Puerto Rican political leaders show another, perhaps more Rooseveltian, side to him.").

¹⁵⁰ The placing of Puerto Rico under the War Department, although "represent[ing] a hardening of colonial policy," RODRÍGUEZ BERUFF, *supra* note 136, at 37, was not in fact a total departure from the manner in which Puerto Rico had been governed since the change in sovereignty from Spain, and for that matter, during Spanish sovereignty when Spanish governor generals were the order of the day. Most of the early U.S. colonial governors were not only military men but also came from the Indian wars experience in the West. These included all the military governors from 1898 through 1900: Gen. Nelson A. Miles, Gen. John R. Brooke, Gen. Guy V. Henry, and Brig. Gen. George Davis. Most of those that followed as civil governors of Puerto Rico after the Foraker Act of 1900 was enacted were also in the military or closely affiliated therewith. For instance, Charles Allen (1900-1904), was a former Assistant Secretary of the Navy, as were Beekman Winthrop (1904-1907), and Theodore Roosevelt Jr. (1929-1932). The latter, also a Lieutenant Colonel in the Army Reserve, died during the invasion of Normandy in World War II. Other military men who were appointed to the Puerto Rican governorship included Col. George Colton (1909-1913), Gen. Blanton Winship (1934-1939), and Adm. William D. Leahy (1939-1940). *Id.* at 17-28.

and stated that too much power had been given to Puerto Ricans “for their own good.”¹⁵¹

During his tenure as Chief Justice, Taft was able to exercise more influence on the proceedings of the Court, and the other branches of Government, than any other Chief Justice in the history of the Court, a not unpredictable situation given his background and the general ethics of the country during the times when he served. The coincidence of all of these personal circumstances in the life of Chief Justice Taft would prove unfortunate for the U.S. citizens of Puerto Rico, for the ruling of the Court in *Balzac* clearly bears his imprint and his personal biases.

4.2.3. *Balzac v. Porto Rico Is Decided*

Jesus M. Balzac was the editor of a daily newspaper in Arecibo, Puerto Rico. He wrote an article indirectly referring to the governor of Puerto Rico, which was considered libelous by the local authorities, and as a result of which he was charged with criminal libel, a misdemeanor under the then-extant Puerto Rican criminal code. When Balzac requested a jury trial claiming that the Jones Act entitled him to this procedure pursuant to the Sixth Amendment of the U.S. Constitution, the Supreme Court of Puerto Rico denied his request. Balzac was tried on two counts, found guilty by a judge, and sentenced to five and four months in jail on the two charges.¹⁵²

On appeal to the Supreme Court of the United States, Balzac’s convictions were affirmed unanimously in an opinion by Chief Justice Taft based essentially on his views of what was the effect of the grant of citizenship to Puerto Ricans in the Jones Act:

What additional rights did it give them? It enabled them to move into the continental United States and becoming

¹⁵¹ William Howard Taft, President, Message to Congress (May 10, 1909), in 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 78 (David Burton ed., 2002); see also 2 HENRY F. PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT (Archon Books 1964) (1939) (documenting Taft’s political career and his statements advocating less independence for Puerto Rico’s government); RODRÍGUEZ BERUFF *supra* note 136, at 36 (discussing the way in which the “rising labor agitation and strikes” contributed to Taft’s statements about the gravity of the situation and the subsequent adoption of a provision in the Foraker Act authorizing the “president to place Puerto Rican affairs under the executive agency of his choosing”).

¹⁵² *People v. Balzac*, 28 P.R. 139 (1920); *People v. Balzac*, 28 P.R. 141 (1920).

residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political.

In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution *It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.*¹⁵³

Duplicating Justice Brown's necromantic displays with regard to inconvenient jurisprudence when confronted by the *Loughborough* and *Dred Scott* decisions in *Downes v. Bidwell*, Taft staged a similar performance with regard to *Mankichi* and *Rasmussen*:

It is true that, in the absence of other and countervailing evidence, a law of Congress or a provision in a treaty acquiring territory, declaring an intention to confer political and civil rights on the inhabitants of the new lands as American citizens, may be properly interpreted to mean an incorporation of it into the Union, as in the case of Louisiana and Alaska. This was one of the chief grounds upon which this court placed its conclusion that Alaska had been incorporated in the Union, in *Rasmussen v. United States*. But Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury.¹⁵⁴

Taft then reverts to the pre-Jones Act arguments heard in *Dorr* about the Philippines:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries

¹⁵³ *Balzac v. Porto Rico*, 258 U.S. 298, 308-09 (1922) (emphasis added).

¹⁵⁴ *Balzac*, 258 U.S. at 309 (citation omitted).

centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. . . . Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when. . . . We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights.¹⁵⁵

Finally, in language that would lead to perpetual ad hoc litigation in an attempt to define what rights attached to the U.S. citizens residing in Puerto Rico, Taft states:

The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.¹⁵⁶

Although the glaring inconsistencies and incongruities in the *Balzac* decision may be explained away by Taft's biases, it is difficult to accept how Justices of the caliber of Holmes and Brandeis would join such a legally faulted opinion without so much as a word of disagreement. Although the Jones Act had

¹⁵⁵ *Id.* at 310-11.

¹⁵⁶ *Id.* at 312-13.

made the status of the Philippines and its inhabitants legally and factually irrelevant, it is clear from Taft's references to the Philippines that his Filipino-phobia was an important underlying influence on his conclusions. Apart from these obvious racial biases, his reliance on those factors is explicable by reference to the *political* positions Taft took as President, in which he had objected to the granting of citizenship to Puerto Ricans if it was linked to eventual statehood.

Obviously, as was required in light of *Rasmussen*, Taft was aware that citizenship was linked with incorporation, and that incorporation was linked with eventual statehood for the territory; and Congress was cognizant of this when it granted U.S. citizenship to Puerto Ricans. The total disregard by Taft of *Rasmussen* and *Mankichi* placed a mantle of legality over an act of judicial usurpation of legislative intent in granting U.S. citizenship to the inhabitants. The excuse that was adopted, that Alaska "was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens" and "was on the American Continent and within easy reach of the then United States,"¹⁵⁷ is totally lacking in legal and factual content, and completely ignores or chooses to overlook the contemporaneous situation with Hawaii, which was similarly situated with Puerto Rico both geographically and legally after the Jones Act, and with regard to which the Supreme Court concluded that the granting of citizenship had brought about incorporation. Furthermore, Congress's action in legislating the Jones Act *after* the Treaty of Paris in effect trumped any inconsistent provisions in that prior treaty, and thus gave added validity to the holdings in *Mankichi* and *Rasmussen* regarding the consequences of granting citizenship on the determination of the status of the territory in question.

In *Balzac* Taft simply was blinded by his desire to reach a pre-determined outcome. His assertion that somehow Puerto Ricans were incapable of understanding "the responsibilities of jurors" and "popular government"¹⁵⁸ is without any basis in the record or the facts. Taft conveniently overlooked the fact that civil and criminal jury trials had been conducted in the U.S. District Court for Puerto Rico for twenty-three years, since 1899. Additionally,

¹⁵⁷ *Id.* at 309.

¹⁵⁸ *Id.* at 310.

for twenty-one years, since 1901, Puerto Rico's own criminal courts had been conducting jury trials in felony cases pursuant to Puerto Rico's criminal code,¹⁵⁹ imported mostly from California. In neither jurisdiction had the existence of any inability by the members of those juries to comprehend their responsibilities been reported. Furthermore, elective government had been operating in Puerto Rico since at least the advent of the Foraker Act in 1900,¹⁶⁰ without any problems having been claimed other than the 1909 appropriations dispute of the Puerto Rico legislature with then-President Taft, a dispute that now-Chief Justice Taft obviously had not forgotten. Without question, by 1922 jury trials and popular government had been operating vigorously in Puerto Rico for some time and were an accepted fact of life by its citizens. Last but not least is the absurdity of the *Balzac* ruling when one considers Taft's conclusion that upon moving to the U.S. mainland, Puerto Ricans ipso facto acquired the full rights of U.S. citizens, including "the responsibilities of jurors" and participation in "popular government," yet in that same opinion Taft considered that these same activities were beyond their comprehension while in Puerto Rico. One cannot but ponder as to how this magical transformation was accomplished.

The very fact that the Court would conclude that the right to trial by jury was not a fundamental constitutional right was in itself an astonishing conclusion which would not hold water in the mainland¹⁶¹ or for mainland U.S. citizens.¹⁶² As is to be expected, it was a holding for which exceptions and excuses would be found.

¹⁵⁹ As the Court itself recognizes. *Id.* at 300 ("The code of criminal procedure of Porto Rico grants a jury trial in cases of felony but not in misdemeanors.").

¹⁶⁰ It should be noted that during the Spanish regime, elective government was not totally absent. In fact, Puerto Ricans, who at the time of the change in sovereignty had the full rights of citizens of Spain, elected sixteen deputies and three senators to the Spanish parliament (Cortes). See FERNANDO BAYRON TORO, ELECCIONES Y PARTIDOS POLITICOS DE PUERTO RICO 3 (1977). This is a condition that has not been duplicated under the American regime. See *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006) (holding that because Puerto Rico is defined as an unincorporated territory of the United States, it lacks state status and therefore cannot appoint presidential electors).

¹⁶¹ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . .").

¹⁶² See *Reid v. Covert*, 354 U.S. 1 (1957) (holding that it is unconstitutional to try a civilian entitled to an Article III court by court-martial, which does not afford the right to a jury trial).

4.3. The "American Exception": The Discriminatory Application of the Balzac Doctrine

The holding in *Balzac* was one for which judicial excuses and exceptions would be created when an inconvenient scenario arose. This came about in a predictable setting as a result of World War II and the overseas trials of dependents of servicemen pursuant to the Uniform Code of Military Justice, which permitted the subjection of those dependents to trial, conviction, and sentencing by court-martial for certain offenses while they accompanied the servicemen.

In two such cases, the wives of two servicemen, one in England (*Reid*), and one in Japan (*Kinsella*), murdered their respective husbands and were subsequently tried, convicted by courts-martial, and sentenced to prison. They were brought to the United States to serve their sentences and upon arrival promptly filed habeas corpus petitions challenging their convictions as having been carried out in contravention of the Fifth and Sixth Amendments of the Constitution by reason of their lacking both indictments by grand juries and trials by petit juries. Thus came *Kinsella v. Krueger* and *Reid v. Covert* before the Supreme Court.

Upon their initial appearance before the Court, Justice Tom C. Clark writing for the majority held that in proceedings outside of the United States proper, the *Insular Cases* recognized the power of Congress to enact a system of laws that did not provide for trial by jury. Citing specifically to *Balzac*, the Court concluded in *Kinsella* that "[b]y 1922 it was regarded as 'clearly settled' that the jury provisions of Article III and the Sixth and Seventh Amendments 'do not apply to territory belonging to the United States which has not been incorporated into the Union.'"¹⁶³ The majority also relied on *In re Ross*, a pre-*Insular Cases* decision upholding the validity of a trial for murder before a consular court, an Article I tribunal without a jury, as a valid exercise of congressional power.¹⁶⁴

Although Justice Frankfurter reserved judgment on the merits because of the lack of time left in the term within which to analyze and decide the issues presented, he filed a separate opinion in which he noted that *In re Ross* represented "historically and juridically, an episode of the dead past about as unrelated to the

¹⁶³ *Kinsella v. Krueger*, 351 U.S. 470, 475 (1956) (quoting *Balzac*, 258 U.S. at 304-05).

¹⁶⁴ *In re Ross*, 140 U.S. 453 (1891).

world of today as the one-hoss shay is to the latest jet airplane.”¹⁶⁵ Chief Justice Earl Warren and Justices Hugo Black and William O. Douglas dissented.¹⁶⁶

After considerable negative public and academic reaction to the majority opinions in the two cases, the Court decided during the summer recess to grant rehearings in both cases, and reversals followed. The plurality opinion was written by Justice Black and joined by the Chief Justice and Justices Douglas and Brennan, the latter having just joined the Court in the later part of that summer after the original opinions were issued. Justices Frankfurter and Harlan filed separate concurrences.

The opinion of Justice Black brings to mind Justice Harlan’s dissents in the original *Insular Cases*:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.¹⁶⁷

The opinion continues:

While it has been suggested that only those constitutional rights which are “fundamental” protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of “Thou shalt nots” which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments. Moreover, in view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly

¹⁶⁵ *Kinsella*, 351 U.S. at 482 (Frankfurter, J., reserving judgment).

¹⁶⁶ *Id.* at 485 (Warren, C.J., Black & Douglas, JJ., dissenting).

¹⁶⁷ *Reid v. Covert*, 354 U.S. 1, 5–6 (1957) (footnotes omitted).

anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.¹⁶⁸

As for *In re Ross*, Justice Black expresses the view that “[a]t best, [it] should be left as a relic from a different era.”¹⁶⁹

Turning to the *Insular Cases* themselves, Justice Black again writes as if lifting the language right out of Harlan’s dissents in those cases:

The “*Insular Cases*” can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, *it is our judgment that neither the cases nor their reasoning should be given any further expansion*. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.¹⁷⁰

¹⁶⁸ *Id.* at 8–9 (footnotes omitted).

¹⁶⁹ *Id.* at 12.

¹⁷⁰ *Id.* at 14 (emphasis added, footnotes omitted); cf. *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting) (“In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. The nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or any place.”).

Although Justice Frankfurter concurred that the court-martialing of a civilian in peacetime for a capital offense must comply with Article III and the Fifth and Sixth Amendments,¹⁷¹ he concluded that the fundamental rights test was appropriate for the territories.¹⁷² The newer Justice Harlan, although also concurring with the majority, essentially agreed with the continued viability of *Ross* and the *Insular Cases*.¹⁷³ In what was substantially a restatement of his original majority opinion, Justice Clark dissented.¹⁷⁴

After the second *Reid* case, other cases that followed invalidated the use of court-martial procedures to try civilian spouses accompanying servicemen overseas for non-capital offenses.¹⁷⁵ Thereafter, the use of such procedures to try civilian employees accompanying the armed forces overseas, whether on charges of capital or non-capital offenses, was also declared unconstitutional.¹⁷⁶ Unfortunately, however, those who hoped that these decisions would presage the final demise of the underlying *Insular Cases* doctrine were to be repeatedly disappointed, as the dogma of the *Insular Cases* has continued to resurface in numerous and diverse controversies since *Reid*.

Such cases have included: *Examining Board of Engineers*,

¹⁷¹ *Reid*, 354 U.S. at 49 (Frankfurter, J., concurring).

¹⁷² See *id.* at 53 (“The ‘fundamental right’ test is the one which the Court has consistently enunciated in the long series of cases dealing with claims of constitutional restrictions on the power of Congress to ‘make all needful Rules and Regulations’ for governing the unincorporated territories.”) (citations omitted). It should be noted that as a young lawyer, Felix Frankfurter had worked in the Bureau of Insular Affairs and, while there, on the drafting of the Jones Bill. MORALES CARRIÓN, *supra* note 137, at 187.

¹⁷³ See *Reid*, 354 U.S. at 67 (Harlan, J., concurring) (“But I do not go as far as [Justice Black] seems to go . . . His opinion, if I understand it correctly, in effect discards *Ross* and the *Insular Cases* as historical anomalies. I believe that those cases, properly understood, still have vitality, and that . . . they have an important bearing on the question now before us.”); *id.* at 74–78.

¹⁷⁴ *Id.* at 79 (Clark, J., dissenting) (“I remain convinced that the former opinions of the Court are correct and that they set forth valid constitutional doctrine under the long-recognized cases of this Court.”).

¹⁷⁵ See, e.g., *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248 (1960) (rejecting court-martial jurisdiction for civilian dependents overseas who are prosecuted for non-capital offenses).

¹⁷⁶ See, e.g., *Grisham v. Hagan*, 361 U.S. 278 (1960) (holding that civilian employees were entitled to the right of trial by jury); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (holding that Article 2(11) of the Uniform Code of Military Justice did not apply to non-capital offenses committed overseas by civilian employees).

Architects & Surveyors v. Flores de Otero, in which the Court ruled that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico pursuant to *Downes* and *Balzac*;¹⁷⁷ *Califano v. Torres*, in which pursuant to a definition of "United States" under the Supplemental Security Income program that excluded Puerto Rico,¹⁷⁸ a woman who qualified for these benefits while a resident of Connecticut had them withdrawn upon moving to Puerto Rico, with the Court upholding this discriminatory treatment relying on the doctrine of the *Insular Cases*;¹⁷⁹ and *Harris v. Rosario*, a related Social Security case involving the Aid to Families with Dependent Children program,¹⁸⁰ pursuant to which families with dependent children in the territories receive less assistance than those residing in the States.¹⁸¹ Justice Marshall's cogent dissent took issue with *Downes* and *Balzac* as being cases whose "present validity . . . is questionable."¹⁸²

5. INTERNATIONAL LAW AND THE *INSULAR CASES*

Although discussion of the *Insular Cases* has covered a span of over one hundred years, there has been little reference by scholars or the courts to a topic that, particularly in recent years, deserves attention. The saga of the *Insular Cases* has an important symbiotic international and domestic component that cannot be ignored.

In this respect it is appropriate that we commence with a

¹⁷⁷ *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976).

¹⁷⁸ 42 U.S.C. § 1382c(e) (2000).

¹⁷⁹ *Califano v. Torres*, 435 U.S. 1, 4 (1978) (per curiam).

¹⁸⁰ 42 U.S.C. §§ 1308, 1396d(b)(2) (2000).

¹⁸¹ *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (holding per curiam that Puerto Rico could be distinguished from the states because Puerto Rican residents did not contribute to the federal treasury, the cost of treating Puerto Rico as a state under the statute would be high, and greater benefits could disrupt the Puerto Rican economy).

¹⁸² *Id.* at 653-54 (Marshall, J., dissenting) ("It is important to remember at the outset that Puerto Ricans are United States citizens and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens.") (citation omitted). Similar language was contained in Justice Brennan's concurrence, joined by Justices Stewart, Marshall, and Blackman, in *Torres v. Puerto Rico*, in which the majority opinion by Chief Justice Burger nevertheless relies on the *Insular Cases* in holding that the Fourth Amendment is applicable to Puerto Rico. 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring).

reading of a relevant passage in our Constitution, the Supremacy Clause:

[A]ll Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*.¹⁸³

International law has been an integral part of our constitutional and legal system since the founding of our nation,¹⁸⁴ and as the cited text of the Constitution unequivocally indicates, *a treaty, once entered into, is supreme over all other law*.

The *Insular Cases* have promoted the continued status of the United States as a colonial nation in a world where that condition is not only obsolete, but unacceptable as a matter of international law. By continuing to patronize its continuing colonial relationships to Puerto Rico, the United States not only degrades its image as a leader of the democratic world, but also places itself in clear violation of its international commitments, and thus concomitantly contravenes its own domestic "Law of the Land."

The United States is a signatory to various treaties, agreements, and declarations which express international commitments requiring it to end the colonial status of its several territories, of which Puerto Rico is its largest and most populous.¹⁸⁵ The United States is a founding member of the United Nations, whose Universal Declaration of Human Rights ("UDHR") establishes that "[e]veryone has the right to take part in the Government of his country, directly or through freely chosen representatives."¹⁸⁶

¹⁸³ U.S. CONST. art. VI, para. 2 (emphasis added).

¹⁸⁴ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (recognizing an "implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789"); *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

¹⁸⁵ See, e.g., Universal Declaration of Human Rights, G.A. Res. 217A, U.N.GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; Organization of American States [OAS], *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, (1948); OAS, *Inter-American Democratic Charter*, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (Sept. 11, 2001); International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1976, 999 U.N.T.S. 171 (ratified by United States June 8, 1992) [hereinafter ICCPR].

¹⁸⁶ UDHR, *supra* note 185, art. 21(1).

Article 21 of the UDHR establishes that “[t]he will of the people shall be . . . expressed in periodic and genuine elections which shall be by universal and equal suffrage.”¹⁸⁷ In 1992, the United States became a party to the International Covenant on Civil and Political Rights (“ICCPR”),¹⁸⁸ which provides that “[a]ll peoples have the right of self-determination,” and that “[b]y virtue of that right they freely determine their political status.”¹⁸⁹ Article 25 of the ICCPR establishes that:

Every citizen shall have the right and opportunity . . .

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives; [and]

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage¹⁹⁰

Additionally pursuant the ICCPR, the United States “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,”¹⁹¹ and further agrees “to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”¹⁹²

A reading of these provisions should leave little doubt that with regard to the U.S. citizens of Puerto Rico, the United States does not meet or comply with any of these treaty obligations or commitments. Although the U.S. citizens of Puerto Rico have local self-government,¹⁹³ they neither vote for the national offices of President or Vice President, nor are they represented in Congress by voting representatives.¹⁹⁴ They, of course, have no say as to the

¹⁸⁷ *Id.* art. 21(3).

¹⁸⁸ ICCPR, *supra* note 185.

¹⁸⁹ *Id.* art. 1(1).

¹⁹⁰ *Id.* art. 25.

¹⁹¹ *Id.* art. 2(1).

¹⁹² *Id.* art. 2(2).

¹⁹³ Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950).

¹⁹⁴ There were plebiscites conducted in 1967, 1993, and 1998, but they were provided for by the local legislature and thus not binding on Congress. See STAFF OF THE H. COMM. ON RESOURCES, 106TH CONG., RESULTS OF THE 1998 PUERTO RICO

application of federal legislation in or to Puerto Rico.

This unfortunate situation is further aggravated by the fact that in addition to failing to comply with these treaty obligations, the government of the United States has actively opposed and obstructed attempts by the U.S. citizens residing in Puerto Rico to correct these violations at such times as they have sought the aid of the courts. Furthermore, contrary to the unequivocal mandate of the Supremacy Clause, the courts have been sympathetic to the U.S. government's opposition to the enforcement of these treaties,¹⁹⁵ notwithstanding that they are the "Law of the Land" and as such must, under the unequivocal mandate of the Constitution, be enforced by the courts.

This outcome is principally based on the theory that these treaties, particularly the ICCPR, are non-self-executing;¹⁹⁶ that is, that the rights created pursuant to these treaties are allegedly "precatory" or "aspirational."¹⁹⁷ Thus, according to this reasoning, the treaties cannot be enforced in the courts of the United States without enabling municipal legislation making them applicable domestically.¹⁹⁸

5.1. *The Doctrine of Self-Execution of U.S. Treaties*

The conclusion that the treaties in question, particularly the

PLEBISCITE, SERIAL NO. 106-A, at 6 (Comm. Print 1999) (report by Rep. Don Young, Chairman, House Comm. on Resources & Rep. George Miller, Member, House Comm. on Resources).

¹⁹⁵ See *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 149 (1st Cir. 2005) (en banc), cert. denied, 547 U.S. 1035 (2006) ("[N]one of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief."); *id.* at 151 ("[T]he right [to vote] claimed cannot be implemented by courts unless Puerto Rico becomes a state or until the Constitution is changed . . .").

¹⁹⁶ Courts and commentators have used the term "non-self-executing" to mean several things. See David N. Cinotti, Note, *The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land*, 91 GEO. L.J. 1277, 1279-80 (2003) (providing three definitions of "non-self-executing" treaties, namely, treaties that (a) are nonjusticiable, (b) convey no private right of action, or (c) require Congress to enact implementing legislation). For present purposes, the term is defined as treaties which do not create individually enforceable rights without the passage of implementing legislation. See *Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18, 21 (2d Cir. 1988) (defining "self-executing" as prescribing rules for determining private rights).

¹⁹⁷ *Igartúa-De La Rosa*, 417 F.3d at 150.

¹⁹⁸ See *id.* at 150-51 ("[T]hey are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.").

ICCPR, are not self-executing is patently flawed.¹⁹⁹ As in the case of the political question doctrine,²⁰⁰ the doctrine of self-execution—or put in its negative appellation, the doctrine of non-self-execution—has at convenient times also been used to sustain ideological viewpoints.²⁰¹ Confusion or obfuscation, purposeful or otherwise, between the *general* rule to the effect that treaties do not create individually enforceable rights,²⁰² and the *specific*, well-established, applicable doctrine of self-execution,²⁰³ have brought us to this state of affairs. It is a predicament resulting from the activism of those who promote the application of the general rule automatically and presumptively to all treaties, while failing to take into account the origins of the doctrine of self-execution and

¹⁹⁹ See *id.* at 158–84 (Torruella, J., dissenting); *id.* at 184–192 (Howard, J., dissenting). In my discussion of the issue of self-execution of treaties I have borrowed heavily from Judge Howard's dissent in this case, which I joined.

²⁰⁰ See THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 4–5 (1992) (“[T]he ‘political-question doctrine,’ is not only not required by[,] but [is] wholly incompatible with American constitutional theory.”); see also Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 334 (2002) (“Because the prudential doctrine allows the Court to avoid deciding a case without a textual analysis of the Constitution, it is this aspect of the political question doctrine that seems to be an unjustified dereliction of the Court’s duty to ‘say what the law is.’”); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814, 815 (1989) (“In modern American society, these justifications for judicial abstention [under the political question doctrine] seem increasingly to be calls for judicial abdication.”); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 601 (1976) (“The cases which are supposed to have established the political question doctrine required no such extra-ordinary abstention from judicial review; they called only for the ordinary respect by the courts for the political domain.”).

²⁰¹ See Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988) (“The distinction found in certain cases between ‘self-executing’ and ‘non-self-executing’ treaties is a judicially invented notion that is patently inconsistent with the express language in the Constitution”); see also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 201 (2d ed. 1996) (“A tendency in the Executive branch and in the courts to interpret treaties and treaty provisions as non-self-executing runs counter to the language, and spirit, and history of Article VI of the Constitution.”); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT’L L. 627, 638 (1986) (citing the Constitution while noting that the United States follows a system of “automatic incorporation”).

²⁰² See, e.g., *United States v. Green*, 671 F.2d 46, 50 (1st Cir. 1982) (noting disagreement as to whether Article 6 of the Convention on the High Seas is self-executing).

²⁰³ See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (describing in detail the proper application of the doctrine of self-execution).

the history that led to its creation in the first place.²⁰⁴

Although a robust discussion of the legitimacy of the doctrine of self-execution, its origins, and its applicability is beyond the scope of this Article, a brief treatment of this topic is required because it is necessary to demonstrate the speciousness of the rulings that support this outcome. Suffice it to say as a preliminary statement, the general rule that a treaty does not create individual rights without enabling municipal legislation has its roots in English law.²⁰⁵ Under the English system, treaties are entered into and concluded by the Crown without any intervention by Parliament. Because of this, under the English process treaties are ineffectual domestically, absent implementing legislation by Parliament.²⁰⁶ Thus, in England there cannot be a self-executing treaty.

In the United States, as evidenced by the unambiguous language of the Constitution and the history that led to the adoption of the relevant constitutional provisions, treaties may be, and presumably should be, self-executing. The historical record sustaining this proposition is unquestionable.²⁰⁷ The Framers

²⁰⁴ See generally Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995) (discussing the history of the doctrine and the subtleties of its proper application).

²⁰⁵ See J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 79-80 (10th ed. 1984) (noting that British law has developed independently from customary international law in that, while the Crown possesses the power to enter treaties, Parliament must enact enabling legislation because otherwise the Crown would be able to unilaterally legislate domestic law without Parliament's consent); see also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 275 (1796) (holding that treaties are traditionally non-self-executing in England in part because "no man living will say that a bare proclamation of the King, upon the ground of the treaty" is adequate authority for enacting domestic law); J.G. Collier, *Is International Law Really Part of the Law of England?*, 38 INT'L & COMP. L.Q. 924, 925-26 (1989) (discussing the history of the doctrine of non-self-execution in England and noting one British court's reasoning that "because a treaty is concluded by the Crown . . . and because the Crown cannot . . . alter the law of the land, the obligation does not form part of [British law] and may not be enforced by the courts unless it has been [enacted by Parliament]" (citing *The Parliament Belge*, 4 P.D. 129 (1879) (holding a British treaty non-self-executing for the above reasoning))).

²⁰⁶ See Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1111 (1992) (describing the longstanding rule under British law that a treaty does not have domestic effect until Parliament enacts implementing legislation).

²⁰⁷ The Framers' intention to establish treaties as law, without the need for further legislative action, is supported not only by the unambiguous text of the Supremacy Clause, but also by the clear record of the events that preceded its adoption at the Constitutional Convention. One specifically rejected proposal

agreed to the present Constitution's procedures whereby treaties are negotiated by the Executive, thereafter are submitted to the Senate for ratification or rejection,²⁰⁸ and if ratified, become the "supreme Law of the Land" along with federal statutes, federal common law, and the Constitution itself, and in appropriate circumstances, are enforceable in the courts of the United States by those who have rights thereunder.

Thereafter, a judicially inspired modification to this constitutionally mandated principle occurred.²⁰⁹ It first appeared

would have required that treaties be sanctioned by legislation if they were to have "the operation of laws." JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 597 (W. W. Norton 1987) (1840). Another would have established two types of treaties: one requiring only action by the President and the Senate, and a second requiring additional action by the House of Representatives. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 538 (Max Farrand ed., rev. ed. 1966). In a similar vein, the Committee on Style removed from the final version of the Supremacy Clause language that would have given the national government the power to "enforce treaties." But the Committee struck this language because it was redundant considering the clear language of the Clause. *Id.* at 389-90. The rejection of these proposals illustrates that the language of the Supremacy Clause was not coincidental, but rather chosen after deliberation, and deliberately, to mean what it said.

The expectation that treaties would become operative as domestic law upon ratification is also expressed in the Federalist Papers, and the ratification debates within the States. For example, in *Federalist No. 22*, Alexander Hamilton explained that "[t]he treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations." THE FEDERALIST NO. 22, at 150 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Similarly, at the North Carolina ratifying convention, one of the Constitution's supporters explained: "It was necessary that treaties should operate as laws on individuals. They ought to be binding upon us the moment they are made. They involve in their nature not only our own rights, but those of foreigners [and should be protected by the federal judiciary]." Paust, *supra* note 201, at 762 (quoting 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 27 (J. Elliot ed., 1941) (1830) (documenting the statements of William Davie, a North Carolina delegate to the Constitutional Convention)). Even those opposing ratification shared in this view: "Brutus," in criticizing Article III, stated that he could "readily comprehend what is meant by deciding a case under a treaty. For as treaties will be the law of the land, every person who have rights or privileges secured by treaty, will have of courts . . . in recovering them." 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 172 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

²⁰⁸ U.S. CONST. art. II, § 2, cl. 2. ("[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur.").

²⁰⁹ See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346-47 (1995) (noting Justice Marshall's decision in *Foster v. Neilson*).

in *Foster v. Neilson*,²¹⁰ in which Chief Justice Marshall concluded that the treaty in question was not self-executing because, *by its terms*, it did not establish a right in the individual claimant, but rather placed an obligation on the legislative branch to act.²¹¹ This so-called *Foster* rule, to the effect that certain treaties are not self-executing, has come into vogue in modern times,²¹² particularly with regard to human rights treaties.²¹³ However, properly applied, the *Foster* rule does not create an automatic presumption against self-execution.²¹⁴ Rather, it refers only to treaties which

²¹⁰ 27 U.S. (2 Pet.) 253 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

²¹¹ *Id.* at 314–15.

²¹² See, e.g., *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968 (4th Cir. 1992) (holding the Hague Convention on the laws and customs of war to be non-self-executing and thus concluding that it does not create a private right of action when breached); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373–74 (7th Cir. 1985) (holding that the U.N. Charter provisions stating that all members pledge to promote the “creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples” are not self-executing and do not create individual rights); *Cardenas v. Smith*, 733 F.2d 909, 918 (D.C. Cir. 1984) (holding that a treaty between the United States and Switzerland for reciprocal assistance in criminal matters did not create “judicially enforceable rights” for individuals because the parties did not so intend); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (dismissing claims of Israeli victims of a PLO bus bombing on the ground that treaties to which the United States is bound regarding human rights, laws of war, and terrorism do not create individually enforceable rights); *United States v. Postal*, 589 F.2d 862, 884 (5th Cir. 1979) (holding that article 6 of the Convention on the High Seas is not self-executing and thus that the Coast Guard’s Convention-breaching seizure of a foreign vessel in international waters did not preclude criminal prosecution in the courts of the United States). Cf. *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1168 (D.C. Cir. 1981) (holding that an administrative order prohibiting foreign airliners must be set aside because it violated a law Congress enacted to enforce several non-self-executing international agreements).

²¹³ See Henkin, *supra* note 209, at 348–50 (noting political efforts to undermine treaty obligations that give rise to greater human rights obligations); see also Lori Fisler Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT L. REV. 515, 519–23 (1991) (describing the use of non-self-executing legislative declarations in response to human rights treaties); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT’L L. 129, 173 (1999) (noting the Senate’s reluctance to allow the United States to be bound by “nonredundant” human rights obligations—human rights obligations not already enacted into domestic law—arising from treaties).

²¹⁴ Compare *United States v. Nai Fook Li*, 206 F.3d 56, 61 (1st Cir. 2000) (en banc) (stating that there is a presumption against self-executing treaties in American law), with *id.* at 68 (Torruella, J., dissenting).

from their text (or when not apparent, from their history)²¹⁵ indicate that they are not creating a private individual right.²¹⁶ Thus, the American constitutional rule of treaty enforcement in the courts, as modified by *Foster* and its progeny, requires *judicial inquiry* into the terms of the treaty to determine whether the treaty is self-executing, or more accurately, whether it creates rights that individuals can enforce in the courts.²¹⁷

Judicial inquiry aimed at determining this question is the key phrase on this issue, particularly when considering the ICCPR and the Senate's *declaration*,²¹⁸ entered at the time of its ratification of this treaty, purporting to establish that the substantive provisions would not be self-executing.²¹⁹ The Senate also made several *reservations*²²⁰ at that time regarding several of the ICCPR's

²¹⁵ See *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution.").

²¹⁶ See *United States v. Alvarez-Machain*, 504 U.S. 655, 667 (1992) ("The Extradition Treaty has the force of law, and if . . . it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation.").

²¹⁷ See *id.* at 663 (stating that courts look first to a treaty's terms to determine its contents); see also *United States v. Stuart*, 489 U.S. 353, 365–66 (1989) ("The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'").

²¹⁸ A declaration is a statement of position by the Senate that "is not presented to the other international signatories as a request for a modification of the treaty's terms." *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 190 (1st Cir. 2005) (Howard, J., dissenting), *cert. denied*, 547 U.S. 1035 (2006). "[I]t is directed primarily towards United States courts to express 'the sense of the Senate' that the treaty should . . . be interpreted [in the manner proposed by the Senate]." *Id.*

²¹⁹ See S. EXEC. REP. NO. 102-23, at 23 (1992) (conditioning the Senate's consent on the United States' declaration that the treaty be non-self-executing); see also 138 CONG. REC. S4784 (1992) (documenting a letter from the President to the Senate requesting ratification of treaty terms).

²²⁰ A reservation is a "unilateral statement . . . whereby . . . [a State] purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331. A reservation thus has an actual effect on the terms of the treaty. See Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 542 n.63 (1991) (noting that in exchange for its advice and consent, the Senate can require the President to enter a reservation to the treaty and obtain the other signatory's consent to this change). There is no doubt that the Senate may hinge its consent to ratify a treaty on a reservation. See *Haver v. Yaker*, 76 U.S. (9 Wall.) 32, 35 (1869)

provisions,²²¹ but none of these reservations referred to the rights provided for in Article 25 (“Every citizen shall have the right and the opportunity . . . [t]o vote . . . at genuine periodic elections which shall be by universal and equal suffrage”);²²² Article 2, paragraph 1 (the United States “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 . . .”);²²³ Article 2, paragraph 3 (the United States agrees to an enforcement mechanism for the realization and security of the rights established in the ICCPR, and undertakes “[t]o ensure that any person whose [ICCPR] rights or freedoms . . . are violated *shall have an effective remedy*” and to ensure that these rights are “*determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy*”);²²⁴ or Article 2, paragraph 2:

Where not already provided for by existing legislati[on] . . . each State Party . . . undertakes *to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*²²⁵

The distinction between a *declaration* and a *reservation* is not one of mere semantics. A non-self-executing *declaration* differs

(stating that the Senate may choose to modify or amend a treaty rather than adopting or rejecting it in its entirety). The reservation will vitiate the Senate’s consent if its terms are not incorporated into the treaty. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 180–81 (2d ed. 1996) (explaining that the Senate may give its consent “subject to conditions” that “may require renegotiation, to the dismay of Presidents”).

²²¹ See 138 CONG. REC. S4781, S4783 (stating that the United States will not take any steps to comply with ICCPR Article 20 that would infringe on the right of free speech and association, deeming ICCPR Article 7 prohibitions against “cruel, inhuman, or degrading treatment or punishment” to apply only to treatment deemed “cruel and unusual” under domestic constitutional law, declining to adhere to ICCPR Article 15, paragraph 1, and reserving the right to treat juveniles as adults under certain circumstances, notwithstanding the provisions of ICCPR Article 10, paragraphs 2(b) and 3, and Article 14, paragraph 4).

²²² ICCPR, *supra* note 185, art. 25.

²²³ *Id.* art. 2, para. 1.

²²⁴ *Id.* art. 2, para. 3 (emphasis added).

²²⁵ *Id.* art. 2, para. 2 (emphasis added).

materially from a reservation.²²⁶ As stated by two leading commentators on this subject:

[T]he Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to the ratification of treaties, not to pass domestic legislation. A declaration is not part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are . . . not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. *The treaty is law. The Senate's declaration is not law.* The Senate does not have the power to make law outside the treaty instrument.²²⁷

Stated differently, the Senate's advice and consent power under

²²⁶ See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 314 cmt. d (1986) (noting that when the United States accedes to a treaty with a reservation, this statement has domestic legal effect, whereas other indications that the President or Senate assigned a distinct meaning to the treaty, such as declarations, are only pertinent to treaty interpretation in "the same way that the legislative history of a statute is relevant"); see also *supra* notes 215 & 217 (noting that treaty language controls unless it is inconsistent with the intent of the treaty's signatories).

²²⁷ Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 296-97 (1991) (emphasis added); see HENKIN, *supra* note 201, at 202 (describing the Senate's practice of declaring treaties non-self-executing as "'anti-Constitutional' in spirit"); Henkin, *supra* note 209, at 346 (arguing that non-self-execution declarations by the Senate may be unconstitutional); see also Cinotti, *supra* note 196, at 1291 (contending that "the President and the Senate do not have constitutional authority to make a non-self-execution declaration legally binding"); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1257, 1265 (1993) (quoting with approval the International Law Association's statement that it "may well be that a non-self-executing declaration . . . does not bind the judicial branch"); John Quigley, *The International Covenant on Civil and Political Rights and the Supremacy Clause*, 42 DEPAUL L. REV. 1287, 1298 (1993) (arguing that courts, rather than the Senate, should determine whether or not a treaty is non-self-executing); Charles H. Dearborn, III, Note, *The Domestic Legal Effect of Declarations that Treaty Provisions Are Not Self-Executing*, 57 TEX. L. REV. 233, 251 (1979) (arguing that declarations might be "an invalid attempt by the Senate to enact domestic legislation without the concurrence of the House").

Article II, section 2,²²⁸ extends only to the making of *reservations* that require changes to treaties before the Senate's consent will be effected. A *declaration* that has domestic effect is, in reality, an attempt to legislate concerning the internal implementation of a treaty. But the power to legislate is not granted to the Senate under Article II. Legislation may only be enacted through bicameral adoption and presentation to the President as set forth in Article I.²²⁹ Not only is there virtually unanimous academic agreement on this point,²³⁰ the only case decided supports this conclusion.

In *Power Authority of New York v. Federal Power Commission*,²³¹ the D.C. Circuit held that a "reservation" by the Senate in a bilateral treaty with Canada was ineffective because the reservation only involved U.S. domestic law.²³² For the reservation to be binding on the judiciary, the court reasoned, it had to constitute an actual part of the treaty:

A true reservation which becomes part of a treaty is one which alters "the effect of the treaty in so far as it may apply in the relations of [the] State with the other State or States which may be parties to the treaty." It creates "a different relationship between" the parties and varies "the obligations of the parties proposing it."²³³

Because the reservation was merely an expression of the Senate's view of domestic policy, it was not part of the treaty and thus did not become domestic law under the Supremacy Clause, thereby binding the courts.²³⁴

²²⁸ U.S. CONST. art. II, § 2, para. 1 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

²²⁹ *INS v. Chadha*, 462 U.S. 919, 958 (1983).

²³⁰ See sources cited *supra* note 227.

²³¹ 247 F.2d 538 (D.C. Cir.), *vacated as moot*, 355 U.S. 64 (1957).

²³² *Id.* at 541. Although called a "reservation" in the opinion, as will be seen from the discussion of this case, the court is actually talking about a declaration. See *id.* (calling the Senate's statement a "reservation" but noting that the statement "made no change in the treaty" and was "not a counter-offer").

²³³ *Id.* at 541 (internal citation omitted).

²³⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), is not to the contrary. In that case, the issue was whether the right to be free from arbitrary abduction and detention was protected under customary international law. The plaintiff did not sue directly under the ICCPR, but rather argued that the ICCPR's terms helped establish the relevant principle of customary international law for purposes of his Alien Tort Statute claim. The Court relied on the Senate's non-self-execution

5.2. *The ICCPR and the Courts*

There should be little doubt that the non-self-execution declaration in the ICCPR is merely an expression by the Senate concerning a purely domestic issue, and like the reservation in *Power Authority*, did not modify the law (i.e., the ICCPR), and thus lacks binding force. Although the Senate's views are relevant to the interpretation of the treaty,²³⁵ whether there is a private right of action under the ICCPR should be decided by the courts on the basis of the totality of the available evidence.²³⁶

There is no need to go further than the unequivocal language of the ICCPR to conclude that it is a classic self-executing treaty which creates individual substantive rights enforceable in the courts of the United States.²³⁷ To begin with, paragraph 1 of Article 2 requires the United States "to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized" in the ICCPR.²³⁸ Under Article 2, paragraph 3, subparagraph (a), there is

declaration in the ICCPR as one factor to support its conclusion that the ICCPR could not, by itself, establish a rule of customary international law. But the Court was not faced with (nor did it decide) the question of whether the Senate's declaration ipso facto prevents a plaintiff from suing directly under the ICCPR. Because the question in *Sosa* was not the binding effect of the Senate's non-self-execution declaration in determining whether the ICCPR establishes a private cause of action, the parties did not present the Court with (and it did not address) the separation of powers arguments questioning the Senate's authority to issue such declarations. See, e.g., Reply Brief for the United States at 9, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

²³⁵ See, e.g., *United States v. Stuart*, 489 U.S. 353, 366-67 (1989) (looking to Senate reports and floor debates to aid in interpreting the Convention between the United States and Canada Respecting Double Taxation of 1942).

²³⁶ See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988) ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.") (quoting *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 431-32 (1943)); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 534 (1987) (stating that treaty interpretation begins with the text of the treaty, but that the treaty's history and practical construction adopted by the parties are relevant); *Air France v. Saks*, 470 U.S. 392, 400 (1985) (stating that "[i]n interpreting a treaty it is proper . . . to refer to the records of its drafting and negotiation"); *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279, 1283 (9th Cir. 1985) (explaining that the most important factor in determining whether a treaty is self-executing is the language, purpose, and intent behind the treaty).

²³⁷ See generally Paust, *supra* note 227 (arguing that, based on the treaty's language, rights to remedies are not dependent on future implementing legislation).

²³⁸ ICCPR, *supra* note 185, art. 2, para. 1.

an obligation on each signatory "[t]o ensure that any person whose rights or freedoms as herein recognized are violated *shall have an effective remedy*."²³⁹ Subparagraph (b) thereof sets forth the obligation "[t]o ensure that any person claiming such a remedy shall *have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop [further] possibilities of judicial remedy*."²⁴⁰ Finally, it is important to note that at the time of ratification the United States made the representation that "existing U.S. law generally complies with the Covenant; hence, *implementing legislation is not contemplated*."²⁴¹ It would seem that the United States' intention, consistent with the aforementioned language of the ICCPR, was to allow individuals access to the courts without the need for additional national legislation.

Although the discussion of whether there is an individual cause of action to enforce the ICCPR in the courts of the United States is an interesting academic and legal question, and official resistance to such constitutes corroborative evidence on the underlying attitudes that have supported the United States' colonial stance, for present purposes these are issues that are secondary to the principal theme under discussion. The main point is that the United States has become a party to the ICCPR and other similar international agreements, and thereby has announced and committed itself to treat *all of its citizens equally*. This, of course, is in addition to what the letter and ethos of the Constitution already speak to and require of the United States in its relationship to its citizens.

Unfortunately, we are faced with the undeniable fact that, at least as to the U.S. citizens residing in Puerto Rico and the other territories, the United States has failed and continues to fail in its fiduciary duty as *parens patriae* of all of its citizens to live up to its aforementioned commitments. This failure inevitably emanates from the continued adherence by the United States to the words and spirit of the *Insular Cases* and their progeny.

²³⁹ *Id.* art. 2, para. 3. (emphasis added).

²⁴⁰ *Id.* (emphasis added).

²⁴¹ S. EXEC. REP. NO. 23, at 19 (1992) (emphasis added); *see also id.* at 10 ("In general, the substantive provisions of the Covenant are consistent with the letter and spirit of the United States Constitution, and laws, both state and federal.").

6. CONCLUSIONS AND IMPLICATIONS

As has become apparent, the *Insular Cases* were wrongly decided. They contravened established doctrine that was based on sound constitutional principles, substituting binding jurisprudence with theories that were unsupported in our traditions or system of government and which were specifically created to meet the political and racial agendas of the times. The basis on which they were premised—that the United States could hold territories and their inhabitants in a colonial status *indefinitely*—was unprecedented in our history and unauthorized by our Constitution. The interpretation given to the Constitution by the *Insular Cases* and *Balzac*, permitting the perpetuation, without limitation, of a subclass of United States citizens unequal in rights to the rest of the body politic, is a constitutional incongruity that is unsupportable morally, logically, or legally.

Furthermore, whatever underpinnings may have existed for these cases at the time they were decided have been totally eroded since then. If there was a justification dictated by the historical period in which they came about, this justification is no longer available. *Plessy* has been reversed by *Brown*,²⁴² making racial discrimination legally and ethically unacceptable. *Discrimination on the basis of locality makes as much sense as such opprobrious conduct based on race, and therefore should also be discarded as a constitutional principle.*

Puerto Rico is part of the First Circuit, and a United States court of appeals sits in Puerto Rico several times a year and exercises Article III powers while there. An Article III district court now sits in Puerto Rico with the same jurisdiction as other Article III district courts throughout the nation,²⁴³ and provides nearly one-third of the appellate case work of the First Circuit. One of the appeals judges on that court resides in Puerto Rico, and sits and decides cases of general federal application, yet does not, while in Puerto Rico, have the same civil and political rights as the other judges on the Court of Appeals for the First Circuit. How can the Constitution be applied in such a balkanized, arbitrary, and

²⁴² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁴³ Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764 (1966) (codified at 28 U.S.C. §§ 119 & 134 (2000)).

irrational manner? The language of the Constitution is “too plain and unambiguous to permit its meaning to be thus influenced.”²⁴⁴

By its repeated decisions upholding the *Insular Cases* and their progeny, the Supreme Court has created what amounts to a political ghetto in the territories, from which there is no escape or solution by its inhabitants because they lack the political power to influence the political institutions that can make the necessary changes to this situation. Puerto Rico’s U.S. citizens have no effective way of exercising the political pressure that is normally available to U.S. citizens residing in the States on the political branches of the national government, where all the fundamental decisions affecting Puerto Rico are made. Thus, the judicial posture commonly expounded, to the effect that these are issues that must be resolved through political means, is flawed ab initio because, in the case of the U.S. citizens of Puerto Rico, no effective political means exist to correct their colonial condition. The claim of “political question” in the case of Puerto Rico is a flagrant subterfuge to avoid taking the action that has been sanctioned by the Supreme Court as appropriate when extreme circumstances are presented of a pervasive deficit in the democratic processes: when courts are faced with a refusal of the political branches to correct the abuses against a discrete group of citizens that is completely under the sovereignty of the United States, the courts are required to act to correct those abuses.²⁴⁵

Over one hundred years of denigrating colonial status should be sufficient evidence of the need for judicial action. The Supreme Court, as it did with *Plessy*, must step forward to correct the wrong it created by sanctioning the *Insular Cases* and their progeny. The continued vitality of these cases represents a constitutional antediluvian anachronism that has created a de jure *and* de facto condition of political apartheid for the U.S. citizens that reside in Puerto Rico and the other territories.

²⁴⁴ *Downes v. Bidwell*, 182 U.S. 244, 374 (1901) (Fuller, C.J., dissenting).

²⁴⁵ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).