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THE EMPIRE FORGOTTEN: THE APPLICATION OF THE BILL OF RIGHTS TO U.S. TERRITORIES

Alan Tauber[†]

I. INTRODUCTION

For over a century, the United States government has been a colonial power. Since the founding of the Republic, the United States has held control of territory not part of any state. This territorial ownership has continued unbroken from 1789 until the present day. However, in 1898 the character of this ownership changed dramatically. Prior to the Spanish-American War the United States only acquired territory with the understanding that it would eventually be incorporated into the Union in the form of one or more states, and that the people residing in those territories would be granted full citizenship rights and join the American polity.¹ This all changed when the United States signed the Treaty of Paris in 1898, ending the war with Spain. As part of the peace agreement, Spain ceded control of the islands of Puerto Rico, Cuba, the Philippines, and Guam to the control of the United States.

For the first time in its history, the United States found itself in possession of land that was both far flung from the contiguous states of the Union, and not intended for eventual statehood. In an effort to deal with this unique situation, the Congress of the United States turned to Article IV, Section 3 of the Constitution, which grants it the power to “dispose of and make all needful rules and regulations re-

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¹ The only exceptions to this general rule were the Native American tribes or nations who the United States government continued to treat as quasi-sovereign bodies. This exception is unimportant for purposes of this paper for two reasons: First, the territory reserved to the Native Americans was and is within the bounds of states of the Union. Second, all Native Americans were granted United States citizenship in 1922. 8 U.S.C. § 1401a (1922).

specting the territory . . . of the United States.”² Almost immediately challenges to regulations arose and made their way to the United States Supreme Court to determine what exactly were the limits of this power and whether these territories were part of the United States, as that term was used in various provisions of the Constitution.

In a series of opinions known as the *Insular Cases*, the Supreme Court ruled that these lands were “foreign in a domestic sense” and that they were not a part of the United States for all constitutional purposes.³ The Court, utilizing what has come to be known as the Territorial Incorporation Doctrine, ruled that since these new possessions were not destined for eventual statehood the full Constitution did not apply. Most importantly, not all the provisions of the Bill of Rights “follow the flag,” and therefore, they do not apply in these territories. This article argues that, after a century of colonial rule, any vitality the *Insular Cases* may once have had has faded, and thus, these cases should be allowed to flow into constitutional obscurity.⁴

This question has become even more important in light of recent developments as the United States extends its power over both citizens and foreign nationals outside U.S. borders. In recent years, the Court has relied on the *Insular Cases* to hold that the full protection of the Bill of Rights does not extend beyond our borders.⁵ As more and more people fall under the dominion of U.S. law it is important to re-examine the underpinnings of the doctrine being used to deny them the full panoply of Constitutional rights.

Part II of this article examines the history of territorial acquisition and regulation beginning with the Ordinance of 1787, which was first passed under the Articles of Confederation, and traces it through the four major land acquisitions of the first century: the Louisiana Purchase, the treaty acquiring Florida, the Treaty of Guadeloupe Hidalgo, and the Treaty of Paris. This Part concludes with an examination of the Treaty of Paris and compares its terms with earlier treaties.

² U.S. CONST. art. IV § 3, cl. 2.

³ *Armstrong v. United States*, 182 U.S. 243 (1901); *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ocampo v. United States*, 234 U.S. 91 (1914); *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

⁴ In this call, I join Professor T. Alex Aleinikoff, who argues for “more flexible understandings of membership [in the United States] that would legitimate new arrangements intended to promote self-determination and equality.” T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 7 (2002).

⁵ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Part III then turns to an examination of the *Insular Cases* themselves. It begins with an examination of the *Dred Scott* decision, which first spoke of the application of constitutional provisions to U.S. territories. It then moves on to the first *Insular Case*, which dealt with the Uniform Duties Clause of Article I, before turning to the Territorial Incorporation Doctrine first articulated by the first Justice White in a concurring opinion in *Downes v. Bidwell*.⁶ This article then traces the development of this doctrine and its eventual adoption by the Court in *Balzac v. Porto Rico*.⁷ It continues with an examination of the cases dealing with the application of the Bill of Rights to the territories. It discusses the fundamental/procedural rights distinction used by the Court and the often racist discourse that colors much of the Court's rhetoric in these cases.

Part IV then turns to potential solutions to the problems caused by the *Insular Cases* and the Territorial Incorporation Doctrine. It examines the benefits and disadvantages of four potential solutions including extension of the Bill of Rights by Congress, incorporation of the territories, overruling of the *Insular Cases*, and independence for these protectorates. The article then concludes by calling for the reversal of the *Insular Cases* and the extension of the full Bill of Rights to currently held U.S. territories.⁸

II. HISTORY OF TERRITORIAL ACQUISITION

The history of territorial acquisition in the United States stretches back to the very founding of the Republic. In fact, the first major ordinance dealing with territory not held by any state was passed by the Confederation Congress in 1787.⁹ The statute controlled the lands north of the Ohio River and to the west of the thirteen original colonies, commonly referred to as the Northwest Territory. This territory was originally held by the individual states but they relinquished their titles in response to a resolution by the Confederation Congress passed October 10, 1780, following a recommendation from Maryland in 1777.¹⁰ The State of Virginia was the first to respond to this resolution when, in 1784, it ceded all its claims to the United States.¹¹

⁶ 182 U.S. 244, 287 (1901) (White, J., concurring).

⁷ 258 U.S. 298 (1922).

⁸ In this way, I hope to help spark a fresh look at the status debate and help "put in play new understandings of sovereignty that provide space for subnational governance without undermining the national state." ALEINIKOFF, *supra* note 4, at 7.

⁹ CONFEDERATE CONGRESS, U.S. Ordinance of 1787 (July 13, 1787).

¹⁰ MAX FARRAND, THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES, 1789-1895, 6 (William S. Hein & Co. 2000) (1896).

¹¹ *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 433 (1856).

Massachusetts and Connecticut quickly followed suit.¹² Having been ceded these lands, the Confederation Congress was then required to legislate for the government of this new territory. Thus, the Confederation Congress passed the now famous Ordinance of 1787, which became the basis for all future territorial governments.¹³

A. The Ordinance of 1787

The Ordinance of 1787 was actually the fourth ordinance passed dealing with the government of the Northwest Territory, but it was the one that served as the model for all future territorial ordinances within the continental United States. The Ordinance served the dual purpose of providing for the governing of the contiguous territories as well as the rights of the individuals who resided therein.¹⁴

The Ordinance was understood to be a temporary measure, governing the territories until such a time as they were fit for full statehood, and this was reflected in the first paragraph of the Ordinance.¹⁵ It provided for limited representation in the U.S. Congress, allowing each territory a delegate who would have the right to debate but not to vote.¹⁶ The Fifth Article of the Ordinance provided for the breakdown of the Northwest Territory into three to five states, all of which were to be admitted on equal footing with the original colonies upon achieving a population of sixty thousand free inhabitants.¹⁷ The final article, which led to much dispute later, outlawed slavery within the territory.¹⁸ This would eventually lead to the *Dred Scott* opinion, which laid the foundation for all future applications of the Constitution to U.S. territories. Upon the formation of the Union and the new Constitution, the Ordinance was rapidly re-enacted with appropriate modifications necessary to conform to the new governing document.¹⁹

One of the first questions that arose in regards to territorial government had to do with the full extent of Congress's powers over this property. Under Article IV, Section 3, Congress has virtually unfettered power to regulate the territories. The only real check appeared in the form of the Article II appointment power; while Congress was

¹² FARRAND, *supra* note 10, at 5-6.

¹³ *Id.* at 8-9. See also, JAMES E. KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 4 (1982).

¹⁴ FARRAND, *supra* note 10, at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 10. Those familiar with territorial governance in the modern age will note that currently, Puerto Rico and the District of Columbia have similar non-voting delegates, though several of the territories do not.

¹⁷ *Id.* at 12.

¹⁸ *Id.*

¹⁹ *Id.* at 14.

free to create positions in territorial governments, it required the President to fill them.²⁰

This question became extremely significant given the arguments by many at the time that the territories did not retain any sovereignty, as the states did, but rather were the property of the central government.²¹ If this argument was correct, then it was unclear what constitutional provisions applied to the territories. The countervailing argument was that the term "United States" within the Constitution was intended to extend to both the states and all lands held by the federal government.²² This question was not easily answered, and indeed came to the forefront with the next acquisition of territory by the federal government: the Louisiana Purchase.

B. Treaty Provisions

The Louisiana Purchase was the first time the United States acquired territory outside of that which it possessed at the end of the Revolutionary War. Many people at the time, including President Jefferson, were unsure that the Constitution allowed the federal government to acquire territory by treaty. President Jefferson in fact sought a constitutional amendment to allow the purchase.²³ Eventually, the amendment was rejected and Congress decided that it was within the inherent sovereign power of the United States to acquire territory via treaty.²⁴ This was the main method of territorial acquisition from 1803 through the present day. As such, a look into the exact terms of these treaties is warranted. This is especially important when considering the extension of the Constitution to newly acquired territories because, until the Treaty of Paris in 1898, the treaties all had some language mandating that the inhabitants and the territory would be incorporated into the Union as soon as possible.

i. The Louisiana Purchase

In 1803, the United States entered into an agreement to purchase all French holdings of land on the North American continent in the

²⁰ KERR, *supra* note 13, at 4.

²¹ *Id.* at 5.

²² *Id.*

²³ *Id.* at 6. See also Abbott Lawrence Lowell, *The Status of Our New Possessions*, 13 HARV. L. REV. 155, 163 (1899).

²⁴ KERR, *supra* note 13, at 6. This decision did not end the controversy, however. Indeed, the Court in *Dred Scott* supported a reading of the Territorial Clause of Article IV as only applying to the lands held as a territory at the time of the founding, and insisted that Congress must find its regulatory power over the territories elsewhere. *Dred Scott v. Sandford*, 60 U.S. (1 How.) 393, 436–42 (1856). Subsequent Courts later rejected this view.

form of the Louisiana Purchase.²⁵ Secretary of State James Madison gave very specific instructions to the U.S. negotiators to the effect that they "must not under any circumstances agree 'to incorporate the inhabitants of the hereby ceded territory with the citizens of the United States, being a provision which cannot now be made.'"²⁶ The negotiators ignored these instructions and ended up inserting Article III of the treaty, which provided as follows:

The inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.²⁷

This provision is quite specific as to the treatment of the ceded land and its inhabitants. It calls for the incorporation of these people into the Union as soon as permissible and requires that they be treated on an equal footing as citizens of the United States, including all rights and immunities. This provision seems to extend the full panoply of rights contained in the Bill of Rights to the newly acquired territory. Most importantly, for purposes of this article, it specifically calls for the incorporation of the territory and its peoples into the United States.

ii. Florida

The territory of Florida was acquired from Spain via a treaty concluded February 22, 1819.²⁸ Article VI of the treaty was lifted almost word-for-word from Article III of the Louisiana Purchase treaty.²⁹ It provided for the incorporation of the inhabitants of the Florida Territory into the Union and secured the enjoyment of all privileges, rights, and immunities of United States citizens for them.³⁰ Article V of the treaty specifically secured the exercise of free religion within the territory.³¹

²⁵ Louisiana Purchase Treaty, U.S.-Fr., Apr. 30, 1803, 8 Stat. 206.

²⁶ *Downes v. Bidwell*, 182 U.S. 244, 324 (1900) (White, J., concurring). See also Lowell, *supra* note 23, at 164.

²⁷ *Downes*, 182 U.S. at 324-25 (quoting 8 Stat. 202).

²⁸ FARRAND, *supra* note 10, at 30.

²⁹ *Id.* app. B, at 64.

³⁰ *Id.*

³¹ *Id.*

Despite these treaty provisions, there was still some doubt as to whether territories acquired in this manner stood on the same footing as the territories owned when the United States came into being.³² This question was first addressed by the Supreme Court in *American Insurance Company v. Canter*.³³ Chief Justice Marshall did not decide the question because it was not directly before the Court. Rather he stated, after reciting Article VI of the treaty, that “[t]his treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States.”³⁴ The Court finally answered the question of the status of the territories acquired through treaty in *Cross v. Harrison*, a case about the Treaty of Guadeloupe Hidalgo.³⁵

iii. Guadeloupe Hidalgo

The Treaty of Guadeloupe Hidalgo ceded all claims of the Mexican Government to the territory of California to the United States. Article IX of the treaty contained similar language to the treaties with Spain for Florida and France for Louisiana. It stated that all citizens who chose not to preserve Mexican citizenship “shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged by the Congress of the United States), to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.”³⁶

In *Cross v. Harrison* the Supreme Court finally decided that upon signature of the Treaty of Guadeloupe Hidalgo California became a part of the United States, and was thus subject to the Uniform Duties Clause of the Constitution.³⁷ This view was almost universally followed after *Cross*.³⁸ Notably, this was also the last treaty signed by the United States government containing language dealing with the incorporation of either the territory or its inhabitants into the United States.³⁹

³² Lowell, *supra* note 23, at 164.

³³ *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828).

³⁴ *Id.* at 542.

³⁵ Lowell, *supra* note 23, at 165.

³⁶ KERR, *supra* note 13, at 83.

³⁷ Lowell, *supra* note 23, at 165.

³⁸ *Id.*

³⁹ The treaty in which the United States acquired Alaska from Russia also contained similar language. Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., Mar. 30, 1876, 15 Stat. 539 (allowing Russians living in Alaska the option to become U.S. citizens). See KERR, *supra* note 13, at 104. See also Lowell, *supra* note 23, at 171.

C. Treaty of Paris

Following the Treaty of Paris, the people and Government of the United States were faced with deciding the important question of whether the Constitution "follows the flag." Unlike the previous acquisitions that occurred through treaty, the Treaty of Paris made no accommodation for the citizens or territory of Puerto Rico, Cuba, or the Philippines as far as the "privileges, rights and immunities" of citizens of the United States.⁴⁰

In fact, the Treaty actually took a step in the opposite direction. Rather than merely ceding the lands and people to the United States, Article IX of the Treaty provides that those living in the territories mentioned who wished to renounce their Spanish citizenship would be held "to have adopted the nationality of the territory in which they may reside."⁴¹ The Treaty also provides that the "civil rights and political status" of those inhabitants would be determined by the Congress of the United States.⁴² This was quite a departure from earlier treaties that mandated equal rights between citizens of the United States and citizens of the territories. Now, plenary control of the civil and political rights of these inhabitants rested in the hands of a Congress far removed, and in which they had no voice.

It was not long before the power of Congress was challenged and the Supreme Court was forced to decide whether or not the Constitution "followed the flag." The Court provided a hybrid answer in which some protections extended automatically, but others would depend on congressional action. This article now turns to an analysis of these decisions.

III. THE *INSULAR CASES*

The Supreme Court answered the question of whether the Constitution "follows the flag" in a series of cases commonly referred to as the *Insular Cases*. The *Insular Cases* were based on disputes arising from the acquisition of Puerto Rico and the Philippines, which the U.S. obtained by the Treaty of Paris. While the exact cases that are in this collection are sometimes disputed, the term is generally understood to encompass a series of cases beginning with *Huus v. New York & Porto Rico S.S. Co.*⁴³ in 1901 and ending with *Balzac v. Porto*

⁴⁰ See Lowell, *supra* note 23, at 171-72.

⁴¹ *Id.* at 172 (quoting Treaty of Paris, 30 Stat. 1758 (1898)).

⁴² *Id.*

⁴³ 182 U.S. 392 (1901).

*Rico*⁴⁴ in 1922.⁴⁵ Over the course of these twenty-one years, the focus of these cases changed dramatically, moving away from a concentration on the Uniform Duties Clause to an examination of which rights in the Bill of Rights, if any, applied to the territories. This article is concerned with the second question, and thus focuses primarily on the three cases of *Downes v. Bidwell*,⁴⁶ in which Justice White's concurrence first laid out the Territorial Incorporation Doctrine, *Dorr v. United States*,⁴⁷ in which the Court first decided that the Bill of Rights does not fully extend to territories, and finally *Balzac v. Porto Rico*⁴⁸ in which the Court finally adopted Justice White's Territorial Incorporation Doctrine as part of the majority opinion.

However, before turning to the *Insular Cases*, it is important to understand the Court's previous views on the extension of the Constitution to territories. Chief Justice Taney originally articulated this view in the much-maligned opinion of *Dred Scott v. Sandford*.⁴⁹

A. *Dred Scott and Background*

Dred Scott is best known for invalidating the Missouri Compromise, which required the admission to the United States of one slave state for every non-slave state. In order to make the ruling, however, Chief Justice Taney had to examine the application of the Constitution to the territories in order to determine whether Congress had the power to craft the compromise.

In a major departure from previous opinions on the subject, Chief Justice Taney ruled that Article IV, Section 3, Clause 2 was not the proper source of Congressional power over the territory, holding that this clause only applied to the territory held by the United States at the time the Constitution was adopted, in other words, the Northwest Territory.⁵⁰ After analyzing the text of the provision, Chief Justice Taney concluded that Article IV, Section 3, Clause 2 "was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."⁵¹ While he acknowledged that this section provided Congress with the power to exercise authority over

⁴⁴ 258 U.S. 298 (1922).

⁴⁵ I note that there is some conflict because some authors choose to limit the *Insular Cases* to six cases decided in 1901, while others expand the definition to include *Balzac* in which Justice White's concurring opinion in *Downes v. Bidwell*, 182 U.S. 244 (1901), was adopted by the majority. For purposes of this paper, I use the expanded definition of the term *Insular Cases*.

⁴⁶ 182 U.S. 244 (1901).

⁴⁷ 195 U.S. 138 (1901).

⁴⁸ 258 U.S. 298.

⁴⁹ 60 U.S. (1 How.) 393, 432 (1856).

⁵⁰ *Id.* at 432.

⁵¹ *Id.*

the Northwest Territory, it "can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the Federal Government."⁵²

Taney concluded that the power to acquire territory arose from another clause in Article IV, Section 3, which allowed Congress to admit new states to the Union.⁵³ He held that this power to admit new states must carry with it the concurrent power to acquire territory not yet fit for admission at the time, "but to be admitted as soon as its population and situation would entitle it to admission."⁵⁴ While making this concession, Taney was adamant that "no power is given to acquire a Territory to be held and governed permanently in that character."⁵⁵

Taney went on to state that setting the limits of the United States was a political, not a judicial, question, and that the Court was bound to recognize as part of the United States whatever the political branches so recognized. He concluded this discussion by stating:

[A]s there is no express regulation in the Constitution defining the power which the General Government may exercise over the person or property of a citizen in a Territory thus acquired, the court must necessarily look to the provisions and principles of the Constitution, and its distribution of powers, for the rules and principles by which its decision must be governed. . . .⁵⁶

Thus, Chief Justice Taney quite clearly laid out his belief, and the majority's opinion, that the Constitution applied in the territories of the United States. It was because the Constitution applied in the territories carrying with it the judicial branch's protection of the "personal rights and rights of property of individual citizens, as protected by the Constitution" that Justice Taney was able to strike down the Missouri Compromise because it violated the property rights of United States citizens.⁵⁷

Justice Taney recognized unambiguously that the Constitution extends to any place that Congress's power extends; the two are co-extensive. He held that the prohibition against the taking of property was not confined to the states "but [that] the words are general, and extend to the whole territory over which the Constitution gives [Con-

⁵² *Id.* at 442.

⁵³ *Id.* at 447.

⁵⁴ *Id.*

⁵⁵ *Id.* at 446.

⁵⁶ *Id.* at 447.

⁵⁷ *Id.*

gress] the power to legislate. . . .”⁵⁸ Thus, the Court had laid the basic groundwork that the Constitution does apply to the territories of the United States. Yet despite this clear and unambiguous language, the debate was not over. Through the creation of the Territorial Incorporation Doctrine, the *Insular Cases* Courts would manage to edge around Justice Taney’s holding in *Dred Scott*.

B. Uniform Duties Clause Cases

The first context in which the Court addressed our new territorial possessions was under Article I, Section 8, Clause 1, the Uniform Duties Clause. This clause grants Congress the power to impose duties and excises on products but mandates that “all Duties, Imposts and Excises shall be uniform throughout the United States.”⁵⁹ The question raised before the Court centered on the meaning of the term “United States.” The Court first addressed the question in 1820 in *Loughborough v. Blake*.⁶⁰ Here, it was argued that the Uniform Duties Clause applied to the District of Columbia. Chief Justice Marshall delivered the unanimous opinion in which he stated:

The power then to lay and collect duties, imposts and excises, may be exercised, and must be exercised throughout the United States. Does the term designate the whole, or any particular portion of the American empire? Certainly this question can admit but one answer. It is the name given to our great republic, which is composed of States and territories. The district of Columbia, or the territory west of Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other.⁶¹

This once again appears to be a clear and unambiguous statement that the Constitution applies unequivocally in the territory controlled by the United States. Yet, the *Insular Cases* Courts ignored this plain reasoning and instead launched into an extensive analysis to determine if the territories of Puerto Rico and the Philippines fell within the term “United States,” as that term was used in the Uniform Duties Clause.

⁵⁸ *Id.* at 450.

⁵⁹ U.S. CONST. art. I, § 8, cl. 1.

⁶⁰ 18 U.S. 317 (1820).

⁶¹ *Id.* at 319.

*DeLima v. Bidwell*⁶², the very first *Insular Case* decided by the Supreme Court, was the first case concerning the issue of Puerto Rico's status. *DeLima* dealt with a challenge to duties collected in the Port of New York on goods shipped from Puerto Rico. The Court ruled that upon the ratification of the Treaty of Paris and the assumption of U.S. control, Puerto Rico ceased being foreign for the purposes of the tariff laws.⁶³ This case did not directly raise a constitutional question, but rather dealt with a question of statutory construction. The constitutional question did not arise until the Court decided *Downes v. Bidwell* and started down the road that would eventually end with the adoption of the Territorial Incorporation Doctrine.

C. *Downes v. Bidwell and the Territorial Incorporation Doctrine*

The Territorial Incorporation Doctrine (TID) draws a distinction between territories that have been "incorporated" into the United States and those that have not. In this context, incorporation means destined for eventual statehood.⁶⁴ The importance of the TID is played out when examining the application of the Constitution to territories held by the United States. Simply stated, the TID holds that the Constitution has full force and effect in incorporated territories; while in unincorporated territories, the Constitution does not fully apply. In other words, when determining the reach of the Constitution, and the Bill of Rights in particular, the Constitution only follows the incorporated flag.

While the credit for this distinction is often given to Justice White's concurring opinion in *Downes v. Bidwell*, it actually is of slightly earlier vintage. Legal scholar Abbott Lawrence Lowell first proposed the idea of drawing a distinction between incorporated and unincorporated territories in a May 1899 article for the *Harvard Law Review*.⁶⁵ Lowell's analysis was lengthy, but its impact was so great that his entire conclusion is worth reprinting:

⁶² 182 U.S. 1 (1901).

⁶³ KERR, *supra* note 13, at 66.

⁶⁴ As Gerald Neuman points out, the term incorporation can be confusing for those new to the literature because it is traditionally used in the context of applying the Bill of Rights to states. While territorial incorporation also deals with the application of the Bill of Rights, it applies to the status of the territory rather than the status of the right. GERALD NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 83 n.c (1996). See also Edward C. Carter, III, *The Extra-Territorial Reach of the Privilege Against Self Incrimination or Does the Privilege "Follow the Flag?"*, 25 S. ILL. U. L.J. 313, 320 (2001) (defining incorporation in regards to territories).

⁶⁵ Abbott L. Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 21 (1899).

The theory, therefore, which best interprets the Constitution in the light of history, and which accords most completely with the authorities, would seem to be that territory may be so annexed as to make it a part of the United States, and that if so all the general restrictions in the Constitution apply to it, save those on the organization of the judiciary; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply. It may well be that some provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people whose social and political evolution has been consonant with our own.⁶⁶

The first portion of Lowell's analysis deals with territory directly incorporated into the Union such as Florida or the Louisiana Purchase. The second portion deals with territories such as Puerto Rico and the Philippines that he, and later the Court, would define as unincorporated. The final portion of the analysis deals with the portions of the Constitution that apply regardless of the status of the territory. These are provisions that apply because they operate directly on the power of Congress to legislate in a given area, rather than powers that arguably have limited application, such as the Uniform Duties Clause discussed above, which only applies "throughout the United States."⁶⁷ The Court, or some members of it, explicitly adopted the entirety of Lowell's analysis in *Downes v. Bidwell*.

i. Downes

There are two important positions articulated by the Court in *Downes v. Bidwell*: Justice Brown's opinion for the Court and Justice White's concurrence.⁶⁸ Justice Brown's opinion is important because he was the sole member of the Court in the majority of all of the *Insu-*

⁶⁶ *Id.* at 176.

⁶⁷ U.S. CONST. art. I, § 8, cl. 1.

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

lar Cases.⁶⁹ Meanwhile, White's concurrence is important because it lays the groundwork for adopting Lowell's analysis, which would become the majority opinion in *Balzac v. Porto Rico*.

Justice Brown spends a great deal of time examining much of the history detailed above before getting to the merits of the case. Once there, however, he immediately adopts portions of Lowell's analysis, drawing a distinction between constitutional prohibitions that "go to the very root of the power of Congress to act at all" and those that are only operative "'throughout the United States' or among the several states."⁷⁰ Looking to provisions of the first type, Justice Brown specifically cites to the bill of attainder and ex post facto clause as well as the nobility clause, both of which are cited by Lowell.⁷¹

Brown then goes on to examine provisions of the second class and turns to the Uniform Duties Clause language mentioned above. He also looks to the language of the Thirteenth Amendment to help draw this distinction.⁷² Justice Brown believed that the United States was understood to encompass only "the *states* whose people *united* to form the Constitution, and such as have since been admitted to the Union upon an equality with them."⁷³

On the other hand, in order to give meaning to the language of the Thirteenth Amendment, which says its provisions apply in the United States, or any place subject to their jurisdiction, "we must treat [those words] as a recognition by Congress of the fact that there may be territories subject to the jurisdiction of the United States, which are not of the United States."⁷⁴ This conception of the Thirteenth Amendment seems strained, especially in light of the amendment's history. An equally logical, and perhaps better fitting, conception of the amendment is that its reference to "any place subject to [the] jurisdiction" of the United States does not refer to U.S. territories, but rather areas under the military control of the United States. Given the recent end of the Civil War and the condition of most of the Southern states under Union military control, it seems highly plausible that the language of the Thirteenth Amendment was drafted to deal with that situation, as opposed to the territories, which were viewed since *Dred Scott* as part of the United States.

⁶⁹ NEUMAN, *supra* note 64, at 86.

⁷⁰ *Downes*, 182 U.S. at 277.

⁷¹ *Id.*

⁷² *Id.* (noting that the Thirteenth Amendment lists its area of applicability as "within the United States, or any place subject to their jurisdiction" (emphasis added)).

⁷³ *Id.*

⁷⁴ *Id.* at 278.

Justice Brown then turned to an examination of the treaty-making power and held that "the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their *status* shall be in what Chief Justice Marshall termed, the 'American Empire.'"⁷⁵ To this end, he examined the treaty provisions and noted that in all prior cases the specific incorporation of the territory had been bargained for, which was not the case in the Treaty of Paris.⁷⁶ He noted that in all the cases, there was an "implied denial of the right" of American citizenship until Congress took some other action to assent to such rights.⁷⁷

Justice Brown concluded his lengthy opinion by comparing the acquisition of territory by the United States as similar to that exercised by other nations.⁷⁸ He saw territorial acquisition and control as a power of a sovereign nation, demanding express limitation of congressional power by the Constitution as a necessary prerequisite to limiting that power.⁷⁹ The problem with Justice Brown's analysis is that it ignores that the United States, at the time, was unlike any other sovereign country in existence, in that it drew, and continues to draw, its power from a written Constitution. Furthermore, in a system of enumerated powers such as ours, the power to legislate over territories must be explicitly granted, not explicitly limited. Once the Court rejects Article IV, Section 3 as a basis for territorial governance, which Chief Justice Taney did in *Dred Scott*, the Court, and the Congress, must search elsewhere in the Constitution for the power to legislate over territories. Justice Brown's view turns the system of enumerated powers on its head. Based on this flawed reading of the Constitution, Justice Brown declares Puerto Rico to be "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution"⁸⁰

Justice White, in his concurrence, viewed the question, not as whether the Constitution is operative, for he saw that as self-evident, but rather "whether the provision relied on is applicable."⁸¹ He went on to state that "the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves

⁷⁵ *Id.* at 279.

⁷⁶ *Id.* at 279–80.

⁷⁷ *Id.* at 280.

⁷⁸ *Id.* at 285.

⁷⁹ *Id.*

⁸⁰ *Id.* at 287.

⁸¹ *Id.* at 292 (White, J., concurring).

an inquiry into the situation of the territory and its relations to the United States.”⁸² With this simple phrase, Justice White adopted Lowell’s analysis as to incorporated versus unincorporated territories and whether provisions of the Constitution apply in those territories. Justice White clarifies this when he defines the issue before the Court as the sole question of “Had Puerto Rico, at the time of the passage of the act in question, been incorporated into and become an integral part of the United States?”⁸³

Justice White then launched into an extended discussion of the treaty-making power, going into much greater detail than Justice Brown, and concluded that in order to be fully incorporated into the Union, the Congress of the United States must acquiesce, and that the treaty-making power alone is not sufficient.⁸⁴ He summarizes this drawn out examination of the treaty-making power with the following:

[T]he treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand when it has expressed in the treaty conditions favorable to incorporation, they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.⁸⁵

Justice White then examined the contents of the Treaty of Paris discussed above and noted that it failed to provide for incorporation in the same manner that earlier treaties had, and in fact, that the actions of Congress expressed a desire that Puerto Rico *not* be incorporated.⁸⁶ Justice White then concluded this examination with the now-famous

⁸² *Id.* at 293.

⁸³ *Id.* at 299.

⁸⁴ *Id.* at 312–43. See also Deborah Herrera, *Unincorporated and Exploited: Differential Treatment for Trust Territory Claimants—Why Doesn't the Constitution Follow the Flag?*, 2 SETON HALL CONST. L.J. 593, 613 (1992).

⁸⁵ *Downes v. Bidwell*, 182 U.S. 244, 339 (White, J., concurring).

⁸⁶ *Id.* at 340.

proposition that “whilst in the international sense Puerto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.”⁸⁷ Therefore, the challenged provision of the Constitution was inapplicable to Puerto Rico.

ii. Other Cases—From Downes to Balzac

While there are several other *Insular Cases*, the two that are most relevant are *Dorr v. United States*⁸⁸ and *Balzac v. Porto Rico*.⁸⁹ *Dorr* is important because it was the first time that the Court addressed the application of the Bill of Rights to the territories of the United States. It was here that the Court drew a distinction between fundamental and procedural rights and ruled that the latter had no effect in unincorporated territories. *Balzac* is important because it marked the end of the *Insular Cases* and the adoption of the TID by a majority of the Court, thus ensuring over a century of colonial rule by the United States.

1. *Dorr*

Dorr dealt with the right to a jury trial encompassed in the Sixth Amendment and whether or not that right extended to an inhabitant of the Philippines, absent a congressional statute. Justice Day, writing for the Court, held that until Congress saw fit to incorporate a territory, Congress was free to govern the territory as it wished.⁹⁰ The Court ignored the clear language of the Sixth Amendment and Article III, Section 2 by noting that when Congress wrote the act for the temporary government of the Philippines, they expressly exempted the islands from Section 1891 of the Revised Statutes of 1878.⁹¹ This section extended the Constitution to the territories of the United States, and the Court viewed this exemption as conclusive in its analysis.⁹²

⁸⁷ *Id.* at 341–42. Justice White concludes his opinion by discussing the obligation of the United States levied by Chief Justice Taney in *Dred Scott* that the US may not hold such territory indefinitely. Justice White rests on a presumption that the Congress will be faithful to its constitutional duty and will end the occupation of any territory not found fit for eventual incorporation. *Id.* at 343–44. Sadly, a century of colonial rule has proven Justice White wrong, and thus this article proposes several solutions to this problem in later sections.

⁸⁸ 195 U.S. 138 (1904).

⁸⁹ 258 U.S. 298 (1922).

⁹⁰ *Dorr*, 195 U.S. at 143.

⁹¹ *Id.*

⁹² *Id.* at 143–44 (finding that § 1891 gives “force and effect” to the Constitution within all territories).

Article III, Section 2 of the Constitution requires a jury trial for all crimes, except impeachment, which "shall be held in the State where the said Crimes shall have been committed; *but when not committed within any State*, the Trial shall be at such Place or Places as the Congress may by Law have directed."⁹³ This clause seems to be a clear and unambiguous call for a jury trial in all cases. Furthermore, this clause explicitly recognizes that crimes may take place outside of the states, yet still be subject to the jurisdiction of the United States. The only place where this could occur would be the territories. And the clause is clear that in such a situation the trial of the crime shall be by jury.

The Court's answer to this clear and unambiguous language was to reach back to another of the *Insular Cases*, *Hawaii v. Mankichi*,⁹⁴ which held that the right to a jury trial was not a "fundamental" right, but rather was "merely a method of procedure."⁹⁵ The Court ended its discussion of the jury right by concluding that

[T]he power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.⁹⁶

This analysis by the Court is interesting for two reasons. First, as noted above, it ignores the plain language of Article III that allows for a jury trial in an area subject to the jurisdiction of the United States, but not in any state. Second, the Court locates the power to govern territories in Article IV, Section 3 of the Constitution, which Justice Taney excluded in *Dred Scott*.⁹⁷ This is especially odd in light of the fact that the Court in *Downes* and other earlier *Insular Cases* used this distinction noted by Taney to justify the distinction between unincorporated and incorporated territories.⁹⁸ Justice Taney's distinction between the territory held at the time of the founding and later acquisi-

⁹³ U.S. CONST. art. III, § 2 (emphasis added).

⁹⁴ 190 U.S. 197 (1903).

⁹⁵ *Dorr*, 195 U.S. at 144-45 (quoting *Mankichi*, 190 U.S. at 220).

⁹⁶ *Id.* at 149.

⁹⁷ *Dred Scott v. Sandford*, 60 U.S. 393, 445 (1856).

⁹⁸ *DeLima v. Bidwell*, 182 U.S. 1, 195-97 (1901); *Downes v. Bidwell*, 182 U.S. 244, 279-80 (1901).

tions was the genesis for the TID.⁹⁹ For the Court to now utilize Article IV, Section 3 as a locus of congressional power undercuts this initial distinction, and places the whole TID in doubt.

But this is not the sole area in which the *Dorr* Court ignored *Dred Scott*. In the *Dred Scott* opinion, Justice Taney specifically mentioned the jury right as one that extended to these newly acquired territories.¹⁰⁰ Justice Taney made this observation well before Congress enacted Section 1891, extending the Constitution to all subsequently acquired territories. This seems to indicate that the jury right *does* apply of its own force. In fact, Justice Taney never cited a statute that extended *any* provision of the Constitution to the territories involved in *Dred Scott*, yet this did not prevent the Court from finding that the Constitution applied there.¹⁰¹

2. Balzac

Balzac was a case once again involving Puerto Rico and the jury right, but this time the question before the Court was what is necessary for Congress to incorporate a territory? The petitioner in this case relied primarily on the Jones Act, the Organic Act of Puerto Rico, passed on March 2, 1917,¹⁰² to support their assertion that Puerto Rico was incorporated into the United States. The Court rejected the petitioner's argument and held that if Congress intended to change the relationship between Puerto Rico and the Union, it would do so explicitly.¹⁰³

Mandating that Congress articulate its intent to incorporate a territory is an odd requirement for incorporation in this case. By granting the inhabitants of Puerto Rico citizenship through the Jones Act, it appeared that Congress explicitly manifested intent to incorporate; however, the Court disagreed.¹⁰⁴ In fact, it is hard to imagine a greater indication of congressional intent to extend the full protection of the Constitution to the people of Puerto Rico than granting them United States citizenship.

In order to safeguard this arguably anomalous result, the Court then went on to state that citizens of the United States visiting Puerto Rico were also not entitled to a trial by jury when visiting the is-

⁹⁹ See *supra* Part III.A-C.

¹⁰⁰ *Dred Scott*, 60 U.S. at 450.

¹⁰¹ See *id.* at 393.

¹⁰² 39 Stat. 951. See also *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922).

¹⁰³ *Balzac*, 258 U.S. at 306.

¹⁰⁴ *Id.* at 308 ("It became a yearning of the Porto [sic] Ricans to be American citizens, therefore, and this act gave them the boon.").

land.¹⁰⁵ "It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it."¹⁰⁶ For the first time, the Court suggested that U.S. citizens did not enjoy full constitutional rights in territories within the jurisdiction of the United States. This is a highly puzzling result given the rationale the Court used to deny rights to the inhabitants of these territories. In reaching this conclusion, the Court based much of its determination on racist discourse, fearing to grant these privileges to "savages."¹⁰⁷ As deplorable as this language is, and even assuming the Court was correct, these concerns would not play out once Congress chose to grant citizenship to these "savages," and they certainly would have no grounding when dealing with a citizen of the contiguous United States visiting Puerto Rico.

iii. Incorporation and Constitutional Rights

As noted above, the Supreme Court tied the exercise of constitutional rights to the status of the territory. In incorporated territories, the entire Bill of Rights applies, whereas in unincorporated territories, only some of it does. When deciding which rights should apply to unincorporated territories of the United States, the Court has settled on only applying "fundamental" rights.¹⁰⁸ It is important to note that, in this context, "fundamental" rights are independent from the rights incorporated against the states through the Fourteenth Amendment.¹⁰⁹

1. Fundamental Rights v. Procedural Rights

For purposes of unincorporated territories, "fundamental" rights are those rights "which are the basis of all free government."¹¹⁰ Court precedent clearly establishes that the Sixth Amendment right to a trial by jury is not "fundamental" within the territorial context.¹¹¹ The Court also held that criminal charges do not have to be presented to a

¹⁰⁵ *Id.* at 309.

¹⁰⁶ *Id.*

¹⁰⁷ See *infra* Part III.B.iii.2.

¹⁰⁸ See *Balzac*, 258 U.S. at 298; *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

¹⁰⁹ This is another unfortunate confluence of language that is used in the *Insular Cases* context but that has also been used in the context of the Fourteenth Amendment. It is especially unfortunate considering both classes of cases use the term "fundamental rights" for deciding which rights to apply. It suffices to say that just because a right has been deemed "fundamental" for purposes of the Fourteenth Amendment does not mean the right is "fundamental" for territorial purposes.

¹¹⁰ *Carter*, *supra* note 64, at 321.

¹¹¹ See *supra* Part III.C.ii.1 (discussing *Dorr*, 195 U.S. at 138).

grand jury.¹¹² Based on these two holdings, one scholar has argued that the Fifth Amendment privilege against self-incrimination would not be deemed "fundamental."¹¹³ The Court has also held that the territorial courts are not Article III courts, but rather are created pursuant to Article IV, Section 3.¹¹⁴

The final area in which the Court has dealt with a constitutional right as it applies to the territories is a special case. In negotiating a covenant in which the former Trust Territory of the Northern Mariana Islands was made a commonwealth, the United States negotiated a land alienation provision that restricted who could purchase land on the islands for the first twenty-five years of the Commonwealth's existence.¹¹⁵ Despite numerous challenges to this provision under the Equal Protection Clause, the Ninth Circuit has held that this land alienation provision is legitimate, and that the Equal Protection Clause essentially does not apply to the Commonwealth of the Northern Mariana Islands, despite finding that it was a fundamental right that applied to Puerto Rico.¹¹⁶

Overall, the Court's distinction between fundamental and procedural rights seems highly strained and arbitrary. After all, of all the proposed amendments offered by the thirteen original states, the First Congress thought that the first ten amendments were the most important to secure. Notably, among these rights was the right to a jury trial. Indeed, as Justice Harlan pointed out in his dissent in *Dorr*, the great legal commentator Blackstone commented on the importance of the trial by jury.¹¹⁷ Responding to a French writer who declared that England's liberties must one day perish as had those of Rome, Sparta, and Carthage, Blackstone replied that "the writer 'should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury.'"¹¹⁸

Justice Harlan responded to this idea in his dissent in *Downes v. Bidwell*. There he wrote that "[a] mistake in the acquisition of territory . . . cannot be made the ground for violating the Constitution or refusing to give full effect to its provisions."¹¹⁹ He went on to state:

¹¹² See *Mankichi*, 190 U.S. at 197.

¹¹³ Carter, *supra* note 64, at 321.

¹¹⁴ Balzac v. Porto Rico, 258 U.S. 298, 312 (1922).

¹¹⁵ Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 711 (1995) (arguing that the covenant's provision of alienation restrictions and a malapportioned legislature "implicate[s] the substantive principle of equal protection").

¹¹⁶ *Id.* at 718, 724. It should be noted that the alienation restriction ended in 2001.

¹¹⁷ *Dorr v. U.S.*, 195 U.S. 138, 157 (1904) (Harlan, J., dissenting).

¹¹⁸ *Id.* (quoting 2 Bl. Comm. 379).

¹¹⁹ 182 U.S. 244, 384 (1901) (Harlan, J., dissenting).

The Constitution is supreme over every foot of territory, wherever situated, under the jurisdiction of the United States, and its full operation cannot be stayed by any branch of the Government in order to meet what some may suppose to be extraordinary emergencies. If the Constitution is in force in any territory, it is in force there for every purpose embraced by the objects for which the Government was ordained.¹²⁰

This, it seems, is the proper view of the Constitution. Every provision was viewed as fundamental by those who framed that great document. It seems quite arbitrary to privilege certain rights over others, especially when, as here, we are talking about that most fundamental of rights, personal liberty. As recent debates over the importance of habeas corpus have shown, the right to be free from detention by the government has been recognized since the signing of the Magna Carta in 1215. The trial by jury has long been recognized as the fundamental bulwark against such arbitrary detention. To so easily dismiss it does a disservice to the importance of this right and sets a dangerous precedent for the future.

The only reason the Court ever sought to deny any rights to the inhabitants of these far-flung territories was based on a racist view of those inhabitants, reflected in much of the discourse utilized by the Court in rendering these decisions.

2. Racist Discourse

In addition to the faulty distinction between fundamental and procedural rights, the *Insular Cases* are plagued by racist discourse used by the Justices to justify the denial of rights to inhabitants of unincorporated territories. Worse yet, the Justices tried to cloak some of this racist language in the guise of pushing "self-determination" for these areas.

This penchant for racist discourse first raised its head in Justice Brown's opinion in *Downes*. There, Justice Brown justified a denial of constitutional protection because he found it "doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States."¹²¹ Justice White is less subtle when he discusses the "grave detriment" to the United States caused by "the immediate bestowal of

¹²⁰ *Id.* at 385.

¹²¹ *Id.* at 279–80 (majority opinion).

citizenship on those *absolutely unfit* to receive it.”¹²² Justice Day goes even further in *Dorr* when he denies a right to a jury trial to territory “peopled by savages.”¹²³

This overt racism has been recognized by several commentators, and has been acknowledged as reflecting the spirit of the times. One noted that some people of the time “argued that [territorial] inhabitants were either unprepared or undeserving of certain ‘Anglo-Saxon’ rights guaranteed by the Constitution.”¹²⁴ Another commentator noted that the *Insular Cases* emphasized the desire of the United States to acquire territory “without conferring the rights of citizenship on subjects who were racially unfit for it.”¹²⁵ Finally, one of those commentators described the Court’s casting of this denial as consistent with democratic ideals:

Most audacious, however, was the Court’s attempt to recast its denial of constitutional rights to territorial inhabitants as consistent with democratic theory. Because statehood, the traditional solution to the anti-democratic character of territorial governance, was unlikely for the new territories, the Court felt compelled to package unincorporated status as a vehicle for limited, local self-determination. . . . To force rights upon an unwilling people, the court stated, would be positively unjust because it would hinder them from ordering their institutions in a way more faithful to their traditional ways. By exempting territories from such unfamiliar rights as jury trials, the *Insular Cases* Court claimed that it was providing territorial peoples with more latitude to protect their traditional ways of life through democratic decisionmaking.¹²⁶

This categorization, in light of the language quoted above, is obviously false. It is a thin veil with which to hide the blatant racism utilized in the Court’s opinions. Furthermore, even if the Court were absolutely sincere in its rationale, the groundwork for this reasoning is no longer present. Puerto Rico, for example, has been a part of the United States for over a century now, with much communication with the mainland. If over a century of association has not “prepared” the people of Puerto Rico to recognize the right to a trial by jury, then no amount of association ever could. The most recently associated

¹²² *Id.* at 306 (White, J., concurring) (emphasis added).

¹²³ *Dorr*, 195 U.S. at 148.

¹²⁴ Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 795 (1992).

¹²⁵ Neuman, *supra* note 64, at 145.

¹²⁶ Katz, *supra* note 124, at 796.

territory, the Commonwealth of the Northern Mariana Islands, which signed its covenant in 1976, after nearly thirty years as a trust territory, has been a part of this country for nearly thirty years. The justifications on which the *Insular Cases* are based are no longer present.

Furthermore, despite this "unfitness" or "unreadiness" to participate in the jury process, the Court has never once denied that Congress could make the jury right applicable to these territories "peopled by savages" with a simple legislative act. The fact that Congress has failed to do so does not justify the continuing denial of rights. Rather, the ability of Congress to act in this matter merely serves to undercut the Court's rationale.

Finally, one aspect of the requested right that has been ignored is its voluntary nature. The Court has long upheld the right of a criminal defendant to waive his or her right to a jury trial and instead be tried by the judge. If the people of Puerto Rico or other territories truly feel the jury right is inconsistent with their culture, they are not required to exercise it.

3. Reid v. Covert

No discussion of the *Insular Cases* would be complete without an examination of *Reid v. Covert*.¹²⁷ *Reid* is the closest the Court has ever come to overruling the *Insular Cases*, and with them, the TID. *Reid* dealt with the capital trial of a civilian accompanying the armed forces in a military court.¹²⁸ Writing for a plurality of the Court, Justice Black declared:

At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.¹²⁹

¹²⁷ 354 U.S. 1 (1957).

¹²⁸ *Id.* at 3.

¹²⁹ *Id.* at 5-6.

Justice Black felt that the Constitution traveled anywhere the federal government did. In effect, the Constitution “followed the flag.” He rested his argument on the language of Article III and its reference to crimes that occurred outside the jurisdiction of any state.¹³⁰ Justice Black stated that given its natural meaning, the language of Article III plainly envisioned the reach of the Constitution beyond the borders of the several states, and that all the protections of that document, including the trial by jury, would apply wherever the United States held sway.¹³¹

Furthermore, Justice Black specifically rejected the fundamental/procedural rights distinction the earlier cases drew. As he put it:

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.¹³²

He then launched into an extended examination of the history of the right to trial by jury and a repudiation of *In re Ross*, the case that first placed into question the right to a jury trial while abroad.¹³³

However, despite a firm belief that the Constitution extended wherever the forces of the U.S. government could be found, as well as his disagreement with the logic underpinning the fundamental/procedural rights distinction, Justice Black stopped short of overruling the *Insular Cases*. Instead, he distinguished them as “involv[ing] the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions,” whereas the basis for governmental power in *Reid* was U.S. citizenship.¹³⁴ He concluded his examination of the *Insular Cases* as follows:

¹³⁰ *Id.* at 7–8.

¹³¹ *Id.*

¹³² *Id.* at 8–9.

¹³³ *Id.* at 9–12 (discussing *In re Ross*, 140 U.S. 453 (1890)).

¹³⁴ *Id.* at 14.

[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.¹³⁵

While acknowledging that the *Insular Cases* should not be expanded, Justice Black refused to take the final step of overturning them. Even with this scaled-back view of the *Insular Cases*, Justice Black was unable to gain a majority of votes. Therefore, it is doubtful that he would have been able to garner a fifth vote for the more radical step of overturning the *Insular Cases*.

Justice Frankfurter concurred in the result, limiting his focus to the narrow question of the rights of civilian dependents facing capital charges in time of peace.¹³⁶ Therefore, he never addressed the broader issue of the reach of the Constitution beyond the borders of the states, and in fact, his opinion makes no reference to the *Insular Cases* at all.

Finally, Justice Harlan concurred on the narrow grounds that the Act allowing for trial of civilians before military tribunals could not constitutionally be applied in time of peace.¹³⁷ Looking to the *Insular Cases*, he specifically found that the doctrine announced still had some vitality.

I do not go as far as my brother Black seems to go on this score. His opinion, if I understand it correctly, in effect discards *Ross* and the *Insular Cases* as historical anomalies. I believe that those cases, properly understood, still have vitality, and that, for reasons suggested later, which differ from those given in our prior opinions, they have an important bearing on the question now before us.¹³⁸

Rather than relying on the "rigid and abstract rule" called for by overturning the *Insular Cases*, Justice Harlan was content to look to the conditions and considerations that would make the particular application of a constitutional provision "impracticable and anomalous."¹³⁹

¹³⁵ *Id.*

¹³⁶ *Id.* at 45 (Frankfurter, J., concurring).

¹³⁷ *Id.* at 65 (Harlan, J., concurring).

¹³⁸ *Id.* at 67.

¹³⁹ *Id.* at 74-75.

The *Insular Cases* are a product of history, of a time when separate was considered equal, and this history is apparent in the language utilized by the Court. Even if the Court was sincere in its belief that denying these rights was best for the people of these lands, something that is hard to prove based on the rhetoric utilized, the basis for these decisions has long since vanished. Like its justification, the racist policy of the TID must be allowed to fade into history. This article now turns to a discussion of how this may occur.

IV. SOLUTIONS

Having examined the multiple problems with the TID, it is now necessary to discuss a solution. An examination of the case law and policy issues surrounding the debate over the extension of the Constitution to U.S. territories reveals four potential solutions.

A. Four Options

i. Extension by Congress

The first, and most simplistic option, is for Congress simply to pass legislation that extends the “procedural” rights to the territories. This would entail the least change to the current system, and would not extend citizenship to those thought “unfit” to receive it. As the Court has pointed out in the *Insular Cases*, Congress has always retained the right to extend the protections of the Bill of Rights to the territories.¹⁴⁰ Indeed, the Court used the creation of a Bill of Rights for Puerto Rico in the Jones Act to justify the conclusion that the federal Bill of Rights does not apply.¹⁴¹ As seen in *Dorr*, Congress would merely need to apply Section 1891 of the Revised Statutes of 1878 in order to extend the full Constitution to acquired territories. This would be, without a doubt, the simplest and least controversial option for dealing with the problems described above. It would involve no challenge to the *Insular Cases* and it would allow Congress to determine on a case-by-case basis which territories are ready to assume the full burdens inherent in the American system of criminal justice.

ii. Incorporation

The next option would be to fully incorporate the territories currently held by the United States into the Union in preparation for eventual statehood. As the Court has pointed out, and as the treaty

¹⁴⁰ *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹⁴¹ *Balzac v. Porto Rico*, 258 U.S. 298, 306–07 (1922).

language of other acquisitions implies, this has always been the eventual goal. Indeed, as the Court held in *Dred Scott*, this country cannot hold territory indefinitely in a subservient role. Clearly over a century of association with the United States has prepared Puerto Rico for full incorporation. The idea of statehood has been bandied about in Puerto Rico for almost two decades, which clearly shows that Congress has considered incorporation in the past. As for the other territories, each has been under the protection and dominion of the United States for over fifty years, and this should be sufficient to orient the peoples of these lands to American values and our political and judicial system. Therefore, Congress could pass an act explicitly incorporating the currently held U.S. territories and causing the full Bill of Rights to apply there.

This could also be achieved on a case-by-case basis, so that Congress could determine which territories are prepared for full statehood. This option may have some political repercussions if people in the United States are opposed to granting statehood to these far-flung territories. However, statehood would not be instantaneous. Rather, the territories would be treated as former incorporated territories were treated, and they would be granted statehood only after meeting certain goals set by Congress. This option, unlike the first, would fulfill the command of *Dred Scott* that the US not hold territory indefinitely.

iii. *Reversal of the Insular Cases*

The next option is to reverse the *Insular Cases* and their idea of the TID. This could be accomplished in two ways. First, Congress could overrule the cases. Because the decisions are based on the Court's view of Congress's intent in trading with foreign nations to acquire territory, rather than on any specific view of Congress's constitutional power, Congress may correct that view through a statutory clarification.¹⁴² Alternatively, the Supreme Court could accept a case from a person charged with a crime in one of the territories who is seeking to enforce one of these "procedural" rights and use this opportunity to overturn the doctrine. This would extend the full Bill of Rights to all

¹⁴² While it is true that the decisions are constitutional in nature, interpreting the reach of the Constitution, the underlying question of territorial incorporation has always been an interpretation of congressional intent. Congress could therefore, consistent with precedent and the Constitution, clarify that all territories acquired were meant to receive the full protections of the Bill of Rights, and thus the *Insular Cases* should be overturned. This is a slightly different option than the one proposed above, because there Congress acknowledges the existence of the TID and merely incorporates the territory. This option would legislatively do away with the TID, declaring that all current and future acquisitions, whatever those might be, are entitled to the full protection of the Bill of Rights, regardless of the prospect for eventual statehood.

land held by the United States regardless of the prospects for eventual statehood and would firmly declare that the Constitution—all of it—follows the flag.

Either of these options would solve the problems outlined above while avoiding the deficiencies of the first two options, which are discussed below. This would potentially have the same political repercussions as the second option, unless the Court made the decision, which would give Congress political cover. While this backlash is not likely to occur, it is a consideration that policy-makers must take into account. However, it is also possible that the repealing of the TID would allow the territories to retain their current status, which would relieve the political concerns.¹⁴³

This option is fairly radical in either form. If the Court acts, it will reverse over a century of precedent. If Congress acts, it may be viewed as usurping the Court's power by legislatively overruling the Court's decisions. While this tension is fairly typical when statutory construction is concerned, when dealing with the interpretation of treaties affecting the application of the Constitution, Congress is on more unsure footing. In fact, it is quite common for Congress to legislatively overrule a Court decision when the Court has read a statute more broadly or narrowly than Congress intended. On the other hand, when dealing with treaties, the House does not have a say, and the President is involved. Therefore, a legislative clarification might be less acceptable.¹⁴⁴

iv. Independence

The final, and most radical, solution would be to grant independence to those territories that are still viewed as unincorporated. This would fulfill Justice Taney's view that the United States cannot hold territory indefinitely, while also removing the stain of the TID and its racist underpinnings. This solution, however, should only be extended to those territories that wish to end their relationship with the United States, determined by plebiscite, rather than casting them out on their own. As a result, it is perhaps the most incomplete of the solutions, for evidence shows that at least some of the territories would not ac-

¹⁴³ While this would violate Justice Taney's holding in *Dred Scott*, it may still be legitimate. At least two territories have voluntarily chosen their current status, and thus there is no problem of domination. Puerto Rico has voted in a plebiscite, rejecting statehood in favor its current status. Additionally, the Commonwealth of the Northern Mariana Islands negotiated their covenant with the United States in 1976, and both parties mutually agreed to the current arrangement. Thus, Justice Taney's concerns may no longer be valid.

¹⁴⁴ The problem of Presidential approval is solved through presentment of the clarifying legislation. However, the involvement of the House in the matter of a treaty is still present.

cept this option.¹⁴⁵ Furthermore, based on the interconnectedness of territorial economies with that of the United States, such a move could be disastrous for the territories.

B. The Path To Take

While all four solutions would offer some form of relief for the problems detailed above, the only realistic solution, one that would provide more than just a temporary reprieve, is the overturning of the *Insular Cases*, specifically *Downes* and *Dorr*. Congress should take the step of legislatively overturning the TID and require the immediate extension of the full Bill of Rights to U.S. territories. The Court should then bulwark this legislation by overturning the TID at its first opportunity. There are several problems with asking the Court to take this step. The first problem is the time frame. It often takes years for a case to work its way through the system and be in a position to seek a writ of certiorari. Second, once a case achieves this status, four justices must agree to hear a case, and five must agree to overturn the TID. It is much easier, and much more realistic, for Congress to take steps to overturn the TID.

While the issues outlined above would affect this option, they are not insurmountable. I do not believe a large percentage of the population has an opinion one way or the other when it comes to granting statehood to territories, the United States has a long history of extending the equal protection of the law to citizens of the United States. This belief in extending rights to those under the dominion of the United States should overcome any animosity to allowing these territories to eventually become states.

As to the other proposed solutions, each has specific problems that militate against applying them in this situation. As for the first option, congressional extension of rights, it suffers from two main problems. First, it leaves the TID intact, and thus any future acquisitions of territory by the United States would still be subject to the doctrine. Arguably, in this day and age, the United States will not acquire any other territory. However, one merely has to look at the occupation of Iraq by U.S. forces to see how such an acquisition may occur.

While it is true that temporary military occupation is quite different from permanent acquisition,¹⁴⁶ nothing prevents the United States from demanding a territorial concession from Iraq before removing

¹⁴⁵ For example, Puerto Rico has twice rejected statehood, in 1993 and 1998. See *Puerto Ricans Say "No" to Statehood*, available at <http://www.cnn.com/WORLD/americas/9812/14/puerto.rico.01/> (last visited Sept. 3, 2006).

¹⁴⁶ See *Fleming v. Page*, 50 U.S. 603 (1850).

all troops, for example. This would be an acquisition of territory that would remain subject to the TID unless Congress specifically provided for its incorporation. Thus, the problems could arise again.

Furthermore, Congressional extension of the rights does nothing to undercut the racist views inherent in the idea of unincorporated territories. While it would extend the full protection of the Bill of Rights to the inhabitants of these lands, it would do nothing to end the message that they are "unfit" for citizenship or statehood. Simply extending the rights without overturning the TID still labels the inhabitants of these territories as second-class citizens.

Similar problems arise with the simple incorporation of these territories. While the racist message is no longer present, there are still all the problems associated with the existence of the TID outlined above. The rights of the inhabitants of future acquisitions would still be subject to the whim of Congress. Furthermore, incorporation could be problematic because it does signal a step on the road to statehood. While people living outside of territories should not fear this, there is strong evidence that the inhabitants of the territories themselves reject such an option. Once again using Puerto Rico as an example, there have been several plebiscites in which people have elected overwhelmingly to retain their commonwealth status. In the true spirit of democracy, all the rights inherent in citizenship in the United States should be extended to the people of the territories without forcing them to take on additional burdens and responsibilities they do not wish to shoulder.

Finally, the independence option is not realistic. There is no indication that the people of these territories would wish to be independent of the United States, and in fact, such a move would be economically disastrous for most, if not all of them. Furthermore, independence could have a real impact on the security of the United States. Many of these territories house strategic military bases that are key to our forward deployment overseas. For example, until recently the United States had a strategic firing range on the island of Vieques, a part of Puerto Rico. Moreover, Guam has long been a forward deployment area for the Pacific Fleet. Thus, granting independence to these territories may be dangerous to U.S. security.

Additionally, having been under the control of one sovereign or another for the last century, these territories may not be ready for independent governance. Certainly they would be unable to defend themselves from foreign aggressors, which may prove to be problematic for the territories in the Western Pacific as China seeks to expand

its influence in the area. Therefore, a continued relationship would be mutually beneficial to both the territories and the United States.

Some may argue that the problems noted by the *Insular Cases* Court are still true today, and that, separated from their racist origins, they present very real concerns of forcing the views of the United States on those unwilling or unable to comply with our particular system of jurisprudence. There are three problems with this view. First, the procedural rights that the *Insular Cases* dealt with are all waivable rights. For example, if a particular defendant does not wish to have his trial heard before a jury of his peers, he may waive his right, just as those within the states may. Second, as we have seen in the context of incorporation under the Fourteenth Amendment, the extension of the Bill of Rights to new contexts can be achieved with a minimum of disruption. States have had few, if any problems, applying many of the Bill of Rights protections to their own laws.¹⁴⁷

Finally, there is the fact that the territories have been applying the "substantive" rights protected for the last century with no problems. Arguably, it is a bigger exercise of cultural hegemony to demand religious equality, free speech, protection from cruel and unusual punishment, and equal protection than to proscribe a certain method of criminal adjudication.¹⁴⁸ Thus, these concerns are misplaced.

V. CONCLUSION

For over a century the United States has embarked on a policy of colonialism that has relegated thousands of people to second-class status. The racism of the turn of the century translated itself into the constitutional policy that those living outside the boundaries of the United States were not entitled to the rights of citizens even though they are subject to its control. There is no principled basis for the Territorial Incorporation Doctrine, which creates and maintains this distinction. Furthermore, it flies in the face of precedent, which states that the United States is not in the business of holding territory indefinitely. Steps must be taken to end the doctrine of Territorial Incorporation. After looking at the possible options, the best method for solving the problems inherent in the status quo is for Congress to take steps to legislatively overturn the doctrine.

¹⁴⁷ There may also be a supremacy clause issue. It is unclear whether or not territorial judges are bound to uphold the Constitution in the same way that state judges are. This would be the proper subject of another article.

¹⁴⁸ There is no doubt that the Eighth Amendment had its impacts on the territories. In *Weems v. United States*, the Court struck down a traditional Filipino punishment as violative of the Eighth Amendment's protection against cruel and unusual punishment. 217 U.S. 349 (1910).