NOTES

JURY TRIALS AND THE TERRITORIAL INCORPORATION GAP

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In 1901, the Supreme Court held that the United States could control territorial land possessions indefinitely, without plans to eventually grant statehood. Over the next twenty-one years, the Court handed down what are infamously known as the Insular Cases*: a series of decisions that reaffirmed the distinctions between "incorporated territories"—those destined for statehood—and "unincorporated territories," the fates of which remained unclear. Artificially distinguishing these two types of territories, the* Insular Cases *carved out certain provisions of the U.S. Constitution that would not extend to the unincorporated territories. In reaching this conclusion, the Court created the territorial incorporation doctrine: the judicial means by which to incorporate (or limit) constitutional rights in the unincorporated territories.*

While the incorporation of constitutional rights against the unincorporated territories has largely stalled over the last century, incorporation of such rights against the states has emerged and solidified itself as an ever-expanding doctrine under the Fourteenth Amendment. Thus, as selective incorporation continues to march forward, rights now applicable against the states remain inapplicable against the territories—an asymmetrical result that propagates colonial attitudes, permits disparate treatment, and denies U.S. citizens in the unincorporated territories the full significance of their citizenship.

This asymmetry is the "territorial incorporation gap." This Note aims to bridge that gap by arguing that the Seventh Amendment's civil jury trial right should be incorporated in Puerto Rico. To that end, this Note proposes an unlikely and reluctant solution: judicial application of the territorial incorporation doctrine, the lasting vestige of the rightly maligned Insular Cases.

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"The basic right to a civil jury trial is a fundamental liberty interest . . . . The Seventh Amendment applies within the states, commonwealths, and territories of the United States."

— *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.* (D.P.R. 2014).[1]

"[T]he inescapable conclusion [is] that trial by jury in American Samoa as of the time when Jake King went to trial on the criminal charges here involved would not have been, and is not now, 'impractical and anomalous'."

— *King v. Andrus* (D.D.C. 1977).[2]

INTRODUCTION

At the turn of the twentieth century, the Supreme Court released a series of infamous opinions known as the *Insular Cases*. Littered with racist diatribes, the opinions addressed the legal status of the territories acquired in the aftermath of the Spanish–American War and, in doing so, laid the foundations of American imperialism. Guam, the Philippines, and Puerto Rico were placed in a legal purgatory: part of the United States, but with limited constitutional rights and privileges. Thus, these territories—labeled "unincorporated territor[ies]"[3]—were relegated to second-class

1. Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 275 (D.P.R. 2014), vacated and remanded, 798 F.3d 26 (1st Cir. 2015).

2. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

3. Rassmussen v. United States, 197 U.S. 516, 525 (1905); see also Christina Duffy Ponsa-Kraus, The *Insular Cases* Run Amok: Against Constitutional Exceptionalism in the Territories, 131 Yale L.J. 2449, 2452 n.2 (2022) (noting that "[t]he Court first used the term 'unincorporated' with respect to U.S. territories in *Rassmussen*").

status within our newfound colonial empire.[4] The result of this second-class status has been a constitutional rights gap, whereby territorial residents receive fewer protections than their state counterparts.

Along with many political and sovereign rights, two constitutionally secured individual rights have been neglected in the territories: the rights to civil and criminal jury trials. These protections, guaranteed by Article III,[5] the Sixth Amendment,[6] and the Seventh Amendment,[7] have been applied inconsistently (if at all) throughout the territories and mark two of the few rights not guaranteed by the Constitution to all territorial inhabitants.[8]

While territorial inhabitants have been consistently denied their legal equality, resistance to this jurisprudential thread has increased in recent years, perhaps most pointedly by Justice Neil Gorsuch, who has called for the *Insular Cases* to be overruled.[9] Similarly, the Department of Justice announced in July 2024 that it no longer considers the *Insular Cases* in its work.[10] These government actors join the list of academics who have long argued that the *Insular Cases* must be overturned to promote legal equality

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4. Today, after Filipino and Cuban independence and additional acquisitions, the current list of unincorporated territories is: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Developments in the Law: The U.S. Territories, 130 Harv. L. Rev. 1616, 1617 (2017).

5. U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

6. Id. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

7. Id. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

8. See Andrew Kent, The Jury and Empire: The *Insular Cases* and the Anti-Jury Movement in the Gilded Age and Progressive Era, 91 S. Cal. L. Rev. 375 app. (2018) (detailing how most constitutional rights were guaranteed in Puerto Rico either by constitutional incorporation, congressional legislation, local legislation, or military or executive order); id. at 382 ("[J]ury guarantees were the only rights which U.S. policymakers in Washington actually wanted to withhold from residents of unincorporated territories."); Ponsa-Kraus, supra note 3, at 2472 ("[N]early every right [the Supreme Court] considered [in the *Insular Cases* and their progeny] turned out to be fundamental in every unincorporated territory, with the exception of the federal rights to an indictment by a grand jury and a jury trial."); Michael D. Ramsey, The Originalist Case Against the *Insular Cases*, 77 Fla. L. Rev. 517, 589–90 (2025) (arguing that overruling the *Insular Cases* would extend the Constitution's criminal and civil jury trial rights to the unincorporated territories).

9. See United States v. Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring) ("[T]he time has come to recognize that the Insular Cases rest on a rotten foundation. And I hope the day comes soon when the Court squarely overrules them.").

10. See DOJ, Just. Manual § 1-21.100 (2024) ("[I]t is the Department's view that the racist language and logic of the Insular Cases deserve no place in our law. Department litigators can and should include similar statements, as appropriate, in filings addressing the Insular Cases."). While the second Trump Administration has not yet indicated if it intends to continue this practice, the policy remains a part of the DOJ *Justice Manual*. Id.

between the states and unincorporated territories.[11] Yet despite these efforts, the *Insular Cases* remain untouched to this day.

This territorial incorporation gap, whereby individual rights have been unequally incorporated in the states and territories, must be reconsidered and bridged. But given the staying power of the *Insular Cases*, it has become clear that both courts and litigating parties need to approach this issue from a new perspective to achieve lasting change. While much scholarship is focused on overturning the *Insular Cases*,[12] this Note argues that the solution to closing the rights gap between the states and the territories can be found in the unlikeliest of places: the *Insular Cases* themselves. Despite their imperial thrust, the *Insular Cases* and their progeny provide a clear set of judicial standards that are familiar to the constitutional incorporation analysis. This Note argues that courts and litigating parties should reconsider these judicial standards and use them to argue for the incorporation of constitutional rights in unincorporated territories.

The starting point should be jury trial rights. The incorporation of the Sixth or Seventh Amendments against the territories has not been examined by the Supreme Court since 1922, when it explained in *Balzac v. Porto Rico* that neither applied in Puerto Rico.[13] Since then, the Sixth Amendment's criminal jury trial right has been incorporated against the states and only one of the territories.[14] And while the Seventh Amendment

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11. See, e.g., Adriel I. Cepeda Derieux, To Lift a Dark Cloud: The *Insular Cases*' Stubborn Vitality, Their Place in Civil Rights Law, and the Need to Overrule Them, 56 Suffolk U. L. Rev. 503, 514–19 (2023) (arguing that the *Insular Cases* and the territorial incorporation doctrine should be overruled); Adriel I. Cepeda Derieux & Rafael Cox Alomar, Saying What Everyone Knows to Be True: Why Stare Decisis Is Not an Obstacle to Overruling the *Insular Cases*, 53 Colum. Hum. Rts. L. Rev. 721, 728–29 (2022) ("The *Insular Cases*—and, specifically, the territorial incorporation doctrine that they commonly stand for—meet every factor that the Supreme Court has said might merit the Court to overrule its own precedent."); Sarah M. Kelly, Toward Self-Determination in the U.S. Territories: The Restorative Justice Implications of Rejecting the *Insular Cases*, 28 Mich. J. Race & L. 109, 142–43 (2023) (noting that congressional overturning of the *Insular Cases* would be a "meaningful symbolic step" toward restorative justice); Ramsey, supra note 8, at 590–91 (arguing that the Constitution's text and relevant history contradict the Court's reasoning in the *Insular Cases*); Neil Weare, Why the *Insular Cases* Must Become the Next *Plessy*, Harv. L. Rev. Blog (Mar. 28, 2018), https://harvardlawreview.org/blog/2018/03/why-the-insular-cases-must-become-the-next-plessy/ [https://perma.cc/V5NW-CWZM]; see also Gary Lawson & Guy Seidman, The First "Incorporation" Debate, *in* The Louisiana Purchase and American Expansion, 1803–1898, at 19, 36 (Sanford Levinson & Bartholomew H. Sparrow eds., 2005) ("[T]he doctrine of the *Insular Cases* simply makes no sense.").

12. See supra note 11.

13. 258 U.S. 298, 304–07 (1922).

14. See Duncan v. Louisiana, 391 U.S. 145, 149 (1968) ("Because . . . trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment[] . . . ."); King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977) (incorporating the Sixth Amendment's jury trial right against American Samoa) .

has not yet been incorporated,[15] it is a question of when, not if, considering the Court's increasingly successful project of fully incorporating the Bill of Rights against the states.[16]

To incorporate the jury trial right in the remaining territories, the courts need only look to the 1977 case, *King v. Andrus*, in which the U.S. District Court for the District of Columbia applied the *Insular Cases* and held that the Sixth Amendment jury trial right applied in American Samoa.[17] Undisturbed to this day, *King* marks the only standing federal judicial opinion incorporating a jury trial right against an unincorporated territory.[18] To reach this conclusion, the district court did not deride the *Insular Cases*, nor did it repurpose them.[19] Rather, the court merely applied the judicial standard laid out in the *Insular Cases* and incorporated a constitutional right.

About forty years later, the District Court for the District of Puerto Rico issued a similar opinion in *Gonzalez-Oyarzun v. Caribbean City Builders, Inc.*, holding that the civil jury trial right was fundamental "within the states, commonwealths, and territories of the United States" and, therefore, was incorporated against both the territories and the states.[20] This opinion was "unsurprising[ly]"[21] overturned by the First Circuit

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15. See, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Cole, 251 U.S. 54, 56 (1919) (holding that the Seventh Amendment was not incorporated against the states).

16. See Richard Boldt & Dan Friedman, Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation, 76 Md. L. Rev. 309, 325 (2017) ("[B]y the early decades of the twenty-first century, virtually all of the protections in the Bill of Rights had been incorporated against the states."); see also Thomas v. Humboldt County, 223 L. Ed. 2d 141, 141 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (arguing that the Court should revisit incorporation of the Seventh Amendment but conceding that this case was an inadequate vehicle).

17. 452 F. Supp. at 17.

18. The U.S. District Court for the District of Puerto Rico incorporated the Seventh Amendment's civil jury trial right against Puerto Rico, but the First Circuit vacated the decision. Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 275 (D.P.R. 2014), vacated and remanded, 798 F.3d 26 (1st Cir. 2015).

19. The "repurposing project" argues that the *Insular Cases* should be maintained and built on to achieve two goals: "cultural accommodation and continued U.S. sovereignty." Ponsa-Kraus, supra note 3, at 2457 (emphasis omitted); see also Russell Rennie, Note, A Qualified Defense of the *Insular Cases*, 92 N.Y.U. L. Rev. 1683, 1707 (2017) (arguing that the *Insular Cases* can be repurposed to protect cultural traditions in the unincorporated territories). While this Note does argue that the *Insular Cases* can provide some utility, its goals are distinct from the repurposing project. The repurposing project suggests that the constitutional inequality inherent in the *Insular Cases* can be useful. This Note, however, argues that the *Insular Cases* can be used to escape constitutional inequality. Thus, while the repurposing project embraces the counterintuitive benefits of second-class legal status, this Note wholly rejects anything less than equality under the law.

20. 27 F. Supp. 3d at 280.

21. Arturo V. Bauermeister, LinkedIn, Civil Jury Trials in Puerto Rico Courts? No, Says the First Circuit. (Aug. 17, 2015), https://www.linkedin.com/pulse/civil-jury-trials-puerto-rico-courts-says-first-bauermeister/ [https://perma.cc/TUF4-VG3S].

Court of Appeals,[22] but the district court's opinion nonetheless shows a viable means by which courts can apply the terms of the *Insular Cases* to pursue what the *Insular Cases* sought to prevent: constitutional equality.

Many judges, litigators, and academics have rightfully lambasted the racist roots that undergird the *Insular Cases*.[23] This Note does not disagree with that impulse; every day that the *Insular Cases* remain good law is another day in which territorial inhabitants live in a state of "separate and unequal."[24] Yet identifying the "rotten foundation[s]" of the *Insular Cases*, it seems, is not enough.[25] Instead, this Note will argue that the best path forward is a reluctant embrace of the *Insular Cases*, which, if applied correctly to Puerto Rico, can bridge the inequality inherent in the territorial incorporation gap. And while it is outside the scope of this analysis, there is no reason why this argument could not be revised and applied to advocate for jury trial rights—among other constitutional rights—in other unincorporated territories.

This Note proceeds in three parts. Part I explores the *Insular Cases* and their historical backdrop. Departing from centuries of American expansionism, the annexation of the unincorporated territories in 1898 was the first major foray outside mainland North America.[26] The territories' geographic distances and cultural divides led politicians and the courts to squabble over how these territories should—or constitutionally must—be governed. Against this backdrop, the Supreme Court stumbled through the *Insular Cases*: by first inventing the territorial incorporation doctrine—under which certain constitutional protections would not apply in the territories—then reworking and reiterating this confused legal standard over decades.[27] Fifty years later, the Court would

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22. *Gonzalez-Oyarzun*, 798 F.3d at 30.

23. See, e.g., United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring) ("The Insular Cases have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law."); Consolidated Opening Brief for Petitioner Unión de Trabajadores de la Industria Eléctrica y Riego, Inc. at 59, Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020) (Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521), 2019 WL 4034611 ("The *Insular Cases* reflect outdated theories of imperialism and racial inferiority that have outlived their usefulness."); Ponsa-Kraus, supra note 3, at 2455 ("[T]he Court implicitly embraced the view that the theory of political legitimacy underlying the Constitution allowed for an exception, born of practical necessity and motivated by racism, permitting a representative democracy to govern people deemed inferior indefinitely without representation.").

24. Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal 5 (1985).

25. *Vaello Madero*, 142 S. Ct. at 1557 (Gorsuch, J., concurring).

26. See infra note 54 and accompanying text.

27. What exactly the *Insular Cases* legally stand for is debated even now. An early formulation of the constitutional question was whether the Constitution "followed the flag." Ponsa-Kraus, supra note 3, at 2466 (internal quotation marks omitted). Answers to this question have varied. Contemporary theorists argued across the spectrum: from "absolute congressional power, totally unfettered by other constitutional constraints" to the entire Constitution applying in full. Pedro A. Malavet, "The Constitution Follows the Flag . . . But

crystallize the main elements of the doctrine: For a right to be judicially incorporated against unincorporated territories, the right must be (1) "fundamental"[28] and (2) neither "impracticable" nor "anomalous."[29]

Part I then considers how the Court's application of the territorial incorporation doctrine has departed from its sibling project: state incorporation of constitutional rights. The territorial incorporation doctrine is territory-specific, considering the factual background of the territory where the right may be incorporated.[30] As a result, it is fruitful to compare state and territorial incorporation through the lens of Puerto Rico, which, despite its extensive colonial history and integration of Anglo-American common law features,[31] still features a glaring incorporation gap: the Sixth Amendment criminal jury trial right. And while the incorporation gap has remained static in recent years, recent case law suggests that the Seventh Amendment may be incorporated against the states,[32] which would only further widen the incorporation gap. Thus, Part I moves on to evaluate the jury trial right in Puerto Rico and in the states today.

Part II details how the incorporation gap, and specifically the denial of jury trial rights, adversely affects Puerto Rican residents. In civil cases,

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Doesn't Quite Catch Up With It": The Story of *Downes v. Bidwell*, *in* Race Law Stories 111, 135 (Rachel F. Moran & Devon Wayne Carbado eds., 2008). As it relates to this Note, it is clear from the case law that "fundamental limitations" on congressional action "certainly apply within unincorporated territories." Ponsa-Kraus, supra note 3, at 2453. So long as the *Insular Cases* exist, expanding the list of "fundamental" territorial rights is the central goal of this Note.

28. Downes v. Bidwell, 182 U.S. 244, 268 (1901) (plurality opinion) ("Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments . . . ."); id. at 291 (White, J., concurring) ("[T]here may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution.").

29. See Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring) ("[T]here is no rigid and abstract rule that Congress . . . must exercise [congressional power overseas] subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous."). As discussed in section I.A, some courts have evaluated both elements of this test, while others have held that the territorial incorporation doctrine is satisfied if either element is met. Given the uncertainty among the courts, this Note assumes the more restrictive formulation of the test—which requires that both elements be met—for the sake of completeness.

30. Balzac v. Porto Rico, 258 U.S. 298, 309–10 (1922) (explaining that constitutional jury trial rights had been incorporated in Alaska but not Puerto Rico or the Philippines in part because of "the needs or capacities of the people" and the historical lack of jury trials in the unincorporated territories (internal quotation marks omitted) (quoting Dorr v. United States, 195 U.S. 138, 148 (1904))).

31. See infra text accompanying notes 204–217.

32. See Thomas v. Humboldt County, 223 L. Ed. 2d 141, 142 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (noting that the Court "should confront its Seventh Amendment" incorporation denial "soon"); McDonald v. City of Chicago, 561 U.S. 742, 765 & n.13 (2010) (noting that the Court would likely find in favor of Seventh Amendment incorporation if the question were squarely before the Court).

plaintiffs are more likely to receive favorable results—such as larger awards and punitive damages—in front of a jury; therefore, the inability to present a civil case to a jury leads to unequal *and worse* outcomes.[33] Furthermore, the Puerto Rican Constitution guarantees only an incomplete right to a criminal jury trial: Only nine of twelve jurors are required to render a guilty verdict.[34] While the Puerto Rican Supreme Court has tried to artificially incorporate the Sixth Amendment's unanimity right into territorial jurisprudence,[35] the lack of territorial incorporation of the Sixth Amendment leaves criminal defendants' liberty interests at risk, even when a quarter of the jury believes them to be not guilty.

Part III argues that the solution is a clear statement from the Supreme Court incorporating jury trial rights against Puerto Rico. While overturning the *Insular Cases* may be a more direct path to constitutional equality for Puerto Ricans and other residents of the unincorporated territories, the Court does not have to unravel the *Insular Cases* to hold that jury trial rights apply to Puerto Rico. Instead, the Court could take this small step toward constitutional equality in the territories by taking the *Insular Cases* and their progeny on their face and applying the two relevant legal standards—"fundamental" and "impracticable and anomalous"—to the Seventh Amendment jury trial right in Puerto Rico.[36]

In sum, this Note argues that the *Insular Cases* themselves provide the opportunity to move toward constitutional equality in Puerto Rico, despite the attempts of Congress and the Court to relegate Puerto Ricans to second-class status. To make its argument, this Note will evaluate American influence on the Puerto Rican legal system, consider Puerto Rican legal history from before the Spanish–American War to the present, and

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33. See Harry Kalven, Jr. & Hans Zeisel, The American Jury 62–63 (1966) (finding that judges and juries disagree on verdicts in 19% of criminal cases and 22% of civil cases); Reid Hastie, David A. Schkade & John W. Payne, A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 Law & Hum. Behav. 287, 306 (1998) ("In the cases we studied individual jurors exhibited a persistent tendency to favor the plaintiffs, concluding that punitive damages were warranted when judges had concluded they were not. These verdicts are not anomalies; they were consistently obtained for the factual circumstances and with standard instructions on the law . . . ."); W. Kip Viscusi, Do Judges Do Better? [hereinafter Viscusi, Do Judges Do Better?], *in* Punitive Damages: How Juries Decide 186, 207 (Cass R. Sunstein, Reid Hastie, John W. Payne, David A. Schkade & W. Kip Viscusi eds., 2002) [hereinafter Punitive Damages] (noting that jurors were more "predisposed toward excessive awarding of punitive damages" than judges).

34. P.R. Const. art. II, § 11.

35. See Pueblo v. Torres Rivera, 204 P.R. Dec. 288, 300–01 (2020) (holding that the U.S. Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020)—in which the Court incorporated the Sixth Amendment's unanimity requirement against the states—applied to Puerto Rican criminal proceedings); Pueblo v. Santa Vélez, 177 P.R. Dec. 61, 65 (2009) (holding that *because* the Sixth Amendment's jury trial right applies against the states through the Due Process Clause of the Fourteenth Amendment, it *therefore* applies to Puerto Rico—thus circumventing the territorial incorporation doctrine).

36. Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring); Downes v. Bidwell, 182 U.S. 244, 268 (1901) (plurality opinion).

conclude that Puerto Ricans (almost all of whom are U.S. citizens[37]) are and always have been worthy of the right to jury trials. While this solution would not disturb the larger constitutional relationship between the United States and Puerto Rico—a relationship that must also be reevaluated—it would help bridge constitutional inequality in Puerto Rico and potentially all of the unincorporated territories.

I. THE TERRITORIAL INCORPORATION GAP DEFINED

A. *The* Insular Cases*, Their Context, and Their Progeny*

Under the Constitution's Territorial Clause,[38] Congress has retained plenary power to govern U.S. territories since the Founding.[39] Yet, the concept of American territories predates the Founding. Congress, still acting under the Articles of Confederation, passed the Northwest Ordinance—setting up a "temporary government" for American-owned lands "North West of the river Ohio"[40]—at the same time as the Founders assembled in Philadelphia to reinvent the American republic.[41] While the

37. The Jones–Shafroth Act of 1917 established qualifications for wholesale naturalization of Puerto Rican residents, many of whom accepted—perhaps reluctantly—Congress's offer of citizenship. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 5, 39 Stat. 951, 953 (1917); see also José Trías Monge, Puerto Rico: The Trials of the Oldest Colony in the World 79 (1997) [hereinafter Trías Monge, Oldest Colony] (noting that only 288 people refused American citizenship out of Puerto Rico's entire population, which during the implementation of the Jones–Shafroth Act was "well over one million" people).

38. See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

39. See Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (noting that "[t]he power of Congress over the Territories of the United States is general and plenary" and derives from the Territories Clause). But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("Nor, for that matter, does the [Territories] Clause, rightly understood, endow the federal government with plenary power even within the Territories themselves." (citing United States v. Vaello Madero, 142 S. Ct. 1539, 1554–55 (2022) (Gorsuch, J., concurring))); Neil Weare, Conservative Justices Question the Foundation of U.S. Colonial Rule, SCOTUSblog (Nov. 24, 2025), https://www.scotusblog.com/2025/11/conservative-justices-question-the-foundation-of-u-s-colonial-rule/ [https://perma.cc/2UL9-ANLH] (analyzing Justice Gorsuch's dissent from denial of certiorari in *Veneno*).

40. 32 Journals of the Continental Congress 1774–1789, at 334, 336–37 (Roscoe R. Hill ed., 1936) [hereinafter Northwest Ordinance]. The First Congress passed equivalent legislation five months into its first session. See An Act to Provide for the Government of the Territory Northwest of the River Ohio, ch. 8, 1 Stat. 50 (1789).

41. Compare Northwest Ordinance, supra note 40, at 334, 336–37 (noting that the Continental Congress passed the Northwest Ordinance on July 13, 1787), with Richard R. Beeman, The Constitutional Convention of 1787: A Revolution in Government, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/white-papers/the-constitutional-convention-of-1787-a-revolution-in-government [https://perma.cc/R65W-T9FV] (last visited Sep. 11, 2025) (noting that the Constitutional Convention took place from May 25, 1787, to September 17, 1878).

Constitution did not include the words "conquest" or "empire," the Framers left Philadelphia having structured a government capable of both—as was clear to leaders of the Founding Era.[42] Since then, the United States has increased through treaty and conquest from thirteen colonies occupying approximately 430,000 square miles[43] to fifty states today occupying approximately 3.5 million square miles.[44]

For more than one hundred years of expansion, every inhabited territory that the United States acquired would in time achieve statehood status.[45] This was intuitive: The point of expansion was for racially homogenous Americans to extend national borders.[46] Therefore, western American territories were not intended to be politically or legally distinct from the eastern states during their transitions from territories to states.[47]

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42. See The Federalist No. 1, at 33 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The subject [of these essays] speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world."); 2 Joseph Story, Commentaries on the Constitution of the United States § 1324 (Melville M. Bigelow ed., Bos., Little, Brown & Co. 5th ed. 1891) (1833) ("[T]he general government possesses the right to acquire territory, either by conquest, or by treaty . . . ."); Letter from Thomas Jefferson to James Madison (Apr. 27, 1809), https://founders.archives.gov/documents/Jefferson/03-01-02-0140 [https://perma.cc/YW3Z-WVN7] ("I am persuaded no constitution was ever before so well calculated as ours for extensive empire & self government."); see also Juan F. Perea, Denying the Violence: The Missing Constitutional Law of Conquest, 24 U. Pa. J. Const. L. 1205, 1238–41 (2022) (arguing that, despite not using the word "conquest," the Constitution included numerous clauses that facilitated American imperialism).

43. American War of Independence: Outbreak, Nat'l Army Museum, https://www.nam.ac.uk/explore/american-war-independence-outbreak [https://perma.cc/4UVQ-MMEM] (last visited Sep. 11, 2025).

44. Profiles: United States, U.S. Census Bureau, https://data.census.gov/profile [https://perma.cc/UPZ6-HJX7] (last visited Sep. 27, 2025) (including the District of Columbia, which occupies approximately sixty square miles).

45. See Ponsa-Kraus, supra note 3, at 2453 ("Before 1898, territories annexed by the United States were presumed to be on a path to statehood."). But see Ramsey, supra note 7, at 542–43 (arguing that while "many drafters and ratifiers [of the Constitution] likely assumed Congress would admit new states from the territories[,] . . . nothing in the text [of the Territories Clause] imposes a constitutional obligation on Congress"). For an early example of a territorial acquisition never destined for statehood, see infra note 54 (describing the authorization of U.S. occupation in the Guano islands).

46. See Sam Erman, Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire 12 (2019) (noting that Senators faced with the prospect of governing alongside Caribbean representatives "[e]quat[ed] Americanness and whiteness" and feared the inclusion of multiple Caribbean states that would add "people of the Latin race mixed with Indian and African blood" to the American electorate (internal quotation marks omitted) (quoting Cong. Globe, 41st Cong., 3d Sess. app. at 30 (1871) (statement of Sen. Schurz))); Ponsa-Kraus, supra note 3, at 2454 n.8 ("Earlier territories had nonwhite inhabitants as well, but on these contiguous lands, the United States pursued a combined policy of white settlement and forceful removal.").

47. While an utterly horrific moment in the Court's history, the Court said this clearly in its reprehensible *Dred Scott* decision. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 446 (1857) (enslaved party) ("There is certainly no power given by the Constitution to the

The Confederation Congress made this clear in the Northwest Ordinance by making numerous guarantees to inhabitants of the Northwest Territories[48] that would later appear in the Bill of Rights, including a prohibition against cruel and unusual punishments,[49] a guarantee of just compensation for government takings,[50] and the right to a trial by jury.[51] And as territorial advancements continued in the American West, federal courts stepped in to ensure that constitutional rights remained securely incorporated.[52]

Uniform constitutional protections in the territories ceased soon after the end of the Spanish–American War. In the negotiated peace, Spain agreed to cede Cuba, Guam, the Philippines, and Puerto Rico to the United States.[53] This was not the first time the United States had acquired territory outside the contiguous North American continent, but the territorial spoils of the Spanish–American War represented the United States' first true foray into extracontinental colonial expansion and subsequent imperial rule.[54]

Federal Government to establish or maintain colonies . . . 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 States."), superseded by constitutional amendment, U.S. Const. amend. XIV; see also James Lowndes, The Law of Annexed Territory, 11 Pol. Sci. Q., 672, 676 (1896) ("[T]he power to acquire new territory is derived from the power to admit new states into the Union.").

48. Northwest Ordinance, supra note 40, at 339–417.

49. Compare id. at 340 (outlawing cruel and unusual punishments in the Northwest Territories), with U.S. Const. amend. VIII (prohibiting cruel and unusual punishments).

50. Compare Northwest Ordinance, supra note 40, at 340 (requiring full compensation in the Northwest Territories for the taking of property or services), with U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

51. Compare Northwest Ordinance, supra note 40, at 340 (guaranteeing the right to trial by jury to inhabitants of the Northwest Territories), with U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); see also id. amends. VI, VII (guaranteeing criminal and civil jury trials).

52. See Thompson v. Utah, 170 U.S. 343, 346 (1898) (noting that the Seventh Amendment's civil jury trial right applied in the territories); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850) (same); see also Reynolds v. United States, 98 U.S. 145, 162 (1878) ("Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned.").

53. Treaty of Peace Between the United States and the Kingdom of Spain, Spain–U.S., arts. I–III, Dec. 10, 1898, 30 Stat. 1754.

54. Forty-two years before the post–Spanish–American War annexations, Congress passed the Guano Islands Act of 1856, permitting U.S. citizens to occupy any uninhabited island that contained deposits of guano, a kind of fertilizer. An Act to Authorize Protection to Be Given to Citizens of the United States Who May Discover Deposites of Guano, ch. 164, 11 Stat. 119, 119 (1856). This led to the American occupation of nearly one hundred uninhabited islands. Evan Garcia, How Guano Islands Helped Build an American Empire, WTTW (Apr. 16, 2019), https://news.wttw.com/2019/04/16/how-guano-islands-helped-build-american-empire [https://perma.cc/AU23-ER89]. One of these islands, the Midway

Divisive political and legal questions immediately arose: What were these new territories? And how would American law apply to them?[55] The Supreme Court quickly intervened to begin answering these and other questions in two cases, both decided on the same day in 1901: *De Lima v. Bidwell*[56] and *Downes v. Bidwell*.[57] In these cases, a fractured Court struggled to articulate a clear position. The issue before the Court in *De Lima* was whether Puerto Rico was a domestic territory or a foreign country after the Treaty of Paris. In a 5-4 decision, the Court held that "Porto Rico [is] not a foreign country . . . but a territory of the United States."[58] This settled the "in or out" question, confirming that Puerto Rico was "in" the United States' sovereign domain.

But if Puerto Rico was a domestic territory, what was its relationship with the United States? Was Puerto Rico truly *in* the United States legally and politically, or merely owned by it? Would it be governed like the Northwest Territories and the many mainland territories that followed? And most importantly, would Puerto Rico eventually become a state like the similarly situated territories before it?

Without wasting a day, the Court dispelled the notions of guaranteed statehood and equal constitutional governance in *Downes*. At issue in *Downes* was whether the Uniformity Clause and the No Preferences Clause were applicable in Puerto Rico, given that Puerto Rico was no longer a foreign country under *De Lima*.[59] In a plurality opinion joined only by its

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Atoll, which would become a key battleground in World War II, was formally annexed in 1867. Homer C. Votaw, Midway—The North Pacific's Tiny Pet, U.S. Naval Institute: Proceedings, Nov. 1940, https://www.usni.org/magazines/proceedings/1940/november/midway-north-pacifics-tiny-pet (on file with the *Columbia Law Review*). But the Midway Islands today comprise 2.4 square miles of land and were ostensibly uninhabited in 1867—incomparable to the combined size and population of Cuba, Guam, the Philippines, and Puerto Rico in 1898. Midway Islands, Britannica (Dec. 5, 2025), https://www.britannica.com/place/Midway-Islands (on file with the *Columbia Law Review*).

55. While it took the Court less than three years to begin the project of answering these questions, legal scholars had already begun to unpack them in the immediate aftermath of the Spanish–American War. See Juan R. Torruella, Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism", 131 Harv. L. Rev. Forum 65, 69 n.24 (2018), https://harvardlawreview.org/forum/vol-131/a-reply-to-the-notion-of-territorial-federalism/ [https://perma.cc/L2YZ-53GM] (detailing five articles published in the *Harvard Law Review* immediately after the United States' post–Spanish–American War annexation in which legal scholars debated how the Constitution would apply to the country's new territories).

56. 182 U.S. 1 (1901).

57. 182 U.S. 244 (1901).

58. *De Lima*, 182 U.S. at 200.

59. *Downes*, 182 U.S. at 248–49 (plurality opinion). The Uniformity Clause of the Constitution states: "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States . . . ." U.S. Const. art. I, § 8, cl. 1. The No Preferences Clause states: "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another." Id. art. I, § 9, cl. 6. These constitutional provisions were particularly important to U.S. interests in the immediate aftermath of the United

author,[60] the Supreme Court held that these constitutional provisions were not applicable. While the acquisition of Puerto Rico was "solely a political question" over which "[p]atriotic and intelligent men may differ," the Court held that Puerto Rico was "not a part of the United States" for purposes of the provision at issue unless "Congress shall so direct [it]"[61]—a nod to Congress's plenary authority under the Territorial Clause.[62] In this system, Puerto Rico and the other newly acquired territories existed in political and legal purgatory. For some purposes—the Court struggled to say which exactly—the territories were part of the United States. [63] But according to the plurality, territorial inhabitants could only benefit from the rights secured by the U.S. Constitution if Congress was willing to grant those rights to these territorial residents.[64]

Infamously, the plurality opinion hurled racist epithets at the inhabitants of the territories, suggesting that they were "savages" and an "alien race[], differing from us in religion, customs, laws, methods of taxation, and modes of thought."[65] This cultural divide, the Court argued, meant that "the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible."[66] Thus, the opinion provides insight into the racism and fearmongering that guided the

States' acquisition of Puerto Rico, considering Puerto Rico's strategic value for the mainland's economic and military interests. Marisabel Brás, The Changing of the Guard: Puerto Rico in 1898, *in* World of 1898: International Perspectives on the Spanish American War, Libr. Cong.: Rsch. Guides (2022), https://guides.loc.gov/world-of-1898/puerto-rico-overview [https://perma.cc/PB68-6FG4]. In *Downes*, a merchant imported goods from Puerto Rico in a New York port and was levied $659.35. *Downes*, 182 U.S. at 247 (plurality opinion). Before the Court was the question of whether Congress could impose a separate tariff rate—which generally amounted to a 25% increase—for goods shipped from a Puerto Rican port to a mainland port. See id. at 247–48; see also An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes, ch. 191, 31 Stat. 77, 77–78 (1900); Tariff for Puerto Rico: House Committee Decides for Duties on a 25 Per Cent. Basis., N.Y. Times, Feb. 3, 1900, at 6, https://timesmachine.nytimes.com/timesmachine/1900/02/03/issue.html (on file with the *Columbia Law Review*).

60. *Downes*, 182 U.S. at 247 (plurality opinion).

61. Id. at 279, 286–87.

62. But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) (arguing that Congress's authority over the territories is not plenary).

63. See *Downes*, 182 U.S. at 277 (plurality opinion) ("We do not wish . . . to be understood as expressing an opinion how far the bill of rights contained in the first eight amendments is of general and how far of local application.").

64. In the case of Puerto Rico, Congress has enacted legislation granting the territory a constitutional right or power only two times. See An Act to Amend the Organic Act of Puerto Rico, ch. 490, sec. 7, § 2, 61 Stat. 770, 772–73 (1947) (codified at 48 U.S.C. § 737 (2018)) (applying the Article IV Privileges and Immunities Clause to Puerto Rico); An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 2, 39 Stat. 951, 951–52 (1917) (incorporating numerous constitutional rights, including due process, a prohibition on government takings without just compensation, and equal protection under the laws).

65. *Downes*, 182 U.S. at 279, 287 (plurality opinion).

66. Id. at 287.

Court—and perhaps the nation[67]—when it came to governing the territories.

Nevertheless, the Court's approach, which centered primarily on whether Congress had expressly incorporated a constitutional provision through its authority under the Territorial Clause, did not prevail. Instead, Justice Edward Douglass White's concurrence would become the Court's framework for approaching federal law in the newly acquired territories. Justice White noted that the United States was familiar with territorial expansion—starting with the Northwest Ordinance and continuing through more than a hundred years of expansion.[68] Yet, as new territories joined the Union, Congress quickly acted to incorporate them into statehood. The key question in these instances, then, was whether Congress had expressly chosen to incorporate the given territory in its organic act.

The most recent example cited by Justice White was Hawaii, which had been annexed in 1898 and "given the status of an incorporated territory" in 1900 by an act of Congress.[69] Unlike Hawaii, Justice White explained, Congress had not granted Puerto Rico incorporated status in its organic act.[70] As a result, Puerto Rico would remain unincorporated,[71] and Congress would have no obligation to ensure constitutional protections within the now-unincorporated territory[72]—an obligation the government maintained in the incorporated territories at the time.[73] Thus,

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67. See Kent, supra note 8, at 452 (noting that "racism and cultural chauvinism" influenced U.S. policymakers in their attempts to more widely limit the role of juries).

68. *Downes*, 182 U.S. at 304 (White, J., concurring).

69. Id. at 305 (emphasis omitted).

70. See id. at 304–05, 341–42 (explaining that Hawaii had been "given the status of an incorporated territory" but that Puerto Rico "had not been incorporated" (emphasis omitted)); see also An Act Temporarily to Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, 31 Stat. 77 (1900).

71. The term "unincorporated territory" is not used in *Downes*. Rather, the Court would coin the phrase four years later in Rassmussen v. United States, 197 U.S. 516, 525 (1905).

72. *Downes*, 182 U.S. at 305–06 (White, J., concurring).

73. See, e.g., New Mexico Organic Act, ch. 49, § 17, 9 Stat. 446, 447, 452 (1850) (implying that New Mexico would eventually become a state and that, until then, "the Constitution . . . shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States"). The Supreme Court did, however, issue an interesting decision in Hawaii v. Mankichi, 190 U.S. 197 (1903). In that case, the defendant was indicted after the U.S. annexation of Hawaii but before its incorporation in 1900. Id. at 209–11, 234. Despite Hawaii's subsequent incorporation, the Court applied the fundamentality test, holding that the grand jury and unanimous criminal jury trial rights of the Fifth and Sixth Amendments "are not fundamental in their nature, but concern merely a method of procedure." Id. at 217–18. Four Justices dissented, with Chief Justice Melville Fuller writing that the rights "to be free from prosecution for crime unless after indictment by a grand jury, and . . . to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve" were "fundamental rights of every person living under the sovereignty of the United States." Id. 226 (Fuller, C.J., dissenting). Had Chief Justice Fuller obtained one more vote, jury rights may have been incorporated against the territories in full

Justice White's concurrence both permitted and empowered American imperialism by creating a new legal status: the unincorporated territory.[74] And unlike the plurality opinion, which focused on whether a particular constitutional provision had been congressionally incorporated, Justice White's concurrence purported to define the relationship between the entire Constitution, the unincorporated territories, and their long-term political and legal futures in the United States.[75]

Thus, through two opinions released in a single day, the Supreme Court laid the foundations for the most ambitious chapter of American imperialism to date. The United States could own domestic territories that were categorically different from territories on track for statehood, and the inhabitants of these newly acquired lands could be governed without full constitutional protections. Over the next twenty years, the Supreme Court continued down this path, consistently distinguishing the unincorporated territories' inhabitants from those in both mainland states and incorporated territories[76] in what would, over time, comprise the *Insular Cases*.[77]

(although this holding was arguably cabined to incorporated territories). See id. at 225–26 (noting that Congress had incorporated Hawaii in 1900 and that its citizens were entitled to the "[f]undamental rights of every person living under the sovereignty of the United States," which included the rights to a grand jury indictment and unanimous jury verdicts).

74. Justice White's opinion essentially adopted one of the frameworks initially proposed in a series of legal articles published in the aftermath of the Spanish–American War. See Abbott Lawrence Lowell, The Status of Our New Possessions—A Third View, 13 Harv. L. Rev. 155, 176 (1899) (arguing that territories acquired with the intention of being "a part of the United States" must receive full constitutional protections, while territories "so acquired as not to form part of the United States" need not receive full constitutional protections); supra note 55 and accompanying text.

75. *Downes*, 182 U.S. at 344 (White, J., concurring) (affirming as constitutional that "the sovereignty of the United States may be extended over foreign territory to remain paramount until in the discretion of the political department of the government of the United States it be relinquished").

76. Including Hawaii and Alaska, which would attain statehood in the mid-twentieth century. The Last Time Congress Created a New State, Nat'l Const. Ctr.: Blog (Mar. 12, 2024), https://constitutioncenter.org/blog/the-last-time-congress-created-a-new-state-hawaii [https://perma.cc/W6X8-33VW].

77. There is scholarly "disagreement" about which rulings constitute the *Insular Cases*. Ponsa-Kraus, supra note 3, at 2460 n.32. Judge Juan R. Torruella argued that only six cases, all decided in 1901, should be included: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. United States, 182 U.S. 221 (1901); Dooley v. United States, 182 U.S. 222 (1901); Armstrong v. United States, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244; and Huus v. N.Y. & P.R. Steamship Co., 182 U.S. 392 (1901). Juan R. Torruella, One Hundred Years of Solitude: Puerto Rico's American Century, *in* Foreign in a Domestic Sense: Puerto Rico, the American Expansion, and the Constitution 241, 248 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Foreign in a Domestic Sense]. Puerto Rico Supreme Court Chief Justice José Trías Monge included three more cases: Dooley v. United States, 183 U.S. 151 (1901); Fourteen Diamond Rings v. United States, 183 U.S. 176 (1901); and Crossman v. United States, 182 U.S. 221 (1901). José Trías Monge, Injustice According to Law: The *Insular Cases* and Other Oddities, *in* Foreign in a Domestic Sense, supra, at 226, 239 n.1. Professor Efrén Rivera Ramos has noted that scholars have expanded past the 1901 decisions to include

Among these denied liberties was the right to a trial by jury. In *Dorr v. United States*, the Court held that the right to a jury trial in a criminal case did not apply in the Philippines.[78] Relying on a case that had been decided the prior year—*Hawaii v. Mankichi*[79]—the Court reaffirmed two principles of the nascent territorial incorporation doctrine: For a constitutional right to be applicable in the U.S. territories, the right in question must be "fundamental"[80] to the jurisdiction in question[81] or, alternatively, Congress

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numerous cases related to territorial legal issues decided over the following two decades: Hawaii v. Mankichi, 190 U.S. 197 (1903); Gonzales v. Williams, 192 U.S. 1 (1904); Kepner v. United States, 195 U.S. 100 (1904); Dorr v. United States, 195 U.S. 138 (1904); Mendezona v. United States, 195 U.S. 158 (1904); Rassmussen v. United States, 197 U.S. 516 (1905); Trono v. United States, 199 U.S. 521 (1905); Grafton v. United States, 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); New York ex rel. Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. United States, 221 U.S. 325 (1911); Ochoa v. Hernandez, 230 U.S. 139 (1913); Ocampo v. United States, 234 U.S. 91 (1914); and Balzac v. Porto Rico, 258 U.S. 298 (1922). Efrén Rivera Ramos, Deconstructing Colonialism: The "Unincorporated Territory" as a Category of Domination, *in* Foreign in a Domestic Sense, supra, at 104, 115 n.4; see also Christina Duffy Burnett, A Note on the *Insular Cases*, *in* Foreign in a Domestic Sense, supra, at 389, 389 (noting that scholarly literature varies on which cases comprise the *Insular Cases*).

This Note refers to the *Insular Cases* as Professor Rivera Ramos's expanded list of cases. While overbreadth is the enemy of precision, the consistent reaffirmation of the *Insular Cases* over two decades is instructive. This passage of time shows the Court evolving past its early fractured roots and eventually coalescing around Justice White's framework for analyzing territorial legal issues. This thread of case law shows how notions of an American empire gradually seeped into and solidified the Court's understanding of the extraterritorial Constitution—one that allowed and embraced American imperialism.

78. 195 U.S. at 138.

79. 190 U.S. at 197.

80. E.g., *Dorr*, 195 U.S. at 148.

81. Ponsa-Kraus, supra note 3, at 2487–89; see also id. at 2453 ("[F]undamental limitations certainly apply within unincorporated territories, though what counts as 'fundamental' may vary from one unincorporated territory to the next."); Robert A. Katz, Comment, The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories, 59 U. Chi. L. Rev. 779, 796–97 (1992) (noting that lower courts' application of the Constitution in the territories "may vary from territory to territory"). Lower courts have struggled to consistently interpret this element in recent years. Citing *Dorr* and *Downes*, the U.S. courts of appeals have interpreted the "fundamental" requirement to "extend[] only to the narrow category of rights and 'principles which are the basis of *all* free government.'" Tuaua v. United States, 788 F.3d 300, 308 (D.C. Cir. 2015) (quoting *Dorr*, 195 U.S. at 147); see also Fitisemanu v. United States, 1 F.4th 862, 878 (10th Cir. 2021) ("[O]nly those 'principles which are the basis of all free government' establish the rights that are 'fundamental' for Insular purposes." (quoting *Dorr*, 195 U.S. at 147)); Wabol v. Villacrusis, 958 F.2d 1450, 1460 (9th Cir. 1992) (articulating the same formulation of the fundamentality standard). While Justice Gorsuch characterized these decisions as an example of how lower courts "feel constrained to apply [the *Insular Cases*'] terms," United States v. Vaello Madero, 142 S. Ct. 1539, 1555 (2022) (Gorsuch, J., concurring), what the lower courts are really doing is mistakenly broadening the "fundamental" requirement. In *Dorr*, which both the *Tuaua* and *Fitisemanu* courts cite as the basis for their "all free government" standard, the Court explained that fundamental rights would depend on "the needs or capacities of the people" in question. *Dorr*, 195 U.S. at 147–48. While this paternalistic formulation is but another condescending, racist way to distinguish the unincorporated territories, it is still binding on lower courts. See *Vaello Madero*, 142 S. Ct. at

must have expressly incorporated the right against a given territory.[82] Again implying that territorial inhabitants were "savages,"[83] the Court concluded that the jury trial right was neither fundamental to the law in the Philippines—previously governed by Spanish civil law, which does not guarantee a jury trial[84]—and that Congress had not expressly granted the jury trial right.[85] Therefore, the Court held the criminal jury trial right guaranteed by the Sixth Amendment did not apply in the Philippines.[86] Nearly twenty years later, the Court would cite and reaffirm *Dorr* as applied to Puerto Rico in *Balzac v. Porto Rico*, expanding the argument to include the Seventh Amendment jury trial right for civil cases.[87]

1555 (Gorsuch, J., concurring). And in *Duncan v. Louisiana*, the Supreme Court explained that the Fourteenth Amendment incorporation doctrine—a distinct but related theory of constitutional incorporation—properly understood, considers the context of the relevant community. 391 U.S. 145, 149 n.14 (1968); see also Ponsa-Kraus, supra note 3, at 2488 ("An accurate reading of *Duncan* would have recognized that *Duncan* itself requires a fact-based, contextual inquiry into whether a right is fundamental in the context of an actual legal system."). This further underscores that the fundamentality question is one that considers local conditions, such as the territory's legal system.

Instead of muddying what is already an "uncomfortable inquiry," *Fitisemanu*, 1 F.4th at 878, courts should return to the correct formulation of *Dorr*'s "fundamental" element: an inquiry that depends on characteristics and "capacities" of the territory's legal system. *Dorr*, 195 U.S. at 147–48; see also infra text accompanying notes 201–204. This type of inquiry also conveniently mirrors the impracticable-and-anomalous element, which requires a territory-specific analysis. See supra note 30; infra note 100 and accompanying text.

82. See *Dorr*, 195 U.S. at 148 (holding that Congress can establish the right to trial by jury through two channels, one of which is "affirmative legislation").

83. Id.

84. See Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published] (B.O.E. 1889, 4763) (Spain). The system of law played a role in other early *Insular Cases*. In *Hawaii v. Mankichi*, the Court grappled with the fact that "the common law of England had been adopted in Hawaii" in 1897. 190 U.S. 197, 217 (1903). The Court, however, noted that Hawaii—which featured no grand juries and nonunanimous petit juries—had reserved the right to maintain its criminal procedures when it adopted a common law system. Id. at 197. Ultimately, the Court determined unanimous juries and grand jury indictments were not fundamental, despite four Justices dissenting. Id. at 218, 225–26. The relevance of legal systems in the fundamentality analysis is explored in section III.A.

85. See *Dorr*, 195 U.S. at 148–49.

86. Id.

87. See Balzac v. Porto Rico, 258 U.S. 298, 304–07, 313 (1922) ("[I]t is . . . clearly settled that [the Sixth and Seventh Amendments] do not apply to territory belonging to the United States which has not been incorporated into the Union." (citing *Dorr*, 195 U.S. at 145; *Mankichi*, 190 U.S. at 197)). The Seventh Amendment question was not squarely before the Court in *Balzac* and, therefore, is nonbinding dicta. See id. at 304 (noting that the Court was addressing whether "the defendant had been denied his right as an American citizen under the Sixth Amendment to the Constitution"). Furthermore, the relevance of *Balzac* is debatable. While the Court has never overruled it, *Balzac* was decided nearly fifty years before *Duncan v. Louisiana*, in which the Court held that the Sixth Amendment jury trial right is "fundamental to the American scheme of justice" and, therefore, incorporated the right against the states. 391 U.S. 145, 149 (1968). While state incorporation doctrine and

The *Insular Cases* then collected dust for more than a quarter century, rarely applied or expounded. This changed, however, thirty-five years later, when a concurrence breathed new life into the territorial incorporation doctrine. In *Reid v. Covert*, two women were accused of killing their husbands while living on American military bases abroad.[88] In each instance, they were tried by a military court without a jury trial.[89] The two defendants were convicted, and they appealed their convictions on the basis that they had not been afforded their jury trial rights.[90]

A majority of the Court agreed that the convictions needed to be overturned, but the Court could not articulate a majority position, resulting—much like in *Downes*—in a fractured set of opinions.[91] The plurality chose to distinguish the *Insular Cases*, instead focusing on the Constitution's applicability on military bases and ignoring the consolidated cases' potential effect on territorial jurisprudence.[92] Rather, as pertains to the territorial incorporation doctrine, the relevant opinion came from Justice John Marshall Harlan,[93] who recentered the then-languishing *Insular Cases*.[94]

According to Justice Harlan, the *Insular Cases* did not stand for the proposition that the "safeguards of the Constitution are never operative" outside of the United States mainland.[95] Rather, the cases stood for what he considered to be a less sweeping proposition: that "there are provisions

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territorial incorporation doctrine involve different inquiries, whether *Duncan* applies in Puerto Rico is an open question that is discussed in section I.C.1.

88. 354 U.S. 1, 3–4 (1957) (plurality opinion).

89. Id.

90. Id. at 4–5.

91. Interestingly, the Court had originally upheld the convictions in two 1956 majority opinions and held that military law would apply to Americans living on military bases abroad. Reid v. Covert, 351 U.S. 487, 488 (1956); Kinsella v. Krueger, 351 U.S. 470, 473 (1956). But the Court granted a motion for rehearing in Reid v. Covert, 352 U.S. 901 (1956) (per curiam), leading to their reversals. *Reid*, 354 U.S. at 5 (plurality opinion).

92. See *Reid*, 354 U.S. at 40 ("We should not break faith with this Nation's tradition of keeping military power subservient to civilian authority, a tradition which we believe is firmly embodied in the Constitution.").

93. Justice John Marshall Harlan II—rather than his grandfather, Justice John Marshall Harlan. Both affected territorial jurisprudence: The older Justice Harlan dissented in Downes v. Bidwell, 182 U.S. 244, 375 (1901) (Harlan, J., dissenting). On one account, the elder Justice Harlan "expressed his firm conviction that the [*Insular Cases*] were fundamentally wrong in principle, and stated that he intended to dissent from every similar decision by the majority of his brethren." Frederic R. Coudert, The Evolution of the Doctrine of Territorial Incorporation, 26 Colum. L. Rev. 823, 842 (1926). Five months before he died, Justice Harlan dissented in *Dowdell v. United States*, in which the Court reaffirmed that neither the grand jury or petit criminal jury were required in the Philippines. 221 U.S. 325, 332 (1911) (Harlan, J., dissenting).

94. As Justice Harlan noted in his concurrence, "[The plurality opinion] in effect discards . . . the *Insular Cases* as historical anomalies. I believe that those cases, properly understood, still have vitality . . . ." *Reid*, 354 U.S. at 67 (Harlan, J., concurring in the judgment).

95. Id. at 74.

in the Constitution which do not *necessarily* apply in all circumstances in every foreign place."[96] Using *Balzac* as an example, Justice Harlan explained that constitutional rights need not apply in places where their application would be "impracticable and anomalous,"[97] a standard that would require a court to consider "the particular local setting, the practical necessities, and the possible alternatives [that] are relevant to a question of judgment."[98]

While courts have continued to wrestle with and update the territorial incorporation doctrine since *Reid*, the Court has never drastically altered the framework.[99] Therefore, the general steps for adjudicating territorial incorporation doctrine cases can be synthesized as follows. First, courts should ask whether Congress affirmatively endowed the given territory with the right in question pursuant to its Territorial Clause authority. If the answer is yes, the issue is not constitutional but statutory, and the court should instead evaluate the extent to which Congress has granted the constitutional right in question through statute. If not, courts must decide

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96. Id.

97. Id. at 74–76.

98. Id. at 75. Ironically, despite Justice Harlan's claim that he was narrowing the *Insular Cases*, id. at 67 (referring to the plurality's interpretation of the *Insular Cases* as "sweeping"), the "impracticable and anomalous" standard arguably expanded the territorial incorporation doctrine. The plurality opinion in *Downes* suggested that the list of fundamental rights was expansive. See Ponsa-Kraus, supra note 3, at 2468; id. at 2472 ("What counts as fundamental depends on the specific territory at issue, but the *Insular Cases* and their progeny repeatedly arrived at the same answer: nearly every right they considered turned out to be fundamental in every unincorporated territory . . . ."); see also *Downes*, 182 U.S. at 282–83 (plurality opinion) (indicating that the rights to free speech, free exercise, access to courts, equal protection, due process, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishment were fundamental rights). Yet, by establishing the "impracticable and anomalous" standard, Justice Harlan gave future Justices an *additional* mechanism by which to evaluate extraterritorial constitutional rights. Compare United States v. Verdugo-Urquidez, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (applying only the impractical and anomalous test to argue that the Fourth Amendment's warrant requirement did not apply to a search of a foreign resident's house by federal authorities), with Fitisemanu v. United States, 1 F.4th 862, 877–81 (10th Cir. 2021) (applying *both* the fundamental test and the impractical and anomalous test to hold that birthright citizenship as guaranteed by the Fourteenth Amendment did not apply in American Samoa), and Tuaua v. United States, 788 F.3d 300, 308, 310 (D.C. Cir. 2015) (same). Thus, Justice Harlan did not rework the territorial incorporation doctrine as much as he added to it.

99. The Court did reconsider the impracticable and anomalous test for extraterritorial application of the Constitution in Boumediene v. Bush, 553 U.S. 723 (2008). In that case, the Court measured impracticability and anomaly by asking three questions: (1) Is the person claiming their rights a U.S. citizen? (2) Where did the activity in question take place? (3) What are the practical obstacles inherent in applying the asserted right? Id. at 766. These questions are not particularly insightful for the incorporation of jury trial rights in Puerto Rico. Puerto Ricans are American citizens, and for a legal proceeding to occur, the action must have some close connection to the forum. Thus, the first two questions will almost always favor application of the right. Finally, the third question does not meaningfully depart from the *Reid* test. As a result, despite being a critical step in extraterritorial constitutionalism, *Boumediene* adds little to this discussion.

whether the right is fundamental within the given territory and whether it would be either impracticable or anomalous to incorporate the right against the territory.[100] Under this test, rights that are fundamental and neither impracticable nor anomalous must be incorporated against the unincorporated territories under the territorial incorporation doctrine. This is the framework against which a territorially incorporated jury trial right claim would be resolved.

B. *Constitutional Incorporation in the States and Puerto Rico*

While the territorial incorporation doctrine's two-step analysis emanates from the Territorial Clause at step one and the Court's interpretation of U.S. colonial history and constitutional structure at step two, the doctrine's not-so-distant cousin—state incorporation doctrine—is rooted in the Fourteenth Amendment's Due Process Clause.[101] In many ways, these doctrines overlap. For example, both analyses evaluate whether a particular right is fundamental,[102] and if it is, then this fundamental

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100. There is certainly overlap between the fundamentality and impracticable and anomalous analyses, in part because Justice Harlan's test was meant to rework and revitalize the *Insular Cases*' original framework. See *Reid*, 354 U.S. at 67 (Harlan, J., concurring in the judgment) ("I believe [the *Insular Cases*], properly understood, still have vitality . . . ."); *Tuaua*, 788 F.3d at 308, 310 (holding that the Citizenship Clause was not fundamental in American Samoa and would represent an anomalous application of a constitutional right). But applying both elements—fundamental *and* impracticable or anomalous—appears counterintuitive: How could a right be fundamental but nevertheless impracticable or anomalous? The answer lies in the Court's definition of "fundamentality"—which the Court has tied to the practice's connection to "Anglo-American" common law principles, Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968)—in contrast to its fact-intensive impracticable-and-anomalous test. With this framework, one could imagine a society that has widely adopted an American common law system but has rarely, if ever, protected a particular individual right traditionally protected by common law jurisdictions. This tension is explored in greater depth in Part III. And regardless of the tension, the analysis in Part III will, for the sake of completeness, assume that the fundamental and impracticable and anomalous tests must both be met to satisfy the territorial incorporation doctrine. See infra section III.A.

101. U.S. Const. amend. XIV, § 1, cl. 3 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."). The Due Process Clause overturned *Barron v. City of Baltimore*, which held that the Takings Clause did not apply against action by the states because the first eight amendments "contain no expression indicating an intention to apply them to the state governments." 32 U.S. (7 Pet.) 243, 250 (1833).

102. While both tests use the same word—fundamental—it is worth exploring their jurisprudential roots. In 1823, Justice Bushrod Washington, riding circuit in Pennsylvania, wrote in *Corfield v. Coryell* that the privileges and immunities discussed in Article IV of the Constitution are those "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign." 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). After the ratification of the Fourteenth Amendment, the Supreme Court cabined this analysis in *The Slaughterhouse Cases* to apply against the federal government only. 83 U.S. (16 Wall.) 36, 37 (1872). But the Court soon began to ask whether fundamental rights included in the Bill of Rights applied against the states in the context of the Due Process Clause and state

character supports incorporation of the right. And whether a right should be incorporated under either doctrine requires a fact-based, contextual analysis, rather than an abstract discussion.[103]

Yet their separate constitutional roots have led to distinct applications of the two doctrines. As the Court articulated in *Duncan v. Louisiana*, determining whether a right is fundamental requires the court to ask whether the right is "necessary to an *Anglo-American* regime of ordered liberty."[104] This is distinct from the inquiry courts conduct for territorial incorporation, in which the court is tasked with determining whether the right is fundamental within the relevant territory.[105]

As a result of this conceptual disparity, individual liberties protected by the Bill of Rights have been incorporated against the states at different

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incorporation. See U.S. Const. amend. XIV (Due Process Clause). In *Hurtado v. California*, the defendant argued that the denial of his right to a grand jury indictment violated the Fourteenth Amendment's Due Process Clause, which protects all rights that "lie at the foundation of all free government." 110 U.S. 516, 521 (1884). In rejecting Hurtado's claim, the Court explained that a grand jury indictment was not one of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Id. at 535. While the *Hurtado* Court did not incorporate the right, its framework enabled the twentieth century's era of expansive selective incorporation. See infra note 106.

Fundamentality also existed in the territorial context before the *Insular Cases*. In *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, the Supreme Court wrote that Congress could not abridge "fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions." 136 U.S. 1, 44 (1890). The Court applied this somewhat obstruse standard, however, to unequivocally explain that the Sixth and Seventh Amendment jury trial rights both applied to the territories. Thompson v. Utah, 170 U.S. 343, 346–47 (1898); see also Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1850). Despite "no longer [being] an open question" in 1898, *Thompson*, 170 U.S. at 346 (citing Springville v. Thomas, 166 U.S. 707 (1897); Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897); *Webster*, 52 U.S. at 460), the *Downes* Court called this line of jurisprudence "of little value" in 1901. *Downes,* 182 U.S. at 269.

Thus, despite similar wording and similar goals—the protection of individual liberties against nonfederal actors—the Fourteenth Amendment's incorporation doctrine has grown ever expansive, while the territorial incorporation doctrine has remained limited and stagnant. See infra note 109 and accompanying text; infra note 110. These similarities further bolster the argument that the question of territorial fundamentality, properly understood, requires consideration of local conditions. See supra notes 81, 100.

103. See King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975) (explaining that a fact-based analysis of American Samoan culture and legal structures was required to determine whether the criminal jury trial was impracticable and anomalous in American Samoa); see also *Duncan*, 391 U.S. at 149 n.14 (noting that determining whether a right is fundamental requires considering "the context of the criminal processes maintained by the American States" and not whether "the limitation in question is . . . necessarily fundamental to fairness in every criminal system that might be imagined"); Ponsa-Kraus, supra note 3, at 2489 ("[T]o follow *Duncan* would not have been to depend on 'key words' like 'fundamental.' Rather, it would have been to ask . . . whether [the criminal jury trial right] is necessary to ensure ordered liberty in the context of American Samoa's legal system.").

104. 391 U.S. at 147–49, 149 n.14 (emphasis added).

105. See supra notes 81, 100.

paces. Interestingly, the *Downes* Court suggested that, as of 1901, territorial constitutional incorporation was leaps and bounds ahead of state incorporation: While incorporation against the states did not "begin in earnest until the mid-twentieth century,"[106] the *Downes* Court implied that certain rights guaranteed by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments may have already applied against Puerto Rico.[107] And Congress would exercise its plenary power to explicitly incorporate many of these rights against Puerto Rico through the Jones–Shafroth Act in 1917.[108]

Yet, since the Jones–Shafroth Act, constitutional incorporation in Puerto Rico has ground to a halt: No additional provision in the Bill of Rights has since been incorporated by Congress through the Territorial Clause or by the courts through the territorial incorporation doctrine.[109]

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106. Akhil Reed Amar, America's Constitution: A Biography 389 (2005); see also Robinson v. California, 370 U.S. 660, 667 (1962) (incorporation of the freedom from cruel and unusual punishments against the states); Mapp v. Ohio, 367 U.S. 643, 654–55 (1961) (incorporation of freedom from unreasonable searches and seizures against the states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (incorporation of the right to free exercise against the states); Near v. Minnesota ex rel. Olson, 283 U.S. 697, 707 (1931) (incorporation of the right to free press against the states); Gitlow v. New York, 268 U.S. 652, 666 (1925) (incorporation of the right to free speech against the states).

107. *Downes*, 182 U.S. at 282–83 (plurality opinion) (suggesting that the following rights may be incorporated against the territories given their status as "natural rights": freedom of speech, freedom of press, free exercise, due process, just compensation, equal protection, freedom from unreasonable searches and seizures, and freedom from cruel and unusual punishments).

108. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones–Shafroth Act), ch. 145, § 2, 39 Stat. 951, 951–52 (1917); see also Kent, supra note 8, at app. at 454 tbl. 1 (noting that the Jones–Shafroth Act protects various rights rooted in the First, Fourth, Fifth, Sixth, and Eighth Amendments).

109. The Court has incorporated constitutional protections since the Jones–Shafroth Act—but only rights that were protected by the Jones–Shafroth Act itself. The Jones–Shafroth Act remained in effect from 1917 to 1952, when the Puerto Rican Constitution was ratified. An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico (Puerto Rico Federal Relations Act of 1950), ch. 446, § 5(1), 64 Stat. 319, 320 (1950) (repealing the Jones–Shafroth Act upon ratification of the Puerto Rican Constitution). In allowing the creation of a territorial constitution, the United States required that the document contain a Bill of Rights, id. § 2, and many of the rights protected by the Jones–Shafroth Act found a place in the territorial constitution. P.R. Const. art. II (guaranteeing various rights, including freedom of speech, press, and exercise of religion; due process; speedy and public trial; and freedom from double jeopardy, among others). However, in part to emphasize the legacy of the Jones–Shafroth Act and its effect on territorial incorporation, the Court proceeded to "incorporate" constitutional rights that had been previously incorporated by the Jones–Shafroth Act. See Torres v. Puerto Rico, 442 U.S. 465, 471 (1979) ("incorporating" the Fourth Amendment's prohibition on unreasonable searches and seizures in Puerto Rico); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 591–93, 600 (1976) (relying on the Jones–Shafroth Act's equal protection right to hold that the Due Process Clause of the Fifth or Fourteenth Amendments—the Court did not clarify which—and the Fourteenth Amendment's Equal Protection Clause all apply to Puerto Rico); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 n.11 (1974) (noting that a Due Process dispute

This contrasts starkly with constitutional incorporation against the states, as since the early twentieth century, constitutional rights have regularly been incorporated such that "[o]nly a handful of the Bill of Rights protections remain unincorporated."[110]

Comparing the list of rights incorporated against the states via the Fourteenth Amendment's Due Process Clause and the list of rights incorporated against Puerto Rico, there is a noticeable gap: The Second Amendment and a large portion of the Sixth Amendment have been incorporated against the states but not against Puerto Rico.[111] And it is reasonable to expect that this gap will only continue to grow. While the Court has long rejected a "total incorporation" theory in favor of selective incorporation of the Bill of Rights,[112] the *McDonald v. City of Chicago* Court noted that full incorporation of the Bill of Rights protections against the states has not occurred in part because the remaining issues have not come squarely before the Court since the period of selective incorporation began.[113] Thus, the incorporation gap between the states and territories will likely widen if these issues come before the Court.

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occurring in Puerto Rico "arises under the Constitution of the United States"); Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Tex. L. Rev. 1, 241–43 (2002) (listing instances in which the Court has addressed the territorial incorporation of constitutional rights). Therefore, while the Court has occasionally "incorporated" constitutional rights against Puerto Rico, it has done so by relying on legislative history surrounding the Jones–Shafroth Act—essentially categorizing these rights as congressionally granted through the first step of the territorial incorporation doctrine—instead of considering the Fourteenth Amendment or the second step of the territorial incorporation doctrine. See *Torres*, 442 U.S. at 471 ("[W]e have no occasion to determine whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment."). Apart from the courts, Congress has incorporated a constitutional provision on one occasion since the Jones–Shafroth Act by incorporating Article IV's Privileges and Immunities Clause against the island "as though Puerto Rico were a State of the Union." An Act to Amend the Organic Act of Puerto Rico, ch. 490, sec. 7, § 2, 61 Stat. 770, 772–73 (1947) (codified at 48 U.S.C. 737 (2018)).

110. McDonald v. City of Chicago, 561 U.S. 742, 765 (2010); see also id. 765 n.13 (enumerating the list of constitutional rights not incorporated against the states).

111. Compare id., with Kent, supra note 8, at app. at 454 tbl. 1 (listing the rights that have and have not been incorporated in the states and territories).

112. Justice Hugo Black believed that the Fourteenth Amendment had completely incorporated the Bill of Rights against the states, a theory that would become known as "total incorporation." Adamson v. California, 332 U.S. 46, 74–75 (1947) (Black, J., dissenting) ("In my judgment . . . history conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought . . . to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights."). Nevertheless, the Court has never adopted Justice Black's total incorporation theory. *McDonald*, 561 U.S. at 761–63.

113. See *McDonald*, 561 U.S. at 765 n.13 (highlighting that, for example, the Court has "never . . . decided" whether the Third Amendment's protection against quartering soldiers is incorporated against the states); see also Thomas v. Humboldt County, 223 L. Ed. 2d 141, 141 (2025) (mem.) (statement of Gorsuch, J., respecting the denial of certiorari) (arguing

Among the rights that could next be incorporated in the states without a clear path for territorial incorporation is the Seventh Amendment's civil jury trial right. If the Seventh Amendment joined the Second and Sixth Amendments in the list of rights applied in the states but federally denied in Puerto Rico, it would only create a more "major" incorporation gap[114]—one that fully ensures jury trial rights—in the states but wholly ignores them in Puerto Rico.[115]

C. *Jury Trial Rights in Puerto Rico and the States*

To appreciate how unsettling the territorial incorporation gap and its potential for expansion are, it is useful to explore exactly what access to jury trials looks like in Puerto Rico as compared to the states. This section will proceed by comparing the right to a jury trial in criminal proceedings in the states and in Puerto Rico before turning to the Seventh Amendment's right to a jury trial in civil proceedings, again comparing its role in the Puerto Rican legal system to that of the states.

1. *Criminal Jury Trials and Unanimous Verdicts.* — As noted, there are three constitutional guarantees to a trial by jury.[116] The Sixth Amendment, which provides numerous protections for criminal defendants, including

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that the Seventh Amendment should be incorporated against the states but that the case here presented "a number of vehicle problems").

114. *Examining Bd.*, 426 U.S. at 591 n.23.

115. The lack of Second Amendment incorporation certainly also contributes to this gap. For a territorial incorporation analysis of the Second Amendment, see generally Héctor Cordero-Vázquez, The Incorporation of a Fundamental Right in a U.S.A. Territory: An Essay of Intranational Comparative Law, 45 Revista Jurídica de la Universidad Interamericana de Puerto Rico [Rev. Jur. U. Inter. P.R.] 227 (2011) (arguing that while the *Insular Cases* remain good law, "the necessary legal instruments to integrate the fundamental right to keep and bear arms in the Territory of Puerto Rico are in place" (emphasis omitted)). While this Note addresses the constitutional gap created by not incorporating individual rights in the U.S. territories, it is worth noting that reinterpretation of certain constitutional provisions is another viable avenue toward constitutional equality. See generally Guillermo J. Martínez, Note, "The People" Protects the People of Puerto Rico: Giving Meaning to an Uninterpreted Part of the Tenth Amendment, 113 Geo. L.J. 1509 (2025) (arguing that a revitalized Tenth Amendment could protect Puerto Rican sovereignty and constitutional federalism).

116. Absent from this analysis so far has been the fourth constitutional reference to a jury: the Fifth Amendment's Grand Jury Clause. U.S. Const. amend. V. While the right to a grand jury indictment has a similarly lofty purpose to a jury trial right—judgment decided by one's own community and peers—there is greater variation in state grand jury practices, and more than half of the states do not require a grand jury indictment. See Ramos v. Louisiana, 140 S. Ct. 1390, 1435 (2020) (Alito, J., dissenting) (noting that twenty-eight states do not require a grand jury indictment). As a result, there is serious doubt as to whether the grand jury right will be incorporated against the states, making it an unlikely candidate to bridge the territorial incorporation gap. But see Robert W. Frey, Note, Incorporation, Fundamental Rights, and the Grand Jury: *Hurtado v. California* Reconsidered, 108 Va. L. Rev. 1613, 1656 (2022) (arguing that the Court should incorporate the grand jury right against the states).

but not limited to the jury trial right,[117] began to be incorporated against the states in *Duncan v. Louisiana*, in which the Court held that the right to a trial by jury in criminal prosecutions was fundamental to the Anglo-American scheme of justice and was, therefore, incorporated against the states.[118] Since *Duncan*, the Court has steadily incorporated almost the entire Sixth Amendment—provision by provision—most recently holding in *Ramos v. Louisiana* that the right to a unanimous guilty jury verdict, interpreted into the meaning of the Sixth Amendment,[119] was fundamental and therefore incorporated against the states.[120]

Despite the Court's march toward full state incorporation of the Sixth Amendment, its applicability in Puerto Rico has remained long crystallized: Neither Congress nor the federal courts have legislated or ruled on the incorporation of the Sixth Amendment in Puerto Rico since *Balzac v. Porto Rico*[121] in 1922. Nevertheless, there have been developments in both the Puerto Rican legislature and territorial courts that have mimicked the Sixth Amendment's protections—albeit incompletely.

After fifty-two years of territorial annexation, the United States allowed Puerto Rico to develop and enact its own constitution in 1950.[122] Over the course of two years, Puerto Rican representatives held a constitutional convention, eventually ratifying the island's first self-made governing document ("the 1952 constitution"), 459 years after the island was first colonized.[123] Among the enumerated rights guaranteed by the

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117. U.S. Const. amend. VI.

118. 391 U.S. 145, 149 & n.14 (1968).

119. The Court first interpreted the Sixth Amendment to require a unanimous jury verdict in Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (plurality opinion), but, in that case, the Court also held in a fractured set of opinions that the unanimity requirement did not apply in the states. Id. This holding was ultimately overturned in *Ramos v. Louisiana*, where the Court incorporated the unanimity requirement against the states. 140 S. Ct. at 1397.

120. *Ramos*, 140 S. Ct. at 1397. While Puerto Rico was not a party to the suit, it was mentioned frequently at oral argument, given it was one of three American jurisdictions that allowed a nonunanimous jury verdict. P.R. Const. art. II, § 11; Transcript of Oral Argument at 29, 52, 54–55, 65, 69, *Ramos*, 140 S. Ct. 1390 (No. 18-5924). The Court's opinion did not mention Puerto Rico once. *Ramos*, 140 S. Ct. at 1393–408.

121. 258 U.S. 298, 304–06 (1922).

122. Puerto Rico Federal Relations Act of 1950, ch. 446, §§ 1–2, 64 Stat. 319, 319.

123. Trías Monge, Oldest Colony, supra note 37, at 5 (noting that Europeans first landed in Puerto Rico in 1493). While the 1952 constitution's significance should not be understated, colonial vestiges remained. The U.S. government retained a veto power over individual provisions of the territorial constitution. See Puerto Rico Federal Relations Act of 1950 § 3 (requiring approval from the President and Congress of any proposed Puerto Rican Constitution). The federal government infamously exercised this power to veto provisions guaranteeing universal access to work, food, healthcare, and other welfare-based measures. See T. Alexander Aleinikoff, Puerto Rico and the Constitution: Conundrums and Prospects, 11 Const. Comment. 15, 18 n.13 (1994) (noting that Congress "refused to approve" such territorial constitutional protections). The United States then introduced its own provision preventing the Puerto Rican government in perpetuity from reconsidering these measures as future amendments. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 64 (2016). Furthermore, as the Supreme Court recently acknowledged in *Sanchez Valle*, the Puerto

1952 constitution was the right to a jury trial in felony prosecutions.[124] Unlike in the states, where the Sixth Amendment requires unanimity under *Ramos*,[125] the 1952 constitution only required nine of twelve jurors to reach a verdict[126]—a practice that greatly diverged from that of U.S. states.[127] Thus, under the letter of this constitutional regime, a person in Puerto Rico can be convicted of a felony—potentially leading to an effective life sentence[128]—even if three of twelve community members think the defendant is innocent.

The Supreme Court of Puerto Rico, however, ended this procedural quirk soon after *Ramos* was decided. In *Pueblo v. Torres Rivera*, the court was faced with the question of whether the Supreme Court's *Ramos* opinion applied to Puerto Rico—which would invalidate the Puerto Rican Constitution's nine-or-more-juror convictions.[129] The natural answer to this question would be that, because the Sixth Amendment is not incorporated against Puerto Rico, Sixth Amendment jurisprudence from

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Rican Constitution derives its authority from congressional action allowing the island to ratify its constitution. Id. at 73 ("And if we go back as far as our doctrine demands—to the 'ultimate source' of Puerto Rico's prosecutorial power—we once again discover the U.S. Congress." (citation omitted) (quoting United States v. Wheeler, 435 U.S. 313, 320 (1978))). While the 1952 constitution also redefined Puerto Rico as a "commonwealth" rather than merely a territory, P.R. Const. art. 1, § 1, "[t]he actual lines of authority didn't change," with Congress retaining its plenary authority under the Territorial Clause. Daniel Immerwahr, How to Hide an Empire: A History of the Greater United States 257 (2019). Therefore, while the 1952 constitution represented a remarkable step forward in Puerto Rican self-governance, it walks in the shadows of American imperialism.

124. Under the Puerto Rican criminal code, a felony is defined as any crime that may be punished by more than six months in prison. P.R. Laws Ann. tit. 33, § 5022 (2012). Thus, any defendant who faces a penalty of more than six months in prison has a right to a jury trial. This comports with the Sixth Amendment's jury trial right standards. See Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that while petty offenses do not require a jury trial, no offense could be deemed petty if it results in a punishment of more than six months in prison).

125. *Ramos*, 140 S. Ct. at 1397.

126. P.R. Const. art. II, § 11.

127. Only two states have ever adopted nonunanimous criminal juries: Louisiana and Oregon, adopted in 1898 and 1933, respectively. Jamiles Lartey, How Two States Differ on the Injustice of Non-Unanimous Juries, Marshall Project (Jan. 7, 2023), https://www.themarshallproject.org/2023/01/07/oregon-louisiana-non-unanimous-juries-unconstitutional [https://perma.cc/ZWB8-8VEK]. Both states were parties to the suit in *Ramos*, and both of their nonunanimity rules were rooted in overtly discriminatory practices. See *Ramos*, 140 S. Ct. at 1417 (Kavanaugh, J., concurring in part) ("In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice . . . ."); Watkins v. Ackley, 523 P.3d 86, 108 (Or. 2022) (Baldwin, J., concurring) ("[R]acist history evolved into Oregon voters' approval and use of the nonunanimous verdict law.").

128. The maximum penalty under the Puerto Rican criminal code is ninety-nine years in prison. See, e.g., P.R. Laws Ann. tit. 33, § 5143 (noting that the penalty for murder in the first degree is ninety-nine years). Thus, while there is no life sentence in Puerto Rico, the maximum penalty is a de facto life sentence.

129. 204 P.R. Dec. 288, 296–300 (2020).

the federal courts also can't apply. But instead, the Puerto Rican Supreme Court held that U.S. Supreme Court decisions—regardless of the topic or substance—are binding against Puerto Rico.[130] Thus, given *Ramos* required unanimity in criminal jury trials, the same rule also applied to Puerto Rican criminal jury trials.[131]

The Puerto Rico Supreme Court similarly employed this rationale to "incorporate" the Sixth Amendment's jury trial right in 2009[132]—more than forty years after the U.S. Supreme Court incorporated the Sixth Amendment jury trial right against the states in *Duncan*—and again in 2022 for the Second Amendment after the U.S. Supreme Court's *McDonald* decision.[133] This line of jurisprudence, however, does not wrestle with the nuances of the territorial incorporation doctrine. It is obvious to say that the Supreme Court's decisions are generally binding against all lower courts, including territorial courts. But this can only be true of Supreme Court decisions that interpret laws *applicable to those lower courts*. Unless the constitutional right in question has been incorporated and is therefore applicable in the territory, Supreme Court precedent cannot be binding.[134]

Nevertheless, this is exactly what the Supreme Court of Puerto Rico held in *Torres Rivera*.[135] So long as the right to a unanimous jury verdict in felony cases rests on this legal foundation, it is insecure in Puerto Rico. And despite the opportunity to clarify the effect of *Ramos* on Puerto Rico, the U.S. Supreme Court has since chosen not to involve itself, only

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130. See id. at 303 ("Después de todo, independientemente de la doctrina jurídica a la que se recurra, las protecciones y garantías que emanan de los derechos que se designan como fundamentales por el Tribunal Supremo de Estados Unidos son extensibles a Puerto Rico." ["After all, regardless of the legal doctrine cited, the protections and guarantees that emanate from the rights designated as fundamental by the United States Supreme Court extend to Puerto Rico."]).

131. Id. at 303–04.

132. See Pueblo v. Santa Vélez, 177 P.R. Dec. 61, 65 (2009) ("El derecho a juicio por jurado de la Enmienda Sexta es un derecho fundamental que aplica a los estados a través de la cláusula del debido proceso de ley de la Enmienda Decimocuarta y, *por lo tanto, a Puerto Rico*." ["The right to a trial by jury under the Sixth Amendment is a fundamental right that applies to the states through the Due Process Clause of the Fourteenth Amendment and, *therefore, to Puerto Rico*."] (emphasis added)).

133. See Pueblo v. Rodríguez López, 210 P.R. Dec. 752, 782 (2022) (holding that the Fourteenth Amendment—rather than the separate territorial incorporation doctrine—required that the Second Amendment was incorporated in Puerto Rico).

134. The tendency of the Supreme Court of Puerto Rico to incorporate rights by holding that the U.S. Supreme Court's Fourteenth Amendment incorporation cases apply fully in Puerto Rico has been met with confusion by at least one court. See Ramos-Cruz v. Puerto Rico, No. 23-1449 (ADC), 2025 WL 2806737, at *5 n.10 (D.P.R. Sep. 30, 2025) (noting that "it is not clear whether [the Supreme Court of Puerto Rico] considered [the Second Amendment] applicable [against Puerto Rico] through the Fourteenth Amendment or through the doctrine of territorial incorporation" in *Rodríguez López*).

135. See *Torres Rivera*, 204 P.R. Dec. at 299–300, 303 (stating that all fundamental rights under U.S. Supreme Court doctrine apply to Puerto Rico).

prolonging the uncertainty.[136] In sum, while there is technically a right to jury trial and a unanimous verdict in Puerto Rico through Puerto Rican Supreme Court case law, access to this right is at risk of disappearing so long as it is propped up by the territorial Supreme Court.[137]

The legal history of criminal jury trial rights in Puerto Rico shows how difficult it can be to bridge the incorporation gap. First, Congress chose not to incorporate the right in either the Jones–Shafroth Act or the Foraker Act.[138] The U.S. Supreme Court then held in *Balzac* that the Sixth Amendment was not fundamental in Puerto Rico and did not incorporate the criminal jury trial right.[139] Outside the incorporation framework, the 1952 constitution then guaranteed a jury trial in criminal prosecutions—albeit without a unanimity requirement.[140] Finally, the right to a unanimous jury verdict was guaranteed by the Puerto Rican Supreme Court[141]—albeit on uncertain legal grounds.

Therefore, despite progress within Puerto Rico toward a criminal jury trial right, the *U.S. constitutional* right remains insecure at best and nonexistent at worst, despite its applicability in the states. More than one hundred years after the *Balzac* decision, no federal court has held that the

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136. See Pueblo v. Centeno, 208 P.R. Dec. 1, 21 (2021) (holding that unanimous verdicts were required for both guilty and not guilty verdicts, in line with the Court's decision in *Ramos*), cert. denied, 143 S. Ct. 89 (2022) (mem.). The Supreme Court could have granted certiorari to clarify the effect of *Ramos* on Puerto Rico and territorial incorporation of the Sixth Amendment.

137. Despite this Note's disagreement with the Puerto Rican Supreme Court's approach, it is certainly not made up out of whole cloth. For example, in *Torres Rivera*, the court described the territorial incorporation doctrine as "polémica" ["controversial"], 204 P.R. Dec. at 302—a description that approaches understatement. The decision then goes on to cite Duncan v. Louisiana, 391 U.S. 145 (1968), for the proposition that, because the U.S. Supreme Court had deemed the criminal jury trial right to be fundamental, it impliedly overturned Balzac v. Porto Rico, 258 U.S. 298 (1922), and held that Sixth Amendment incorporation jurisprudence must also apply in Puerto Rico. *Torres Rivera*, 204 P.R. Dec. at 302–04. This is, without a doubt, a viable argument; it was made by the defendant on appeal in King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975), the case which, on remand, resulted in the incorporation of jury trial rights in American Samoa. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

This Note, following existing scholarship, also points to *Duncan* as a change in the territorial incorporation doctrine but reads it more narrowly. Namely, this Note argues that *Duncan* altered the territorial incorporation doctrine from questioning whether a right is fundamental to all notions of ordered liberty to questioning whether the right in question is fundamental to the territory's specific legal system. See supra notes 81, 102; infra section III.A. Thus, while the Supreme Court of Puerto Rico has, perhaps nobly, rejected the influence of the *Insular Cases* to craft a reasonable vision for the U.S. Constitution's applicability in the territories, this Note takes the more somber view: that the *Insular Cases* remain current doctrine and must be deployed for constitutional equality while they remain good law.

138. See supra notes 70–72, 109, and accompanying text.

139. *Balzac*, 258 U.S. at 304–13.

140. P.R. Const. art. II, § 11.

141. See *Torres Rivera*, 204 P.R. Dec. at 300–01.

Sixth Amendment's criminal jury trial right is incorporated against Puerto Rico,[142] to the detriment of Puerto Rican residents.[143]

2. *Civil Jury Trials.* — The other constitutional jury trial protection—that of civil jury trials—is found in the Seventh Amendment's civil jury trial guarantee. As mentioned earlier, the Seventh Amendment does not currently contribute to the incorporation gap: The civil jury trial is not incorporated against either the states or any of the territories.[144] For Puerto Rico, this was confirmed in *Balzac*, in which the Court explained that neither the Sixth Amendment or, by analogy in dicta, the Seventh Amendment, was incorporated in Puerto Rico.[145] And importantly, while the civil jury trial right is guaranteed in every state either through their constitution or statutes,[146] there is no territorially created right to a civil jury trial in Puerto Rico.[147]

While *Balzac*'s Sixth Amendment holding was arguably disturbed by the criminal jury trial right's incorporation in *Duncan*,[148] the *Balzac* Court's Seventh Amendment dicta has never been altered by state incorporation of the civil jury trial right. But it is somewhat unclear why the Supreme Court has not yet incorporated the Seventh Amendment against the states. A leading explanation is that the Court simply has not yet found the appropriate vehicle.[149] As the Court noted in *McDonald*, federal courts have rarely been faced with the question directly, and the Court has not ruled on Seventh Amendment incorporation in over one hundred years[150]—well before selective incorporation began.[151]

An alternative argument hinted at by the *McDonald* Court is that stare decisis cautions against incorporating the Seventh Amendment against the states.[152] This explanation relies on the Supreme Court's 1916 *Minneapolis*

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142. One federal court, however, has incorporated the Sixth Amendment's jury trial right against an unincorporated territory: The District Court for the District of Columbia incorporated the right against American Samoa. See supra text accompanying note 17.

143. See infra Part II.

144. See supra note 16 and accompanying text.

145. *Balzac*, 258 U.S. at 304–06, 313; see also supra note 87.

146. See Eric J. Hamilton, Note, Federalism and State Civil Jury Rights, 65 Stan. L. Rev. 851, 855, 858–59 (2013).

147. The word "jury" is not used once in the Rules of Civil Procedure of Puerto Rico. See P.R. R. Civ. Proc.

148. See Ponsa-Kraus, supra note 3, at 2486–89 (arguing that the courts should have considered the relevance of *Duncan* in Sixth Amendment territorial incorporation jurisprudence).

149. See supra note 109.

150. See Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 219 (1916) ("[There is] no ground for the proposition that the [Seventh] Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law . . . .").

151. McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010).

152. See id. at 784–85, 784 n.30 (plurality opinion) ("[I]f a Bill of Rights guarantee is fundamental from an American perspective, then, *unless stare decisis counsels otherwise*, that guarantee is fully binding on the States . . . ." (emphasis added) (footnote omitted)).

& St. Louis Railroad Co. v. Bombolis decision, which held that the Seventh Amendment does not apply in the states.[153] Operationalizing stare decisis to limit selective incorporation may have been more persuasive before *Ramos*, but the *Ramos* Court overturned precedent to incorporate the unanimity requirement of the Sixth Amendment.[154] Therefore, it is no longer sufficient to say that constitutional rights ought not be incorporated merely because stare decisis counsels otherwise. Given that the *McDonald* Court cited stare decisis and the lack of a presented issue as the only jurisprudential roadblocks to incorporating the Seventh Amendment,[155] it is reasonable to expect that the Court would not be so easily frustrated if a Seventh Amendment incorporation case came before it today.

Yet, practical roadblocks prevent federal courts from ruling on Seventh Amendment incorporation against the states. First, most states have already guaranteed the right to a jury trial in their state constitutions, and the remaining three states—Wyoming, Colorado, and Louisiana—have guaranteed some form of the civil jury trial right through statutes.[156] Therefore, appealing claimants would not be arguing that they were *denied* their jury trial right in the states; rather, they would most likely be arguing that there was some sort of irregularity inconsistent with the Seventh Amendment, such as a lack of unanimity.[157] Second, an exceedingly small percentage of cases are disposed of through a jury trial,[158] such that opportunities to argue for a claimant's Seventh Amendment jury trial right are rare.

Despite these hurdles, Justice Gorsuch recently signaled a potential path forward, implying a plaintiff could bring a claim against a state or local agency and assert their Seventh Amendment civil jury trial right in

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153. 241 U.S. at 217.

154. Ramos v. Louisiana, 140 S. Ct. 1390, 1425 (2020) (Alito, J., dissenting) (calling the Court's decision to overturn Apodaca v. Oregon, 406 U.S. 404 (1972), in which the Court chose not to incorporate the Sixth Amendment's unanimity requirement, a "rough treatment" of stare decisis).

155. *McDonald*, 561 U.S. at 765 n.13, 784–85, 784 n.30.

156. Hamilton, supra note 146, at 855, 858–59.

157. See Andres v. United States, 333 U.S. 740, 748 (1948) (explaining that the Sixth and Seventh Amendments both require unanimous jury verdicts). State practices regarding unanimity in civil juries vary widely, with many states historically and currently not requiring unanimity. See, e.g., N.Y. C.P.L.R. § 4113 (McKinney 2025); Hans Zeisel, The Verdict of Five Out of Six Civil Jurors: Constitutional Problems, 1982 Am. Bar Found. Rsch. J. 141, 141 nn.2–3 (compiling jurisdictions with nonunanimous juries).

158. See Paula Hannaford-Agor & Morgan Moffett, Nat'l Ctr. for State Cts., 2023 State-of-the-States Survey of Jury Improvement Efforts: Volume and Frequency of Jury Trials in State Courts 4 (2024), https://ncsc.contentdm.oclc.org/digital/collection/juries/id/365/ [https://perma.cc/9MSY-6DLT] (describing survey results showing that about 2% of felony criminal cases, about 1% of misdemeanor criminal cases, and about 1% of civil cases are disposed by jury trial).

line with the Court's recent decision in *SEC v. Jarkesy*.[159] If such an assertion is made and is successful, incorporation of the Seventh Amendment *only* against the states would further widen the incorporation gap. Thus, the prospect of state incorporation of the Seventh Amendment should worry those concerned about second-class constitutional treatment of territorial residents.

In sum, comparing the jury trial rights between Puerto Rico and the states provides a complex, if not confounding, view of the incorporation gap. The criminal jury trial right has not been incorporated in Puerto Rico through the U.S. Constitution, but the Puerto Rican Constitution guarantees that right. The Sixth Amendment's unanimity right is also not incorporated federally, but the Supreme Court of Puerto Rico has incorporated the *Ramos* decision, albeit without applying the territorial incorporation doctrine. And finally, the Seventh Amendment jury trial right has not been incorporated against the states or Puerto Rico. But while the Court has not taken the step, it has indicated interest in incorporating the civil jury trial right against the states—a move that would further widen the incorporation gap.

II. THE JURY DENIED—THE COSTS OF A LOST JURY

Given the extent to which the territorial incorporation gap is comprised of jury trial rights, it is worth measuring the existential, democratic, and outcome-determinative costs of denying these rights. While general constitutional inequality is damaging to Puerto Rico's relationship with the United States and its ability to determine its future, the unincorporation of jury trial rights is particularly pernicious: Unequal access to juries leads to unequal outcomes in civil contexts[160] and fewer jury trials results in less civic engagement. Thus, this Part will consider how juries affect trial outcomes and shape society's conception of the justice system, thereby showing the harm that is done when jury trials are denied.

A. *Unequal Outcomes*

Access to juries materially benefits defendants in both criminal and civil cases, and unanimity requirements benefit defendants while also incentivizing more thoughtful and deliberative juries. In a comprehensive twentieth-century study, Professors Harry Kalven, Jr., and Hans Zeisel found that juries and judges disagreed on verdicts in 19.1% of cases.[161] In 16.9% of those cases, the jury acquitted when the judge would have found

159. Thomas v. Humboldt County, 223 L. Ed. 2d 141, 142 (2025) (mem.) (statement of Gorsuch, J., respecting denial of certiorari); see also 144 S. Ct. 2117 (2024).

160. As noted above in section I.C and below in section II.A, there is practical uniformity in the criminal jury context, despite doctrinal disjunction.

161. Kalven & Zeisel, supra note 33, at 62. This study identified 3,576 cases where a jury rendered a verdict and asked the presiding judge whether they agreed with the jury. Id. at 55–56.

the defendant guilty.[162] Furthermore, considering guilt, lesser offenses, and criminal penalties, juries were more lenient than judges in 28.3% of cases.[163] This study was replicated fifty years later, when it was found that judges and juries disagree on guilt 25% of the time—a 6% increase from Kalven and Zeisel's numbers.[164] Thus, access to a jury trial can materially affect the likelihood that the defendant will not be convicted *and* will be more leniently punished.

The Sixth Amendment's unanimity requirement also serves as an important factor in determining trial outcomes. Unanimity is a tall hurdle that prosecutors must overcome: Rather than only convincing a supermajority of the jury, a prosecutor must convince *the entire* jury that a defendant is guilty beyond a reasonable doubt. With a unanimous jury, a defendant is always one holdout away from a hung jury and another opportunity at innocence. This is reflected in social science research, which has found that the hung-jury rate is higher when unanimity is required.[165] Furthermore, unanimity forces jurors to deliberate for longer periods of time, which often leads to more accurate judgments.[166] In one simulation, observers found that as fewer jurors were required to render a verdict, the jury deliberated for less time.[167]

Therefore, denying criminal jury trial rights, including constitutionally required unanimity, leads to worse outcomes for defendants and produces less deliberative jurors. While the criminal jury trial right is currently available in Puerto Rico, its unanimity requirement is both new and vulnerable. If the Puerto Rican Supreme Court's *Torres Rivera* decision is abrogated,[168] this would mark another area of inequality between Puerto Rican and state residents. Thus, until the unanimity requirement is incorporated by the Supreme Court against Puerto Rico, Sixth Amendment rights will remain vulnerable on the island.

The denial of civil jury trial rights produces similarly adverse effects and—even more clearly than the denial of criminal jury rights—shows the

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162. Id. at 62.

163. Id.

164. Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's *The American Jury*, 2 J. Empirical Legal Stud. 171, 181 tbl. 1 (2005); see also Kalven & Zeisel, supra note 33, at 62.

165. Jeffrey Abramson, We, the Jury: The Jury System and the Ideal of Democracy 198 (1994).

166. See Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., in Support of Petitioner at 19, Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (No. 19-5807), 2020 WL 4450434 ("[N]on-unanimous juries 'discourage[] painstaking analyses of the evidence and steer[] jurors toward swift judgments that too often are erroneous or at least highly questionable.'" (second and third alterations in original) (quoting Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261, 1273 (2000))).

167. See Abramson, supra note 165, at 200 (finding that unanimous juries deliberated 84% longer than juries that only required eight of twelve jurors to render a verdict).

168. See supra notes 129–137 and accompanying text.

practical inequality between Puerto Rican and state residents. As noted above, while the Seventh Amendment is not incorporated against either the states or the territories, each state provides a domestic right to a civil jury trial—either through their state constitution or by statute.[169] No such right is provided by the Puerto Rican Constitution or territorial statutory scheme.[170]

Kalven and Zeisel found that judge–jury disagreement was mildly more prevalent in civil cases, with juries and judges disagreeing about 22% of the time.[171] Yet, judge–jury disagreement is particularly acute in civil trials at the damages stage. In one study, researchers found that in a hypothetical case dealing with corporate liability in the aftermath of an airplane accident, 84.1% of jurors believed punitive damages should be imposed.[172] When the same hypothetical was posed to ninety-four state judges, only 30.3% found that punitive damages should have been imposed.[173] This conclusion has been replicated numerous times and spans both punitive and compensatory civil damages.[174] So long as there is no right to a civil jury trial in Puerto Rico, claimants in Puerto Rico will be comparatively disadvantaged by lower awards in civil claims. Apart from the inherent inequality that comes from this denied right, barring Puerto Rican plaintiffs from civil jury trials and their associated benefits may encourage forum shopping away from the island, which would raise inevitable questions of fairness and efficiency.[175] Thus, while every state guarantees the right to a civil jury trial, the lack thereof in Puerto Rico leads to worse litigation outcomes and represents another gap in legal practices between the states and Puerto Rico.

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169. See supra note 156 and accompanying text.

170. See supra note 147 and accompanying text.

171. Kalven & Zeisel, supra note 33, at 63. Modern studies have been able to approximately replicate these findings, usually finding a slightly higher rate of disagreement. See Angela M. Jones, Shayne E. Jones & Aaron Duron, Perspective Differences in Trial Process: A Comparison of Judges, Juries and Litigants, 26 Psychiatry Psych. & L. 87, 88 (2019) (noting that modern studies generally find civil jury disagreement in approximately 20% to 35% of cases).

172. W. Kip Viscusi, Judging Risk and Recklessness, *in* Punitive Damages, supra note 33, at 171, 177.

173. Viscusi, Do Judges Do Better?, supra note 33, at 196.

174. See Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman & Martin T. Wells, Juries, Judges, and Punitive Damages: An Empirical Study, 87 Corn. L. Rev. 743, 778 (2002) (noting that there is a statistically greater range of punitive damages awarded by juries than by judges); Joni Hersch & W. Kip Viscusi, Punitive Damages: How Judges and Juries Perform, 33 J. Legal Stud. 1, 2–3 (2004) ("We find that . . . juries are more likely to make punitive awards and make larger awards. . . . We also find that juries award greater compensatory damages than do judges for any given case type.").

175. Scott Dodson, The Culture of Forum Shopping in the United States, ABA: Int'l Law. (June 5, 2024), https://www.americanbar.org/groups/international_law/resources/international-lawyer/57-2/culture-of-forum-shopping-united-states/ (on file with the *Columbia Law Review*) (noting that inefficiencies, delays, higher costs, and concerns of unfairness are natural consequences of forum shopping).

B. *Civic Engagement*

Trial by jury has been a central tenet of many countries' justice systems for centuries.[176] Yet, the American tradition of jury trials is unique in its concern about civic engagement and education. As Alexis de Tocqueville observed during his visit to America, juries represented "an eminently republican institution."[177] According to Tocqueville, jury duty was seen as both a judicial and political institution, an act of political and civic engagement equal to the American citizen's job as elector.[178] This duty and the right to jury trials generally were, as Justice Joseph Story remarked, "essential to political and civil liberty,"[179] a point on which, per Tocqueville, "[a]ll English and American lawyers are unanimous."[180] In addition to upholding these republican values, jury duty would "form the judgment and . . . augment the natural enlightenment of the people" by acting as "a school, free of charge and always open, where each juror comes to be instructed in his rights."[181]

These societal benefits observed by Justice Story and Tocqueville in the early nineteenth century are still visible today. Studies have shown that jury duty service leads to an increase in civic engagement, including a higher likelihood of voting and volunteering in political campaigns.[182] Furthermore, the entire judiciary benefits, as jurors are more likely to trust the judicial system after jury service.[183]

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176. See 3 William Blackstone, Commentaries *349 (noting that juries were a feature of British jurisprudence since the early Saxon colonies of the tenth century and traces of the practice could also be found in France, Germany, and Italy).

177. 1 Alexis de Tocqueville, Democracy in America 260 (Harvey C. Mansfield & Delba Winthrop eds. & trans., U. Chi. Press 2000) (1835).

178. Id. at 258, 261.

179. 2 Story, supra note 42, § 1768.

180. Tocqueville, supra note 177, at 259 n.3. But see Lizzie Dearden & Michael D. Shear, U.K. Plans to End Jury Trials for Crimes With Sentences Under 3 Years, N.Y. Times (Dec. 1, 2025), https://www.nytimes.com/2025/12/01/world/europe/uk-jury-trial-courts.html (on file with the *Columbia Law Review*).

181. Tocqueville, supra note 177, at 262. But see Andrew Guthrie Ferguson, Jury Instructions as Constitutional Education, 84 U. Colo. L. Rev. 233, 272–74 (2013) (arguing that modern jury instructions do not adequately educate jurors on constitutional principles).

182. See Valerie P. Hans, John Gastil & Traci Feller, Deliberative Democracy and the American Civil Jury, 11 J. Empirical Legal Stud. 697, 709–15 (2014) (finding that jurors who participate in a case where a unanimous decision is reached are much more likely to vote in future elections); Perks of Jury Duty: Research Says It Boosts Civic Engagement, Nat'l Civic League (Dec. 1, 2024), https://www.nationalcivicleague.org/perks-of-jury-duty-research-says-it-boosts-civic-engagement/ [https://perma.cc/A345-WVZV] (noting that jury duty increases the likelihood of voting in future elections and increases the jurors' belief in the judicial system).

183. See Liana Pennington & Matthew J. Dolliver, Understanding the Effects of Jury Service on Jurors' Trust in Courts, 56 Law & Soc'y Rev. 580, 596 (2022) ("[F]actors relating to positive deliberation experiences, satisfaction with the jury process, and juror attitudes

Perhaps most importantly, jury trials give citizens the opportunity to consider and execute the community's sense of justice. Jurors have the opportunity to protect defendants from an overly punitive government,[184] a principle that traces its origins to the Founding Era.[185] The jury's decision may come in the form of nullification[186] or compromise;[187] either way, the jury has the rare opportunity to develop and reinforce the societal and community values outside the ballot box—an opportunity that aligns with Tocqueville's understanding of the jury as "eminently republican."[188]

It naturally follows that fewer jury trials result in fewer opportunities for potential jurors and society at large to feel these benefits of increased civic engagement and judicial transparency. And for Puerto Rico, this is particularly acute in the civil context, where jury trials are not guaranteed.[189] Furthermore, to serve on a federal jury, prospective jurors are required "to adequately read, write, understand, and speak" English.[190] As a result, a large percentage of Puerto Rican residents[191] will only ever

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relating to law and justice all interact to bring about a rapid and meaningful increase in trust in courts for many jurors.").

184. See Why Jury Trials Are Important to a Democratic Society, Nat'l Jud. Coll., https://www.judges.org/wp-content/uploads/2020/03/Why-Jury-Trials-are-Important-to-a-Democratic-Society.pdf [https://perma.cc/RQM5-LH4S] (last visited Sep. 12, 2025) ("The founding fathers included jury trials in the constitution because jury trials prevent tyranny.").

185. See Kathleen M. O'Malley, Trial by Jury: Why It Works and Why It Matters, 68 Am. U. L. Rev. 1095, 1098 (2019) (noting that James Madison called the civil jury trial right "as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature" (alteration in original) (internal quotation marks omitted) (quoting Mark W. Bennett, Judges' Views on Vanishing Civil Trials, 88 Judicature 306, 307 (2005))); History of Jury Duty, U.S. Cts.: W.D. Mo., https://www.mow.uscourts.gov/jury/history_of_jury_duty [https://perma.cc/BR8C-NGB6] (last visited Sep. 12, 2025) ("Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.").

186. See United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) ("If the jury feels that the law . . . is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.").

187. For example, if a defendant is charged with multiple counts, the jury can choose to convict on certain counts and acquit on others, even if the compromise itself makes little legal sense. See McElrath v. Georgia, 144 S. Ct. 651, 659 (2024) ("We have long recognized that, while an acquittal might reflect a jury's determination that the defendant is innocent of the crime charged, such a verdict might also be 'the result of compromise, compassion, lenity, or misunderstanding of the governing law.'" (quoting Bravo-Fernandez v. United States, 580 U.S. 5, 10 (2016))).

188. Tocqueville, supra note 177, at 260.

189. See supra note 147 and accompanying text.

190. Juror Qualifications, Exemptions and Excuses, U.S. Cts., https://www.uscourts.gov/court-programs/jury-service/juror-qualifications-exemptions-and-excuses [https://perma.cc/9RRP-Q78K] (last visited Sep. 11, 2025).

191. One study found that in 2014, approximately 44% of Puerto Rican residents did not speak English. Rosa E. Guzzardo Tamargo, Verónica Loureiro-Rodríguez, Elif Fidan

participate in a civil suit if they are sued.[192] Thus, when jury trial rights are denied and curtailed, it is not only the defendant who is adversely affected. Rather, society's notion of justice is stunted, and the judiciary remains shrouded in mystery—both results being detrimental to the justice system.

III. BRIDGING THE TERRITORIAL INCORPORATION GAP

The solution is a Supreme Court decision incorporating jury trial rights in Puerto Rico. And the most likely way to convince the Court to do this is by recentering the oft-rejected logic of the *Insular Cases* and their progeny, soberly applying the legal standards expounded in those cases, and showing the Court that jury trial rights are neither impracticable nor anomalous but fundamental in Puerto Rico. While litigating parties have nobly attempted to overturn the *Insular Cases* in their entirety, this project has struggled throughout the twenty-first century,[193] with the Supreme Court reluctant and unwilling to overturn the *Insular Cases* outright.[194] To

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Acar & Jessica Vélez Avilés, Attitudes in Progress: Puerto Rican Youth's Opinions on Monolingual and Code-Switched Language Varieties, 40 J. Multilingual & Multicultural Dev. 304, 305 (2019).

192. Tocqueville noted that civil jury trials were particularly important for developing an empathetic notion of community justice: "[T]here is almost no one who fears being the object of a criminal prosecution one day; but everyone can have a lawsuit." Tocqueville, supra note 177, at 262.

193. See Willie Santana, The New *Insular Cases*, 29 Wm. & Mary J. Race Gender & Soc. Just. 435, 437–38 (2023) ("Despite the overwhelming academic and popular consensus against the Insular Cases, the Supreme Court has not only failed to overrule them but has instead unwittingly engaged in a project of establishing *new* Insular Cases." (footnotes omitted)).

194. It is worth briefly considering why the Court has been so sheepish about the *Insular Cases*. The natural question is this: If the *Insular Cases* are overturned, then what is territorial jurisprudence? The Constitution affords little mention of the territories other than Congress's plenary authority pursuant to the Territorial Clause to govern them. But see Veneno v. United States, 223 L. Ed. 2d 216, 218 (2025) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("Nor, for that matter, does the [Territories] Clause, rightly understood, endow the federal government with plenary power even within the Territories themselves." (citing United States v. Vaello Madero, 142 S. Ct. 1539, 1554–55 (2022) (Gorsuch, J., concurring))). In the absence of the *Insular Cases*, would the Constitution apply equally in full against the territories? Could the United States own indefinite territories without the *Insular Cases*, such that their overturning would require the government to reexamine the political statuses of the unincorporated territories? Would Puerto Rican independence be required? Immediate resolution of these questions would be welcomed, but the Court would likely hope to avoid reformulating American–Puerto Rican relations in a single judicial opinion. See James T. Campbell, *Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement With the *Insular Cases* and "the Law of the Territories", 131 Yale L.J. 2542, 2598 (2022) (arguing that "ill-considered judicial engagement" with the *Insular Cases* could harm territorial communities); Anthony M. Ciolli, Needful Rules and Regulations: Originalist Reflections on the Territorial Clause, 77 Vand. L. Rev. 1263, 1271–73 (2024) (explaining that these open questions have led to reluctance within the Court to definitively overturn the *Insular Cases*); see also U.S. Gov't Accountability Off., GAO-14-31, Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources 14–35 (2014). But see Ramsey, supra note

achieve a new result, prospective plaintiffs should instead dust off the territorial incorporation doctrine and apply its logic to jury trial rights.

While this Note has discussed both the absent civil jury trial right and the loosely rooted unanimous jury trial right, the latter is currently available under the Supreme Court of Puerto Rico's *Torres Rivera* decision.[195] As a result, there are no viable means for a Sixth Amendment incorporation claim to work its way to a federal appellate court.[196] Instead, civil claimants should assert their Seventh Amendment jury trial right and argue that it should be incorporated against Puerto Rico through the *Insular Cases*' territorial incorporation doctrine. Thus, Part III will evaluate the argument in favor of incorporating the Seventh Amendment against Puerto Rico. It will conclude by considering and ultimately dismissing other avenues for change, such as congressional or territorial legislative action.

A. *Applying the* Insular Cases *to the Jury Trial Right*

As was noted earlier, the territorial incorporation doctrine is a two-step inquiry: First, did Congress grant the right in question to the given territory through legislation? Second, if Congress did not, is the right fundamental, and is it neither impracticable nor anomalous?[197] Here, the first step is easy: Congress has never explicitly incorporated the Seventh Amendment's civil jury trial right against Puerto Rico.[198]

Having addressed that threshold question, we can turn to the harder questions, the first of which is whether the civil jury trial right is fundamental in Puerto Rico. At first glance, the answer appears to be no. Puerto Rico existed for hundreds of years under the Spanish civil law system, which does not generally provide jury trial rights (and certainly didn't in Puerto Rico).[199] Furthermore, since being annexed by the United States, Puerto Rico has never guaranteed a civil jury trial right in its statutes

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7, at 581–90 (arguing that overturning the *Insular Cases* "would likely not be substantially disruptive").

195. See Pueblo v. Torres Rivera, 204 P.R. Dec. 288, 300–01 (2020) (holding that, after the Supreme Court's decision in Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Sixth Amendment's unanimity requirement was incorporated against Puerto Rico).

196. There is one clause of the Sixth Amendment that is not yet incorporated in either the states or the territories that litigating parties could target in the unincorporated territories: The right to have "an impartial jury *of the State and district wherein the crime shall have been committed*." U.S. Const. amend. VI (emphasis added). This argument, however, poses two challenges. First, unlike the Seventh Amendment, the Court has never flagged that this clause is ripe for incorporation. Second, it is unclear if this aspect of the Sixth Amendment could be incorporated against the territories, given the language guarantees jurors of the "*state* . . . wherein the crime shall have been committed." Id. (emphasis added).

197. See supra section I.A.

198. Balzac v. Porto Rico, 258 U.S. 298, 305–13 (1922).

199. See, e.g., Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published] (B.O.E. 1889, 4763) (Spain).

or constitution.[200] How could a right that has never existed in Puerto Rico be considered fundamental?

To illustrate this, it is best to consider and dismiss these two critiques, beginning first with the argument that a right cannot be fundamental if it has never been practiced in the given territory. This argument appears intuitive, but if it is accurate, the territorial incorporation doctrine would swallow itself. The territorial incorporation doctrine is a judicial framework through which rights that are not currently guaranteed in a particular territory can be incorporated within that territory. If Puerto Rico *did* guarantee a civil jury trial right, then it would be unnecessary to sue for the guarantee of that right. Therefore, the mere fact that a civil jury trial right does not exist in Puerto Rico does not mean the civil jury trial right is not fundamental to Puerto Rico's legal system and within the realm of the territorial incorporation doctrine.

The second argument to consider is that, because Puerto Rico has a civil law tradition that did not include jury trial rights, a jury trial right cannot be fundamental to Puerto Rico's system of justice. This is a more potent criticism that strikes at the heart of what fundamentality requires. Nevertheless, the argument does not refute the conclusion that the civil jury trial right is fundamental in Puerto Rico under the territorial incorporation doctrine.

In *Duncan*, the Court held that the criminal jury trial right was incorporated against the states because the criminal jury trial right was fundamental to the Anglo-American (i.e., common law) system of justice.[201] Implicit in this ruling is the understanding that fundamentality is linked to the jurisdiction's legal system (e.g., common law or civil law).[202] Therefore, if the Court is evaluating a civil law system, which generally does not provide jury trial rights,[203] then it is unlikely to find that the right is fundamental. But if the Court is evaluating a common law system that has practiced some form of the right for an extended period of time, the Court should hold the right to be fundamental. Therefore, to determine whether the civil jury trial right is fundamental in Puerto Rico, one must consider the development of its legal system over time.

As discussed, Puerto Rico had a civil law system during its colonial occupation by Spain.[204] During this time, legal practices in colonial Puerto Rico were materially different than U.S. equivalents. Mayors and governors—generally untrained in the law—served as judges for centuries, and neither a Spanish Royal Court nor a court of appeals was established

200. See supra note 147 and accompanying text.

201. Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

202. See supra notes 81, 102, 137.

203. See infra note 221 and accompanying text.

204. See, e.g., Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil [Royal Decree of July 24 1889 By Which the Civil Code Is Published].

until 1832.[205] As to the broader profession, there were only three or four lawyers on the island in 1790.[206] The Puerto Rican legal bar was established in the nineteenth century and quickly became sophisticated, but it remained relatively small—twenty-two lawyers practiced on the island in 1840,[207] and only twelve were members of the bar.[208] Nonlawyers were allowed to advise during various segments of the legal process, and there was no law school in Puerto Rico pre–American annexation, such that all lawyers had to be educated abroad.[209]

This changed soon after American annexation of the island. American colonial authorities "embarked on ambitious campaigns to transform the legal systems and codes of Puerto Rico" and the other newly annexed territories, requiring "the systematic replacement of Spanish legal systems."[210] While cultural Americanization largely failed in Puerto Rico,[211] legal Americanization transformed the island's civil law tradition into "a hybrid of Civil and Common law,"[212] in which "Anglo-American common law . . . overlaid" the Spanish civil law system.[213] Common law features—such as the right to a criminal jury trial[214]—quickly began to materialize, with the first Puerto Rican Legislative Assembly codifying a

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205. Carmelo Delgado Cintrón, El Colegio De Abogados De Puerto Rico: Un Resumen Histórico [The Bar Association of Puerto Rico: A Historical Summary] (July 5, 1973), https://web.archive.org/web/20160303204735/http://capr.zaspy.com/index.cfm?page=10 (on file with the *Columbia Law Review*).

206. Rogelio Pérez-Perdomo, Latin American Lawyers: A Historical Introduction 32 (2006); Cintrón, supra note 205.

207. Cintrón, supra note 205.

208. Pérez-Perdomo, supra note 206, at 32.

209. Cintrón, supra note 205.

210. Pedro A. Cabán, The Colonizing Mission of the United States in Puerto Rico, 1898–1930, *in* Transnational Latina/o Communities: Politics, Processes, and Cultures 115, 119 (Carlos Vélez-Ibáñez & Anna Sampaio with Manolo González-Estay eds., 2002).

211. See Trías Monge, Oldest Colony, supra note 37, at 182 ("The people of Puerto Rico have also stubbornly clung to their national culture and traditions through decades of strenuous efforts to Americanize them."). For an account of the United States' attempt to impose the English language in Puerto Rican schools, as well as territorial inhabitants' subsequent resistance, see generally Aida Negrón De Montilla, Americanization in Puerto Rico and the Public School System: 1900–1930 (2d ed. 1975).

212. Pedro F. Silva-Ruiz, The Puerto Rican Legal System: A Hybrid of Civil and Common Law (Relationships Between Civil Law and Common Law in Puerto Rico), 8 Rev. Compar. L. 45, 56–57 (2003).

213. T.B. Smith, The Preservation of the Civilian Tradition in "Mixed Jurisdiction", 35 Revista Jurídica de la Universidad de Puerto Rico [Rev. Jur. U.P.R.] 263, 265 (1966). To be sure, the civil law tradition still plays a meaningful role in modern Puerto Rican jurisprudence. See, e.g., Urbain Pottier v. Hotel Plaza Las Delicias, Inc., 379 F. Supp. 3d 130, 136–37 (D.P.R. 2019) (acknowledging the lasting effect of Spanish civil traditions on Puerto Rican copyright law).

214. See Brianne J. Gorod & Lesley Kennedy, Why Americans Have a Right to Trial by Jury, Const. Accountability Ctr. (June 5, 2024), https://www.theusconstitution.org/news/why-americans-have-a-right-to-trial-by-jury/ [https://perma.cc/AU7H-T4ML] (noting that jury trial rights are deeply rooted in English common law).

criminal jury trial right.[215] This right was then enshrined in Puerto Rico's first self-founding document, the 1952 constitution.[216] And even during the early annexation, Puerto Ricans embraced their role as jurors and produced a "remarkable showing" toward their new civic duty.[217]

Thus, only fifty-four years after the American annexation, Puerto Rico had transitioned from a purely civil law system to a hybrid system that had adopted many common law institutions. This is particularly true of public and procedural law—which includes the here-relevant areas of constitutional law, civil procedure, and criminal procedure—which are "heavily influenced [by] and/or follow[]" American law.[218] In such a hybrid system, which features access to juries and other common law institutions, the civil jury trial right must be considered fundamental to Puerto Rico's legal system because, at least in the areas of law that most clearly implicate juries, Puerto Rico has adopted a primarily common law approach.

Bolstering this argument is the fact that Puerto Rico has already embraced the jury trial right, albeit incompletely. But this lack of completion speaks only to how anachronistic the lack of civil jury trials in Puerto Rico is. By embracing the criminal jury trial right in its territorial constitution,[219] Puerto Rico did not just embrace an individual right. Rather, this choice suggests that the Puerto Rican legal system adopted principles of community justice and civic participation manifest in a general jury trial right. In such a system, distinguishing between criminal and civil trials would be arbitrary and would not reflect how society conceptualizes the contours of its justice system.[220] Instead, by embracing a common law jury trial right,[221] the Puerto Rican legal system also

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215. An Act Concerning Procedure in Jury Trials, 1901 P.R. Laws 112.

216. P.R. Const. art. II, § 11.

217. Kent, supra note 8, at 448 (internal quotation marks omitted) (quoting Foster V. Brown, Report of the Attorney General of Porto Rico to the War Department 255 (1911)).

218. Silva-Ruiz, supra note 212, at 57.

219. P.R. Const. art. II, § 11.

220. Even though the *Balzac* Court was faced only with a Sixth Amendment incorporation claim, it felt the need to address the civil jury trial right as well—indicative of the notion that criminal and civil juries were seen as conceptually coupled. See Balzac v. Porto Rico, 258 U.S. 298, 304–05 (1922) ("It is well settled that these provisions for jury trial in criminal and civil cases apply to the Territories of the United States. But it is just as clearly settled that they do not apply to territory . . . which has not been incorporated into the Union." (citations omitted) (citing Gurvich v. United States, 198 U.S. 581 (1905) (per curiam); Rassmussen v. United States, 197 U.S. 516, 528 (1905); Dorr v. United States, 195 U.S. 138, 145 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Black v. Jackson, 177 U.S. 349 (1900); Cap. Traction Co. v. Hof, 174 U.S. 1 (1899); Thompson v. Utah, 170 U.S. 343, 347 (1898); Am. Publ'g Co. v. Fisher, 166 U.S. 464 (1897); Callan v. Wilson, 127 U.S. 540, 556 (1888); Reynolds vs. United States, 98 U.S. 145, 167 (1878); Webster v. Reid, 52 U.S. (11 How.) 437, 460 (1851))).

221. See Thomas Weigend, The Impact of the Jury, Britannica, https://www.britannica.com/topic/procedural-law/The-impact-of-the-jury (on file with the *Columbia Law Review*) (last

embraced the underlying values of jury trials, the right to which is fundamental across both civil and criminal proceedings.[222]

Because of the influential role common law institutions play in Puerto Rico's hybrid legal system, the Seventh Amendment's right to a civil jury trial is fundamental in Puerto Rico. This satisfies the first prong of the territorial incorporation doctrine's noncongressional path.

The second and final question is whether the right is impracticable or anomalous—the answer to which is unequivocally no.

Regarding the question of anomaly, it would be more accurate to say that the *lack* of civil jury trials is anomalous. As was noted in the fundamentality discussion, common law systems that feature jury trial rights do not generally distinguish between civil claims and criminal prosecutions. Justice Story noted this when he said that civil jury trials were "scarcely inferior" to the equivalent criminal jury right,[223] and the English and American common law systems include both civil and criminal jury trial rights. Thus, the only anomaly in the Puerto Rican legal system is that it provides one category of jury trial rights without the other.

Turning then to impracticability, civil jury trials would surely be practical, in part because criminal jury trials have long been an available right in Puerto Rico. In *King*, the Court interpreted impracticability to be a question of whether a criminal jury trial right would interfere with a cultural institution in American Samoa, ultimately concluding that the Sixth Amendment did not undermine Samoan culture.[224] Here, there is no equivalent cultural concern: Again, Puerto Rico already has a criminal jury trial right; if jury trial rights undercut a Puerto Rican cultural institution, then the criminal jury trial right would not have been established by the legislature in its first legislative session, and the same right would not have been enshrined in the 1952 constitution.[225]

Furthermore, the extension of the Seventh Amendment in Puerto Rico would not impose difficulties regarding implementation. Puerto Rico already has the infrastructure to procure capable jurors as a result of the guaranteed criminal jury trial.[226] And as noted earlier, a large portion of

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visited Jan. 8, 2026) ("Probably the single most dramatic difference between civil- and common-law procedure is the institution of the civil jury trial . . . .").

222. While the Seventh Amendment is not incorporated against the states, this is mostly a jurisprudential anomaly for the reasons discussed in this Note. See supra section I.C.2.

223. 3 Joseph Story, Commentaries on the Constitution of the United States § 1762 (Bos., Hilliard, Gray & Co., 1833).

224. King v. Andrus, 452 F. Supp. 11, 17 (D.D.C. 1977).

225. See supra note 216 and accompanying text.

226. See Jury Duty Administration Bureau, Jud. Branch P.R., https://poderjudicial.pr/eng/community-education/legal-topics/criminal-cases/jury-duty-administration-bureau/ [https://perma.cc/WBD5-NCUY] (last visited Sep. 12, 2025) (detailing the jury selection process and noting that purpose of the system is "to guarantee the constitutional right of every person charged with a felony to be tried by an impartial jury of their peers").

the Puerto Rican population cannot participate in federal jury trials, given the federal courts' English-language requirement.[227] As a result, there are plenty of potential jurors who are, at the moment, only eligible for territorial criminal jury trials. The territorial government would have to further develop the jury selection infrastructure to fill civil jury panels. But the need to expand an already-existing jury system cannot rise to impracticability if it was not impracticable for the American Samoan government to build a jury selection operation after *King*. Therefore, under the *Reid* formulation of the impracticable-and-anomalous test, application of the Seventh Amendment's civil jury trial right is neither impracticable nor anomalous in Puerto Rico.

Given that the Seventh Amendment's civil jury trial right is fundamental to Puerto Rico's legal system—which today includes American and British common law features, particularly in the areas of procedure and criminal law—and given that the civil jury trial is neither impracticable nor anomalous in Puerto Rico, the Court should incorporate the Seventh Amendment through the territorial incorporation doctrine. Such a ruling would grant Puerto Ricans a substantive right enjoyed by residents in every state, thereby bridging the legal inequality that separates Puerto Ricans from Americans living in the states. Rather than rejecting the *Insular Cases* as cementing constitutional inequality, litigating parties can and should use the *Insular Cases* to assert their rights so long as the Court allows these horrific cases to retain their precedential value.

B. *The Pitfalls of Legislative Solutions*

While a judicial solution would bring needed clarity to the territorial incorporation doctrine, courts operate slowly, such that legislative solutions may bring about constitutional equality more quickly. As discussed, step one of the territorial incorporation doctrine asks whether Congress has explicitly incorporated the given right.[228] Therefore, wouldn't it be to simply ask Congress to incorporate the Sixth and Seventh Amendments—or perhaps the entire Constitution—against Puerto Rico and the other territories?

While Congress and the Puerto Rican Legislative Assembly could both act on this issue by either granting the Sixth and Seventh Amendment protections (in the case of Congress) or establishing a civil jury trial system (in the case of the Puerto Rican legislature), both proposals would incompletely solve the dual issues of constitutional inequality[229] and denial

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227. See supra notes 190–191 and accompanying text.

228. See supra text accompanying note 84.

229. This Note has assumed without arguing that constitutional equality is itself a desirable end. But it is worth acknowledging that the cost of such equality is decreased territorial autonomy. In *Fitisemanu v. United States*, for example, the American Samoan government intervened to argue that the Citizenship Clause should not apply in the

of substantive rights. The rest of Part III will consider both legislative avenues in turn.

1. *U.S. Congressional Action.* — Congress could solve the territorial incorporation gap by simply passing a law fully granting the Bill of Rights's protections in Puerto Rico and the other unincorporated territories. This would promote state–territorial equality under the law and guarantee useful, substantive rights for territorial residents. But this solution underestimates the difficulty of congressional action and forgets the lack of voice that Puerto Rico has in Congress. Passing any law is an arduous affair: A legislator or group thereof must persuade a majority of elected representatives—each with their own concerns and constituents—to consider and agree to a legislative proposal. Generally, members of Congress may negotiate with other members, trading votes, making future campaign promises, and showing how their proposed law will benefit constituents across the country.

However difficult this process is for a voting congressperson, Puerto Rico's Resident Commissioner—the island's nonvoting delegate in Congress—faces a taller task given that they have none of these legislative tools. The Resident Commissioner cannot vote[230] and therefore lacks relative bargaining power. And Puerto Rican residents can't vote in national elections,[231] so politicians with national ambitions do not need to consider how Puerto Ricans may feel about their voting history. Thus, because the current constitutional regime disarms Puerto Rican politicians in Congress, they face a treacherously uphill battle when trying to propose legislation.[232] As a result, it is unlikely that Congress would enact legislation as impactful as full constitutional incorporation in Puerto Rico—especially when the Constitution is not fully incorporated in the states either.[233]

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territory. 1 F.4th 862, 864 (10th Cir. 2021). Therefore, had the court incorporated the Citizenship Clause against American Samoa, it would have done so over the express wishes of the territorial government. Should there be individuals subject to the laws of the United States who do not benefit from all of its protections? Certainly not. But is judicially imposed, autonomy-limiting constitutional equality the perfect solution? See generally Alvin Padilla-Babilonia, The Imposition of Constitutional Rights, 123 Mich. L. Rev. 1289 (2025) ("The debate about how the Constitution applies to the territories overshadows how the imposition of rights can also impair democratic self-governance, pluralism, and decolonization.").

230. See Jane A. Hudiburg, Cong. Rsch. Serv., R40170, Parliamentary Rights of the Delegates and Resident Commissioner From Puerto Rico 1 (2022).

231. Ashleigh Jackson, Here's Why Millions of Americans in Puerto Rico, Other Territories Can't Vote for President, The Hill (Oct. 30, 2024), https://thehill.com/homenews/4960708-heres-why-millions-of-americans-in-puerto-rico-other-territories-cant-vote-for-president/ (on file with the *Columbia Law Review*).

232. See, e.g., Trías Monge, Oldest Colony, supra note 37, at 108–09 (explaining the swift legislative death of the Tydings–Piñero Bill, which would have allowed Puerto Rico to conduct a political status referendum that would be binding on the United States).

233. See supra note 112.

2. *Puerto Rican Legislative Solution.* — A legislative solution from within Puerto Rico would be more feasible, but it would fall flat in terms of constitutional equality. The territorial incorporation gap is more than just a list of rights denied in Puerto Rico; it represents the second-class status that the United States has imposed on the unincorporated territories. Judicial bridging of the incorporation gap would be a powerful first step in reconciling the legal relationship between the United States and its territories. Yet, if territorial legislatures and courts establish various federal constitutional rights within the territories, this expansion will only serve to preempt future litigation.

The Puerto Rican Supreme Court's *Pueblo v. Torres Rivera*[234] and *Pueblo v. Rodriguez Lopez*[235] rulings illustrate this point: Because the Puerto Rican Supreme Court incorporated the Second Amendment and certain rights protected by the Sixth Amendment into Puerto Rican jurisprudence, there is no realistic avenue to challenge their lack of federal unincorporation through the territorial incorporation doctrine. As a result, the incorporation gap remains, with fewer options to meaningfully challenge it. All the while, the federal courts are absolved from facing the "rotten foundation[s]"[236] of the *Insular Cases*, as the cases slowly fade, unseen, into the tapestry of federal jurisprudence.[237]

While legislative action could resolve the issue of constitutional incorporation in the territories, the likelihood of a federal solution is bleak, while a territorial solution would remain incomplete. Therefore, a judicial remedy—applying the *Insular Cases* and the territorial incorporation doctrine—remains the best path to feasibly and completely resolve the territorial incorporation gap.

CONCLUSION

The *Insular Cases* represented a sharp and appalling departure from American territorial jurisprudence. Before the *Insular Cases*, territorial residents in the American West enjoyed most, if not all, constitutional protections and looked forward to eventual statehood.[238] The *Insular Cases* disrupted this reality, creating an artificial, two-tier system in which incorporated territories enjoyed the opportunities and protections of the

234. 204 P.R. Dec. 288, 300–01 (2020) (incorporating the Sixth Amendment's jury unanimity right in Puerto Rico).

235. 210 P.R. Dec. 752, 770–71 (2022) (incorporating the Second Amendment in Puerto Rico).

236. United States v. Vaello Madero, 142 S. Ct. 1539, 1557 (2022) (Gorsuch, J., concurring).

237. See Christina Duffy Ponsa, When Statehood Was Autonomy, *in* Reconsidering the *Insular Cases*: The Past and Future of the American Empire 1, 1 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015) (describing the *Insular Cases* as "[n]early invisible for a century after they were handed down").

238. See supra notes 45–47 and accompanying text.

American legal system and unincorporated territories received only what the courts and Congress were willing to give them.

These cases have been the subject of well-founded criticism by academics, litigants, judges, and Justices.[239] To many, the *Insular Cases* represent the roadblock to constitutional equality in the territories, and these advocates have long called for their complete dismantling. Nevertheless, over the last 125 years, the Court has never been able to escape these cases, which retain full precedential force.

Despite the nobility of this legal movement, challenging the *Insular Cases* head-on has only yielded marginal doctrinal improvement. So long as the *Insular Cases* remain good law, litigating parties must explore new strategies to successfully procure and protect constitutional rights in the territories. A reluctant embrace of the *Insular Cases* could prove to be one such strategy—providing a solution to the incorporation gap and territorial legal inequality that could be used as a springboard to dismantle the larger political and structural inequalities in the unincorporated territories. In pursuit of constitutional equality, this Note proposes a reluctant embrace of the *Insular Cases* to bridge the territorial incorporation gap.

239. See supra notes 9–11 and accompanying text.