THE CENTENARY OF *BALZAC V. PORTO RICO*: SECOND-CLASS CITIZENSHIP IN THE CONTEXT OF THE PRESIDENTIAL VOTE

Artículo

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Introduction

April 10, 2022, marked the centenary of *Balzac v. Porto Rico*,[1] the case that culminated the infamous series of cases known as the Insular Cases. In a nutshell, the United States Supreme Court concluded that the Territorial Clause of the Constitution of the United States gives it plenary powers over unincorporated territories.[2] Thus, Congress has unilateral power to decide which territories are incorporated or not and, consequently, which territories receive the benefits of the entire constitution or only the fundamental rights.[3] In the words of Justice Moore:

> In *Balzac*, the Court concluded finally that "it is the locality that is determinative of the application of the Constitution . . . and not the [citi-

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

2 *Id.*; U.S. Const. art. IV, § 3, cl. 2.

3 *Cf.* United States v. Vaello-Madero, 142 S. Ct. 1539, at *39 (2022) (Gorsuch, concurring):

> The flaws in the Insular Cases are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.

> zenship] status of the people who live in it." *Balzac*, 258 U.S. at 309 ("[A] citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal constitution" because such right is not a fundamental right). . . . Thus *Balzac* solidified the truly amazing concept that the bundle of rights of citizenship grows and diminishes as the citizen travels from one location to another within the physical geographic boundaries of the United States of America![4]

Judge Moore further stated that:

> Not surprisingly, the *Insular Cases* have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government as embodied in the Declaration of Independence and repeated in such documents as the Gettysburg Address and the Civil Rights laws.[5]

Furthermore, the United States of America (hereinafter, "United States" or "U.S") has five populated colonies,[6] where about 3,657,291 American citizens and nationals live.[7] However, unsurprisingly, none of them has the right to vote in the presidential election,[8]

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4 Ballentine v. United States, Civ. No. 1999-130, 2001 WL 1242571 at *22 (D.V.I. Oct. 15, 2001).

5 *Id.* at *23.

6 Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol'y Rev. 57, 58 (2013). ("[a] colony is 'a territory, subordinate in various ways —political, cultural, or economic— to a more developed country. Supreme legislative power and much of the administration rest[s] with the controlling country, which [is] usually of a different ethnic group from the colony.'") (*citing* A Dictionary Of The Social Sciences 102 (Julius Gould & William Kolb, eds., 1964)). Subtly, in the latest opinion on the unincorporated territories, the majority opinion in *United States v. Vaello-Madero*, 142 S. Ct. 1539 (2022), only use the term "territories", without the surname of "unincorporated". ("[t]he United States includes five Territories: American Samoa, Guam, the Northern Mariana Islands, the U. S. Virgin Islands, and Puerto Rico.") *see* United States v. Vaello-Madero, 142 S. Ct. 1539 (2022).

7 This estimate is made by summing the data provided by the Central Intelligence Agency (hereinafter, "C.I.A.") and the U.S. Census Bureau:

1. American Samoa: 45,443 people (including citizens and nationals)
2. Guam: 169,086 people
3. Northern Mariana: 51,475 people
4. Puerto Rico: 3,285,874 people
5. U.S. Virgin Islands: 105,413 people

American Samoa, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/american-samoa/ (last visited May 16, 2022); *Guam*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/guam/ (last visited May, 16 2022); *Northern Mariana Islands*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/northern-mariana-islands/ (last visited May 16, 2022); *Virgin Islands*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/virgin-islands/ (last visited May 16, 2022); *Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020,* U.S. Census Bureau, https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-change-data-table.pdf (last visited May 16, 2022).

8 Igartúa de la Rosa v. United States, 32 F.3d 8, 9 (1st Cir. 1994).

despite the fact that the President represents them at the federal executive branch.[9] For example, the territory with the largest population,[10] Puerto Rico (3,285,874 people),[11] has more inhabitants than the following states of the union: Utah (3,271,616), Iowa (3,190,369), Nevada (3,104,614), Arkansas (3,011,524), Mississippi (2,961,279), Kansas (2,937,880), New Mexico (2,117,522); Nebraska (1,961,504), Idaho (1,839,106), West Virginia (1,793,716), Hawaii (1,455,271), New Hampshire (1,377,529), Maine (1,362,359), Rhode Island (1,097,379), Montana (1,084,225), Delaware (989,948), South Dakota (886,667), North Dakota (779,094), Alaska (733,391), Vermont (643,077), and Wyoming (576,851).[12] In fact, Puerto Rico's population is larger than the following states' populations combined: North Dakota, Alaska, Vermont, and Wyoming.[13] Likewise, the aforementioned territory has more population than Washington D.C. (689,545),[14] the only territory where the residents have the right to

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9 The United States Constitution states that:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.
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> . . . .
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> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

U.S. Const. art. II, § 1, cl. 2, 4:

10 A territory is defined as follows:

> A portion of the country not included within the limits of any [s]tate, and not yet admitted as a [s]tate into the Union, but organized under the laws of Congress with a separate legislature under a territorial governor and other officers appointed by the President and Senate of the United States.

New York ex rel. Kopel v. Bingham, 211 U.S. 468, 475 (1909) (*citing* Ex parte Morgan, 20 F. 298, 305 (S.D.N.Y. 1883)).

11 *Annual and Cumulative Estimates of Resident Population Change for the United States, Regions, States, District of Columbia, and Puerto Rico and Region and State Rankings: April 1, 2020 to July 1, 2021*, U.S. Census Bureau, https://www2.census.gov/programs-surveys/popest/tables/2020-2021/state/totals/NST-EST2021-CHG.xlsx (last visited May 16, 2021).

12 *Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020,* U.S. Census Bureau, https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-change-data-table.pdf (last visited May 16, 2022); *Annual Estimates of the Resident Population for the United States, Regions, States, District of Columbia, and Puerto Rico: April 1, 2020 to July 1, 2021*, U.S. Census Bureau, https://www2.census.gov/programs-surveys/popest/tables/2020-2021/state/totals/NST-EST2021-POP.xlsx (last visited May 16, 2021).

13 *Id.*

14 *See* New York ex rel. Kopel v. Bingham, 211 U.S. 468, 475 (1909). It is important to understand that the concept of territories:

> [Has been] reference[d] exclusively [as] that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not in any sense independent governments; they have no Senators in Congress and no Representatives in the lower house of that body, except what are called Delegates, with limited functions. Yet they exercise nearly all the powers of government, under what are generally called organic acts passed by Congress conferring such powers on them. It is this class of governments, long known by the name of Territories . . ..

N.Y. ex rel. Kopel v. Bingham, 211 U.S. 468, 475-76 (1909) (*citing In re* Lane, 135 U.S. 443, 447 (1890)).

vote in the presidential election.[15] This comparison is not intended to emphasize the population size of Puerto Rico or the other territories, but to highlight an evident democratic deficiency where the people who live in the states possess more decision-making power than Americans and nationals who live in the territories, regardless of population sizes.[16]

While this territorial reality persists, a struggle is brewing in the states for access to democratic justice through direct presidential vote.[17] This occurs because the election of the President and Vice President of the United States is carried out by means of an indirect vote, which excludes the majority of the population of the states and fragments the votes through the Electoral College.[18] Hence, a system has been developed that considers the

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15 Amendment XXIII of the United States Constitution maintains that:

> The District constituting the seat of Government of the United States shall appoint in such manner as Congress may direct:
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> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

U.S. Const. amend. XXIII, § 1.

16 José Trías Monge, a distinguished lawyer who served as the Chief Justice of the Supreme Court of Puerto Rico explained the following regarding the Insular Cases:

> [D]emocracy and colonialism are fully compatible; there is nothing wrong when a democracy such as the United States engages in the business of governing others; people are not created equal, some races being superior to others; it is the burden of the superior peoples, the white man's burden, to bring up others in their image; and colonies have no right to freedom or any other rights, except to the extent that the nation which possesses them should in due time determine.

José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, *in* Foreign in a Domestic Sense 228 (Christina Duffy Burnett & Burke Marshall eds., 2001).

17 Igartúa de la Rosa v. United States, 32 F.3d 8, 9 (1st Cir. 1994).

18 Amendment XII of the United States Constitution states that:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;–the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;–The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. [And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death or other constitutional disability of the President.–]* The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then

majority vote of all the citizens of the states, regardless of which candidates have won or not in the state, this is what determines who will preside over the White House.[19] Unfortunately, this system ignores the 3,658,570 citizens and nationals residing in the overseas territories of the U.S.[20]

This article also does not purport to conduct a legal analysis of the constitutional validity of the National Popular Vote Interstate Compact (hereinafter, "N.P.V.I.C.").[21] On the contrary, this article begins from the premise that the said strategy to achieve direct democracy is constitutionally viable.[22] What it intends to expose, in essence, are two interrelated issues: (1) the search for a greater democracy in the United States through the N.P.V.I.C., and (2) how this mechanism can serve as a remedial method in the face of one of America's greatest democratic injustices: the exclusion of American citizens and nationals from the right to vote in the presidential election.[23] To do this, we will first examine how the territories of the U.S. have been excluded from voting for the President and Vice President. First, the Insular Cases will be examined, including *Balzac v. Porto Rico*.[24] Then, the N.P.V.I.C. thesis and the political premises behind its reasoning will be analyzed. Finally, suggestions will be provided as to how the N.P.V.I.C. can serve as a tool to not only equalize the voting rights of all American citizens in the states but also to provide equal voting rights to the insular citizens.[25]

> from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

U.S. Const. amend. XII.

19 *Cf.* Bush v. Gore, 531 U.S. 98, 104 (2000) ("[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

20 *American Samoa*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/american-samoa/ (last visited May 16, 2022); *Guam*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/guam/ (last visited May, 16 2022); *Northern Mariana Islands*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/northern-mariana-islands/ (last visited May 16, 2022); *Virgin Islands*, Central Intelligence Agency – The World Factbook, https://www.cia.gov/the-world-factbook/countries/virgin-islands/ (last visited May 16, 2022); *Change in Resident Population of the 50 States, the District of Columbia, and Puerto Rico: 1910 to 2020,* U.S. Census Bureau, https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-change-data-table.pdf (last visited May 16, 2022).

21 *See* Akhil Reed Amar and Vikram David Amar, *How to Achieve Direct National Election of the President without Amending the Constitution*, FindLaw (Dec. 28, 2001), http://supreme.findlaw.com/legal-commentary/how-to-achieve-direct-national-election-of-the-president-without-amending-the-constitution.html; *Cf.* Tara Ross & Robert M. Hardaway, *The Compact Clause and National Popular Vote: Implications for the Federal Structure,* 44 N.M.L. Rev. 383, 422–32 (2014).

22 This article does not intend to delve into the constitutional merits of the N.P.V.I.C. but rather starts from the basis that it is constitutional to elaborate a theory of how the territories could benefit from such a compact. I acknowledge that if the Supreme Court deemed the N.P.V.I.C. unconstitutional, my theory would be mooted.

23 Igartúa-de la Rosa v. United States, 417 F.3d 145, 147 (1st Cir. 2005); *see* Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001).

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

25 *See* Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis,* 38 Cardozo L. Rev. 797 (2016).

I. *Balzac v. Porto Rico*: notes on legal contradictions

To administer and control the territories, Congress follows the Territorial Clause that states the following: "[t]he 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."[26] Historically, the Territorial Clause "was a special provision for a known and particular territory, and to meet a present emergency, and nothing more."[27] At the same time, the Supreme Court of the United States once interpreted this constitutional provision as an impediment to perpetual colonialism:

> There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new [s]tates. That power is plainly given; and if a new [s]tate is admitted, it needs no further legislation by Congress, because the Constitution itself defines the relative rights and powers, and duties of the [s]tate, and the citizens of the [s]tate, and the Federal Government. *But no power is given to acquire a Territory to be held and governed permanently in that character.*[28]

Before making the aforementioned interpretation, the United States Supreme Court had expressed that the United States was "composed of [s]tates and territories."[29] For that reason:

> [The] [t]erritories acquired by Congress, whether by deed of cession from the original [s]tates, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as [s]tates, upon an equal footing with the original [s]tates in all respects.[30]

However, this vision of the purpose of territories changed with the Spanish–American War and the Insular Tariff Cases, later known as the Insular Cases.[31]

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26 U.S. Const. art. IV, § 3, cl. 2.

27 Scott v. Sandford, 60 U.S. 393, 432 (1857).

28 *Id.* at 446. (emphasis added).

29 Loughborough v. Blake, 18 U.S. 317, 319 (1820).

30 Shively v. Bowlby, 152 U.S. 1, 49 (1894).

31 The Supreme Court of the United States of America identified in *Examining Board. Of Engineers, Architects & Surveyors v. Flores De Otero*, the following cases as insular cases:

1. De Lima v. Bidwell, 182 U.S. 1 (1901)
2. Dooley v. United States, 182 U.S. 222 (1901)
3. Armstrong v. United States, 182 U.S. 243 (1901)
4. Downes v. Bidwell, 182 U.S. 244 (1901)
5. Hawaii v. Mankichi, 190 U.S. 197 (1903)

The Insular Cases were only about duties, taxes, and rights related to jury and trial but the statements made in these cases carried a significant weight.[32] A century after these pronouncements, *Balzac* and the other Insular Cases have been questioned for being based on a racial discourse that has no space in the current legal system. Recently, the Supreme Court expressed that "[t]hose cases did not reach this issue [the appointments clause], and *whatever their continued validity* we will not extend them in these cases."[33] Nonetheless, we have been able to appreciate that some Justices of the current Supreme Court of the United States have expressed interest about the validity of the Insular Cas-

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6. Rassmussen v. United States, 197 U.S. 516 (1905)
7. Balzac v. Porto Rico, 258 U.S. 298 (1922)

Board. Of Engineers, Architects & Surveyors v. Flores De Otero, 426 U.S. 572, 599 n.30 (1976).

Despite these, an extensive list is considered appropriate for this article:

1. Ocampo v. United States, 234 U.S. 91 (1914)
2. Ochoa v. Hernandez y Morales, 230 U.S. 139 (1913)
3. Dowdell v. United States, 221 U.S. 325 (1911)
4. New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909)
5. Kent v. Porto Rico, 207 U.S. 113 (1907)
6. Grafton v. United States, 206 U.S. 333 (1907)
7. Trono v. United States, 199 U.S. 521 (1905)
8. Mendezona y Mendezona v. United States, 195 U.S. 158 (1904)
9. Kepner v. United States, 195 U.S. 100 (1904)
10. Dorr v. United States, 195 U.S. 138 (1904)
11. Gonzales v. Williams, 192 U.S. 1 (1904)
12. Pepke v. United States, 183 U.S. 176 (1901)
13. Huus v. N.Y. & P.R. Steamship Co., 182 U.S. 392 (1901)
14. Goetze v. United States, 182 U.S. 221 (1901)
15. Crossman v. United States, 182 U.S. 221 (1901)

See also Carmelo Delgado Cintrón, Imperialismo Jurídico Norteamericano en Puerto Rico 1898-2015 (2015).

32 *See* Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 Yale L. J. F. 284 (2020-2021). For example, some Insular Cases, like *Balzac*, outlined that the right to trial by jury guaranteed by the Sixth Amendment is not a fundamental right and, consequently, it did not apply to Puerto Rico. However, the Supreme Court explained in *Pueblo v. Torres Rivera*:

> Almost a century after the expressions issued by the Supreme Court of the United States in *Balzac*, it is evident that the passage of time has been in charge of modifying the rule of law in force at that time, to the point that what was ruled there regarding the right to a jury trial has become a dead letter. The express recognition of that right as a fundamental one in [Duncan v. State of Louisiana, 391 US 145 (1968)], had the effect of automatically extending it to Puerto Rico. This occurred outside the inextricable historical imbrications of the theory of territorial incorporation outlined in *Balzac*.

Pueblo v. Torres Rivera, 204 DPR 288, 303 (2020) (translated by author).

33 Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1665 (2020) (emphasis added).

34 For example, in the oral argument of the case of *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), Justice Alito asked the following:

> Since you mentioned Balzac, can I ask you a question about that? So let's imagine this case is decided in your favor, and then a — a defendant who has been convicted by a non-unanimous verdict in

es.[34] This article suggests that these cases should now be examined with skepticism.[35]

In summary, the Insular Cases established that there are two categories of territories: incorporated and unincorporated.[36] In the first category, the constitution applies *ex proprio vigore*, while in the second, only fundamental rights are applicable.[37] Undoubtedly,

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> Puerto Rico comes here and he says, look, I am a citizen of the United States, and the only reason why I was able to be convicted by a non-unanimous verdict is —are these old Insular Cases that reflect attitudes of the day in the —in the end of the —after the — the aftermath of the Spanish American war, and just as you brushed aside Apodaca, you should brush aside the Insular Cases.

Ramos v. Louisiana Oral Argument Transcript, Heritage Reporting Corporation 67-68 (Oct. 7, 2019), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/18-5924_4gcj.pdf.

Also, in the oral argument of *United States v. Vaello-Madero*, Justice Gorsuch questioned the following: "why shouldn't we just admit the Insular Cases were incorrectly decided? . . . [I]f the Insular Cases are wrong and if you're proceeding on a premise inconsistent with them, why shouldn't we just say what everyone knows to be true?".

United States v. Vaello-Madero Oral Argument Transcript, Heritage Reporting Corporation 9 (Nov. 9, 2021), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-303_n75p.pdf; *see also*, *United States v. Vaello-Madero* where Justice Gorsuch, in his concurring opinion, stated the following:

> Perhaps this Court can continue to drain the Insular Cases of some of their poison by declaring provision after provision of the Constitution "fundamental" and thus operative in "unincorporated" Territories. But even one hundred years on, that pitiable job remains unfinished. Still today under this Court's cases we are asked to believe that the right to a trial by jury remains insufficiently "fundamental" to apply to some [three] million U.S. citizens in "unincorporated" Puerto Rico.

United States v. Vaello-Madero, 142 S. Ct. 1539 at *515 (2022) (Gorsuch concurring).

35 *See* Cepeda Derieux & Weare, *supra* nota 32.

36 The principal distinction between incorporated and unincorporated territories is that the "[s]tatehood has unvaryingly been the destiny of all Incorporated Territories." Granville-Smith v. Granville-Smith, 349 U.S. 1, 8 n.12 (1955). I consider this distinction between incorporated and unincorporated territories a fallacy because the Constitution of the United States of America authorizes Congress to admit *territories* as future states, without the tags *incorporated* or *unincorporated*. The United States Constitution mentions the following:

> 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; see also Department of Justice Analysis of the Puerto Rico Statehood Admission Act (H.R. 1522), which states:

> H.R. 1522 does not contain an express declaration of intent to make Puerto Rico an "incorporated" territory immediately upon certification of a pro-statehood vote. To the contrary, H.R. 1522 seems designed to postpone incorporation until the effective date in the President's declaration, at which time Puerto Rico would skip past the intermediate step of being considered an incorporated territory and be admitted directly into the Union as a state. Moreover, the immediate disruption that would result were Puerto Rico to quickly become subject to the Constitution's uniformity provisions should count strongly against such a result. To reduce the possibility of immediate incorporation even further, however, the Department recommends that Congress state expressly that Puerto Rico shall remain unincorporated until its admission as a state under section 3.

Department of Justice, *H.R. 1522, the Puerto Rico Statehood Admission Act,* https://naturalresources.house.gov/imo/media/doc/DOJ%20Analysis%20of%20HR%201522.pdf (last visited May 16, 2022).

37 *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 688 (9th Cir. 1984) ("the *Insular Cases* distinguish . . . between incorporated territories, which are intended for statehood from the time of acquisition and in which the entire Constitution applies *ex proprio vigore,* and unincorporated territories, which are not intended for statehood and in which only fundamental constitutional rights apply by their own force.").

the case of *Balzac v. Porto Rico*, is the pinnacle of legal imperialism on the part of the Supreme Court of the United States to justify the colonization of the federal government over its overseas territories.[38] On this aspect, Atiles Osoria explains that:

> One of the main challenges in terms of formal or positive-liberal law that this exercise of legitimation faced was that the jurisprudence established in Dred Scott v. Sandford (1857) argued that the United States Congress could not acquire new territories that were not to be annexed. That is, the legal discourse (but not the political) was that the United States could not maintain territories in colonial conditions. However, following the long tradition of serving the law to capitalist-imperial interests, the Court adapted the jurisprudence to colonialism. In this way, the Insular Cases not only imply the definition of the legal truth of Puerto Rico and Puerto Ricans, but also suppose the transformation of U.S, constitutionalism.[39]

In this respect, it could be inferred that "[s]tatehood has unvaryingly been the destiny of all Incorporated Territories".[40] As Atiles Osoria emphasized, the Supreme Court of the

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

39 José M. Atiles Osoria, El derecho en conflicto: colonialismo, despolitización y resistencia en Puerto Rico 110 (2018) (translated by author).

40 Granville-Smith v. Granville-Smith, 349 U.S. 1, 8 n. 12 (1955); "A vital distinction was made between 'incorporated' and 'unincorporated' territories. The first category had the potentialities of statehood like unto continental territories." *Id.* at 5. Further, the Supreme Court discussed the case of Palmyra Atoll, a portion of land from Hawaii which was separated and not incorporated as a state irony in, and the irony in its status and the benefits it receives versus that of an incorporated territory, by stating the following:

> The following territorial anomaly further illustrates the erosion and inadherence by Congress of *Balzac*'s language to the effect that the incorporation of a territory will necessarily lead to statehood. When the 'incorporated territory' of Hawaii became a state, a portion of it was segregated and not made part of the State of Hawaii. *See* Hawaii Statehood Act, P.L. 86-3 (1959). The result is that today, Palmyra Atoll, by virtue of Congressional action, is an unpopulated and unorganized, yet incorporated territory of the United States. Under the *ratio decidendi of Balzac*, this is not possible, given that Palmyra did not became a state, nor will ever likely become one. Ironically, however, the United States Constitution affords greater protections and rights to a citizen in Palmyra Atoll than in an unincorporated territory.

Consejo De Salud Playa Ponce v. Rullan, 593 F. Supp. 2d 386, 391 (D.P.R. 2009). *See* United States v. Vaello-Madero, 142 S. Ct. 1539, at *43 (2022) (Gorsuch concurring) ("[a]t the same time, the full panoply of constitutional rights apparently applies on the Palmyra Atoll, an uninhabited patch of land in the Pacific Ocean, because it represents our Nation's only remaining "incorporated" Territory. It is an implausible and embarrassing state of affairs."); *see also,* Joel Andrews Cosme Morales *Palmyra Atoll: America's 51st State?*, 49 S.U.L. REV 97 (2021), stating the following regarding this matter:

> [T]he incorporation of the Palmyra Atoll seems more like a historical accident than a coherent determination by Congress. Palmyra was not part of the territory destined for statehood in conjunction with Hawaii. For this reason, said congressional behavior should lead us to infer that the atoll has always been treated as a possession lacking the necessary political organization to be considered a territory. Consequently, it is logical to deduce that Congress can cede and de-annex the Palmyra Atoll while Puerto Rico's relationship with the United States has been strengthened to such a degree that it is arguable Puerto Rico is at least an incorporated territory.

Joel Andrews Cosme Morales, *Palmyra Atoll: America's 51st State?*, 49 S.U.L. REV 97, 143-44 (2021),

United States modified the jurisprudence to legitimize colonialism.[41] For this reason, the Supreme Court created the legal categories for the territories of *incorporated* and *unincorporated*. Now, it is reasonable to believe that the citizens of incorporated territories are facing a fallacy because the United States Congress is not limited when granting statehood, that is, it can admit *territories* without the last name of incorporated or unincorporated.[42] Consequently, it has been sustained that there is no legal basis that supports the creation of the categories of *incorporated* and *unincorporated territory* beyond being a jurisprudential legislation.[43] Despite the foregoing, and in order to argue that only incorporated territories can be admitted as a state, from an analysis of the jurisprudential evolution of the terminology of the Supreme Court, it must be considered that there is prejudice against the territories.[44]

Let's examine the case of *Rasmussen v. United States*.[45] The Supreme Court had to resolve whether Alaska became an incorporated territory in order to conclude that the fundamental rights of the Constitution were applicable.[46] The Supreme Court determined

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41 Atiles Osoria, *supra* note 39 at 110.

42 In support of this, the Article IV of the United States Constitution states that:

> 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.

43 *Id.*; *see* Igartúa v. United States, 626 F.3d 592, 595 (1st Cir. 2010) ("the constitutional text is entirely unambiguous as to what constitutes statehood; the Constitution explicitly recites the thirteen original states as being the states and articulates a clear mechanism for the admission of other states, as distinct from territories.").

44 *See* Reid v. Covert, 354 U.S. 1 (1957) (about which Neuman wrote: "Juxtaposing *Reid v. Covert* with the *Insular Cases* produces bizarre results. For example, a U.S. citizen prosecuted by the federal government has a constitutional right to a jury trial in Japan, but not in Puerto Rico.") Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories* in Foreign in a Domestic Sense 190 (Christina Duffy Burnett & Burke Marshall eds., 2001). See *Reid*, where the Supreme Court of the United States stated that:

> The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to . . . govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. None of these cases had anything to do with military trials and they cannot properly be used as vehicles to support an extension of military jurisdiction to civilians. Moreover, it is our judgment that neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written constitution and undermine the basis of our Government. If our foreign commitments became of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there.

Reid, 354 U.S at 14.

45 Rassmussen v. United States, 197 U.S. 516 (1905).

46 The United States Supreme Court expressed that:

> Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantees of the Fifth,

that it could be inferred that the territory was incorporated in light of the actions of Congress in relation to the territory.[47] The treaty to acquire Alaska provided for the following: "The inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property and religion."[48] It is necessary to remember that the territory of Alaska was an organized territory occupied by inhabitants who enjoyed United States citizenship by virtue of Congress. These factors motivated the Supreme Court to conclude that Alaska was an incorporated territory.[49] Furthermore, the precedent served as the basis for both the United States Federal Court for the District of Puerto Rico and the Supreme Court of Puerto Rico to conclude that the territory became an incorporated territory after the collective naturalization of Puerto Ricans.[50] In the federal sphere, it was decided that Puerto Rico was an incorporated territory with the following statements:

> The word "citizen" we have seen employed once in the Declaration of Independence, oftener in the Articles of Confederation, and still more frequently in the Constitution, but even in the latter "persons" and "inhabitants" are more common. "People of the United States" and "citizens" are synonymous.
>
> . . . .
>
> Congress has made [Puerto] Rico a part of the geographical, commercial, and judicial system of the nation, and has by the last organic act conferred citizenship also . . . incorporation and citizenship imply each other, for they are practically synonymous . . ..

> Sixth and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution.

Id. at 526.

47 *Cf.* Justice Harlan concurrence:

> If the Constitution does not become the supreme law in a Territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by non-action, Congress, under the theory of "incorporation," and although a mere creature of the Constitution, could forever withhold from the inhabitants of such Territory the benefit of the guaranties of life, liberty and property as set forth in the Constitution. I cannot assent to any such doctrine. I cannot agree that the supremacy of the Constitution depends upon the will of Congress.

Id. at 530.

48 *Transcript for the Treaty of Cession of Alaska (1867)*, art. III, National Archives, https://www.archives.gov/milestone-documents/check-for-the-purchase-of-alaska (last visited May 16, 2022).

49 *See* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. Pa. J. Int'l L. 283, 316 (2007) ("*Rasmussen* reaffirmed *Makichi* not only as to the validity of the incorporation theory, but also, and more important as regards a central theme of this Article, as to what was the determining criterion for concluding whether a territory had been incorporated into the United States.").

50 *See* In the Matter of Tapia, 9 P.R. Fed. 452 (1917); Muratti v. Foote, 25 DPR 568 (1917).

> This being true, the Constitution applies to those newly made Americans in [Puerto] Rico just as much as to the older Americans on the continent. There cannot be two kinds of Americans under a Republic. [51]

This case, had a lot of weight in the judicial conscience of the District Court of Puerto Rico, when it inferred that the United States Congress incorporated the territory, and that Puerto Ricans were American citizens who occupied a republican-organized archipelago.[52] More so, the Supreme Court of Puerto Rico decided likewise in *Muratti v. Foote*.[53] In this case, the Supreme Court of Puerto Rico considered the *Rasmussen* case as an applicable precedent.[54] In particular, the Supreme Court of Puerto Rico considered that the acquisition of a territory, plus citizenship, plus an organized government, is equivalent to facing an incorporated territory.[55] For the Supreme Court, the order of events did not matter. In other words, for the Supreme Court, trying to argue that Puerto Rico had not been incorporated was equivalent to pronouncing that the acquisition of a Territory, plus the organized government, plus citizenship in the case of Puerto Rico is not the same as the acquisition of a Territory, which is then given citizenship and an organized government, which is the case in Alaska.[56] Or what is the same, deny the algebraic truth that a + b + c = a + c + b.[57]

In other words, we can argue that both cases amounted to a uniform and unitary analysis by lower judicial forums of Puerto Rico's relationship with the United States.[58] Although it is the reasonable and adequate conclusion,[59] the logical legal reasoning did not

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51 In the Matter of Tapia, 9 P.R. Fed. 452, 476, 494 (1917).

52 According to Luis Fuentes-Rohwer:

> In *Rassmussen*, the Court offered three facts in support of its conclusion that Alaska had been incorporated by Congress: the text of the treaty of acquisition; subsequent congressional actions; and the Court's own decisions. . . . That is, by extending "all the rights, advantages, and immunities of citizens of the United States," the treaty of acquisition with Russia treats the territorial residents of Alaska as incorporated. Yet, by leaving the civil and political rights of territorial residents undecided, to be determined by Congress at a future date, those territories are actually unincorporated until Congress determines what these rights will be. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot,* 83 IND. L.J. 1525, 1549 (2008); *see* Rassmussen v. United States, 197 U.S. 516, 516-25 (1905); Treaty with Russia, March 30, 1867, U.S.-Russ., 15 Stat. 542.

53 Muratti v. Foote, 25 DPR 568, 581 (1917).

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 Torruella, *supra* note 49, at 321 n.146 (2007) ("[i]n both cases, the lower courts in Puerto Rico had concluded that defendants had not been properly charged because they had not been indicted by grand juries, and thus, presumably the Sixth Amendment had been violated.").

59 Justice White sustained: "that the United States specifically intended to incorporate all of the previously acquired territories, and that such intention was ¾and must be¾ made by Congress either expressly or implicitly. One prior indicator of congressional intent to incorporate was whether the territory's people were given U.S. citizenship . . .." Susan K. Serrano, *Elevating the Perspectives of U.S. Territorial Peoples: Why the Insular Cases Should Be Taught in Law School,* 21 J. GENDER RACE & JUST. 395, 407 (2018) (*citing* Downes v. Bidwell, 182 U.S. 244, 319-23, 335 (1901) (White, J., concurring)).

prevail because in an indecipherable *per curiam,* the Supreme Court of the United States revoked *Tapia* and *Muratti*.[60] It seems ironic that the United States Supreme Court used the same cases that the lower courts cited to overturn them.[61] Faced with this ambivalence, the Supreme Court of the United States expressed itself again on the manner in the case of *Balzac v. Porto Rico*.[62]

In this case, Jesús M. Balzac was charged with criminal libel and found guilty in a trial without a jury, for which he was sentenced to spend nine months in jail.[63] Given this factual picture, Mr. Balzac argued that his constitutional right had been violated, as he believed he was entitled to a trial by jury under the Sixth Amendment.[64] In a unanimous decision, which should surprise no one in retrospect, the Supreme Court of the United States decided that the right to a jury trial was not a fundamental right applicable to Puerto Rico.[65] It clearly established that it does not apply to the territory belonging to the United States that has not been incorporated into the Union.[66]

In *Balzac*,[67] the scope of the theory of territorial incorporation is decided once and for all. To this end, a state of exception was created and the rule of inference of incorporated territoriality was discarded. The United States Congress is now required to decide on whether or not a territory is incorporated. It should be considered that the above was a mandatory conclusion to arrive at a predetermined result.[68] If the U.S. Supreme Court's conclusion in *Porto Rico v. Tapia,*[69] can be considered as ambivalent and arbitrary, the

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60 Sam Erman explains in further detail that:

> In the cases *In re Tapia* (1917) and *Muratti v. Foote* (1917), the respective courts declared that post-naturalization Puerto Rico was incorporated. In the subsequent brief to the Supreme Court, U.S. Attorney General Howard Kern advanced Felix Frankfurter's claim that the "great diversity" in forms of U.S. governance in occupied lands proved that Congress had discretion to fix a place's status without reference to the status of its people.

See also Sam Erman, Almost Citizens: Puerto Rico, The U.S. Constitution, and Empire 149 (Cambridge University Press 2019) (*citing* In the Matter of Tapia, 9 P.R. Fed. 452 (1917); *Muratti*, 25 DPR 568 (1917)).

61 Torruella, *supra* note 49, at 321 n.146 ("[i]n a cryptic per curiam the Supreme Court reversed, citing *Downes*, *Mankichi*, and *Dorr*, an inscrutable conclusion at the time considering what the Court had said regarding the granting of citizenship in *Mankichi* and *Rasmussen*, but understandable with the benefit of the hindsight that *Balzac* would soon provide.").

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

63 *Id.* at 300.

64 *Id.*

65 *Id.* at 306-09.

66 *Id.*

67 *Id.*

68 Arnaud explained:

> A major contention was that the *Foraker Act* did not give Puerto Ricans citizenship —a major provision of the Northwest Ordinance and its progeny— so the *Jones Act* surely manifests Congress's intention to incorporate Puerto Rico into the Union. However, the Supreme Court in another pivotal case, *Balzac v. Porto Rico*, held that the granting of citizenship through the *Jones Act* did not represent sufficient congressional action as to incorporate Puerto Rico.

Emmanuel Hiram Arnaud, *A License to Kill: State Sponsored Death in The Oldest Colony in the World*, 86 Rev. Jur. UPR 291, 302 (2017).

69 Porto Rico v. Tapia, 245 U.S. 639 (1918); *see also*, Charles R. Venator-Santiago, Puerto Rico and the Origins of US Global Empire: The Disembodied Shade (Routledge 2015).

decision in *Balzac* is equivalent to the displays of prejudice and racism.[70] Chief Justice Taft wrote:

> The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors, actual or possible, being part of the judicial system of the country, can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.[71]

Today this case is still significantly criticized and scrutinized. For example, Judge Gelpí once wrote that: "[a]s was the case with the original *Insular Cases*, the *Balzac* decision made no common sense and again showed extreme racism as well as ignorance of the realities of the island at the time."[72] Meanwhile, Judge Torruella highlighted that: "[the] assertion that somehow Puerto Ricans were incapable of understanding 'the responsibilities of jurors' and 'popular government' is without any basis in the record or the facts."[73] As mentioned, *Balzac* modified the doctrine of unincorporated territories,[74] when the Court held that a credible expression of the United States Congress is necessary to incorporate a territory.[75] Consequently, legal imperialism authorized the United States to have territories that are theoretically not destined for statehood,[76] despite being organized under a

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70 See for example how Pedro A. Malavet explained it:

> As plainly explained in *Balzac*, while internally the Puerto Ricans are viewed as United States citizens, they are nonetheless viewed as social and legal "Others." The United States hides Puerto Rico from "mainland" "real *estadounidenses*" by socially constructing Puerto Ricans in the United States as greedy immigrants and Puerto Ricans in Puerto Rico as ungrateful foreigners. At the same time, the United States legally constructs Puerto Ricans as second-class citizens, by giving them statutory United States citizenship which —far from an act of democratic kindness— proves to be the ultimate weapon of the Empire.

Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 Mich. J. Race & L. 1, 44 (2000).

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

72 Consejo de Salud Playa de Ponce v. Rullan, 586 F.Supp. 2d 22, 30 (D.P.R. 2008).

73 Torruella, *supra* note 49, at 326. (*citing Balzac*, 258 U.S. at 309-10).

74 *See* Carlos Saavedra Gutiérrez, *Incorporación de jure o incorporación de facto: dos propuestas para erradicar fantasmas constitucionales*, 80 Rev. Jur. UPR 967, 976 (2011).

75 Tauber explained that:

> Mandating that Congress articulate its intent to incorporate a territory is an odd requirement for incorporation in this case . . . it is hard to imagine a greater indication of congressional intent to extend the full protection of the Constitution to the people of Puerto Rico than granting them United States citizenship.

Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case W. Res. L. Rev. 147, 165 (2006).

76 *Cf.* Boumediene v. Bush, 553 U.S. 723, 726 (2008) ("the Court adopted the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.").

republican form of government and, at the same time, occupied by a majority of American citizens.[77] Likewise, it could be inferred that the United States can dominate and possess territories that, despite not being politically organized, are destined for statehood. This situation creates a serious problem in the jurisprudential canon on territories. First, the islands remain in a state of territorial uncertainty. The foregoing is a consequence of the fact that the political future of the colonies is subject exclusively to the will of Congress. That is why this article states that it is unconstitutional to acquire territories so as not to convert them into a state and maintain them as colonies *ad perpetuam*, since such conduct violates the principles that founded the nation of the United States. Remember that the Supreme Court said that: "[t]here is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure. . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character."[78] It can be argued that we are facing a jurisprudential inconsistency motivated by the fact that the Justices did not want to tie the United States to having to guarantee statehood to an overseas territory full of Hispanics and Afro-descendants.[79] After all, Puerto Rico is a territory occupied by

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77 Pedro A. Malavet pointed out that:

> The Supreme Court expressly indicates that as long as they choose to remain on the island, Puerto Ricans, who are United States citizens, will not enjoy the full rights of American citizenship. It thus distinguishes between Puerto Ricans as individual United States citizens, and as collective inhabitants of Puerto Rico. As individuals, they are free "to enjoy all political and other rights" granted U.S. citizens, *if* they "move into the United States proper." . . . But as long as they remain on the island, they cannot fully enjoy the rights of United States citizenship.

Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 Berkeley La Raza L.J. 387, 388 n.6 (2002) (*citing* Balzac v. Porto Rico, 258 U.S. 298, 311 (1922)).

78 Dred Scott v. Sandford, 60 U.S. 393, 446 (1857). Given the contradictions of the insular cases, it has been mentioned that:

> It seems that the territorial incorporation doctrine, resting on a century of precedent —even if steeped in folly—may continue to exist, albeit with lessened vigor. The comment about constitutional significance suggests a warning for the legislature (and ultimately territorial citizens as well) that territories could someday become de facto incorporated, in direct contravention of *Balzac*. Perhaps the Supreme Court would even use *Balzac* to overturn itself by finding a century of congressional inaction serves as de facto incorporation, as *Balzac* did speak about the territories with an eye to their newly acquired and uncertain future statuses.

Riley Edward Kane, *Straining Territorial Incorporation: Unintended Consequences from Judicially Extending Constitutional Citizenship*, 80 Ohio St. L.J. 1229, 1245 (2019) (*citing Balzac,* 258 U.S. at 304-06)); *see also* Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 Yale J. Int'l L. 229, 263 (2018) (*citing* Gary Lawson & Guy Seidman, The Constitution Of Empire: Territorial Expansion & American Legal History 4 (2004) ("[w]hereas there is no constitutional problem with the acquisition of territory that is intended as a future state, there are serious questions about the ability of the United States to add territories that are not slated for statehood.")).

79 Baldwin expressed that:

> 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 immunities . . . would . . . 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).

an ethnic community defined by racial, linguistic, and cultural affinities, which are not eminently Anglo-Saxon, but Latino. However, Puerto Rico is a political community even older than the American federation, since its oldest city dates to 1521.[80]

Chief Justice of the Supreme Court, William Howard Taft, wrote the opinion of and stated the following:

> It was further settled in *Downes v. Bidwell* . . . and confirmed by *Dorr v. United States* . . . that neither the Philippines nor Porto Rico was territory which had been incorporated in the Union or become a part of the United States, as distinguished from merely belonging to it; and that the acts giving temporary governments to the Philippines, 32 Stat. 691, and to Porto Rico, 31 Stat. 77, had no such effect. The *Insular Cases* revealed much diversity of opinion in this court as to the constitutional status of the territory acquired by the Treaty of Paris ending the Spanish War, but the *Dorr Case* shows that the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.[81]

He also said that:

> We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.[82]

It is not surprising that this case is in clear contradiction with *Thompson v. Utah*.[83] In that case:

> The Court reasoned that Thompson, a Utah prisoner, was protected by the Sixth Amendment when Utah was still a Territory because "the right of trial by jury in suits at common law appl[ied] to the Territories of the United States." . . . The Court then stated that this right "made it impossible to deprive him of his liberty except by [a] unanimous verdict."[84]

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80 *San Juan*, Britannica, https://www.britannica.com/place/San-Juan-Puerto-Rico (May 18, 2022); Magaly Rivera, *San Juan,* Welcome to Puerto Rico!, https://welcome.topuertorico.org/city/sanjuan.shtml (last visited, May 18, 2022).

81 Balzac v. Porto Rico, 258 U.S. 298, 305 (1922) (emphasis added).

82 *Id.* at 311.

83 Thompson v. Utah, 170 U.S. 343 (1898).

84 Ramos v. Louisiana, 140 S. Ct. 1390, 1421 (2020) (Thomas, J., concurring) (*citing Thompson*, 170 U.S. at 346-47, 355).

In other words, the Supreme Court concluded that the right to trial by jury does not apply to unincorporated territories.[85] In any case, "[t]he *Insular Cases* are widely recognized as having contradicted precedent of their time and as having been motivated by politics and racial biases."[86] Moreover "[t]he *Insular Cases*, would today be labeled blatant 'judicial activism'."[87] Also, Torruella in his dissent expressed that:

> They are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda. These theories in turn provided a platform that allowed a receptive bare plurality of Justices to reach a result unprecedented in American jurisprudence and unsupported by the text of the Constitution.[88]

As previously mentioned, Judge Gelpí stated that the *Balzac* decision was lacking in common sense and an understanding of the realities on the island at that time; the decision was therefore an expression of racism, a trait that the other Insular Cases possessed as well.[89] Once *Balzac* is resolved, it is necessary to examine whether the United States Congress issued an expression of incorporation over a territory. Remarkably, in 1922, the Supreme Court conveniently altered the scrutiny used to determine whether a territory is classified as incorporated.[90]

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85 *Balzac*, 258 U.S at 304-05.

86 Nathan Muchnick, *The Insular Citizens: America's Lost Electorate v. Stare Decisis*, 38 Cardozo L. Rev. 797, 800 (2016) (*citing* Torruella, *supra* note 49, at 286).

87 Igartúa-de la Rosa v. United States, 417 F.3d 145, 163 (1st. Cir. 2005) (Torruella, J., dissenting).

88 *Id.*

89 Consejo de Salud Playa de Ponce v. Rullan, 586 F.Supp. 2d 22, 30 (D.P.R. 2008); Judge Gelpí further stated that:

> In 1899 the Carroll Commission, appointed by President McKinley to personally study the conditions of the island, concluded that the existing governmental structure and laws of Puerto Rico need not be abrogated, superseded, revolutionized nor recast, but only reorganized or amended. . . . The Commission's Report further concluded that "[Puerto Ricans] knew pretty well what the rights and privileges of American citizenship were" and had the capacity of self-government. . . . Consequently, the Report recommended that the Constitution and Laws of the United States be extended to Puerto Rico . . ..

Id. at 28-29 (*citing* Henry K. Caroll, Report on the Island of Porto Rico: its population, civil government, commerce, industries, productions, roads, tariff, and currency, with recommendations 57, 59, 63 (1899)).

90 No doubt this scrutiny stems from the inventiveness and racial bias of the Supreme Court at the time. Ediberto Román explained that:

> The *Balzac* Court, somewhat surprisingly, made completely inconsistent statements concerning the citizenship status of the people of Puerto Rico. Despite holding that such citizens did not have a constitutional right under the Sixth Amendment, the Court announced that the grant of United States citizenship to the people of Puerto Rico was "to put them as individuals on an exact equality with citizens from the American homeland. . . ."

Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 Fla. St. U. L. Rev 1, 24 n.184 (1998) (*citing* Balzac v. Porto Rico, 258 U.S. 298, 311 (1922)). Also, Professor José Julián Álvarez stated that:

> Balzac's decision caused some surprise at the time. The doctrine of territorial incorporation, as originally developed by Justice White in his opinion at *Downes*, clearly suggested that the grant of

II. Territorial disenfranchisement

Regardless of the distinctions that have been created between incorporated and unincorporated territories, the federal courts of the United States have ruled that for purposes of the right to vote for the presidency, this distinction is not important, since the only ones entitled to vote are the states and not the citizens, per se.[91] This implies that the right to vote for the presidency does not belong to American citizens, no matter where they are located in the country, but rather to the states that make up the federation.[92] To understand this reasoning, a series of cases that explain this constitutional distinction shall be discussed.

First, consider the case of Ada Flores Sánchez, a Puerto Rican and American citizen residing in Puerto Rico.[93] She filed a lawsuit challenging the constitutional validity of Public Law 600, which allowed Puerto Rico to have its own constitution.[94] She argued that such a federal legislation did not allow her to vote for the President and Vice President of the United States.[95] In response, the United States District Court for the District of Puerto Rico held as follows: "[t]he constitutional challenge in this instance is plainly without merit. Although plaintiff is a U.S. citizen, under the Constitution of the United States the President is not chosen directly by the citizens, but by the electoral colleges in the States and the District of Columbia."[96] The Court further explains that "[t]he whole thrust of this is that the Constitution does not, by its terms, grant *citizens* the right to vote, but leaves the matter entirely to the *[s]tates*."[97] Further, the Court disassociates citizenship from the right to vote, stating that "the right to vote is not an essential right of citizenship."[98]

It should be remarked that the Court cited a report from the Ad Hoc Advisory Group examining the feasibility of extending the right to vote for President and Vice President to the citizens of Puerto Rico,[99] which concluded that Puerto Ricans should have the right to vote for the presidency.[100] The Court enunciated that:

> United States citizenship to the inhabitants of a territory was an implicit way in which Congress could incorporate that territory into the United States.

José Julián Álvarez González, *La protección de los derechos humanos en Puerto Rico*, 57 Rev. Jur. UPR 133, 139 n.34 (1988) (translated by author).

91 *See* Bush v. Gore, 531 U.S. 98, 104 (2000).

92 As the First Circuit explained it:

> Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution. This provision does not confer the franchise on "U.S. citizens" but on "Electors" who are to be "appoint[ed]" by each "State," in "such Manner" as the state legislature may direct, equal to the number of Senators and Representatives to whom the state is entitled.

Igartúa-de la Rosa, 417 F.3d at 147 (*citing* U.S. Const. art. II, § 1, cl. 2; U.S. Const. amend. XII).

93 Sanchez v. United States, 376 F. Supp. 239 (1974).

94 *Id.;* Puerto Rico Federal Relations Act, 64 Stat. 319 (1950).

95 *Sanchez*, 376 F. Supp. at 239-40.

96 *Id.* at 241.

97 *Id.*

98 *Id.*

99 *See* Ad Hoc Advisory Group on the Presidential Vote for Puerto Rico, The Presidential Vote for Puerto Rico (1971).

100 *Sanchez*, 376 F. Supp. at 241-42 (1974).

> [I]t is inexcusable that there still exists a substantial number of U.S. citizens who cannot legally vote for the President and Vice President of the United States. However, until the Commonwealth votes for [s]tatehood, or until a constitutional amendment is approved, which extends the presidential and vice presidential vote to Puerto Rico, there is no substantial constitutional question raised by plaintiff . . . .[101]

Ten years after *Sanchez v. United States*, the United States Court of Appeals for the Ninth Circuit had an opportunity to adjudicate a similar dispute with Guam.[102] In *Attorney Gen. of Guam v. United States*, the Attorney General of Guam and four people sued the United States on behalf of American voters residing in Guam.[103] The Ninth Circuit held that Guam, an unincorporated territory, is not a state for the purposes of federal elections.[104] The Ninth Circuit further highlighted the constitutional principle of the United States that citizens do not vote for the President and Vice President, because the "Constitution expressly delegates authority to the states to regulate selection of Presidential electors."[105] The Ninth Circuit summarizes the syllogism as follows:

> The right to vote in presidential elections under Article II inheres not in citizens but in states: citizens vote indirectly for the President by voting for state electors. Since Guam concededly is not a state, it can have no electors, and plaintiffs cannot exercise individual votes in a presidential election. There is no constitutional violation.[106]

For the Ninth Circuit, a constitutional amendment is necessary, as in the case of the District of Columbia, so that the territories could vote for the President and Vice President of the United States.[107] Among the arguments presented by the plaintiffs in this case, the expansion of the right to vote in the federal sphere stands out. In particular, they argue as follows:

> [A] constitutional amendment is not necessary because, since the passage of the twenty-third amendment, the Supreme Court has so expansively interpreted Congressional power over federal elections that Congress already has legislated presidential voting rights for American citizens who are not residents of any state. Specifically, plaintiffs point to . . . the Overseas Citizens Voting Rights Act (O.C.V.R.A.) . . . .[108]

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101 *Id.* at 242.
102 Attorney General of Territory of Guam v. U.S., 738 F.2d 1017 (9th Cir. 1984).
103 *Id.*
104 *Id.* at 1019.
105 *Id.* (*citing* Anderson v. Celebrezze, 460 U.S. 780, 794, n. 18 (1983)).
106 *Id.*
107 *Id.*
108 *Id.* at 1019–20.

O.C.V.R.A. allows U.S. citizens who have moved to foreign countries, regardless of whether they pay taxes in their last state of residence or have a defined plan to return to the United States, to vote for the President and Vice President of the United States.[109] For the Ninth Circuit, the said legislation is inapplicable to the territories because the "legislative history of the O.C.V.R.A. makes clear that it was premised constitutionally on prior residence in a state."[110] Therefore, Guam, as an unincorporated territory, does not have the right to vote for the President or Vice President until the constitution is amended or the territory obtains statehood.[111]

A decade after *Guam*, the First Circuit heard a new claim from American citizens residing in Puerto Rico who wanted to vote for the U.S. President and Vice President.[112] *Igartúa de la Rosa v. United States* (hereinafter, "*Igartúa I*") would be the first case in a series of attempts by Mr. Igartúa de la Rosa and other American plaintiffs for an equal vote for territorial citizens. The First Circuit, through a *per curiam*, ruled that Puerto Rico is not a state for the purposes of Article II of the United States Constitution.[113] The Court used the same reasoning that was outlined in *Sánchez* and *Guam*.[114] However, this case raised a second controversy. A group of residents of Puerto Rico, who had previously participated in presidential elections, challenged the constitutionality of the *Uniformed and Overseas Citizens Absentee Voting Act* (hereinafter, "U.O.C.A.V.A."): "[a]ppellants claim that the Act illegally discriminates against citizens who have taken up residence in Puerto Rico rather than outside the United States, because the former are not entitled by the Act to vote in their prior state of residence."[115] Using a rational basis test in the absence of a suspect classification, the Court concluded that the U.O.C.A.V.A. was constitutional because although the legislation does not guarantee the people who move to Puerto Rico a right to vote for the presidency, the said limitation is not a consequence of the Act, but of the constitution.[116] For the 2000 election year the United States District Court for the District of Puerto Rico took another tack stating the following:

> The present political status of Puerto Rico [and other territories] has enslaved the United States citizens residing in Puerto Rico [and the territories] by preventing them from voting in Presidential and Congressional elections and therefore it is abhorrent to the most sacred of the basic safeguards contained in the Bill of Rights of the Constitution of the United States—freedom.[117]

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109 *Id.* at 1020 (*citing* 42 U.S.C. § 1973 (2022); currently at 52 U.S.C. § 20310 (2022)).
110 *Id.*
111 *Id.*
112 Igartúa de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994).
113 The First Circuit expressed:

> [T]he Constitution provides that the President is to be chosen by electors who, in turn, are chosen by "*each state* . . . in such manner as the Legislature thereof may direct." . . . Pursuant to Article II, therefore, only citizens residing in *states* can vote for electors and thereby indirectly for the President.

Id. at 9 (*citing* U.S. CONST. art. II, § 1, cl. 2.).
114 *Id.* at 10.
115 *Id.*
116 *Id.* at 11.
117 Igartúa de la Rosa v. United States, 107 F. Supp. 2d 140, 141 (D.P.R. 2000).

In essence, the facts are the same as in *Igartúa I*. Two groups of individuals claimed their rights to vote for the President and Vice President in the 2000 elections.[118] The first group consisted of residents of Puerto Rico who had never voted in presidential elections and who argued that "they have a right to vote in Presidential elections because they are U.S. citizens and, as such, are vested with the inherent power to vote for those who represent them."[119] The second group consisted of people who voted in past elections for the presidency and who challenged the U.O.C.A.V.A., which allowed U.S. citizens to vote in the federal elections when they lived outside of the United States.[120] *United States* for the purpose of the Act includes Puerto Rico.[121] At the same time, "[b]oth groups argue[d] that the United States Constitution and the International Covenant on Civil and Political Rights, a treaty to which the United States is a party, guarantee their right to vote in Presidential elections."[122]

For the analysis of this case, the Federal District Court for the District of Puerto Rico examined the development of Puerto Rico's relationship with the United States and stated that the territory's political relationship with the federation is framed "within the context of the unfulfilled promises of freedom made by the United States to the people of Puerto Rico."[123] Furthermore, citing again Article II, Section 1, Clause 2 of the United States Constitution on this occasion, the District Court expressed that "the clause refers to the logistics by which the electors of the states elect the President and the Vice President."[124] That is, "Article II merely sets forth the mechanism by which the right to vote will be implemented in the states",[125] but "the Court considers whether Plaintiffs have a fundamental right under the United States Constitution to participate in Presidential elections."[126] Providing a narrative exposition of the evolution of the right to vote in the United States, the District Court observes that a constitutional amendment is not necessary for Puerto Rican American citizens to vote in the presidential elections:

> The right preexists the potential amendment by virtue that the Constitution itself provides that right. Requiring a constitutional amendment to grant U.S. citizens residing in Puerto Rico the right to participate in Presidential elections is tantamount to entering into a democratic process to determine if democracy should prevail. In this way, a constitutional amendment, like Article II, section 1, clause 2, might address the way in which U.S. citizens residing in Puerto Rico would vote in such elections. Just as [U.O.C.A.V.A.] allowed, without the need of a constitutional amendment, the participation in federal elections of U.S. citizens residing abroad, U.S.

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118 *Id.*
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.* at 141–42.
124 *Id.* at 145.
125 *Id.*
126 *Id.*

> citizens residing in Puerto Rico do not need a constitutional amendment to be able to vote in Presidential elections.[127]

Notwithstanding the foregoing, the First Circuit reversed the District Court ruling based on the *stare decisis* doctrine.[128] In this case (hereinafter, "*Igartúa II*"), Judge Torruella concurred with the opinion, considering it "to be technically and, as the law now stands, legally correct in its conclusion that the Constitution does not guarantee United States citizens residing in Puerto Rico the right to vote in the national Presidential election."[129] However, Judge Torruella was not silent on the inarticulate premise behind the presidential claims by the territories, i.e., the fight for democratic equality. Torruella stated:

> On numerous occasions since 1952 Congress has turned a blind eye and a deaf ear to the continuing inequality to which United States citizens in Puerto Rico are subjected, and a perusal of the Congressional Record demonstrates the jealousy with which Congress has guarded its plenary power over the Island.[130]

The logical conclusion from the non-congressional actions on the democratic development of Puerto Rico and other territories is that "[t]he perpetuation of this colonial condition runs against the very principles upon which this Nation was founded. *Indefinite* colonial rule by the United States is not something that was contemplated by the Founding Fathers nor authorized *per secula seculorum* by the Constitution."[131] Despite the above, in 2000 the American citizens residing in Puerto Rico were unable to vote in the presidential elections and, curiously, the President and Vice President elected did not obtain a majority of the popular vote in the result.[132]

Igartúa II was not the only case involving Puerto Rican residents trying to claim their constitutional right to vote for the presidency in the 2000 elections.[133] Xavier Romeu, born in the mainland, moved to Puerto Rico in 1999 and applied with an application from Westchester County, New York, for his right to vote in the presidential elections in an absentee ballot.[134] In this case, Romeu wasn't eligible to receive an absentee ballot under the U.O.C.A.V.A. because, for the purposes of the said legislation, Puerto Rico is *United States*.[135] Furthermore, Romeu was not a *special federal voter* under the laws of New York,[136] his previous state of residence, because his domicile and registered place to vote was Puer-

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127 *Id.* at 148.

128 Igartúa De La Rosa v. United States, 229 F.3d 80, 83 (1st Cir. 2000).

129 *Id.* at 85 (Torruella, J., concurring).

130 *Id.* at 88 (Torruella, J., concurring).

131 *Id.* at 89 (Torruella, J., concurring).

132 Michael Levy, *United States presidential election of 2000*, Britannica, https://www.britannica.com/event/United-States-presidential-election-of-2000 (last visited May 21, 2022).

133 Romeu v. Cohen, 121 F. Supp. 2d 264 (S.D.N.Y. 2000).

134 *Id.* at 269.

135 *Id.* at 270 (*citing* 42 U.S.C. § 1973ff-6 (2022); currently at 52 U.S.C. § 20310 (2022)).

136 *Id.* at 271 (*citing* N.Y. Elec. Law § 11-200).

to Rico, thus not outside of the United States.[137] He questioned his inability to vote in the presidential elections by alleging that this legal limitation prevented him from exercising his right to vote and travel, which violated the protections offered by the Privileges and Immunities Clause Equal Protection Clause.[138] None of Romeu's arguments were successful in the United States District Court for the Southern District of New York. Making a clear dichotomy between the legal arguments and politics, Judge Scheindlin expressed the following: "[a]lthough I am unable to afford Romeu the relief he seeks, there is little doubt that all American citizens living in Puerto Rico are suffering a grave injustice. As American citizens, they should be allowed to vote for their national leader."[139]

Romeu appealed the determination of the District Court.[140] The Second Circuit Court of Appeals stated that U.S. citizens who are residents of the territories do not have the right to vote in presidential elections because the territories are not *states* for the purposes of Article II and therefore not granting territorial citizens the right to vote does not violate the Constitution.[141] The Second Circuit recognizes that the question raised in this case was slightly different:

> [N]ot whether Puerto Ricans have a constitutional right to vote for the President, but rather whether Equal Protection is violated by the U.O.C.A.V.A., in that it provides presidential voting rights to former residents of [s]tates residing outside the United States but not to former residents of [s]tates residing in Puerto Rico.[142]

For the same reasons we have already discussed, the Second Circuit's answer was in the negative.[143] Notwithstanding the foregoing, it is worth highlighting the observations made by Judge Leval in his personal capacity. Judge Leval recognized that there was some truth in the claim that territories cannot vote in presidential elections if they have not been admitted as states or the Constitution has not been amended.[144] Therefore, Judge Leval proposed an alternative, different from the one outlined in this article, which is equally viable:

> If, notwithstanding the command of Article II, section 1 that electors be appointed in the manner that the [s]tate legislature directs, Congress may nonetheless impose on the [s]tates a requirement that each accept the votes of certain U.S. citizens who are not residents of the [s]tate but reside outside the United States or in other [s]tates. I can see no reason why Congress might not also with respect to the presidential election require the [s]tate to accept the presidential votes of certain U.S. citizens who are

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137 *Id.*
138 *Id.* at 268.
139 *Id.* at 285.
140 Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001).
141 *Id.* at 123.
142 *Id.* at 124.
143 *Id.*
144 *Id.* at 128.

> nonresidents of the [s]tate residing in the U.S. territories. At minimum, Congress might do so on the model of the U.O.C.A.V.A. by requiring [s]tates to accept the votes of U.S. citizens now residing in the territories who were formerly residents of the [s]tate. Indeed, even without congressional mandate, a [s]tate would no doubt have the power to pass statutes similar to the [New York Election Law] allowing its former residents now residing in a territory to participate in its federal elections. Furthermore, if the Constitution authorizes the U.O.C.A.V.A. and the other Congressional limitations outlined above on the power of the [s]tates to determine who may vote in its presidential elections, I see no reason in the Constitution why Congress might not impose a further requirement: Congress might permit every voting citizen residing in a territory to vote for the office of President by requiring every [s]tate that chooses its electors by popular vote (which all [s]tates do) to include in that [s]tate's popular vote the State's pro rata share of the votes cast by U.S. citizens in the territories.[145]

Based on the foregoing, it's reasonable to consider that the idea of enforcing on states the requirement that each one must accept the votes of certain U.S. citizens who are not residents of the state and are also residing in U.S. territories could be a viable strategy to establish equal vote for the territories. Nevertheless, it does not overcome the issue of having Electoral College elects candidates who do not have a popular majority. However, at the end of the day, the right to vote and elect the President of the U.S. is better than the lack thereof.

In 2004, the First Circuit heard the case referred to as *Igartúa III*, where Gregorio Igartúa-De La Rosa alleged that his "inability to vote for the President and Vice-President of the United States of America" due to his residence in Puerto Rico constituted a violation of his right to equal protection as a citizen of the United States.[146] However, yet again, based on the *stare decisis* doctrine, the members of the panel's majority dismissed the cause of action.[147] Notably, Judge Torruella strongly dissented and criticized Puerto Rico's colonial relationship with the United States, expressing the following about the *Insular Cases*:

> [It] not only gives underlying support to this subservient condition, but more importantly, it relegates the U.S. citizens who reside in Puerto Rico to perpetual inequality by insulating the political branches of government from any effective pressure from these citizens, who have neither voting representation in Congress nor the right to vote for the offices of President and Vice-President.[148]

For Judge Torruella, only the non-democratic inaction of the political branches in relation to the territories could be addressed by the non-political branch, that is, the judi-

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145 *Id.* at 129-30.
146 Igartúa-De La Rosa v. United States, 386 F.3d 313 (1st Cir. 2004).
147 *Id.*
148 *Id.* at 316 (Torruella, J., disenting).

cial branch.[149] Torruella explains that the inequality that citizens under the United States' territories face in comparison with citizens living in the states has its roots in the Insular Cases.[150] Furthermore, he continues his opinion by stating that these cases in turn arise from the racial mentality evident in *Plessy v. Ferguson*.[151] Moreover, Torruella maintains that the right to vote is an inherent right of citizenship: "[i]t is fundamental because it is preservative of all other rights by adding the validating imprimatur of the ballot box to the business of government. Furthermore, it has been considered a fundamental right since at least 1886 . . .."[152] Just as the judicial branch had a stance based on the inequality transmitted through the *Plessy v. Ferguson* ruling, Judge Torruella understands that "it becomes incumbent upon the judicial branch to take such extraordinary measures as are necessary and appropriate to protect the rights of this discreet and insular minority."[153] Subsequently, the First Circuit panel in *Igartúa III* vacated its own decision and granted panel rehearing.[154] Furthermore, the Court granted an *en banc* review.[155]

In this new case, the First Circuit had to adjudicate the following controversy: should the failure of the U.S. Constitution to grant the territories the right of a presidential vote be declared a violation of U.S. treaty obligations?[156] Again, the reasoning of the First Circuit majority in rejecting the possibility that citizens in the territories should be allowed to vote for the President and Vice President is the same:

> Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution. This provision does not confer the franchise on "U.S. citizens" but on "Electors" who are to be "appoint[ed]" by each "[s]tate," in "such Manner" as the state legislature may direct, equal to the number of Senators and Representatives to whom the state is entitled.[157]

The majority of the Panel explained that although "[many m]odern ballots may omit the names of the electors and list only the candidates,"[158] giving the appearance that cit-

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149 *Id.* (Torruella, J., disenting) ("[o]nly the judicial branch can correct this denigrating and unacceptable condition, one which was created in the first place by that branch in the *Insular Cases, et al.*"); *see also* Igartúa-De La Rosa v. United States, 229 F.3d 80, 89 (1st Cir. 2000) (*citing* Brown v. Board of Education, 347 U.S. 483 (1954) ("[i]n *Brown*, the Court recognized that, as the ultimate interpreter and protector of the Constitution, it must at times fill the vacuum created by the failure or refusal of the political branches to protect the civil rights of a distinct and politically powerless group of United States citizens.").

150 *Igartúa*, 386 F.3d at 316 (Torruella, J., disenting).

151 *Id.* (Torruella, J., disenting) (*citing* Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education, 347 U.S. 483 (1954)) ("[t]he doctrine of inequality created by the Supreme Court in the *Insular Cases* stands on the same discredited theoretical footing as that espoused by the majority in *Plessy v. Ferguson* . . . and which was put to rest by the Supreme Court in *Brown v. Board of Education* . . .").

152 *Igartúa*, 386 F.3d at 317 (Torruella, J., disenting).

153 *Id.* at 320 (Torruella, J., disenting).

154 Igartúa-De La Rosa v. U.S., 404 F.3d 1 (1st Cir. 2005).

155 Igartúa-De La Rosa v. U.S., 407 F.3d 30, 31 (1st Cir. 2005).

156 Igartúa-De La Rosa v. U.S., 417 F.3d 145 (1st Cir. 2005).

157 *Id.* at 147 (*citing* U.S. Const. art. II, § 1, cl. 2).

158 *Id.* at 147.

izens vote directly for the President and Vice President, the legal reality is that they are voting for the electors of the states.[159] Thus, the Panel closed the door to the possibility that the court could grant access to the presidential voting right to territorial citizens:

> The case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means. But the right claimed cannot be implemented by courts unless Puerto Rico becomes a state or until the Constitution is changed (as it has been, at least five times, to broaden the franchise). U.S. Const. amend. XV (race, color, previous servitude); [U.S. Const.] amend. XIX (sex); [U.S. Const.] amend. XXIII (District of Columbia); [U.S. Const.] amend. XXIV (payment of poll or other tax); [U.S. Const.] amend. XXVI (age eighteen and older). It certainly should not be "declared" by a federal court on the basis of treaties none of which was designed to alter domestic law—and none of which could override the Constitution.[160]

In 2007, the United States Court of Appeals for the Third Circuit upheld the decision of the United States District Court for the District of the Virgin Islands, Division of St. Thomas and St. John. It ruled that the Virgin Islands does not have the right to vote for the President and Vice President of the United States.[161] The District Court's reasoning behind the ruling was that the Virgin Islands are an unincorporated territory and not a state.[162] To establish that the resident citizens of the territories do not have the right to appoint electors, the Court cited *Bush v. Gore* to that effect stating that: "[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."[163]

The last case to examine in relation to the right to vote in presidential elections is *Segovia v. United States*.[164] In *Segovia*, six former Illinois residents who moved to "Puerto Rico, Guam, and the Virgin Islands challenge[d] [the] federal and state legislation" that prevented them from "obtain[ing] absentee ballots for federal elections in Illinois."[165] In particular, the U.O.C.A.V.A., and Illinois' M.O.V.E. legislation were analyzed.[166] The Seventh Circuit stated that "the territories where the plaintiffs now reside are considered part of the United States under the relevant statutes, while other territories are not. The anomalous result is that former Illinois residents who moved to some territories can still vote in

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159 *Id.*

160 *Id.* at 151.

161 Ballentine v. United States., 486 F.3d 806, 809-11 (3d Cir. 2007).

162 *Id.* at 811.

163 *Id.* (*citing* Bush v. Gore, 531 U.S. 98, 104 (2000)).

164 Segovia v. United States, 880 F.3d 384 (7th Cir. 2018).

165 *Id.* at 386.

166 *Id.* at 387; *see also* Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. §§ 20302(a)(1), 20310 (5)(c), 20310 (8) (2022) (it amended the *Overseas Citizens Voting Rights Act*); Overseas Citizens Voting Rights Act, 42 U.S.C. §§ 1973dd-1973dd-5 (2022); S. 1415, 111th Cong. (2009).

federal elections in Illinois, but the plaintiffs cannot."[167] Interestingly, if they had moved to "American Samoa or the Northern Mariana Islands, Illinois law would consider them" foreign residents with voting rights.[168]

The reasoning of the Seventh Circuit on the nature of the right to vote in the territories was clear: "the residents of the territories have no fundamental right to vote in federal elections."[169] Additionally, the Panel said that "[t]he territories send no electors to vote for president or vice president and have no voting members in the United States Congress."[170] In other words, "[t]he unmistakable conclusion is that, absent a constitutional amendment, only residents of the [fifty] [s]tates have the right to vote in federal elections."[171]

As we have seen, the territories' struggle for the right to vote for the presidency has been vehement. Over time, the ties between the territories and the federal government have strengthened. For example, the First,[172] Second,[173] Fourth,[174] Fifth,[175] Sixth,[176] and Eighth Amendments,[177] as well as the Equal Protection Clause apply to Puerto Rico. However, it has not been enough to obtain electoral justice.[178] That is why this article supports the belief that it is necessary for the territories to devise new and creative strategies given that the judiciary branch has failed to ensure their citizens' voting rights. After all, "[i]t may well be that over time the ties between the United States and any of its unincorporated [t]erritories strengthen in ways that are of constitutional significance."[179]

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167 *Id.* at 386.
168 *Id.* at 387.
169 *Id.* at 390.
170 *Id.*
171 *Id.*
172 U.S. Const. amend. I.
173 *Id.* amend. II.
174 *Id.* amend. IV.
175 *Id.* amend. V.
176 *Id.* amend. VI.
177 *Id.* amend. VIII.
178 *See* Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (right to unanimous jury); Timbs v. Indiana, 139 S. Ct. 682 (2019) (protection against excessive fines); McDonald v. City of Chicago, 561 U.S. 742 (2010) (right to keep and bear arms*);* Posadas de P.R. Associates v. Tourism Co. of P.R., 478 U.S. 328 (1986*);* Torres v. Commonwealth of P.R., 442 U.S. 465 (1979); Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572 (1976); Schilb v. Kuebel, 404 U.S. 357 (1971) (protection against excessive bail); Benton v. Maryland, 395 U.S. 784 (1969) (double jeopardy); Washington v. Texas, 388 U.S. 14 (1967) (right to compulsory process to obtain witness testimony and the right to confront witnesses); Klopfer v. State of North Carolina, 386 U.S. 213 (1967) (right to a speedy trial); Parker v. Gladden, 385 U.S. 363 (1966) (right to an impartial jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confront witnesses); Aguilar v. State of Texas, 378 U.S. 108 (1964) (requirements in a warrant); Malloy v. Hogan, 378 U.S. 1 (1964) (right against self-incrimination); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Robinson v. California, 370 U.S. 660 (1962) (protection against cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (freedom from unreasonable search and seizure); *In re* Oliver, 333 U.S. 257 (1948) (right to a public trial and right to notice of accusations); Everson v. Board of Education of Ewing Tp., 330 U.S. 1, 15-16 (1947) (guarantee against the establishment of religion); Cantwell v. State of Connecticut, 310 U.S. 296 (1940) (free exercise of religion); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934) (free exercise of religion); De Jonge v. State of Oregon, 299 U.S. 353 (1937) (right of assembly and petition); Near v. State of Minnesota ex rel. Olson, 283 U.S. 697 (1931) (freedom of the press); Gitlow v. People of the State of New York, 268 U.S. 652 (1925) (freedom of speech); Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226 (1897) (protection against taking property without due compensation).
179 Boumediene v. Bush, 553 U.S. 723, 758 (2008).

III. National Popular Vote Interstate Compact: Premises behind the compact

In the United States' presidential elections, Americans cast their vote, but the vote count is not what determines the winner.[180] The election of the President and Vice President has its constitutional basis in the Electoral College, contemplated in Article II, Section 1 of the United States Constitution along with its respective Twelfth and Twenty-fifth Amendments.[181] Based on these minimal constitutional provisions, the states and the federal government have complemented the presidential electoral process by enacting state legislation. In what is pertinent, the Constitution mentions that the states have the power to "appoint [electors], in such Manner as the Legislature thereof may direct . . . ."[182] It should be noted that a textual reading of the constitutional clause does not say that the states will have the power to appoint the electors exclusively. However, the constitutional canon implies that those who vote directly for the President and Vice President are the actual electors and not the majority of the people.[183] This implies that there may be presidents who legitimately come to power without receiving a majority of the vote of all the Americans who participated in the elections.[184] In fact, this has already happened five times.[185]

Recently, the Supreme Court of the United States in *Chiafalo v. Washington* had the opportunity to carry out a historical recount of the Electoral College and the methodology for selecting the President and Vice President.[186] The Supreme Court, through the voice of Justice Kagan, explained the difficulty the framers had to face in order to reach an agreement regarding the method for selecting the President and Vice President.[187] After the Electoral College amendment, citizens voted for a list of electors presented by a political party with the objective that the winning list would vote for the presidential candidate of their party in the Electoral College.[188] Subsequently, the citizens of most states began to vote for their own presidential candidate as the ballots increasingly did not include electors.[189] Basically, "[a]fter the popular vote was counted, [s]tates appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College."[190]

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180 Chiafalo v. Washington, 140 S. Ct. 2316, 2319 (2020) ("[e]very four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each [s]tate appoints based on the popular returns. Those few *electors* then choose the President.").

181 U.S. Const. art. II, § 1; U.S. Const. amend. XII; U.S. Const. amend. XXV.

182 U.S. Const. art. II, § 1, cl. 2.

183 *Chiafalo*, 140 S. Ct. at 2319 ("[t]he [s]tates have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every [s]tate appoints a slate of electors selected by the political party whose candidate has won the [s]tate's popular vote").

184 Jerry Schwartz, *EXPLAINER: They lost the popular vote but won the elections,* Associated Press (Oct. 31, 2020), https://apnews.com/article/AP-explains-elections-popular-vote-743f5cb6c70fce9489c9926a907855eb.

185 *Id.*

186 *Chiafalo*, 140 S. Ct. at 2319.

187 *Id.* at 2320-21.

188 *Id.* at 2321; *see* U.S. Const. amend. XII.

189 *Chiafalo*, 140 S. Ct. at 2321.

190 *Id.*

This democratic method is unreliable since it allows a candidate who does not necessarily obtain a popular majority in the entire federation to win. That's where the idea for the National Popular Vote Interstate Compact (hereinafter, "N.P.V.I.C.") comes from.[191] So far, the N.P.V.I.C. has been endorsed by sixteen jurisdictions.[192] The compact establishes that the presidential electors will examine the number of presidential votes cast in each state of the United States and the District of Columbia with the objective of adding the votes to calculate what is known as the total of national popular votes.[193] Based on the said list of votes by the majority of people, the electoral delegate will vote in the Electoral College according to the national majority of the states and the District of Columbia.[194] Therefore, regardless of how their states voted, the presidential electors will vote according to how the majority of Americans in the entire federation voted.[195] With this strategy, the duo of candidates who receive the most votes at the popular level will always win, thus avoiding the need to amend the constitution, while using the Electoral College against itself.[196]

What are the premises that suggest that a system whereby the majority of the popular vote elects the president instead of the Electoral College is better? In short, the main presumption is that the Electoral College is immanently undemocratic because it leads to an indirect election of the President and Vice President.[197] It should be noted that the origin of the Electoral College is justified by the fact that, in the 18th century, the United States had poor means of communication, a low literacy rate, and little democratic experience.[198] However, this pragmatic and historical origin does not justify holding an indirect election in the 21st century, which benefits from instantaneous media,[199] a high literacy rate, and two centuries of democratic experience.

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191 *See Agreement Among the States to Elect the President by National Popular Vote,* National Popular Vote!, https://www.nationalpopularvote.com/written-explanation (last visited May 21, 2021).

192 *Id.*

193 *See* Elliott Ramos, *There's a Plan Afoot to Replace the Electoral College, and Your State may Already Be Part of It*, NBC News (Nov. 9, 2020), https://www.nbcnews.com/politics/2020-election/map-national-popular-vote-plan-replace-electoral-college-n1247159.

194 *Id.*

195 *Id.*

196 Article V of the United States Constitution states that:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

U.S. Const. art. V.

197 Kaitlyn Marlowe, *The Electoral College is Bad for Democracy,* The University of Tennessee Knoxville: Chancellor's Honors Program Projects 21 (Dec. 7, 2020), https://trace.tennessee.edu/utk_chanhonoproj/2399.

198 Cong. Research Serv., R43823, The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact 15 (2019).

199 *Id.* at 20.

The N.P.V.I.C.'s implicit premise is to provide democratic justice, where each vote counts equally, providing a *de facto* fully democratic electoral system without having to go through intermediary processes.[200] This implies that the President and Vice President would be elected based on a true majority of electors having equal votes, regardless of the electoral domicile status. In essence, the N.P.V.I.C. would undermine the possibility of a president being elected without having a majority of the votes.

However, the N.P.V.I.C., as previously contemplated, leaves out 3,658,570 American citizens and nationals who contribute to the United States in multiple ways, excluding them from electing the head of the executive branch. In other words, the territories are governed without taking the volition of the citizens in the territories into account. Although the N.P.V.I.C. recommends that all the votes made by American citizens be counted equally, it overlooks the citizens who reside in the territories. Yet, it is not too late to correct this omission.

IV. National Popular Vote Interstate Compact: One person, one vote

The mechanism contemplated by the N.P.V.I.C. system implies that the votes of American citizens in the states will be counted, leaving aside the American citizens in the territories. Consequently, the territories would be outside of the jurisdiction of the President and Vice President because their citizens' right to vote has not been made viable in any way. According to the First, Second, and Ninth Circuits, American citizens of the territories would only have the ability to vote for the President if the territories are admitted as states or if the constitution is amended, as was the case with Washington D.C.[201]

Now, this article proposes a third way. Because Congress continues to decide what to do or not do with the territories, and the colonial condition continues to subjugate the electoral rights of the citizens in the territories, the N.P.V.I.C. must be amended to include all American citizens and nationals who inhabit the territories. At the moment, the N.P.V.I.C. does not have all the votes needed to become a self-executing compact. This implies that it can be amended so that American citizens and nationals from the five United States territories can be included within the language of what is the national voter list.

This means that, if the proposed amendment is made, when the states' electors cast their votes for the President and Vice President, they must not only observe the electoral behavior of the majority of the citizens in the states, but also those in the territories. The territories would thus cast symbolic votes, which would gain strength through the recognition by the other states as valid votes. This would mean counting not only the votes of American citizens in the states but also of the citizens and nationals who live in the terri-

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200 After all, the right to vote is a fundamental right guaranteed to all American citizens, at least in the states; *see* Bush v. Gore, 531 U.S. 98, 104 (2000); Burson v. Freeman, 504 U.S. 191, 211 (1992); Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986); Buckley v. Valeo, 424 U.S. 1 (1976); Lubin v. Panish, 415 U.S. 709, 721 (1974); Bullock v. Carter, 405 U.S. 134 (1972); City of Phoenix, Arizona v. Kolodziejski, 399 U.S. 204 (1970); Harper v. Virginia State Board of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62, (1964); Wesberry v. Sanders, 376 U.S. 1, 7 (1964).

201 Romeu v. Cohen, 265 F.3d 118 (2d Cir. 2001); Igartúa-De la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994); Attorney General of Territory of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984).

tories. Thereby, around 3,658,570 American citizens and nationals living in the territories would finally have a chance to cast their votes in presidential elections.

This is an alternative way of doing justice to the territories that have contributed so much to the federation and have not been reciprocated with a guaranty of judicial equality. Granting the right to the presidential vote to the territories in this manner would not only correct a historical wrong, but it would also not also be contrary to the principles of direct voting that are proposed by the N.P.V.I.C.

Conclusion

From a retrospective analysis of one hundred years, it can be concluded that *Balzac v. Porto Rico* is built on a house of cards of legal contradictions. Unfortunately, *Balzac* is a reminder of the dynamics of the colonial state of exception of the Supreme Court of the United States that, at the time, justified a legal discourse of U.S. imperialism. Reading *Balzac v. Porto Rico* in 2022, leaves a bad taste in the mouth, a taste of judicial racism.[202]

For instance, Atiles Osoria highlights that refusing to extend the Sixth Amendment to Puerto Rico:

> [W]as sustained on the basis of racism and discrimination that had characterized the process of *americanization*. Indeed, this can be inferred from the opinion of Justice Taft, who argues that trial by jury requires citizens with the cultural background provided by the *common law* tradition. In this manner, it was established that Puerto Ricans were not culturally, socially, politically nor historically qualified to serve as jurors.[203]

Apparently, and in accordance with the racist mentality of the time, Puerto Ricans do not deserve the benefits of a jury trial system that they could not understand:

> In addition to judicial racism, Taft argued that according to the jurisprudence established in *Downes* and *Dorr*, neither the Philippines nor

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202 Ramón Grosfoguel, *The Concept of "Racism" in Michel Foucoult and Frantz Fanon: Theorizing from the Being or the Nonbeing Zone?*, 16 Tabula Rasa 93 (January-June 2012) (translated by author) (Ramón Grosfoguel states that racism for Fanon is based on the premise that there is "a global hierarchy of superiority and inferiority on the human line that has been politically produced and reproduced as a structure of domination for centuries . . ."); *Id.* (this causes two types of people to be classified: those from above the line —humans— and those from below the line —sub-humans or non-humans—. The above implies that "[t]he people who are above the human line are socially recognized in their humanity as human beings with subjectivity and with access to "human/citizen/civil/labor" rights, while "[t]he people below the line of the human are considered sub-human or non-human, that is, their humanity is questioned and, therefore, denied."); Agustín Morales Mena, *Biopolítica, Racismo de estado y migración. Persecución de la vida cotidiana de personas migrantes irregulares en países posindustriales*, *in* El derecho como regulación de la vida y la muerte: biopolítica y necropolítica legal 150 (2020) (translated by author) (this conception of racism makes the different racist markers visible: "color, language, nation, religion, social class, culture, etc."); *Id.* at 154 (in other words, in addition to the phenotypic trait of skin color, racism is intertwined with "uses and customs.").

203 José M. Atiles-Osoria, El derecho en conflicto: colonialismo, despolitización y resistencia en Puerto Rico 122 (2018) (translated by author).

> Puerto Rico had been incorporated by the organic laws approved by Congress and with which they were provided with a provisional government. Likewise, the judge held that the *Jones Act* did not try to convert Puerto Rico into an incorporated territory, since there is no clause or declaration of purposes in the law that indicates so.[204]

This precedent also implicitly serves as a basis to influence American's reluctancy to provide access to the presidential vote to those American citizens who live in the archipelago. Guaranteeing the territories the right to the presidential vote through the N.P.V.I.C., would be an advancement in the struggle that constitutes the integration of the territories and their residents into the United States. However, it is clear that this is not a method of decolonization, nor does it aspire to be one. Even in an ideal world, where the N.P.V.I.C. is implemented and it is found to be constitutionally valid, the territories would still not be states. That is, they would continue to be subject to the plenary powers of the United States Congress.[205]

The decolonization of the territories is another matter, but it is a necessary discussion to get closer to the goals of justice.[206] The people who reside in the territories will have to decide in due course if they want to maintain the relationship they currently have with the United States, or if they want to live in a different manner. As this article has illustrated, the federal courts tend to shut the doors on these matters that can be considered immanently political.[207] However, the judicial branch must be vigilant that, while political decisions are made, the rights of citizens are not harmed by arbitrariness or discrimination.[208]

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204 *Id.* (translated by author).

205 *See* Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890); Murphy v. Ramsey, 114 U.S. 15, 44 (1885); First National Bank v. Yankton County, 101 U.S. 129, 130 (1879); *Developments—the U.S. Territories (Introduction)*, 130 Harv. L. Rev. 1617 (2017) ("[t]hese unincorporated but organized territories exercise self-governance, while still sitting subject to the U.S. Congress's plenary power. The territories all have unique histories and political perspectives, and their legal relationships with the United States vary accordingly.").

206 *See* Pedro A. Cabán, Constructing A Colonial People: Puerto Rico And The United States, 1898-1932 1, 15-40 (1999).

207 The Supreme Court adopted the territorial incorporation doctrine through the *Insular Cases*:

> The Supreme Court's decisions in the *Insular Cases* rest on . . . a legal fiction by justifying, as a matter of constitutional doctrine, U.S. colonial policy toward the territories, including Puerto Rico, acquired in the Spanish–American War of 1898. Grounded on the dominant imperialist ideology of the time, the Court, in the *Insular Cases*, adopted the doctrine of territorial incorporation, thereby drawing an arbitrary distinction between incorporated and unincorporated U.S. territories.

Gerardo J. Cruz, *The Insular Cases and the Broken Promise of Equal Citizenship: A Critique of U.S. Policy Toward Puerto Rico,* 57 Rev. Der. P.R. 27, 28 (2017).

208 Racial bias is impregnated in the *Insular Cases*. Accordingly, Justice Torruella expressed the following:

> [A] definite tinge of racial bias is discernible in several of the plurality opinions [in the *Insular Cases*]. This is not a surprising circumstance considering that the Justices that decided the *Insular Cases* were, almost to a man, the same that decided the infamous "separate but equal" case of *Plessy v. Ferguson* in 1896. The rules established in the *Insular Cases* were simply a more stringent

It is for this reason that after one hundred years, Puerto Rico and the United States of America must once again reflect on the legal-political relationship that exists between them. Within that reflective scope, it is necessary to consider that there is an unequal treatment of U.S. citizens by the federal government. This treatment is no longer justified because it is based on factional, xenophobic and racist precedents. Millions of United States citizens are considered second-class citizens for the simple fact of living in a territory. This fact subjects them to the arbitrariness and caprice of eminently racist precedents. Modern society cannot allow the existence of eternal colonialism for it is a position that alienates the anti-colonial spirit that founded the United States. Thus, *Balzac v. Porto Rico* must be removed from the jurisprudential canon for violating the human dignity of the American citizens living in the territories of the United States.

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version of the *Plessy* doctrine: the newly conquered lands were to be treated not only separately, but also *unequally*.

Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 Yale L. & Pol'y Rev. 57, 68 (2013); *see* Plessy v. Ferguson, 163 U.S. 537 (1896).