The Story of Downes v. Bidwell: "The Constitution Follows the Flag ... But Doesn't Quite Catch up With It"

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Introduction

The May 27, 1901 ruling of the United States Supreme Court in Downes v. Bidwell, particularly Justice Edward Douglass White’s opinion, is today the most important of the Insular Cases. With the U.S. Armed Forces facing insurgency in the Philippines and political wrangling in Cuba and Puerto Rico following the Spanish American War, the policy motivations for the result in this case were straightforward. The United States was becoming a world power, which, at the turn of the twentieth century, meant becoming an imperial nation capable of holding colonies on which to establish military bases all over the world.

1 This is the quoted response of then Secretary of War Elihu Root when—after hearing a reading of the five opinions of the Supreme Court in the Downes case—confused reporters asked how the Justices had replied to the question “Does the constitution follow the flag?” See George Shiras III, Justice George Shiras, Jr. of Pittsburgh 191 (Winfield Shiras ed., 1953) (citing 1 Arthur Wallace Dunn, From Harrison to Harding 256-57 (1922)).

2 182 U.S. 244 (1901).

3 Id. at 287-344 (White, J., concurring).

Downes effectively provides constitutional authorization for this process by interpreting Article IV, Section 3, Clause 2 of the Constitution, the Territorial Clause, to give Congress almost unfettered authority to deal with territorial possessions.

The Territorial Clause provides:

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; and nothing in this Constitution shall be so construed as to Prejudice any claims of the United States, or of any particular state.5

Initially, this clause was applied to most of the thirty-seven territories that became states after the original thirteen colonies.6 For example, Alaska and Hawai‘i were at one time regulated by legislation passed by Congress, but that legislation was repealed or became obsolete after statehood.7 Today, the clause applies to Puerto Rico, the Virgin Islands, Guam, the Northern Marianas, American Samoa, the Federated States of Micronesia, the Marshall Islands, and Palau.8 Statutes passed under the authority of the Territorial Clause refer to these areas not as “territories,” but rather as “possessions,” “insular possessions,” or “insular areas.”9 Pursuant to these statutes, the United States controls

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5 U.S. Const. art. IV, § 3, cl. 2.

6 Texas, which, from the American perspective, seceded from Mexico and became a state after being an “independent Republic,” is a possible exception. For a succinct distinction between the continental territories and the island territories, see Arnold H. Leibowitz, Defining Status: A Comprehensive Analysis of United States Territorial Relations 4–16 (1989).

7 As to Alaska, see 48 U.S.C. §§ 21–488f (2003). Alaska was officially admitted to statehood on January 6, 1959. See Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 6, 1959); Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339. As to Hawai‘i, see 48 U.S.C. §§ 611–21 (2003). Hawai‘i was admitted by law as of March 18, 1959. See Act of Mar. 18, 1959, Pub. L. No. 86–3, 73 Stat. 4 (1959). Section 2 of this law provided for the new state to include all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawai‘i on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

Id.

8 Leibowitz, supra note 6, at 3.

9 See generally 48 U.S.C. §§ 731, et seq. (2003) (title named “Territories and Insular Possessions”). The Department of the Interior’s Office of Insular Affairs currently defines the term “insular area” as follows:

A jurisdiction that is neither a part of one of the several States nor a Federal district. This is the current generic term to refer to any commonwealth, freely associated state,
or has a legal relationship with these eight populated island territories and controls several unpopulated islands. The populated territories collectively have well over four million residents, and among this group, the Samoans, as well as the residents of the three so-called Free Associated States—Micronesia, the Marshall Islands, and Palau—are not citizens of the United States.

Some may consider a 1901 case to be ancient history, but *Downes* and its progeny still govern all of these regions. This chapter will

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10 In its “Island Fact Sheet,” the Department of the Interior’s Office of Insular Affairs identifies the unpopulated island territories of the United States under two designated categories: “United States Territories under the Jurisdiction of OIA,” which includes Wake Atoll and certain areas of the Palmyra Atoll, and “U.S. Territories under the Jurisdiction of the U.S. Fish and Wildlife Service,” which includes Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Navassa Island, and most of Palmyra Atoll, often referred to together as the Guano Islands. Office of Insular Affairs, Dep’t of the Interior, The Islands, at http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm (last visited February 4, 2007); see generally Leibowitz, supra note 6, at 3 (a listing of the current U.S. territorial possessions). On the Guano Islands, see Guano Islands Act of 1856, ch. 164, § 1, 11 Stat. 119 (codified at 48 U.S.C. § 1411 (2003)) (“Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.”)

11 The Puerto Rican population of close to four million, as discussed below in note 15 and accompanying text, far exceeds the populations of other island territories, which the 2000 Census found were as follows: American Samoa, 57,291; Guam, 154,805; the U.S. Virgin Islands, 108,612; and the Commonwealth of the Northern Mariana Islands, 62,221. U.S. Census Bureau, United States Census 2000, The Island Areas, at http://www.census.gov/population/www/cen2000/islandareas.html (last visited Aug. 27, 2006).


13 See, e.g., Torres v. Puerto Rico, 442 U.S. 465 (1979); see also Margaret Leech, *In the
explore the Insular Cases as a way to understand the role of race in articulating the relationship between American territorial expansion and American citizenship—between American empire and American democracy. The chapter begins by historicizing the Downes opinion. My aim here is threefold: (1) to provide a brief description of the effects of Spanish colonial rule on Puerto Rico; (2) to set forth the circumstances leading up to the Spanish American War; and (3) to illustrate how the outcome of that war helped to shape America’s identity as a colonial power. Next, the chapter tells the story behind the Downes opinion itself, showing how the law reflected an uneasy balance between declaring the island to be both a U.S. possession, and one with a separate, not entirely “American” population. As this story and its aftermath will reveal, Downes and other early cases made clear that Puerto Rico did not enjoy the same status as states when it came to matters of commerce and trade. Because Congress exercised plenary power over the insular possessions, it could impose tariffs and taxes similar to those levied on foreign countries. A later generation of Insular Cases used Puerto Rico’s separate and subordinate status to relegate its residents to second-class citizenship. Yet another generation of decisions make clear that the doctrine first set forth in Downes and elaborated in these later opinions remains good law today. The resiliency of decisions that signaled the rise of the United States as an imperial power is then explained by turning to the normative ideas about race, citizenship, and empire that lay behind the Insular Cases.

Social, Historical, and Legal Context:

Our Islands and Their People

The Downes case arose because Puerto Rico, a Spanish colony for over 400 years, had just been acquired by the United States as part of the spoils of war. Shortly before the war, Puerto Rico had enjoyed newfound autonomy under Spanish rule, and its residents expected that the American takeover would eventually lead to statehood or independence. As Downes and its progeny would make clear, however, U.S. officials devised a new model for insular possessions, one of territorial acquisition but only partial political incorporation.

Puerto Rico in 1901: Self-Government and Spanish Citizenship that Did Not Last Long

Puerto Rico is a group of islands bordered by the Atlantic Ocean and Caribbean Sea, the main island of which is the home to all but a few

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14 José de Olivares, Our Islands and Their People as Seen with Camera and Pencil (William S. Bryan Wheeler ed., 1899) is a large two-volume coffee-table book set, which was sold door-to-door after the war, purportedly describing the new island territories.
thousand of the inhabitants. Puerto Rico is the most populous of the current island territories of the United States, with estimates in 2006 placing the number of residents at 3,927,188; perhaps not surprisingly, then, Puerto Rico figures prominently in most of the Insular Cases.\(^\text{15}\) Because U.S. citizens have not moved to Puerto Rico in substantial numbers, Puerto Rico remains a culturally Latina/o island, even after more than one hundred years of U.S. occupation.\(^\text{16}\) Additionally, a number of Puerto Ricans have migrated to the mainland. The 2000 Census found 3,406,178 persons in the fifty states and the District of Columbia who identified themselves as “Hispanic or Latino,” specifically “Puerto Rican,” making Puerto Ricans one of the largest Latina/o groups in the United States.\(^\text{17}\)

For about five centuries before Christopher Columbus claimed the territory for Spain in 1493, Taino and Carib natives lived on the Puerto Rican islands. But the Spanish colonial period lasted for a little more than four centuries, during which period the people we now refer to as Puerto Ricans were—through racial, legal, political, and cultural processes—created.\(^\text{18}\) On the eve of the Spanish American War in 1898, Puerto Rico and Cuba were the last outposts of Spain in the Americas. Mexico (the viceroyalty of New Spain) and Central America (the captancy of Guatemala) became independent in 1821 in the aftermath of the Napoleonic invasion of Spain. Three years later, the Battle of Ayacucho in the Andes marked the end of the wars of independence in South America.\(^\text{19}\)


\(^{16}\) According to the 2000 U.S. Census 98.8% of Puerto Rican citizens describe themselves as “Hispanic or Latino” and 95.1% as “Puerto Rican.” U.S. Census Bureau, Profile of the General Demographic Characteristics: 2000, Geographic Area: Puerto Rico, at http://factfinder.census.gov/servlet/QTTable?_bm=y & -geo_id=04000US72 & -qr_name=DEC_2000_SF1_U_DP1 & -ds_name=DEC_2000_SF1_U (last visited Aug. 27, 2006).


\(^{19}\) The Spanish empire in the Americas was almost totally lost between 1821 and 1824, though Cuba and Puerto Rico were still under Spanish control. See José Terrero, Historia de España 456-58 (Juan Regla ed., 1972).
In a process that had started with the revolution of September 1868 in Spain and continued with the new constitution of 1876, the Spanish crown began to reconsider the legal regime governing the islands of Cuba and Puerto Rico. Article 89 of the Constitution of the Spanish Monarchy of 1876 gave the government the power to issue special legislation for the governance of the "provincias de ultramar" (the overseas provinces). Clause 2 gave Cuba and Puerto Rico the right to be represented in the Cortes—the Spanish legislative body—once special laws to that effect were enacted. Over the next few years, Spain granted Cuba and Puerto Rico increasing levels of home rule. Due to political turmoil in Spain, however, this constitutional authorization was not implemented in earnest until 1897. On November 25, 1897, Spain enacted the Charter of Autonomy for Puerto Rico. The charter granted self-government by an elected lower chamber of the legislature, a partially elected and partially appointed upper legislative chamber, and an appointed high executive, known as the governor-general. As part of the autonomy process, Spanish citizenship was formally granted to the native-born inhabitants of Cuba and Puerto Rico that same month. A separate decree extended the civil rights guarantees of the 1876 Spanish constitution to Puerto Rico. These reforms were designed to calm civil unrest on the island. For example, in the late 1890s, Luis Muñoz–Rivera, the leader of Puerto Rico’s principal political group, the Autonomist Party, rejected plans for a military attack against the Spanish proposed by Puerto Rican pro-independence forces in exile in New York.

The Charter of Autonomy set the stage for the final Spanish election in Puerto Rico. On March 27, 1898, 121,573 voters went to the polls. On
July 17, 1898, the new local government was installed. Puerto Rico’s Autonomist and Liberal Parties welcomed the charter and elected the country’s first homegrown government just weeks before the start of the Spanish American War. But the Charter of Autonomy still proved unacceptable to the more stridently pro-independence Puerto Ricans in New York, some of whom encouraged the United States to invade. After Autonomist leaders in Puerto Rico rejected the call for revolution against Spain, officers of the Puerto Rico Section, a pro-independence group originally founded by exiles in 1892 as the Borinquen Club, met with Senator Henry Cabot Lodge in 1898 to ask the “United States government for help in evicting Spain from Puerto Rico.” The pro-independence puertorriqueñas/os in New York even provided interpreters and scouts for the U.S. Army. To be sure, many believed that the United States would quickly give Puerto Rico independence after the invasion, as would happen in Cuba. What pro-independence forces clearly underestimated in both Puerto Rico and Cuba was how disruptive America’s imperial dreams would be for these islands. The concerns expressed by some Puerto Rican leaders were largely ignored. For example, Ramón Emeterio Betances worried that “if Puerto Ricans don’t act fast after the Americans invade, the island will be an American colony forever.”

And indeed, in July 1898, the americanos invaded, and the Autonomist experiment ended before Puerto Rico had a real chance, however limited, to rule itself. Nevertheless, native political thinking and organizing had developed greatly during the nineteenth century, and when Americans arrived in Puerto Rico, they found sophisticated politicians and parties ready to support, challenge, and oppose the new sovereign.

Between September 1898 and April 12, 1900—following the quick American victory in the war—Puerto Rico was under military rule, supervised by the War Department. During this period, the “partidas,”

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27 It was an imperfect form of home rule, as the Spaniards retained the authority to appoint certain members of the upper chamber of the legislature and to set the eligibility requirements, which ensured that only the economically powerful classes would be allowed to run for office. The law required that candidates for office have “an annual income of four thousand pesos.” Tit. III, art. 5 & 6 of the charter, P.R. Laws Ann., vol. 1, pp. 2–3. See Pedro Malavet–Vega, Historia de la Canción Popular en Puerto Rico: 1493–1898 at 293, 351, 448–49, 505–08 (1992) (explaining the income situation in Puerto Rico at the time). On the monetary units in Spanish times, see Fernando Pícó, Historia General de Puerto Rico 9 (1986).
28 Jiménez de Wagenheim, supra note 25, at 198–199.
29 See id. at 200.
30 See generally Raúl Serrano Geyls, 1 Derecho Constitucional de Estados Unidos y Puerto Rico 439–42 (1986) (describing the legal aspects of this early period of military rule);
well-organized mobs, fought in the mountains of Puerto Rico. This guerrilla class-warfare began with the poor attacking the Spaniards but quickly extended to attacks on wealthy criollas/os (creoles). The targets were mostly white mallorquines (Majorcans) and corsos (Corsicans) who owned coffee plantations and, thus, controlled what was then the most powerful part of the island economy. These were the same immigrants who arrived after Spain opened Puerto Rico and Cuba to those fleeing the wars of independence in the Spanish Americas. At the expense of the Puerto Rican poor, the U.S. military restored “order” and earned the gratitude and allegiance of some of the Puerto Rican elites.

Soon after the change in sovereignty, the former Pure and Orthodox Party became the pro-statehood Partido Republicano Puertorriqueno (Puerto Rican Republican Party). The party’s goal was “the definitive and sincere annexation of Puerto Rico to the United States. Declaration of organized territory for Puerto Rico, as a prelude thereafter to become a State of the Federal Union.” Party leaders favored accelerating the Americanization project (the process of educating the Puerto Ricans in English to become “Americans”), which hopefully would lead to statehood. Accordingly, in the party’s original political manifesto, leaders supported English as the language of instruction “in order to put the country [‘el país’ [sic], referring to Puerto Rico] in conditions more favorable soon to become a new State of the Federation.”

Luis Muñoz–Rivera continued to lead the Autonomist/Liberal Party, which also was undergoing a transformation after the invasion and

31 Creoles are persons of Spanish descent born in the colonies. See generally Fernando Picó, 1898: La Guerra después de la Guerra: 201–207 (1987) (concluding that the partidas were not a response to the United States invasion, but rather a rejection of the economic and social order that prevailed during Spanish times). See also Ángel Rivero Méndez, Crónica de la Guerra Hispanoamericana en Puerto Rico 465–72 (1973) (describing the partidas as the acts of thieves, and how they were put down by the U.S. military and the new Insular Police).

32 Picó, supra, note 31, at 195–196 (concluding that the U.S. military had “rehabilitated the wealthy [mostly non-creole] landowners as arbiters of the rural [economic and social] order,” after noting that both poor and wealthy criollos continued to challenge military rule).


34 Id. at 261.
became the Partido Federal Puertorriqueño (Puerto Rican Federal Party) in October 1899. Perhaps surprisingly, the party’s first official platform supported the immediate grant of territorial status to Puerto Rico and eventual statehood.\(^35\) But it also favored the absolute autonomy of the island’s municipal governments to handle what the party called *asuntos locales* (local matters), especially education.\(^36\) This put leaders in direct conflict with the U.S. administrators and with the Puerto Rican Republican Party. On October 26, 1900, an editorial in *La Democracia*, the newspaper published by the Federal Party and edited by Muñoz–Rivera, criticized U.S. administrators as well as the Republican Party and its political thugs.\(^37\) The editorial ended with a call for withdrawal from the first election. Consequently, in 1900 the Federal Party boycotted the election.

In the November 1900 election, of 123,140 registered voters in Puerto Rico, 58,367 voted for Republicans, and 148 voted for Federals. Republican candidates were elected to all thirty-five positions in the newly created House of Delegates, and the sole Puerto Rican delegate to the U.S. Congress, called the resident commissioner, also was a Republican. The Federal Party did not wholly withdraw from the 1902 elections, and its candidates were elected from two Puerto Rican districts. But the Puerto Rican Republican Party’s candidate was again elected resident commissioner, and the majority of the delegates to the local legislative body were Republicans.\(^38\)

The turn of the twentieth century was characterized by *turbas republicanas* (Republican mobs or riots). The former Autonomists and supporters of the Federal Party were attacked by violent gangs associated with the Republican cause. These planned, non-spontaneous acts of violence were generally tolerated, and sometimes supported, by the U.S. authorities. In some of the more serious attacks, for example, one that

\(^{35}\) *Programa del Partido Federal, 1 de Octobre de 1899, in 1–1 Lucha Política*, supra note 33, at 271–72. In February 1904, the Federal Party dissolved itself and was reconstituted as the Partido Unión de Puerto Rico (Union Party of Puerto Rico). The party again included among its principal leaders Luis Muñoz–Rivera, the Autonomist Party founder, but it also now included Rosendo Matienzo–Cintrón, a prominent independence leader, as well as another important independence supporter, José de Diego. Again displaying the colonial political pragmatism that recognized strength in numbers, the party also included statehood supporters. Its name was specifically chosen to describe the intent to unify the party members’ diverse political views regarding status. The official minutes of the convention can be found in 1–1 *Lucha Política*, supra note 33, at 282–85.

\(^{36}\) See *Programa del Partido Federal*, supra note 35, parr. 6, p. 271, and parr. 11, p. 272.


\(^{38}\) Bayrón Toro, supra note 26, at 115–16, 120–21.
took place on September 13, 1900, the turbas ransacked the offices of the Federal Party’s newspaper, *El Diario de Puerto Rico*, destroying the printing equipment. The next day, the turbas shot at Muñoz-Rivera’s home, but the authorities actually charged him and other Federal Party members with crimes. Although Muñoz-Rivera and the other defendants were acquitted of all charges on December 22, 1900, the atmosphere of fear and intimidation led many liberal politicians to flee Puerto Rico. Muñoz-Rivera left for New York early in 1901 with his wife and infant son, Luis Muñoz–Marín, and did not return to Puerto Rico until January 26, 1904.39

**The United States in 1901: In the Afterglow of the Spanish American War**

For the United States, the Spanish American War and the *Downes* ruling brought to an end the age of Northwest Ordinances and Jacksonian manifest destiny,40 which had culminated in statehood, as the prevailing theory of territorial expansion of the United States, in favor of a new colonial paradigm. In the aftermath of the war and the U.S. takeover of Puerto Rico, the Philippines, Guam, and Cuba, the United States Supreme Court gave constitutional approval to the acquisition and control of island territories for the sake of legal, political, and military control, rather than for national territorial expansion, accompanied by “immigration and settlement” by persons of acceptable American stock who were already citizens of the United States.41 Theodore Roosevelt called this “Americanism”; Henry Cabot Lodge labeled it the “large policy”; but it was imperialism, which the principal architect of America’s naval doctrine at the time, Alfred T. Mahan, labeled as such and defined as “the extension of national authority over alien communities . . . This broader

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40 By this I mean the phrase as it was first used by Democrats aligned with President Andrew Jackson, who favored the incorporation of the Oregon territories, Texas and the spoils of the Mexican–American War into the United States, eventually as states of the union. More generally, it was used to justify expansion of the United States, again through statehood, from the Atlantic to the Pacific. I am not using it in the sense that mostly–Republican “expansionists” of the late 1890s and early twentieth century used it, since I prefer the clarity and distinguishability of the imperialism discourse, especially as it occurred around the elections of 1896, 1900, and 1904. *See generally* Julius W. Pratt, *Expansionists of 1898: The Acquisition of Hawai‘i and the Spanish Islands* 1–33 (1936) (contrasting territorial expansion of the early nineteenth-century United States, mostly associated with Democrats, with the late nineteenth-century overseas expansionism advocated mostly by the Republicans). *See also* Zimmermann, *supra* note 4, at 13 (noting that most politicians who favored the concept avoided the term “imperialism” and barely tolerated “expansionism”).

definition implies that a country does not have to own the territory of an alien community in order to exercise imperial authority over it.”

Behind the political debate over territorial expansion was a professional debate over military doctrine. Prevailing doctrine deemed naval power the most important way to project military and political authority abroad. A show of force was seen as essential to being a strong player in international political and economic affairs, and to ensuring the security of the United States. No one influenced this thinking more than Alfred T. Mahan, a graduate of the U.S. Naval Academy at Annapolis and a commissioned naval officer. He became president of the Naval War College, reportedly much to the chagrin of Annapolis and Navy authorities, in 1886. It was there that he became a naval history scholar and developed a new vision of American naval doctrine. This doctrine was driven by the need to project American power abroad. It required a large navy, with large capital ships, a canal in Panama, and the ability to maintain naval coaling stations throughout the world, especially in the Atlantic and Pacific Oceans. Mahan was a good scholar and a prolific writer, and his books and magazine articles became highly influential in political circles in Washington. Two of his particularly important fans were Massachusetts Senator Henry Cabot Lodge and future President Theodore Roosevelt.

Racism, supported by the pseudo-science of Social Darwinism, also justified the takeover of lands belonging to “inferior races.” Rubin Francis Weston explained:

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

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42 Zimmermann, supra note 4, at 13.

43 See id. at 85–122 (referring to Mahan as a “pen-and-ink sailor”).


45 Mahan and Roosevelt met at a critical time. In 1887, Mahan invited Roosevelt to lecture at the War College on the subject of the War of 1812, which Roosevelt had studied while a student at Harvard. Zimmermann, supra note 4, at 92.

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
relation of the Negro to a status of second-class citizenship indicated
that the Southern point of view would prevail. The racism which
caus ed the relegation of the Negro to a status of inferiority was to be
applied to the overseas possessions of the United States.47

Indeed, an important effect of the Spanish American War was to
unite white southerners and northerners against a common enemy. In
particular, the War served as a military reconciliation between white
officers of the former Confederate armed forces and the professional
military establishment. On Memorial Day in 1905, Senator Foraker, for
whom Puerto Rico's Organic Act of 1900 was named, delivered an
address in which he said:

The Spanish-American War was attended with many good results,
but one of the best was the impetus it gave to the restoration of
cordial relations and the spirit of union and Americanism through­
out the country. It gave the young men of the South an opportunity
to put on the blue and show their loyalty and devotion to the flag,
and to win, as they did, a heroic share of the glory and greatness
that were added to the Republic; while their representatives in
public life distinguished themselves by the conspicuous and patriotic
character of their utterances and services. What has followed is but
the natural result, and every survivor of the Union Army should be
profoundly thankful that his life has been spared to see such a
complete vindication of all that for which he contended.48

The War targeted the last Spanish island colonies in the Caribbean
and Pacific. In President William McKinley's instructions to the U.S.
delegation that negotiated the Treaty of Paris, he ordered that only one
full territory be demanded from the Spanish: Puerto Rico.49 Although the


49 *Instructions of the President to the United States Peace Commissioners, September 16, 1898, in U.S. Dep't of State, Papers Related to the Treaty with Spain*, S. Doc. No. 56–148 at 3–4 (1901). These papers were initially secret, but on February 5, 1901, the Senate lifted the "injunction of secrecy" and ordered the publication of 3000 volumes. *Id.* at 1. I specify "full" territory because the U.S. did demand the cession of individual islands in the Ladrones and Philippine archipelagos, Guam and Luzón, respectively. *Id.* at 4, 7.
islands were important to the United States for military and economic reasons, their principal attraction was their strategic location when the Spanish American War broke out. Indeed, the acquisition of Puerto Rico was contemplated from the very conception of the new “American empire” by two of its principal architects:

Assistant Secretary of the Navy Theodore Roosevelt, in a personal letter to Senator Henry Cabot Lodge, wrote: “. . . do not make peace until we get Porto Rico.” Lodge replied: “Porto Rico is not forgotten and we mean to have it. Unless I am utterly . . . mistaken, the administration is now fully committed to the large policy that we both desire.”

After a failed ultimatum to Spain to pacify Cuba or leave, the conflict began on April 25, 1898. Congress then declared war, retroactive to April 21, 1898, the date on which the U.S. warship Nashville had captured the Spanish ship Buenaventura. Although the campaign cannot be described as long or especially bloody, young men on both sides died and those who lived did so in fear. In the Puerto Rico campaign, seventeen Spanish soldiers were killed, eighty-eight wounded, and 324 taken prisoner. Only three U.S. soldiers were killed, and forty were wounded, mostly by Puerto Rican irregular troops. The Spanish forces in Puerto Rico did not put up much of a fight; the guns of San Juan had not been fired in hostility since they repelled the British invasion in 1797, and they had not been upgraded since then. The United States quickly captured the island. U.S. forces took Ponce, the largest city in the south, on July 28th, without firing a shot. At that time Major General Nelson Miles issued a proclamation announcing:

To the inhabitants of Porto Rico: In the prosecution of the war against the Kingdom of Spain by the people of the United States, in the cause of liberty, justice, and humanity, its military forces have come to occupy the Island of Porto Rico . . . . They bring you the fostering arm of a nation of free people, whose greatest power is in its justice and humanity to all those living within its folds.

The chief object of the American military forces will be to overthrow the armed authority of Spain and to give to the people of


51 President William McKinley signed the resolution on April 20. On April 21, the U.S. ambassador to Spain delivered an ultimatum to the Spanish government, giving it until noon on April 23, 1898, to pacify Cuba or leave. See Rivero Méndez, supra note 31, at 18–24.

52 Id.

53 Id. at 28; Héctor Andrés Negroni, Historia Militar de Puerto Rico 340 (1992).
your beautiful island the largest measure of liberty consistent with this military occupation. . . . [We have] come to bring protection, not only to yourselves but to your property, to promote your prosperity and bestow upon you the immunities and blessings of liberal institutions of our government.\textsuperscript{54}

By August 12, 1898, the United States had ended its military operations in Puerto Rico, and on September 14, 1898, most of the remaining Spanish troops left the island. October 18th was the final day for the official surrender of San Juan to the U.S. troops, and the last few Spanish soldiers sailed aboard the warship \textit{Montevideo} on October 23rd.\textsuperscript{55} The Treaty of Paris, signed on December 10, 1898, approved by the U.S. Senate, and ratified by the President in 1899, officially ended the Spanish American War, with the island of Puerto Rico as the United States’ prize.\textsuperscript{56}

The national election of November 1900 was won by “Imperialist” McKinley over “anti-Imperialist” William Jennings Bryan. Between the time of McKinley’s reelection and his assassination at the end of 1901, he finished the takeover of the island territories, including, though somewhat reluctantly, the Philippines.\textsuperscript{57} In the fall of 1900, the President and his administration had a strong interest in the Supreme Court cases that would define the President’s authority over the newly conquered territories.

\textit{Mr. Bidwell and the 576 Boxes of Oranges from Mayagüez}

\textit{Downes v. Bidwell} is the principal storyline of the nine Insular Cases of the 1900 term.\textsuperscript{58} The term “Insular Cases” was widely used in

\textsuperscript{54} Carr, \emph{supra} note 30, at 31.

\textsuperscript{55} The \textit{Puerto Ricans}, \emph{supra} note 50, at 102–03.

\textsuperscript{56} The official title is the Treaty of Peace between the United States of America and the Kingdom of Spain. \textit{See P.R. Laws Ann.}, vol. 1, 16; \textit{see also Race and Races, supra note} 46, at 327. Article II of the treaty reads: “Spain cedes to the United States the island of Porto Rico \textsc{sic} and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.” \textit{Id.} at 327. The editors of the Puerto Rican legal collection changed the references to “Porto Rico” included in the original English to “Puerto Rico.” \textit{See P.R. Laws Ann.}, vol. 1, p. 17.

\textsuperscript{57} Zimmermann, \emph{supra} note 4, at 316 (discussing McKinley as a reluctant imperialist, especially about the Philippines); \textit{see also id.} at 393 (noting that “Bryan made ‘imperialism’ the primary issue of his campaign”); \textit{see also id.} at 401–02 (“[O]n September 6, 1901, President McKinley was shot . . . at the mammoth Pan-American Exposition in Buffalo . . . and he died on September 14 [1901].”).

the media and the legal literature to describe this litigation.\textsuperscript{59} The Supreme Court itself designated these lawsuits as the "Insular Tariff Cases," as indicated in its statement of the case in \textit{De Lima v. Bidwell}.\textsuperscript{60} The use of the word "insular" rather than "territory" distinguished the new possessions from the territories existing prior to the Spanish American War, which were destined for eventual statehood. Accordingly, the United States Supreme Court used "Insular Cases" as a reference to the lawsuits resolved in 1901 involving the territorial possessions acquired after the Spanish American War, and beginning with \textit{Hawai'i v. Mankichi}.\textsuperscript{61} As used in this context, "insular" simply means "relating to, or constituting an island."\textsuperscript{62}

Most of the cases involved the collection of taxes and tariffs on Puerto Rican agricultural products brought to the United States, but the disputes necessarily raised questions regarding the meaning of citizenship and how the U.S. Constitution would be applied to the new island territories. Taxes, crops, and citizenship were important themes in Puerto Rico in 1901. The island was still reeling, not so much from the Spanish American War as from the storm islanders called "San Ciriaco" (Saint Cyril), which hit Puerto Rico in August 1899, causing death as well as property and crop destruction.\textsuperscript{63} A popular \textit{seis}, the music of Puerto Rican farm laborers, blamed American racism and taxes for the Puerto Ricans’ post-war and post-storm suffering. After bemoaning the loss of the coffee crop, the song attributed the troubles to U.S. imperialism rather than a natural disaster:

\begin{quote}
I am, man, convinced/that the bad situation / does not depend on the cyclone / as many have believed. / The blame of the yanqui has been / that he hates us very, very much / and if what I hear is true, /
\end{quote}

\footnotesize{\textit{v. United States (Dooley II), 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States (The Diamond Rings), 183 U.S. 176 (1901).}}

\footnotesize{\textsuperscript{59} See, e.g., Charles E. Littlefield, \textit{The Insular Cases, Address Before the American Bar Association} (Aug. 22, 1901), in \textit{15 Harv. L. Rev.} 169 (1901).}

\footnotesize{\textsuperscript{60} 182 U.S. 1, 2 (1901).}

\footnotesize{\textsuperscript{61} 190 U.S. 197 (1903). The Supreme Court has used the phrase "insular cases" in twenty-three of its published opinions, starting with \textit{Mankichi}, and has referred more generally to the cases or the possessions twenty-eight times. Lexis Search conducted June 26, 2006. The most recent reference is \textit{United States v. Lara}, 541 U.S. 193 (2004) (regarding tribal authority to prosecute crimes). The Court also makes passing reference to "insular possessions" in regard to the habeas corpus statute in \textit{Rasul v. Bush}, 542 U.S. 466, 475 (2004) (case arising out of detentions in Guantánamo).}

\footnotesize{\textsuperscript{62} Webster’s Ninth New Collegiate Dictionary 628 (rev. ed. 1990).}

\footnotesize{\textsuperscript{63} Pedro Malavet–Vega, \textit{De las Bandas al Trio Borinquen: 1900–1927}, at 36–37 (2002).}
when they collect the tax/how dangerous this is! / we are really bad off, *Perucho*64

The song went on to indict the “absorbent [yanqui] race” for “not being able to take” the Puerto Ricans.

The Insular Cases were so important in their day that the filing of the cases was widely reported,65 and oral arguments occurred over a period of ten days, with the resulting opinions occupying hundreds of pages over two volumes of the U.S. Reports. Soon after the cases were decided, the 56th Congress ordered a reprinting of the parties’ written briefs and transcription of the oral arguments into a volume, which the Supreme Court Reports note—with some sense of awe—“amounted to 1075 pages.”66 Though May 27, 1901 was to be the last day of the term, the reading of the opinions in the Insular Cases took about five hours, forcing the court to reconvene the next day.67 Due to the importance of the cases, “[t]he small courtroom was crowded to repulsion throughout the day, prominent government officials and many attorneys being present, and the proceedings were followed from start to finish with keen interest.”68 Both the Washington Post and the New York Times ran front-page articles reporting on the decisions, noting that the room was full of government dignitaries, including Secretary of War Elihu Root.69

Elihu Root was a successful New York corporate lawyer with no military experience when he was selected for the position of Secretary of War by President McKinley. In choosing Root, President McKinley was “not looking for anyone who kn[ew] anything about war or for anyone who kn[ew] anything about the army; he [needed] a lawyer to direct the government of these Spanish islands.”70 The Insular Possessions were

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64 See id. at 37, 115 n.13 (noting that the song was published in the “labor newspaper *El Pan del Pobre* (the Poor Man’s Bread), on 25 August 1901”). The song’s original Spanish lyrics are: “Estoy, chico, convencido/ que la mala situación/ no depende del ciclón/ como muchos han creido./ La culpa del yanqui ha sido/ que nos odia mucho, mucho/ y si es cierto lo que escucho,/ cuando cobren el impuesto,/ ¡qué peligroso está esto!/ ¡qué mal estamos Perucho!” Id. (translation by the author).

65 See, e.g., *Held Over By Supreme Court; Cases Involving Question Whether Porto Rico and Philippines Are Part of United States Postponed*, N.Y. Times, Nov. 13, 1900, at 8.

66 *De Lima*, 182 U.S. at 3; H.R. Con. Res. 72, 56th Cong. (1901); *The Insular Cases: Comprising the Records, Briefs, and Arguments of Counsel in the Insular Cases of the October Term, 1900, in the Supreme Court of the United States, Including the Appendixes Thereto* (1901) [hereinafter *Insular Cases*].

67 *Court Decides Insular Cases*, N.Y. Times, May 28, 1901, at 1.

68 Id.


70 *Leech*, supra note 13, at 379; see also *Zimmermann*, supra note 4, at 147–48 (recounting the same story).
regulated through the War Department from 1898 until 1934, when that responsibility was shifted to the Department of the Interior.\footnote{See José Triás Monge, Puerto Rico: The Trials of the Oldest Colony in the World 58 (1997). This text incorrectly gives 1933 as the date, which is probably a typographical error, because the author’s more detailed collection, and his original source, indicates 1934; see also Triás Monge, 2 Historia Constitucional de Puerto Rico 206-214 (1981) (discussing the transfer of authority to the Department of the Interior).} As Secretary of War, Root therefore was an important figure in the Insular Cases and an interested and quite knowledgeable listener as the opinions were read.\footnote{See Philip C. Jessup, Elihu Root 348 (1938) (providing an interesting analysis of the correspondence and discussion between Root, then Secretary of State John Hay, and President McKinley on the subject of the territories, concluding that “Root did not trust Congress to do an efficient job in mapping out a form of colonial government [for the insular possessions]”). Shortly before his assassination, McKinley expressed his intention to create a bureau in the Department of State to deal with the insular possessions. On September, 14, 1901, Root wrote Hay to express his support for the “Bureau of Insular Affairs” at the Department of State, because supervision of the insular governments “can go where it belongs under civil control in the nearest approach we can make to a Department of Colonial Affairs.” \textit{Id.} at 349–50.}

In the first opinion to be read, \textit{De Lima}, the Court ruled that for the purpose of imposing import tariffs in the United States, Puerto Rico was not a foreign country but rather a U.S. territory.\footnote{De Lima v. Bidwell, 182 U.S. at 174 (narrowly construing the question presented in the case as “whether territory acquired by the United States by cession from a foreign power remains a ‘foreign country’ within the meaning of the tariff laws”).} Specifically, Justice Henry Billings Brown—speaking for himself, Chief Justice Melville Weston Fuller, and Justices John Marshall Harlan, David Josiah Brewer, and Rufus Wheeler Peckham—stated that “by the ratification of the treaty of Paris the island became territory of the United States, \textit{although not an organized territory in the technical sense of the word}.”\footnote{\textit{Id.} at 196 (emphasis added).} Therefore, sugar from Puerto Rico was not “imported merchandise” under the general tariff laws of the United States\footnote{\textit{Id.} at 175.} because the tariffs in those laws applied only to imports from foreign countries and George R. Bidwell, the collector of taxes at the port of New York, lacked the authority to levy tariffs on Puerto Rican products under the law. Accordingly, “the duties [on sugar imported from Puerto Rico] were illegally exacted, and \ldots the plaintiffs [were] entitled to recover them back.”\footnote{\textit{Id.} at 200.}

But, anticipating his future concurrence in \textit{Downes}, Justice Joseph McKenna—speaking for himself and Justices Edward Douglass White and George Shiras, Jr.—indicated in dissent that the status of Puerto
Rico represented “a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely.”

Where the majority had seen only two categories, foreign countries and domestic territories, the dissenters saw three: “foreign countries,” such as Spain, “domestic territory[,] such as New York,” and “[b]etween these extremes . . . other relations, . . . Porto Rico occup[ying] one of them.”

The majority had noted the distinction between U.S. territories that are “organized” and those that are “not organized,” but, as their votes in Downes would make clear, four of the five members of that majority (Fuller, Harlan, Brewer, and Peckham) did not intend that distinction to have constitutional significance either in setting the limits of federal authority over the insular possessions or in extending civil rights to their residents.

In fact, De Lima was immediately eclipsed by the reading of the Downes decision. Downes is the most important of the Insular Cases, because it interprets the Foraker Act of April 12, 1900, which turned Puerto Rico into an “organized” territory—one that is subject to a congressional organic statute. The Act—named after the Republican Senator from Ohio, Joseph Benson Foraker—authorized a U.S.-appointed civilian government to be established on the island, and provided for its chief executive, the governor, to be named by the President of the United States. Additionally, the President appointed the members of the cabinet, known as the Executive Council, who also acted as the upper legislative house. The lower house of thirty-five delegates was elected by the people of Puerto Rico. The Act further provided that the Chief Justice and associate Justices of the island’s supreme court would be appointed by the President of the United States. In addition, the Act created the Federal District Court for Puerto Rico. This regime lasted until 1917, when it was replaced by the Jones Act.

77 Id. at 220 (McKenna, J., dissenting).
78 Id. at 20–01.
79 The facts in De Lima occurred in fall 1899, before passage of the Foraker Act.
81 See generally Foraker Act §§ 18–27, 33–34. Section 27 provides that the Executive Council shall be one of the two houses of the legislative assembly. This appointed body arguably has been the most important element in the process of “Americanizing” Puerto Rico. See Pedro A. Cabán, Constructing a Colonial People: Puerto Rico and the United States, 1898–1932, at 122–26 (1999).
During discussion of the Foraker Bill, the U.S. Senate changed the references to “Puerto Rico” contained in the original draft to “Porto Rico,” which was used in the final proposal and was only changed by law in 1932.\(^{83}\) Beyond the misspelling of Puerto Rico’s name, the Senate made a more significant change: It removed from the draft of the bill any reference to extending the United States Constitution to the territory of Puerto Rico. This set up the legal question that would be resolved in Downes: Does the Constitution automatically apply in a U.S. territory? The Senators’ decision was explained thusly:

The change was made because of the opinion expressed by the members of the committee that our Constitution is not suited to the Puerto Rican people. The opinion was also quite general that the extension of the Constitution was not necessary. Some of the Senators [sic] expressed the opinion that the natives of the island were not yet prepared for jury trials.\(^{84}\)

What started out as a bill to extend civil rights and government to Puerto Rico, and to include the island in the free trade internal to the United States, became a much simpler organic act to enable civilian government for the island. Republican protectionists scuttled the free trade provisions and substituted a tax.\(^{85}\) Therefore, the Foraker Act imposed a tax of “fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries” on Puerto Rican imports into the United States.\(^{86}\) On November 20, 1900, Bidwell, the same collector of customs at the port of New York involved in De Lima, demanded $659.35 in taxes, a not insubstantial sum for that day:

upon thirty-three (33) boxes of oranges . . . from the port of San Juan . . . and . . . upon 543 boxes of oranges, [also] the product of the island of Porto Rico, consigned to these plaintiffs [“Samuel B. Downes, doing business under the firm name of S.B. Downes &

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\(^{83}\) See Government of Puerto Rico; Senate Committee on the Island Discusses the Foraker Bill and Makes Changes, N.Y. Times, Jan. 28, 1900, at 4. See also Act of May 17, 1932, ch. 190, 47 Stat. 158 (codified at 48 U.S.C. § 731a (1999)) (“That from and after the passage of this resolution [May 17, 1932] the island designated ‘Porto Rico’ in the Act entitled ‘An Act to provide a civil government for Porto Rico, and for other purposes,’ approved March 2, 1917, as amended, shall be known and designated as ‘Puerto Rico.’ All laws, regulations, and public documents and records of the United States in which such island is designated or referred to under the name of ‘Porto Rico’ shall be held to refer to such island under and by the name of ‘Puerto Rico.’”).

\(^{84}\) Government of Puerto Rico, supra note 83, at 4.

\(^{85}\) Leech, supra note 13, at 487–89 (detailing the development of the bill in Congress).

\(^{86}\) Foraker Act § 3. This was a change from the originally proposed bill, reportedly as a result of protests from and lobbying by sugar producers and citrus farmers. See Leech, supra note 13, at 488.
Company," at the port of New York and brought thither from the port of Mayaguez in the said island of Porto Rico during the month of November, 1900, by the steamer Ponce. The plaintiffs paid under protest, got their oranges and, represented by the New York City law firm Coudert Brothers, filed their suit that same day! The complaint, which was personally verified under oath by Samuel B. Downes, alleged a case "arising under" the Constitution, specifically: the said oranges were not liable to duty, the same not having been imported from any foreign country within the meaning of any valid statute or executive order of the United States, but were merchandise which must, under and by virtue of the provisions of the Constitution of the United States in that regard, be admitted to free entry in any port of the United States.

Procedurally, this case arose during the period of the Evarts Act of 1891, during which the circuit courts lost their appellate jurisdiction to the newly-created courts of appeals, but retained their original trial jurisdiction. Additionally, this was not long after the lower federal courts were first granted original jurisdiction over federal question complaints by the Judiciary Act of 1875, and the case predates the 1938 enactment of the Federal Rules of Civil Procedure. Therefore, rather than filing a motion to dismiss under Rule 12 of the current Federal Rules of Civil Procedure, the United States Attorney for the Southern District of New York, Henry L. Burnett, filed a demurrer arguing "[t]hat the complaint does not state facts sufficient to constitute a cause of action." On November 30, 1900, Circuit Judge Henry Lacombe heard

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87 Transcript of Record, Downes v. Bidwell, 182 U.S. 244 (1901) (No. 507), reprinted in Insular Cases, supra note 66, at 724.

88 Paul Fuller was a partner at Coudert Brothers, which represented the private litigants in the most important Insular Cases, along with Frederic R. Coudert, Jr. Fuller was born in 1856, orphaned of mother and abandoned by his father. He was raised by Charles Coudert and became a prominent attorney in the New York Bar. He helped to found Fordham Law School and was its dean. See Metropolitan Corporate Counsel, The Paul Fuller Memorial Children’s Service Program: Coudert Brothers LLP Globalizes Pro Bono, at http://www.metrocorpcounsel.com /current.php?artType=view & artMonth=August & artYear=2004 & EntryNo=1474 (last visited Aug. 27, 2006).

89 Insular Cases, supra note 66, at 724.

90 See Erwin Chemerinsky, Federal Jurisdiction 22-23 (1989) (citing Act of Mar. 3, 1891, ch. 517, 26 Stat. 826). According to Chemerinsky, “In 1911, the circuit courts were eliminated and their original trial jurisdiction transferred to the district courts.” Id. at 23 (citing Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087).


92 Insular Cases, supra note 66, at 725.
oral arguments and ruled in favor of the defendant, ordering the complaint dismissed and awarding costs to the defendant. The next day, judgment was entered dismissing the action and taxing costs in the amount of sixteen dollars and thirty cents. Downes filed a writ of error and notice of appeal with the circuit court on December 5, 1900. Judge Lacombe officially allowed the matter to proceed, and John A. Shields, clerk of the court, certified a nineteen-page record for appeal on December 7, 1900, with costs paid by canceling a “ten-cent U.S. internal revenue stamp.” The case was filed with the U.S. Supreme Court on December 11, 1900 and assigned case number 507.

Justice Brown announced the Court’s decision to uphold the lower court ruling, but he wrote only for himself. The other Justices filed separate opinions to explain their reasons for upholding the tax. Justice Brown concluded:

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 constitutional, so far as it imposes [discriminatory] duties upon imports from such island [to the United States].

Justice White’s concurring opinion, joined by Justices Shiras and McKenna, the same three who had subscribed to McKenna’s dissent in De Lima, had the most votes. Articulating what would eventually become the accepted doctrine, Justice White found that Puerto Rico, and by analogy Guam and the Philippines, was an organized, but unincorporated, territory of the United States—that is, part of the United States under the Territorial Clause, but subject to absolute congressional legislative authority under that provision and the Necessary and Proper Clause of the U.S. Constitution.

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94 Judgment, Downes, 182 U.S. 244 (No. 507), reprinted in Insular Cases, supra note 66, at 726.

95 Writ of Error, Downes, 182 U.S. 244 (No. 507), reprinted in Insular Cases, supra note 66, at 721; Clerk’s Memo with Judge’s Authorization, Downes, 182 U.S. 244 (No. 507), reprinted in Insular Cases, supra note 66, at 721–722; Certification of the Record, Downes, 182 U.S. 244 (No. 507), reprinted in Insular Cases, supra note 66, at 722. The system of canceling stamps to pay court filing fees is still used in the local courts in Puerto Rico.

96 Insular Cases, supra note 66, at 729.

97 Downes v. Bidwell, 182 U.S. at 287. The Foraker Act required “the payment of *15 per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries.” Id. at 247–48.

98 U.S. Const. art. IV, § 3, cl. 2.

99 U.S. Const. art. I, § 8, cl. 18.
Justice Gray, the final vote for the bare majority, issued a separate concurrence. In it, he sought to limit the impact of the majority’s position by characterizing Puerto Rico’s status as temporary: “If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.” Justice White’s opinion also included an important caveat suggesting that territorial status could not last forever:

Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated, the presumption necessarily must be that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.

Despite these reassurances, neither opinion sought to set a time limit on the Foraker Act’s provisions, and to this day, Puerto Rico remains an unincorporated territory of the United States, albeit with an increasingly powerful locally elected government.

Despite its division, the majority rejected the argument that, in matters of taxation, Congress could not treat the U.S. territory of Puerto Rico differently than a state; thus, Puerto Rican exports to the U.S. mainland were subject to duties not imposed on products of the states, and import tariffs on oranges, sugar, or any other Puerto Rican product were legitimately imposed by Congress. Most importantly, the Downes majority gave Congress almost unfettered discretion to do with Puerto Rico what it wanted.

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101 Id. at 346. This position was eventually adopted by a majority of the Court in Balzac, 258 U.S. 298, 305 (expressly adopting White’s opinion as controlling).

102 Id. at 343–44 (White, J., concurring) (emphasis added).

103 In other words, the equal taxation provision of the Constitution did not benefit Puerto Rico. See U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.").
The four dissenting Justices—Chief Justice Fuller and Justices Harlan, Brewer, and Peckham—joined a single dissenting opinion authored by Chief Justice Fuller.\textsuperscript{104} The dissent called for constitutional values to prevail over the desire for empire that turned Puerto Rico into a separate and subordinate possession:

[The Founders] may not, indeed, have deliberately considered a triumphal progress of the nation, as such, around the earth, but as [Chief Justice John] Marshall wrote: “It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception.”

This cannot be said, and on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.\textsuperscript{105} Justice Harlan issued a separate dissent, which has come to be held in high regard.\textsuperscript{106} In his opinion, he found the sui generis distinction between “incorporated” and “unincorporated” territories less than compelling:

I am constrained to say that this idea of “incorporation” has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel. In my opinion, Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.\textsuperscript{107}

In short, the dissenters did not believe that the insular possessions should be relegated to an uncertain status between independence and statehood based on special exceptions or the manipulation of vague legal terms.

\textit{Downes} established that, in matters of taxation, Congress could treat the U.S. territory of Puerto Rico differently than a state; thus, Puerto Rican exports to the U.S. mainland were subject to duties not

\textsuperscript{104} Downes v. Bidwell, 182 U.S. at 347–75 (Fuller, C.J., dissenting).

\textsuperscript{105} \textit{Id.} at 374–75.

\textsuperscript{106} \textit{Id.} at 375–91 (Harlan, J., dissenting).

\textsuperscript{107} \textit{Id.} at 391.
imposed on products in interstate commerce. More importantly, the *Downes* majority gave Congress almost unfettered discretion to do with Puerto Rico what it wanted. For those who believed that territorial expansion based on an imperialist and colonial model was sound national policy, the obvious contradictions between Justice Brown’s positions in *De Lima* and *Downes* were intellectually indefensible. As a result, Justice White’s concurring opinion became the preferred theory for the pro-empire view. This was not lost on the New York Times, which editorialized soon after the cases that:

The *De Lima* case was a stumbling block for Justice Brown. By asserting in that case the principle that cession and possession made Porto Rico a part of the territory of the United States he invalidated much of the reasoning by which he reached, in the *Downes* case, the conclusion that for purposes of tariff legislation the island is not territory of the United States within the prohibition which the Constitution lays upon Congress respecting uniform taxes. In making this assertion we are supported by the high authority of Horace Gray and by the clearly reasoned opinion of Justice White, speaking for himself and Justices Shiras and McKenna, concurring in the view that the Porto Rican tariff is not repugnant to the Constitution, but reaching that conclusion by a process of reasoning and interpretation solidly based upon the historical practice and judicial sanctions of a century of territorial increase. It would have been better for the reputation of the Supreme Court had the task of writing its opinion in the controlling case of *Downes* been committed to Justice White.

Some of the most prominent legal thinkers of the time took positions on the matter, most notably in early issues of the Harvard Law Review and the Yale Law Journal. Indeed, the early volumes of those two journals are full of articles debating the legal status of the new island territories. For example, Harvard Law School Dean Christopher Langdell supported unfettered congressional authority, as did Simeon E. Baldwin. Recognizing that U.S. administrators were in effective

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108 See supra note 103.


111 See, e.g., Simeon E. Baldwin, *The People of the United States*, 8 Yale L.J. 159, 159 & 167 (1899) (arguing that the phrase “the People of the United States” in the preamble of the Constitution limited the applicability of the Constitution to citizens of the states); see
control of the conquered territories, Baldwin addressed executive powers, and, referring specifically to the power of the presidency, he wrote: “all honest men, not blinded by party passion, felt that the President held great constitutional functions, which made him, in his sphere, little short of the dictator of the Republic.”112 More generally, this legal scholarship interpreted the Territorial Clause along three very different lines: (1) It conferred absolute congressional power, totally unfettered by other constitutional constraints; (2) It granted almost completely unfettered congressional authority, which was limited by fundamental constitutional guarantees; and (3) It implied the “Constitution Follows the Flag,” meaning that all constitutional guarantees and constraints on congressional power applied in the territories.113

Downes effectively established different types of “domestic territories,” but now in concurrence rather than in dissent as in De Lima. White’s distinction between incorporated and unincorporated territories was important, because at that time the United States already had other territories, most of which were then believed to be on their way to statehood, including Arizona, New Mexico, Oklahoma, Alaska, and Hawai’i. The status of these territories made arguments about absolute congressional authority unacceptable to scholars such as Abbott Lawrence Lowell.114 Lowell objected that “[t]he narrower view of the Constitution, that which limits its provisions to the area of the States [might] allow[] Congress to confiscate property in the District of Columbia or in a Territory without compensation, or ... to pass a bill of attainder against a resident of Washington or of Arizona, and order him hung without trial.”115

Although the Downes decision triggered some controversy among legal scholars, its admittedly fragmented holdings would come to be a shared constitutional vision that today enjoys almost unanimous support among the Justices, no matter their political stripes. There is currently little doubt that the Constitution does not follow the flag and that Congress has broad discretion to govern insular possessions that are

also Simeon E. Baldwin, The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory, 12 Harv. L. Rev. 393 (1899) (upon approval of the Treaty of Paris by the U.S. Senate, authority to govern the territories would be transferred from the executive to the legislative branch).

112 Simeon E. Baldwin, Absolute Power, an American Institution, 7 Yale L.J. 1, 19 (1897).

113 See Trías Monge, 1 Historia Constitucional, supra note 24, at 238 (providing a succinct analysis of the legal literature of the time).


115 Id. at 156–57.
permanently in limbo, moving neither toward statehood nor independence. *Downes* came to achieve this authoritative status through a series of later decisions, all of which are treated as part of the Insular Cases.

**The Aftermath of Downes**

In evaluating the aftermath of *Downes*, some authors take a broad view, identifying the Insular Cases as a complex series of decisions that helped create the "American Empire." 116 One might also situate the cases even more generally within the law of conquest or the "right of discovery." 117 My aim is to examine these cases as constitutional moments in which the Supreme Court both legitimized and helped to effectuate a second age of American territorial expansion at the turn of the twentieth century.

Most students of American law know *Dred Scott v. Sandford*118 for its shameful definition of African slaves as non-citizens and chattel property rather than individuals entitled to constitutional rights. But *Scott v. Sandford* was also a Territorial Clause case in which the majority stated:

> The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. *It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority.*119

*Scott v. Sandford* represents the first age of American territorial expansion, characterized by conquest of the native inhabitants followed by colonization by the growing U.S. immigrant population.

The nine Insular Cases of the October 1900 term ushered us into a second age of expansion that did not involve territorial incorporation into the nation through statehood, but rather the holding of colonies subject to almost absolute congressional authority. After the nine cases decided in the October 1900 term, the Court addressed a series of "intermediate cases," resolved between 1903 and 1922, in which first the

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118 60 U.S. (19 How.) 393 (1856).

119 *Id.* at 447 (emphasis added).
Fuller Court, then the White Court in 1910, and finally the Taft Court in 1921, tried to agree on a single constitutional doctrine in their application of the Territorial Clause. These cases demonstrated that the unincorporated status of a territory could lead to second-class citizenship for its residents.

These intermediate cases start with *Hawai‘i v. Mankichi* in 1903, in which the court ruled that Hawaiian territorial law, not the Seventh Amendment, governed the defendant’s right to a criminal jury trial. Justices White and McKenna concurred, stating that Congress had not expressly incorporated Hawai‘i; therefore, full constitutional protections such as the right to jury trial did not apply.120 *Mankichi* was soon followed by *Gonzales v. Williams*, a unanimous ruling written by Chief Justice Fuller in favor of a Puerto Rican woman seeking entry into New York City after the Immigration Commissioner had declared her a foreigner and excluded her from the city.121 The court held that Puerto Ricans, while not U.S. citizens, are nonetheless subjects or “nationals” of this country, and therefore not foreigners for purposes of the immigration laws. Later in 1904, the Court issued *Kepner v. United States*,122 *Binns v. United States*,123 and, more importantly, *Dorr v. United States*, in which a majority reaffirmed the incorporation doctrine first articulated by Justice White in *Downes*, and found that the Philippines constituted an unincorporated territory.124

In 1905, a case involving territorial Alaska, *Rassmussen v. United States*, reiterated the result of the 1901 decisions and continued to solidify a prevailing view from among the many articulated by the Justices in the earlier opinions.125 Writing for the majority, Justice White ruled that Alaska, unlike Puerto Rico, was an incorporated territory of the United States, with full constitutional protections for its residents. Other cases that applied White’s incorporation doctrine in this period were *Dowdell v. United States*126 in 1911, and *Porto Rico v. Rosaly*127 in 1913. In *Rosaly*, then-Chief Justice White wrote for a unanimous court

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120 *Hawai‘i v. Mankichi*, 190 U.S. 197, 218–21 (1903) (White, J., concurring).

121 *Gonzales v. Williams*, 192 U.S. 1 (1904).

122 195 U.S. 100 (1904).

123 194 U.S. 486 (1904) (involving taxation in Alaska).


126 221 U.S. 325 (1911) (holding that *Dorr* disposes of the matter and that the Philippine Supreme Court properly affirmed defendants’ convictions after requiring trial court to supplement record on appeal).

127 227 U.S. 270 (1913).
that Puerto Rico was a “completely organized Territory [of] although not . . . incorporated into the United States.”

The Foraker Act—the Organic Act for Puerto Rico interpreted in Downes—was replaced by the Jones Act of 1917, making changes to the local government and, most significantly, giving Puerto Ricans U.S. citizenship. In 1922, Balzac v. Porto Rico applied the Jones Act and, in the process, turned Justice White’s concurrence in Downes into normative constitutional doctrine, and still quite applicable precedent. The court unanimously affirmed Downes, citing Justice White’s opinion and the incorporation doctrine as controlling, which helped to clarify the constitutional relationship between Puerto Rico and the United States.

On the specific facts of the case, Balzac ruled that even after the grant of U.S. citizenship to the residents of Puerto Rico, not all U.S. constitutional protections applied to the territory: fundamental rights, generally those guaranteed by the Due Process Clause, would automatically apply to U.S. citizens living in the unincorporated territories, but personal freedoms, such as the rights to trial by jury and uniform taxation, would not. This decision is often considered the last of the Insular Cases because subsequent opinions have simply reinforced the doctrinal approaches adopted in Downes and Balzac.

The Supreme Court came close to overruling these two decisions in the 1957 case of Reid v. Covert, but could muster only a plurality.

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129 See Jones Act of 1917, § 5, P.R. Laws Ann. vol. 1, pp. 72–73, (conferring U.S. citizenship on all “citizens of Porto Rico [sic]”; it adopted the definition of Puerto Rican citizenship included in § 7 of the Foraker Act). This new law, however, left some confusion about Puerto Rican citizenship that required judicial resolution. See Jones Act of 1917, § 13, P.R. Laws Ann. vol. 1, p. 83; § 43, P.R. Laws Ann. vol. 1, p. 120. See also Ediberto Román, The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism, 26 Fla. St. U. L. Rev. 1 (1998) (a detailed study of the legal issues related to the grant of U.S. citizenships to the Puerto Ricans); Puig Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958) (plaintiff born in Puerto Rico in 1922 who resided on the island for fourteen years, but whose return from a visit to Spain was delayed from 1936 to July 1941 because of the Spanish civil war, was a U.S. citizen pursuant to the Jones Act, because she established her residence in Puerto Rico prior to the trip to Spain and her absence was involuntary).

130 258 U.S. 298 (1922).

131 Id. at 305 (stating that “the opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court”).

132 Id.

133 Id. at 312–13.

case involved two civilian women, both U.S. citizens, tried by military tribunals for killing their husbands, members of the U.S. armed forces, on American military bases in England and Japan. The Court held that depriving the women of their right to a jury trial in a civilian court violated their constitutional rights, ruling that the Constitution protects citizens when they are outside of the United States. Specifically criticizing Balzac and Downes, Justice Hugo Black, joined by Chief Justice Earl Warren and Justices William Douglas and William Brennan, wrote:

This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. 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 anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.135

But concurring in the result only, Justices Felix Frankfurter and John Marshall Harlan II136 distinguished the Insular Cases, believing them to be good law. In his opinion, Justice Frankfurter put it this way:

The results in the cases that arose by reason of the acquisition of exotic "Territory" do not control the present cases, for the territorial cases rest specifically on Art. IV, § 3, which is a grant of power to Congress to deal with "Territory" and other Government property. Of course the power sought to be exercised in Great Britain and Japan does not relate to "Territory."137

That Puerto Rico is still one of the "exotic territories" was confirmed in 1978 in Califano v. Torres,138 when the Supreme Court reiterated the Insular Cases’ holding that Puerto Rico is an unincorporated territory of the United States. While living in the states, Cesar Gautier Torres, Carmelo Bracero Colón, and a third party identified by the Court only as “Vega,” had received Supplemental Security Income through a

135 Id. at 8–9 (footnotes omitted).

136 Justice Harlan was the grandson of Justice John Marshall Harlan who had eloquently dissented in Downes. See David Shultz, Encyclopedia of the Supreme Court 196–97 (2005).

137 Reid, 354 U.S. at 53 (Frankfurter, J., concurring).

federal Social Security Administration program for "qualified aged, blind, and disabled persons." When they moved to Puerto Rico, however, their benefits were canceled. The Supreme Court let this discrimination stand, explaining:

[t]he exclusion of Puerto Rico in the amended program is apparent in the definitional section... [T]he Act... states that no individual is eligible for benefits during any month in which he or she is outside the United States. The Act defines "the United States" as "the 50 States and the District of Columbia." The Justices then concluded that "we deal here with a constitutional attack upon a law providing for governmental payments of monetary benefits." Such a statute "is entitled to a strong presumption of constitutionality." As the Court explained, "So long as [the statute's] judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."

The "rational basis" for Congress's action in this case was later described by the Court in *Harris v. Rosario*: "In [Califano], we concluded that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do 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." In ruling that the lower level of reimbursement provided to Puerto Rico under the Aid to Families with Dependent Children program did not violate the Fifth Amendment's Equal Protection Clause, *Harris* exposed Puerto Rico's continued unincorporated territorial status. Justice Thurgood Marshall noted in his dissent that three of his contemporaries on the Court had expressed opposition to *Downes* and its denial of constitutional protections to U.S. citizens, but they did not join him here. Marshall concluded that *Harris* ultimately illustrated how the

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139 Id. at 2.
140 Id. (citations omitted).
141 Id. at 5 (citations omitted) (quoting Mathews v. de Castro, 429 U.S. 181, 185 (1976); Jefferson v. Hackney, 406 U.S. 535, 546 (1972)). See Malavet, supra note 18, at 155–58 (describing the Puerto Rican economy generally, specifically identifying the Puerto Ricans as the poorest American citizens).
142 Harris v. Rosario, 446 U.S. 651, 652 (1980). Although Puerto Ricans do not pay federal income taxes, they do pay Social Security and other federal taxes, and additionally, it is difficult to conceive how $300 million for children's welfare would negatively disrupt the Puerto Rican economy. See Malavet, supra note 18, at 155–58 (discussing Puerto Rico's economy).
Insular Cases had become entrenched constitutional doctrine that accorded some Americans second-class citizenship.143

As of the writing of this chapter, the most recent reference to the Insular Cases can be found in Justice Clarence Thomas’s concurring opinion in United States v. Lara144 in 2004. There, citing Reid, he wrote: “The ‘Insular Cases,’ which include the Hawai‘i and Puerto Rico examples . . . involved Territories of the United States, over which Congress has plenary power to govern and regulate.”145 As long as the Insular Cases remain good law, Congress, in the exercise of its authority under the Territorial Clause, may unilaterally change the statutory relationship between the United States and its territories. Moreover, one Congress cannot bind another, which makes statutory language purporting to limit future legislative enactments unconstitutional.146

Attempts to create formal Puerto Rican citizenship have been legally and politically rebuffed. For example, in 1997, socialist Juan Mari–Bras renounced his U.S. citizenship, hoping to retain only Puerto Rican citizenship as his legal citizenship, and the Supreme Court of Puerto Rico held that Puerto Rican citizenship was independent of U.S. citizenship because of certain provisions of Puerto Rican law.147 On the day before that opinion was issued, however, the Puerto Rican law alluded to in the opinion was amended to require both U.S. citizenship and Puerto Rico residency in order to become a citizen of the island, making the matter of law addressed in the opinion moot.148 As a result, Puerto Ricans are limited to the legal citizenship of the United States but they are not entitled to the full enjoyment of the rights usually associated with that citizenship.

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143 Harris, 446 U.S. at 653–54 (Marshall, J., dissenting).
144 Lara, 541 U.S. at 214 (Thomas, J., concurring).
145 Id. at 225.
Downes’ Legacy: Citizenship of a Second Class

The most enduring effect of Downes is its definition of a diminished level of citizenship for territorial subjects of the United States. Section 1 of the Fourteenth Amendment reads, in part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”

To the extent that this provision creates formal universal U.S. citizenship, it is belied by the reality of that citizenship, which is often constructed on the basis of fault lines defined by essentialized notions of race. The territorial peoples are just one example of this citizenship construct, and one can easily include American Indians, African Americans, Asian Americans, and Mexican Americans among the victims.

The citizenship status of Puerto Ricans was left unclear at the end of the Spanish American War, when Article IX of the Treaty of Paris provided:

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners.

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.

149 Until Puerto Ricans were granted U.S. citizenship in 1917, they were, in the words of a Democratic U.S. senator, “without a country.” Still, under international law, Puerto Rican citizenship is not recognized. See Carr, supra note 30, at 36.

150 U.S. Const. amend. XIV, § 1. The section continues as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”


152 See, e.g., Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).


Although the *peninsulares* (natives of the Iberian Peninsula) were given the option to retain their Spanish citizenship, the native-born Puerto Ricans were not. They lost the Spanish citizenship they had been granted in late 1897. Yet again, the island’s native inhabitants became subjects, but not citizens, of a colonial power. Despite the language of the treaty, until Congress acted on the matter, the legal citizenship of Puerto Rico’s non-Spanish inhabitants was defined by the U.S. courts, initially and enduringly, in *Downes*. *Downes* effectively defined the legal rights of the inhabitants of the territories of the United States, as well as the power of the federal executive and legislative branches to regulate the land and its people.

Two decades later, in *Balzac v. Porto Rico*,\(^ {156}\) the Supreme Court, in adopting the incorporated/unincorporated territories categories created by White, constitutionally constructed the U.S. citizenship of Puerto Ricans as second class as long as they remained in the territory of Puerto Rico. The Court distinguished between the rights of U.S. citizens living in Puerto Rico and those of U.S. citizens living in “the United States proper.” As long as Puerto Ricans chose to remain on the island, they would enjoy the formal status but not the full rights of American citizenship. *Balzac* thus distinguished between Puerto Ricans as individual U.S. citizens and Puerto Ricans as collective inhabitants of Puerto Rico. As individuals, they were free “to enjoy all political and other rights” granted to U.S. citizens if they “move[d] into the United States proper,” but as long as they remained on the island, they could not fully enjoy the rights of U.S. citizenship.\(^ {157}\) The Court explained the motivation behind this construction of Puerto Rican second-class citizenship in nativistic terms when it distinguished the island from Alaska:

> 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.\(^ {158}\)

This statement clearly assumes that Puerto Rican U.S. citizens are not the “American citizens” who could resettle an “American” state. While recognizing the impossibility of creating an Anglo-Saxon majority in Puerto Rico, the Court also constructed Puerto Ricans as “others.” Because Puerto Ricans are so “other,” the incorporation of the territory into the United States could not be inferred; it had to be clearly

\(^{156}\) 258 U.S. 298 (1922).

\(^{157}\) Id. at 311.

\(^{158}\) Id. at 309 (emphasis added).
expressed by Congress.\textsuperscript{159} To this day, Congress has not expressed itself on the matter of incorporation and full extension of constitutional guarantees to Puerto Rico.

\textbf{Conclusion: Forgotten Cases and Invisible Citizens}

The Fuller Court is often remembered in law schools for invalidating the first national income tax\textsuperscript{160} and declaring a state law prohibiting more than sixty hours in a work-week unconstitutional,\textsuperscript{161} but its most famous case is \textit{Plessy v. Ferguson}.\textsuperscript{162} With the exception of Justice McKenna, who was appointed in January of 1898,\textsuperscript{163} all the members of the \textit{Downes} Court were members of the Court that decided the notorious \textit{Plessy} in 1896—a decision in which Justice Brewer did not participate and Justice Harlan dissented.\textsuperscript{164} But while the “separate but equal” standard of \textit{Plessy} was relegated to the historical trash bin by \textit{Brown v. Board of Education},\textsuperscript{165} the \textit{Downes} decision is still good law. By relieving

\begin{footnotesize}
\begin{enumerate}
  \item\textsuperscript{159} Again, the Supreme Court is rather clear in \textit{Balzac}:
  \begin{quote}
  The jury system needs citizens trained to the exercise of the responsibilities of jurors
  \ldots 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.
  \end{quote}
  \textit{Id.} at 310.
  \item\textsuperscript{160} \textit{Pollock v. Farmers’ Loan & Trust Co.}, 158 U.S. 601 (1895), \textit{superseded by} U.S. Const. amend XVI.
  \item\textsuperscript{161} \textit{Lochner v. New York}, 198 U.S. 45 (1905) (invalidating a New York penal statute forbidding employers from requiring workers to exceed sixty hours in a work week).
  \item\textsuperscript{162} 163 U.S. 537 (1896) (7–1 decision).
  \item\textsuperscript{163} See 3 \textit{The Justices of the Supreme Court of the United States: Their Lives and Major Opinions} 861 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter \textit{Justices of the Supreme Court}].
  \item\textsuperscript{164} J. Gordon Hylton explains why Justice Brewer did not participate in the decision:
  \begin{quote}
  The final line of the United States Supreme Court opinion in the landmark case of \textit{Plessey v. Ferguson} states, “Mr. Justice Brewer did not hear the argument or participate in the decision of this case.” Because of the untimely death of his daughter, the 58-year old Justice had been forced to leave Washington, D.C. for his home in Leavenworth, Kansas, on April 13, 1896, the day \textit{Plessy} was argued before the Court. Without Brewer, the Court voted 7 to 1 to uphold Louisiana’s “separate but equal” public accommodations law. Only Justice John Marshall Harlan, a former slaveholder from Kentucky, agreed that the challenged “Jim Crow” statute violated the Fourteenth Amendment’s guarantee of equal protection of the laws.
  \end{quote}
  \item\textsuperscript{165} 347 U.S. 483 (1954).
\end{enumerate}
\end{footnotesize}
Congress and the President of most constitutional limitations on the exercise of their discretion, the Supreme Court in *Downes* intended to allow the government some flexibility in dealing with new territorial possessions. But that flexibility has now become a permanent system for the regulation of an island empire, rather than a transitional process as it was for Cuba and even the Philippines.

The late Chief Justice William H. Rehnquist, in his book *The Supreme Court*, discussed why President Theodore Roosevelt had demanded to know how Oliver Wendell Holmes would vote on the Insular Cases before nominating him to replace the retiring Horace Gray on the Supreme Court. In a letter to Holmes' sponsor, Senator Henry Cabot Lodge, Roosevelt wrote:

> The majority of the present Court who have, although without satisfactory unanimity, upheld the policies of President McKinley and the Republican party in Congress, have rendered a great service to mankind and to this nation. The minority—a minority so large as to lack but one vote of being a majority—have stood for such reactionary folly as would have hampered well-nigh hopelessly this people in doing efficient and honorable work for the national welfare, and for the welfare of the islands themselves, in Porto Rico and the Philippines. No doubt they have possessed excellent motives and without doubt they are men of excellent personal character; but this no more excuses them than the same conditions excused the various upright and honorable men who took part in the wicked folly of secession in 1860 and 1861.

Now I should like to know that Judge Holmes was in entire sympathy with our views [on the Insular Cases].

Rehnquist then concluded that “Holmes was duly appointed an associate justice [effective December 8, 1902], and largely fulfilled Roosevelt’s expectations of him with respect to the so-called Insular Cases, which were a great issue at that time, although they are scarcely a footnote in a text on constitutional law today.”

The late Chief Justice is, of course, correct that *Downes* and the Insular Cases are treated as a legal footnote. But they should not be. As President Roosevelt’s litmus test for appointment of one of the best-

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167 *Id.* at 216.

168 3 *Justices of the Supreme Court*, *supra* note 163, at 878.

169 Rehnquist, *supra* note 166, at 217. Justice Holmes acquiesced in the continued imposition of the White doctrine in the *Insular Cases*, but did not expressly embrace it. Accordingly, he concurred in the result in *Balzac*, but without a written opinion. 258 U.S. 298, 314 (1922).
remembered Justices in history indicates, these decisions were critical to
the determination of the kind of country that the United States was to
come. Moreover, Downes is living constitutional doctrine daily affect­
ing the lives of millions of Puerto Ricans who are relegated to second­
class citizenship and leaving a United States territory in a permanent
state of constitutional uncertainty about its future. The Insular Cases
are indeed the enduring legacy of the Fuller Court and an essential part
of the legal development of our nation. Downes v. Bidwell constitution­
ally defines the nation that we are. If we study it seriously, rather than
relegating it to legal obscurity, we might become the nation that we wish
to be.

Race Law Stories (Rachel F. Moran and Devon W. Carbado, eds., Foundation Press 2008).