The Insular Cases and the Emergence of American Empire

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Introduction

Any project of extending the sphere of the United States, by annexation or otherwise, is met by the constitutional lion in the path.

Captain Alfred Thayer Mahan,
The Interest of America in Sea Power, Present and Future, 1898

This is a study of empire, a term that only recently has returned to fashion. Almost all political scientists, constitutional scholars, journalists, and other Americans think of the United States as a federal republic—that is, made up of its member states and ruled by its elected representatives—but the reality is something else: the United States exerts sovereignty over territorial inhabitants who do not have full voting representation in the U.S. House, the Senate, or the Electoral College. Neither, and earlier, did the inhabitants of these territories have a voice in the decisions that their islands be annexed by the United States, with the exception of the residents of the Northern Marianas. These territorial inhabitants and their territorial governments, as a result, occupy a political limbo—despite the fact that their inhabitants are officially designated as “U.S. citizens.” They are both a part of the United States and apart from the United States. The indeterminate status of the inhabitants and local governments of the United States’ island territories was established by the U.S. Supreme Court’s decisions in the Insular Cases.

Although the history of the United States’ island territories follows from that of the previous continental territories—as I shall show shortly—the U.S. Constitution itself has almost nothing on the territorial expansion of the United States. Only in Sections 2 and 3 of Article IV does the Constitution (briefly) mention Congress’s power to admit new states and exercise authority over the territory and property of the United States. Even then, the Constitution says nothing about the extent of the territory or property of the United States, or of the number of new states that might be added to the Union. Yet the fact of the extraordinary geographic expansion of the United States is
critical to understanding the rise of the nation as a world power and global empire. A vast and sparsely populated North American continent, with its rich agricultural and mineral resources and its largely temperate and favorable climate, attracted and absorbed millions of immigrants. Land provided the foundation for the tremendous growth in the population and wealth of the United States and facilitated its emergence as a great power and then superpower.

It took political action to acquire that land. By the terms of the 1783 Treaty of Paris after the American Revolution, Britain ceded the trans-Appalachian West — the eastern half of the Mississippi River valley — to the young United States. Twenty years later, President Thomas Jefferson made the extraordinary purchase of the “Louisiana” territory from France, thereby doubling the size of the United States with the stroke of a pen. President James Madison added West Florida in 1811 and Florida proper in 1819; President Polk secured the Mexican Cession in 1848, and Secretary of State William Seward persuaded President Andrew Johnson and the U.S. Congress to buy Alaska in 1867. In these and other instances, the land acquired by the U.S. government was organized into territories and then into states that were to become part of the Union.

Congress administered these newly acquired areas. It divided areas into districts and/or territories and later annexed the territories (or parts of territories) as separate states. In fact, almost all the nonoriginal states of the Union owe their existence to this process of expansion and political absorption. Thirty-one of the fifty states were formerly U.S. territories and regarded as states “in embryo,” given that U.S. expansion during the eighteenth and nineteenth centuries had always been followed by the organization of territorial governments and then the annexation of territories as states of the Union — states that were to be admitted on an equal footing with the existing states. Every time the United States extended the domain of its sovereignty, the protections of the U.S. Constitution followed. The Constitution “followed the flag,” in the words of William Jennings Bryan in the presidential election campaign of 1900.

The Constitution followed the flag in two ways. Geographically, as the United States expanded north to Michigan, Minnesota, the Dakotas, and Montana, south to New Orleans and Louisiana, Alabama, Mississippi, and Florida, and west beyond the Mississippi River out to California and Oregon, Congress extended constitutional liberties and added new states to the Union. Only six nonoriginal states did not have territorial governments. Vermont was independent, although always assumed to be part of the United States, until its admission in 1791; Texas was an independent republic from 1837 to 1845, prior to being annexed by the United States; and California was a military district from 1848 to 1850, before its admission into the Union. Kentucky, meanwhile, had been part of Virginia until 1792; Maine had been part of Massachusetts until 1820; and West Virginia had been part of Virginia until 1863.

Temporally, the Constitution followed the flag, since Congress did not immediately admit new states once the United States acquired new areas. Instead, Congress had to decide when to create territorial governments and when to allow the territories to become member states of the Union. Not surprisingly, then, the length of time between when an area came under U.S. sovereignty and when Congress admitted it as a state or part of a state varied considerably. Congress admitted California after only 2 years and formed the state of Louisiana in just 9 years’ time. But it took Hawai‘i 61 years to become a state (1959) from the time when it was acquired (1898); 64 years passed between when New Mexico and Arizona came under U.S. sovereignty (1848) and when they were both admitted as states (1912); Alaska (1867) took 92 years to become a state (1959); and Oklahoma (1803) took 104 years (1907). And until the territories became states, Congress dictated territorial policy.

Notwithstanding this variation, all the territories of continental North America were eventually admitted as states or as parts of other states, with Tennessee (1796) being the first territory to become a state, and Hawai‘i the most recent (1959). (I follow the official state spelling for “Hawai‘i” unless I am quoting directly or referring to the title of a particular law or governmental institution.) So even as the United States kept growing in geographic size, it was — remarkably — able to keep its representative form of government. The United States could be an “empire of liberty,” as Thomas Jefferson called it. Or, as the political scientist William Riker wrote in 1964, federalism was “an effective alternate to empire.”

Yet the process of geographic expansion followed by the organization of territorial governments and then the admission of new states
into the Union came to a sudden halt after the Spanish-American War of 1898, when the United States acquired Cuba, Puerto Rico, the Philippines, and Guam according to the terms of the peace treaty with Spain. Ending this taken-for-granted process of territorial absorption were the U.S. Supreme Court's decisions in the Insular Cases, a series of cases that directly addressed the political and constitutional status of the United States' island territories. Only months after President William McKinley won reelection in 1900, the Supreme Court suddenly had to decide whether Puerto Rico, the Philippines, and Hawai'i (annexed in 1898) were part of the United States with respect to the U.S. tariff law.

The nine cases to be decided by the Court were known as the Insular Cases. They were also known as the Insular Tariff Cases (since eight of them were tariff related), the Porto Rican Cases (since seven of them involved Puerto Rico), and the Insular Test Cases (since these were the first cases to test whether the new island territories were foreign or domestic for the purposes of the tariff and other constitutional questions). Constitutional scholars, historians of Puerto Rico, the Philippines, and the U.S. territories, biographers of Supreme Court justices, and others subsequently included later Supreme Court decisions among the Insular Cases — decisions that ruled on additional constitutional questions concerning the territories — such as the right to a trial by jury, the prohibition against double jeopardy, and governmental immunity from suit. (See "A Note on the Insular Cases" and the chronology at the end of the book for an explanation of the criteria used in selecting the thirty-five Insular Cases.)

The Supreme Court's decisions in the Insular Cases of 1901 generated great controversy, consistent with Alfred Thayer Mahan's warning quoted in the epigraph to this introduction that "extending the sphere of the United States" would be "met by the constitutional lion in the path." Although continental expansion had previously provoked constitutional questions, never before had the United States added areas this populated and this remote from American shores.

The nation's leading constitutional scholars and political writers argued in the leading academic journals and political magazines over the political status of the island territories and their inhabitants, and over which provisions of the U.S. Constitution should apply to the inhabitants of these new island territories. The debate was over how to define the "United States," in effect, and how to interpret the Constitution with respect to U.S. territories. Observers at the time reported that the Insular Cases aroused more political passion than had any action by the Supreme Court since its decision in Dred Scott v. Sandford (1857). And for good reason. The Supreme Court's rulings on how the territories and their inhabitants fit into the existing political and constitutional systems of the United States had tremendous implications for the racial composition of the American people, for the United States' strategic position in the world and the internationalization of the American economy, for the balance of power between Congress and the presidency, and for republican government in the United States.

The Supreme Court's decisions of 1901 and later years created a novel, even revolutionary, constitutional doctrine: the Incorporation Doctrine. The United States' island territories in the Caribbean Sea and the Pacific Ocean were "unincorporated" territories that were to receive only unspecified "fundamental" constitutional protections, whereas the "incorporated" territories of continental North America were a part of the Union and enjoyed the full protections of the U.S. Constitution. The new tropical territories were thereby a part of the United States, but not entirely so. And their inhabitants had some constitutional protections, just not all of them.

The origin of the Supreme Court's distinction between the United States' incorporated and unincorporated territories was Justice White's concurring opinion in Downes v. Bidwell, decided on May 27, 1901. But it took until 1905, when White drafted his lead opinion in Rasmussen v. United States, for a majority on the Court to support the Incorporation Doctrine as the rationale for the Court's decision. And not until after White's death, and the preceding deaths of Chief Justice Fuller and Justices Harlan, Brewer, and Peckham, did the Incorporation Doctrine achieve its complete triumph in the last of the Insular Cases, Balzac v. Porto Rico (1922), where Chief Justice Taft relied exclusively on the doctrine when drafting the Court's unanimous decision.

White's doctrine thus won out over an alternative view of the United States' relationship with its territories, namely, Justice Brown's "extension theory." This theory held that Congress had to expressly extend the Constitution to any territories for the Constitution to apply, since the territories themselves — old or new — were not necessarily...
a part of the United States. Rather, the United States consisted solely of its member states, in other words, until such time that Congress acted to expand the Union.

The Incorporation Doctrine also triumphed over the strict constructionism of Chief Justice Fuller and Justices Harlan, Peckham, and Brewer — the four justices who dissented in *Downes v. Bidwell*. In their dissents, Fuller and Harlan argued that the U.S. Constitution did apply in full to the areas annexed by the terms of the 1899 peace treaty with Spain. They argued that the Constitution applied *ex proprio vigore* — that is, by its own force.

With the Supreme Court's creation of the new political status of "unincorporated" territories, though, the *Insular Cases* broke with the history of the late eighteenth- and nineteenth-century United States. Congress's power to regulate the territories and possessions of the United States under the Constitution's territory clause — that "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" (Article IV, Section 3, Clause 2) — had always been tempered by the assumption that such power was to be exercised only temporarily. (Indicative of this premise, Article IV, Section 3, Clause 1, which immediately precedes the territory clause, empowers Congress to add new states to the Union.) With the decisions in the *Insular Cases*, though, Congress's territorial authority was no longer to be just temporary. New territories might never become states if Congress did not want them to be.

The immediate impact of the Supreme Court's decisions in 1901 was to ratify the expansionism of President William McKinley, Vice President (and later President) Theodore Roosevelt, Philippine governor (and later president and U.S. Supreme Court chief justice) William Howard Taft, Secretary of War (and later Secretary of State) Elihu Root, Senator Henry Cabot Lodge, and other prominent Republicans. And over the next two decades, in the full set of *Insular Cases*, the Supreme Court worked out exactly which constitutional provisions applied to the new island territories and which did not.

Although the *Insular Cases* provoked great controversy when the Supreme Court first issued its decisions, they lie forgotten today — deep in the shadows of other decisions of the Fuller Court, such as the *Sugar Trust Case* (United States v. E. C. Knight, 1895), *In Re Debs* (1895), *Plessy v. Ferguson* (1896), and *Lochner v. New York* (1905). The reason for this neglect, I suspect, is the Constitution's near silence on the subject of territorial expansion. And this silence breeds neglect, since students of American politics and government look to the Constitution as the blueprint of the U.S. political system and as guideline for their subjects of study. Thus does much of political science, constitutional law, and political history focus on the formal and informal powers of the three great institutions of government: the Congress; the presidency and executive branch; and the Supreme Court and federal court system. Perhaps at least as much scholarship looks at political process: voting and election campaigns; legislative procedures, rules, and norms; and the activities of political parties and political organizations. Other studies examine the formation and impact of public opinion, the making and implementation of public and foreign policy, and the conduct of public relations and operation of the media.

But much less scholarship examines U.S. expansion and the emergence of an American empire. This is where the *Insular Cases* make for much more than historical interest.

First, the rulings still stand. Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Marianas (a 400-mile-long chain of fourteen islands in the far western Pacific) all remain "unincorporated territories" of the United States (the United States acquired five of the six islands constituting Eastern Samoa in 1899; it acquired the U.S. Virgin Islands in 1917, and the Northern Marianas became a territory in 1976), while *Downes v. Bidwell* and the other *Insular Cases* continue to be cited by U.S. courts, including the Supreme Court. Furthermore, the decisions in the *Insular Cases* and in *Downes v. Bidwell*, in particular, established the political and constitutional subordination of the United States' island territories. And the U.S. government continues to have sovereignty over U.S. citizens and areas that do not have and have not had equal representation, since territorial inhabitants, even if U.S. citizens, are unable to vote for federal officeholders — although they can do so if they move their residence to one of the fifty states. For the inhabitants of these island territories, the United States does not have a government of the governed. This lack of representation became entrenched with the decisions in the *Insular Cases*, even if its legacy can be traced back to the founding and to the origins of the U.S. territorial system.
Second, the fact of the territories undermines the principle of “limited government,” as Judge José Cabranes, Judge Juan Torrella, José Tías Monge, and Efrén Rivera Ramos—all of whom are of Puerto Rican background—point out. Territorial government is not limited in the sense of being subject to checks and balances, since Congress, the presidency and executive branch, and federal courts may assert their powers over the territories at any time. Contrary to the provisions of the Ninth Amendment that the rights enumerated in the Constitution “shall not be construed to deny or disparage others retained by the people,” and to those of the Tenth Amendment, that “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,” the rights of the U.S. territorial citizens—presumably among “the people” of the United States—are nonetheless not fully reserved to them or their territorial governments.

Third, the Insular Cases’ endorsement of expansion marks the emergence of an American empire, to define “empire” as the acquisition and control of a territory and its inhabitants without consent. U.S. territorial inhabitants have been, and are, subject to the continued legal domination of the United States (notwithstanding the several nonbinding referenda on the political status of Puerto Rico). And with the Supreme Court’s endorsement of Congress’s plenary authority over the U.S. island territories, the United States came to imitate the older European powers that had long exerted sovereignty over remote colonies and dependent nations—including, nominally, those in North America.

At the same time, the decisions in the Insular Cases gave rise to a second kind of empire, one where the United States has exerted its influence informally instead of through territorial ownership. In the early twentieth century the United States actually had more territory under its sovereignty than it ever had before or has had since. Yet the United States let Cuba go, and later the Philippines. The justification for the power of the United States to actually divest itself of its territories—an unprecedented development that contrasts with the prohibition of states’ ability to secede—can be found in the briefs and opinions of the Insular Cases, as well as in the arguments of political and constitutional experts of the day. The United States did not have to have an empire based on territory: it could exert informal control instead.

Curiously, though, few Americans know of the Insular Cases. Presidents and politicians in Washington, D.C., and in the states do not mention the cases. Journalists do not comment on them. Students do not learn about them in high school or college. And few legal scholars, political scientists, or historians write about them. Indicative of the neglected status of the Insular Cases, as Professor Sanford Levinson points out, is that Robert McCloskey does not mention them in his widely assigned and classic text on the judiciary, The American Supreme Court. Neither do almost any of the dozens of casebooks that survey U.S. constitutional law.

This neglect comes at a high cost. For a study of the Insular Cases informs us about less-studied aspects of constitutional law, American political history, and U.S. foreign policy: the near silence of the Constitution on the geographic expansion of the United States; the development and reality of the U.S. territorial system, one that both preceded and succeeded the Supreme Court’s decisions in the Insular Cases; the admission of new states into the Union; and the meaning and criteria of citizenship. The Supreme Court’s resolution of how to handle these issues of the early twentieth century has shaped American foreign policy and the U.S. political system to this day.

Many have written expertly on related subjects, such as the important rise of the United States as a world power and the Spanish-American War. Others have revealed the racism and ethnocentrism prevalent throughout the history of the United States. Still others have traced the rise of Progressivism, growth of public administration, and rise of the bureaucratic state in the early twentieth century. And economic historians have explored the development and emergent dominance of big business in the late decades of the nineteenth century and early decades of the twentieth century. But a study of the Supreme Court’s decisions in the Insular Cases shows how these realms intersected on the question of how the United States was to handle its new, extended possessions and why the fact of these possessions still matters.