ARTICLES

THE SUPREME COURT SHOULD OVERRULE THE TERRITORIAL INCORPORATION DOCTRINE AND END ONE HUNDRED YEARS OF JUDICIALLY CONDONED COLONIALISM

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I. INTRODUCTION

Can the United States' Bill of Rights coexist with colonial rule? Do the guarantees in the Bill of Rights limit what the federal government may do, consistent with the Constitution, in its territories? Is the current state of constitutional law in U.S. territories coherent? This article argues that the current state of constitutional law regarding the applicability of the Bill of Rights to the "unincorporated territories" is incoherent, unprincipled, and at odds with the purpose and spirit of the Bill of Rights. The year 2001 is the 100th anniversary of the notorious *Insular Cases*[1] in which the Supreme Court, by judicial fiat, created the Territorial Incorporation Doctrine ("TID") and the status of "unincorporated territory." According to some, the TID is as invidious a doctrine as that which the same Supreme Court announced in *Plessy v. Ferguson*.[2] The creation of this doctrine ran contrary to

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1. The *Insular Cases* is a term used to refer to many cases, even those decided after 1901, affecting the insular possessions. In this article, *Insular Cases* refers to the cases decided in 1901, mainly Downes v. Bidwell, 182 U.S. 244 (1901); DeLima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Armstrong v. United States, 182 U.S. 243 (1901); Huus v. New York & P.R. Steamship Co., 182 U.S. 392 (1901); Dooley v. United States, 182 U.S. 222 (1901); and Fourteen Diamond Rings, 183 U.S. 176 (1901).

2. 163 U.S. 537; *see* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 3-5 (2d ed. 1988); *accord* Igartua de la Rosa v. United States, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, J., concurring).

prior established law and has condemned Puerto Rico[3] to colonial status for 100 years. The United States Supreme Court should reconsider and overrule the TID.

In recent years, the issue of Puerto Rico's status has received increased media attention. Newspapers, television news reports, and magazines have covered the protests against the United States Navy's bombings and other actions in one of Puerto Rico's islands, Vieques.[4] Similarly, President Clinton's pardoning of Puerto Rican "terrorists"/"freedom fighters" in 1999 subjected him to intense media criticism.[5] Adding to the complexities of the consequences of Puerto Rico's colonial status are two opinions from federal district court judges in Puerto Rico in 2000. In one, a federal district court judge held that U.S. citizens in Puerto Rico were entitled to vote in the 2000 Presidential election (although the First Circuit promptly reversed the ruling).[6] In the other, a judge held that the Puerto Rican Constitution trumps federal law and makes the federal death penalty act "locally inapplicable."[7] At their core, all of these issues are *symptoms* of the true problem: Puerto Rico's colonial status that, according to one federal district judge, has enslaved Puerto Ricans.[8]

This article also focuses on the Bill of Rights, which has traditionally been regarded as guaranteeing individual liberties against the overreaching or arbitrary behavior of government. The protection of individual guarantees in the Bill of Rights and the rest of the Constitution is complemented by the other major purposes of the Constitution: establishing the framework and

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3. Although there are other "unincorporated" territories, this article focuses on Puerto Rico. Throughout this paper, the terms "unincorporated territories" and "colonies" are used interchangibly because colonialism is the most adequate description for "the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal lawmaking processes that shape its people's daily lives." José A. Cabranes, *Puerto Rico and the Constitution*, First Circuit Judicial Conference, 110 F.R.D. 449, 480 (1985); *accord Igartua de la Rosa*, 229 F.3d at 89 (Torruella, J., concurring).

4. *See, e.g.*, Vieques Protestors Watch and Wait in Puerto Rico (visited May 2, 2000) <http://www.cnn.com/2000/WORLD/americas/05/02/vieques.02/>; Illinois Congressman Complains of Maltreatment by Navy During Protest (visited May 2, 2001) <http://www.cnn.com/2001/ALLPOLITICS/05/02/vieques.congressman.ap/index.html>; Cintron Rodriguez v. United States, 995 F. Supp. 238 (D.P.R. 1998).

5. *See, e.g.*, Dirk Johnson, *Amid Clemency Furor, Puerto Ricans Released*, AUSTIN AMERICAN STATESMAN, Sept. 11, 1999, at A13; Cynthia Corzo, *Clemency to Puerto Rican Nationalists Draws Fire*, HISPANIC, Nov. 1999, at 14.

6. Igartua de la Rosa v. United States, 107 F. Supp. 2d 140 (D.P.R. 2000), and 113 F. Supp. 2d 228, 242 (D.P.R. 2000), *rev'd*, 229 F.3d 80 (1st Cir. 2000).

7. United States v. Acosta Martinez, 106 F. Supp. 2d 311, 321 (D.P.R. 2000).

8. *Igartua de la Rosa*, 107 F. Supp. 2d at 148-49. Recently, there has been a resurgence in scholarly interest in the constitutional issues. *See, e.g.*, TORRUELLA, *supra* note 2; JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 55-56 (1997); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

structure of a national government based on federalist principles and promoting local self-government.

The Bill of Rights was based on the experiences of persons who had been under British colonial rule. As such, the provisions of the Bill of Rights are both deeply rooted in Anglo-Saxon legal principles and strongly anti-colonialist. Ironically, when the United States acquired its territories after the Spanish-American War of 1898, the Supreme Court misused the Anglo-Saxon legal tradition of the United States to rationalize the inapplicability of the Bill of Rights in the colonies, to a large extent because of the race and non-Anglo-Saxon national origin of the majority of the people living in those places. In so doing, the Court ignored its own established case law and the anti-colonial history and spirit of the Bill of Rights.

Throughout the nineteenth century, the United States expanded the territory to which the Constitution and the Bill of Rights applied. Everywhere the United States flag went, the Constitution and its judicial interpretations followed. Territories were acquired and governed under the Territory Clause[9] and admitted to statehood on an equal footing under the Constitution via the Statehood Admission Clause.[10] As late as 1898, it was "beyond question" that the Bill of Rights "followed the flag" and applied in the territories of the United States.[11]

However, in 1901, the Supreme Court created a new political status under the Constitution—a colony—via the Territorial Incorporation Doctrine.[12] While the TID's colonial creation was based on federalist notions, it has in fact negated self-government and condoned violations of individual liberties otherwise guaranteed to other citizens. Two later cases entrenched the TID as established law: *Dorr v. United States*[13] and *Balzac v. Porto Rico*.[14] While some Warren Court justices questioned the validity of the *Insular Cases*,[15] more recent decisions by the Rehnquist

9. "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." U.S. CONST. art. IV, § 3, cl. 2.

10. "New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." U.S. CONST. art. IV, § 3, cl. 1.

11. Thompson v. Utah, 170 U.S. 343, 346-47 (1898).

12. *See infra* notes 71-97 and accompanying text.

13. 195 U.S. 138, 155 (1904) (Harlan, J., dissenting).

14. 258 U.S. 298, 304-13 (1922).

15. *See* Reid v. Covert, 354 U.S. 1, 14 (1957) ("[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion."). *See also* Torres v. Puerto Rico, 442 U.S. 465, 475 (1979) (Brennan, J., concurring).

Court reaffirmed the continuing validity of the *Insular Cases*, *Balzac*, and, thus, the legitimacy of the Territorial Incorporation Doctrine.[16]

This article argues that the United States Supreme Court should restore the previously settled law that the Constitution and Bill of Rights fully apply in territories subject to U.S. rule and thereby overrule the TID. In so arguing, this article first discusses the major legal philosophies in the dispute and analyzes the historical and legal context of the TID. The article also examines the similarities between the TID and the Incorporation Debate regarding the applicability of the Bill of Rights against the states via the Fourteenth Amendment.[17] While the Supreme Court conceived of the TID in the context of political relations of *places*, the result has been to limit the constitutional rights of *people*. This article also highlights the contradiction between the anti-colonial origins of the Bill of Rights and the colonial status of unincorporated territories by analyzing the particular constitutional guarantees that remain inapplicable in the territories.

The Supreme Court made the wrong decision in 1901 in adopting the TID. Political, not legal, considerations fueled the Supreme Court's decision to create the TID and accept the creation of a colonial status for the territories the United States acquired in 1898. Even if the Court's stated rationales were valid at

16. United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (citing *Insular Cases*, *Dorr*, and *Balzac* as authority). For a critique of the *Insular Cases*, and for an indignant reaffirmation of their current applicability, see United States v. Lopez Andino, 831 F.2d 1164, 1172 (1st Cir. 1987), *cert denied*, 486 U.S. 1934 (1987) (Torruella, J., concurring); Igartua de la Rosa v. United States, 229 F.3d 80, 86 (1st Cir. 2000) (Torruella, J., concurring); and Popular Democratic Party v. Puerto Rico, 24 F. Supp. 2d 184, 192-93 (D.P.R. 1998).

17. According to Professor Neuman, it is "unfortunate that tradition has associated the word 'incorporate' with both the applicability of the Bill of Rights to federal action in the territories and the applicability of the Bill of Rights to actions of the states. In the first case, the reference is to incorporating the territory into the United States, and in the second, to incorporating the Bill of Rights into the Fourteenth Amendment." Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 958 n.287 (1991). The use of the term "incorporation" for both debates is not unfortunate in my view because it highlights the fact that there are strong links between the two debates, revealing striking parallels in constitutional philosophies and results. Prior scholarship has failed to treat the two debates in conjunction. In fact, both "incorporation" debates involve judicial interpretation of "fundamental rights," the Bill of Rights, federalism, racism, and the power of governments in the United States system. The applicability of the Bill of Rights in the unincorporated territories is even more important than in the context of the incorporation debate involving the States and the Fourteenth Amendment because of the viable argument that Puerto Rico is not a sovereign separate and apart from the federal government's delegated authority. Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572, 607 (1976) (Rehnquist, J., dissenting); *see generally* Carlos R. Soltero, *Is Puerto Rico a "Sovereign" for Purposes of the Dual Sovereignty Exception to the Double Jeopardy Clause?*, 28 REV. JUR. U.I.P.R. 183, 196-99 (1994). For contrary views, see generally *id.*, at 190-91, 194-96.

one time, they no longer are. Therefore, the Supreme Court should overrule the TID and give the people of Puerto Rico the full protection owed to them under the Bill of Rights.

II. CONCEPTUAL FRAMEWORK: NEUMAN'S MODELS

The subject matter of this article is limited to the constitutional rights of individuals, as guaranteed by the Bill of Rights, and uses three of Neuman's four theoretical models about the source and scope of constitutional rights.[18] The Municipal Law model presumes the applicability of constitutional rights: (i) within the United States territory, to all persons, (ii) to citizens of the United States everywhere in the world, and (iii) to aliens outside United States territory only in those circumstances in which the United States seeks to impose legal obligations upon them under United States law.[19] Two of Neuman's other models, the "Global Due Process" and the "Membership Model," are also addressed in this paper because they are prevalent among members of the Supreme Court[20] and are tied to the colonial relationship between the United States and its unincorporated territories. The "Global Due Process" and "Membership Model" traditions blend pragmatism, great deference to the political branches, and expediency, to limit the scope and reach of the Bill of Rights. These traditions reflect the Court's refusal to interfere with the political branches, especially when the rights of minorities are involved.[21] The Global Due Process and Membership

18. The four models are: 1) Universalism—"rights with no express limitations as to the persons and places covered should be interpreted as applicable to every person and at every place"; 2) Membership Model—rights are limited to those who are members of the social contract/political community; 3) Municipal Law—the Constitution constrains government action everywhere; 4) Balancing Approaches or Global Due Process—balancing rights and interests so long as they comport with due process. Neuman, *supra* note 17, at 916-20. "Universalism" is not analyzed in this paper because it is even more expansive than the Municipal Law model, less likely to be adopted, and not as well-grounded in United States constitutional law. This approach is grounded more in international human rights law. *Id.* at 982-84.

19. *Id.* at 919. For an exposition of this position, *see Verdugo-Urquidez*, 494 U.S. at 297 (Blackmun, J., dissenting). The Municipal Law model is more expansive than current constitutional doctrine because "illegal" aliens do not have the same constitutional rights as citizens (Plyler v. Doe, 457 U.S. 202, 211-13 (1982)), the Bill of Rights does not apply *ex propio vigore* to the territories (Dorr v. United States, 195 U.S. 138, 149 (1904)), and the Bill of Rights does not protect aliens subject to the federal government's acts abroad, *Verdugo-Urquidez*, 494 U.S. at 261.

20. For an exposition of the Global Due Process perspective, see *Verdugo-Urquidez*, 494 U.S. at 275 (Kennedy, J., concurring). For an exposition of the Membership Model, see *id.* at 261.

21. Similar reasoning is found in cases like *Plessy v. Ferguson*, 163 U.S. 537, 543-52 (1896) (holding that separate but equal racial accommodations are constitutionally permissible). *See also* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

Model views were manifested in the "Incorporation Debate" *and* the debate on the TID, to the detriment of people's rights.

III. HISTORY OF THE TERRITORIAL INCORPORATION DOCTRINE

A. *Issues Raised by 1898 Territorial Acquisitions: Colonialism, Racism, and Territorial "Incorporation"*

Territorial expansion played an important role in American politics and American constitutional history prior to 1898. However, the 1898 Spanish-American War brought the United States into the imperialists' club for the first time.[22] The acquisition and permanent occupation of Puerto Rico, the Philippines, and other Spanish colonies by the United States after the Spanish-American War raised new political issues.[23] The acquired territories involved significant numbers of people of different races and cultures.[24] Through the distinction between "incorporated" and "unincorporated" territories, the Supreme Court created the "Territorial Incorporation Doctrine," a legal rationalization for American colonialism.[25]

Racial considerations had long played a role in United States expansionism. Considerations about the racial composition of territories had been important in the many wars with the

22. On American Imperialism, see PAUL KENNEDY, THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000 (1988). On the Spanish-American War, see PHILIP S. FONER, THE SPANISH-CUBAN-AMERICAN WAR AND THE BIRTH OF AMERICAN IMPERIALISM, 1895-1902 (1972) and WALTER LAFEBER, THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSIONISM, 1860-1898 (1963). The U.S. took Puerto Rico, Guam, and the Philippines as war booty from Spain through the Treaty of Paris, 30 Stat. 1754 (1898).

23. Before the Spanish-American War, "the distinction between acquisition and incorporation was not regarded as important, or at least it was not fully understood and had not aroused great controversy. Before that, the purpose of Congress might well be a matter of mere inference . . . but in these latter days, incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view." Balzac v. Porto Rico, 258 U.S. 298, 306 (1922).

24. The racial and cultural components of the inhabitants of the newly acquired possessions of the United States and perceptions of racial inequality and hierarchy have been critical issues affecting how the United States has governed those territories. *See generally* MICHAEL H. HUNT, IDEOLOGY AND U.S. FOREIGN POLICY, 46-91 (1987); *see also* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: the Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 284-89 (1996), *reprinted in* JUAN F. PEREA, ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 328-31 (2000).

25. Even in 1901, the Chief Justice acknowledged this: "[The Territorial Incorporation Doctrine] assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power." Downes v. Bidwell, 182 U.S. 244, 373 (1901) (Fuller, C.J., dissenting).

Native American nations of North America,[26] the Mexican-United States War (1846-1848),[27] and the Civil War.[28] However, the larger number of people from "alien races and cultures" made the newly acquired territory "unfit" for ultimate statehood.[29] Unlike prior territorial acquisitions, these territories were destined to be held as colonial dependencies.[30]

The constitutional issue raised by the acquisition of overseas islands as a result of the Spanish-American War was whether the Constitution and the Bill of Rights applied to actions by the United States in the territories. Prior to 1900, the applicability of the Bill of Rights in United States territories was settled law.[31] However, in the *Insular Cases*, a judicially activist Supreme Court refused to follow its precedents and created the TID. No discussion about the TID is complete without the contemporary academic debate.[32]

B. *Academic Debate and the Genesis of the Territorial Incorporation Doctrine*

The most prevalent constitutional issue of the times involved the constitutionality of American imperialism or colonialism.[33]

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26. Nancy Carol Carter, *Race and Power Politics As Aspects of Federal Guardianship Over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197, 227 (1976). *See also* Irene K. Harvey, Note, *Constitutional Law: Congressional Plenary Powers Over Indian Affairs-A Doctrine Rooted in Prejudice*, 10 AM. INDIAN L. REV. 117 (1982).

27. RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 5 (1990); PEREA ET AL., *supra* note 24, at 254-60.

28. The main conflict before the war was slavery in the territories. *See* Scott v. Sandford, 60 U.S. 393 (1856).

29. To many it was "obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians." *Downes*, 182 U.S. at 282.

30. The "United States, therefore, ought not to annex a country evidently and to all appearances irredeemably unfit for statehood because of the character of its people and where the climactic conditions forbid the hope that Americans will migrate to it in sufficient numbers to elevate its social conditions and ultimately justify its admission as a State." Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 304 (1898). Consider the distinction made by Chief Justice Taft between Alaska, on the one hand, and the colonies, on the other: "Alaska was a very different case . . . . 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[sic] Rico presents." Balzac v. Porto Rico, 258 U.S. 298, 309 (1922).

31. Thompson v. Utah, 170 U.S. 343, 346-47 (1898).

32. For a thorough analysis of the *Insular Cases* and the academic debate, see TORRUELLA, *supra* note 2, at 24-31.

33. As Chief Justice Taft, wrote: "Few questions have been the subject of such discussion and dispute in our country as the status of our territory acquired from

In the period from 1898-1902, at least 29 law review articles were published by prominent constitutional legal scholars[34] in the Harvard Law Review, Yale Law Journal, and Columbia Law Review dealing with the territories acquired as a result of the Spanish-American War. Race and culture were preeminent concerns in the academic debate.[35] As Professor Bell has pointed out in the African-American context,[36] the constitutional rights of territorial inhabitants were always secondary to domestic concerns.[37] Three positions emerged corresponding with Neuman's models of constitutional interpretation.

1. *"Municipal Law" Scholars*

Scholars who took the "Municipal Law" approach were anti-imperialists who claimed that the Constitution always followed the flag.[38] According to this view, the entire Constitution would

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Spain in 1899. The division between the political parties in respect to it, the diversity of the views of the members of this court in regard to its constitutional aspects, and to the constant recurrence of the subject in the Houses of Congress, fixed the attention of all on the future relation of this acquired territory to the United States." *Balzac*, 258 U.S. at 306.

34. Among the participants in the debate were Christopher Columbus Langdell, the famous contracts scholar and Dean of Harvard Law School, and Simeon E. Baldwin, the prominent professor at the Yale Law School. 1 WHO'S WHO IN AMERICA? (5th ed. 1962).

35. *See, e.g.*, "Our Constitution was made by a *civilized and educated people*. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the *half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunity* from the sharp and sudden justice-or injustice-which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government." Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government By the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899) (emphasis added). "Its inhabitants are some of them at such *a low stage of human development as to be beyond the pale of constitutional guarantees*. Though belonging in some sense to the United States, they cannot be for a moment considered as citizens of the United States." Talcott H. Russell, *Results of Expansion*, 9 YALE L.J. 239, 239 (1900) (emphasis added). "We have been engaged for the last year in a war which . . . can scarcely be dignified by that name. *We have had an army chasing savages around the swamps of the Philippines*." *Id.* at 242 (emphasis added).

36. "Significant progress for blacks is achieved when the goals of blacks coincide with the perceived needs of whites." DERRICK BELL, RACE, RACISM AND AMERICAN LAW 8 (3d ed. 1992).

37. "In my judgment it was a bad mistake to throw away our wonderful inherited felicity, in being removed from endless complications with the politics of other continents." James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 465 (1899). *Accord* "They do not want independence. The best of them say that it is actually impossible . . . . The Filipinos are not capable of governing themselves. What experience have they had under the grinding tyranny of Spain's rule, with no opportunity to govern themselves except in their local affairs? We can give what they are capable of exercising; that is, municipal and county home rule." Jacob G. Shurman, *The Philippines*, 9 YALE L.J. 215, 220 (1900).

38. "Whether a European power shall indulge the appetite for land is a question merely of ability and expediency . . . . The Federal government is in a different

inevitably apply to overseas United States colonies.[39] New territorial acquisitions could be no different than prior territorial acquisitions because "the United States could not lawfully acquire territory to hold permanently or for an indefinite period as a dependent province or colony."[40] Of great concern was that people born in the territories, pursuant to the Treaty of Paris and the language of the Fourteenth Amendment,[41] would be citizens of the United States or would vote under the Fifteenth Amendment.[42] Even more problematic from their perspectives was that statehood was the ultimate end for all territories.[43]

The Municipal Law scholars distinguished between possessions ceded to the United States for annexation (territories), where the Bill of Rights applied in full at all times to protect the people who lived there, and coaling stations, vacant islands, and land occupied during wartime.[44] Although Congress has plenary powers to administer the territories, constitutional limits on Congressional power "are absolute denials of power without regard to place."[45]

2. *"Membership Model" Scholars*

The "Membership Model" scholars were imperialists who believed that the Constitution set no limits on the United States' ability to act abroad. According to this perspective, the United

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position. Its powers are conferred, and duties and restraints are imposed upon it, by a written constitution interpreted by an independent judiciary." Randolph, *supra* note 30, at 291. Note the similarities with Hugo Black's views on the uniqueness of the American experience in Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 869-70 (1960).

39. "Puerto Rico and the Philippines are as much a part of the United States and as much subject to and protected by the Federal Constitution as was the Louisiana purchase, or has been any other territorial acquisition in our past history." George P. Costigan Jr., *The Third View of the Status of Our New Possessions*, 9 YALE L.J. 124, 132 (1900).

40. Baldwin, *supra* note 35, at 404; Randolph, *supra* note 30, at 297.

41. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

42. "They must, therefore, by the XV. Amendment have the same right of suffrage which may be conceded in those territories *to white men of civilized races*. One generation of men is soon replaced by another, and *in the tropics more rapidly than with us*. In fifty years, the bulk of the adult population of Puerto Rico, Hawaii, and the Philippines, should these then form part of the United States, will be claiming the benefit of the XV. Amendment." Baldwin, *supra* note 35, at 407 (emphasis added). After a century, these fears correspond to a current legal reality. *See, e.g.*, Igartua de la Rosa v. United States, 107 F. Supp. 2d 140, 144-49 (D.P.R. 2000).

43. "[T]he subjection of annexed territory to exclusive federal control is an abnormal and temporary stage necessarily preceding the normal and permanent condition of statehood." Randolph, *supra* note 30, at 292.

44. *Id.*

45. "[T]hese Americans possess the same personal and property rights that people of the States enjoy." *Id.* at 302.

States was no different than European powers when it came to colonialism and territorial expansion.[46] The source of American power to acquire colonies under this approach was "an incident to the functions of representing the whole country in dealing with other nations and states, whether in peace or in war . . . . Upon the power of acquiring colonies the Constitution has no restraint upon the sound judgment of the political department of the United States."[47] Excessive judicial deference to political branches is typical of the "Membership Model" approach to constitutionalism.[48]

Critiquing the Municipal Law view, Membership Model scholars contended that: "[w]e must disentangle views of political theory, political morals, constitutional policy and doctrines as to the convenient refuge for loose thinking which is vaguely called the 'spirit' of the Constitution, from doctrines of constitutional law."[49] In other words, pragmatic concerns, not "idealistic" notions, lie at the heart of this view.[50]

Membership Model scholars concluded that, based on the example of "our tribal Indians", the territorial inhabitants were not citizens.[51] Furthermore, the territories were to be governed by the plenary powers of Congress under the Territory Clause[52] with no promise of statehood.[53]

The "Membership Model" perspective, in the context of the post-Spanish-American War academic debate, praised British colonial rule throughout the world as enlightened and worthy of emulation: "a wise and free colonial administration . . . is one of

46. Thayer, *supra* note 37, at 469. What can the United States do? "It may do what other sovereign nations may do." *Id.*

47. *Id.* at 471.

48. *Compare* Thayer, *supra* note 37, at 471, *with* Neuman, *supra* note 17, at 984-987.

49. Thayer, *supra* note 37, at 468.

50. Does the Constitution prevent colonial rule and administration? "If it does, one will be driven to the conclusion that the authors of that instrument were either less successful in saying what they meant, or else were less sagacious and far-sighted, than they have had the reputation of being." Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 392 (1899).

51. Thayer, *supra* note 37, at 471.

52. "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." U.S. CONST. art. IV, § 3, cl. 2.

53. Granting statehood to the territories of the Northwest Territory was, according to this view, "purely an arrangement of policy" and therefore not required by the Constitution. Thayer, *supra* note 37, at 476. "None of these islands [Hawaii and Spanish islands] have been acquired with a view to their being admitted as States, and it is to be sincerely hoped that they will never be so admitted, *i.e.*, that they will never be permitted to share in the government of this country, and especially to be represented in the United States Senate." Langdell, *supra* note 50, at 391. *See* HUNT, *supra* note 24, at 82.

the most admirable contrivances for the improvement of the human race and their advancement in happiness and self-government . . ."[54]

Another underlying fundamental strand in these scholars' writings is the strong "states' rights" perspective which emphasized the differences between states and territories:

> [I]t was the States in their corporate capacity that voted in the Continental Congress, and not the individual members of the Congress . . . though it was established by the people of the United States; yet it was not established by them as one people, . . . but, on the contrary, its establishment in each State was the act of the people of that State; and if the people of any State had finally refused to ratify and adopt it, the consequence would have been that that State would have ceased to be one of the United States.[55]

Proponents of the Membership Model approach tended also to favor states' rights and federalism over individual rights in other contexts as well.[56] For example, Bradley Thayer sets out distinctions between constitutional prohibitions and guarantees depending on *places* rather than *people*.[57]

3. *"Global Due Process" Scholars*

Abbott Lawrence Lowell proposed a third position as a compromise that is typical of the "Global Due Process" approach. According to the third view, the narrow Membership Model view espoused by Langdell and Bradley Thayer fails to account for the Constitution's potential applicability everywhere the federal government acts and would lead to "conclusions sharply at variance with commonly received opinion. It allows Congress to confiscate property in the District of Columbia or in a territory without compensation . . . . It suffers the government to pass a bill of attainder against a resident of Washington or of Arizona, and order him hung without trial."[58] On the other hand, the broader Municipal Law view espoused by Randolph and Baldwin automatically and mechanically applying the Constitution and the Bill of Rights is also wrong and "irrational, because it extends the restrictions of the Constitution to conditions

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54. Thayer, *supra* note 37, at 475.

55. Langdell, *supra* note 50, at 366-368.

56. Compare the strong states' rights position of Langdell, *supra* note 50, at 366, with the second Justice Harlan's dissent in *Duncan v. Louisiana*, 391 U.S. 145, 171-73 (1968) (Harlan, J., dissenting).

57. Thayer, *supra* note 37, at 479.

58. Abbott Lawrence Lowell, *The Status of Our New Possessions - A Third View*, 13 HARV. L. REV. 155, 156-57 (1899).

where they cannot be applied without rendering the government of our new dependencies well-nigh impossible . . ."[59]

Lawrence Lowell agrees with the Municipal Law scholars that the Constitution clearly had previously applied to the territories from the Northwest Territory (the original territories), the Louisiana Purchase, Florida, acquisitions from Mexico, and Alaska. Therefore, the Constitution is *potentially* applicable in the territories. However, the heart of Lawrence Lowell's position is that, unlike all previous territorial acquisitions, there was no explicit provision in the Treaty of Paris "incorporating" Puerto Rico and the Philippines into the Union.[60] He argues that only the ninth article of the Treaty of Paris, which provides that Congress shall determine the civil rights and political status of the territories' native inhabitants, explicitly refers to the relationship between the inhabitants of the territories and the United States.[61] According to Lowell, this language is "clear" and indicated "that if the government can acquire possessions without making them a part of the United States, it has done so in this case."[62]

Although admitting that "authority upon this question is certainly meagre [sic]", Lawrence Lowell concludes that the theory which best interprets the Constitution

> would seem to be that the 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. [Furthermore 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.[63]

This "third view" became established constitutional law, as discussed below.

This position, based on a Global Due Process approach, did not remain unchallenged. For example, Costigan called this third view "logically indefensible" because "[e]very reservation or guarantee of rights in the Federal Constitution is in fact, if not in

59. *Id.* at 157.
60. *Id.* at 171.
61. *Id.* at 171-72.
62. *Id.* at 172.
63. *Id.* at 176.

form, a restriction upon the power of Congress, and in constitutional interpretation it is fact, not form that controls."[64] His critique posits that there are only two intellectually honest positions: "Congress either has unlimited scope in dealing with the personal and property rights of Puerto Ricans and Filipinos in their respective islands, or its power is restricted by all the limitations provided in the Federal Constitution which are in terms of general application."[65] Global Due Process' pragmatism is at odds with Costigan's Municipal Law view. Where an alternative, less restrictive constitutional interpretation is possible, the Global Due Process approach disregards the Constitution's textual limitations on the federal government because adherence to those limitations would produce an "irrational result" in the territories. Costigan, and other Municipal Law scholars, criticize this approach as constitutionally untenable and akin to saying that "any construction of the Federal Constitution which makes that instrument forbid us to do what it may be expedient for us to do, or even what we want to do, is irrational and to be avoided."[66] Costigan contended that if the United States could acquire possessions without annexing them it did so in the case of Cuba, not Puerto Rico and the Philippines.[67]

The academic debate between these prominent constitutional law scholars had a profound impact on the Supreme Court's analysis of the applicability of the Bill of Rights to "unincorporated territories."[68]

C. *The Insular Cases* of 1901

The Insular Cases of 1901 were a watershed in constitutional law regarding the United States' relation with its colonies. The *Insular Cases* are composed of several challenges based on the Uniformity Clause[69] to duties imposed on commercial goods exchanged between the newly-acquired territories and the United States. The cases themselves held that these territories were neither foreign countries,[70] nor "part of the United States"[71] for

64. Costigan, *supra* note 39, at 125-126.
65. *Id.* at 126.
66. *Id. Cf.* Reid v. Covert, 354 U.S. 1, 14 (1957).
67. Costigan, *supra* note 39, at 130.
68. TORRUELLA, *supra* note 2, at 24-61.
69. "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." U.S. CONST. art. I, § 8, cl. 1. For a controversial interpretation of the Uniformity Clause in the context of Puerto Rican statehood, see Philip Joseph Deutch, *The Uniformity Clause and Puerto Rican Statehood*, 43 STAN. L. REV. 685 (1991).
70. DeLima v. Bidwell, 182 U.S. 1 (1901).
71. Downes v. Bidwell, 182 U.S. 244 (1901).

tariff purposes. The most important of these cases, *Downes v. Bidwell*, produced two notable results. First, the Uniformity Clause was held inapplicable to the newly-acquired territories.[72] Second, *Downes* provided the first judicial manifestation of the distinction between "incorporated" and "unincorporated" territories in the United States constitutional system.[73]

The judicial opinions in the *Insular Cases* paralleled those in the academic debate and reflect the divisiveness of the issue. In *Downes*, no philosophical position could muster a majority of votes on the Court. Justice Brown's opinion announcing the judgment of the Court reflects the Membership Model view and follows Langdell and James Bradley Thayer. It concludes that territories were never part of the United States and that the Constitution "deals with States, their people, and their representatives."[74] Race and cultural differences were central concerns.[75] In terms of rights applicable in the new territories, there was

> a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinion and to a public expression of them . . . to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, . . . and to particular methods of procedure pointed out in the Constitution, *which are peculiar to Anglo-Saxon jurisprudence,* and some which have already been held by the States to be unnecessary to the proper protection of individuals.[76]

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72. "We are therefore of opinion that the Island of Porto [sic] 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 . . . ." *Id.* at 287 (emphasis added).

73. *Id.* at 287 (White, J., concurring). *See also* JAMES EDWARD KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 83-85 (1982) (arguing that Justice White's opinion in *Downes v. Bidwell* did not address the Treaty of Guadalupe Hidalgo because Congress had treated California as part of the United States without an "act of incorporation").

74. *Downes*, 182 U.S. at 251; *but see DeLima*, 182 U.S. at 200.

75. "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 the differences of soil, climate, and production, which may require action on the part of Congress that would be quitted unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians." *Downes*, 182 U.S. at 282.

76. *Id.* at 282-83 (citations omitted) (emphasis added).

Justice Brown catalogues the rights found in the first fifteen amendments, suggesting that he was addressing primarily the applicability of the Bill of Rights in the colonies. The last clause of the quote suggests that the idea of "fundamental rights", in the context of the TID, was from its inception informed by what the Supreme Court considered "fundamental" in relation to the applicability of the Bill of Rights to the states through the Fourteenth Amendment. The "Anglo-Saxon jurisprudence" language would rear its head again.[77]

Although this excerpt from Justice Brown's opinion resembles the Global Due Process approach, the key distinction is the strong deference to the political branches in determining the applicability of the Constitution's guarantees and protections. Justice Brown's view permitted the extension of the Constitution if, and when, Congress chose to do so. Finally, Justice Brown's opinion indicates the truth behind the smoke and mirrors:

> Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it.[78]

Pragmatism, deference to the political branches, and expediency were driving forces behind this manifestation of the Membership Model approach in determining whether the Constitution followed the flag. Puerto Rico and the Philippines were unincorporated territories, which were "not a part of", but rather "appurtenant[79] and belonging to, the United States."[80]

Justice White's concurring opinion in *Downes*, joined by two other Justices, reflects the Global Due Process approach. The opinion followed Lawrence Lowell and articulated the middle or third view that certain judicially-identifiable clauses of the Constitution applied to the newly acquired territories. The issue underlying this view was not *whether* the Constitution applied, but *which* provisions applied.[81] According to Justice White's opinion, which became law in *Dorr v. United States*,[82] neither the Bill of Rights nor the individual Constitutional guarantees applied to the colonies. Rather, Congressional power over the colonies under the Territory Clause was plenary and subject only to the

77. *See infra* Section V. A. 2.
78. *Downes*, 182 U.S. at 286.
79. Appurtenant is defined as "Annexed to a more important thing." BLACK'S LAW DICTIONARY 98 (7th ed. 1999).
80. *Downes*, 182 U.S. at 287.
81. *Id.* at 292 (White, J., concurring).
82. 195 U.S. 138, 148-49 (1904).

limitations of "fundamental" rights. According to the first Justice White, these rights are not directly related to the Bill of Rights and the Constitution, but rather are "inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended [by Congress]."[83]

Relying on "general principles of the law of nations" regarding territorial acquisition, Justice White rejected the *ex propio vigore* application of the Constitution because the "result of the argument [would be] that the Government of the United States is absolutely without power to acquire and hold territory as property or as appurtenant to the United States."[84] Based on the notion that the Treaty of Paris did not explicitly "incorporate" Puerto Rico and the other territories, Justice White argued that such a silence should be construed against incorporation "until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form part of the American family."[85] The portion of the Court subscribing to this view perceived a need to avoid the "evil of immediate incorporation."[86] This was the *judicial* genesis of the TID.

Downes was a 5-4 decision. Two written opinions espoused the views of the four dissenters that would have rejected the TID as meaningless, without textual support, and without precedent in United States history. Both opinions reflected the Municipal Law model, followed Randolph, Baldwin, and Costigan, and would have held that Puerto Rico and the Philippines were part of the United States, fully applying the Bill of Rights to them. Although both dissenting opinions (representing four justices) articulated similar positions, their tones were different. Whereas Chief Justice Fuller's opinion was straightforward, the first Justice Harlan's opinion scathingly critiqued the Court's holding and the TID. Harlan's opinion is similar to his strong dissents in *Plessy v. Ferguson*[87] and *Hurtado v. California*,[88] the latter in the incorporation context.

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83. *Downes*, 182 U.S. at 291 (White, J., concurring).

84. *Id.* at 300 (White, J., concurring).

85. *Id.* at 339 (White, J., concurring).

86. *Id.* at 313 (White, J., concurring); *but see* KERR, *supra* note 73, at 83-86.

87. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting). For more on the comparison between *Plessy* and the *Insular Cases*, see TORRUELLA, *supra* note 2, at 3-5, 268.

88. 110 U.S. 516, 547 (1884) (Harlan, J., dissenting). The dissents in *Hurtado* and in *Downes v. Bidwell* are strikingly similar in terms of their views of the Bill of Rights.

Fuller would have held that the Foraker Act's tariff provisions violated the Uniformity Clause.[89] Further, both Municipal Law dissents stressed that acquisition of territory and subsequent governance of that territory is done "subject to the constitution and laws of its own government, and not according to those of the government ceding it."[90] In the United States, the "source of national power" is the Constitution "and the government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit."[91] Rather than focusing on *places*, Justice Harlan focused on the inequitable effect of the Court's ruling on *people* subject to the power and control of the United States:

> In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is one capable of controlling and managing their interests in all these respects is the Government of the Union. It is their Government, and in that character they have no other.[92]

Harlan's dissent rejects the notion that the United States is merely a "league of states" and argues that "the Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by the People of the United States."[93] Similarly, Congress could not, in Justice Harlan's view, govern any territory as a colony.[94]

According to Justice Harlan, if the view that the Constitution does not limit the right of Congress to act in the newly acquired territories ever received "the sanction of the majority of this court, a radical and mischievous change in our system of government will be the result. We will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism."[95] Justice Harlan correctly pointed out that *Downes* and the TID failed to command a majority of the Court in 1901. Nevertheless, within a

89. Foraker Act, 31 Stat. 77 (1900); *Downes*, 182 U.S. at 347-48 (Fuller, C.J., dissenting).

90. *Downes*, 182 U.S. at 367 (Fuller, C.J., dissenting) (quoting *Pollard's Lessee v. Hagan*, 44 U.S. 212, 225 (1845)).

91. *Id.* at 369 (Fuller, C.J., dissenting); *see id.* at 379-380 (Harlan, J., dissenting).

92. *Id.* at 377 (Harlan, J., dissenting) (quoting *Cohens v. Virginia*, 19 U.S. 264, 413-14 (1821)).

93. *Id.* at 376, 378 (Harlan, J., dissenting) (quoting *Martin v. Hunter's Lessee*, 14 U.S. 304, 324 (1816)).

94. *Id.* at 380 (Harlan, J., dissenting); KERR, *supra* note 73, at 90; Igartua de la Rosa v. United States, 229 F.3d 80, 89-90 (1st Cir. 2000) (Torruella, J., concurring).

95. *Downes*, 182 U.S. at 379 (Harlan, J., dissenting).

matter of years, a majority of the Court would adopt the TID.[96] Justice Harlan's dissent also highlights the novelty and "judicially activist" character of the TID:

> This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution .... What is meant by such incorporation we are not fully informed, nor are we instructed as to the precise mode in which it is to be accomplished .... 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.[97]

Despite Justice Harlan's views and the views of three other members of the Supreme Court in the early Twentieth Century, the TID became the law.

D. *Territorial Incorporation Doctrine Remains the Law*

As in the context of the incorporation controversy, pragmatism and recognition of only certain "fundamental rights" are established constitutional law. Congressional power over the unincorporated territories is plenary, limited only by "fundamental rights" which have been recognized on an *ad hoc* basis rather than from a "Total Incorporation" or *ex propio vigore* perspective. The Supreme Court is the sole arbiter of which constitutional rights are "fundamental" enough to recognize in unincorporated territories. The result is that colonial inhabitants are left in a legal limbo similar to Native Americans after some Supreme Court decisions.[98] The Territorial Incorporation Doctrine, representative of the same immoral era in constitutional law that produced *Plessy*, remains good law.[99]

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96. Dorr v. United States, 195 U.S. 138, 148-49 (1904).

97. *Downes*, 182 U.S. at 380, 389, 391 (Harlan, J., dissenting).

98. For example, in *Elk v. Wilkins*, 112 U.S. 94, 99-104 (1884), the Supreme Court held that Indians, even assimilated ones, were not citizens of the United States and could not vote in elections despite the clear and unequivocal language of the Fourteenth and Fifteenth Amendments. In *United States v. Kagama*, 118 U.S. 375, 379-81 (1886), the Supreme Court held that Indians were within the geographical limits of the United States and subject to the plenary powers of Congress. *See generally* Newton, *supra* note 21, at 224-25.

99. United States v. Verdugo-Urquidez, 494 U.S. 259, 259 (1990); King v. Morton, 520 F.2d 1140, 1146-48 (D.C. Cir. 1975); N. Mariana Islands v. Atalig, 723 F.2d

IV. PORTIONS OF THE BILL OF RIGHTS APPLICABLE IN THE UNINCORPORATED TERRITORIES AND THE RELATIONSHIP TO THE INCORPORATION DEBATE

There are striking similarities in methodology and results between the "Fundamental Fairness" approach advocated by Justice Frankfurter—as well as the "Selective Incorporation Plus"[100] adopted by the Supreme Court in the Incorporation Debate context, and the "Fundamental Rights" approach of the TID.

Whereas the "Total Incorporation" and *ex propio vigore* approaches reflecting the Municipal Law perspective would apply the Bill of Rights *in full* to the states and the territories respectively, "Selective Incorporation" and "Fundamental Fairness" have not. The Incorporation Debate and the TID are also similar in that the same guarantees of the Bill of Rights that have been held inapplicable against the states are not applicable in the "unincorporated territories", except for the Sixth Amendment right to a jury trial, which is applicable against the states through the incorporation cases, but not against the federal government in the "unincorporated territories."[101]

Provisions of the Bill of Rights which the Supreme Court has recognized as applying in the unincorporated territories include the First Amendment,[102] Fourth Amendment,[103] and, arguably, the right to writ of habeas corpus and the Fifth Amendment right to just compensation.[104] Other constitutionally guaranteed "fundamental rights" that are not textually in the

682, 689-91 (9th Cir. 1984); *Igartua de la Rosa*, 229 F.3d at 85-90 (Torruella, J., concurring); Rayphand v. Sablan, 95 F. Supp. 2d 1133, 1139 n.14 (D. N. Mar. I. 1999), *aff'd sub nom*, Torres v. Sablan, 528 U.S. 1110 (2000).

100. "Selective Incorporation Plus" is the approach of the Supreme Court in incorporating the Bill of Rights against the states through the Fourteenth Amendment. This approach fully incorporates provisions of the Bill of Rights on an ad hoc basis, when the Court considers the provision to be "fundamental." Although similar, this approach is distinguishable from "Fundamental Fairness" as advocated by Justice Frankfurter because it fully incorporates the guarantee against the state as opposed to analyzing whether fundamental fairness has been violated in the particular case. The "Selective Incorporation Plus" approach differs from "Total Incorporation" because it incorporates partially, and on an ad hoc basis. Finally, the "plus" refers to non-textual provisions of the Bill of Rights which have been incorporated against the states, such as the "beyond a reasonable doubt" standard in criminal prosecutions. *In re Winship*, 397 U.S. 358, 368 (1970).

101. *Compare* Duncan v. Louisiana, 391 U.S. 145, 151-56 (1968), *with* Balzac v. Porto Rico, 258 U.S. 298, 305-13 (1922).

102. El Vocero de P.R. v. Puerto Rico, 508 U.S. 147, 148 n.1 (1993).

103. Torres v. Puerto Rico, 442 U.S. 465, 469 (1979).

104. Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 242-43 (1967).

Bill of Rights have been applied to the unincorporated territories as well, including the right to procure an abortion.[105]

V. The Constitutional Right to a Criminal Jury Trial Does Not Apply in the Unincorporated Territories

A. *Balzac* and the Sixth Amendment Jury Trial Right in All Criminal Cases

As interpreted by the Supreme Court, the "right to trial by jury" is not guaranteed by the Constitution in the unincorporated territories.[106] Similarly, the Supreme Court has held that the Fifth Amendment's requirement of indictment by grand jury is inapplicable to unincorporated territories.[107] What rationale exists for holding that a non-felony, criminal defendant in an unincorporated territory is not entitled to a trial by jury?

The fascinating seminal case in the field is *Balzac v. Porto Rico*.[108] *Balzac* addresses the extent to which the Bill of Rights' guarantees of the right to a jury in a criminal trial, the right to free speech, and the right to a free press are preserved in the American colonial setting. The facts of *Balzac* are similar to a famous case from colonial American history where British colonial authorities prosecuted the publisher of the first major independent opposition newspaper in the American colonies for seditious libel.[109] Like Peter Zenger over a hundred years earlier, Jesús M. Balzac, the editor of a daily newspaper in Puerto

105. Guam Soc'y of Obstetricians and Gynecologists v. Ada, 962 F.2d 1366, 1370 (9th Cir. 1992), *cert denied*, 506 U.S. 1011 (1992) (striking down Guam's anti-abortion law based on *Roe v. Wade*, 410 U.S. 959 (1973)); Montalvo v. Colon, 377 F. Supp. 1332, 1341-42 (D.P.R. 1974) (applying *Roe v. Wade*, 410 U.S. 959 (1973), to Puerto Rico).

106. *Balzac*, 258 U.S. at 312-13.

107. Ocampo v. United States, 234 U.S. 91, 98 (1914).

108. 258 U.S. 298 (1922).

109. The trial of John Peter Zenger is infamous in American constitutional history. Zenger was a German immigrant who published the *New York Weekly Journal* and was tried for seditious libel in connection with some articles criticizing the colonial governor of New York, William Cosby. On the trial, see Vincent Buranelli, The Trial Of Peter Zenger (1957) and James Alexander, A Brief Narrative Of The Case And Trial Of John Peter Zenger (1972). The significant aspects of the Zenger trial are that: 1. a local jury was allowed to determine whether published and written articles constituted libel against the colonial government; and 2. "truth" became established as a defense to charges of seditious libel. Since, as a matter of law, Zenger was guilty, the jury was asked to "nullify" the existing law. On the significance of the trial, see Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193, 1277 (1992) [hereinafter Amar, *Fourteenth Amendment*] and Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 87, 236-37 (1998) [hereinafter Amar, Bill of Rights]. *But see* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. Rev. 455, 510-512 (1983). Additionally, although not taken seriously in its modern form and not considered "fundamental" by the Supreme Court, three grand juries refused to indict

Rico, was criminally prosecuted for allegedly libelous statements made about the then appointed colonial governor.[110] *Balzac* is also factually similar to *Dorr v. United States,* which involved a criminal prosecution against two editors of a Filipino newspaper for making allegedly libelous statements against members of the colonial government.[111] *Dorr* and *Balzac* highlight the additional importance of the right to a jury trial in criminal prosecutions for political "crimes", as was the case in *Zenger.* According to the Supreme Court of Puerto Rico in *Balzac*:

> The article transcribed in the information [no grand jury indictment was obtained in his case either] in this case is so violent in its invective [sic] that we do not see fit to reproduce it for the purposes of our records. Not only did a simple reading of it show that the Governor of Porto [sic] Rico was the subject of attack, but that in half a dozen or more places of the article there were phrases that, if true would necessarily expose Arthur Yager [the loathed colonial governor of Puerto Rico] to public hatred, contempt, or ridicule.[112]

Chief Justice Taft, writing for a unanimous United States Supreme Court, dismissed the First Amendment issues in a single paragraph.[113] The Court then turned its attention to the jury trial issues. Balzac was denied a trial by jury under a Puerto Rican statute which provided jury trials for felonies, but not misdemeanors.[114] In upholding the constitutionality of that statute, the Supreme Court proffered several rationales for why it rejected the applicability of the Sixth Amendment's guarantee of a jury

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Zenger, forcing the colonial government to resort to accusing him based on information. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 38-40 (1985).

110. Torres v. Mathews, 426 F. Supp. 1106, 1109 (D.P.R. 1977).

111. Consisting of headlines claiming "Traitor, Seducer, and Perjurer. Sensational Allegations Against Commissioner Legarda. Made of Record and Read in English—Spanish Reading Waived. Wife would have killed him. Legarda Pale and Nervous." The article dealt with the testimony of Don Benito Legarda, a member of the Philippine Commission who testified for the prosecution against an editor of another paper named Valdez. Dorr v. United States, 195 U.S. 138, 149 (1904). More recently, the Samoan right to trial by jury in Samoa was also implicated in the First Amendment context in a case involving Jake King, the publisher of the weekly *Samoan News*, the only newspaper in American Samoa. Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 373 (1980-81). The trial judge was the head of the Samoan Supreme Court. That case was not a libel prosecution, however, but an income tax evasion case.

112. People v. Balzac, 28 P.R.R. 139, 140-41 (1920), *aff'd*, 258 U.S. 298 (1922).

113. "A reading of the two articles removes the slightest doubt that they go far beyond the 'exuberant expressions of meridional speech,' to use the expression of this court in a similar case in *Gandia v. Pettingill*, 222 U.S. 452, 458. Indeed they are so excessive and outrageous in their character that they suggest the query whether their superlative vilification has not overleapt itself and become unconsciously humorous. But this is not a defense." Balzac v. Porto Rico, 258 U.S. 298, 314 (1922).

114. *Balzac*, 258 U.S. at 302.

trial in a criminal case, which are examined in subsections 1-4. None of these rationales have validity today, if they ever did.

1. *Orderly administration of justice*

Rationale: The right to trial by jury could "provoke disturbance" rather than aid the orderly administration of justice. What "disturbances" could arise from juries presiding over criminal cases? Perhaps efficiency in administering justice is a paramount concern, and forcing the jury system into "unincorporated" territories would force the courts to go through the cumbersome steps of jury selection and jury deliberations en route to a verdict. But the same concerns apply with equal force to juries within the fifty states. Most on point are those cases concerning Florida, Louisiana, Texas, California, and the other Western states which at one point were all civil code jurisdictions without juries. When they became part of the United States, these entities were forced to adopt the guarantee to a trial by jury.[115] This rationale is certainly insufficient to justify depriving a defendant of his or her constitutionally guaranteed rights as a United States citizen[116] in a United States jurisdiction. Indeed, "such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution."[117]

2. *Deference and respect to the colonies and their legal systems and traditions*

Rationale: There exist in the colonies established systems of jurisprudence where fair and orderly trials prevail under long-established codes without a jury. Arguably, this was a pragmatic and culturally sensitive position. There is some intuitive force in saying that constitutional requirements should not be blindly, mechanically, or zealously applied where they might be inappropriate.[118] The Court has shown similar sensitivities in the Incorporation Debate.[119] Furthermore, since Puerto Rico and the Philippines were civil code jurisdictions, it could have been disruptive to impose this Anglo-Saxon requirement on the legal re-

115. Duncan v. Louisiana, 391 U.S. 145, 154 (1968).

116. Reid v. Covert, 354 U.S. 1, 33 (1957) (holding that American citizens are entitled to jury trial for capital murder cases overseas).

117. Dorr v. United States, 195 U.S. 138, 155 (1904) (Harlan, J., dissenting).

118. *See* King v. Morton, 520 F.2d 1140, 1146-48 (D.C. Cir. 1975).

119. For example, in applying the Sixth Amendment right to a jury trial in state proceedings, the Court has held that unanimity is not required by the United States Constitution. *See* Apodaca v. Oregon, 406 U.S. 404, 412-14 (1972). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 773 n.25 (2d ed. 1988).

gime.[120] But the refusal to apply the criminal jury trial guarantee to the unincorporated territories for this reason is ironic, and the contradiction is belied by the willingness to impose other parts of the Constitution, United States laws generally,[121] and restrictions on speaking Spanish, in furtherance of "Americanization."[122] The irony of claiming a respect for local self-government, while thwarting the same, resembles the Court's treatment of Native Americans.[123]

3. *An effective jury system requires citizens trained to be responsible jurors*

Rationale: Jury duty is a civic duty which requires participation in self-governance, and since the territories are not self-governing, colonial inhabitants could not be responsible jurors. Stated differently, the Court said: "In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume."[124] Even Stanley Laughlin, who favors greater autonomy and "laboratory" experiments permitting diversity and cultural preservation, acknowledges that this rationale is "rather farfetched" because many "mainland Americans never see the inside of a courthouse before being called for jury duty, and they or their ancestors may have emigrated from civil-law countries."[125] It is undoubtedly true that Puerto Ricans, Filipinos, and others did not have centuries of training in "the common law" prior to 1898. However, the federal government of the United States imposed jury trials in Puerto Rico as early as 1899.[126] Inhabitants of unincorporated territories have served on juries in federal courts and in felony cases for over a century in

120. "Congress has thought that a people like the Filipinos or the Porto [sic] 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 . . . ." Balzac v. Porto Rico, 258 U.S. 298, 310 (1922). Stanley Laughlin reasserts the argument the Bill of Rights should be read so as to promote self-government and self-determination to the indigenous people of the colonies. According to Laughlin, the Bill of Rights is neither a suicide pact nor "a genocide pact, whether we define genocide as physically destroying a people or killing their culture." Laughlin, *supra* note 111, at 388. Laughlin also says that the Territorial Incorporation Debate "which originally legitimated popular desire to fulfill America's manifest destiny now [ironically] provides the theoretical basis for assuring a large measure of territorial self-determination." *Id.*

121. *See* Leibowitz, *supra* note 104.

122. *See* MONGE, *supra* note 8, at 55-56.

123. *Cf.* Duro v. Reina, 495 U.S. 676, 693 (1990) (Indian tribal governments have no criminal jurisdiction to punish non-tribal members, whether other Indians or non-Indians).

124. *Balzac*, 258 U.S. at 310.

125. Laughlin, *supra* note 111, at 372.

126. CARMELO DELGADO CINTRÓN, DERECHO Y COLONIALISMO: LA TRAYECTORIA HISTÓRICA DEL DERECHO PUERTORRIQUEÑO 275 (1988).

Puerto Rico. Even if in 1922 Puerto Ricans and other inhabitants of the colonies were somehow "unfit" to serve as jurors, this rationale has no validity after 100 years plus of United States' colonial rule. This fact notwithstanding, colonial and paternalistic arguments regarding the inability of the inhabitants of the territories to serve as jurors persist.[127]

Chief Justice Taft's arguments on behalf of the Court in *Balzac* are legal rationalizations for perpetuating colonialism. If the goal of the United States was to improve the capacity for self-governance of the natives and to bring to Puerto Rico the "blessings of liberty,"[128] one could hardly imagine a more appropriate populist institution, apart from the voting booth, than the jury box.[129] A jury trial serves not only the particular interests of the defendant in a criminal case, but also the participatory needs of citizens in self-government by dispensing justice.[130]

4. *Jury trials are procedural, not "fundamental personal rights"*

Rationale: Unlike "fundamental rights", which would exist even without constitutional provisions, the right to a jury trial is "merely" remedial. In other words, as the second Justice Harlan stated in the Incorporation Debate context, due process requires only that criminal trials be fundamentally fair, not that they be jury trials.[131]

Although the right to a jury trial is remedial, throughout American history jury trials have been considered fundamental.[132] As the first Justice Harlan said in *Dorr*, consistent-

127. In *King v. Andrus*, 452 F. Supp. 11, 13 (D.D.C. 1977), the government argued that Samoans should not have trial by jury because they would be reluctant to convict a member of the Samoan community.

128. This language comes from a speech by General Nelson Miles upon arriving in Puerto Rico with the United States' invasion force in 1898 where he said: "We have not come to make war upon the people of a country that for centuries has been oppressed, but, on the contrary, to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our government .... This is not a war of devastation, but one to give all within the control of its military and naval forces the advantages and blessings of enlightened civilization." ARTURO MORALES CARRIÓN, A POLITICAL AND CULTURAL HISTORY OF PUERTO RICO 132 (1983); *see also Igartua de la Rosa*, 229 F.3d at 85 n.3 (Torruella, J., concurring).

129. *See* AMAR, BILL OF RIGHTS, *supra* note 109, at 96; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) [hereinafter Amar, *Constitution*].

130. Amar, *Constitution*, *supra* note 129, at 1196.

131. Duncan v. Louisiana, 391 U.S. 145, 186 (1968) (Harlan, J., dissenting).

132. Amar, *Constitution*, *supra* note 129, at 1182-1199. "Its preservation and proper operation as a protection against arbitrary rule were among the major objectives of the revolutionary settlement [as expressed through the Bill of Rights]." *Duncan*, 391 U.S. at 151; *but see* Palko v. Connecticut, 302 U.S. 319, 325 (1937) (arguing that a jury trial is not essential to the very essence of a scheme of ordered

with his dissents in *Hurtado v. California*[133] and *Hawaii v. Mankichi*:[134]

> that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure and are not fundamental in their nature. In my opinion, guaranties[sic] for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.[135]

This succinct and straightforward discourse is typical of the Municipal Law tradition. The quote also explicitly links the TID with the Incorporation Debate. Since *Balzac*, the Supreme Court has recognized that juries are crucial to the fair administration of justice based on American political history.

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.[136]

The *Duncan* decision's language on the fundamental nature of juries discredits the view that criminal jury trials are not fundamental guarantees. *Balzac*, like *Duncan*, involved the right to a jury trial in "marginal" criminal cases, where the defendants were being tried neither for capital offenses nor for petty offenses, but where both defendants faced actual prison time. According to at least one scholar, the "overwhelming probability" is that a late Twentieth Century or early Twenty-First Century Court would overrule *Balzac* because "[n]ot to do so would require a justification, explaining why Puerto Rico could deny a fundamental right which no state can deny."[137] So, is the TID still good law?

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liberty, saying "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.").

133. 110 U.S. 516, 538 (1884) (Harlan, J., dissenting).

134. 190 U.S. 197, 226 (1903) (Harlan, J., dissenting).

135. Dorr v. United States, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting).

136. *Duncan*, 391 U.S. at 155-56 (citations omitted).

137. David M. Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, First Circuit Judicial Conference, 110 F.R.D. 449, 458 (1985).

B. *The Continuing Validity of the TID and Balzac*

Although Helfeld may be correct that a modern Court would overturn *Balzac*, *Balzac, Dorr*, and the TID remain good law and are as valid in 2001 as in 1901, as evidenced by the fact that the Supreme Court approvingly cited them in 1990.[138]

Without question, the language in *Duncan*, an Incorporation Debate case that emphasizes the fundamental nature of jury trials in criminal cases, and other cases cast doubt on *Balzac*. Most prominently among those cases is *Reid v. Covert*,[139] a case that Neuman refers to as the "watershed decision . . . ending the regime of strict territoriality."[140] *Balzac*'s opinion rested on a strict territorial approach: the rights of United States citizens and those in a United States controlled jurisdiction did not apply against the federal government solely because Puerto Rico was a territory, not a state. By contrast, aliens in the United States were protected by the provisions of the Bill of Rights via equal protection.[141] Logically, then, only by setting foot in a state or in an "incorporated territory" could Puerto Rican inhabitants receive the full protection of the Bill of Rights. However, *Reid* held that civilian United States citizens who had killed their respective military spouses while overseas were entitled to a trial by jury.[142] *Reid*'s holding, together with the broad language of Justice Black's plurality opinion for the Court, espoused a Municipal Law perspective that criticized the *Insular Cases* and called into question the validity of the TID. *Reid* flanked the TID's strictly territorial limitations by expanding the scope of the applicability of the Bill of Rights based on a *person's* status as a citizen. Since persons born in Puerto Rico are citizens, *Reid's* logic *could* apply there. Similarly, four Supreme Court Justices in 1979 repudiated the *Insular Cases*, *Balzac*, and the TID.[143] However, more recently the Supreme Court breathed new life into these cases by approvingly citing *Balzac*.[144]

Distinctions made on the basis of the *place* are usually grounded on the degree of United States dominion and control over the locality or physical territory. At one end of the spec-

138. United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990).

139. 354 U.S. 1 (1957), decided together with *Kinsella v. Krueger*, 351 U.S. 487 (1956), *reh'g granted* 354 U.S. 1 (1957). These cases involved two wives of servicemen overseas, one in England and one in Japan, who were court-martialed for killing their husbands. In these cases, the Supreme Court rejected "the idea that when the United States [government] acts against citizens abroad it can do so free of the Bill of Rights." 354 U.S. at 5.

140. Neuman, *supra* note 17, at 965.

141. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

142. 354 U.S. at 5.

143. Torres v. Puerto Rico, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring).

144. *Verdugo-Urquidez*, 494 U.S. at 268.

trum are the states comprising the United States where the Constitution applies in full against the federal government and selectively against state governments. At the other end are aliens in foreign countries where the Bill of Rights does not generally apply. Between those extremes are places where the applicability of the Bill of Rights is less clear, including military bases, coaling stations, territories (incorporated and unincorporated), and Indian tribal nations.

Among these "places," the denial of trial by jury in the unincorporated territories is the least justifiable. In cases involving crimes committed by military personnel on military bases, the Fifth Amendment excludes the applicability of the Sixth Amendment.[145] Similarly, the fact that "guano islands" are uninhabited, or at best slightly populated, provides a compelling reason not to apply trial by jury in those "places." Regarding crimes committed abroad, there are typically conflict-of-law issues. Additionally, sovereign nations may have an interest in trying in their own legal systems those criminal matters related to crimes committed within the foreign country. However, in the case of colonies of the United States, none of these concerns exist. In the colonies, there are substantial numbers of civilians who are not under the power of another sovereign. In the colonies, there are United States courts, United States prosecutors, United States judges, and United States interests at stake. Yet the Supreme Court, through the TID, has unjustifiably exempted portions of the Bill of Rights from application in the territories. To borrow from the first Justice Harlan's dissent regarding the rejection of the extraterritorial application of the constitutional right to a jury trial in criminal cases, the constitutional provision should read: "The trial of all crimes, except in cases of impeachment, and except where [Puerto Ricans and others residing in the unincorporated territories] are concerned, shall be by jury."[146]

VI. OTHER BILL OF RIGHTS GUARANTEES THAT REMAIN UNINCORPORATED AND INAPPLICABLE TO THE UNINCORPORATED TERRITORIES

As in the case of the states via "Selective Incorporation", other provisions of the Bill of Rights remain inapplicable to the unincorporated territories: the Second and Third Amendments, the Ninth and Tenth Amendments, the grand jury indictment re-

145. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

146. Dorr v. United States, 195 U.S. 138, 156 (1904) (Harlan, J., dissenting).

quired by the Fifth Amendment, and the Seventh Amendment civil jury trial guarantee.[147] These provisions will be analyzed in relation to interests specific to the colonies. The Total Incorporation/Municipal Law approach would apply the entire Bill of Rights against the states and against the federal government in the colonies. By contrast, the current state of the law is at least partially ambiguous on the applicability of the Bill of Rights in the colonies because of the *ad hoc*, selective incorporation approach of the TID and the dearth of litigation on issues related to some of the more obscure or anachronistic provisions of the Bill of Rights discussed in this section. Additionally, the combination of statutory enactments and the treatment of Puerto Rico as "effectively" a state may render these issues unlikely to arise.[148]

A. *Second and Third Amendments*

The Second and Third Amendments, also known as the "military amendments," are concerned principally with the threat of an overbearing military power encroaching on civilian society.[149] Both are also linked to constitutional notions of privacy.[150]

To some, the Second and Third Amendments are artifacts of a particular historical time period and context, and therefore are neither "fundamental" nor worthy of being incorporated against the states (or applying in the colonies).[151] However, strong arguments are heard from those who consider "the right to bear arms" a fundamental civil and political right linked to self-de-

147. Arguably, the Eight Amendment's right against excessive fines and bail has also not been incorporated. *Accord* DAVID M. O'BRIEN, 2 CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1084-85 (2d ed. 1995). But see *Schilb v. Kuebel*, 404 U.S. 357 (1971), where "the Court indicated that provision also was likely to be deemed fundamental." WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 67 (2d ed. 1992).

148. As a practical matter, the actions of the Commonwealth government are treated in virtually the same manner as acts by state governments, although the federal government has broader authority. Puerto Rico has legislated for jury trials to the extent the United States Supreme Court has required in the field, and is generally treated as a state. David M. Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, First Circuit Judicial Conference, 110 F.R.D. 449, 458-63, 468-74 (1985). *See also* P.R. Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 141 n.1 (1993) (assuming without deciding that the Eleventh Amendment fully applies to the Commonwealth government of Puerto Rico). However, on the disparate treatment of constitutional claims, in particular with regard to "economic" issues, see *Harris v. Rosario*, 446 U.S. 651 (1980) and *Califano v. Torres*, 435 U.S. 1 (1978).

149. *See* Amar, *Constitution*, *supra* note 129, at 1162-75; AMAR, BILL OF RIGHTS, *supra* note 109, at 46-63.

150. AMAR, BILL OF RIGHTS, *supra* note 109, at 62-63

151. Adamson v. California, 332 U.S. 46, 63-64 (1947) (Frankfurter, J., concurring).

fense.[152] The applicability of these amendments to the territories is particularly important. The military amendments, concerned with an overbearing military imposing on civilian life, relate to the preservation of civil liberties.[153]

The current debate over the Second Amendment has focused almost exclusively on the issue of gun control laws.[154] Modern Second Amendment jurisprudence does not consider the right to bear arms to be an absolute right; nor could it be, given the explicit text of the Second Amendment.[155] The Second Amendment embodies concerns not only of minorities (political, racial, religious, or otherwise), but of populism, federalism, and protection from an overbearing military.[156] Incorporating the Second Amendment against the states would address many of the same concerns, except perhaps federalism, since one of the chief purposes of the Fourteenth Amendment was to alter federalist relations.[157] Still, courts have refused to incorporate the Second Amendment against the states.[158]

Similarly, enabling local citizens to combat colonial rule from afar which stifles local self-government, the precise evil to be avoided by the framers of the Second Amendment, weighs in

152. In the case of marginalized groups or "discrete and insular minorities" such as the inhabitants of the colonies, a strong case "can be made that a society with a dismal record of protecting a people has a dubious claim on the right to disarm them. Perhaps a re-examination of this history can lead us to a modern realization of what the framers of the Second Amendment understood: that it is unwise to place the means of protection totally in the hands of the state, and that self-defense is also a civil right." Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 361 (1991).

153. AMAR, BILL OF RIGHTS, *supra* note 109, at 59.

154. *See* Elaine Scarry, *War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms*, 139 U. PA. L. REV. 1257, 1268 (1991) ("[T]he second amendment is a very great amendment, and coming to know it through criminals and the endlessly disputed claims of gun clubs [is like] coming to know the first amendment only through pornography.")

155. "A *well regulated* Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added).

156. Amar, *Constitution*, *supra* note 129, at 1162-71; AMAR, BILL OF RIGHTS, *supra* note 109, at 46-53.

157. *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 128-30 (1986).

158. *See* Presser v. Illinois, 116 U.S. 252, 265 (1886); Edwards v. City of Goldsboro, 178 F.3d 231, 252 (4th Cir. 1999); Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995). *See generally* Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 673-74 (1989). As Kates has written, "the only viable justification for denying incorporation of the second amendment against the states today is the exclusively state's right view that the amendment does not confer an individual right . . . . But as this states' rights interpretation of the amendment is itself not viable historically, it therefore follows that the second amendment should be held applicable to the states through the due process clause of the fourteenth." Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 257 (1983).

favor of applying this amendment to the colonies. However, the Supreme Court has not considered this anti-colonial guarantee's applicability against the federal government in the American colonies.

Likewise, the Third Amendment has never been incorporated against the states or applied in the territories. The Third Amendment is generally viewed as "an affirmation of the general right of individual privacy."[159] The Constitutional backwater of the Third Amendment, like the Second Amendment, has never been incorporated, in part because no directly on point cases have been heard by the Supreme Court.[160] The Third Amendment deals with a narrower version of an already "incorporated" general right of privacy. The Third Amendment, as applied to the states, would constitutionally guarantee the right of people to be secure against state "soldiers" or police officers (e.g. SWAT teams) "commandeering" one's house for police operations. Third Amendment concerns have not been completely extinguished in today's society.[161]

While "Selective Incorporation" has had no occasion to incorporate these two provisions of the Bill of Rights against the states, a "Total Incorporation" or Municipal Law approach would have automatically incorporated them.

Unlike in the states, a strong argument exists that in the colonies there is no governing sovereign other than the federal government.[162] If that view is correct, the applicability of the United States Constitution may have greater significance in connection with the TID than in the Incorporation Debate context. Not allowing the Second and Third Amendments to apply to people in the colonies may make political sense since military presence and control is critical to maintaining a colonial government and one of the main purposes of having overseas colonies is the acquisi-

159. See AMAR, BILL OF RIGHTS, *supra* note 109, at 62, discussing seven attempts to link the Third Amendment with the right of privacy and only one dissent in a context involving military overreaching in *Laird v. Tatum*, 408 U.S. 1, 22 (1972) (Douglas, J., dissenting).

160. William Sutton Fields, *The Third Amendment: Constitutional Protection From the Involuntary Quartering of Soldiers*, 124 MIL. L. REV. 195, 204-10 (1989). Some cases have mentioned the Third Amendment as a textual commitment for the right of privacy. The Second Circuit in *Engblom v. Carey*, 677 F.2d 957 (2d Cir. 1982), held that the Third Amendment was a fundamental right incorporated into the Fourteenth Amendment and applicable against the states. Fields, *supra*, at 204-05.

161. AMAR, BILL OF RIGHTS, *supra* note 109, at 61. For instance, *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), dealt with the United States Department of Defense takeover of a United States citizen's ranch and agri-business property in Honduras in order to establish a military training center to train Salvadoran soldiers. The case was properly pled as a Fifth Amendment Takings Clause case, but could have been pled in the alternative as a Third Amendment case.

162. *See supra* note 17.

tion and maintenance of military bases. In fact, the recently reemerged issue of the United States' use of Vieques for naval bombing exercises and war games may implicate the very issues embodied by these amendments (military imposition on civilian life by a colonial government in which the local citizens have no Congressional voting representation). As in the case of African-Americans, denial of Second Amendment rights, together with the restriction of other civil liberties, can be a tool of racially based or ethnically based oppression.[163] Like the First Amendment's guarantee of petition and assembly, the Second Amendment is political.[164] In no place is this connection more evident than in the colonies, where the people residing there have no voting representation in Congress.

B. *Ninth and Tenth Amendments*

Justice Black excluded the Ninth and Tenth Amendments from his Municipal Law model of "Total Incorporation".[165] These two Amendments may be viewed as "federalist" provisions. As Amar has argued:

> [Black's] strongest structural argument against incorporating [the Ninth] [A]mendment— that it's tough to transmogrify a provision "enacted to protect state powers against federal invasion" into "a weapon of federal [judicial] power to prevent state legislatures from passing laws they consider appropriate to govern local affairs" relies on a plausible yet debatable reading of the Ninth Amendment. It's a structural argument, however, that applies in spades against Black's own commitment to incorporating the [E]stablishment [C]lause.[166]

The Tenth Amendment, unlike the Ninth Amendment, is undoubtedly "federalist" in character. The Tenth Amendment has been interpreted as nothing more than "a truism that all is retained which has not been surrendered."[167] However, in the context of the territories and the TID, the Tenth Amendment has greater significance. The clear text of the Tenth Amendment that reserves powers *not delegated* to the federal government, not just to the states, but *to the people*, supports the Municipal Law

163. Cottrol & Diamond, *supra* note 152, at 335.

164. *See* Amar, *Constitution*, *supra* note 129, at 1163.

165. Griswold v. Connecticut, 381 U.S. 479, 518-20 (1965) (Black, J., dissenting); *see also* Black, *supra* note 38, at 871.

166. Amar, *Constitution*, *supra* note 129, at 1160 n.139, *quoting* Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting) (citations omitted). For a more detailed analysis of the Establishment Clause and incorporation, see Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1712-14 (1992).

167. United States v. Darby, 312 U.S. 100, 124 (1941) (upholding constitutionality of minimum wage law).

view regarding the applicability of the Bill of Rights in the territories since the federal government is one of *delegated*, limited, and enumerated powers.[168] The federal government may not act beyond those powers, irrespective of the Constitution.[169]

In 2000, a case in a federal district court potentially implicated these amendments. In *United States v. Acosta-Martinez*, a federal district judge ruled that the federal death penalty is locally inapplicable to Puerto Rico because the Puerto Rican constitution prohibits the death penalty.[170] Although apparently not pleaded as such, the federal death penalty, as applied in Puerto Rico, may also violate the Ninth or Tenth Amendment.

C. *Grand Jury Indictments and Civil Jury Trials*

The other Bill of Rights provisions that have neither been incorporated against the states nor held applicable in the colonies relate to juries: the Fifth Amendment's requirement of presentment by grand jury indictment and the Seventh Amendment's civil jury trial guarantee. Arguably, these two provisions have been the greatest impediments to "Total Incorporation" in the Incorporation Debate.[171]

Hurtado v. California held that the grand jury requirement of the Fifth Amendment is not applicable against the states via the Fourteenth Amendment.[172] The rationale in *Hurtado* was a concern with local flexibility as a policy goal. This argument has a federalist component, as the Court in *Hurtado* provided:

> [N]othing in Magna Charta [and, presumably, in the Bill of Rights, exists] which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted.[173]

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168. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

169. Additionally, it is at least conceivable that the phrase "the people" at the end of the Tenth Amendment referred not only to the people who reside in the states, but also to "the people" in the territories held by the United States at the time of the framing of the Constitution who were governed by the Northwest Ordinance.

170. 106 F. Supp. 2d 311, 321 (D.P.R. 2000).

171. Amar, *Fourteenth Amendment*, *supra* note 109, at 1266 n.309. The Jones Act of 1917 had its own bill of rights applicable to Puerto Rico similar to the Bill of Rights, with "two major exceptions: the right, under the Fifth Amendment, not to 'be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,' and the right, under Sixth and Seventh Amendments, to a jury trial." Examining Bd. Of Engineers, Architects and Surveyors v. Flores de Otero, 426 U.S. 572, 591 n.23 (1976).

172. 110 U.S. 516, at 534-35 (1884).

173. *Id.* at 531.

Furthermore, whatever "due process" may require, it does not constitutionally "'demand that the laws existing at any point of time shall be irrepealable, or that any forms of remedies shall necessarily continue.'"[174] Since *Hurtado*, concerns with federalism and the monetary cost of obtaining a grand jury indictment in every serious criminal case have buttressed the arguments against incorporation of this requirement.

The *Hurtado* holding is questionable. As the first Justice Harlan said at the time:

> [If due process] did not, in the judgment of the framers of the Constitution, necessarily require a grand jury in capital cases, inexorable logic would require it to be, likewise, held that the right not to be put twice in jeopardy of life and limb for the same offence, nor compelled in a criminal case to testify against one's self—rights and immunities also specifically recognized in the Fifth Amendment—were not protected by that due process of law . . .[175]

Thus, at least according to the first Justice Harlan, the requirement of a presentment by a grand jury was as fundamental as those provisions of the Bill of Rights that were subsequently incorporated. Justice Harlan further stated:

> I submit, however, with confidence, there is no foundation for the opinion that, under Magna Charta or at common law, the right to a trial by jury in a capital case was deemed of any greater value to the safety and security of the people than was the right not to answer, in a capital case, upon a mere information filed by an officer of the government, without previous inquiry by a grand jury.[176]

Second, Justice Harlan points out that when the Fourteenth Amendment was adopted, "a criminal prosecution, by information, for a crime involving life, was not permitted in any one of the States composing the Union."[177] To Justice Harlan, due process of law did not mean one thing "with reference to the powers of the States, and another with reference to the powers of the general government."[178] Nevertheless, *Hurtado* remains good law.[179] The parallels between the Incorporation Debate and the

174. *Id.* at 536 (quoting *Brown v. Board of Levee Com'rs.*, 50 Miss. 468, 479 (1874)).

175. *Hurtado*, 110 U.S. at 547 (Harlan, J., dissenting).

176. *Id.* at 549 (Harlan, J., dissenting). More pointedly, Justice Harlan noted that it "is shown upon almost every page of the common law" that "no person could be arraigned for a capital offence except upon the presentment or indictment of a grand jury." *Id.* at 544.

177. *Id.* at 557 (Harlan, J., dissenting).

178. *Id.* at 541 (Harlan, J., dissenting).

179. Albright v. Oliver, 510 U.S. 266, 272 (1994). At least two justices appeared to argue for some version of incorporating this right. *Id.* at 292, 302, 306 (Stevens, J., dissenting).

TID are evident in the grand jury context. The Supreme Court has found this textual guarantee inapplicable in both situations. In other words, the Supreme Court does not consider the right to an indictment by a grand jury "fundamental" enough to apply either when prosecutions are initiated by a state or when prosecutions are initiated by the federal government in the colonies.[180]

Similarly, the Seventh Amendment remains unincorporated against the states and in the territories pursuant to *Walker v. Sauvinet*.[181] The Seventh Amendment jury trial guarantee[182] has been narrowly interpreted by the Supreme Court in the federal context.[183] Consistent with this, the Court has been reluctant to extend the requirement to apply against the states and the territories, for fear that every civil litigant in a state court or in a territorial court would request a jury trial in all cases involving more than twenty dollars. Some have made arguments that an *Erie*[184]-like principle could be read into the "preserved at common law" language of the Seventh Amendment[185] to avoid these pragmatic problems. The Total Incorporation/Municipal Law approach would fully apply the Seventh Amendment and the grand jury requirement in "unincorporated territories" *because* they are in the Bill of Rights.[186]

D. *Summary*

The unpleasant prospect of having the Second and Third Amendments, as well as the civil and criminal jury provisions, apply in unincorporated territories exposes the contradiction between the anti-colonial Bill of Rights and the colonial relationship between the United States and those territories. Indeed, local self-government according to republican principles and the protection of individual liberties, the very essence of the Bill of Rights, are directly at odds with a colonialist structure not providing for voting representation.[187]

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180. Compare the role of the grand juries in the American colonies as described in AMAR, BILL OF RIGHTS, *supra* note 109, at 84-86.

181. 92 U.S. 90, 93 (1875); Colgrove v. Battin, 413 U.S. 149, 170 n.4 (1973) (Marshall, J., dissenting).

182. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

183. *Colgrove*, 413 U.S. at 152-64; *see generally* FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 409-58 (3d ed. 1985).

184. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 80 (1938) (providing that federal courts in diversity should apply state common law as well as statutory law).

185. AMAR, BILL OF RIGHTS, *supra* note 109, at 222-23.

186. *Colgrove*, 413 U.S. at 183 (Marshall, J., dissenting).

187. *Accord* Igartua de la Rosa v. United States, 229 F.3d 80, 88 (1st Cir. 2000) (Torruella, J., concurring).

VII. THE DEEPER PHILOSOPHICAL DISPUTE

The current state of constitutional law regarding the applicability of the Bill of Rights to the colonies generally, and the Sixth Amendment's right to trial by jury particularly, reflects the Global Due Process model. Can *Reid, Balzac,* and *Verdugo-Urquidez* be reconciled? One answer is that *Reid* dealt with the rights of citizens abroad, and *Verdugo-Urquidez* dealt with the rights of aliens or foreigners, and thus a distinction between *persons* is resurrected based on the *place*-a foreign country. Analyzing the discrepancy more thoroughly reveals the two extreme versions of two different models of constitutionalism: Black's expansive view under the Municipal Law model and Rehnquist's restrictive Membership Model based on social contract theory.

Concerns about democracy also weigh in favor of applying the Bill of Rights and the jury trial provisions in the territories and abolishing the TID via the expansive Municipal Law approach. Is there a better American institution than the jury to instruct the citizenry in self-government? The Municipal Law perspective supports overruling the TID and reflects the view that the United States, a democratic republic with a civil liberty tradition and a written constitution, is in a different position from other colonial powers. The Supreme Court should overrule the TID because it is inconsistent with the Bill of Rights and the original purpose of the Constitution. It was precisely the outrage that colonists had in the colonies of the British Empire against colonialism that led to the creation of the Constitution. Certainly the Constitution was not an unbounded grant of power from the states and the "people" to the federal government. As in the Incorporation Debate, the Bill of Rights is a constitutional floor providing textual rights that clearly safeguard individual liberties, as opposed to merely relying on the justices' *ad hoc* determinations of whether government action comports with vague notions of "due process." With regard to unincorporated territories, the case for applying the Bill of Rights in full is stronger than in the states since there is no competing "sovereign," as is the case with state governments.

The issue of race relations goes to the very essence of the TID since the colonial inhabitants were, and remain, overwhelmingly not Anglos. Their constitutional rights have traditionally been devalued, and correspondingly there has been less concern about self-government by those "*people*" in those "*places*". Even citizenship in the territories is devalued and "second-class," since

"aliens" in the United States and U.S. citizens in Japan and England have more rights than citizens in the territories.[188]

The Incorporation Debate and the debates over the TID raise significant issues about the Supreme Court in American constitutional law, history, and politics. Has the Supreme Court taken the constitutional rights of all citizens seriously? Does the text of the written United States Constitution, including the Bill of Rights, mean what it says, or does it contain precatory declarations that should be selectively applied? Incorporation against the states has been about protecting individual rights, federalism, and race relations. Not surprisingly, the same concerns show up in the TID debate. Protection of all constitutional rights requires that the Constitution follow the flag.

The Bill of Rights delineates where the government's power ends. In a society, rights and liberties cannot be absolutes (e.g. yelling "fire" in a crowded theater is not protected by the First Amendment freedom of speech); however, some rights should be as close to absolute as possible, and the Bill of Rights is a textual commitment to that view.[189] According to the first Justice Harlan,

> It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon [the Supreme] [C]ourt than to exert its full authority to prevent all violation of the principles of the Constitution.[190]

Despite those concerns, for inhabitants of Puerto Rico and other territories that "evil day" began in 1901, and has continued for over a century.

After all, what separates law from politics is the intent of *universal* application.[191] The government's discrimination against those subject to its jurisdiction, in violation of the idea of universal application, leads to delegitimation and naked power politics. Accordingly, the Supreme Court should overrule the TID and reinstate prior established law that the Constitution applies equally to all similarly situated persons in all civilian places controlled by the United States. By so doing, the Supreme Court would begin to close a dark chapter in American constitutional history.

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188. *See generally* Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998).

189. *See* Black, *supra* note 38, at 879.

190. Downes v. Bidwell, 182 U.S. 244, 382 (1901) (Harlan, J., dissenting).

191. LEOPOLD POSPÍŠIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY 8 (1974).