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The Inconvenience of a “Constitution [that] Follows the Flag ... but Doesn’t Quite Catch Up with It”: from *Downes v. Bidwell* to *Boumediene v. Bush*

Pedro A. Malavet

Submission Cover Letter

To the Editorial Board:

I hereby submit my article draft titled: *The Inconvenience of a “Constitution [that] Follows the Flag ... but Doesn’t Quite Catch Up with It”: From Downes v. Bidwell to Boumediene v. Bush*. I would like you to consider it for publication in your law review or journal.

My title combines a play on the title of one of the most recent substantial articles on the 2008 *Boumediene v. Bush* decision that also addresses the Insular Cases, published by the Columbia Law Review in 2009, with the quoted description of the ruling in the latter cases delivered on the day the opinions were read in May of 1901 by Secretary of War Elihu Root.

The article addresses the Boumediene court’s use of the doctrine of the Insular Cases. In granting rights to the persons detained at the Guantanamo Bay Naval Station, the majority used the doctrine of the cases that were initially resolved in 1901, following the Spanish American War, to devise a new rule for the War on Terror. The dissenting justices disagreed with the majority on the issue of the applicability of the suspension of habeas corpus clause of the Constitution in Guantanamo Bay, but they agreed that the rule of the Insular Cases is still good law.

I have been studying the Insular Cases for a number of years and have referenced them in several of my works. Most recently in my book *America’s Colony: The Political and Cultural Conflict Between the United States and Puerto Rico* (NYU Press 2007) and in a book chapter *The Constitution Follows the Flag ... but Doesn’t Quite Catch Up with It: The Story of Downes v. Bidwell*, in *RACE LAW STORIES* (Rachel F. Moran, Devon W. Carbado, eds., Foundation Press 2008). In this article I have built on my existing work to provide a critique of Boumediene v. Bush and the majority’s reference to its “situational” rights paradigm as “transitional” and “temporary,” because the reality of such terms is clearly belied by the continued territorial status of the U.S. colonies acquired as a result of the Spanish American War in 1898.

I add extensive detail to place the Court's discussion of the Insular Cases in their proper historical, precedential and sociological context. I have also taken the time to review the recent literature on the subject and have cited to the most important recent work. My most recent search on LEXIS showed 506 law review articles referencing *Boumediene*, but only 48 also mentioned the Insular Cases and only a fraction of those took the time to study the entire series of cases, and none has gone back to describe, as I do, the filing of briefs for the taxes on 576 boxes of oranges that lead to the most important of the cases, *Downes v. Bidwell*. I also emphasize the status of the persons most "inconvenienced" by *Downes*: the territorial citizens of the United States, especially the almost 4 million Puerto Ricans living on the island, and the 4.1 million Puerto Ricans living in the 50 states and the District of Columbia. The territorial citizens have been subjected to the rule of the Insular Cases for 109 years, which would seem to contradict the *Boumediene* majority's characterization of its ruling as a type of practical decision-making applicable only to temporary and transitional situations.

I am on sabbatical during the Spring of 2010, and I am mostly working out of my home office. You may contact me at my office phone number (325) 273-0974 or via e-mail (Malavet@law.ufl.edu). If you call my law school office number and leave a voicemail message, the system will page me and I should be able to return your call relatively quickly, but email will be the fastest way to reach me.

Thank you for your consideration.

Sincerely,

Pedro A. Malavet
Professor of Law
The University of Florida
Fredric G. Levin College of Law
PO Box 117625
2500 SW 2nd Avenue
Gainesville, FL 32611-7625
(352) 273-0974
Fax 392-3005
Web: <http://nersp.osg.ufl.edu/~malavet>

The Inconvenience of a “Constitution [that] Follows the Flag ... but Doesn’t Quite Catch Up with It”: from *Downes v. Bidwell* to *Boumediene v. Bush*¹

By Pedro A. Malavet*

Abstract:

Boumediene v. Bush, resolved by the U.S. Supreme Court in June of 2008, granted habeas corpus rights, at least for the time being, to the persons detained at Guantanamo Bay Naval Station. The majority partially based its ruling on the doctrine of the Insular Cases, first set forth in the 1901 decision in *Downes v. Bidwell*. Additionally, the four dissenting justices agreed with the five in the majority that the plurality opinion of Justice Edward Douglass White in *Downes* — as affirmed by a unanimous court in 1922 in *Balzac v. People of Porto Rico* — is still the dominant interpretation of the Constitution’s Territorial Clause, abandoning the rule set forth in 1856 in *Dred Scott v. Sanford*. The *Boumediene* majority labels this a “situational” standard that allows it to pick which provisions of the Constitution

¹ The quote is the 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 in May of 1901 — confused reporters asked how the justices had replied to the question “Does the constitution follow the flag?” Winfield Shiras, ed., JUSTICE GEORGE SHIRAS, JR. OF PITTSBURGH 191 (University of Pittsburgh Press 1953), citing Arthur Wallace Dunn, FROM HARRISON TO HARDING, vol. I, 256-257 (G.P. Putnam’s Sons, 1922). As the title suggests, this article is a follow up to my book chapter *The Constitution Follows the Flag ... but Doesn’t Quite Catch Up with It: The Story of Downes v. Bidwell*, in RACE LAW STORIES (Rachel F. Moran, Devon W. Carbado, eds., Foundation Press 2008) (hereinafter “Malavet, *The Story of Downes*”). The chapter and article also reflect the content of my book AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (NYU Press 2007).

* Professor of Law, the University of Florida Fredric G. Levin College of Law; JD and LL.M., Georgetown University Law Center. I am grateful to Dean Kevin R. Johnson for helpful comments on a draft of this article. I am grateful to my home institution for a Summer Research Grant and Sabbatical that I partially spent working on this piece.

will be enforced in the U.S. Territorial Possessions and now extraterritorially as well.

This article provides historical context and analysis of the Insular Cases, that series of decisions on the power of the U.S. government over territory and people under the Territorial Clause, and criticizes the *Boumediene* majority's use of it to justify the "situational" application of constitutional rights to subjects of United States law, especially to those who are most "inconvenienced": the territorial U.S. citizens. The article also points out the fallacy that these legal situations are temporary and transitional given that most of the current territorial possessions have been continuously occupied since the end of the Spanish American War in 1898.

I began work on this article a few weeks after the *Boumediene* decision was issued in an attempt to greatly expand a short contribution to an anthology into an article, and to discuss the Supreme Court's most recent citation of the Insular Cases. But unforeseen circumstances forced me to move on to other projects and delay its publication. Luckily, this delay has given me the opportunity to revise the draft and to review the literature produced in response to the case. A LEXIS search of published law review articles found 506 articles that referenced *Boumediene* in their text. When that search was refined to articles referencing *Boumediene* and the Insular Cases together, it produced 48 article results. The study of the published articles leaves me almost as disappointed as I was in the Fall of 2008 with the level of study of the Insular Cases by the U.S. legal mainstream.

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A. Introduction

Boumediene v. Bush, resolved by the Supreme Court in June of 2008, ruled that so-called “enemy combatants” held by the United States at Guantánamo Bay Naval Station have a constitutionally-guaranteed right to habeas corpus review of their detention by federal courts.² In reaching this result, the majority opinion relied upon what it labeled the “doctrine” of the Insular Cases,³ a series of decisions arising mostly as a result of the Spanish American War of 1898. While they disagreed on whether or not the rule should apply to Guantánamo, the dissenting justices and those in the majority unanimously agreed that the over-a-century-old rule of the Insular Cases, that in order to permit substantial discretion to the executive and legislative branches of government to deal with new territories and their inhabitants, some, but not all, the provisions of the U.S. Constitution apply *ex proprio vigore* in our territorial possessions, is still good law. Most observers will not know the real context of the old cases, and the current Supreme Court neglects to acknowledge the continuing effect of those decisions on over four million citizens of the United States who have lived with the rule of the Insular Cases for the 109 years since it was first articulated in *Downes v. Bidwell*.⁴ This article seeks to start to remedy those shortcomings.

I began work on this article a few weeks after the *Boumediene* decision was issued in an attempt to greatly expand a short contribution to an anthology into an article,⁵ and to discuss the Supreme Court’s most recent citation of the Insular Cases. But first a law review placement blunder on my part, and then a family tragedy

² 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41, 2008 U.S. LEXIS 4887, 76 U.S.L.W. 4406 (U.S.S.Ct. 2008). Citations to the text of the opinion found in this article follow the pagination of the Slip Opinions available at <http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf> (last visited March 15, 2010).

³ *Boumediene* at 29.

⁴ 182 U.S. 244 (May 27, 1901).

⁵ See Malavet, *The Story of Downes*, *supra* note 1.

forced me to move on to other projects and delay its publication.⁶ Luckily, this delay has given me the opportunity to review the literature produced in response to the case, and to re-assess my original conclusion that the Insular Cases were not seriously studied in U.S. law generally and in Constitutional Law in particular. A LEXIS search of published law review articles found 506 articles that referenced *Boumediene* in their text. When that search was refined to articles referencing *Boumediene* and the Insular Cases together, it produced 48 article results.⁷

An analysis of those cites found that the references to the Insular Cases were generally in passim and few authors studied the history of those cases. But there were some exceptions,⁸ significantly, the work of Christina Duffy Burnett, who, in a recent article entitled *A Convenient Constitution? Extraterritoriality After Boumediene*,⁹ seeks to place *Boumediene* and the Insular Cases in the context of “Fourteenth Amendment incorporation” jurisprudence, rather than in what she calls the “Territory Clause” and I label the Territorial Clause

⁶ I posted an early version of this article on the BePress service and sent it off for publication in the Fall of 2008. Within two days, I had two offers to publish it, including one from a symposium issue dedicated to the case. For reasons that I can only attribute to a sudden case of temporary insanity —or perhaps feeling the pressure of critiques of symposia publications and the search for “top” placements— I declined them. I later explained to my Dean and Associate Dean that I *had* produced an article during the Summer of 2008, but had not gotten it published because I am a moron (or more kindly, because I tried to play the placement game and did so ineptly).

⁷ Both searches were conducted in March, 2010. The first simply found references to “Boumediene w/5 Bush” in the previous two years. The second searched for the case name and the phrase “Insular Cases” in the same text, during the same time period.

⁸ See, e.g., Ernesto Hernández-López, *Boumediene v. Bush and Guantanamo, Cuba: Does the “Empire Strike Back”?*, 62 SMU L. REV. 117, 142-149 (2009) (an overview of the Insular Cases in an article studying the legal relationship between the U.S. and Cuba, and the claims over Guantanamo Naval Station). Two well-known federal judges of Puerto Rican descent have also written substantial articles on this subject. See Jose Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 YALE L.J. 1660 (2009); and Juan Torruella, *The Insular Cases: The Establishment Of A Regime Of Political Apartheid: Article*, 77 REV. JUR. U.P.R. 1 (2008).

⁹ 109 Colum. L. Rev. 973 (2009) (hereinafter “Burnett, A Convenient Constitution”).

of the U.S. Constitution (Article IV, section 3, clause 2). By bringing the two lines of cases together, she hopes to provide a more sound way to resolve the constitutional questions that arise in these situations.¹⁰ While I wish that the Supreme Court decided and cited the Insular Cases as decisions about the due process owed to full citizens of the United States,¹¹ that is not what the court has chosen to do, so far; though hopefully they will consider Burnett's suggestions. Nevertheless, Burnett's work provides an unorthodox take on and a review of the orthodox Constitutional Law literature's analysis of the Insular Cases.¹² In this article I present the Insular Cases in their historical and sociological context to illustrate how the court's interpretation of the Territorial Clause constitutionally "inconveniences" the territorial citizens by relegating them to second-class legal status, and argue that the solution to the problem created by the Insular Cases lies in overruling *Downe's* use of the Territorial

¹⁰ Burnett, *A Convenient Constitution* at 1042 ("I have challenged the idea that there should be two separate and unrelated ways of handling questions of constitutional scope and content, one for the domestic setting and another abroad. I have illustrated the point with a review of the Fourteenth Amendment incorporation cases, which concern essentially the same questions that the jurisprudence on constitutional extraterritoriality confronts.")

¹¹ See Part F *infra*.

¹² For unorthodox takes on the Insular Cases, see, e.g., Malavet, *AMERICA'S COLONY*, *supra* note 1; Ediberto Román, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* (2006); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. OF RACE & LAW 1, 21-40 (2000); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLORIDA STATE UNIVERSITY LAW REVIEW 1 (1998). For unorthodox takes on American Law more generally, see, e.g., *RACE LAW STORIES*, *supra* note 1; *LATINOS AND THE LAW: CASES AND MATERIALS* (Richard Delgado, Juan F. Perea, Jean Stefancic, eds. 2008); *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (Juan F. Perea, Richard Delgado, Angela P. Harris, Jean Stefancic, Stephanie Wildman, eds. 2nd ed. 2007); *CRITICAL RACE THEORY. CASES, MATERIALS AND PROBLEMS* (Dorothy A. Brown, ed. 2nd ed. 2007); *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS, CASES AND MATERIALS* (Emma Coleman Jordan and Angela P. Harris, eds. 2005); *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. 1995).

Clause to situationally pick and choose which constitutional provisions will be enforced in the territories.

But let us begin on what was supposed to be the last day of the Supreme Court term, when the justices issue an anxiously awaited decision on a case that has made front-page-news throughout their term. The case raises questions about the power of the United States government to deal with the aftermath of a fast and tactically successful war as a result of which our armed forces are in effective control of previously foreign territory, but facing various degrees of resistance ranging from political wrangling to violent and bloody insurgency. While this scenario may sound familiar, the year is not 2008, it is 1901.

The May 27, 1901 ruling of the United States Supreme Court in *Downes v. Bidwell*,¹³ particularly Justice Edward Douglass White's plurality opinion,¹⁴ is today the most important of the Insular Cases. With the U.S. Armed Forces facing a guerilla war in the Philippines¹⁵ and political wrangling in Cuba and Puerto Rico following the Spanish American War, the policy motivations for the result in this case were straight-forward. The United States was becoming a world power —a Superpower in today's parlance. This power was principally expressed by deploying a large navy, which in turn required overseas bases of operations, and at the turn of the twentieth century that meant an imperial nation capable of holding colonies on

¹³ 182 U.S. 244-391 (1901).

¹⁴ 182 U.S. at 287-344.

¹⁵ Whether to call the conflict in the Philippines a war, an insurrection, an insurgency, or something else, is a matter of some controversy. See generally David J. Silbey, *A WAR OF FRONTIER AND EMPIRE: THE PHILIPPINE-AMERICAN WAR (1899-1902)* (2007) (describing the Philippine insurgency that followed the United States victory in the Spanish American War; the Introduction addresses the debate over what to label the conflict). President McKinley put it this way in his second inaugural address on March 4, 1901: "We are not waging war against the inhabitants of the Philippine Islands. A portion of them are making war against the United States." http://avalon.law.yale.edu/19th_century/mckin2.asp (last visited March 15, 2010).

which to establish military bases all over the world.¹⁶ *Downes* effectively provides constitutional authorization for this process, by reinterpreting the Territorial Clause of the Constitution to abandon the old rule that the Constitution follows the flag to our territories *in toto*, and instead giving to Congress almost unfettered authority to deal with the territorial possessions by picking and choosing the constitutional provisions that will be allowed to apply in the territorial possessions.

Some may consider a 1901 case to be ancient history, but *Downes* and its progeny are still applicable law, as shown most recently by *Boumediene*. Yet, while partially basing its ruling on *Downes*, the *Boumediene* court neglected to acknowledge that *Downes* and its progeny are most pertinent to the current territorial possessions of the United States, and their population of more than four million—for the most part— citizens of the United States. In addition to helping us to see the possible long-term implications of *Boumediene*, a study of *Downes* and its legal and historical context can inform a more nuanced understanding of the Supreme Court of the United States and its approach to citizenship and legal membership in our constitutional culture.

This article will first discuss the Supreme Court's recent use of the Insular Cases to support its decision on the constitutional question of suspension or availability of habeas corpus for the persons imprisoned in Guantánamo Bay. It will then put the Insular Cases and its primary decision, *Downes v. Bidwell*, in their proper social, historical and legal contexts. Historically, in Puerto Rico —the then

¹⁶ See generally Warren Zimmermann, *FIRST GREAT TRIUMPH: HOW FIVE AMERICANS MADE THEIR COUNTRY A WORLD POWER* 8 (Farrar, Straus and Giroux 2002) (“John Hay, Captain Alfred T. Mahan, Elihu Root, Henry Cabot Lodge, and Theodore Roosevelt can fairly be called the fathers of modern American imperialism and the men who set the United States on the road to becoming a great power.”). See also Bartholomew H. Sparrow, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (University Press of Kansas 2006) (describing “how the United States handled its first major episode of globalization and how the Supreme Court, in [the Insular Cases], crucially redirected the course of American history”).

new island territory acquired as a spoil of war that was directly affected by the case — the decision was issued in a time of poverty and the dashed hopes for the self-government granted by the defeated Spanish empire, and uncertainty about the new American empire. In the United States, these were the times of William McKinley, Teddy Roosevelt and the first armed conflict since the American Civil War. The article will then focus on the facts of the *Downes* decision and the process that produced it. The article will continue with the legal context for the decision — the series of cases now labeled as the Insular Cases — and their evolution from multiple opinions issued by a deeply divided Supreme Court into a well-accepted constitutional rule that endures today. The article will then engage in a brief critical analysis of the enduring effects of *Downes* and conclude with what it tells us about the possibly long-term implications of *Boumediene* and why we should engage in more serious studies of the Insular Cases.

B. *Boumediene v. Bush*: The Insular Cases in the 21st Century

Associate Justice Anthony M. Kennedy, writing for the majority of the United States Supreme Court in *Boumediene* — joined by Associate Justices John Paul Stevens, David Hackett Souter, Ruth Bader Ginsburg, and Stephen G. Breyer¹⁷ rearticulates the relevance of the Insular Cases as follows:

Fundamental questions regarding the Constitution’s geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines — ceded to the United States by Spain at the conclusion of the Spanish-American War — and Hawaii — annexed by the United States in 1898. At this point Congress chose to

¹⁷ The justices’ names and order of seniority are as listed in their official biographies published by the Court. <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited March 15, 2010) (the current posting includes the biography of the now-retired Justices O’Connor and Souter).

discontinue its previous practice of extending constitutional rights to the territories by statute. ...

In a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State. [Citations omitted]. The Court held that the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace. Yet it took note of the difficulties inherent in that position.¹⁸

While many will hail the majority decision because its result guarantees constitutional rights to human beings being held by U.S. authorities well outside of a combat-zone, at least for the time being, this introduction by the court in fact sets up the discussion of yet-another rationalization of why “other”¹⁹ people should not be “burdened” with the full range of rights guaranteed by our constitution unless the Supreme Court finds it convenient for the United States. Rather than having “the constitution follow the flag,” i.e., ruling that all provisions of the constitution, especially those that guarantee individual rights, apply *ex proprio vigore* to territorial subjects, the Supreme Court articulates a flexible test that gives great deference to the political branches of government. The court chooses to engage in a case-by-case and right-by-right analysis to decide which of the individual protections guaranteed in the constitution to U.S. citizens in the territory of a U.S. state should be conferred upon U.S. citizens and non-citizens found in U.S. custody in territory controlled by the U.S. that has not been incorporated into the union as a state. The

¹⁸ Boumediene at 27(citations omitted).

¹⁹ In general, as used herein, “Other” and “othering,” i.e., to be “othered,” mean to be socially constructed as “not normative.” See, e.g., Cathy J. Cohen, *Straight Gay Politics: The Limits of an Ethnic Model of Inclusion*, in *ETHNICITY AND GROUP RIGHTS* 580 (Will Kymlicka & Ian Shapiro eds., 1997) (“Much of the material exclusion experienced by marginal groups is based on, or justified by, ideological processes that define these groups as ‘other.’ Thus, marginalization occurs, in part, when some observable characteristic or distinguishing behavior shared by a group of individuals is systematically used within the larger society to signal the inferior and subordinate status of the group.”) citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963).

rationalization of avoiding “overburdening” the different “cultures” acquired as spoils of the Spanish-American War today gives way to the needs of the so-called war on terror. As I discuss further below, on both occasions, the principal beneficiary of this flexibility is the federal government —both at the executive and legislative levels— because they are given almost unfettered authority to deal with large groups of persons who, often in spite of their U.S. citizenship, are to be treated as lesser citizens and ultimately as lesser human beings. In the words of the majority in *Boumediene*:

As the Court later made clear, “the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.” *Balzac v. Porto Rico*, 258 U.S. 298, 312, 42 S. Ct. 343, 66 L. Ed. 627 (1922).²⁰

While the Supreme Court then and now characterizes this constitutional “flexibility” as both desirable and necessary, the end result of these opinions has been to leave too much discretion to the political branches of government at a time when judicial review was most needed to guarantee the basic human rights of new subjects of United States law. The territorial subjects of the United States by definition live in areas that lack full representation in the United States House of Representatives and Senate, and they are not allowed to vote in presidential elections. That leaves them without meaningful participation in the process of law making and enforcement by the United States, even though the United States is the ultimate legal authority over them and their territory.²¹

²⁰ *Boumediene* at 28.

²¹ See generally, Malavet, *AMERICA’S COLONY*, supra note 1, at 47, 134, 155 (discussing “democracy deficit” in the relationship between the territory of Puerto Rico and the United States).

In order to justify this policy, the majority opinion in *Boumediene* focuses on the Philippines and the “assumption” that they would become independent. That did indeed happen, forty-five years after the 1900 Supreme Court term ended.²² Cuba, another territory acquired as a result of the Spanish American War, was granted independence by the treaty that ended that war, but subject to U.S. rule, which severely limited its sovereignty for decades.²³ The majority opinion does not in any way expressly acknowledge the fate of Guam and Puerto Rico, which were then and are still territories of the United States subject to the rule of the Insular Cases. For the territorial citizens this is not a temporary transition on the way to independence, rather it is a permanent status of constitutional

²² The official date when Philippine Independence was recognized by the United States is July 4, 1946. See Proclamation of Philippine independence. Proc. No. 2695, of July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352, issued pursuant to 22 USCS § 1394, and appearing as 22 USCS § 1394 (“provid[ing] that the United States recognized Philippine independence and surrendered American sovereignty over the Philippines.”)

²³ Article I of the Treaty of Paris ended Spanish sovereignty over Cuba, subject to “occupation by the United States.” Treaty of Paris, Dec. 10, 1898, U.S.–Spain, art. IX, T.S. no. 343, in *P.R. Laws Ann.*, vol. 1, 17. The Platt Amendment of 1901 officially recognized Cuban sovereignty, subject to severe conditions imposed by the United States. The United States Department of State describes the Amendment as follows:

While the amendment was named after Senator Orville Platt of Connecticut, it was drafted largely by Secretary of War Elihu Root. The Platt Amendment laid down eight conditions to which the Cuban Government had to agree before the withdrawal of U.S. forces and the transfer of sovereignty would begin.

... Although the Cuban [Constitutional Convention] delegates realized that the amendment significantly limited Cuban sovereignty, and originally refused to include it within their constitution, the U.S. Government promised them a trade treaty that would guarantee Cuban sugar exports access to the U.S. market. After several failed attempts by the Cubans to reject or modify the terms of the Platt amendment, the Cuban Constitutional Convention finally succumbed to American pressure and ratified it on June 12, 1901, by a vote of 16 to 11. The Platt Amendment remained in force until 1934 when both sides agreed to cancel the treaties that enforced it.”

<http://www.state.gov/r/pa/ho/time/ip/86557.htm> (last visited March 15, 2010). The official end of this regime with the Treaty of 1934 is discussed infra notes 35-36 and accompanying text.

inferiority imposed by the U.S. Supreme Court and enforced by the executive and legislative branches now for over one hundred years.

The majority opinion characterizes the policy behind the Insular Cases thusly:

The Court thus was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. See *Downes, supra*, at 282, 21 S. Ct. 770, 45 L. Ed. 1088 (“It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production ...”).²⁴

No such qualms were on display during the westward expansion of the United States. The constitution did in fact “displace[] altogether the existing legal systems [of the] newly acquired Territories,” of the American West, with the full legal support of the Supreme Court.²⁵ The local law in Puerto Rico or Guam was not any more threatened by the application of constitutional provisions than was the law of Louisiana, California, Texas, Florida or New York. The only legal system being protected here is that of the United States to maintain a colonial empire. Nevertheless, as the majority continues to explain the “situational” standard for the application of constitutional limitations on the powers of Congress:

These considerations resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories. See *Dorr, supra*, at 143, 24 S. Ct. 808, 49 L. Ed. 128 (“Until Congress shall see fit to incorporate territory ceded by treaty into the United States, . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body *as are applicable to the situation*”);

²⁴ Boumediene at 27.

²⁵ See the discussion of *Johnson v. M’Intosh*, *infra* notes 177-179 and accompanying text.

Downes, supra, at 293, 21 S. Ct. 770, 45 L. Ed. 1088 (White, J., concurring) (“[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States”).²⁶

The majority goes on to explain that some basic “personal rights” guaranteed by the U.S. Constitution must be applied *ex proprio vigore* to non-citizens (and, as explained below, to U.S. citizens as well) in the territorial possessions:

[As] early as *Balzac* in 1922, the Court took for granted that even in unincorporated Territories the Government of the United States was bound to provide to noncitizen inhabitants “guaranties of certain fundamental personal rights declared in the Constitution.” 258 U.S., at 312, 312, 42 S. Ct. 343, 66 L. Ed. 627; see also *Late Corp. of Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1, 44, 10 S. Ct. 792, 34 L. Ed. 478 (1890) (“Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments”).²⁷

The majority emphasizes that it will identify which rights will be guaranteed in any particular territory at any particular time, but it will exercise that discretion so as to give Congress (and implicitly the Executive Branch as well) substantial leeway:

Yet noting the inherent practical difficulties of enforcing all constitutional provisions “always and everywhere,” *Balzac, supra*, at 312, 312, 42 S. Ct. 343, 66 L. Ed. 627, the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed. This century-old doctrine informs our analysis in the present matter.²⁸

²⁶ *Boumediene* at 27-28 (emphasis added). The incorporation doctrine is discussed below in part E.

²⁷ *Boumediene* at 28-29.

²⁸ *Boumediene* at 29.

The majority then proceeds to “hold that Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause.”²⁹

Associate Justices Souter, Ginsburg and Breyer, concurred in a brief opinion authored by Souter. They do not mention the Insular Cases at all and rather focus on responding to the dissenting justices’ arguments regarding the habeas corpus statutes. The concurrence also responds to the part of Justice Scalia’s dissenting opinion rejecting the majority’s acceptance of *de facto* as distinguished from *de jure* sovereignty.³⁰

The four remaining justices — Chief Justice John G. Roberts, Jr., and Associate Justices Antonin Scalia, Clarence Thomas and Samuel Anthony Alito, Jr. —³¹ dissented, expressing their views in two written opinions that all four joined. The first dissent, authored by the Chief Justice, does not mention the Insular Cases at all.³² Justice Scalia’s dissent states that there is only one kind of sovereignty: *de jure*. In his opinion, sovereign control is the key to the application of habeas corpus, and neither the suspension clause nor the Insular Cases are at all applicable in this situation because we lack sovereignty over Guantánamo. He writes:

Eisentrager thus held —held beyond any doubt— that the Constitution does not ensure habeas for aliens held by the United States in areas over which our Government is not sovereign.
[Footnote omitted].

The Court also reasons that *Eisentrager* must be read as a “functional” opinion because of our prior decisions in the Insular Cases. See *ante*, at 26-29. It cites our statement in *Balzac v. Porto Rico*, 258 U.S. 298, 312, 42 S. Ct. 343, 66 L. Ed. 627 (1922), that

²⁹ Boumediene at 41.

³⁰ Boumediene at 1 (Souter, J., concurring).

³¹ See biographiescurrent.pdf, *supra* note 17.

³² Boumediene at 1 (Roberts, C.J., dissenting).

“the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.” *Ante*, at 28. But the Court conveniently omits *Balzac*’s predicate to that statement: “The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the *sovereign power* of that government is exerted.” 258 U.S., at 312, 42 S. Ct. 343, 66 L. Ed. 627 (emphasis added). The *Insular Cases* all concerned territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268, 110 S. Ct. 1056, 108 L. Ed. 2d 222 (1990); *Reid v. Covert*, 354 U.S. 1, 13, 77 S. Ct. 1222, 1 L. Ed. 2d 1148 (1957) (plurality opinion of Black, J.). None of the *Insular Cases* stands for the proposition that aliens located outside U.S. sovereign territory have constitutional rights, and *Eisentrager* held just the opposite with respect to habeas corpus. As I have said, *Eisentrager* distinguished *Yamashita* on the ground of “our sovereignty [over the Philippines],” 339 U.S., at 780, 70 S. Ct. 936, 94 L. Ed. 1255.³³

The majority simply reads *Eisentrager* differently.

The Court’s holding in *Eisentrager* was thus consistent with the *Insular Cases*, where it had held there was no need to extend full constitutional protections *to territories the United States did not intend to govern indefinitely*. Guantanamo Bay, on the other hand, is no transient possession. In every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States. See *Rasul*, 542 U.S., at 480, 124 S. Ct. 2686, 159 L. Ed. 2d 548; *id.*, at 487, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (KENNEDY, J., concurring in judgment).³⁴

Having articulated how it applied to the Guantánamo situation, the majority argues that although the rule of the *Insular Cases* is a firm

³³ *Boumediene* 10-11 (Scalia, J., dissenting) (emphasis original).

³⁴ *Boumediene* at 39 (emphasis added).

constitutional doctrine, it is not intended for indefinite application in any one territory. This statement, however, is belied by the experience of the current territorial possessions, as developed later in this article. Nevertheless, to illustrate its contention that the rule of the Insular Cases is intended to apply in temporary and transitional situations, the majority of the court places its focus and emphasis on Cuba and the Philippines as territories that were held only temporarily and transitionally –except of course for Guantánamo. The majority almost completely ignores the current status of Guam and Puerto Rico as territorial possessions that have been subjected to the rule of the Insular Cases for an indefinite period of time. Guantánamo itself has been subject to U.S. rule for a much longer period than was acceptable to the government that all members of the court state has sovereignty over Guantánamo Bay: the Cuban government.³⁵ The U.S.

³⁵ U.S. control over Guantánamo Bay Naval Station was legally established by a treaty and then a “lease”. See *Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations; February 23, 1903*, in 192 THE CONSOLIDATED TREATED SERIES 429-430 (Clive Parry, ed. 1980), and *Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantnamo and Bahia Honda; July 2, 1903*, in 193 THE CONSOLIDATED TREATED SERIES 314-316 (Clive Parry, ed. 1980). Under the treaty of February 23, 1903, *de jure* sovereignty over Guantánamo Naval Station belongs to the Cuban government, but *de facto* control belongs to the United States. Art. III of the treaty of February 23, 1903, reads:

While on the one hand the United States recognizes the continuance of the ultimate *sovereignty of the Republic of Cuba* over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement *the United States shall exercise complete jurisdiction and control over and within said areas* with the right to acquire (under conditions to be hereafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof.

192 Parry collection at 430. The majority in *Boumediene* accepted the government’s position regarding sovereignty over Guantánamo. The court explains that

for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay. As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that

government “lease” of Guantánamo is, from the American perspective, indefinite, in that the U.S. takes the position that both sides must agree to terminate the lease or to change its provisions in any way.³⁶ Accordingly, the suggestion that the constitutionally-flexible case-by-case approach adopted by the majority is not going to be applied indefinitely in a particular territory is a rank fallacy.

Moreover, the majority’s only acknowledgement of one of the current territorial possessions subject to U.S. sovereignty, Puerto Rico, makes it clear that the almost four million U.S. citizens living there have only the constitutional rights that the court “situationally” —and from my perspective most inconveniently— chooses to allocate to them. Specifically, the majority opinion states that it is possible for

the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory.

Boumediene at 24-25. As noted above, the dissenters felt that the matter of *de jure* sovereignty was decisive on this case. However, the majority rules that the constitutional habeas corpus suspension clause is binding upon the United States in territory under its *de facto* sovereignty. Boumediene at 25. See also *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004) (6-3 ruling that statutory habeas corpus was available to persons held by the United States in territory under the *de jure* sovereignty of another country, but *de facto* control of the United States; Justice Scalia, Chief Justice Rhenquist and Justice Thomas dissented).

³⁶ This is based on the language of the original treaty of February 23, 1903, as modified by the 1934 treaty that legally ended the regime that expressly allowed direct interference by the United States in internal Cuban affairs. See *Treaty between the United States of America and Cuba*, May 29, 1934, Treaty Series, No. 866, 48 Statutes at Large 1682. Art. III of the treaty of 1934, reads, in pertinent part: “So long as the United States of America shall not abandon the said naval station of Guantanamo or the two Governments shall not agree to a modification of its present limits, the station shall continue to have the territorial area that it now has, with the limits that it has on the date of the signature of the present Treaty.” Prior to 1934, legal authorization for unilateral U.S. intervention in Cuba was guaranteed by an additional agreement signed in 1903, the *Treaty Between Cuba and the United States Determining their Relations*, May 22, 1903, in 193 THE CONSOLIDATED TREATED SERIES 198-201 (Clive Parry, ed. 1980) (Art. III provides: “That the government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the treaty of Paris on the United States, now assumed and undertaken by the government of Cuba.”) The treaty of May 22, 1903, was generally superseded by the treaty of 1934.

the bundle of rights applicable in a particular territory to change over time. It writes:

It may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance. Cf. *Torres v. Puerto Rico*, 442 U.S. 465, 475-476, 99 S. Ct. 2425, 61 L. Ed. 2d 1 (1979) (Brennan, J., concurring in judgment) (“Whatever the validity of the [Insular Cases] in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970’s”).

The “constitutionally significant” change that the majority anticipates is one that might expand (or contract) the “personal rights” guaranteed by the Constitution to the territorial subjects or citizens. The fundamental constitutional nature of the relationship between the United States and its territories will not change, however, because that will still be governed by the Territorial Clause as interpreted by the Insular Cases. The right to choose which constitutional provision(s) will apply in the territories is the crux of the court’s use of the Territorial Clause to create the so-called “doctrine of the Insular Cases” and their progeny.

The only thing that remains clear after *Boumediene*, is the so-far indefinite and continuous application of the Insular Cases to the territorial citizens, subjects and possessions of the United States acquired following the Spanish American War. Though they disagree as to whether those cases apply to the Guantánamo detentions, all members of the current Supreme Court clearly agree that the Insular Cases are still good law. The entire court is also unanimous that the White plurality in *Downes*, as adopted in *Balzac*, is the primary articulation of the rule of the Insular Cases. The remainder of this article explains and critiques how a three-judge plurality issued by a deeply divided court in 1901, became the firmly established rule, as

expressly recognized by *Balzac* in 1922, and remains in vigor to this day.

C. Social, Historical and Legal and Context: *Our Islands and their People*³⁷

Our constitution does not refer to insular possessions, rather it uses the label “territory,” in the aptly labeled Territorial Clause of the constitution of the United States, which reads:

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.³⁸

Initially, the clause was applied to most of the 37 territories that became states after the original thirteen colonies.³⁹ For example, Alaska and Hawaii are current states that were regulated by legislation passed by Congress pursuant to the Territorial Clause, but that legislation was repealed or became obsolete after statehood.⁴⁰ Right

³⁷ José de Olivares, *OUR ISLANDS AND THEIR PEOPLE AS SEEN WITH CAMERA AND PENCIL* (N.D. Publishing Co. 1899) is a large two-volume coffee-table book set purportedly describing the new island territories that were sold door-to-door after the war.

³⁸ U.S. Constitution, Art. IV, sec. 3, cl. 2.

³⁹ With the possible exception of Texas, which, from the American perspective, seceded from Mexico and became a state of the union after being an “independent Republic.” But that left open the period between the congressional annexation vote on March 1, 1845, and the formal statehood admission in December of 1845. In *DeLima v. Bidwell*, 182 U.S. 1 (1901), the majority notes: “Texas remained a foreign state until December 25[, 1845], when she was formally admitted.” 182 U.S. at 191. 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 POSSESSIONS* 4-16 (Kluwer Law International 1989).

⁴⁰ As to Alaska, see, e.g., 48 U.S.C. secs. 21-488f. As to Hawaii, see, e.g., 48 U.S.C. secs. 611-621. Alaska is officially admitted into statehood on January 3, 1959. See Presidential Proclamation No. 3269 of Jan 3, 1959, 24 Fed. Reg. 81, 73 Stat. ch 16, and Public Law 85-

now, and legally as a result of the Insular Cases, as Arnold Leibowitz explains, “[t]he United States [is] . . . the largest overseas territorial power in the world. [It] now governs five areas (Puerto Rico, [the] Virgin Islands, Guam, the Northern Marianas, and American Samoa) with over four million people[,] and has special responsibilities for three additional areas (Federated States of Micronesia, the Marshall Islands and Palau).”⁴¹

In the era pertinent to the Insular Cases, statutes passed on the authority of the territorial clause refer to these as “possessions,” “insular possessions” or “insular areas.”⁴² Pursuant to these statutes, the United States controls or has a legal relationship with the eight populated island territories named above, and controls several unpopulated islands.⁴³ The populated territories collectively have well

508, 72 Stat. 339 (1958). Hawaii was admitted by law as of March 18, 1959. See Public Law 86-3, 76 Stat. 4 (1959). But section 2 of this law excepted “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.*

⁴¹ Leibowitz, *DEFINING STATUS* at 3.

⁴² See generally Title 48 of the United States Code. The Department of the Interior’s Office of Insular Affairs currently defines the term 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, possession or territory or Territory and from July 18, 1947, until October 1, 1994, the Trust Territory of the Pacific Islands. Unmodified, it may refer not only to a jurisdiction which is under United States sovereignty but also to one which is not, i.e., a freely associated state or, 1947-94, the Trust Territory of the Pacific Islands or one of the districts of the Trust Territory of the Pacific Islands.

http://www.doi.gov/oia/Islandpages/political_types.htm (last visited March 15, 2010).

⁴³ In its “Island Fact Sheet,” the Department of the Interior’s Office of Insular Affairs identifies the following unpopulated island territories of the United States, under the designated categories:

United States Territories Under the Jurisdiction of OIA[:] Palmyra Atoll-
Excluded Areas[,] Wake Atoll-Residual Administration
U.S. Territories under the Jurisdiction of the U.S. Fish and Wildlife Service
[These are often referred to as the Guano Islands:] Baker Island[,] Howland
Island[,] Jarvis Island[,] Johnston Atoll ...[,] Kingman Reef[,] Navassa Island[,]
Palmyra Atoll

over four million residents,⁴⁴ and among this group, only the Samoans are not citizens of the United States.⁴⁵

Several unpopulated islands, and the eight populated island territories of the United States and any U.S. national or citizen living in or traveling to them is currently subject to the constitutional doctrine of the Insular Cases issued in the days of President William McKinley.⁴⁶

<http://www.doi.gov/oia/Firstpginfo/islandfactsheet.htm>. See generally Leibowitz, *DEFINING STATUS* at 3. On the Guano Islands, See 48 U.S.C. sec. 1411 (“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.”)

⁴⁴ The Puerto Rican population of 3.9 million, as discussed below in footnote 49 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. <http://www.census.gov/population/www/cen2000/islandareas.html> (last visited March 15, 2010).

⁴⁵ Leibowitz, *DEFINING STATUS*, 449-451 (though expressing some doubt about the matter, noting that American Samoans are treated as “non-citizen nationals” of the United States). The three so-called Free Associated States, The Republic of the Marshall Islands, the Federated States of Micronesia, and Palau, are members of the United Nations. See U.N. press release ORG/1317 (Sept. 26, 2000), available at <http://www.un.org/Overview/unmember.html>. The Federated States of Micronesia and the Marshall Islands were admitted on September 17, 1991, and Palau was admitted on December 15, 1994. They have their own citizenship, independent from the United States. See generally Leibowitz, *DEFINING STATUS* at 639-703. As of July 2006, their populations are estimated, respectively, at 60,422, 108,004, and 20,579. <http://www.cia.gov/cia/publications/factbook/geos/rm.html#People>; <http://www.cia.gov/cia/publications/factbook/geos/fm.html#People>; <http://www.cia.gov/cia/publications/factbook/geos/ps.html#People>.

⁴⁶ See, e.g., *Torres v. Puerto Rico*, 442 U.S. 465 (1979), discussed in section E infra. See also Margaret Leech, *IN THE DAYS OF MCKINLEY* (Harper and Brothers 1959).

1. Puerto Rico in 1901: Self-Government and Spanish Citizenship that did not last long

For Puerto Rican islanders, the Insular Cases were not simply the start of their second colonial period, but the extension of 400 years of colonial status that initially deprived them of legal citizenship in the country that ruled over them.

Puerto Rico is a group of islands bordered by the Atlantic Ocean and Caribbean Sea. The main island is known as Puerto Rico and is joined by adjacent smaller islands that include Vieques, Culebra, Mona, and Monito.⁴⁷ The main island — which is roughly 160 kilometers long and 53 kilometers wide and contains most of Puerto Rico's 8,959 square kilometers of land area — is the home of all but a few thousand of its inhabitants. Therefore, the archipelago is generally referred to as the *Isla del Encanto* (enchanted island or isle of enchantment) or, simply, the “island.” 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 the Spaniards created the racial, legal, political, and cultural composition of the Puerto Ricans.⁴⁸

Puerto Rico is the most populous of the current island territories with current estimates placing the number of residents at 3,927,188, and was involved in most of the insular cases.⁴⁹ Other U.S. citizens

⁴⁷ See 48 United States Code sec. 731 (1999): “The provisions of this Act [48 USCS sec. 731 et seq.] shall apply to the island of Puerto Rico and to the adjacent islands belonging to the United States, and waters of those islands; and the name Puerto Rico as used in this Act shall be held to include not only the island of that name but all the adjacent islands as aforesaid.”

⁴⁸ See generally Malavet, *AMERICA'S COLONY* 49-116.

⁴⁹ According to the 2000 Census, Puerto Rico's population was 3,808,610.

<http://www.census.gov/census2000/states/pr.html> (last visited March 15, 2010). The estimate issued in 2009 is that the population has risen to 3,966,213 (July 2009 est.).

<https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> (last visited March 15, 2010).

have not moved to Puerto Rico in substantial numbers, however,⁵⁰ and Puerto Rico remains a culturally Latina/o island even after more than one hundred years of U.S. occupation. Puerto Ricans are one of the largest Latina/o groups in the United States. The 2000 Census also found 3,406,178 persons in the 50 states and the District of Columbia who identified themselves as “Hispanic or Latino” and specified “Puerto Rican” in their forms.⁵¹ On July 13, 2009, the Pew Research Center reported that “4.1 million Puerto Ricans resided in the 50 U.S. states and the District of Columbia in 2007, according to the Census Bureau’s American Community Survey.”⁵² For the first time, the Puerto Rican population in the states exceeds that of the island.

On the eve of the Spanish American War in 1898, Puerto Rico and Cuba were the last outposts of Spain in the Americas.⁵³ The return of the Spanish Monarchy in 1814 meant the loss of Spanish citizenship and participation in the political process briefly granted by the 1812 *Constitución de Cádiz* (Constitution of Cadiz). White *cubanas/os* (Cubans) and *puertorriqueñas/os* were back to being subjects of Spain, but they were not its citizens.⁵⁴ In a process that had started with the revolution of September 1868 in Spain and continued

⁵⁰ According to the 2000 U.S. Census— which provides the most detailed information—more than 3.8 million persons live in Puerto Rico, of whom 98.8 percent describe themselves as “Hispanic” or “Latino” and 95.1 percent as “Puerto Rican.” U.S. Bureau of the Census, “DP-1: Profile of the General Demographic Characteristics: 2000, Data Set: Census 2000 Summary File 1 (SF 1) 100 Percent Data, Geographic Area: Puerto Rico,” available at <http://www.census.gov>.

⁵¹ http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_QTP9&-geo_id=01000US&-ds_name=DEC_2000_SF1_U&-redoLog=false (last visited March 15, 2010).

⁵² <http://pewresearch.org/pubs/1280/profile-puerto-ricans-living-in-us> (last visited March 15, 2010).

⁵³ The Spanish empire in the Americas was almost totally lost between 1821 and 1824, principally as a result of the Napoleonic invasion of the Iberian Peninsula. Juan Regla, ed., JOSÉ TERRERO: HISTORIA DE ESPAÑA 456-58 (1972).

⁵⁴ See generally Malavet, AMERICA’S COLONY 32-33 (generally describing the effect of the Napoleonic occupation on Spanish law and in particular that persons of African ancestry had to apply for citizenship and meet further requirements under the royal constitution).

with the new constitution of 1876,⁵⁵ 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 del ultramar*” (the overseas provinces). Clause 2 of this article gave Cuba and Puerto Rico the right to be represented in the Cortes —the Spanish legislative body— once special legislation to that effect was approved. In a series of enactments, Cuba and Puerto Rico received increasing levels of home rule and the rights of Spanish citizens, but due to the turmoil in Spain, the constitutional authorization was not implemented in earnest until 1895.⁵⁶ The reforms were more acceptable to the Puerto Ricans than to the Cubans. 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.⁵⁷

As part of the autonomy process, Spanish citizenship was formally granted to the native-born inhabitants of Cuba and Puerto Rico in November 1897.⁵⁸ On November 25, 1897, Spain legislated 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.⁵⁹ A separate

⁵⁵ During the reign of Alfonso XII. See Julio Montero-Díaz, ed., *CONSTITUCIONES Y CÓDIGOS POLÍTICOS ESPAÑOLES 1801–1978*, 145 (Ariel, 1998).

⁵⁶ Alfonso L. García-Martínez, ed., *PUERTO RICO: LEYES FUNDAMENTALES 9–114* (Editorial Edil, 1989).

⁵⁷ OLGA JIMÉNEZ DE WAGENHEIM, *PUERTO RICO: AN INTERPRETATIVE HISTORY FROM PRE-COLUMBIAN TIMES TO 1900*, 198-99 (1998). But in Cuba, General Máximo Gómez was still fighting the Spanish when the United States invaded Cuba in 1898.

⁵⁸ Article 1 of the Decree of 9 November 1897 gives Spanish citizenship, on an equal footing with residents of the Peninsula, to the Spanish subjects in the Antilles. See García-Martínez, ed., *LEYES FUNDAMENTALES*, supra note 56, at 93.

⁵⁹ Title I, article 2, of the Charter of Autonomy, in “Historical Documents,” in *PUERTO RICO LAWS ANNOTATED* vol. 1, 16 (Lexis Publishing Puerto Rico, 1999). In order to avoid confusion with

decree extended the civil rights guarantees of the 1876 Spanish constitution to apply to Puerto Rico.⁶⁰ The Charter of Autonomy set the stage for the final Spanish election in Puerto Rico.⁶¹ 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.⁶² On July 17, 1898, the new local government was installed in San Juan.⁶³

The Charter of Autonomy proved unacceptable to the more stridently pro-independence Puerto Ricans exiled in New York, some of whom encouraged the United States to invade. In 1892, these exiles had founded the Borinquen Club, a pro-independence Puerto Rican group. After autonomist leaders in Puerto Rico rejected their call for revolution against Spain, officers of the club, which by then had changed its name to the Puerto Rico Section, met with Senator Henry Cabot Lodge in 1898 to ask the "United States government for help in evicting Spain from Puerto Rico."⁶⁴ The pro-independence *puertorriqueñas/os* in New York even provided interpreters and

the numbering of the laws themselves, I use *P.R. Laws Ann.*, vol. 1, p. xx when citing specific pages in this important historical volume of the *Puerto Rico Laws Annotated*, which transcribes in English many fundamental laws and historical documents that are essential to the discussion in this book. However, when citing Puerto Rican laws generally, I provide the legal citation for the statutes by using the abbreviation *P.R. Laws Ann.* followed by the appropriate title and section.

⁶⁰ See José Trías-Monge, *HISTORIA CONSTITUCIONAL DE PUERTO RICO*, vol. 1, 128 (1980).

⁶¹ Fernando Bayron-Toro, *ELECCIONES Y PARTIDOS POLÍTICOS DE PUERTO RICO* 107 (Isla, 4th ed. 1989).

⁶² 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." Title III, arts. 5 and 6 of the charter, *P.R. Laws Ann.*, vol. 1, 2–3. This was a lot in those days, when a teacher made 180 pesos a year and peasants made four-eighths to seven-eighths peso a day. . Pedro Malavet-Vega, *HISTORIA DE LA CANCIÓN POPULAR EN PUERTO RICO: 1493-1898*, 293, 351, 448–49, 505–8 (1493-1898) (Corripio 1992). On the monetary units in Spanish times, see Fernando Picó, *HISTORIA GENERAL DE PUERTO RICO* 9 (Ediciones Huracán, 1986).

⁶³ Bayron-Toro, 129–39.

⁶⁴ Jiménez de Wagenheim, *INTERPRETATIVE HISTORY*, 198–99.

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 it did with Cuba. What they clearly underestimated in both Puerto Rico and Cuba was how disruptive “America’s” imperial dreams would be for both islands.⁶⁵ In July 1898, the *americanos* invaded, and the Autonomist experiment ended before Puerto Rico had a real chance, however limited, to rule itself.

Soon after the change in sovereignty, the former Pure and Orthodox Party became the pro-statehood Partido Republicano Puertorriqueño (Puerto Rican Republican Party). The party’s organizers, which included José Celso Barbosa and Manuel F. Rossy, described their goals as “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.”⁶⁶ They favored accelerating the Americanization project (the process of educating the Puerto Ricans in English to become “Americans”), which, they hoped, would lead to statehood. Accordingly, in their original political manifesto, they 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.”⁶⁷

Luis Muñoz-Rivera continued to lead the Autonomist/Liberal Party, which also was undergoing a transformation after the invasion and became the Partido Federal Puertorriqueño (Puerto Rican Federal Party) in October 1899. Perhaps surprisingly, the party’s first official program, or platform, supported the immediate grant of territorial

⁶⁵ Jiménez de Wagenheim notes however that Independence Leader Ramón Emeterio Betances, exiled in France, warned that “if Puerto Ricans don’t act fast after the Americans invade, the island will be an American colony forever.” Jiménez de Wagenheim, *INTERPRETATIVE HISTORY*, 200 (notes omitted).

⁶⁶ *Manifiesto de los dirigentes de la agrupación de los puros ortodoxos dirigido al país invitando a la formación del partido republicano puertorriqueño, April 19, 1899*, in Reece B. Bothwell-González, ed., *PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA* vol. 1-1, 259–62 (Universidad de Puerto Rico, Editorial Universitaria, 1979) (translation by the author).

⁶⁷ *LUCHA POLÍTICA*, vol. 1-1, 261 (translation by the author).

status to Puerto Rico and eventual statehood.⁶⁸ 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.⁶⁹ This put them in direct conflict with the U.S. administrators and with the Republican Party. On October 26, 1900, an editorial in *La Democracia*, the newspaper published by the party and edited by Muñoz-Rivera, criticized the U.S. administrators of Puerto Rico and the Republican Party and its political thugs.⁷⁰ The editorial ended with a call for withdrawal from the elections. Consequently, in 1900 the Federal Party boycotted the first election held under the U.S. regime.⁷¹

Native political thinking and organizing had developed greatly during the nineteenth century in Puerto Rico, so that when the United States arrived it found an elite of sophisticated politicians and parties ready to support, challenge, and oppose the new sovereign. The future of the Puerto Ricans, however, would not be determined in their local elections, it would be decided by their new sovereign, and initially, by the United States Supreme Court.

⁶⁸ *Programa del Partido Federal, 1 de octubre de 1899*, in *LUCHA POLÍTICA*, vol. 1-1, 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 the autonomist Luis Muñoz-Rivera, the Autonomist Party founder and now independence leader Rosendo Matienzo-Cintrón, and another prominent independence supporter, José de Diego. Again displaying the colonial political pragmatism recognizing 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 *LUCHA POLÍTICA*, vol. 1-1, 282–85.

⁶⁹ Item 6 in their official “program.” *Programa del partido federal, October 1, 1899*, in *LUCHA POLÍTICA*, vol. 1-1, 271–72.

⁷⁰ “El Retraimiento,” *La Democracia*, October 26, 1900, in *LUCHA POLÍTICA*, vol. 1-1, 273–74.

⁷¹ For a discussion of the election results, see Bayrón-Toro, 115–16, 120–21.

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

Victory in the Spanish American War left the United States in effective control of its new island empire. Militarily, but more importantly legally and politically, the United States found itself at a crossroads. The Spanish American War and the *Downes* ruling bring to an end the age of the Northwest Ordinances and Jacksonian Manifest Destiny⁷² 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 our takeover of Puerto Rico, the Philippines, Guam and Cuba, the Supreme Court gives constitutional approval to the acquisition and control of territory for the sake of legal, political and military control of the islands rather than for national territorial expansion, accompanied by “immigration and settlement” by persons who were already citizens of the United States, and acceptable American stock.⁷³

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 definition implies

⁷² 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, as 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 20th 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 HAWAII AND THE SPANISH ISLANDS* 1-33 (chapter entitled “The New Manifest Destiny” contrasts territorial expansion of the early 19th century U.S., mostly associated with Democrats, with the late 19th Century overseas expansionism advocated mostly by the Republicans). See also Zimmerman, *FIRST GREAT TRIUMPH*, at 13 (noting that most politicians who favored it avoided the term “imperialism” and barely tolerated “expansionism”).

⁷³ See *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), as discussed below.

that a country does not have to own the territory of an alien community in order to exercise imperial authority over it.”⁷⁴ Mahan criticized the shortcomings of the Spanish, French and Dutch imperial projects, while expressing his admiration for the English empire; he disposed of the irony of the American War of Independence *from Great Britain* as follows: “Since she lost what is now the United States, Great Britain has become benevolent and beneficent to her colonies.”⁷⁵

Behind the political debate over territorial expansion was a professional debate over military doctrine. The one that prevailed deemed naval power the most important way to project military and political authority abroad, and this was seen as essential to being a strong player in international political and economic affairs, as well as the best way to ensure the security of the United States. No one influenced this thinking more in favor of the projection of naval power than Mahan, a graduate of the U.S. Naval Academy at Annapolis and 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 developed as a scholar familiar with naval history, and where he 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, but most especially in the Atlantic and Pacific oceans.⁷⁶ Mahan concluded that the “triumphs and the sufferings of the past months [referring to combat operations in the Spanish American War] have drawn men’s eyes to the necessity for increase of force, not merely to sustain over-sea dominion, but also to ensure timely use, in action, of the latent military and naval

⁷⁴ Zimmermann, *FIRST GREAT TRIUMPH*, at 13.

⁷⁵ Alfred T. Mahan, *The Relations of the United States to their New Dependencies*, in *LESSONS OF THE WAR WITH SPAIN, AND OTHER ARTICLES* 243 (1899).

⁷⁶ See generally Zimmermann, *FIRST GREAT TRIUMPH*, at 85-122 (chapter 3, referring to Mahan as a “pen-and-ink sailor”).

strength which the nation possesses.”⁷⁷ Mahan was clearly a good scholar and a prolific writer, and his books and magazine articles became highly influential in political circles in Washington.⁷⁸ Two particularly important admirers were Massachusetts Senator Henry Cabot Lodge and future President Theodore Roosevelt.⁷⁹

The war targeted the last Spanish island colonies in the Caribbean and Pacific oceans. In President William McKinley’s instructions to the U.S. delegation that negotiated the Treaty of Paris, the only full territory that he ordered them to demand from the Spanish was the islands of Puerto Rico.⁸⁰ Although the 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

⁷⁷ Alfred T. Mahan, *The Relations of the United States to their New Dependencies*, in *LESSONS OF THE WAR WITH SPAIN, AND OTHER ARTICLES* 251 (1899).

⁷⁸ See, e.g., Alfred T. Mahan, *SOME NEGLECTED ASPECTS OF WAR* (Boston: Little, Brown and Company 1907) *reprinted as* *UNILATERAL FORCE IN INTERNATIONAL RELATIONS* (Garland Publishing, Inc. 1972). Mahan’s best known work was *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783*, published in 1890. He also published extensively in magazines of the time, in his preface to another of his more important books, *THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE*, published in 1897, stated:

The thanks of the author are expressed to the proprietors of the “Atlantic Monthly,” of the “Forum,” of the “North American Review,” and of “Harper’s New Monthly Magazine,” who have kindly permitted the republication of the articles originally contributed to their pages.

Both these books are available in electronic form, including downloadable pdf files, at <http://www.riapress.com/riapress/index.lasso> (last visited March 15, 2010).

⁷⁹ Mahan and Roosevelt met at a critical time. In 1887, Mahan invited Roosevelt to lecture at the War College on the war of 1812, which Roosevelt had studied while a student at Harvard. Zimmermann, *FIRST GREAT TRIUMPH*, at 92.

⁸⁰ *Instructions of the President to the United States Peace Commissioners*, September 16, 1898, in *PAPERS RELATED TO THE TREATY WITH SPAIN*, U.S. Senate, 56th Cong., 2nd sess., doc. no. 148, 1901), 3–4, microfiche (Sanford, N.C.: Microfilming Corp. of America, 1982). These papers initially were secret, but on February 5, 1901, the Senate lifted the “injunction of secrecy” and ordered the publication of three thousand volumes. *Id.* at 1. I state “full” territory because the U.S. did demand the cession of individual islands in the Ladrões and Philippine archipelagoes. *Id.* at 4, 7 (Guam in the Ladrões and Luzón in the Philippines).

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.”⁸¹

The strategic importance of Puerto Rico, correctly spelled, was noted and explained by Mahan in his essay *Lessons of the War with Spain*, published in 1899.⁸² Mahan sums up the “military importance of Puerto Rico” as follows:

Puerto Rico, considered militarily, is to Cuba, to the future Isthmian canal, and to our Pacific [sic, Atlantic?] coast, what Malta is, or may be, to Egypt and the beyond, and there is for us the like necessity to hold and strengthen the one, in its entirety and in its immediate surroundings, that there is for Great Britain to hold the other for the security of her position in Egypt, for her use of the Suez Canal, and for the control of the route to India. It would be extremely difficult for a transatlantic state to sustain operations in the western Caribbean with a United States fleet based upon Puerto Rico and the adjacent islands. . . . [Provided that island bases be accompanied by] adequate naval strength, without which no maritime position possesses value.⁸³

The war itself began after an ultimatum of sorts. On April 19, 1898, the U.S. Congress passed a joint resolution authorizing the

⁸¹ Kal Wagenheim and Olga Jiménez-de Wagenheim, eds., *THE PUERTO RICANS: A DOCUMENTARY HISTORY* 89 (Princeton, N.J.: Markus Wiener, 1996) (italics added)

⁸² Alfred Thayer Mahan, *LESSONS OF THE WAR WITH SPAIN AND OTHER ARTICLES* (Little Brown 1899).

⁸³ Mahan, *Lessons*, at 28-30.

president to use force if Spain “failed to pacify Cuba.”⁸⁴ On April 25, 1898, Congress declared war, retroactive to April 21, 1898, because on that date the U.S. warship *Nashville* had captured the Spanish ship *Buenaventura*.⁸⁵ U.S. troops landed in Guánica, Puerto Rico, on July 25, 1898, while a naval force blockaded San Juan harbor.⁸⁶ 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 his diary, a Puerto Rican-born gunnery officer in the Spanish army recounted the agonizing wait to be attacked in San Juan, when they already knew that U.S. troops had landed in the south and were marching north. They also were well aware of the presence of American warships offshore. Indeed, the wait proved too stressful for two of the gunnery officer’s comrades, who attempted suicide. One of the U.S. soldiers, the poet Carl Sandburg, recounts his own deep fear of being attacked during the first night after his unit landed in Guánica. The only shots he heard, however, were fired by a unit from Illinois that apparently panicked during the night, firing so wildly that they hit the transport carrying the task force commander, several Red Cross nurses, and, presumably, fellow soldiers.⁸⁷

The Spanish forces in Puerto Rico did not put up much of a fight. The guns of San Juan had not been fired in hostilities 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 of the island, on July 28,

⁸⁴ 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. Rivero, CRÓNICA, 18–24.

⁸⁵ Rivero, CRÓNICA, at 18–24.

⁸⁶ Rivero provides a critical analysis of the campaign and the tactics in CRÓNICA, 522–23.

⁸⁷ Wagenheim, eds., THE PUERTO RICANS, 96–97, 99–103. Among the U.S. troops that landed in Guánica was the poet Carl Sandburg. His account of the landing and the Puerto Rico campaign can be found in his autobiography: Carl Sandburg, ALWAYS THE YOUNG STRANGERS (New York: Harcourt, Brace, 1953). The excerpts referring to the Puerto Rico campaign are quoted in Wagenheim, eds., THE PUERTO RICANS, 96–98.

without firing a shot. On this date, 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 [*sic*]. . . . 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 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.⁸⁸

In the Puerto Rico campaign, seventeen Spanish soldiers were killed, eighty-eight were wounded, and 324 were taken prisoner. For the United States, three soldiers were killed and forty were wounded, mostly by Puerto Rican irregular troops.⁸⁹

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 18 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 *Montevideo* on October 23.⁹⁰ The second colony had begun.

The Treaty of Paris, signed on December 10, 1898, approved by the U.S. Senate, and ratified by the president in 1899, officially ended

⁸⁸ Carr, *COLONIAL EXPERIMENT*, at 31.

⁸⁹ Héctor Andrés Negróni, *HISTORIA MILITAR DE PUERTO RICO* 340 ([Spain]: Sociedad Estatal Quinto Centenario, 1992); Carr, *COLONIAL EXPERIMENT*, at 28.

⁹⁰ Wagenheim, eds., *THE PUERTO RICANS*, at 102–3.

the Spanish-American War, with the island of Puerto Rico the United States' prize.⁹¹

The national election of November 1900 — won by “Imperialist” McKinley over “anti-Imperialist” William Jennings Bryan — was preceded by a heated political debate over what to do with the new territorial possessions. The Democratic Party platform denounced Republican “imperialism” and “militarism”:

We declare again that all governments instituted among men derive their just powers from the consent of the governed; that any government not based upon the consent of the governed is a tyranny; and that to impose upon any people a government of force is to substitute the methods of imperialism for those of a republic.

We hold that the Constitution follows the flag, and denounce the doctrine that an Executive or Congress deriving their existence and their powers from the Constitution can exercise lawful authority beyond it or in violation of it. We assert that no nation can long endure half republic and half empire, and we warn the American people that imperialism abroad will lead quickly and inevitably to despotism at home. ***

We oppose militarism. It means conquest abroad and intimidation and oppression at home. ... We denounce it as un-American, un-Democratic, and un-Republican, and as a subversion of the ancient and fixed principles of a free people.⁹²

The Republicans were clearly happy with the results of the Spanish American War and embraced the notion of territorial expansion. Their platform hailed the acquisition of American Samoa,

⁹¹ The official title is the Treaty of Peace between the United States of America and the Kingdom of Spain. See *P.R. Laws Ann.*, vol. 1, 16; see also Juan F. Perea et al., eds., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* 327 (St. Paul: West Group, 2000). Article II of the treaty reads: “Spain cedes to the United States the island of Porto Rico [*sic*] and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.” *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.” See *P.R. Laws Ann.*, vol. 1, 17.

⁹² Platform of the Democratic Party of July 4, 1900, <http://www.presidency.ucsb.edu/ws/index.php?pid=29587> (last visited March 15, 2010).

avored the annexation of Hawaii, “home rule for, and the early admission to statehood of the Territories of New Mexico, Arizona, and Oklahoma.”⁹³ But President McKinley and many in his party bristled at the Democrats’ charge that his policies were imperialist and militaristic. The Republican platform generally defended the Spanish American War and justified it as “liberation” of the island peoples:

In accepting by the Treaty of Paris the just responsibility of our victories in the Spanish war, the President and the Senate won the undoubted approval of the American people. No other course was possible than to destroy Spain’s sovereignty throughout the West Indies and in the Philippine Islands. That course created our responsibility before the world, and with the unorganized population whom our intervention had freed from Spain, to provide for the maintenance of law and order, and for the establishment of good government and for the performance of international obligations. Our authority could not be less than our responsibility; and wherever sovereign rights were extended it became the high duty of the Government to maintain its authority, to put down armed insurrection and to confer the blessings of liberty and civilization upon all the rescued peoples.⁹⁴

The President and candidate for reelection had to express his views in more detail in his acceptance of the nomination and his campaign speeches because the platform, despite high-level discussions on the subject, failed to include already approved plank language explaining the Republican position on “[the] constitutional relationship of the new possessions — not yet decided by the Supreme Court, and an inevitable campaign issue.”⁹⁵ McKinley argued that it was up to Congress to decide the status of the island territories, while emphasizing that our intentions towards them were benevolent:

⁹³ Republican Party Platform of June 19, 1900, <http://www.presidency.ucsb.edu/ws/index.php?pid=29630> (last visited March 15, 2010).

⁹⁴ Republican Party Platform of June 19, 1900, <http://www.presidency.ucsb.edu/ws/index.php?pid=29630> (last visited March 15, 2010).

⁹⁵ Leech, IN THE DAYS OF MCKINLEY, *supra* note 46 at 542. See also Zimmermann, FIRST GREAT TRIUMPH, 393 (noting that “Bryan made ‘imperialism’ the primary issue of his campaign”).

We reassert the early principle of the Republican Party, sustained by unbroken judicial precedents, that the Representatives of the people in Congress assembled have full legislative power over territory belonging to the United States, subject to the fundamental safeguards of liberty, justice, and personal rights, and are vested with ample authority to act “for the highest interests of our Nation and the people intrusted to its care.” This doctrine, first proclaimed in the cause of freedom, will never be used as a weapon for oppression. I am glad to be assured by you that what we have done in the Far East has the approval of the country.

.....
 The Republican Party was dedicated to freedom forty-four years ago. It has been the party of liberty and emancipation from that hour; not of profession, but of performance. It broke the shackles of 4,000,000 slaves and made them free, and to the party of Lincoln has come another supreme opportunity, which it has bravely met in the liberation of 10,000,000 of the human family from the yoke of imperialism.⁹⁶

McKinley was attempting to remind the nation of the debate at the time of *Scott v. Sanford*, discussed further in Part E below, when the Republicans had argued that not all provisions of the Constitution should apply in the territories, in order to prevent the application therein of the constitutional language intended to protect the obscenity of slavery.⁹⁷ But the Democrats pointed out that slavery was gone, and we were now faced with a new island empire.

On the night of November 6, 1900, the Republicans won an overwhelming victory, earning 292 of 447 electoral votes and a majority of the popular vote.⁹⁸ Between the time of his reelection and his assassination at the end of 1901, McKinley finished the takeover of the island territories, including, though somewhat reluctantly, the

⁹⁶ Speech accepting nomination. <http://www.presidency.ucsb.edu/ws/index.php?pid=76197> (last visited March 15, 2010).

⁹⁷ See *infra* note 182 and accompanying text.

⁹⁸ In the days of McKinley at 559.

Philippines.⁹⁹ Controlling and governing the new territorial possessions were major priorities of McKinley's administration starting in late 1898. His last three State of the Union Addresses, delivered, respectively, in December of 1898, 1899 and 1900, were principally focused on the results of the Spanish American War and the affairs of the new insular possessions.¹⁰⁰ The insurgency in the Philippines was the primary topic of discussion, the development of home rule for Puerto Rico and the transition to a "free" Cuban constitution were the other major topics regarding the territories covered by the President in trying to set executive and congressional priorities.¹⁰¹

Between September 1898 and April 12, 1900, Puerto Rico was under military rule supervised by the War Department.¹⁰² In the Fall of 1900, president McKinley and his administration had a strong

⁹⁹ Zimmermann, *FIRST GREAT TRIUMPH*, 316 (discussing McKinley as a reluctant imperialist, especially about the Philippines); 401-402 ("[O]n September 6, 1901, President McKinley was shot ... at the mammoth Pan-American Exposition in Buffalo. ...and he died on September 14 [1901].").

¹⁰⁰ State of the Union Address of December 5, 1898, <http://www.presidency.ucsb.edu/ws/index.php?pid=29539> (last visited March 15, 2010); State of the Union Address of December 5, 1899, <http://www.presidency.ucsb.edu/ws/index.php?pid=29539> (last visited March 15, 2010); State of the Union Address of December 3, 1900 <http://www.presidency.ucsb.edu/ws/index.php?pid=29541> (last visited March 15, 2010).

¹⁰¹ *Id.*

¹⁰² April 12, 1900, was the effective date of the first law passed by the U.S. Congress creating a civilian government for Puerto Rico. The law, known as the Foraker Act is discussed further below, notes 123-131 and accompanying text. On the period of military rule, see generally Raúl Serrano-Geyls, *DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO*, vol. 1, 439-42 (Colegio de Abogados de Puerto Rico, Instituto de Educación Práctica, 1986); Carmen Ramos-de Santiago, *EL GOBIERNO DE PUERTO RICO* 55-60 (Editorial de la Universidad de Puerto Rico, 1986); see also RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 32-33 (1984). The early period of American rule in Puerto Rico was a bit messy. See Malavet, *America's Colony*, *supra* note 1, at 57-60 (discussing the early period of American occupation). For an interesting description of the period, see Leibowitz, *DEFINING STATUS*, 140-41. See also de discussion *infra* note 114 and accompanying text.

interest in the Supreme Court cases that would define our constitutional authority over the newly conquered territories.

D. Mr. Bidwell and the 576 Boxes of Oranges

Downes v. Bidwell is the principal decision of the nine Insular Cases of the 1900 term.¹⁰³ Most of the lawsuits involved the collection of taxes and tariffs on Puerto Rican agricultural products brought to the United States. But the cases necessarily raised questions of the meaning of citizenship and how the American Constitution would be applied to the new island territories.

Taxes, crops and citizenship are 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 call “San Ciriaco” (Saint Cyril), which hit Puerto Rico on Tuesday, August 8, 1899. This

¹⁰³ (1) *Downes v. Bidwell*, 182 U.S. 244-391, 287 (May 27, 1901) (5-4 ruling; interpreting the first organic act passed by Congress to regulate Puerto Rico, ruled: “We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the constitution.”); (2) *DeLima v. Bidwell*, 182 U.S. 1-220 (May 27, 1901) (5-4 ruling; as a result of the Treaty of Paris, Puerto Rico is an island territory not a foreign country within meaning of U.S. tariff laws); (3) *Goetze v. United States*, 182 U.S. 221-222, 222 (1901); (4) *Crossman v. United States* [referred to as “the Hawaiian case”], 182 U.S. 221-222 (resolved summarily with *Goetze*, citing *DeLima* as controlling; neither “Port Rico [nor] the Hawaiian islands were foreign countries within the meaning of the [U.S.] tariff laws”); (5) *Dooley v. United States*, 182 U.S. 222, 235 (1901) [Dooley I] (after the Treaty of Paris Puerto Rico was no longer subject to U.S. tariffs); (6) *Armstrong v. United States*, 182 U.S. 243-244, 244 (1901) (duties imposed after signing of Treaty of Paris not properly executed); (7) *Huus v. New York and Porto Rico Steamship Company*, 182 U.S. 392-397 (May 27, 1901) (unanimous decision holding that ship traveling from San Juan to New York engaged in domestic “coasting trade” under U.S. law); (8) *Dooley v. United States* [Dooley II], 183 U.S. 151-176 (December 2, 1901) (5-4 along the voting lines of *Downes*; rules that Foraker Act taxes on Puerto Rican imports were constitutionally imposed); and (9) *Fourteen Diamond Rings v. The United States* [often referred to as “the Philippines case”], 183 U.S. 176-185 (December 2, 1901) (5-4, with Brown again the deciding vote with Fuller, Harlan, Brewer and Peckham in the majority ruling citing *DeLima* that the Philippines by virtue of the Treaty of Paris, ceased to be a “foreign country” for purposes of U.S. tariff laws; and Gray, White, Shiras, and McKenna in dissent).

tropical cyclone “caused 3,369 deaths and more than 2,000 injuries; damages to property were estimated at more than thirty five million dollars. Crops and farms ... were devastated ... Hunger and decease were rampant.”¹⁰⁴ A popular *seis*, the music of Puerto Rican farm laborers of the time, blamed American racism and taxes for the post-war and post-storm suffering of the Puerto Ricans. After bemoaning the loss of the coffee crop (one of the most important crops in Puerto Rico at the turn of the 20th century), the verses blame the Americans:

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/ and if what I hear is true,/ when they collect the tax;/how
dangerous this is!/ ;we are really bad off, *Perucho*!¹⁰⁵

The song goes on to blame 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 briefs was widely reported,¹⁰⁶ oral argument occurred over a period of ten days, and the resulting opinions occupy hundreds of pages over two volumes of the U.S. Reports for the October Term of 1900 (numbers 182 and 183). In the midst of the litigation of the cases at the Supreme Court level, a fight erupted in the U.S. Senate over the nomination of Justice Harlan’s son to be Attorney General of Puerto Rico. He was finally confirmed on May 21, 1901, just before the Insular Cases were decided with his father as one of the dissenters

¹⁰⁴ Pedro Malavet-Vega, *DE LAS BANDAS AL TRIO BORINQUEN: 1900-1927*, 36-37 (Ediciones Lorena 2002) (translation by the author).

¹⁰⁵ Malavet-Vega notes that the song was published in the “labor newspaper *El Pan del Pobre* (the Poor Man’s Bread), on 25 August 1901. Malavet-Vega, *DE LAS BANDAS*, supra note 104, at 37, 115 n. 13. The original Spanish lyrics are: *Estoy, chico, convencido/ que la mala situación/ no depende del ciclón/ como muchos han creído./ 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 autor).

¹⁰⁶ See, e.g., *Held Over By Supreme Court; Cases Involving Question Whether Porto Rico and Philippines Are Part of United States Postponed*, *The New York Times*, Nov 13, 1900, pg. 8

against the administration position.¹⁰⁷ Soon after the cases were decided, the 56th Congress ordered a reprinting of the parties' written briefs and transcription of oral arguments into a volume which the Supreme Court reports note — with some sense of awe — “amounted to 1075 pages.”¹⁰⁸

May 27, 1901 was to be the last day of the term, but the reading of the opinions in the Insular Cases took about five hours, forcing the court to reconvene the next day.¹⁰⁹ The opinions were read in the “Old Senate Chamber,” where the court held sessions between 1860 and 1935, when its current building was completed.¹¹⁰ “The small courtroom was crowded to repletion throughout the day, prominent government officials and many attorneys being present, and the proceedings were followed from start to finish with keen interest.”¹¹¹ The Washington Post and the New New York Times ran front-page articles reporting on the decisions, noting that one of the government dignitaries was Secretary of War Elihu Root.¹¹²

Elihu Root was a successful New York corporate lawyer when he was selected for the position of Secretary of War by President

¹⁰⁷ See *Fight on Harlan Nomination: Senators Foraker and Pettigrew Get Into a Heated Argument — confirmation Again Delayed Senate*, New York Times, January 17, 1901, p. 5. (soon after oral argument was heard on Downes). *Senate Acts on Harlan Nomination*, the New York Times, p.7, January 22, 1901 (“The Senate in executive session to-day confirmed the nomination of James S. Harlan to be Attorney General of Porto Rico. The final vote was reached after a discussion of more than two hours' duration, and when announced stood 43 to 21 in favor of confirmation.”).

¹⁰⁸ *DeLima v. Bidwell*, 182 U.S. at 3; 56th Congress, H.R. 72; THE INSULAR CASES: COMPRISING THE RECORD, 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 (Government Printing Office 1901).

¹⁰⁹ *Court Decides the Insular Cases*, Special to the New York Times, The New York Times, pg. 1, May 28, 1901.

¹¹⁰ http://www.supremecourthistory.org/history/supremecourthistory_history_homes.htm (last visited March 15, 2010).

¹¹¹ *Court Decides the Insular Cases*, Special to the New York Times, The New York Times, pg. 1, May 28, 1901.

¹¹² *The Status of Our Insular Possessions*, The Washington Post, page 1, May 28, 1901; *Court Decides Insular Cases*, The New York Times, p. 1, May 28, 1901.

McKinley, not because of his non-existent military experience, but rather because he was a lawyer. His initial reaction to receiving the job offer over the “newfangled telephone” was to reply: “Thank the President for me, ... but say that it is quite absurd. I know nothing about war, I know nothing about the army.” The reply he received illustrates why he is such a important figure in understanding the Insular Cases: “President McKinley directs me to say that he is not looking for any one who knows anything about war or for any one who knows anything about the army; he has got to have a lawyer to direct the government of these Spanish islands, and you are the lawyer he wants.”¹¹³ The Insular Possessions were regulated through the War Department between 1898 and 1934, when that responsibility was shifted to the Department of the Interior.¹¹⁴ This Secretary of War was therefore an interested and quite knowledgeable listener as the opinions were read.¹¹⁵

¹¹³ Leech, *IN THE DAYS OF MCKINLEY*, at 379; see also Zimmermann, *FIRST GREAT TRIUMPH*, at 147-148 (recounting the same story).

¹¹⁴ Between 1898 and 1934, Puerto Rico was governed through the War Department. That responsibility was shifted to the Department of the Interior, effective in May of 1934, where it remained until 1952. See, José Trías-Monge, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 58 (Yale University Press 1997) (this text incorrectly gives 1933 as the date, which is probably a typographical error since in his more detailed collection, and in his original source, it indicates 1934); José Trias Monge, *HISTORIA CONSTITUCIONAL DE PUERTO RICO*, vol. II, 206-214 (Editorial Universitaria 1981) (discussing the transfer of authority to the Department of the Interior).

¹¹⁵ Prompting the exchange discussed in note 1 *supra*. See also Philip C. Jessup, *ELIHU ROOT*, vol. I, 348 (Dodd, Mead and Co. New York, 1938) (referring to the famous cite quoting Arthur Wallace Dunn, *FROM HARRISON TO HARDING*, Vol. I, p. 257 (Putnams 1922)). This book also contains 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].” *Id.*, at 348. 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.” *Id.*, at 349-350. Root became Secretary of State in the administration of Theodore Roosevelt, and it is in that capacity that he visits Puerto Rico

In the first opinion to be read, *DeLima v. Bidwell*, the U.S. Supreme 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.¹¹⁶ Specifically, Justice Brown —speaking for himself, Chief Justice Fuller, Justices Harlan, Brewer and Peckham— wrote that “by the ratification of the treaty of Paris the island became territory of the United States—*although not an organized territory in the technical sense of the word.*”¹¹⁷ Therefore, sugar from Puerto Rico was not “imported merchandise” under the general tariff laws of the United States, as amended by the Customs Administrative Act of 1890,¹¹⁸ because the tariffs in those laws applied only to imports from foreign countries. The collector of taxes at the port of New York, Bidwell, lacked the authority to levy tariffs on Puerto Rican products under that law. Accordingly, “duties [on sugar imported from Puerto Rico] were illegally exacted, and the plaintiffs [were] entitled to recover them back.”¹¹⁹

But anticipating here in dissent what he would later join in concurring in *Downes*, Justice McKenna —speaking for himself and Justices White and Shiras— indicates that the status of Puerto Rico represented “a relation to the United States between that of being a

starting on July 8, 1906, during his “South American Trip.” *Id.*, at 468-492 (detailing and contextualizing this long voyage). He was entertained at the Governor’s mansion, *La Fortaleza*, by the Puerto Rican Police band, directed by Francisco Verar. Malavet-Vega, *DE LAS BANDAS*, *supra* note 104, at 65 & 81.

¹¹⁶ *DeLima v. Bidwell*, 182 U.S. 1 (1901). The court narrowly construed the question presented in the case: “This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a ‘foreign country’ within the meaning of the tariff laws.” *DeLima v. Bidwell*, 182 U.S. at 174.

¹¹⁷ 182 U.S. at 196. Justice Brown delivered the opinion of the court, which was joined by Chief Justice Fuller, and Justices Harlan, Brewer and Peckham.

¹¹⁸ 26 Stat. 131, c. 407 (June 10, 1890), discussed by the court at 182 U.S. at 175.

¹¹⁹ 182 U.S. at 200. I have ignored other issues addressed by the court in this removal action, especially the jurisdictional and remedy questions, because they are not pertinent here. But anyone interested in the statutory limitations on the court’s jurisdiction or on remedies available for governmental misapplication of statutes will find parts of the majority opinion of interest.

foreign country absolutely and of being domestic territory absolutely.”¹²⁰ Where the majority had seen only the categories of (a) foreign countries and (b) domestic territories, the dissenters saw (a) “foreign countries,” such as “Spain and its possessions,” (b) “domestic territory[,] such as New York now is” and (c) “[b]etween these extremes there are other relations, and that Porto Rico occupied one of them.”¹²¹ The majority does make the brief descriptive distinction between U.S. territories that are “organized” and those that are “not organized” that is quoted above. But, as their votes in *Downes* make clear, four of the five members of that majority (Fuller, Harlan, Brewer and Peckham) did not intend that distinction to have constitutional significance in determining the civil rights of the territorial citizens or the constitutional limitations on the power of congress and president to rule them.

DeLima was immediately eclipsed by the reading of the *Downes* decision, because it interprets the Foraker Act of April 12, 1900, making *Downes* the most important of the Insular Cases. The facts in *DeLima* occurred in the Fall of 1899, before passage of the Foraker Act.¹²² The Foraker Act, in providing for a government for Puerto Rico, turns it into an “organized” territory, i.e., one that is subject to a congressional organic statute. Therefore, the Supreme Court would be faced with the question of what constitutional rights are applicable in any territory subject to U.S. sovereignty that was not yet a state.

The act — named after the very powerful Republican Senator from Ohio, Joseph Benson Foraker — authorized a U.S.-appointed civilian government to be established on the island, and its chief executive, the governor, would be named by the president of the

¹²⁰ *DeLima v. Bidwell*, 182 U.S. at 220 (McKenna, J., dissenting, together with Justices White and Shiras).

¹²¹ 182 U.S. 200-201 (McKenna, J. dissenting).

¹²² *DeLima v. Bidwell*, 182 U.S. at 2.

United States.¹²³ The president also 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 chief justice and associate justices of the island's supreme court were to be appointed by the president of the United States. The Act created the Federal District Court for Puerto Rico.¹²⁴ This regime lasted until 1917 when it was replaced by the Jones Act, which led to the *Balzac* decision discussed in the next section.¹²⁵

During discussion of the Foraker bill, the U.S. Senate changed references to "Puerto Rico" contained in the original draft with "Porto Rico", and that denomination was used in the final proposal and was only changed by law in 1932.¹²⁶ A defense of the new spelling of the island's name in the law strikes a modern reader as a concession to underachieving:

A Senate Committee has decided that "Porto Rico" is the proper spelling of our new island territory, and not "Puerto Rico," after

¹²³ See Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in various sections of title 48 of the United States Code). The act is also transcribed in vol. 1 of the *Laws of Puerto Rico Annotated*, under the heading "Historical Documents." See *P.R. Laws Ann.*, vol. 1, 24–48. See also Foraker Act, sec. 17, in *P.R. Laws Ann.*, vol. 1, 36–37.

¹²⁴ See generally Foraker Act, secs. 18–27, 33, and 34, *P.R. Laws Ann.*, vol. 1, 36–39, 42–44. Sec. 27 provides that the council shall be one of the two houses of the legislative assembly (*P.R. Laws Ann.*, vol. 1, 39). The Executive Council is argued to have been the most important element in the process of "Americanizing" Puerto Rico. PEDRO A. CABÁN, *CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898-1932*, 122-126 (1999).

¹²⁵ See the Jones Act of 1917, ch. 145, 5, 39 Stat. 951, 953 (1917). The Jones Act is also transcribed in title 1 of the *Laws of Puerto Rico Annotated*. *P.R. Laws Ann.*, vol. 1, 52.

¹²⁶ Government of Puerto Rico, New York Times, January 27, 1900, pg. 4. Act of May 17, 1932, chap. 190, 47 Stat. 158: "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.'" The act is now codified as 48 United States Code sec. 731a (1999).

the local and Spanish usage. The spelling adopted by the committee ought to prevail. It is the easiest and simplest form and in accordance with common-sense principles. Whenever an opportunity presents itself, as in this case, to choose between a phonetic form of spelling and an intricate or more involved form, the former ought always to be adopted. Silent letters and fantastic combinations in words impose a useless and wholly unnecessary tax upon the memory and intellect, and they ought to be ruled out of the English language as rapidly as possible. Life is too short and time too precious to be spent in trying to master the absurdities of the spelling book, which have no excuse for existence.¹²⁷

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.¹²⁸ This sets 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 expressed the opinion that the natives of the island were not yet prepared for jury trials.¹²⁹

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

¹²⁷ *Common Sense in Spelling*, from Leslie's Weekly, New York Times, Mar. 18, 1900, pg. 29.

¹²⁸ The removed provision appears to mirror already-existing statutory language that extended the application of the Constitution to "organized" territories. 18 Stat. 391 (1874) ("The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States.").

¹²⁹ *Government of Puerto Rico*, New York Times, January 27, 1900, pg. 4.

the free trade provisions and substituted a tax.¹³⁰ Therefore, the Foraker Act also 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.¹³¹

While the Republicans failed to include proposed language praising the law in their platform,¹³² the Democrats turned the act into a major campaign issue in the election of 1900. The Democratic platform — after declaring their view “that the Constitution follows the flag” — attacked the Foraker Act:

we denounce the Porto Rican law, enacted by a Republican Congress against the protest and opposition of the Democratic minority, as a bold and open violation of the nation’s organic law and a flagrant breach of the national good faith. It imposes upon the people of Porto Rico a government without their consent and taxation without representation. It dishonors the American people by repudiating a solemn pledge made in their behalf by the Commanding General of our Army, which the Porto Ricans welcomed to a peaceful and unresisted occupation of their land. It dooms to poverty and distress a people whose helplessness appeals with peculiar force to our justice and magnanimity. In this, the first act of its imperialistic programme, the Republican party seeks to commit the United States to a colonial policy, inconsistent with republican institutions and condemned by the Supreme Court in numerous decisions.¹³³

President and presidential candidate McKinley explained the Republican position on constitutional authority over the territories as follows:

¹³⁰ Leech, *IN THE DAYS OF MCKINLEY*, at 487-489, detailing the development of the bill in Congress.

¹³¹ Section 3 of the Foraker Act. 31 Stat. 77, c. 191, Sec. 3, April 12, 1900. This was a change from the originally proposed bill, reportedly as a result of protests from and lobbying by sugar producers and citrus farmers. Leech, *IN THE DAYS OF MCKINLEY*, at 488.

¹³² See Republican Party Platform of June 19, 1900, *supra* note 93.

¹³³ Democratic Party Platform of 1900, *supra* note 92.

We reassert the early principle of the Republican Party, sustained by unbroken judicial precedents, that the Representatives of the people in Congress assembled have full legislative power over territory belonging to the United States, subject to the fundamental safeguards of liberty, justice, and personal rights, and are vested with ample authority to act “for the highest interests of our Nation and the people intrusted to its care.” This doctrine, first proclaimed in the cause of freedom, will never be used as a weapon for oppression. ...¹³⁴

With the respective arguments already articulated by the opposing sides in the political branches of government, a judicial decision would have to settle the matter. On November 20, 1900, George R. Bidwell, the same collector of customs at the port of New York involved in *DeLima*, demanded six hundred fifty nine dollars and thirty five cents (\$659.35) in taxes “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 & 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”¹³⁵ The plaintiffs paid under protest, got their oranges and — represented by Coudert Brothers,¹³⁶ the New York City law firm, with offices at 71 Broadway — filed their suit that same day! The complaint, which was verified under oath by Samuel B. Downes

¹³⁴ Speech accepting nomination. <http://www.presidency.ucsb.edu/ws/index.php?pid=76197> (last visited March 15, 2010).

¹³⁵ Plaintiff’s Complaint, November 20, 1900 in *INSULAR CASES*, supra note 108, at 723-724.

¹³⁶ 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. He 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.
<http://www.metrocorpounsel.com/current.php?artType=view&artMonth=August&artYear=2004&EntryNo=1474>

personally, 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 with 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.”¹³⁷

Procedurally, this was 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.¹³⁸ Additionally, this was not that long after the lower federal courts were first granted original jurisdiction over federal question complaints in the Judiciary Act of 1875,¹³⁹ and it predates the enactment of the Federal Rules of Civil Procedure in 1938. Therefore, rather than filing a Motion to Dismiss under Rule 12 of the current Federal Rules of Civil Procedure, United States Attorney for the Southern District of New York, Henry L. Burnett, filed a demurrer arguing “That the complaint does not state facts sufficient to constitute a cause of action.”¹⁴⁰ On November 30, 1900, Circuit Judge Henry Lacombe heard oral argument at the “post-office building, in the borough of Manhattan, city of New York” and ruled in favor of the defendant, ordering the complaint dismissed and awarding costs to the defendant.¹⁴¹ Judgment was entered dismissing the action and taxing costs in the amount of sixteen dollars and thirty cents (\$16.30) at 12:30 p.m. on December 1, 1900.¹⁴² *Downes* filed a writ of error —

¹³⁷ *INSULAR CASES*, supra note 108, at 724.

¹³⁸ Irwin Chemerinsky, *FEDERAL JURISDICTION* (Little, Brown & Company 1989): 22-23, citing Act of Mar. 3, 1891, ch. 517, 26 Stat. 826. “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. 1, 36 Stat. 1087.

¹³⁹ Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. See generally, Chemerinsky, *FEDERAL JURISDICTION*, at 222.

¹⁴⁰ *INSULAR CASES*, supra note 108, at 725.

¹⁴¹ Order, in *INSULAR CASES*, supra note 108, at 725. Judgment, *Id.*, at 726.

¹⁴² Order, in *INSULAR CASES*, supra note 108, at 725. Judgment, *Id.*, at 726.

giving notice of the appeal— with the Circuit Court on December 5, 1900. Judge Lacombe officially allowed the matter to proceed, and clerk of the court John A. Shields certified a 19-page record for appeal on December 7, 1900, canceling a “ten-cent U.S. internal revenue stamp.”¹⁴³ The case was filed with the Supreme Court on December 11, 1900 and assigned case number 507.¹⁴⁴

Though the plaintiffs were clearly interested in the constitutional principle, the monetary amounts involved were not insubstantial. The Foraker Act had provided a salary of \$8,000 dollars a year for Puerto Rico’s governor, and salaries between \$3,000.00 and \$5,000.00 for high officials including the justices of the Supreme Court.¹⁴⁵ The Justices of the United States Supreme Court earned \$10,000.00 a year in 1901, and that salary had just been increased in 1900 after remaining at \$6,000.00 for forty years.¹⁴⁶ Moreover, the salaries of the high officials were immense sums in the context of Puerto Rico. Just before the American invasion, a Puerto Rican teacher earned 180 pesos —the Spanish monetary unit—a year, and peasants earned four-eighths to seven-eighths peso a day.¹⁴⁷ Section 11 of the Foraker Act provided for an exchange rate of sixty cents for every *peso*,¹⁴⁸ and the first legislative assembly elected under the auspices of the Foraker Act provided minimum salaries of between 30 and 40 “dollars per school month, for each month of actual service”

¹⁴³ Writ of Error, *INSULAR CASES*, supra note 108, at 721, Clerk’s Memo with Judge’s Authorization, *Id.*, at 721-722; Certification of the Record, *Id.*, at 722. The system of canceling stamps to pay court filing fees is still used in the local courts in Puerto Rico, where I am admitted to practice.

¹⁴⁴ *INSULAR CASES*, supra note 108, at 729.

¹⁴⁵ Foraker Act sec. 36, c. 191, 31 Stat. 85, Apr. 12, 1901.

¹⁴⁶ Richard Posner, *THE FEDERAL COURTS* 22 (Harvard University Press 1996), citing 28 U.S.C. sec. 5.

¹⁴⁷ Malavet-Vega, *HISTORIA*, 293, 351, 448–49, 505–8. On the monetary units in Spanish times, see Fernando Picó, *HISTORIA GENERAL DE PUERTO RICO* (Ediciones Huracán, 1986), 9.

¹⁴⁸ Apr. 12, 1900, c. 191, sec. 11, 31 Stat. 80.

for teachers in Puerto Rico.¹⁴⁹ Therefore, while we might today resent a constitutional doctrine that relegates Puerto Ricans and other territorial peoples of the United States to second class citizenship for a few hundred dollars and 576 boxes of oranges, in 1900, \$659.35 was a lot of money.

Justice Brown announced the result of the case, but the four concurring justices joined or issued separate opinions, therefore, in articulating his reasoning he wrote only for himself.¹⁵⁰ The court ruled “that the Island of Puerto 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; that the Foraker act is constitutional, so far as it imposes [discriminatory] duties upon imports from such island [to the United States].”¹⁵¹ 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 U.S. state; thus, Puerto Rican exports to the U.S. mainland were subject to duties not imposed on the products of the states. Therefore, import tariffs on oranges, sugar, or any other Puerto Rican product, were legitimately imposed by the U.S. Congress.¹⁵² Justice White’s concurring opinion had the most votes, since it was joined by Justices Shiras and McKenna, the same three who had subscribed McKenna’s dissent in *DeLima*. Articulating what will eventually

¹⁴⁹ Sections 16-18, see William H. Hunt, Secretary of Porto Rico, ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO CB 22, January 31, 1901, p. 34 (San Juan, 1901).

¹⁵⁰ The opinion states that “Mr. Justice Brown ... announced the conclusion and judgment of the court.” 182 U.S. at 247. Justice Brown’s opinion is found in 182 U.S. at 247-287.

¹⁵¹ *Downes v. Bidwell*, 182 U.S. at 287. The Foraker Act required “the payment 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’” (182 U.S. at 247-48).

¹⁵² In other words, the equal taxation provision of the Constitution did not benefit Puerto Rico. Compare U.S. Constitution, Art. I, sec. 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”).

become the accepted doctrine, White finds 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”¹⁵³ but subject to absolute congressional legislative authority under that provision and the “necessary and proper clause” of the U.S. Constitution.¹⁵⁴ Justice Gray, the final vote for the bare majority, issued a separate concurrence, like Brown speaking only for himself.¹⁵⁵ The four dissenting justices — Chief Justice Fuller, Justices Harlan, Brewer and Peckham — joined a single dissenting opinion authored by Fuller,¹⁵⁶ but Justice Harlan also issued a separate dissent.¹⁵⁷ Justice Harlan’s dissent has become better known and regarded over the years, just as Justice White’s concurrence became the accepted constitutional doctrine.

For those who believed that territorial expansion along an imperialist/colonial model was a sound national policy, Justice Brown’s obvious contradictions between his position in *DeLima* and *Downes* were intellectually indefensible. Regardless of Brown’s consistency issues, this seems rather unfair to the four other members of the *DeLima* majority — Chief Justice Fuller, Justices Harlan, Brewer and Peckham, the dissenters in *Downes* — and to the opinion they joined. The four dissenters in *Downes* express views that are perfectly consistent with their majority opinion in *DeLima*. *DeLima*, however, was limited to its facts, because the then existing state of the law was superseded by the Foraker Act and by *Downes*, making the latter the dominant decision. Unfortunately for the dissenters, when judging *Downes*, Justice White’s plurality became the favorite because it articulates the pro-empire view in an intellectually-

¹⁵³ U.S. Constitution, Art. IV, sec. 3, cl. 2.

¹⁵⁴ The necessary and proper clause. U.S. Constitution, Art. I, sec. 8.

¹⁵⁵ 182 U.S. at 344-347.

¹⁵⁶ 182 U.S. at 347-375.

¹⁵⁷ 182 U.S. at 375-391.

defensible manner. For example, the New York Times editorialized soon after the cases:

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.¹⁵⁸

The New York Times editorial also noted another strength in Justice White's opinion: it overruled *Scott v. Sanford*, which the newspaper celebrated with the following editorial comment:

The *ex proprio vigore* doctrine of constitutional application as expounded by Calhoun in the interest of the slave power is destroyed forever.¹⁵⁹

¹⁵⁸ *The Court and the Opinions*, Editorial, *New York Times*, May 29, 1901; pg. 8.

¹⁵⁹ See the discussion *supra* note 182 and accompanying text. The "Calhoun" named in the editorial is John Calmore Calhoun, most famous as the staunchly racist, pro-slavery Senator from South Carolina from 1832 until his death in 1850 (although he left the Senate to serve as Secretary of State in 1845). Calhoun had served in the House of Representatives, as Secretary of War and as Vice-President of the United States under Presidents John Quincy Adams and Andrew Jackson. He was the first person to resign the vice-presidency, which he did in order to run for the Senate in 1832.

Some of the most prominent legal thinkers of the time took positions on the matters at issue in the Insular Cases, 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 with four articles in volume 12 and three in volume 13 of the Harvard journal. Four in volume 8 of the Yale law journal for the years 1898-1899. For example, Harvard Law School dean Langdell supported unfettered congressional authority,¹⁶⁰ as did Simeon E. Baldwin.¹⁶¹ Recognizing that the executive was in effective 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.”¹⁶² More generally, this legal scholarship interpreted the Territorial Clause along three lines: (1) absolute Congressional power totally unfettered by other constitutional constraints; (2) almost completely unfettered Congressional authority but limited by fundamental constitutional guarantees, and (3) the “Constitution Follows the Flag”, meaning that all constitutional guarantees and constraints on congressional power apply in the territories.¹⁶³

¹⁶⁰ Christopher C. Langdell, *The Status of Our New Territories*, 12 HARVARD LAW REVIEW 365, 379-392 (1899) (detailing how, in the author’s view, most provisions limiting congressional authority to legislate did not apply to the new territories).

¹⁶¹ 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 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).

¹⁶² Simeon E. Baldwin, *Absolute Power*, 7 YALE L.J. 1, 19 (1897).

¹⁶³ Trias-Monge provides a succinct analysis of the legal literature of the time. Trias-Monge, *HISTORIA CONSTITUCIONAL*, vol. I, at 238.

Downes effectively established the distinction between different types of “domestic territories,” but now in concurrence rather than in dissent, with White labeling them incorporated and unincorporated territories. This was important because at the time the United States already had other territories, most of which were then believed to be on their way to statehood. Indeed Arizona, New Mexico, Oklahoma, Alaska and Hawaii would eventually become states of the union. The District of Columbia, as a special federal enclave, also fell within this discourse, but has not become a state. This made the arguments of absolute congressional authority unacceptable to scholars like Abott Lawrence Lowell,¹⁶⁴ Puerto Rico in his view was a “part of” the United States but had not been “incorporated” into it. This was the perfect imperial compromise. We could control land and its people by making it domestic U.S. territory relative to other countries, but we were not bound to give to the people living in those territories the same rights enjoyed in the states of the union.

In his dissenting opinion, Justice John Marshall Harlan found the distinction 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, Puerto 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.¹⁶⁵

Most important, the majority, over the vigorous dissent of the four justices, gave to the U.S. Congress almost unfettered discretion to do with Puerto Rico what it wanted. In the dissenting opinion written

¹⁶⁴ Abott Lawrence Lowell, *The Status of our New Possessions—A Third View*, 13 Harvard L. Rev. 155 (1899).

¹⁶⁵ 182 U.S. at 391 (Harlan, J. dissenting).

by Chief Justice Melville W. Fuller, joined by Justices Harlan, David J. Brewer, and Rufus W. Peckham, the minority called for constitutional values to prevail over the desire for empire:

They 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 farther, 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.¹⁶⁶

Justice Horace Gray’s brief concurring opinion proved to be prophetic: “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.”¹⁶⁷ However, Justice White’s opinion includes 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*

¹⁶⁶ 182 U.S. at 374–75 (Fuller, Chief Justice, dissenting).

¹⁶⁷ 182 U.S. at 346. This position was eventually adopted by a majority of the Court in *Balzac*.

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.¹⁶⁸

As discussed earlier, the *Boumediene* majority also classified the “situational” standard as producing rules of temporary duration. Nevertheless, to this day Puerto Rico continues to be an unincorporated territory of the United States, albeit with an increasingly powerful locally elected government.

Politically, the majority in *Downes* followed the Republican policy of empire building: territorial expansion unburdened by the concept of having the constitution follow the flag. In fact, the court majority was principally composed of republican appointees and the dissents were filed principally by democrat-appointed justices. The two exceptions in fact prove the policy rule. Former Louisiana Democratic Senator White voted with the Republican majority. His fellow southerner, but Republican appointee, Harlan made a clean break with anti-black racism in his dissent in *Plessy v. Ferguson*,¹⁶⁹ and had made his policy choice when he joined the Union Army during the Civil War (White fought for the Confederacy).¹⁷⁰ So, to the extent that they followed the Republican policies of anti-insular-peoples’ nativism and territorial expansion, the alignment of justices was fairly understandable. What is more interesting is how the pro-empire position of a three-justice plurality in a deeply divided court went on to become the shared constitutional vision that is now unanimous among the justices, no matter their political stripes.

¹⁶⁸ 182 U.S. at 343–44 (italics added).

¹⁶⁹ 163 U.S. 537 (1896). The court’s alignment in the *Plessy* case is discussed further below in notes 248–250 and accompanying text.

¹⁷⁰ See generally, Ely, *The Fuller Court*, supra note 186, Showmaker, *The White Court*, and Pratt, *The Court Under Edward Douglass White*, supra note 196.

E. The *Downes* Supremacy: from Imperial Vacillation to Unanimous Plenary Power

The common phrase “Insular Cases” was immediately used in the media to describe the nine cases of the term of October 1900 when they were filed. The legal literature quickly picked up on this usage as well.¹⁷¹ The Supreme Court itself designated them as the “Insular Tariff Cases” as indicated in its Statement of the Case in *DeLima v. Bidwell*.¹⁷² The use of the word insular rather than territory would distinguish the new possessions from the territories existing prior to the Spanish American War, which were eventually destined for statehood. Accordingly, the United States Supreme Court in *Hawaii v. Mankichi* uses “Insular Cases” as a reference to the cases resolved in 1901 involving the territorial possessions acquired after the Spanish American War.¹⁷³ As used in this context, “insular” simply means “relating to, or constituting an island.”¹⁷⁴ But another meaning of the term insular might better describe the attitudes: “physically or emotionally removed from others.”¹⁷⁵

Some authors take a broad view, identifying the insular cases as a complex series of decisions that helped create the “American empire.” Guadalupe T. Luna, for example, noted that the *Scott v. Sanford* decision is arguably the first of the insular cases because it created the imperial United States with its inherent constructs of citizens and noncitizens within U.S. territorial control; *Balzac v.*

¹⁷¹ See, e.g., Charles E. Littlefield, *The Insular Cases*, 15 HARVARD L. REV. 169 (1901).

¹⁷² *DeLima v. Bidwell*, 182 U.S. 1, 2 (1901).

¹⁷³ 190 U.S. 197 (1903). As of 2006, the Supreme Court had used the phrase “insular cases” in 23 of its published opinions, starting with *Mankichi* and 28 times has it referred more generally to the cases or to the possessions. Lexis Search conducted June 26, 2006. The latest back then was *United States v. Lara*, 541 U.S. 193 (2004) (regarding tribal authority to prosecute crimes). *Bush v. Rasul* makes passing reference to “insular possessions” in regards to the habeas corpus statute. 542 U.S. 466 (2004) (case arising out of detentions in Guantánamo). But *Boumediene* is the most recent decision that follows the rule of the Insular Cases.

¹⁷⁴ Webster’s Ninth New Collegiate Dictionary, p. 628.

¹⁷⁵ Encarta World English Dictionary.

People of Porto Rico then established the categories of citizenship based on larger or lesser entitlements to constitutional rights.¹⁷⁶ One might also see them even more generally within the law of conquest or the “right of discovery.” In *Johnson v. M’Intosh*,¹⁷⁷ the Supreme Court ruled that the “right of discovery” and the “right of conquest” gave Europeans legal title over the American Continents. It stated as well that Native Americans could not be *assimilated*, i.e., they could not “be incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected.”¹⁷⁸ Incorporation was not “practicable,” thus requiring the Europeans to choose between “abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword.”¹⁷⁹

Like American Indians, African slaves were also not allowed to assimilate into American citizenship. Most students of American law know *Dred Scott v. Sanford* for its shameful definition of African slaves as non-citizens and chattel property rather than as persons entitled to constitutional rights.¹⁸⁰ But, as President McKinley

¹⁷⁶ Guadalupe T. Luna, *On the Complexities of Race: The Treaty of Guadalupe Hidalgo and Dred Scott v. Sanford*, 53 *MIAMI LAW REVIEW* 691, 708-709 (1999) (noting that *Scott v. Sanford* gave constitutional authority to constructs of citizens and noncitizens within U.S. territorial control); see also Sarah H. Cleveland, *Symposium: 150th Anniversary Of The Dred Scott Decision: Article: Foreign Authority, American Exceptionalism, And The Dred Scott Case*, 82 *Chi.-Kent. L. Rev.* 393 (2007) (a thorough and updated study of the historical context and constitutional bases for the decision).

¹⁷⁷ *Johnson v. M’Intosh*, 21 U.S. 543, 8 Wheat. 543 (1822).

¹⁷⁸ *Id.* at 584-585.

¹⁷⁹ The Supreme Court justified genocide as follows:

When the conquest is complete, ... the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, ...

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

Id. at 584-585.

¹⁸⁰ *Dred Scott v. Sanford*, 60 U.S. 393 (1856) (African slaves imported into the United States and their descendants, free or otherwise, “are not included, and were not intended to be included,

repeatedly alluded to during the 1900 presidential election campaign, *Scott v. Sanford* 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*¹⁸¹

Scott v. Sanford ruled that Congress could not ignore the three constitutional provisions that protected slavery when legislating for new territories.¹⁸² Paradoxically, while the Civil War, the 13th and 14th Amendments reversed the *de jure* exclusion of African slaves from citizenship, the *Downes* decision creates a new kind of lesser citizenship by reversing *Scott v. Sanford*'s interpretation of the Territorial Clause, allowing Congress to ignore constitutional provisions prohibiting discriminatory taxation and requiring trial by jury.

Clearly *Downes* and its companion cases fit well in the larger context of the jurisprudence of American expansionism. *Johnson v.*

under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their [sic, its?] authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.")

¹⁸¹ *Scott v. Sanford*, 60 U.S. at 125-126.

¹⁸² U.S. Const. Art. I, § 2, Cl. 3 (slaves contribute 3/5 to their masters' entitlement to congressional representation); U.S. Const. Art. I, § 9, Cl. 1 (limiting the power of Congress to restrict the slave trade), U.S. Const. Art. IV, § 2, Cl. 3 (runaway slaves had to be returned to slave states). See generally RACE AND RACES, at 103-104 (explaining that "Despite the protections of slavery in the Constitution, its drafters were careful not to use the word 'slave' at all, despite language that was understood by all to refer to slaves.").

M’Intosh and Scott v. Sanford represent the first age of American territorial expansion characterized by territorial conquest from the native inhabitants, followed by colonization by the growing U.S. immigrant population. The second age of expansion did not involve this territorial incorporation into the nation or the re-population of the territory by “American” “pilgrims” rather than by the unassimilable Latinas/os.¹⁸³ This article is concerned with this second age of expansionism that started with the Spanish American War and was legally defined by the Insular Cases that followed it.

The first reported case in which the facts occurred in or around Puerto Rico after the start of the Spanish American War is *The Olinde Rodriguez*, which involved the seizure of a vessel by the United States Navy during its blockade of San Juan harbor in July of 1898. The matter was decided on May 15, 1899.¹⁸⁴ But the constitutional law of the second age of expansion starts with the nine Insular Cases resolved in 1901. While no knowledgeable person would challenge *Downes*’ labeling as one of the Insular Cases, no definitive listing of those decisions is agreed upon.¹⁸⁵ This article divides them into three categories:

¹⁸³ On Latina/o assimilation generally, see Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? : *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (a poignant discussion of growing up latina/o in California); George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 UCLA CHICANO-LATINO L. REV. 1 (1999) (drawing analogies between American demands of assimilation and insect biology and *Star Trek*’s Borg characters).

¹⁸⁴ *The Olinde Rodriguez*, 174 U.S. 510 (1899) (about ownership of vessel taken by the U.S. navy during its blockade of San Juan harbor).

¹⁸⁵ For a general discussion of this debate, see Efrén Rivera-Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 225 (1996); Efrén Rivera Ramos, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (American Psychological Association 2001); see also Burnett, *An Inconvenient Constitution*, supra note 9, at note 4 and accompanying text. The most serious work on the Insular Cases was done by José Trías Monge, the late Chief Justice of the Puerto Rico Supreme Court, in the first volume of this five volume collection on the constitutional history of Puerto Rico. See José Trías Monge, HISTORIA CONSTITUCIONAL DE PUERTO RICO, vol. I (Editorial UPR 1999).

First, the nine cases of the October Term of 1900, with seven opinions issued on May 27, 1901, and two in December of 1901, in which a deeply divided Supreme Court, under Chief Justice Melville Weston Fuller, narrowly allowed the McKinley administration and Congress to exercise plenary powers in dealing with the territorial acquisitions resulting from the Spanish American War.¹⁸⁶ Justice White's concurring opinion in *Downes* adopts the categories of incorporated and unincorporated territories as determinative of the bundle of constitutional rights and obligations that apply in the territories. Hereafter, these cases will be referred to as "*Downes* and its companion cases."

Second, the "intermediate cases" resolved between 1903 and 1922, in which the Fuller court, on its way to becoming the White court in 1910, and the Taft court in 1921, tries to agree on a single constitutional doctrine in its application of the Territorial Clause of the Constitution.

Third, a single decision that is arguably the last of the Insular Cases: *Balzac v. People of Porto Rico*. A unanimous Supreme Court settles upon Justice White's plurality opinion and his incorporated/unincorporated territory dichotomy as the applicable constitutional doctrine, and this remains the rule to this day, as recognized by all nine justices in *Boumediene*. Subsequent cases have merely reinforced the continued status of *Downes* and *Balzac* as the law of the land in the application of the Territorial Clause of the Constitution of the United States.

The cases between *Downes* and *Balzac*, those in the second category of Insular Cases, start with *Hawaii v. Mankichi*, in 1903, in which the court rules that Hawaiian territorial law, not the Seventh Amendment, governed the defendant's right to a criminal jury trial. White and McKenna concur, stating that congress had not expressly

¹⁸⁶ I purposely avoid stating that the court was led by Chief Justice Fuller, as on this matter he was mostly among the dissenters or at best concurred in the judgments. See generally, James W. Ely, Jr., *THE FULLER COURT: JUSTICES, RULINGS AND LEGACY* (ABC-CLIO, Inc. 2003).

incorporated Hawaii, therefore full constitutional protections such as the right to jury trial did not apply in the territory.¹⁸⁷ The decision is significant because Justice Oliver Wendell Holmes had replaced Justice Horace Gray on the Supreme Court and Justice Shira was replaced by Justice William Day.¹⁸⁸ *Mankichi* was soon followed by *González v. Williams*, a unanimous ruling subscribed by Chief Justice Fuller in favor of a Puerto Rican woman seeking entry into New York City after the Immigration Commissioner had ruled her a foreigner and excluded her from the city. The court ruled that Puerto Ricans while not citizens of the United State are nonetheless subjects or “nationals” of this country and therefore not foreigners for purposes of the immigration laws.¹⁸⁹

In 1904, the court issued *Kepner v. United States*,¹⁹⁰ *Binns v. United States*,¹⁹¹ and, more importantly, *Dorr v. United States*.¹⁹² In *Dorr*, a case originating in the Philippines, White, now joined by a majority of the court, reaffirms the incorporation doctrine that he first articulated in *Downes* and finds that the Philippines were an unincorporated territory.¹⁹³

In 1906, a case involving territorial Alaska, *Rassmusen 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 prior opinions. Writing for the majority, Justice White

¹⁸⁷ 190 U.S. at 218, 219.

¹⁸⁸ 190 U.S. 197 (1903). Fuller, Harlan, Brewer and Peckham dissent, 190 U.S. 221-226, and Harlan files a separate dissent, 190 U.S. 226-249.

¹⁸⁹ 192 U.S. 1 (1903). Citing *Elk v. Wilkins*, 112 U.S. 94 (1884), the court rules that Puerto Ricans are “Nationals” of the United States, and were neither citizens, for purposes of constitutional guarantees, nor foreigners, for purposes of the immigration laws.

¹⁹⁰ 195 U.S. 100 (1904).

¹⁹¹ 194 U.S. 486 (May 31, 1904) (involving taxation in Alaska; opinion by Brewer, with indication that Harlan took no part in the case, but no mention of the other justices either joining or dissenting, though Brewer speaks for the Court).

¹⁹² 190 U.S. 138 (1904).

¹⁹³ 195 U.S. 138 (1904) (only Harlan remained firm in opposing the imperial constitution; Fuller and other former dissenters concurred in the result, though they still noted their rejection of the incorporation notion).

rules that Alaska, unlike Puerto Rico, was an incorporated territory of the United States, with full constitutional protections for its residents. Harlan concurred in the result, continuing to reject the incorporated/unincorporated distinction and stating that constitutional guarantees apply fully in all territories. Brown also concurred, expressing his view that congress has exercised plenary powers in granting such rights to Alaskans.¹⁹⁴ Other cases continuing to apply White's incorporation doctrine in this period were *Dowdell v. United States* in 1911¹⁹⁵ and *Porto Rico v. Rosaly* in 1913, in which then Chief Justice White wrote for a unanimous court that Puerto Rico was a "completely organized Territory [of] ... although not incorporated ... into the United States."¹⁹⁶

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.¹⁹⁷ In 1922, *Balzac v. People of Porto Rico* applied the

¹⁹⁴ 197 U.S. 516 (1905). Justice Moody had replaced Justice Henry Billings Brown on the court by then.

¹⁹⁵ 221 U.S. 91 (1911) (dissent by Harlan, without opinion; Day writes for all others that *Dorr* disposes of the matter and that Philippine Supreme Court properly affirmed defendants' convictions after requiring trial court to supplement record on appeal.)

¹⁹⁶ 227 U.S. 270 (1913) quoting *Kopel v. Bingham*, 211 U.S. 468, 476 (1909) (rules that Puerto Rico government enjoyed sovereign immunity). White became Chief Justice by appointment of President William Howard Taft, in 1910. See Rebecca S. Showmaker, *THE WHITE COURT: JUSTICES, RULINGS AND LEGACY* 3 (ABC-CLIO, Inc. 2004); Walter F. Pratt, Jr., *THE SUPREME COURT UNDER EDWARD DOUGLASS WHITE, 1910-1921* (University of South Carolina Press 1999).

¹⁹⁷ See Jones Act of 1917, sec. 5, *P.R. Laws Ann.*, vol. 1, 72–73 (conferring U.S. citizenship on all "citizens of Porto Rico [*sic*]"; it adopted the definition of Puerto Rican citizenship included in sec. 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, sec. 13, *P.R. Laws Ann.*, vol. 1, 83; and sec. 43, *P.R. Laws Ann.*, vol. 1, 120. For an interesting discussion of some of the perils of "statutory citizenship" for those born in U.S. territories, see Gabriel J. Chin, *Why Senator John McCain Cannot Be President: Eleven Months And A Hundred Yards Short Of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1 (2008) (arguing that the then Presidential Candidate was not a "natural born" citizen under Art. II § 1 of the Constitution due to an exclusion in the statute applicable in the Panama Canal Zone at the time of his birth). See also

Jones Act and in the process turned Justice White's concurrence in *Downes* v. *Bidwell* into normative constitutional doctrine, and still quite applicable precedent, as noted in *Boumediene*. The court unanimously affirmed *Downes*, and cited Justice White's opinion, and the incorporation doctrine as controlling.¹⁹⁸ *Balzac* v. People of Porto Rico was resolved by the U.S. Supreme Court after passage of the Jones Act. By adopting one of the many views articulated in the earlier insular cases, this case helped clarify the constitutional relationship between Puerto Rico and the United States. It stated that "the opinion of Mr. Justice White of the majority, in *Downes* v. *Bidwell*, has become the settled law of the court."¹⁹⁹ 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.²⁰⁰ 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 would not. Among the latter are the right to a trial by jury and the right to uniform taxation.²⁰¹

In *Reid* v. *Covert*, in 1957, the Supreme Court came close to overruling *Downes* and *Balzac*, but could muster only a plurality. The case involved two civilian wives — both U.S. citizens — who killed their husbands who were members of the U.S. armed forces, on U.S. military bases in England and Japan, respectively, and were tried by military tribunals. The Supreme Court held that depriving the women

Ediberto Román, *The Alien- Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLORIDA STATE UNIVERSITY LAW REVIEW N. 146 (1998); Puig Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958).

¹⁹⁸ 258 U.S. 298 (1922).

¹⁹⁹ *Balzac*, 258 U.S. at 305.

²⁰⁰ The court cites with approval Justice White's position, 258 U.S. at 346, quoting *Dorr* v. United States, 195 U.S. 138, 149 (1904).

²⁰¹ The court explained the applicability of fundamental rights to the unincorporated territories. 258 U.S. at 312–13. *Balzac* itself rules that trial by jury was one such right. See also *De Lima* v. *Bidwell*, 182 U.S. 1 (1901); *Downes* v. *Bidwell*, 182 U.S. 244 (1901) (both cases concerning taxation).

of a right to a jury trial in a civilian court violated their constitutional rights. The court ruled that the Constitution protects U.S. citizens even outside U.S. territory.²⁰² Specifically criticizing *Balzac* and *Downes*, Justice Hugo Black, joined by Chief Justice Earl Warren and Associate 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.²⁰³

But concurring in the result only, Justices Felix Frankfurter and John Marshall Harlan II (the grandson of the John Marshall Harlan involved in *Downes*)²⁰⁴ distinguished the Insular Cases and believed them to be good law.²⁰⁵ In his opinion 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.”²⁰⁶

²⁰² 354 U.S. 1 (1957).

²⁰³ 354 U.S. at 8-9, footnotes omitted.

²⁰⁴ David Schultz, *ENCYCLOPEDIA OF THE SUPREME COURT*, 196-197 (Facts on File, Inc. 2005).

²⁰⁵ 354 U.S. at 41 (Frankfurter, J., concurring in the result); 354 U.S. at 65 (Harlan, J., concurring in the result).

²⁰⁶ 354 U.S. at 53 (Frankfurter, J. concurring in the result).

That Puerto Rico is still one of the “exotic territories” was directly confirmed in *Califano v. Torres*,²⁰⁷ where the Supreme Court reiterated what it had said in the Insular Cases, that Puerto Rico was an unincorporated territory of the United States. The three appellees in this case had moved from Massachusetts, Connecticut, and New Jersey to Puerto Rico. While living in the states, they had received Supplemental Security Income through a federal Social Security Administration program for “qualified aged, blind, and disabled persons.” When they arrived in Puerto Rico, however, their benefits were canceled. The Supreme Court, in a *per curiam* opinion, let this discrimination stand, explaining that

the exclusion of Puerto Rico in the amended program is apparent in the definitional section. . . . [The] 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.”²⁰⁸

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.” “So long as its judgments are rational, and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket.”²⁰⁹

The “rational basis” for Congress’s action in this case was 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

²⁰⁷ 435 U.S. 1 (1978).

²⁰⁸ 435 U.S. at 2–3 (citations omitted).

²⁰⁹ 435 U.S. at 5, citing *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). How curious that the court uses the language of the war on poverty to justify the denial of funds to the poorest American citizens. See Malavet, *AMERICA’S COLONY*, at 155-158.

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.”²¹⁰ In *Torres v. Puerto Rico*, the U.S. Supreme Court ruled that Congress had the power to grant, and conversely to withhold, constitutional guarantees from the U.S. citizens who may be found in Puerto Rico.²¹¹

*Harris v. Rosario*²¹² exposes Puerto Rico’s continued territorial status. In this case the U.S. Supreme Court, summarily, but with a written opinion, ruled 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. In accordance with its authority under the territorial clause of the U.S. Constitution, Congress can make any necessary rules that affect the territories, and it may treat Puerto Rico differently from states if it has a rational basis for its actions. Justice Thurgood Marshall noted in his lonely dissent that he and 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, and *Harris* ultimately really illustrates how the Insular Cases have become entrenched constitutional doctrine.²¹³

²¹⁰ First, while Puerto Ricans do not pay federal income taxes, they do pay Social Security and other federal taxes, and second, it is difficult to conceive how \$300 million for children’s welfare would negatively disrupt the Puerto Rican economy. See *Harris v. Rosario*, 446 U.S. at 652. See also Malavet, *AMERICA’S COLONY*, at 155-158 (on Puerto Rico’s economy).

²¹¹ *Torres v. Puerto Rico*, 442 U.S. 465 (1979). But at least four justices expressed the view that more constitutional guarantees ought to apply. 442 U.S. at 475-476 (Brennan, J., concurring in the judgment with Stewart, Marshall and Blackmun). *Boumediene* refers to *Torres* expressly as discussed *supra* in Part B.

²¹² 446 U.S. 652 (1980).

²¹³ *Harris v. Rosario*, 446 U.S. at 653-654. (Marshall, J., dissenting). Marshall wrote: It is important to remember at the outset that Puerto Ricans are United States citizens, see 8 U. S. C. § 1402, and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens. While some early opinions of this Court suggested that various protections of the Constitution do not apply to Puerto Rico, see, e. g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the present validity of those decisions is questionable. See *Torres v. Puerto Rico*, 442 U.S. 465, 475-476

Prior to *Boumediene*, the most recent reference to the Insular Cases could be found in Justice Thomas's opinion concurring in the judgment in *United States v. Billy Jo Lara*, in which, citing *Reid v. Covert*, he writes: "The 'Insular Cases,' which include the Hawaii and Puerto Rico examples, ante, ..., involved Territories of the United States, over which Congress has plenary power to govern and regulate."²¹⁴

As long as the Insular Cases remain good law — and *Boumediene* clearly rules that they do— Congress, in the exercise of its authority under the Territorial Clause, may unilaterally change the statutory relationship between the territories and the United States, as it deems appropriate. Moreover, one Congress cannot bind another, therefore, statutory language purporting to limit future legislative enactments is unconstitutional.²¹⁵ Nevertheless, to this day, the Puerto Ricans continue to travel with a U.S. passport but without the legal right to a separate Puerto Rican citizenship.

Attempts to create a legal Puerto Rican citizenship have been legally and politically rebuffed. For example, in an interesting but *sui*

(1979) (Brennan, J., concurring in judgment). We have already held that Puerto Rico is subject to the Due Process Clause of either the Fifth or Fourteenth Amendment, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, *Examining Board v. Flores de Otero*, 426 U.S. 572, 599-601 (1976). The Fourth Amendment is also fully applicable to Puerto Rico, either directly or by operation of the Fourteenth Amendment, *Torres v. Puerto Rico*, *supra*, at 471. At least four Members of this Court are of the view that all provisions of the Bill of Rights apply to Puerto Rico. 442 U.S., at 475-476 (Brennan, J., joined by Stewart, Marshall, and Blackmun, JJ., concurring in judgment).

Id., footnote omitted.

²¹⁴ 541 U.S. 193, 225 (2004). Thomas cites "*Reid v. Covert*, 354 U.S. 1, 13, 1 L. Ed. 2d 1148, 77 S. Ct. 1222 (1957); U.S. Const., Art. IV, § 3, cl. 2." *Id.*

²¹⁵ On this see *I.N.S. v. Chadha*, 462 U.S. 919 (1983) ("legislative veto," the reservation of authority by the Congress to invalidate executive action taken pursuant to passed statute unconstitutional); see also *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986) (Gramm-Rudman balanced budget act provisions requiring specific executive action to reduce deficit violated constitutional separation of powers).

generis case, 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. The opinion in *Ramírez de Ferrer v. Mari-Bras*, was issued on November 18, 1997, according to the published text.²¹⁶ On the day *before* the opinion was issued, 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.²¹⁷ This made the matter of law addressed in the opinion moot. The U.S. Department of State later rescinded Juan Mari-Bras's renunciation of his U.S. citizenship, returning him to his legal status before the case was resolved. Therefore, 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.

F. *Downes'* Legacy: Citizenship of a Second-Class

The most enduring effect of *Downes v. Bidwell* and the Insular Cases is the effective definition of a lesser level of citizenship for territorial subjects of the United States.²¹⁸ 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

²¹⁶ *Ramírez-de Ferrer v. Mari-Bras*, 144 P.R. Dec. 141 (1997). Plaintiff Miriam Ramírez-de Ferrer is a pro-statehood activist who is currently a Puerto Rican senator. Juan Mari-Bras is the founder of the MPI and the Socialist Party of Puerto Rico.

²¹⁷ *P.R. Laws. Ann.*, title 1, sec. 7 (as amended by sec. 1 of law 132 of Nov. 17, 1997); see also Pedro Malavet-Vega, *DERECHOS Y LIBERTADES CONSTITUCIONALES EN PUERTO RICO* (Ediciones Lorena 2003), 589, n. 1454 and accompanying text (the note discusses the controversy that arose as a result of the rather curious timing of the amendment to the statute).

²¹⁸ Therefore, until they were granted U.S. citizenship in 1917, Puerto Ricans were, in the words of a Democratic U.S. senator, "without a country. Can any man conceive of a more tyrannical form of government?" Under international law, Puerto Rican citizenship is not recognized. Carr, *COLONIAL EXPERIMENT*, 36 (citing *Congressional Record*, 56th Cong., 1st sess., April 5, 1900, 4954).

the United States and of the State wherein they reside.”²¹⁹ 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 faultlines defined by essentialized notions of race. The territorial peoples are just one example of this. One can easily include American Indians, African Americans,²²⁰ Asian Americans²²¹ and Mexican Americans among the victims of these citizenship constructs.²²²

As noted by Professor Sarah H. Cleveland, the treatment of territorial citizens fits within a disturbing pattern of constitutional rules that are designed to have discriminatory effects on “discrete and insular minorities”²²³ within the United States: territorial citizens, American Indians, and immigrants in our territory.²²⁴ “The Indian, alien, and territory cases often have been ignored by mainstream constitutional law scholars as late-nineteenth-century anomalies of American constitutional jurisprudence. The doctrines developed

²¹⁹ U.S. Const. Amend. 14, sec. 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.”

²²⁰ See discussion of *Johnson v. M’Intosh* and *Scott v. Sanford*, *supra* notes 177-182 and accompanying text.

²²¹ To this limited study, we might add the mistreatment of Native Americans and Native Hawaiians. See Eric K. Yamamoto, Carrie Ann Y. Shirota, and Jayna Kanani Kim, “*Indigenous Peoples’ Human Rights in United States Courts*,” in Berta Esperanza Hernández-Truyol, ed., *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 300-319 (New York University Press 2002).

²²² As detailed by Guadalupe Luna, Mexicans were dispossessed of their land despite their formal U.S. citizenship and their legal rights. Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife,”* 4 MICHIGAN JOURNAL OF RACE AND LAW 39 (1998); see also Perea et al., eds., *RACE AND RACES*, 262.

²²³ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (“prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for more searching judicial inquiry”) (citations omitted).

²²⁴ Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1 (2002).

during this period, however, continue to be the controlling constitutional authority in all three areas.”²²⁵

For example, the “plenary power” doctrine — giving almost absolute deference to Congress to legislate the treatment of immigrants — initially developed in the 19th century shortly before the Spanish American War,²²⁶ remains in effect.²²⁷ As Dean Kevin R. Johnson concludes: “The Supreme Court has consistently refused to disturb discriminatory immigration laws. As Justice Frankfurter put it, ‘whether immigration laws have been crude and cruel, whether they have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress.’ ”²²⁸ Whether the Puerto Ricans were, to the United States, citizens, alien immigrants, or something else, was unclear after the Spanish American War. It was initially left to the Supreme Court rather than to Congress to define it.

Article IX of the Treaty of Paris provided that

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

²²⁵ Cleveland, at 12. Professor Cleveland identifies two other scholars who have also discussed this pattern. T. Alexander Aleinikoff, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002). See also Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427 (2002). Cleveland at note 50 and accompanying text.

²²⁶ See *Chae Chin Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (if Congress “considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security . . . , [that] determination is conclusive upon the judiciary”).

²²⁷ *Demore v. Kim*, 538 U.S. 510; 123 S. Ct. 1708; 155 L. Ed. 2d 724 (2003) (reasserting Congress’ “broad powers over immigration and naturalization”).

²²⁸ Kevin R. Johnson, *Minorities, Immigrants and Otherwise*, __ YALE LAW J. POCKET PART __ (forthcoming 2008) citing *Harisiades v. Shaughnessy*, 342 U.S. 580, 596-97 (1952) (Frankfurter, J., concurring).

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.²²⁹

Although the *peninsulares* (natives of the Iberian Peninsula) were given the choice of retaining their Spanish citizenship, the native-born Puerto Ricans were not; they lost the Spanish citizenship that 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 would be defined by the U.S. courts, initially and enduringly, in *Downes v. Bidwell*.

Downes effectively defined the legal rights of the inhabitants of the territories of the United States, and the power of the federal executive and legislative branches to regulate the land and its people. The case concerned the power of the federal government towards persons under our control who are, sometimes irrespective of citizenship status, racialized as something "other" than "Americans." Racism, supported by social Darwinism as pseudo-science, generally justified the take over of the lands belonging to "inferior races."²³⁰ However, what "racial superiority" entailed had to be recast during the period of the Insular Cases.

Westward "manifest destiny" defined anglo-white racial supremacy as making that group capable of "outbreeding" the "inferior" races. Reginald Horsman explains:

By the 1850s the American Sense of idealistic mission had been corrupted, and most of the world's peoples were condemned to

²²⁹ Treaty of Paris, Dec. 10, 1898, U.S.–Spain, art. IX, T.S. no. 343, in *P.R. Laws Ann.*, vol. 1, 20 (italics added).

²³⁰ See generally Reginald Horsman, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM* (1981).

permanent inferiority or even extinction. General world progress was to be accomplished only by the dominating power of a superior race, and a variety of lesser races were accused of retarding rather than furthering world progress. A traditional colonial empire had been rejected [in the continental United States], but it was believed that the expansion of a federal system might ultimately prove possible as American Anglo-Saxons outbred, overwhelmed, and replaced “inferior” races. This time was to be hastened by commercial penetration of the most distant regions of the earth. ...²³¹

Once the United States reached the island territories, however, biological reality required white racial supremacy to redefine itself no longer to mean that the “superior” race could “outbreed” the “inferior” one. Rather, now it was the “inferior” race that bred like rats or cockroaches, or, at least, enough that it could not be displaced by white anglo immigration. While explaining the rule of the Insular Cases, as discussed later in this section, the Supreme Court acknowledged that Puerto Rico and other territories occupied as a result of the Spanish American War could not be colonized by an Anglo-Saxon majority.²³² New Dealer Rexford G. Tugwell — the last non-Puerto Rican appointed Governor of the island — illustrates the United States’ racialization of Puerto Ricans, and its views of fertility. When Tugwell was the secretary of agriculture, he accompanied First Lady Eleanor Roosevelt on her trip to Puerto Rico in March 1934, about which he wrote:

I rather dislike to think that our falling fertility must be supplemented by these people. But that will probably happen. Our control of the tropics seems to me certain to increase immigration from here and the next wave of the lowly . . . succeeding the Irish, Italians and Slavs . . . will be these mulatto, Indian, Spanish people

²³¹ Horsman, *supra* note 230, at 297.

²³² See the discussion of *Balzac* *infra* notes 237-239 and accompanying text.

from the south of us. They make poor material for social organizations but you are going to have to reckon with them.²³³

The Spanish-American War thus left the United States in charge of new subjects who were clearly cast as “racially inferior.” At the same time, the war acted as uniter of 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. In his inaugural address at the start of his second term on March 4, 1901, President McKinley noted this phenomenon when he stated that as a result of the Spanish American War: “We are reunited. Sectionalism has disappeared. Division on public questions can no longer be traced by the war maps of 1861.”²³⁴ On Memorial Day on May 30, 1905, Senator Foraker, for whom Puerto Rico’s organic act of 1900 was named, delivered an address as part of his work to have the graves of confederate soldiers in northern cemeteries “treated with due respect”, which illustrates this concept more explicitly. 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 throughout 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.²³⁵

²³³ Arturo Morales-Carrión, *PUERTO RICO: A CULTURAL AND POLITICAL HISTORY* 232 (New York: American Association for State and Local History, 1983).

²³⁴ http://avalon.law.yale.edu/19th_century/mckin2.asp (last visited March 15, 2010).

²³⁵ <http://www.arlingtoncemetery.net/foraker-1905.htm> (last visited March 15, 2010).

The racial paradigm that would prevail after North-South white reconciliation would be that of Southern white supremacy. Rubin Francis Weston explains:

Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern “counterrevolutionary” point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.”²³⁶

In adopting the incorporated/unincorporated territories categories created by Justice White, *Balzac* constitutionally constructs the U.S. citizenship of Puerto Ricans as second class as long as they remain on the territory of Puerto Rico. It distinguishes between the rights of U.S. citizens living in Puerto Rico and U.S. citizens living in “the United States proper.” The court expressly indicates that as long as they choose to remain on the island, Puerto Ricans who are U.S. citizens will not enjoy the full rights of American citizenship. It thus also distinguishes between Puerto Ricans as individual U.S. citizens and as collective inhabitants of Puerto Rico. As individuals, they are free “to enjoy all political and other rights” granted to U.S. citizens *if* they “move into the United States proper.” But as long as they remain

²³⁶ Rubin Francis Weston, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, 15 (Columbia: University of South Carolina Press 1972). Cornel West described the normative paradigm of “American” liberalism that produced these injustices. See Cornel West, *The Role of Law in Progressive Politics*, in David Kairys, ed., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 709 (Basic Books 3rd Ed. 1998).

on the island, they cannot fully enjoy the rights of U.S. citizenship.²³⁷ The Supreme 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.²³⁸

This statement, which is the Court's interpretation of the act giving U.S. citizenship to Puerto Ricans, 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 on the island, the Court also constructed Puerto Ricans as "others." Because Puerto Ricans are so "other," the incorporation of the territory that they populated into the United States could not be inferred; it had to be clearly expressed by Congress.²³⁹ The rule of the Insular Cases, which the court consistently mischaracterizes as "situational" and "transitional" vis-à-vis any one territory, has allowed Congress to maintain our island empire by constitutional default for over a century.

²³⁷ Balzac, 258 U.S. at 311.

²³⁸ 258 U.S. at 309 (italics added).

²³⁹ Again, the Supreme Court is rather clear in *Balzac*: "The jury system needs citizens trained to the exercise of the responsibilities of jurors. . . . 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." 258 U.S. at 310–11.

G. Conclusion: A *Downes* Rule for Citizens that the *Boumediene* Court Refuses to See

As the *Boumediene* opinion pushes two years of age, its historical and precedential foundation in the Insular Cases is not substantially and seriously discussed, and is even less understood, in legal discourse in the United States. More generally, the Insular Cases are but legal footnotes in U.S. legal scholarship, outside of Critical Race Theory generally²⁴⁰ and LatCrit Theory in particular.²⁴¹ Professor Burnett does identify some significant, although, as she notes, not broad-based progress in their incorporation into the traditional law school curriculum, particularly the work of Constitutional Law scholar Sanford Levinson and his inclusion of a section dedicated to the Insular Cases in his Constitutional Law casebook.²⁴² But Professor

²⁴⁰ All the works are simply too numerous to be referenced here, but I cite many of them in the notes to this article. More generally, Cornell West writes that:

Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life — created primarily, though not exclusively, by progressive intellectuals of color — compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

Cornel West, *Foreword*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. 1995).

²⁴¹ See also note 12 *supra* and accompanying text. “LatCrit” stands for “Latina and Latino Critical Race Theory.” See Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1089, n. 2 (1997); 10 LA RAZA L.J. 3, n. 2 (1998) (undertaking the “difficult process” of defining LatCrit). For my personal take on the literature, see Pedro A. Malavet, *Literature and Arts as Antisubordination Praxis LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293-1331 (2000); Pedro A. Malavet, *The Accidental Crit II: Culture and the Looking Glass of Exile*, 78 D.U. L. REV. 753-793 (2001); and Pedro A. Malavet, *The Accidental Crit III: The Unbearable Lightness of Being ... Pedro*, in PROFESSIONAL FORBEARANCE: NARRATIVES FROM MINORITY LAW PROFESSORS ABOUT SURVIVING THE AMERICAN ACADEMY (Karla Erickson and Angela Onwuachi Willig, eds., Cambridge University Press forthcoming 2011).

²⁴² PROCESSES OF CONSTITUTIONAL DECISIONMAKING 385-98 (Paul Brest et al. eds., 5th ed. 2006), referenced *Id.* at note 225.

Levinson's call for *Installing the Insular Cases into the Canon of Constitutional Law* unfortunately appears to have been heeded only by himself in the world of Constitutional law casebook and treatise authors,²⁴³ once again, outside CRT.²⁴⁴

In spite of the substantial work of Critical Race Scholars and of Professor Levinson's casebook, more law students today will study Justice Edward Douglass White's interpretation of the Sherman Antitrust Act than his views on the Territorial Clause.²⁴⁵ The Fuller Court is often remembered in law schools for declaring the national income tax²⁴⁶ and a state law prohibiting more than 60 hours in a work-week unconstitutional.²⁴⁷ Its most famous case is *Plessy v. Ferguson*. Except for Joseph McKenna, who had been appointed by President McKinley to replace the retiring Justice Stephen J. Field, in

²⁴³ Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION* 123 (Christina Duffy Burnett and Burke Marshall, eds., Duke 2001) (noting that the Insular Cases were not extensively discussed in any of the "contemporary constitutional law casebooks or treatises"); see also Sanford Levinson, *Why the Canon Should Be Expanded to Include The Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 241-66 (2000); both works are referenced along with the continued dearth of coverage in Burnett, *A Convenient Constitution*, supra note 9, at notes 31, 34, 211, 224, 225, and accompanying text.

²⁴⁴ For example, see Malavet, *The Story of Downes*, supra note 1; LATINOS AND THE LAW, supra note 12, at 52-64 (in chapter on Puerto Rico and Puerto Ricans, section dedicated to *Downes v. Bidwell* and *Balzac v. People of Porto Rico*): RACE AND RACES, supra note 12, at 359-369 (same).

²⁴⁵ "The 'rule of reason' became the standard for applying the Sherman Antitrust Act after the Court's opinions in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911), both written by White." Walter Pratt, SUPREME COURT, supra note 196, at 6, note 24.

²⁴⁶ *Pollock v. Farmer's Loan and Trust Co.*, 158 U.S. 601 (1895). Reversed by the 16th Amendment.

²⁴⁷ *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating New York penal statute forbidding employers from requiring workers to exceed 60 hours in a work week); cf. *Muller v. Oregon* 208 U.S. 412 (1908) (upholding law restricting women working in laundries to no more than ten hours a day).

January of 1898,²⁴⁸ all the members of the Fuller Court when it decided *Downes* had been appointed prior to 1898 and were members of the court that decided the notorious *Plessy v. Ferguson* in 1896; a decision in which Justice Brewer did not participate and Justice Harlan dissented.²⁴⁹ While the “separate but equal” standard of *Plessy* was relegated to the historical trash bin by *Brown v. Board of Education of Topeka Kansas*,²⁵⁰ the *Downes* decision is still good law, as clearly stated in *Boumeidene*.

By relieving Congress, the President and itself 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 our new territorial possessions. That flexibility has now become a permanent system for the regulation of our island empire, rather than a transitional process, as it was for the Philippines and Cuba —Guantánamo and the Platt Amendment notwithstanding. The use of the cases by the court in *Boumediene*

²⁴⁸ Leon Friedman and Fred L. Israel, eds., *THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: THEIR LIVES AND MAJOR OPINIONS*, vol. III, 861 (Chelsea House Publishers 1997). Field had been appointed to the court by President Abraham Lincoln in 1863! Leon Friedman and Fred L. Israel, eds., *THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: THEIR LIVES AND MAJOR OPINIONS*, vol. II, 534 (Chelsea House Publishers 1997).

²⁴⁹ 163 U.S. 537 (1896) (7-1 decision written by Brown; Harlan dissented). A law review article explains why Justice Brewer, who had joined the court in 1890, did not participate in the decision:

The final line of the United States Supreme Court opinion in the landmark case of *Plessy 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 *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.

J. Gordon Hylton, *The Judge Who Abstained in Plessy v. Ferguson: Justice David Brewer and the Problem of Race*, 61 *MISS. L.J.* 315-316 (1991).

²⁵⁰ 347 U.S. 483 (1954).

changes nothing about that, rather it reasserts the doctrine of the Insular Cases perhaps in even more dangerous form.

President George W. Bush's appointees to the Supreme Court, Chief Justice Roberts and Associate Justice Alito, sided with his administration in the dissents in *Boumediene*.²⁵¹ Such loyalty from justices to the administration that appointed them is nothing new and it played an important role in the Insular Cases. As discussed above, the majority opinions in the cases resolved in 1901 were joined by Republican appointees who sided with a Republican President, and the dissents were issued principally by Democratic presidential appointees.²⁵² The late Chief Justice William H. Rehnquist in his book *The Supreme Court*,²⁵³ discusses how President Theodore Roosevelt demanded to know how Oliver Wendell Holmes would vote on the Insular Cases before he would nominate 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

²⁵¹ *Boumediene* at 1 (Roberts, C.J., dissenting, joined by Scalia, Thomas and Alito); *Boumediene* at 1 (Scalia, J., dissenting, joined by Roberts, Thomas and Alito); see also [biographiescurrent.pdf](#), supra note 17 ("President George W. Bush nominated [Roberts] as Chief Justice of the United States, and he took his seat on September 29, 2005; "President George W. Bush nominated [Alito] as an Associate Justice of the Supreme Court, and he took his seat on January 31, 2006.").

²⁵² See supra note 170 and accompanying text.

²⁵³ William H. Rehnquist, *THE SUPREME COURT* 215-217 (Alfred A. Knopf 2001).

conditions excused the various upright and honorable men who took part in the wicked folly of secession 1860 and 1861.

Now I should like to know that Judge Holmes was in entire sympathy with our views [on the Insular Cases]²⁵⁴

Rehnquist then concludes that “Holmes was duly appointed an associate justice [effective December 8, 1902²⁵⁵], 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.”²⁵⁶

As already discussed, the late Chief Justice is of course correct that *Downes* and the Insular Cases have been treated as a legal footnote for much of the past century. But they should not be. I had hoped that *Boumediene* would at least produce serious discussions of the decisions, but I am disappointed by the relatively small number of articles published after the decision that really address the issue. After all, *Downes* and the Insular Cases, as Teddy Roosevelt’s litmus test for appointment of one of the best-remembered justices in history indicates, were critical decisions determining the kind of country that the United States was to become. *Boumediene* is easily understood as a decision that defines the country that we are today. But, *Downes* is also our living constitutional doctrine and it daily affects the lives of millions of our citizens by creating an underclass of citizenship and United States territory in a permanent state of constitutional uncertainty about its future.

The “wartime” moments of 1898 and 2010 are more similar as far as the law is concerned than is generally realized. The Spanish American War and the so-called War on Terror produced military

²⁵⁴ Rehnquist, *THE SUPREME COURT*, at 216.

²⁵⁵ *THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: THEIR LIVES AND MAJOR OPINIONS*, vol. III, 878.

²⁵⁶ Rehnquist, *THE SUPREME COURT*, p. 217. As was discussed in section E above, Oliver Wendell Holmes acquiesced in the continued imposition of the White doctrine in the Insular Cases, but did not expressly embrace it; though if he disagreed he might have issued one of his now well-regarded dissents.

engagements that involved a commitment of our armed forces and cost lives, innocent and not, on all sides of the conflicts. At the same time, the armed conflicts produced the need to make important decisions about how our Constitution should be applied to the emerging and perhaps unanticipated results of military victory and accompanying extended control over territory and people. On both occasions, the Supreme Court took a racialized “us vs. them” approach. That is, the court believed that “grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production.”²⁵⁷

While many will be seduced by the ruling’s legitimate grant of habeas relief to the detainees, the articulated rationales underlying the *Boumediene* decision are deeply troubling. The court reasserted a rule of plenary power over territorial citizens while barely acknowledging those citizens’ existence and without recognizing the duration of the occupation of the current United States territories. The majority may have cast new doubt on the applicability of fundamental rights guaranteed by the Bill of Rights to the territorial citizens. Then, without any sense of irony, the court discussed the Philippines and its “transition to independence,” rearticulating in the process the doctrine of the Insular Cases as an *old* and *well-established* rule to be flexibly applied to *temporary and transitional* situations. The majority then places what is currently happening in Guantánamo Bay in the category of these temporary situations.

The fallacy of those assumptions casts serious doubt on the soundness of *Downes v. Bidwell* and *Boumediene v. Bush*. The *Boumediene* court does not in any way recognize that over four million souls currently live under the rule of the Insular Cases *and have done so for over a century*. This means that the majority’s reliance on the Insular Cases, and the dissenters’ acceptance of their rule, are very inaccurately characterized in *Boumediene*. The only counter to such mischaracterizations of the cases is to go back to their

²⁵⁷ *Boumediene* at 27, citing *Downes*, *supra*, at 282, 21 S. Ct. 770, 45 L. Ed. 1088.

original context — which this article has attempted to lay out only a very broad terms — and to acknowledge their continuous application for a period of over one hundred years to a particular group of current U.S. citizens. As I have written before, the Insular Cases, now more than ever, are indeed the living legacy of the Fuller court and an essential part of the legal development of our nation. *Downes v. Bidwell* constitutionally 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, the nation that the *Boumediene* majority only *pretends* that we are.