

# The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the *Insular Cases*

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*At the end of the Spanish-American War of 1898, America gained control of three new territories—Puerto Rico, Guam, and the Philippines. The political fate of these islands generated a bitter debate in the United States as many wondered how a country whose identity had been forged in the crucible of colonialism could, only a century after gaining its independence, administer an empire of its own. Despite the enormous political and public attention paid to the issue of American expansion, it was the Supreme Court—in a series of decisions collectively known as the Insular Cases—that interceded to settle the protracted political feud. What is most striking about this episode in constitutional history is that the Court’s intervention brought closure to a volatile national debate implicating international affairs and foreign treaties—matters in which courts were expected not to meddle—without provoking significant public backlash or damaging the Court’s institutional credibility. And the Insular Cases themselves have remained good law ever since. This Article seeks to understand why.*

*Specifically, this piece aims to understand the process by which divisive, politically charged issues were transformed into questions fit for judicial review, how that process ratified the decisions themselves, and what role the political branches can play in validating otherwise questionable judicial action. It concludes first that there is considerable evidence, as a descriptive matter, that before the Supreme Court decided the Insular Cases, political actors took a series of steps that authorized and facilitated judicial consideration of questions that were political in nature. Second, the Article contends, as a normative matter, that the Insular Cases illustrate how the political branches can properly validate the Court’s decisions by consenting in advance to the judiciary’s involvement and certifying certain questions to the courts. Although the precise features of this process defy easy classification, it is possible to discern evidence of five elements that laid the groundwork for legitimate judicial review. By (1) disavowing their own authority to settle the dispute, (2) publicly inviting the Court to mediate the controversy, (3) endorsing the validity of judicial resolution, (4) casting the political issue in legal and constitutional terms, and (5) proposing nonlegal factors that could compensate for the absence of traditional standards, the popular branches helped transform arguably political questions into justiciable ones. It is this “consent and certify” process that at once explains and justifies the Supreme Court’s intervention in the Insular Cases. More broadly, the Article suggests that the largely forgotten historical context of the Insular Cases reveals an important, unexplored potential source of judicial legitimacy: the political branches of government.*

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## INTRODUCTION

At the dawn of the twentieth century, the United States was embroiled in a bitter debate over territorial expansionism. The Spanish-American War of 1898 had left America in possession of three new territories—Puerto Rico, Guam, and the Philippines—whose fate and future governance were uncertain.<sup>1</sup> Many wondered how a country whose identity had been forged in the crucible of colonialism could, only a century after gaining its independence, administer an empire of its own.<sup>2</sup> Political parties fashioned distinctive national platforms to emphasize pro- and anti-imperialist leanings. Members of Congress vociferously disagreed about the status of America's newly acquired territories. And the presidential election of 1900 became a nationwide referendum on the expansionist policies of the McKinley administration.<sup>3</sup> Yet, in the end, despite the concentration of political attention on the subject, these disputes were not resolved by the elected branches of government. Rather, it was the Supreme Court—in a series of decisions collectively known as the *Insular Cases*—that inter-

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<sup>1</sup> Under the Treaty of Paris, Spain also ceded Cuba to the United States. See Treaty of Peace between the United States and the Kingdom of Spain, 30 Stat 1754, Treaty Ser No 343 (1898) (“Treaty of Paris”) (“Spain relinquishes all claim of sovereignty over and title to Cuba.”). Cuba’s postwar status was less in doubt, however, because of the Teller Amendment, an 1898 resolution in which the United States expressly committed in advance to return control of Cuba to its people. See Joint Resolution for the Recognition of the Independence of the People of Cuba, Demanding that the Government of Spain Relinquish Its Authority and Government in the Island of Cuba, and to Withdraw Its Land and Naval Forces from Cuba and Cuban Waters, and Directing the President of the United States to Use the Land and Naval Forces of the United States to Carry These Resolutions into Effect, J Res 24, 55th Cong, 2d Sess (Apr 20, 1898), in 30 Stat 738, 739 (1899) (“Teller Amendment”) (stating that the United States “hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people”). Accordingly, the United States left Cuba in 1902. See Library of Congress, *Teller and Platt Amendments* (1998), online at <http://www.loc.gov/rr/hispanic/1898/teller.html> (visited Jan 29, 2010); Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* 135 (Kansas 2006).

<sup>2</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec S 2128 (Feb 23, 1900) (statement of Sen George G. Vest) (“In the last Congress, when discussing the relations of these newly acquired islands to the United States, I undertook to show that by the historic argument, if I may so term it, it was impossible that the men who fought the Revolutionary war and made the Constitution of 1789 could ever have contemplated establishing a colonial system in this country.”); 56 Cong, 1st Sess, in 33 Cong Rec S 3669 (Apr 3, 1900) (statement of Sen William E. Mason) (“[W]hen you levy an impost duty, [such as the one considered here between the United States and Cuba,] that duty which the fathers were afraid of, that duty which they went to war about, that duty which invited the Boston tea party—it says when you levy that sort of a duty you must make it uniform throughout the United States.”).

<sup>3</sup> See notes 106–10 (describing the political questions answered by the *Insular Cases*).

ceded to settle the protracted political feud over the status of American territories and the legitimacy of American expansionism.<sup>4</sup>

To be sure, the *Insular Cases* are historically notable because they put to rest a longstanding national controversy, blessed the expansionist agenda of the Republican Party, and established the ground rules of territorial governance.<sup>5</sup> And there should be renewed interest today in the *Insular Cases* because those opinions (originally issued in 1901) have recently formed part of the legal edifice of the Court's landmark decision in *Boumediene v Bush*.<sup>6</sup> As a matter of political theory, however, what is most striking about this episode in constitutional history is that the Court's intervention in the *Insular Cases* brought closure to a volatile national debate *without* provoking the public's backlash or damaging the Court's institutional credibility. Indeed, simply by agreeing to consider the cases, the Supreme Court positioned itself to answer profound issues that defined and divided the nation—and the manner in which the Court ultimately resolved the *Insular Cases* pronounced a clear winner on the question of American expansionism. Yet there were no serious charges of judicial activism, or sustained challenges *either* to the Court's authority to decide the cases or to the legitimacy of the decisions themselves. Both sides (warmly or grudgingly) accepted the Court's settlement, and the *Insular Cases* have remained good law ever since.<sup>7</sup>

Public and political acquiescence to the decisions is particularly remarkable because there was little cause at the time to expect it. The cases unmistakably implicated international affairs and foreign treaties, subjects in which the courts were expected not to meddle; in fact,

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<sup>4</sup> See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 *Revista Jurídica Universidad Puerto Rico* 225, 303 (1996) (“The intense debate that had accompanied the process of acquisition of new territories had to be settled in order for the process to continue its course. There was a need to develop a truly *common sense* among the organic intellectuals of the metropolitan state. The decisions of the *Insular Cases* had precisely that effect.”).

<sup>5</sup> See Sparrow, *Emergence of American Empire* at 6 (cited in note 1).

<sup>6</sup> 128 S Ct 2229, 2253–55 (2008). Justice Anthony Kennedy's majority opinion relies directly on the *Insular Cases*, and hence the validity of the Court's decision concerning the habeas corpus rights of individuals detained by the United States government may now be inextricably linked to the legitimacy of the *Insular Cases* themselves. This project began independent of the *Insular Cases*' newfound significance in the context of the modern debate concerning the rights of noncitizen detainees at Guantanamo Bay and Bagram Air Base; these recent developments only underscore the importance of revisiting and better understanding the history, implications, and enduring validity of the *Insular Cases*.

<sup>7</sup> See text accompanying notes 156–60.

many were aware of the “gravity of the issues at stake”<sup>8</sup> and at first questioned the wisdom of the Supreme Court’s involvement.<sup>9</sup> Moreover, the issues presented by the *Insular Cases* bore a close resemblance to the kinds of political questions that courts, even in 1901, were forbidden to consider.<sup>10</sup> It is true that each of the *Insular Cases* had been framed as an issue of statutory interpretation and positive law; but each also implicated a roiling political debate over American imperialism.<sup>11</sup> In fact, the main question common to all the cases was one that traditionally had been decided by the country’s political branches: whether specific territories like Puerto Rico were foreign or domestic.<sup>12</sup> For these reasons, the Court could easily have declined to consider the cases, and its failure to do so arguably reinforces the fashionable perception that the Supreme Court of the *Lochner* era was comfortable injecting itself into extralegal controversies with significant

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<sup>8</sup> See Carman F. Randolph, *Notes on the Law of Territorial Expansion with Especial Reference to the Philippines* 7 (De Vinne 1900) (Submitted to the Committee on the Judiciary of the Senate of the United States, Mar 16, 1900).

<sup>9</sup> See notes 91–105 and accompanying text.

<sup>10</sup> See *Marbury v Madison*, 5 US 137, 170 (1803) (“Questions, in their nature political . . . can never be made in this court.”). See also *Luther v Borden*, 48 US 1, 46–47 (1849) (“Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the court has been urged to express an opinion. We decline doing so.”).

<sup>11</sup> See notes 122–36 and accompanying text.

<sup>12</sup> Of the nine *Insular Cases*, seven of them concerned the status of Puerto Rico. See *De Lima v Bidwell*, 182 US 1, 1–2 (1901) (holding that after its cession to the United States by the treaty with Spain, Puerto Rico was no longer a “foreign country,” within the meaning of the Dingley Tariff Act); *Goetze v United States*, 182 US 221, 221 (1901) (holding that Puerto Rico and the Hawaiian Islands were not foreign countries within the meaning of the tariff laws); *Dooley v United States*, 182 US 222, 222 (1901) (“*Dooley I*”) (holding that Puerto Rico and the United States were foreign countries with respect to each other, within the meaning of the revenue laws, while the island was in the military occupation of the United States, before its cession to the United States by treaty); *Armstrong v United States*, 182 US 243, 244 (1901) (holding that Puerto Rico and the United States were foreign countries with respect to each other, within the meaning of the revenue laws, while Puerto Rico was under military occupation by the United States); *Downes v Bidwell*, 182 US 244, 247 (1901) (holding that the imposition of duties on imports from Puerto Rico under the Foraker Act was a constitutional exercise of congressional power); *Huus v New York & Porto Rico Steamship Co*, 182 US 392, 392 (1901); *Dooley v United States*, 183 US 151, 153 (1901) (“*Dooley II*”) (holding that taxes imposed on imports into Puerto Rico were constitutional because Puerto Rico was not considered a state). In addition, one dealt exclusively with Hawaii, see *Crossman v United States*, 182 US 221, 221 (1901) (consolidated with *Goetze*) (holding that imports from Hawaii were not subject to tariffs imposed on imports from a foreign country because Hawaii was not considered a foreign country), and one addressed the Philippines, see *Fourteen Diamond Rings v United States*, 183 US 176, 177 (1901) (holding that diamonds imported from the Philippines were not subject to tariffs imposed on imports from a foreign country because the Philippines was not considered a foreign country). For a more detailed description of these cases, see Part I.A.

policy and political dimensions.<sup>13</sup> Despite all this, the Court's decision to interject—and the legitimacy of the *Insular Cases* themselves—has stood the test of time. This Article seeks to understand why.

Accordingly, the Article explores the history of the *Insular Cases* in order to explain how the Court found itself in a *legitimate* position to settle questions ordinarily reserved for political and public resolution. Specifically, it attempts to understand the *process* by which divisive and politically charged issues were transformed into questions apparently fit for judicial review, and how that process validated the decisions themselves. This overarching inquiry produces two conclusions. *First*, as a descriptive matter, there is considerable evidence that, before the Supreme Court decided the *Insular Cases*, political actors took a series of steps that authorized and facilitated judicial consideration of questions that were mainly political in nature. Among other things, for example, elected officials publicly called upon the Supreme Court to enter its view, describing the political controversy in emphatically legal terms. *Second*, as a normative matter, I contend that the *Insular Cases* provide an illustration of where the political branches defensibly validated the Court's decisions by consenting in advance to the judiciary's involvement and essentially certifying certain questions to the courts. It is this "consent and certify" process, in my view, that explains and justifies the Supreme Court's intervention in the *Insular Cases*. More broadly, I conclude that this episode in constitutional history reveals a valid, but largely unappreciated and unexplored, source of judicial legitimacy: the political branches of government.

To establish and defend this process whereby political actors enhance the legitimacy of judicial actions, this Article proceeds in five parts. Part I provides relevant background. First, it summarizes the *Insular Cases* themselves, underscoring that although the specific legal question varied from case to case, all of the *Insular Cases* addressed the status of territories acquired by conquest and treaty. Second, it reviews the literature commenting on these cases, reporting that most prior scholarship either refers to the cases as evidence of the political controversies of the time, or dissects the reasoning of the opinions in order to understand how they influenced America's subsequent governance of the territories at issue. Part I also surveys research on the sources of judicial legitimacy, noting that most scholarship connects the validity of judicial decisionmaking to the logic of the opinions

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<sup>13</sup> See, for example, Paul Finkelman, Book Review, *Civil Rights in Historical Context: In Defense of Brown*, 118 Harv L Rev 973, 1009 (2005) (describing criticisms of *Lochner* and judicial activism by the Supreme Court between 1880 and 1930).

themselves, to the strength of the underlying interpretive methods, or to the legitimacy of the overarching political structure. Few have considered (even generally) the role of the popular branches of government in validating the judiciary's actions—and it seems no one has studied how the Supreme Court was able to navigate and put to rest a raging political debate about American expansionism without calling into question the legitimacy of the judiciary and the validity of its decisions.<sup>14</sup> By deeply probing one significant historical illustration where the political branches appear to have directly reinforced the legitimacy of judicial action, this Article seeks to address these apparent gaps in the literature and, in doing so, to begin to highlight the political roots of judicial legitimacy.

To do so, Part II begins by establishing the basic predicate of this Article: the *Insular Cases*, somewhat surprisingly, produced very little public backlash as both sides accepted the Court's opinions as a valid resolution of the dispute. Part II enumerates why this was unexpected, describing how (1) an impassioned public was deeply divided over the issue of expansionism and closely monitored the Court's involvement, (2) many recalled the Court's fateful decision in *Dred Scott* and warned that the *Insular Cases* might lead to similar consequences, and (3) the *Insular Cases* presented controversial questions with significant political dimensions that under ordinary circumstances may have been unfit for judicial review. To validate this third observation, the Article provides a brief overview of the political question doctrine itself (as it stood at the turn of the twentieth century). Even measured against these early doctrinal standards, the putatively legal issues presented by the *Insular Cases* perhaps qualified as political questions that the Supreme Court should (or at the very least could) have declined to review. This characterization of the issues raised by the *Insular Cases* is corroborated by several justices' individual statements, by the highly political considerations that dominated their opinions, and by the historical context surrounding the cases.

Next, Part III sifts through the congressional record in order to document the process by which elected officials and other political actors facilitated and legitimized the Court's involvement in the *Insular Cases*. The precise features of this process defy easy classification; it is possible however to discern evidence of five elements that laid the groundwork for legitimate judicial review. By (1) disavowing the authority of the legislature and executive to resolve the matter, (2) publicly inviting the Court

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<sup>14</sup> See notes 84–88 and accompanying text.

to mediate the controversy, (3) endorsing the validity of judicial involvement, (4) casting the political issue in legal and constitutional terms, and (5) proposing nonlegal factors that could compensate for the absence of traditional legal standards, the popular branches helped transform arguably political questions into justiciable ones.

Part IV then sets forth a preliminary normative case for this “consent and certify” process, explaining why it represents a defensible means by which political actors can fortify the legitimacy of judicial actions. Courts must, of course, be sufficiently insulated from political currents in order to act independently. That does not mean, however, that the legitimacy of judicial pronouncements is not rightly influenced by the prior activities and statements of the popular branches of government. Part IV outlines three sets of considerations to support this position. First, where the political branches have affirmatively solicited and consented to judicial involvement, the principal concerns that underlie modern political question doctrine—a doctrine that may draw into question a decision’s legitimacy—are substantially diminished. When a case presents a putative political question, the appropriateness of assertive judicial action is enhanced by the political branches’ recommendation to intervene, creating the kind of interdependent, “workable government” envisioned by Justice Robert Jackson in *Youngstown Sheet & Tube Co v Sawyer*.<sup>15</sup> Second, political actors can validly help discern the elusive line between the kind of question reserved exclusively for political resolution and the kind that is appropriate for judicial review—and their views in this regard can inform and validate the judiciary’s decision to consider questions that fall near that line. Finally, just as federal courts can certify questions to their state counterparts, the political branches may also ask the courts, in certain circumstances, to share their views on matters that are partly legal and partly political in nature. This dynamic dialogue between the courts and representatives of the people validates and strengthens the actions of each. And encouraging this kind of intergovernmental discourse resists the fiction that the legitimacy of a court’s decision is (or should be) a static, academic judgment, acknowledging instead that the people and their representatives must ultimately approve a judicial decision if it is to endure and lay the foundation, as the *Insular Cases* have, for further pronouncements a hundred years hence.

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<sup>15</sup> See 343 US 579, 635 (1952) (Jackson concurring) (“While the Constitution diffuses power ... it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).

## I. BACKGROUND

In 1898, Ambassador John Milton Hay transmitted a letter to then-Lieutenant Colonel Theodore Roosevelt, describing the United States' conflict with Spain as a "splendid little war."<sup>16</sup> It lasted a mere four months, yet at its conclusion Spain transferred to the United States possession of Puerto Rico, Guam, the Philippines, and governing authority over an independent Cuba.<sup>17</sup> Cuba was treated differently from the three other territories because, immediately before formal military conflict commenced, the United States Congress passed the Teller Amendment to express America's commitment to liberating the people of Cuba. Among other things, the amendment prospectively bound the United States to free Cuba from all colonial rule once the conflict abated.<sup>18</sup> Accordingly, the Treaty of Paris—which formally ended the war—established limited ties between America and Cuba by explicitly providing that the sovereign people of Cuba would rule themselves.<sup>19</sup>

The treaty failed to specify, however, the exact relationship between the United States and the remaining island territories. After the political branches wrestled inconclusively with this issue for nearly three years—a period discussed extensively in Part II—the question was redirected to the Supreme Court in the form of the *Insular Cases*. Part I.A describes the individual cases, and Part I.B summarizes the existing scholarship commenting on these cases.

### A. The *Insular Cases*

The Supreme Court heard the nine *Insular Cases* over the course of two terms: seven were decided on May 27, 1901,<sup>20</sup> and two were postponed until the following term and decided on December 2, 1901.<sup>21</sup>

<sup>16</sup> Peter Huchthausen, *America's Splendid Little Wars: A Short History of U.S. Military Engagements: 1975–2000* xv (Penguin 2003).

<sup>17</sup> The Treaty of Paris was signed on December 10, 1898 and ratified on April 11, 1899. Treaty of Paris, 30 Stat at 1754.

<sup>18</sup> See *Teller and Platt Amendments* (cited in note 1) (declaring that the United States "hereby disclaims any disposition of intention to exercise sovereignty, jurisdiction, or control over said island except for pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people").

<sup>19</sup> Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* 17–18 (Puerto Rico 1985); Carl Schurz, *American Imperialism*, in Theodore P. Greene, ed., *American Imperialism in 1898* 77, 83 (D.C. Heath 1955).

<sup>20</sup> The seven cases settled on May 27, 1901 were *De Lima v Bidwell*, 182 US 1, 1 (1901); *Goetze v United States*, 182 US 221, 221 (1901); *Crossman v United States*, 182 US 221, 221 (1901); *Dooley v United States*, 182 US 222, 222 (1901) ("Dooley I"); *Armstrong v United States*, 182 US 243, 243 (1901); *Downes v Bidwell*, 182 US 244, 246 (1901); *Huus v New York & Porto Rico Steamship Co*, 182 US 392, 392 (1901).



Many consider *Downes v Bidwell*<sup>22</sup> the lead decision among the *Insular Cases*.<sup>23</sup> According to Justice John Marshall Harlan, it “involve[d] consequences of the most momentous character.”<sup>24</sup> The controversy arose when Samuel Downes, a merchant whose company had imported oranges from Puerto Rico, brought suit against the collector of the port of New York in order to recover back duties he had paid on his “imports.” Downes claimed that the Treaty of Paris, which declared Puerto Rico a United States territory and severed its ties with Spain, meant that Puerto Rico was no longer “foreign” to the United States. He further observed that the Uniformity Clause of the Constitution provided that “all duties, imposts, and excises shall be uniform throughout the United States.”<sup>25</sup> Accordingly, Downes argued that the federal law permitting the New York duty (which taxed trade with Puerto Rico) violated the Uniformity Clause, insisting that the phrase “throughout the United States” included American territories. The premise of this argument was that a newly acquired territory such as Puerto Rico could not indefinitely be kept separate from the rest of the United States:

[I]t is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States and which are not so completely incorporated as to be in all respects a part of the United States; that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States.<sup>26</sup>

Advocates of American imperialism objected to Downes’s position since it called into question the power of Congress to establish territo-

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<sup>21</sup> The two cases settled on December 2, 1901 were *Dooley v United States*, 183 US 151, 151 (1901) (“*Dooley II*”), and *Fourteen Diamond Rings v United States*, 183 US 176, 176 (1901). See Sparrow, *Emergence of American Empire* at 122 (cited in note 1) (“Justice Brown had requested that *Fourteen Diamond Rings v. United States* (the ‘Philippine case’) and *Dooley v. United States II* be postponed until the next term, and Chief Justice Fuller agreed to do so.”).

<sup>22</sup> 182 US 244 (1901).

<sup>23</sup> See, for example, Christina Duffy Burnett and Burke Marshall, eds, *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 7 (Duke 2001) (emphasizing the significance of *Downes* partly because “it produced the most detailed exposition of Justice White’s doctrine of incorporation”); Sparrow, *Emergence of American Empire* at 11 (cited in note 1).

<sup>24</sup> See *Downes*, 182 US at 379 (Harlan dissenting).

<sup>25</sup> US Const Art I, § 8 (emphasis added). See *Downes*, 182 US at 249.

<sup>26</sup> *Downes*, 182 US at 311–12 (White concurring).

ries that remained forever outside the United States; moreover, it specifically challenged Congress's authority to create laws with respect to US territories that would have been unconstitutional had they been directed at states fully within the union.<sup>27</sup>

By a 5-4 vote, a fractured Supreme Court rejected Downes's view in a decision that produced five separate writings and no clear majority opinion. On its surface, *Downes* held only that the heavier duties imposed upon Puerto Rican imports were valid, leaving US territories outside the Constitution's Uniformity Clause. But the basis of the ruling was crucial, for the Court reconceived of Puerto Rico not as foreign or domestic, but rather as "a territory appurtenant and belonging to the United States, but not a part of the United States."<sup>28</sup> Or as Justice Edward White famously put it, Puerto Rico was "foreign to the United States in a domestic sense."<sup>29</sup> In effect, the Court endorsed Congress's authority to govern Puerto Rico as a satellite colony, formally validating the territory's hybrid status somewhere between foreign nation and domestic state.

Justice Henry Brown, who cast the decisive vote,<sup>30</sup> offered a wide range of reasons to justify the Court's view that Congress could lawfully leave Puerto Rico in this unusual intermediate position. First, he referred to settled foreign and domestic practices. He claimed that, absent a contrary constitutional directive, the United States should have the same power over newly acquired territories that other nations historically possessed.<sup>31</sup> He also observed that Congress had consistently treated states and territories differently under the Constitution, though he admitted that prior territories had been squarely placed

<sup>27</sup> Id at 286 (majority) ("A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.").

<sup>28</sup> Id at 287.

<sup>29</sup> Id at 341 (White concurring). Justice White was joined by Justices George Shiras and Joseph McKenna. Id at 287. Years later, in *Balzac v Porto Rico*, 258 US 298, 305 (1922), the Court unanimously affirmed this view.

<sup>30</sup> Justice Brown was the decisive vote in both *Downes* and *De Lima*, joining the four dissenting justices in *Downes* to form a majority in *De Lima*. He was in the majority in all nine cases and wrote the opinion for the Court in eight. See Sparrow, *Emergence of American Empire* at 112 (cited in note 1) (explaining that Chief Justice Fuller assigned to Justice Brown eight of the opinions because of his expertise in admiralty law).

<sup>31</sup> *Downes*, 182 US at 285:

If it be once conceded that we are at liberty to acquire foreign territory, a presumption arises that our power with respect to such territories is the same power which other nations have been accustomed to exercise with respect to territories acquired by them. If, in limiting the power which Congress was to exercise within the United States, it was also intended to limit it with regard to such territories as the people of the United States should thereafter acquire, such limitations should have been expressed.

on the path to statehood at the outset.<sup>32</sup> Second, Justice Brown argued that the text of the Constitution suggested the possibility of territories that were neither fully foreign nor fully domestic. For example, he reasoned that, by “prohibiting slavery and involuntary servitude ‘within the United States, or *in any place subject to their jurisdiction,*’”<sup>33</sup> the Thirteenth Amendment implied “that there may be places within the jurisdiction of the United States that are no part of the Union.”<sup>34</sup>

Justice Brown also stressed the consequence of the Court’s ruling on the future prospects of an American empire. He believed that natural events or a successful war could “bring about conditions which would render the annexation of distant possessions desirable.”<sup>35</sup> He voiced reluctance to interfere with America’s advancement in those circumstances: “A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.”<sup>36</sup> And contracting the scope of Congress’s authority over Puerto Rico was tantamount to limiting America’s power to acquire territories:

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the “American empire.” . . . Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.<sup>37</sup>

For these reasons (among others<sup>38</sup>), the Court ruled against *Downes* and concluded that Puerto Rico was not fully part of the United States, but rather was “foreign . . . in a domestic sense.”<sup>39</sup>

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<sup>32</sup> *Id.* at 258 (“Congress has or has not applied the revenue laws to the territories, as the circumstances of each case seemed to require . . . Congress has been consistent in recognizing the difference between the states and territories under the Constitution.”).

<sup>33</sup> *Id.* at 251 (emphasis added) (citation omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Downes*, 182 US at 286–87.

<sup>36</sup> *Id.* at 286.

<sup>37</sup> *Id.* at 279–80.

<sup>38</sup> Justice Brown also distinguished adverse prior rulings. For example, in order to diminish *Dred Scott*, 60 US at 450–51, which stated that Congress could not legislate with respect to a territory in a manner that exceeded what Congress could validly do with respect to a state, he contended that the germane part of *Dred Scott* was dicta and that slavery and tariff regulations were distinguishable in any event. See *Downes*, 182 US at 273–74 (“The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products.”).

<sup>39</sup> *Downes*, 182 US at 341 (White concurring).

Four justices dissented, two of them publishing opinions—Chief Justice Melville Fuller and Justice John Marshall Harlan—arguing that the Uniformity Clause of the Constitution applied to all territories subject to American authority. Chief Justice Fuller’s dissent expressly rejected the broad authority claimed by the government to administer Puerto Rico without constitutional limit:

[T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

...

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original states and territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power. In our judgment, so much of the Porto Rican act as authorized the imposition of these duties is invalid.<sup>40</sup>

He added that “[t]he people of all the states are entitled to a voice in the settlement of [this] subject,”<sup>41</sup> and hence that a constitutional amendment was needed to authorize the colonial structure envisioned by the majority. Justice Harlan, for his part, echoed the chief justice’s arguments.<sup>42</sup> He

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<sup>40</sup> Id at 372–74 (Fuller dissenting).

<sup>41</sup> Id at 374.

<sup>42</sup> He wrote: “I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution.” Id at 386 (Harlan dissenting). Justice Harlan also highlighted the tension between the *Downes* decision and the Court’s ruling in *De Lima*, which concluded that Puerto Rico was not foreign (and hence that a tariff could not be imposed upon it):

I cannot agree that [Puerto Rico] is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts, and excises imposed by Congress “shall be uniform throughout the United States.” How [Puerto] Rico can be a domestic territory of the United States, as distinctly held in *De Lima v. Bidwell*, and yet, as is now held, not embraced by the words “throughout the United States,” is more than I can understand.

Id.

too insisted that an amendment was required to authorize the grant of power demanded by those in favor of an American empire:

We heard much in argument about the “expanding future of our country.” It was said that the United States is to become what is called a “world power;” and that if this government intends to keep abreast of the times and be equal to the great destiny that awaits the American people, it *must* be allowed to exert all the power that other nations are accustomed to exercise. My answer is, that the fathers never intended that the authority and influence of this nation should be exerted otherwise than in accordance with the Constitution. If our government needs more power than is conferred upon it by the Constitution, that instrument provides the mode in which it may be amended and additional power thereby obtained. The People of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interpretation.<sup>43</sup>

The other *Insular Cases* rulings were somewhat derivative of *Downes*, and because they implicated many of the same considerations, they were equally contentious. For example, *De Lima v Bidwell*<sup>44</sup> presented the opposite problem of *Downes*: *Downes* held that Puerto Rico was not *domestic*; *De Lima* addressed whether Puerto Rico was *foreign*. The controversy arose in a similar fashion. De Lima & Company filed suit to recover duties paid on sugar imports from Puerto Rico. According to the plaintiff, Puerto Rico was not a foreign country under the US Tariff Act of 1897.<sup>45</sup> Despite its ruling in *Downes* that Puerto Rico was not a *domestic* part of the United States, the Court ultimately concluded that Puerto Rico was not *foreign* either.<sup>46</sup> Obliquely acknowledging the tension between *Downes* and *De Lima*, the Court remarked that the rulings should not be read to negatively affect one another.<sup>47</sup> Writing again for a slim 5-4 majority, Justice Brown narrowly defined a foreign country as “one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United

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<sup>43</sup> *Downes*, 182 US at 386–87 (Harlan dissenting).

<sup>44</sup> 182 US 1 (1901).

<sup>45</sup> *Id* at 180–81.

<sup>46</sup> *Id* at 200.

<sup>47</sup> In fact, in *Fourteen Diamond Rings*, the Court rejected the argument that one justice’s concurrence in both *De Lima* and *Downes* undercut the precedential value of *De Lima*. *Fourteen Diamond Rings*, 183 US at 181–82. The Court summarily dismissed the suggestion: “The ruling in the *Case of De Lima* remained unaffected, and controls that under consideration.” *Id* at 182.

States.”<sup>48</sup> Accordingly, because the treaty with Spain transferred the territory of Puerto Rico to the United States, it was no longer a foreign country: “We are therefore of [the] opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted, and that the plaintiffs are entitled to recover them back.”<sup>49</sup> The consolidated cases of *Goetze v United States* and *Crossman v United States*<sup>50</sup> simply affirmed the basic principle of *De Lima*, reiterating that Puerto Rico and Hawaii were not foreign countries under American tariff law and reversing on that basis the administrative decision to tax merchandise imported into the United States.<sup>51</sup>

The prior cases were all predicated upon goods shipped from one of the territories into the United States. Some of the *Insular Cases* also addressed the converse question of how to treat merchandise sent from the United States into the territories. In *Dooley v United States*,<sup>52</sup> for example, the Court held that before the ratification of the Treaty of Paris, duties that had been levied on exports to Puerto Rico were lawfully collected by the military commander and the President under the war power.<sup>53</sup> After ratification of the treaty, however, Puerto Rico “ceased to be a foreign country,”<sup>54</sup> and hence *export* levies were invalid. Addressing the related problem of *import* duties, *Armstrong v United States*<sup>55</sup> concerned taxes imposed upon imports received into San Juan; the Court upheld “duties exacted by the collector of the port of San Juan” on goods imported from the United States because the territories were not states subject to the Uniformity Clause.<sup>56</sup>

Adding some confusion was *Huus v New York & Porto Rico Steamship Co.*,<sup>57</sup> which only reinforced the impression that the status of these territories remained somewhere between foreign sovereign and

<sup>48</sup> *De Lima*, 182 US at 180.

<sup>49</sup> *Id* at 200.

<sup>50</sup> 182 US 221 (1901).

<sup>51</sup> *Id* at 221–22.

<sup>52</sup> 182 US 222 (1901) (“*Dooley I*”).

<sup>53</sup> *Id* at 230 (“[G]overnment must be carried on, and there was no one left to administer its functions but the military forces of the United States. Money is requisite for that purpose, and money could only be raised by order of the military commander. The most natural method was by the continuation of existing duties.”).

<sup>54</sup> *Id* at 234.

<sup>55</sup> 182 US 243 (1901).

<sup>56</sup> *Id* at 244.

<sup>57</sup> 182 US 392 (1901).

domestic state.<sup>58</sup> In *Huus*, the Supreme Court addressed: (1) whether Puerto Rican ports were foreign, (2) whether trade between Puerto Rico and the United States was “coasting” or domestic trade, and (3) whether ships traveling between Puerto Rico and the United States were domestic, “coastwise steam vessels.”<sup>59</sup> In this narrow context, a unanimous Court held that the Foraker Act (the federal law that established civilian government in Puerto Rico) nationalized Puerto Rico and entitled its ports to be considered within the United States for shipping purposes alone.<sup>60</sup> In contrast to the other *Insular Cases*, the Court rested its conclusion on § 9 of the Foraker Act, which provided for the “nationalization of all vessels” and guaranteed that “the coasting trade between Porto Rico and the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great coasting districts of the United States.”<sup>61</sup> Accordingly, the Court held that the vessel was “engaged in the coasting trade, and that the New York pilotage laws did not apply to her.”<sup>62</sup>

By December 1901, the Court had set forth its affirmative view of the status of United States-controlled territories. They were “foreign to the United States in a domestic sense.”<sup>63</sup> The clumsy phrasing is not easy to decipher. But understood in the context of the first seven *Insular Cases*, it meant that these territories were no longer *foreign* entities—and hence import and export levies applicable to foreign nations could not be collected. But nor were they *domestic*, and thus levies did not have to be uniformly applied to them as though they were newly added states. Much like the traditional spoils of conquest during the colonial era, these territories—to the chagrin of anti-imperialists—were stranded somewhere in between.

The two final installments decided the following term did little to dislodge this overall result. In *Dooley v United States*,<sup>64</sup> the Court took up the issue of the constitutionality of the Foraker Act itself.<sup>65</sup> The Act fixed duties on imports into Puerto Rico, and was challenged as a vi-

<sup>58</sup> Id at 396 (finding that Puerto Rico “never belonged to the United States, or any of the states composing the Union” but that trade with Puerto Rico “is properly a part of the domestic trade of the” United States).

<sup>59</sup> The Court answered the latter two questions in the affirmative without reaching the first question. Id at 397.

<sup>60</sup> Id at 396–97. See Foraker Act, 31 Stat 77 (1900), codified as amended at 48 USC § 731 et seq.

<sup>61</sup> See Foraker Act, 31 Stat at 79.

<sup>62</sup> *Huus*, 182 US at 397.

<sup>63</sup> *Downes*, 182 US at 341 (White concurring).

<sup>64</sup> 183 US 151 (1901) (“*Dooley II*”).

<sup>65</sup> Id at 152–53.

olation of Article I, § 9 of the Constitution, which states that “no tax or duty shall be laid on articles exported from *any state*.”<sup>66</sup> The case again hinged on whether Puerto Rico was a domestic state, foreign sovereign, or something in between. Finding that Puerto Rico was not a state but rather a territory held by the United States, the Court upheld the Act’s constitutionality.<sup>67</sup>

Finally, *Fourteen Diamond Rings v United States*<sup>68</sup> simply extended to the Philippines principles that had been established with respect to Puerto Rico (and, in one instance, Hawaii).<sup>69</sup> Specifically, the Court considered whether rings brought to California from Luzon, Philippines after the ratification of the peace treaty were illegally imported because they had been shipped from a foreign country without the necessary payment of duties. The Court resolved the dispute on the ground that the Philippines, like Puerto Rico, was not a foreign territory: “The Philippines were not simply occupied, but acquired, and having been granted and delivered to the United States, by their former master, were no longer under the sovereignty of any foreign nation.”<sup>70</sup>

Through these nine decisions, the Supreme Court seemingly settled a long-running national debate about the status of territories acquired in the wake of a war.<sup>71</sup> The Court’s rulings authorized the McKinley administration to retain territories without incorporating them into the United States—in effect, sanctioning the colonization of Puerto Rico, Hawaii, and the Philippines.<sup>72</sup> Before documenting the deeply political nature of the questions resolved by the Court (Part II), and before trying to explain why the Court may have validly

<sup>66</sup> Id at 153 (emphasis added).

<sup>67</sup> Id at 157 (reasoning that Congress had greater power to legislate the affairs of a territory than a state).

<sup>68</sup> 183 US 176 (1901).

<sup>69</sup> Id at 179.

<sup>70</sup> Id at 178.

<sup>71</sup> See, for example, *Porto Rico Is Subject to Congress*, Philadelphia Inquirer B8 (May 28, 1901) (“The decision concerning Porto Rico cuts the ground from under the feet of those persons who have opposed the annexation of Cuba on the ground that free sugar and free tobacco would ruin the home industries.”); Torruella, *The Supreme Court and Puerto Rico* at 61 (cited in note 19) (“Thus, amazingly, in one day, the Court held Puerto Rico to be in and/or out of the United States in three different ways!”); Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case W Res L Rev 147, 148 (2006).

<sup>72</sup> See Ramos, 65 Revista Jurídica Universidad Puerto Rico at 261 (cited in note 4) (“Territories can be either incorporated or unincorporated; organized or unorganized. The determination of their status depends on the will of Congress.”); Editorial, Philadelphia Record 4 (May 29, 1901) (“The Supreme Court of the United States has sustained President McKinley and reversed Chief Justice Marshall. It has reasserted the right of taxation without representation that the colonies fought to overturn.”); Sparrow, *Emergence of American Empire* at 103 (cited in note 1).



considered these questions (Part III), it is useful to consider briefly what prior commentators have said about these cases.

## B. Review of the Literature

Despite their historical significance, the *Insular Cases* have received sparse scholarly attention in the hundred years since they were decided.<sup>73</sup> Chief Justice William Rehnquist once observed with respect to the *Insular Cases* that “[e]ven the most astute law student of today would probably be completely unfamiliar with these cases; indeed, [even] when I went to law school more than 30 years ago, they rated only a footnote in a constitutional law case book.”<sup>74</sup> Judge José Cabranes subsequently remarked, “Justice Rehnquist’s observation was equally true when I went to law school more than 20 years ago—only then I (who searched diligently) had difficulty finding that footnote.”<sup>75</sup>

Thankfully, the cases have received greater attention over the last decade.<sup>76</sup> But the scope of current scholarship still remains relatively limited and clusters around two main subjects. One line of scholarship refers to the *Insular Cases* in the context of chronicling the political controversies and public climate during the Spanish-American War and in its aftermath.<sup>77</sup> Walter LaFeber, for example, explains American expansionism at the end of the Spanish-American War as largely driven by a search

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<sup>73</sup> See Sanford Levinson, *Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 Const Comment 241, 246 (2000) (describing the *Insular Cases* as a “topic that is remarkably understudied by constitutional scholars, much to our detriment”).

<sup>74</sup> José A. Cabranes, *Puerto Rico and the Constitution*, 110 FRD 475, 477 (1986) (addressing the 1985 Judicial Conference of the First Circuit), citing William H. Rehnquist, Edward Douglass White Lecture, Louisiana State University (Mar 19, 1983).

<sup>75</sup> Cabranes, 110 FRD at 477 (cited in note 74). See also Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 John Marshall L Rev 55, 57 n 13 (1997).

<sup>76</sup> See, for example, Sparrow, *Emergence of American Empire* at 111–41 (cited in note 1); Burnett and Marshall, eds, *Foreign in a Domestic Sense* at 82–166 (cited in note 23); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U Pa J Intl L 283, 286 (2007); Tauber, 57 Case W Res L Rev at 154–73 (cited in note 71); Burnett, 72 U Chi L Rev at 805–13 (cited in note 17).

<sup>77</sup> For books and articles on the political debates about expansionism, legislation passed by Congress and the President regarding the newly acquired territories, and the 1900 election waged at the height of the debate about American imperialism, see Stanley K. Laughlin, Jr, *The Law of United States Territories and Affiliated Jurisdictions* 25–27 (Lawyers Cooperative 1995); John M. Blum, et al, *The National Experience: A History of the United States* 534–37 (Harcourt, Brace 5th ed 1981); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 19 (Martinus Nijhoff 1989); Rubin Francis Weston, *Racism in U.S. Imperialism: The Influence of Racial Assumptions on American Foreign Policy, 1893–1946* 35–36 (South Carolina 1972). See generally Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 Miss Valley Hist Rev 43, 45–52 (1937).

for new markets in Asia and Latin America.<sup>78</sup> Robert Beisner studied the grassroots movement of anti-imperialism and the twelve public figures, including former President Benjamin Harrison, who spearheaded the movement.<sup>79</sup> This body of scholarship refers obliquely to the *Insular Cases* only to situate the decisions in a broader narrative about the dominant political and economic trends at the turn of the century.

Another body of literature concentrates on the reasoning of the *Insular Cases* and on how these rulings shaped America's subsequent governance of the newly acquired territories.<sup>80</sup> Some have scrutinized the Court's opinions, their internal consistency, and the distinctions the Court drew between "incorporated" territories, which the Court expected to eventually join the Union as states, and "unincorporated" territories, which could be retained indefinitely and where only the most basic provisions of the Constitution applied.<sup>81</sup> Others, elaborating upon concerns that were prominent at the time the decisions were issued, have explored the role of the *Insular Cases* in laying the groundwork for an American empire.<sup>82</sup> For example, Christina Burnett has argued that the *Insular Cases* facilitated imperialism by allowing America to acquire territory only to then formally and permanently

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<sup>78</sup> Walter LaFeber, *The New Empire: An Interpretation of American Expansion, 1860–1898* 370–79 (Cornell 1963).

<sup>79</sup> Robert L. Beisner, *Twelve against Empire: The Anti-Imperialists, 1898–1900* xxv (Chicago 1985).

<sup>80</sup> See, for example, Sparrow, *Emergence of American Empire* at 169–211 (cited in note 1).

<sup>81</sup> See, for example, Owen M. Fiss, 8 *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888–1910* 241 (Macmillan 1993); Jon M. Van Dyke, *The Evolving Legal Relationships between the United States and Its Affiliated U.S.-Flag Islands*, 14 *U Hawaii L Rev* 445, 449–50 (1992); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 *Colum L Rev* 823, 840 (1926); David K. Watson, *Acquisition and Government of National Domain*, 41 *Am L Rev* 239, 253–54 (1907).

<sup>82</sup> See, for example, Sparrow, *Emergence of American Empire* at 215–28 (cited in note 1); Burnett and Marshall, eds, *Foreign in a Domestic Sense* at 2 (cited in note 23) ("The *Insular Cases* . . . enable[d] the United States to acquire and govern its new 'possessions' without promising them either statehood or independence."); Terrasa, 31 *John Marshall L Rev* at 57 (cited in note 75) (arguing that the *Insular Cases* "vested with constitutional legitimacy the existence of a second class of citizens not entitled to all the protections afforded other citizens on the mainland"); Ramos, 65 *Revista Jurídica Universidad Puerto Rico* at 300–03 (cited in note 4) (arguing that the decisions "produced an authoritative rationale for the claim that Congress could exercise almost unrestricted power over the peoples of the territories"); José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 *Harv L Rev* 450, 458–59 (1986) ("The doctrine of territorial incorporation seemed . . . an ideal solution to the question of how the United States might deal with the people of the new colonies."); Torruella, *The Supreme Court and Puerto Rico* at 118–33 (cited in note 19) (noting that the *Insular Cases* "created an unprecedented status under United States sovereignty: an American territory for whom no pledge of even future equality was made"); James E. Kerr, *The Insular Cases: The Role of the Judiciary in American Expansionism* 92–111 (Kennikat 1982).

distance itself from those territories: “[T]he doctrine of territorial incorporation thus amounted to a constitutional doctrine of territorial deannexation.”<sup>83</sup>

There is a final body of scholarship that does not deal directly with the *Insular Cases* but is nonetheless relevant to this Article. It concerns the sources and significance of judicial legitimacy, and this line of literature is far better developed. There are a number of authors who have emphasized the importance of legitimacy to the longevity of specific Supreme Court rulings and to the work of the Court itself.<sup>84</sup> Scholars have also long debated from what sources judicial legitimacy is derived. Some, like Ronald Dworkin and Ken Kress, link the authority of a decision to the coherence of its philosophical underpinnings.<sup>85</sup> Others, including Owen Fiss and Joseph Raz, contend that the strength of any given judicial decision depends ultimately on whether the polity accepts the overarching legal structures and norms that are in place, for example, “the value of judicial interpretation,” the “worth of the Constitution,” and “the place of constitutional values in the American system.”<sup>86</sup> Still others, such as James Boland, believe that the legitimacy of Supreme Court decisions corresponds mainly to the stature of specific justices and to the strength of the interpretive modes of analysis they apply.<sup>87</sup>

By contrast, scant attention has been paid to the idea that judicial legitimacy may be derived from the political branches themselves.

<sup>83</sup> Burnett, 72 U Chi L Rev at 802 (cited in note 17).

<sup>84</sup> See, for example, Jeffrey Rosen, *The Day after Roe*, Atlantic Monthly 56 (June 2006):

[S]erious people on both sides of the abortion divide are girding themselves for the fights in Congress and the state legislatures that they believe will erupt once *Roe* is finally uprooted. . . . [I]n many of the fifty states, and ultimately in Congress, the overturning of *Roe* will probably ignite one of the most explosive political battles since the civil-rights movement, if not the Civil War.

The Supreme Court has expressly recognized the importance of the legitimacy of its rulings; in *Planned Parenthood v Casey*, 505 US 833, 845–46 (1992), it invoked “principles of institutional integrity” as a reason for holding that it could not overturn the decision in *Roe v Wade*, 410 US 113 (1973).

<sup>85</sup> See, for example, Ken Kress, *Legal Indeterminacy*, 77 Cal L Rev 283, 290–95 (1989) (reviewing various versions of philosophical legitimacy); Ronald Dworkin, *Law’s Empire* 190–216 (Belknap 1986) (discussing the Supreme Court’s legitimacy as rooted in the philosophical underpinnings of the decisions).

<sup>86</sup> Owen M. Fiss, *Objectivity and Interpretation*, 34 Stan L Rev 739, 756 (1982) (arguing that the authoritativeness of judicial rulings “vitally depends on a recognition of the value of judicial interpretation”); Joseph Raz, *The Authority of Law* 1–27 (Clarendon 1979) (emphasizing those same values).

<sup>87</sup> James M. Boland, *Constitutional Legitimacy and the Culture Wars: Rule of Law or Dictatorship of a Shifting Supreme Court Majority?*, 36 Cumb L Rev 245, 246–47 (2006) (noting that the legitimacy of rulings is rooted in the justices and the interpretive modes of analysis they applied).

Thus, little has been done to explore how the actions of the political branches can validate and lend credibility to the decisions of the courts, particularly on matters that have deeply engaged politicians and the public. There is one recent and noteworthy exception to this. In his book, *Political Foundations of Judicial Supremacy*, Keith Whittington explains that the principle that the courts are the final arbiters of the meaning of the Constitution is the result, at least partly, of the systematic and sustained efforts of political actors throughout history to cast the courts in that role.<sup>88</sup> Whittington's critical insight is an important launching point for this project, for it recognizes that the legitimacy of the Court's basic role with respect to the Constitution has itself been influenced throughout history by the popular branches of government. Yet Whittington does not purport to examine how this is accomplished in the context of specific decisions, what actions reinforce or erode the legitimacy of a particular judicial opinion, or whether the enduring vitality of a court's pronouncements properly rests on what elected officials say and do in advance of and after a decision is reached. In other words, once one accepts that it is the Court's role to interpret the Constitution (or a particular law), what determines whether a controversial pronouncement on a political subject will command sufficient public approval to withstand the scrutiny of time? It is this question that others have answered by reference to the logic of a decision, or to the intuitive appeal of the interpretive approach. But no one has explored the mechanics of how the political branches (through floor statements by legislators, for example) establish the legitimacy of the Court's decisions.

To be sure, scholars have begun the long-awaited excavation of these fascinating cases. And existing literature has already succeeded in documenting the consequences of the Court's rulings and recognizing the *Insular Cases* as part of broader historical trends. Still, a number of antecedent questions have been left unanswered: Why did the Supreme Court intervene in these matters in the first place? Should the overtly political character of the issues implicated by the *Insular Cases* have convinced the Supreme Court to withhold discretionary review, rather than decide the status of territories acquired by conquest and treaty? After all, these were concerns that Justice Joseph McKenna explicitly raised in his dissenting opinion in *De Lima*: "It is not for the judiciary to question it. It involves circumstances which the

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<sup>88</sup> Keith E. Whittington, *Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* 5 (Princeton 2007) (showing that political leaders have advocated and actively thrust the Court into the role of interpreting the Constitution).

judiciary can take no account of or estimate. It is essentially a political function. . . . [E]ssentially the whole matter is legislative, not judicial.”<sup>89</sup> In the end, Justice McKenna’s reproofing argument against judicial involvement went unheeded, and the Supreme Court effectively extinguished a national political firestorm. The questions that linger a full century later are *why* and *how*: Why did the Court feel comfortable involving itself? And how is it that the Court’s dramatic intervention did not ignite a firestorm of its own?

## II. JUDICIAL INTERFERENCE WITH AMERICAN IMPERIALISM

As described in Part I, the *Insular Cases* squarely came down in favor of American expansionism, removing the supposed constitutional barriers to Congress’s plans to maintain the new territories as satellite colonies indefinitely. As Justice McKenna said with respect to one representative case, *De Lima* ultimately did “more than declare [the legality of sugar duties]. It vindicate[d] the government from national and international weakness [and] enable[d] the United States to have—what it was intended to have—‘an equal station among the Powers of the earth’ [ ] to do all ‘Acts and Things which Independent States may of right do.’”<sup>90</sup> But whether the Court’s endorsement of American colonialism would settle the public debate depended, in turn, on whether political leaders and the public would recognize the rulings as valid. Remarkably, despite what was at stake, by the time the *Insular Cases* were heard in 1901, the public actually expected the Supreme Court—rather than Congress or the President—to decide the status of the islands and territories and the future of American expansionism.

Thus, before describing a process that arguably legitimized the Court’s involvement, it is instructive to describe how, to everyone’s surprise, the *Insular Cases* were in fact accepted by the public without significant backlash. Accordingly, Part II.A identifies several reasons why public acquiescence was quite unlikely; Part II.B reports that, despite these reasons, the *Insular Cases* were received as the valid and final word on what had previously been a fierce, combustible political debate.

### A. The Anticipated Outcome

There were at least five reasons for why the public may have rejected the Supreme Court’s decisions in the *Insular Cases*.

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<sup>89</sup> *De Lima*, 182 US at 208, 219 (McKenna dissenting).

<sup>90</sup> *Id.* at 220 (quotations marks omitted).

First, the public had good reasons to think that the Court's intervention improperly encroached on the independence of the political branches to conduct foreign affairs and sign international treaties. Indeed, in several pre-1900 cases, the Court signaled that disputes involving treaties and foreign relations were beyond the judiciary's proper reach.<sup>91</sup> Two cases in particular illustrate this point. First, in *Doe v Braden*<sup>92</sup>—on its surface, a simple property dispute—the Court refused to consider claims challenging the validity of a treaty with a foreign nation.<sup>93</sup> The opening line of Chief Justice Roger Taney's opinion read: "This controversy has arisen out of the treaty with Spain by which Florida was ceded to the United States."<sup>94</sup> The Court sought to discourage objections to the validity of the treaty on the ground that, if treaty-based disputes became routine, "it would be impossible for the executive department . . . to conduct our foreign relations . . . and fulfil the duties which the Constitution has imposed upon it."<sup>95</sup> The *Braden* Court acknowledged its "duty to interpret [a treaty] and administer it according to its terms,"<sup>96</sup> but also expressed a general reluctance for courts to intervene when issues typically negotiated and settled by treaty are at stake.

Similarly, in *Foster v Neilson*,<sup>97</sup> the Court declined to settle a disagreement that hinged on a boundary dispute that had been the subject of protracted negotiations between Spain and the United States.<sup>98</sup> The Court relied on *Foster* to hold in a later case that even "when individual rights depended on [those] boundaries," "the settlement of boundaries [is not] a judicial but a political question."<sup>99</sup> The Court believed a contrary ruling threatened to interfere with foreign negotiations. In light of these cases, and given that the precise designation of United States territories after the Spanish-American War implicated both treaty interpretations and America's negotiations with foreign powers, the issues

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<sup>91</sup> In *United States v Arredondo*, 31 US 691 (1832), for example, the Court explained "the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided." *Id.* at 711, citing *Foster v Neilson*, 27 US 253, 307 (1829). As a consequence, in drawing territorial boundary lines, the Court held that "it was not its duty to *lead*, but to *follow* the action of the other departments of the government." *Arredondo*, 31 US at 711.

<sup>92</sup> 57 US 635 (1853).

<sup>93</sup> *Id.* at 657.

<sup>94</sup> *Id.* at 654.

<sup>95</sup> *Id.* at 657.

<sup>96</sup> 57 US at 657.

<sup>97</sup> 27 US 253 (1829).

<sup>98</sup> *Id.* at 307, 314.

<sup>99</sup> *Arredondo*, 31 US at 711, citing *Foster*, 27 US at 307.

raised and resolved by the *Insular Cases* may have been viewed by the public as far beyond the bailiwick of the Court.

Second, it was no secret to the public that the Court was addressing a set of highly political questions.<sup>100</sup> In fact, this widespread perception was explicitly observed in a report to the Senate Judiciary Committee: “[T]he gravity of the issues at stake has created an impression that the question of the Philippines is not properly a question of law, but lies within that domain of policy into which the Supreme Court will not intrude.”<sup>101</sup>

Third, for many, the lessons and consequences of the Court’s prior intervention in *Dred Scott* remained in view, and some feared that the *Insular Cases* risked an equally sharp public rebuke.<sup>102</sup> Indeed, express references to *Dred Scott* during congressional debates over the *Insular Cases* served as reminders of the open hostility the Court’s decisions might engender. For example, Maine Congressman Charles Littlefield objected to judicial involvement in the debate over expansionism by referring to President Abraham Lincoln’s scathing criticism of the Court’s prior role in *Dred Scott*: “Abraham Lincoln, in his great debate with Douglas, bitterly and savagely attacked the Supreme

<sup>100</sup> See, for example, 56 Cong. 1st Sess. in 33 Cong Rec H 3723 (Apr 3, 1900) (statement of Rep Mondell) (probing “if the question [about the tariff bill for Puerto Rico] is a constitutional one”); Sparrow, *Emergence of American Empire* at 110 (cited in note 1) (noting that Attorney General John Griggs and Solicitor General John Richards believed the *Insular Cases* decided political questions).

<sup>101</sup> Randolph, *Territorial Expansion* at 7 (cited in note 8). See also L.S. Rowe, *The Supreme Court and the Insular Cases*, 18 *Annals Am Acad Polit & Soc Sci* 38–39 (1901).

<sup>102</sup> See, for example, Abraham Lincoln, *Abraham Lincoln on the Dred Scott Decision* (June 26, 1857), online at <http://teachingamericanhistory.org/library/index.asp?document=52> (visited Jan 29, 2010):

If this important decision had been made by the unanimous concurrence of the judges, and without any apparent partisan bias, and in accordance with legal public expectation, and with the steady practice of the departments throughout our history, and had been in no part, based on assumed historical facts which are not really true; or, if wanting in some of these, it had been before the court more than once, and had there been affirmed and re-affirmed through a course of years, it then might be, perhaps would be, factious, nay, even revolutionary, to not acquiesce in it as a precedent. But when, as it is true we find it wanting in all these claims to the public confidence, it is not resistance, it is not factious, it is not even disrespectful, to treat it as not having yet quite established a settled doctrine for the country?

Indeed, both prior and subsequent Court decisions have been susceptible to widespread public resistance. See, for example, *Cooper v Aaron*, 358 US 1, 4 (1958) (addressing a claim by the governor of Arkansas—who dispatched the Arkansas National Guard to impede the integration of a Little Rock high school—that state officials were not bound by the holding in *Brown v Board of Education*, 347 US 483 (1954), which declared public school segregation unconstitutional). See also *Worcester v Georgia*, 31 US 515 (1832), which prompted President Andrew Jackson’s oft-quoted rejoinder: “John Marshall has made his decision; now let him enforce it.”

Court for its decision in the *Dred Scott* case.”<sup>103</sup> Senator Henry Teller similarly referred to *Dred Scott* as an example of Congress’s capacity to overrule a decision of the Court, if the Court improperly meddled in political matters: “I do not say that you can not change the decisions of the court by changing the Constitution. We changed the Constitution in order to meet the opinion in the *Dred Scott* case.”<sup>104</sup> A comparable public rejection was conceivable because “controversial literature,” along with public debates about the *Insular Cases* (inside and outside of Congress) had “led . . . to a bitterness which . . . resemble[d] the controversies over the Fugitive Slave Law and the Missouri Compromise,” as one commentator noted.<sup>105</sup>

Fourth, public opinion was not sufficiently one-sided to suggest that one outcome might be more palatable to the polity than another. In fact, the country appeared deeply and *evenly* divided. The presidential election results of 1900 provide some measure of the disagreement.<sup>106</sup> Incumbent President William McKinley waged the Spanish-American War; helped acquire the islands of Puerto Rico, Guam, and the Philippines; and ardently advocated in favor of their incorporation. Democratic candidate William Jennings Bryan, in contrast, ran on an anti-imperialist platform, casting American expansionism as the principal voting issue.<sup>107</sup> Likewise in Congress, American expansionism was considered a significant, if not the key, determinant of the 1900 election.<sup>108</sup> The election results therefore provide a crude barometer of

<sup>103</sup> 57 Cong, 1st Sess, in 35 Cong Rec H 343 (Dec 17, 1901) (statement of Rep Littlefield) (arguing that the *Downes* decision is similar to the *Dred Scott* decision in that both holdings allow for the exploitation of a people). See also Charles E. Littlefield, *The Insular Cases*, 15 Harv L Rev 169, 175 (1901).

<sup>104</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3671 (Apr 3, 1900) (statement of Sen Teller). Senator Teller ultimately went on to warn against relying on this mechanism, noting: “You know how much it cost.” *Id.*

<sup>105</sup> Coudert, 26 Colum L Rev at 823 (cited in note 81). See also Sparrow, *Emergence of American Empire* at 5 (cited in note 1) (“Observers at the time reported that the *Insular Cases* aroused more political passion than had any action by the Supreme Court since its decision in *Dred Scott v. Sanford*.”).

<sup>106</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 3718 (Apr 3, 1900) (statement of Rep Thomas) (“The question of expansion, or imperialism, . . . is one of the issues on which the next national campaign will be fought.”); Coudert, 26 Colum L Rev at 823 (cited in note 81) (“The election of 1900 largely turned upon the so-called issue of imperialism.”).

<sup>107</sup> See, for example, *Bryan Praises the Irish: Democratic Candidate Addresses United Societies of Cook County*, NY Times 3 (Aug 16, 1900) (“No matter to what party you may belong, no matter with what party you shall cast your vote, I pray you to so cast your vote as to preserve that doctrine of human liberty as the binding force in this country.”).

<sup>108</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 1995 (Feb 20, 1900) (statement of Rep Payne) (“It is unfortunate that we should go into a great Presidential contest over a question involving extra territorial policy.”). The Anti-Imperialist League declared, although surely in



the degree of disagreement: McKinley won 7.2 million votes, while Bryan collected roughly 6.3 million votes.<sup>109</sup> Using the same barometer, a report to the Senate Judiciary Committee suggested that the Court was likely to interpret the election returns as a gauge of public sentiment: “[A]s some having greater respect for the [political] powers than for the integrity of the Court say, its judgment will reflect what they assume is the popular desire to exploit the islands with a free hand.”<sup>110</sup> Under these circumstances, there was little reason to think that the public was poised to embrace the Supreme Court’s decision.

Finally, the *Insular Cases* concerned divisive controversies that could easily have been construed as political questions, which ordinarily would have precluded the Court’s involvement.<sup>111</sup> The remainder of Part II explores this possibility in greater detail.

To do so, it first explains, by reference to the political question doctrine as it stood at the time, that the putatively legal issues presented in the *Insular Cases* could have been construed as political questions. Second, it looks to what the justices themselves said and to the key political and policy considerations that dominated their opinions. Part II.A concludes by presenting evidence of the surrounding historical context in order to document the far-reaching political implications and manifestly political nature of the very issues the Court resolved. These observations are not intended to establish that the *Insular Cases* undoubtedly involved political questions, but only to suggest that the Court could credibly have avoided hearing the cases on that basis.

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part from wishful thinking, that the decision to retain the island possession was the central issue of the 1900 campaign. See Terrasa, 31 *John Marshall L Rev* at 64 (cited in note 75) (“The status of the territories quickly became a prominent issue in the 1900 presidential campaign.”).

<sup>109</sup> E. Berkeley Tompkins, *Scylla and Charybdis: The Anti-imperialist Dilemma in the Election of 1900*, 36 *Pac Hist Rev* 143, 160 (1967).

<sup>110</sup> Randolph, *Territorial Expansion* at 7 (cited in note 8).

<sup>111</sup> See, for example, *Luther v Borden*, 48 US 1, 47 (1849) (holding that the determination of whether Rhode Island’s charter government was effectively annulled through a vote of its citizens is a political question and not within the Court’s power); *Baker v Carr*, 369 US 186, 217 (1962); *Vieth v Jubelirer*, 541 US 267, 305 (2004) (Scalia (plurality); id at 311 (Kennedy concurring) (noting the lack of a judicially manageable standard but declining to answer the question definitively since one may “emerge in the future,” allowing the question to become justiciable); *League of United Latin American Citizens v Perry*, 548 US 399, 414 (2006) (“A plurality of the Court in *Vieth* would have held such challenges to be nonjusticiable political questions, but a majority declined to do so.”). See also Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 *Colum L Rev* 237, 246–86 (2002); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *Yale L J* 597, 601–25 (1976).

1. Doctrine indicates political core.

From the time of *Marbury v Madison*,<sup>112</sup> it has been settled that political questions are not appropriate for judicial resolution: “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”<sup>113</sup> By 1901, when the Court considered the *Insular Cases*, the doctrine had developed sufficiently to establish that, as a matter of law, the Court could have declined to consider the cases (absent the “consent and certify” process I identify and defend in Parts III and IV). Several considerations support this view.

a) *Lack of judicial standards.* One of the main touchstones of early political question doctrine was the absence of judicial standards. Thus, in his 1924 survey of the doctrine, Oliver Field referred to a number of pre-1900 cases and offered the following synopsis of the law at the time:

It is true that the courts have not formulated any very clear conception of the doctrine of political questions, nor have they always acted upon the same general principles. But a reading of the cases seems to warrant the statement that the most important factor in the formulation of the doctrine is that stated above, namely, a lack of legal principles to apply to the questions presented.<sup>114</sup>

For example, in 1849, the lack of legal standards prompted the Supreme Court to decline to decide the case of *Luther v Borden*.<sup>115</sup> The Court was asked to determine whether a particular state government was “republican” within the meaning of the Guarantee Clause of the

<sup>112</sup> 5 US (1 Cranch) 137 (1803).

<sup>113</sup> *Id.* at 170. More modern formulations elaborated upon early political question doctrine, setting forth a number of additional criteria that could help identify a political question. See, for example, *Baker*, 369 US at 217:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

<sup>114</sup> Oliver P. Field, *The Doctrine of Political Questions in the Federal Courts*, 8 Minn L Rev 485, 512 (1924).

<sup>115</sup> 48 US 1, 41–42, 47 (1849).

Constitution.<sup>116</sup> This meant the Court needed to determine whether the state convention had voted against or in favor of forming a new government, but the Court had no means of taking a census, for example, to see who voted. In light of these practical difficulties and the absence of typical judicial standards to settle the dispute, the Court found that the task of specifying whether a state was “republican,” even when that task is described as an interpretation of the Guarantee Clause, rests with Congress.<sup>117</sup>

From this perspective, the *Insular Cases* arguably posed political questions. After all, just as Luther had sought the Court’s opinion as to whether a state government was “republican,” the *Insular Cases* requested that the Court offer its view on whether a United States territory was “foreign” or “domestic.” That question, in turn, was not susceptible to ordinary legal standards. No prior cases supplied judicially manageable criteria for deciding if a territory was foreign or domestic anymore than for evaluating whether a government was republican in form. On the contrary, the Supreme Court had at least once previously insisted that the elected branches of government designate a territory’s political status: “Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges.”<sup>118</sup> Moreover, as Part II.B explains, the absence of judicial standards in the *Insular Cases*—or their relative insignificance—was confirmed by the justices’ heavy reliance on political and policy considerations concerning what was better for the future prospects of American expansionism.

Thus, although the cases technically involved the Uniformity Clause and various federal tariff laws, the answer to each of the putatively legal questions depended (just as in *Borden*) upon a political determination of “what was ‘domestic’ and what was ‘foreign.’”<sup>119</sup> As

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<sup>116</sup> *Id.* at 38 (noting that the Court had to decide whether Rhode Island’s temporary “charter government had no legal existence” between 1841 and 1842, in which case “the laws passed by its legislature during that time were nullities”); *id.* at 26–27, citing US Const Art IV, § 4.

<sup>117</sup> *Borden*, 48 US at 42.

<sup>118</sup> *Jones v United States*, 137 US 202, 212 (1890) (finding that it is well-settled precedent in the United States and England that the legislative and executive branches determine the sovereignty of a territory).

<sup>119</sup> Sparrow, *Emergence of American Empire* at 80 (cited in note 1). See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 2037 (Feb 21, 1900) (statement of Rep Bromwell):

[I]f we regard the ports of Puerto Rico as foreign ports, we are in the same position as if we were to undertake by law to levy a duty upon goods exported from any port in the United States into England, France, or any foreign country. On the other hand, if we look upon the

one political commentator said referring to the status of the newly acquired territories: “The decisions have served to bring out with great clearness the peculiar position occupied by the Supreme Court. Unlike any other tribunal, it is at times called upon to pass on questions which, while legal in form, are political in substance, profoundly affecting the fabric of our institutions.”<sup>120</sup>

b) *Delegation by law and treaty.* A second significant factor, which was announced by Chief Justice John Marshall in *Marbury* itself, was whether the question had been committed “by the constitution and laws” to one of the elected branches of government.<sup>121</sup> This too supports the conclusion that the *Insular Cases* answered political questions, since (1) the political status of the territories was an issue that had been unequivocally submitted to Congress by treaty, and (2) all matters of governance of United States territories were expressly delegated to Congress by the Constitution.

In fact, the Treaty of Paris could hardly have been clearer as to Congress’s responsibility and designated role: “The civil rights and *political status* of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”<sup>122</sup> Accordingly, the Department of War’s annual report declared that the residents of Puerto Rico were “subject to the complete sovereignty of [the United States], controlled by no legal limitations except those which may be found in the treaty of cession.”<sup>123</sup> Significantly, vesting authori-

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ports of Puerto Rico as domestic ports, then we are met with the controlling provision of the Constitution.

56 Cong, 1st Sess, in 33 Cong Rec H 2038 (Feb 21, 1900) (statement of Rep Ray) (“Now, if the authors of the Standard Dictionary are correct [that an export refers only to goods traded to a foreign country] . . . then that settles the proposition, does it not? [B]ecause Puerto Rico is not a foreign country.”); 56 Cong, 1st Sess, in 33 Cong Rec S 2131 (Feb 23, 1900) (statement of Sen Vest) (“Is Puerto Rico a part of the United States or not? Will some Senator on the other side answer me that question and remove any nebulosity about this argument? Is Puerto Rico a part of the United States or entirely outside of its domain and jurisdiction?”).

<sup>120</sup> Rowe, 18 Annals Am Acad Polit & Soc Sci 38 at 38–39 (cited in note 101).

<sup>121</sup> 5 US (1 Cranch) at 170. Chief Justice John Marshall gave two examples of political questions that the judiciary should refuse to entertain because they have been constitutionally delegated to a coordinate branch of government: (1) the executive power to nominate and appoint political representatives, and (2) actions performed by an executive officer in foreign affairs at the direction of the President. See id at 166–67.

<sup>122</sup> Treaty of Paris Art IX, 30 Stat at 1759 (emphasis added).

<sup>123</sup> José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 226, 227 (cited in note 23). See also Joseph Story, 2 *Commentaries on the Constitution of the United States* § 1328 at 230 (Little, Brown 3d ed 1858) (“The power of congress over the public territory is clearly exclusive and universal; and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is

ty in Congress to specify the “political status” of Puerto Ricans was neither an accident nor a matter of course. The Treaty of Guadalupe in 1848, for example, had left to Congress only the *timing* of when Mexicans would become United States citizens, not what their political status would be under the Constitution.<sup>124</sup> And congressmen noted this difference—between the Treaty of Paris and prior territorial treaties—to show that, in contrast to the political designation of prior acquisitions of land, the status of the territories obtained from Spain in 1900 had been left exclusively to Congress.<sup>125</sup>

Even apart from the Treaty of Paris, the Constitution itself explicitly granted to Congress full governance authority over United States territories. Article IV of the Constitution states: “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.”<sup>126</sup> During a debate about Congress’s power to govern the territories, Senator Joseph Foraker—architect of the Foraker Act<sup>127</sup>—pointed to this constitutional delegation of power to justify his view that it was Congress’s task to determine Puerto Rico’s political fate:

We find in [the Constitution] a grant of power to the United States Government to make war, a grant of power to make treaties, each and both carrying along with it and with them the pow-

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affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled.”)

<sup>124</sup> See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, 9 Stat 922, Treaty Ser No 207 (1848) (“Treaty of Guadalupe Hidalgo”) (emphasis added):

[The] Mexicans who . . . shall not preserve the character of citizens of the Mexican republic . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (*to be judged of by the Congress of the United States*) to the enjoyment of all the rights of citizens of the United States, according to the principles of the [C]onstitution.

<sup>125</sup> See 56 Cong, 1st Sess, in 33 Cong Rec H 3719 (Apr 3, 1900) (statement of Rep Thomas) (noting that the treaties for the Louisiana Purchase and Mexican Cession intended “eventually to admit all [of that] territory” and inhabitants “to statehood and citizenship,” while the Treaty of Paris gave Congress the power to decide future statehood and citizenship status). Compare Louisiana Purchase Treaty Art III, 8 Stat 200, Treaty Ser 86 (1803); Treaty of Guadalupe Hidalgo Art IX, 9 Stat at 922 with Treaty of Paris Art IX, 30 Stat at 1759.

<sup>126</sup> US Const Art IV, § 3, cl 2. Of course, the President, with the advice and consent of the Senate, also had constitutional treaty-making power, which augmented the political branches’ authority with respect to the territories the United States inherited after the Spanish-American War. See US Const Art II, § 2, cl 2.

<sup>127</sup> See note 60.

er also to acquire territory and, as a result of that, the power to govern territory.<sup>128</sup>

Thus, in the end, between Article IV and the Treaty of Paris, it seems clear that Puerto Rico's political status was at least as much a question for the people and the elected branches of government as it was an issue for the courts.

## 2. Justices recognize political core.

This analysis is reinforced by the justices' own statements and the postures they assumed in their opinions. Several justices explicitly recognized the political nature of the issues raised in the *Insular Cases*. Justice McKenna, for example, said in his dissent in *De Lima*: "Upon what degree of civilization could civil and political rights under the Constitution be awarded by courts? The question suggests the difficulties, and how essentially the whole matter is legislative, not judicial."<sup>129</sup> Even Justice Brown, the critical fifth vote in *Downes*, acknowledged the close proximity between the questions before the Court and classic political questions: "Patriotic and intelligent men may differ widely as to the desirability of this or that acquisition, but this is solely a political question."<sup>130</sup>

Moreover, throughout the decisions, the justices depended upon political and policy-based considerations of what position would least endanger the security, prosperity, and growth of the country—the very kind of arguments the political branches would ordinarily contemplate. The opinions of the two leading authors of the *Insular Cases* are especially instructive on this point. Justice Brown, who wrote eight of the Court's nine opinions, declared in *Downes*:

[N]o construction of the Constitution should be adopted which would prevent Congress from considering each [newly acquired territory] upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.<sup>131</sup>

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<sup>128</sup> Winfred Lee Thompson, *The Introduction of American Law in the Philippines and Puerto Rico: 1898–1905* 44 (Arkansas 1989). See also Ramos, 65 *Revista Jurídica Universidad Puerto Rico* at 322 (cited in note 4).

<sup>129</sup> 182 US at 219 (McKenna dissenting).

<sup>130</sup> 182 US at 286.

<sup>131</sup> *Id.*

He added: “Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.”<sup>132</sup>

Similarly, Justice White, whose theory of incorporation the Court adopted in later territorial governance cases, elaborated on the importance of flexibility in order to acquire and cede territories as needed:

If the authority by treaty is limited as is suggested, then it will be impossible to terminate a successful war by acquiring territory through a treaty, without immediately incorporating such territory into the United States. . . . Suppose the necessity of acquiring a naval station or a coaling station on an island inhabited with people utterly unfit for American citizenship and totally incapable of bearing their proportionate burden of the national expense. Could such island, under the rule which is now insisted upon, be taken? . . . Can it be denied that, if the requirements of the Constitution as to taxation are to immediately control, it might be impossible by treaty to accomplish the desired result?<sup>133</sup>

Astonishingly, Justice White admitted that the *opposite* view—even if rooted in an interpretation of the Constitution—would rest upon political considerations unsuitable for judicial analysis:

[I]t is said that the spirit of the Constitution excludes the conception of property or dependencies possessed by the United States . . . that the theory upon which the Constitution proceeds is that of confederated and independent states, and that no territory, therefore, can be acquired which does not contemplate statehood, and excludes the acquisition of any territory which is not in a position to be treated as an integral part of the United States. *But this reasoning is based on political, and not judicial, considerations.*<sup>134</sup>

Hence, it seems apparent that the justices were cognizant of the political implications of the issues they were deciding; yet, either explicitly or implicitly, instead of attempting to navigate away from visible political shoals, they steered their opinions directly into them.

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<sup>132</sup> *Id.* at 279–80.

<sup>133</sup> *Id.* at 311 (White concurring).

<sup>134</sup> *Downes*, 182 US at 311–12 (White concurring) (emphasis added).

### 3. Context confirms political core.

American reign over Guam, Puerto Rico, and the Philippines represented a “great departure”<sup>135</sup> because the country had never before governed such heavily populated and far-flung territories.<sup>136</sup> Not surprisingly then, continuing control of these conquests well after the end of the war—a departure from the traditional treatment of territories such as New Mexico and California<sup>137</sup>—ignited an incendiary national debate that divided the American public and political parties.<sup>138</sup> Indeed, not since *Dred Scott* had the country been so divisively splintered,<sup>139</sup> and all sides claimed that the stakes had never been higher:

The question of expansion, or imperialism . . . is one that is and has been for some time past agitating the minds of the American people. It is fraught with tremendous consequences to the Republic. It is one of the issues on which the next national campaign will be fought. It is not only a question of the greatest interest to me and every American citizen, but in my humble opinion it is the most important question presented to the citizens of this country since the first shot at Sumter in 1861.<sup>140</sup>

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<sup>135</sup> Beisner, *Twelve against Empire* at 237 (cited in note 79) (“[I]t was a departure from traditional American practice to acquire distant, heavily populated colonies for which statehood was not intended.”).

<sup>136</sup> See, for example, Sparrow, *Emergence of American Empire* at 4 (cited in note 1) (“[N]ever before had the United States added areas this populated and this remote from American shores.”); Charles Morris, *Our Island Empire: A Hand-Book of Cuba, Porto Rico, Hawaii, and the Philippine Islands* xii (Lippincott 1899).

<sup>137</sup> Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 140, 148 (cited in note 23).

<sup>138</sup> As the *New York World* reported, “Legal and political opinion was never so divided.” *Vital Principles Embodied in Test Cases*, *NY World* (May 27, 1901). See also Coudert, 26 *Colum L Rev* at 823 (cited in note 81) (observing “how fervent a controversy raged some twenty-five or more years ago,” one which “divided not only courts, judges and lawyers, but public opinion generally”).

The legal academy also sharply disagreed. While scholars including Christopher Columbus Langdell (former dean of Harvard Law School), Charles A. Gardiner (New York Bar Association), and James Bradley Thayer (Harvard Law professor) believed that the United States consisted only of the states, others like Judge Simeon Baldwin and Carmen Randolph understood the United States to include both the states and the territories. See Sparrow, *Emergence of American Empire* at 40–41 (cited in note 1).

<sup>139</sup> See Cabranes, 100 *Harv L Rev* at 455 (cited in note 82).

<sup>140</sup> 56 *Cong*, 1st Sess, in 33 *Cong Rec H* 3718 (Apr 3, 1900) (statement of Rep Thomas). And Representative Thomas was not alone. For example, in reference to Puerto Rico, Representative James D. Richardson said on the House floor: “Mr. Chairman, I am not an alarmist. . . . With this much of preface of a personal character, I begin by saying that in my judgment the pending bill is more dangerous to the liberties of the people of this Republic than any measure ever before seriously presented to the American Congress.” 56 *Cong*, 1st Sess, in 33 *Cong Rec H* 1947 (Feb 19, 1900) (statement of Rep Richardson).



Some insisted that holding the islands as colonies would cast doubt upon defining features of the country's identity and betray the principles of self-governance that animated the American Revolution.<sup>141</sup> Presidential candidate William Jennings Bryan, for example, reminded the country:

To-day, in the presence of a great and overshadowing issue, it is well for us to remember that we have brought the people from the Old World with the promise that here they shall get liberty as it was taught by the fathers. If to-day we are willing to abandon those principles, then we must stand before the world convicted of having brought people here under false pretenses.<sup>142</sup>

Similarly, as one legal scholar framed the debate, the central question was “whether the people approve the policy of abandoning the Declaration of Independence, turning the Republic into an Empire, and transforming a peaceful democracy into an imperial conqueror,”<sup>143</sup> while for another, “[t]he ‘giant issue now,’ [was] whether the flag shall stand for freedom or oppression.”<sup>144</sup> Former Vermont Senator George F. Edmunds asked in equally dramatic terms whether the country would betray its founding principles and forget its own history:

The expansion and dominations, now almost encircling the globe, entered upon by Congress have cost the people of the United States a very great expenditure of blood and treasure, and a severe shock to the ideas of liberty, self-government and equality which used to be thought fundamental, and which we professed (sincerely, it is to be hoped) when we declared war against Spain.<sup>145</sup>

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<sup>141</sup> *Bryan Praises the Irish*, NY Times at 3 (cited in note 107) (proclamation of the United Irish Societies of Cook County):

Within the year freedom has received desperate blows at the hands of nations who claim to be wedded to liberty, and we regret to say that the foreign policy of our own American Republic has exhibited a desire on the part of our Government to share in the seizure of territory, which is the distinguishing mark of the nation that throttled liberty upon this continent, burned its Capitol at Washington . . . .

Brook Thomas, *A Constitution Led by the Flag: The Insular Cases and the Metaphor of Incorporation*, in Burnett and Marshall, eds, *Foreign in a Domestic Sense* 82, 84 (cited in note 23) (arguing that “what was at stake” in the *Insular Cases* was “how the United States thought of itself—or themselves—as a nation”).

<sup>142</sup> *Bryan Praises the Irish*, NY Times at 3 (cited in note 107). See also Rowe, 18 *Annals Am Acad Polit & Soc Sci* at 38–39 (cited in note 101) (denouncing colonialism as “profoundly affecting the fabric of our institutions”).

<sup>143</sup> Tompkins, 36 *Pac Hist Rev* at 153 (cited in note 109).

<sup>144</sup> Id at 153, quoting Frank Parsons, *The Giant Issue of 1900*, 23 *The Arena* 561, 561 (1900).

<sup>145</sup> George F. Edmunds, *The Insular Cases*, 537 *N Am Rev* 145, 153 (1901).

For some, a failure to expand the country's territorial expanse threatened to delay America's ascension to its rightful place as a great power.<sup>146</sup> For others, what path America chose risked imperiling the country's very existence.<sup>147</sup> As the Democratic platform proclaimed:

[T]hat all governments instituted among men derive their just powers from the consent of the governed; that any government not based upon the consent of the governed is a tyranny; and that to impose upon any people a government of force is to substitute the methods of imperialism for those of a republic. . . . We assert that no nation can long endure half republic and half empire, and we warn the American people that imperialism abroad will lead quickly and inevitably to despotism at home.<sup>148</sup>

Yet, despite the intense concentration of political attention on the subject, the Court agreed to hear the *Insular Cases* and thus injected itself into a deeply contentious political debate.

In light of (1) the doctrine at the time, (2) the justices' statements and opinions in the cases themselves, and (3) the surrounding circumstances, it seems at least fair to say that the Supreme Court *could* have validly declined (and perhaps *should* have refused) to resolve the cases. But just as these considerations indicate that the Court could have turned the cases down, they also suggest that the public and their political leaders would likely resist, and afterwards object to, any unwarranted interference by the Court. Yet, as Part II.B reports, the Court did not decline the cases, nor did politicians or the public dispute the legitimacy of the decisions once they were delivered.

## B. The Actual Outcome

Political leaders and the public could have marginalized and ignored the Supreme Court's involvement in the debate over American expansionism; instead, throughout the process, they elected to watch

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<sup>146</sup> See *De Lima*, 182 US at 220 (McKenna dissenting). Justice McKenna, for example, noted that declaring the legality of the sugar duties "vindicate[d] the government from national and international weakness" and "enable[d] the United States to have—what it was intended to have—'an equal station among the Powers of the earth,' and to do all 'Acts and Things which Independent States may of right do.'" *Id.*

<sup>147</sup> See, for example, James C. Fernald, *The Imperial Republic* 9 (Funk & Wagnalls 1899) ("Imperialism, in the sense of despotic rule, can have no place in our American republic, except by the destruction of the republic itself, and the extirpation of the American ideal.").

<sup>148</sup> John T. Woolley and Gerhard Peters, eds, *The American Presidency Project: Democratic Party Platform of 1900* (University of California, Santa Barbara, 2009), online at <http://www.presidency.ucsb.edu/ws/index.php?pid=29587> (visited Jan 29, 2010).

the *Insular Cases* closely.<sup>149</sup> As the *New York World* declared, “No case ever attracted wider attention.”<sup>150</sup> The *New York World* also reported that the public was feverishly watching to see if the Court would uphold the “McKinley policy of imperialism.”<sup>151</sup> The day the cases were announced, attendance at the Court reflected this widespread interest:

The bare rumor that the court would render its decision in the insular test suits was sufficient to create an interest among all sorts and conditions of people in Washington that sent them to the Capitol in a frenzy of excitement. They realized that no such momentous issues affecting the growth and progress of the nation are likely again to come before the tribunal of last resort for arbitrament, and every man who was fortunate enough to gain access to the chamber during the delivery of the opinions appreciated that he was witnessing one of the most tremendous events in the nation’s life.<sup>152</sup>

What is more, the *New York Daily Tribune* observed the attendance of political and military leaders in the courtroom on that day: “No such crowd either as to numbers or distinguished personnel has been seen in the Supreme Court room as that assembled there today.”<sup>153</sup>

According to some, the attention and scrutiny the Court received was due to the fact that its decisions were expected to settle once and for all this “strong and furious” debate.<sup>154</sup> But, upon announcement of the decisions, predictions surfaced that the *Insular Cases* would be renounced and ultimately reversed. A *New York Times* editorial, for example, predicted that *Downes* would “share the fate of the *Dred Scott* decision.”<sup>155</sup>

In the end, however, the Court’s decisions appeared to silence political and public debate rather than set it off. Peter Dunne’s cartoon featuring the fictitious Mr. Dooley captured the widespread view that the Court would ultimately settle the debate over expansionism, and reflected the

<sup>149</sup> See Charles Warren, 3 *The Supreme Court in United States History* 430 (Little, Brown 1924) (describing the cases as a “judicial drama of truly Olympian proportions” that “entered immediately into the political arena” and “constituted by far the most important fact in the Court’s history during the period since [Justice] Waite’s death”).

<sup>150</sup> *Constitution Follows Flag: Porto Rico Tariff Legal*, *NY World* 1 (May 27, 1901).

<sup>151</sup> *Vital Principles Embodied in Test Cases*, *NY World* (cited in note 138).

<sup>152</sup> *Insular Suits Decided: Government Wins a Big Victory and Loses a Minor Point*, *NY Daily Trib* 1, 2 (May 28, 1901).

<sup>153</sup> *Id.*

<sup>154</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1946 (Feb 19, 1900) (statement of Rep Payne).

<sup>155</sup> *The Court and the Opinions*, *NY Times* 8 (May 29, 1901).

public's perception that the Court could validly engage questions concerning the political status of the newly acquired territories:

"I see," said Mr. Dooley, "th' Supreme Coort has decided th' Constitution don't follow th' flag."

"Who said it did?" asked Mr. Hennessy.

"Some wan," said Mr. Dooley. "It happened a long time ago an' I don't raymimber clearly how it come up, but some fellow said that ivrywhere th' Constitution wint, th' flag was sure to go. 'I don't believe wan wurrud iv it,' says th' other fellow. 'Ye can't make me think th' Constitution is goin' thrapezin' around ivrywhere a young liftnant in th' ar-rmy takes it into his head to stick a flag pole. It's too old. It's a home-stayin' Constitution with a blue coat with brass buttons onto it, an' it walks with a goold-headed cane. . . .

'But,' says th' other, 'if it wants to thtravel, why not lave it?' 'But it don't want to.' 'I say it does.' 'How'll we find out?' 'We'll ask th' Supreme Coort.' ["]<sup>156</sup>

Ultimately, even those who doubted the reasoning and consistency of the rulings nevertheless accepted them as the authoritative and final judgment on American expansionism.<sup>157</sup> Indeed, Puerto Rico and Guam continue to be "unincorporated territories" of the United States. And the *Insular Cases* remained not only valid law throughout the twentieth century,<sup>158</sup> but in June 2008 also provided important constitutional precedent for determining where and to whom the freedoms of the Constitution would apply.<sup>159</sup> As Justice Anthony Kennedy declared in *Boumediene*: "Yet noting the inherent practical difficulties of enforcing all constitutional provisions always and everywhere, the Court devised in the *Insular Cases* a doctrine that allowed it to use its power sparingly and where it would be most needed. *This century-old doctrine informs our analysis in the present matter.*"<sup>160</sup>

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<sup>156</sup> Finley Peter Dunne, *The Supreme Court's Decisions*, in Elmer Ellis, ed, *Mr. Dooley at His Best* 72, 72–73 (Charles Scribner's Sons 1938).

<sup>157</sup> See Edmunds, 537 N Am Rev at 147 (cited in note 145).

<sup>158</sup> See, for example, *Torres v Puerto Rico*, 442 US 465, 475 (1979) (Brennan concurring) (declining to extend but not overruling *Downes*). See also *In re Iraq and Afghanistan Detainees Litigation*, 479 F Supp 2d 85, 99–100 (DDC 2007) (recognizing and respecting the *Insular Cases* when holding that constitutional protections, such as the Fifth Amendment right to be free of torture, did not extend to aliens detained in Afghanistan and Iraq); Tauber, 57 Case W Res L Rev at 148 (cited in note 71).

<sup>159</sup> See *Boumediene*, 128 S Ct at 2236–37.

<sup>160</sup> Id at 2255 (quotation marks and citations omitted) (emphasis added).

### III. "CONSENT AND CERTIFY": RENDERING POLITICAL QUESTIONS JUSTICIABLE

The acquiescence of the political branches and the public to the Supreme Court's decisions in the *Insular Cases* was rather remarkable. How the country reached such a point, where it was not only acceptable but indeed appropriate for the judicial branch to settle what for years had been a profoundly political dispute, may be explained by the actions of Congress and the President. For in the years preceding the *Insular Cases*, the branches ordinarily responsible for answering political questions entrusted the Court to resolve them instead. Thus, members of both the executive and legislative branches explicitly called for and implicitly endorsed judicial arbitration of a national dispute.

In an effort to explain why the Court's pronouncements were not publicly repudiated, this Part identifies and elaborates upon steps political actors took that made it more appropriate for the Supreme Court to address the controversial and deeply political questions presented by the *Insular Cases*. These actions constituted a transformative process by which fundamentally political questions were converted into justiciable ones.

In particular, the political branches appear to have taken five sets of steps that preauthorized and laid the groundwork for the Supreme Court's intervention: (1) disavowing the legitimacy of the legislature's consideration of the matter, (2) publicly inviting the Court to mediate the controversy, (3) endorsing the validity of judicial intervention, (4) casting the political issue in legal and constitutional terms, and (5) proposing nonlegal factors as a basis for the Court's decision that would compensate for the absence of traditional judicial standards.

#### A. Disavowing the Legitimacy of the Legislature's Consideration of the Matter

Toward the end of the Spanish-American War, the country was divided over the morality and wisdom of expansionism. Both chambers of Congress were gripped by a fractious, bitter debate over the power to govern far-reaching islands through specific territorial legislation. Interestingly, during these debates, many members vocally disclaimed political authority to settle the dispute, arguing that the political arena was an improper forum in which to decide this particular issue. The reasons behind this view varied.

Senator George F. Hoar, for example, warned of the risks of deciding the politically charged issue in chambers dominated by public passions, skeptical of those who thought "that the policy and the destiny of

this people are to be better settled in crowded assemblies, with shouting and clapping of hands and stamping of feet.”<sup>161</sup> Others questioned the wisdom of congressional debate when the controversy had become plainly politicized in the days preceding the presidential election:

I think it is unfortunate that we have attempted at this time to legislate upon this subject. I do not mean to say it offensively, but it is apparent to everybody that this bill has been a plaything of politics here. On one side the Republicans have been trying to make capital out of it, and, as a matter of course, the other side have tried to make capital against it.<sup>162</sup>

Accordingly, Senator Teller also believed that if Congress were to decide the legitimacy of American expansionism, it should only be done after the 1900 presidential election. Teller and others feared that expansionism would be exploited as an electoral issue and used to pande-  
 er to the public.<sup>163</sup> Moreover, allowing the political branches of government to resolve the matter suffered from the usual problems of democracy, leaving the issue vulnerable to special interests<sup>164</sup> and sud-

<sup>161</sup> *Senator Hoar's Views: Extracts from His Address at Worcester, Mass*, 55 *Friends' Intelligencer* 831, 831 (Nov 12, 1898) (preferring that decisions affecting the American people be settled like “they were of old in the quiet chamber where Madison and Hamilton sat in council”).

<sup>162</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3685 (Apr 3, 1900) (statement of Sen Teller).

<sup>163</sup> Terrasa, 31 *John Marshall L Rev* at 64 (cited in note 75) (“The floor debate became a conglomerate of long-winded speeches, often appearing to be addressed to the press rather than to members of the House.”).

<sup>164</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec S 3672 (Apr 3, 1900) (statement of Sen Mason) (“What can we say to the laboring men . . . They are not for this bill.”); 56 Cong, 1st Sess, in 33 Cong Rec H 3710 (Apr 3, 1900) (statement of Rep Robinson) (“[I]n these troublous times of acquiring and governing outlying island possessions and efforts at once to sustain the Constitution the interest of labor seems neglected.”); id at 3710 (“We affirm our previous position on this question, namely, that there must be no slavery or serfdom by ownership or contract tolerated under the American flag, and that we will make anyone whose action shall in any way militate against this principle of human freedom responsible for such action in every legitimate manner open to us.”), quoting American Federation of Labor, *Report of the Proceedings of the 19th Annual Convention of the American Federation of Labor* 74 (James H. Stone & Co 1899) (Dec 13, 1899); Terrasa, 31 *John Marshall L Rev* at 63–64 (cited in note 75):

President McKinley, however, miscalculated the impact that his policy would have on American public opinion. The prospect of assimilating the “half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infested Puerto Rico” was enough to tame the wildest of the expansionist spirits. The greatest opposition came from the private sector. The beet sugar and tobacco industries, fearing competition from the cheaper Puerto Rican and Filipino products, launched a massive lobbying campaign against the free trade measure. . . . The American sugar and tobacco producers were not concerned with the Puerto Rican production; the Puerto Rican yield was negligible compared to the total size of the market.

den shifts in popular opinion.<sup>165</sup> Industry lobbyists, for example, supported American expansionism on the ground that the country's cotton trade with China would improve if the United States functionally dictated Philippine economic and trade policy. In the face of these special interests, Republican Congressman Joseph Lane of Iowa urged his colleagues not to allow base political considerations to trump the distinctively American principles that would have to be surrendered should the nation accept the practice of ruling over territories that had not given their consent to be governed:

Are we to sacrifice the principles of the Declaration of Independence to sell a few bales of cotton or a few bushels of wheat? Trade is valuable; but, purchased by the sacrifice of the principles of the Declaration of Independence and of the Farewell Address of Washington and of the Monroe doctrine, it is not worth the price.<sup>166</sup>

Political leaders, seemingly moved by these objections (which were raised in both chambers of Congress), acknowledged the need for an alternate forum for deciding the legitimacy of territorial governance. Senator Teller, for instance, expressed the view that the federal legislature could not provide a dispassionate forum in which to debate American expansionism, at least until after the presidential election: "I believe if we had waited until after the coming Presidential election, we could have sat down here deliberately, with less temptation to draw it into politics than we have had; and we might have secured legislation better than we are likely to secure under present conditions."<sup>167</sup>

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See also Terrasa, 31 *John Marshall L Rev* at 64 n 41 (cited in note 75) ("These industries were afraid, however, that a grant of free trade to the Island would set a precedent that would bind Congress when legislating for the Philippines.").

<sup>165</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec S 3677 (Apr 3, 1900) (statement of Sen Mason) ("As I said before, the plain people will not stand it. God help the man who takes to the people in November, and asks for an indorsement or a return to a seat here or at the other end of the Capitol."); 56 Cong, 1st Sess, in 33 Cong Rec H 3724 (Apr 3, 1900) (statement of Rep Boutell) ("Now, many of the newspaper extracts that were read by my eloquent and earnest friend from Mississippi last week were in the nature of strictures upon members of the Republican party and criticisms upon their vote on what is known as the Puerto Rican bill.").

<sup>166</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 3721 (Apr 3, 1900) (statement of Rep Lane).

<sup>167</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3685 (Apr 3, 1900) (statement of Sen Teller). For his part, Congressman Sereno E. Payne recognized the political distortions created by the upcoming presidential election but was not necessarily ready to shift responsibility to another branch of government altogether, instead urging his colleagues not "to make some political capital for the Presidential campaign" and thus entertaining the possibility of legislative deliberations free of feverish political bargaining after the presidential election was over: "As patriots . . . we should sit down with deliberate, dispassionate judgment and consider the questions that confront us with reference to these islands." 56 Cong, 1st Sess, in 33 Cong Rec H 1941 (Feb 19, 1900) (statement of Rep Payne) (discussing the trade of Puerto Rico).

Ultimately, political leaders disclaimed the political process as the appropriate venue in which to resolve the controversy over American expansionism. Instead, as the next Part shows, the leaders of both parties crowned the Supreme Court as the superior forum.

## B. Publicly Inviting the Court to Mediate the Controversy

The political branches referred the dispute to the Supreme Court through both explicit statements and implicit acknowledgments that the Court was the appropriate final arbiter of expansionism. For example, the McKinley administration expressly invited the Court's intervention because it believed judicial scrutiny would legitimize United States governance of its territories. The *New York Times* reported that Republican President McKinley "believed it advisable at the earliest moment to secure a decision of the Supreme Court on the constitutional question involved."<sup>168</sup> That same month, the United States Minister to Spain, the Honorable Perry Belmont (who served as a Democratic congressman before his appointment), suggested that the power the President and Congress sought to exercise over newly acquired territories could be fairly characterized as illegitimate and imperialist *unless* the Supreme Court said otherwise:

That new issue is well enough described as imperialism. . . . Its essence is the claim that the President and Congress can govern, unrestrained by the Constitution, all our territories which are not States. It demands for the President and Congress as much power over the Philippines and Porto Rico as Queen Victoria and Parliament have over India. It defies . . . and denies *the control of the Supreme Court*.<sup>169</sup>

The Minister to Spain also expressly endorsed Supreme Court involvement as a means of curbing excesses of congressional power:

The Secretary of War . . . manifests an uneasiness over what a possible future Congress and President may do, if the islands be left exposed to legislation unrestrained by the Constitution. That he prefers to rely on the spirit and nature of our fundamental law rather than on its letter is perhaps immaterial provided the judi-

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<sup>168</sup> *The President's Attitude: Has Not Changed His Opinion, but Approves House Bill*, NY Times 1 (Mar 7, 1900).

<sup>169</sup> *Mr. Belmont on the Issue: Attacks the Administration's Expansion Policy—Will Work for Mr. Bryan's Election*, NY Times 3 (Aug 16, 1900) (emphasis added).



cial power can, in a proper case, sit in judgment on whatever Congress may do. *The essential thing is Constitutional control.*<sup>170</sup>

The Spanish Minister therefore proposed that “[t]hey might promote a suit which should carry the question to the Supreme Court for a prompt judgment.”<sup>171</sup>

Secretary of War Elihu Root agreed with the ambassador. He wrote Senator John Morgan of Alabama on June 1, 1901, and said “the power to impose duties in the Spanish islands, on goods coming from the United States” would “better be settled by the Court than discussed in Congress where, after months of heated debate, it might result in conclusions only to be overruled by the Court.”<sup>172</sup>

Explicit invitations soliciting judicial review also echoed through both chambers of Congress, though they originated primarily from the Republican side of the aisle. A debate on the House floor illustrates how politicians expressly delegated final judgment authority of territorial governance to the Supreme Court specifically—and the judiciary more generally:

House Rep Neville: Who will decide what portions of the Constitution are locally applicable to the Hawaiian Islands, and under what authority will that tribunal act in so deciding?

House Rep Knox: What portion of the Constitution and laws extended are applicable to the island will be a question for litigation in the courts. . . . We establish a Federal district court with a jurisdiction of the circuit court, that upon constitutional questions appeal may be had and a writ of error may lie to the Supreme Court of the United States.<sup>173</sup>

The resemblance between this exchange and the Mr. Dooley political cartoon suggests how broadly shared this view may have been in the public.<sup>174</sup> As Congressman John W. Gaines said:

Can Congress say what shall not be “contrary to the Constitution?” Of course not. That task is for the courts. It has been repeatedly held by our highest courts that a law passed by Territorial legislatures “contrary to the Constitution of the United States is

<sup>170</sup> Perry Belmont, *The President's War Power and an Imperial Tariff*, 170 N Am Rev 433, 444 (1900) (emphasis added).

<sup>171</sup> *Id.* at 439.

<sup>172</sup> Sparrow, *Emergence of American Empire* at 124 (cited in note 1).

<sup>173</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 3801 (Apr 5, 1900) (statement of Reps Neville and Knox).

<sup>174</sup> See note 156 and accompanying text.

void,” which goes to prove that Congress is without power to enact laws beyond the limitation of or its powers granted.<sup>175</sup>

Aside from explicit solicitations, political leaders also invited judicial review through congressional action. Representative George W. Ray observed, for example, that the ambiguous wording of legislation invited judicial interpretation:

Indirectly, however, and as a necessary consequence of attempting to legislate at all regarding the management of affairs pertaining to the support and commercial control of this newly acquired Territory, using the word territory in the sense of peopled land, and not in the sense of “territory” as applied to our organized Territories on the continent of North America, we open up the whole question of the powers of Congress over Puerto Rico, the Philippine Islands, and our Territories generally, and the broad question whether or not new territory, territory acquired since the Constitution was ordained and established . . . is a part of the United States in the political sense of that term, so that the Constitution . . . is, of its own force and vigor, and unaided by and independent of any executive or legislative action.<sup>176</sup>

Other members of Congress were more direct about crafting and passing legislation in order to elicit judicial review. Congressman Seno E. Payne, Chairman of the House Ways and Means Committee, advocated enacting a law as a test case that would bring before the Court the issue of territorial governance. Congressman Payne championed the Foraker bill on this basis:

If this bill is passed it will give the Supreme Court of the United States the first opportunity it has ever had to meet that question fairly and squarely and say whether the limitation for uniform taxation in the United States refers to the United States or the United States and the territory belonging to the United States. It may be an important question to be considered in the future when we come to legislate for the Philippine Islands, when we come to legislate, if we have to, with respect to Cuba, and I think it would be a good proposition to submit that question now to the Supreme Court.<sup>177</sup>

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<sup>175</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 2000 (Feb 20, 1900) (statement of Rep Gaines).

<sup>176</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 2034 (Feb 21, 1900) (statement of Rep Ray).

<sup>177</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1946 (Feb 19, 1900) (statement of Rep Payne).

Representative Lane observed that this strategy to secure judicial review was proposed by several House members: “[I]t is suggested that the tariff bill will furnish a means to raise the constitutional questions and have the Supreme Court decide them within two years.”<sup>178</sup>

Finally, the presence of several members of Congress and the administration when the Supreme Court announced its decisions provided further corroboration that the political branches welcomed or at least accepted Supreme Court intervention. As the *New York World* reported: “A momentous political and legal question hinged on the decision. The administration watched the case eagerly.”<sup>179</sup> Press accounts revealed that Secretary Root, Attorney General Philander Knox, Solicitor General John K. Richards, Senators Henry C. Lodge and William E. Mason, and Representatives James D. Richardson and Charles Grosvenor were present in the Supreme Court when the *Insular Cases* opinions were read aloud.<sup>180</sup> And that the media widely reported the attendance of an array of elected officials at the announcement of the decisions may have had the broader effect of signaling political leaders’ acceptance of the Court’s decisions.<sup>181</sup>

### C. Endorsing the Validity of Judicial Intervention

Members of Congress also appeared specifically to endorse judicial resolution of the hotly contested issue of American expansionism. Contained in a variety of statements by party leaders and rank-and-file legislators were (1) seemingly hopeful anticipation that the Supreme Court would intervene, and (2) express acknowledgment of the legitimacy and supremacy of the Court’s decision with respect to unincorporated territories.<sup>182</sup>

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<sup>178</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 3716 (Apr 3, 1900) (statement of Rep Lane).

<sup>179</sup> *Constitution Follows Flag: Porto Rico Tariff Legal*, *NY World* at 1 (cited in note 150).

<sup>180</sup> See *The Status of Our Insular Possessions*, *Wash Post* 1 (May 28, 1901) (detailing the frenzy on the day the decisions were handed down and cataloging politicians that were in attendance).

<sup>181</sup> See Sparrow, *Emergence of American Empire* at 86 (cited in note 1).

<sup>182</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec S 3672 (Apr 3, 1900) (statement of Sen Mason) (“What can we say to the laboring men if this revenue tariff goes through, even though the Supreme Court should sustain it?”); 56 Cong, 1st Sess, in 33 Cong Rec H 1954 (Feb 19, 1900) (statement of Rep Dalzell):

Now, no constitutional amendment was made, not because Mr. Jefferson, as my friend from Tennessee [Mr. Richardson] said, came to the conclusion that none was necessary, but because it was held by statesmen, as it was subsequently held by the court, that the United States was a sovereign nation, having and entitled to exercise all the powers of any sovereign nation . . . and as a necessary consequence of that right, the right to govern it without limitation, save that in the discretion of the Congress, its agents in the government.

Representative Robert Morris, for starters, shared his view that the issue of territorial governance would necessarily and inevitably come before the Court: “[I]t is necessary for us (and the Supreme Court will find it necessary) to come to a clear and fixed determination of the meaning of the term ‘United States’ as used in the Constitution.”<sup>183</sup> Congressman David A. De Armond, while less deterministic about the matter, nevertheless also predicted that the Court would soon intervene:

I believe the time is not far off—and I am warranted in that belief by reference to the decisions of the Supreme Court, by everything that we have upon that subject that deserves the name of authority . . . that the time is not far off when the doctrine . . . [will be affirmed] that the Constitution is not merely a convenient little thing like a garment, to be taken off and put on.<sup>184</sup>

Senator William Mason was not only convinced that the Court would, in fact, intervene but also expressed confidence that the justices would discharge their duty unaffected by the powerful political currents that had swept up most legislators:

Do you think that the fever of imperial expansion has so overtaken the people that we will abandon the doctrine of American protection that we may put the flag over an unwilling and an unhappy people; or do you dream that the Supreme Court is so tainted with partisanship that it will descend from its upper atmosphere of a pure jurisprudence to carry out the dictates of a party caucus?<sup>185</sup>

Representative Littlefield agreed that the Court would resolve the debate as a principled arbiter in a manner insulated from the tug-of-war of public opinion:

Such are a few of the considerations tending to show that the profession and the country may not feel like unreservedly ac-

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56 Cong, 1st Sess, in 33 Cong Rec H 1946 (Feb 19, 1900) (statement of Rep Payne) (“[N]o citizen of the United States, feeling aggrieved by these alleged imperial laws, has [yet] gone into the United States court . . . This uniform interpretation of the Constitution by Congress has not been questioned by any citizen of the United States in any court.”).

<sup>183</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1577 (Feb 6, 1900) (statement of Rep Morris).

<sup>184</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 3751 (Apr 4, 1900) (statement of Rep De Armond).

<sup>185</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3671 (Apr 3, 1900) (statement of Sen Mason). See also 56 Cong, 1st Sess, in 33 Cong Rec S 3669 (Apr 3, 1900) (statement of Sen Mason) (“[I]t is a question whether you can pass a bill by the United States Congress that will stand the test of the Supreme Court revision that it contains with it the inherent force and right to take a man’s life without due process of law.”).

quiescing in this decision. The foundation upon which it rests is too insecure to insure permanence. As the needle always turns to the pole, *may we not hope that the greatest court in Christendom will in the end determine the law of the land in accordance with correct principles.*<sup>186</sup>

Because these statements reflected the political branches' conscious aim of entrusting the Court to settle the controversy over American expansionism, they facilitated and diminished concerns about judicial resolution of a political question.

These political overtures enabled judicial review by signaling that Congress and the President actually preferred that the Court settle the hotly contested dispute over American expansion; this was a message that members of the Court received. Justice McKenna explicitly noted these political entreaties in explaining the Court's willingness to adjudicate the *Insular Cases*: "If the other departments of the government must look to the judicial for light, that light should burn steadily."<sup>187</sup> Justice Harlan wrote in a private communication: "Our next term is likely to be a most important one; chiefly because we may be called on to declare the extent of the power of Congress, over our new possessions. I hear there is a case on the docket which will compel us to face the issue."<sup>188</sup>

Finally, even before the start of the Spanish-American War, the Democratic Party had declared its recognition of judicial supremacy on issues of territorial governance. Admitting "differences of opinion" about the limits on the power of Congress to govern the territories, the platform declared: "Resolved, That the Democratic party will abide by the decision of the Supreme Court of the United States upon these questions of Constitutional Law."<sup>189</sup> The platform went even fur-

<sup>186</sup> Charles E. Littlefield, *The Insular Cases II*, 15 Harv L Rev 281, 297 (1901) (emphasis added).

<sup>187</sup> *De Lima*, 182 US at 205 (McKenna dissenting).

<sup>188</sup> Sparrow, *Emergence of American Empire* at 79 (cited in note 1). Harlan's letter continued: "It is a great question, and worthy of serious, deliberate consideration. I have impressions, but no fixed opinions." Loren P. Beth, *John Marshall Harlan: The Last Whig Justice* 250 (Kentucky 1992).

<sup>189</sup> *Democratic Party Platform; June 18, 1860*, Avalon Project, online at [http://avalon.law.yale.edu/19th\\_century/dem1860.asp](http://avalon.law.yale.edu/19th_century/dem1860.asp) (visited Jan 29, 2010). Presumably this did not refer to all constitutional questions. In fact, the party had simultaneously decided to distinguish explicitly among different issues of constitutional law: "Inasmuch as difference of opinion exists in the Democratic party as to the nature and extent of the powers of a Territorial Legislature, and as to the powers and duties of Congress, under the Constitution of the United States, over the institution of slavery within the Territories." *Id.* See also Littlefield, 15 Harv L Rev at 184 (cited in note 103).

ther and advised its citizenry to also respect Court decisions concerning territorial governance:

Resolved, That it is in accordance with the true interpretation of the Cincinnati platform that, during the existence of the territorial governments, the measure of restriction, whatever it may be, imposed by the Federal Constitution on the power of the territorial legislature over the subject of the domestic relations, as the same has been, or shall hereafter be finally determined by the Supreme Court of the United States, should be respected by all good citizens, and enforced with promptness and fidelity by every branch of the General Government.<sup>190</sup>

Thus, politicians' explicit invitation and implicit endorsement of judicial intervention essentially certified the political question to the Court, requesting that the judiciary verify one view of the Constitution or the other.

#### D. Casting the Political Issue in Legal and Constitutional Terms

Politicians also tacitly courted judicial intervention by debating expansionism in explicitly legal terms. Even though leaders recognized the important political considerations implicated by expansionism,<sup>191</sup> politicians chose routinely and repeatedly to frame the controversy in legal terms. As Judge Cabranes once remarked: "Not since *Dred Scott* and the struggle over slavery had the country been so racked by a political controversy framed in constitutional terms. Once again, the constitutional theories elaborated by scholars and argued by political leaders revealed fundamental disagreements about how the nation ought to define itself."<sup>192</sup> The various formulations of the foreign policy debate—what authority the United States had to acquire territories, whether these islands were domestic or foreign, and what rights should be accorded to residents of these territories—were all cast as constitutional questions. Political leaders relied heavily on the text of

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<sup>190</sup> Edward McPherson, *The Political History of the United States of America during the Period of Reconstruction* 362 (Philp & Solomons 1871).

<sup>191</sup> See, for example, *The "Deadly Parallel" on Cuban Tariff Reduction*, S Rep No 439, 57th Cong, 1st Sess 3 (1902) (noting the views of the economic interests of the secretary of war and governor general on tariffs with respect to the islands); 56 Cong, 1st Sess, in 33 Cong Rec S 3671 (Apr 3, 1900) (statement of Sen Teller) (Apr 3, 1900) (asserting the foreign diplomatic concerns with saying one thing to Europe and saying another to Puerto Rico).

<sup>192</sup> See Cabranes, 100 Harv L Rev at 455 (cited in note 82).

the Constitution and earlier Supreme Court decisions during these debates over American expansionism.<sup>193</sup>

First, what authority the United States had to acquire territories was debated on the basis of what the Constitution permitted. For example, in proposing a resolution on December 6, 1898, Senator George Vest argued that a colonial model was flatly incompatible with the structure of government contemplated and established by the Framers, and that the United States Constitution simply did not authorize the federal government to maintain territories with no path to statehood:

[U]nder the Constitution of the United States no power is given to the Federal Government to acquire territory to be held and governed permanently as colonies. The colonial system of European nations can not be established under our present Constitution, but all territory acquired by the Government . . . must be acquired and governed with the purpose of ultimately organizing such territory into States suitable for admission into the Union.<sup>194</sup>

Likewise, Congressman De Armond said, “[T]he controversy must be settled by appealing to the Constitution, by getting the correct decision from the words of the Constitution. . . . The Constitution is the fountain head,”<sup>195</sup> just as Judge Charles A. Gardiner described it as a

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<sup>193</sup> Public debates in newspapers and elsewhere reflected a similar dialogue. See, for example, Edmunds, 537 N Am Rev at 150–51 (cited in note 145) (“Congress, thinking itself free from any constitutional constraint, has thought it fit to enact discriminative measures affecting intrinsic rights and interests . . . has imposed conditions upon the people of Cuba not hinted at in the solemn, public declaration made by Congress, when the great drama out of which have grown all our present embarrassments opened.”). Similarly, the *New York Evening Post* excerpted a speech given by George G. Mercer of the American League of Philadelphia:

On this anniversary of the birth of Washington we bid you welcome to the city where he presided over the deliberations of the convention which framed our Constitution. Here, where he lived while President of the United States we are glad to have you come to measure by his standard the acts of the President today. Here, where Jefferson wrote, and our Revolutionary forefathers adopted, the Declaration “that these colonies are and of right out to be free and independent,” we trust that you may demand for the Philippines the same rights of freedom and self-government. . . . Here, where the Constitution had its birth, we beg you to consider whether the interpretation of that Constitution as made by John Marshall shall be the supreme law of the land, or whether it shall be interpreted by William McKinley in such a way as to establish extra-continental and imperial government over territory belonging to the United States.

See Tompkins, 36 Pac Hist Rev at 149 (cited in note 109), quoting Speech of George G. Mercer, Eastern Conference of Anti-Imperialists (Feb 23, 1900), in *Special Anti-Imperialist Supplement*, NY Evening Post 2 (Feb 24, 1900).

<sup>194</sup> 55 Cong, 3d Sess, in 32 Cong Rec S 20 (Dec 6, 1898) (statement of Sen Vest).

<sup>195</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 3750 (Apr 4, 1900) (statement of Rep De Armond) (reasoning by analogy that if the Constitution is the fountain head, then Congress is one of the

“constitutional” quandary in a speech at President McKinley’s reelection headquarters: “The Republican Party maintains that the United States has the right to acquire the Philippines or other foreign territory. The Democratic Party denies such right. A Constitutional problem fundamental to expansion is thus put at issue and made a vital part of the campaign.”<sup>196</sup>

Second, politicians consistently argued that the islands were domestic or foreign on the basis of whether they fell within the constitutional terms “territories” or “the United States.”<sup>197</sup> The congressional record is filled with quotes from the floor of both the House and Senate citing the constitutional text as determinative of whether the island territories should be considered separate from the United States.<sup>198</sup> Thus, Representative John Dalzell said:

Does the term “United States” include Puerto Rico as the framers of that instrument intended when they used that language? The first place that we ought to go for an answer to that question is to the Constitution itself. We ought to be able to ascertain from the language used what was the intention of the framers of that great instrument at the time when it was made.<sup>199</sup>

Representative Ray asserted even more forcefully that the Constitution was not simply an initial starting point but rather provided a conclusive answer:

I can answer it to my own satisfaction completely, and I can answer it, I think, to the satisfaction of every fair-minded man within the authority and express language of the decisions of the Su-

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streams flowing from it, and if a stream cannot rise higher than its source, then Congress is bound by the Constitution and its words).

<sup>196</sup> Charles A. Gardiner, *The Policy of Expansion*, NY Times 6 (Sept 23, 1900) (replying to William Jennings Bryan). See John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Breaking upon Constitutional Law: A Study among the Records of Congress*, 13 Harv L Rev 371, 394 (1899) (noting that Senators Morrell, Hoar, Lodge, and Platt resisted American annexation of Puerto Rico and the Philippines by lodging “constitutional objections” to these acquisitions) (emphasis added).

<sup>197</sup> US 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

<sup>198</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 3750 (Apr 4, 1900) (statement of Rep De Armond).

<sup>199</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1953 (Feb 19, 1900) (statement of Rep Dalzell).



preme Court of the United States and in such a way that no lawyer or man capable of comprehending legal reasoning [sic].<sup>200</sup>

Third, politicians framed the question of what rights to accord to the newly acquired territories—an issue that, under the Treaty of Paris, was arguably left to Congress<sup>201</sup>—as a legal inquiry. The Democratic national platform of 1900 maintained that the territories were entitled to those rights accorded by the Constitution and therefore asked: “Does the Constitution follow the flag?”<sup>202</sup> Secretary of War Elihu Root construed the issue similarly and answered this question in the negative: “[A]s near as I can make out the Constitution follows the flag—but doesn’t quite catch up with it.”<sup>203</sup> Casting these different political questions as all answered by the Constitution made intervention by the Supreme Court seem not only appropriate but essential.

Having framed these foreign policy questions as constitutional issues, political leaders further legitimized judicial intervention by relying on modes of classic legal reasoning in debating territorial governance. Rather than acting as independent interpreters relying on political considerations such as expediency or popular will, political leaders primarily made *legal* arguments based on (1) doctrinal precedents established by the Supreme Court, and (2) the Framers’ intent and the “spirit” of the Constitution.

First, rather than providing their own interpretive understandings of the text of the Constitution, leaders relied primarily on those of the Supreme Court.<sup>204</sup> The House majority report, for example, included a

<sup>200</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 2037 (Feb 21, 1900) (statement of Rep Ray).

<sup>201</sup> See note 122.

<sup>202</sup> Donald Bruce Johnson, ed, 1 *National Party Platforms* 112 (Illinois 1978) (suggesting that were the Constitution not to follow the flag the United States would become “half republic and half empire”).

<sup>203</sup> Fiss, 8 *Troubled Beginnings* at 245 n 77 (cited in note 81).

<sup>204</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 3750 (Apr 4, 1900) (statement of Rep De Armond) (noting that it is instructive to consider “the decisions of the Supreme Court of the United States interpreting the Constitution . . . [w]hen a dispute arises as to whether Congress has or has not any particular power”); 56 Cong, 1st Sess, in 33 Cong Rec S 3691 (Apr 3, 1900) (statement of Sen Gallinger) (quoting Justice Bradley’s arguments in different Supreme Court opinions); 56 Cong, 1st Sess, in 33 Cong Rec 3670–71 (Apr 3, 1900) (statement of Sen Mason) (including *Capital Traction Company v Hof*, 174 US 1, 45–46 (1899) (holding that Congress would have power from the Constitution to exercise exclusive legislation in all cases whatsoever, but that power is limited by the Constitution) and *McAllister v United States*, 141 US 174, 181 (1891) (holding that the Supreme Court was created “in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States”)); 56 Cong, 1st Sess, in 33 Cong Rec S 3564 (Mar 31, 1900) (statement of Sen Fairbanks) (“In fact, it has been discussed more or less since the Louisiana purchase, almost a century ago. It is impossible to recall a precedent or authority which has not been invoked in

lengthy discussion of Supreme Court precedents in elaborating its position.<sup>205</sup> Representative John Dalzell, in a quote characteristic of those invoking the Constitution, argued for unconstrained imperialism on the basis of Supreme Court case law: “I say, then, that not only from the four corners of the Constitution itself, but from the decisions of the highest court of the land, we are led to believe that the term ‘United States’ in the Constitution does not extend to and cover the Territories.”<sup>206</sup> By citing the holdings and opinions of the Court in this way, elected officials endorsed judicial authority to decide political issues arising from American expansionism.<sup>207</sup>

Second, to the extent that politicians engaged in an inquiry separate from the Court, they relied heavily on traditional forms of legal analysis (for example, textualism, legislative history, the intent of the Framers) to complement political arguments:<sup>208</sup> “We ought to be able

support of one or the other contention and with which the country and the Senate have not already become entirely familiar.”); 56 Cong, 1st Sess, in 33 Cong Rec H 2004 (Feb 20, 1900) (statement of Rep Hopkins) (“I have carefully studied each of these decisions, and I think when they are properly considered they are in harmony with the position I assume.”); 56 Cong, 1st Sess, in 33 Cong Rec H 2003 (Feb 20, 1900) (statement of Rep Hopkins):

I think, [Mr. Chairman], that a careful analysis of the decisions of the Supreme Court of the United States will support my contention that the ceded islands become the property of, and not an integral part of, the United States. In support of that position, I desire to briefly call the attention of members of the House to what Mr. Justice Bradley said in the case of *Mormon Church v. United States*.

56 Cong, 1st Sess, in 33 Cong Rec H 1968–69 (Feb 20, 1900) (statement of Rep Kenney) (“That title and possession has passed to us is beyond dispute, and with title and possession to us the Constitution has gone to them.”); 56 Cong, 1st Sess, in 33 Cong Rec H 1953–54 (Feb 19, 1900) (statement of Rep Dalzell) (engaging in a lengthy discussion of five Supreme Court cases); 56 Cong, 1st Sess, in 33 Cong Rec H 1949–50 (Feb 19, 1900) (statement of Rep Richardson) (“I shall cite decisions of the Supreme Court of the United States which in my judgment are absolutely decisive of this question.”); 56 Cong, 1st Sess, in 33 Cong Rec H 1948 (Feb 19, 1900) (statement of Rep Richardson) (“This is a tax measure. The power to tax is the power to destroy. This is the language of the Supreme Court.”).

<sup>205</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1945 (Feb 19, 1900) (statement of Rep Payne) (“The cases which bear out our contention, some of them directly and others indirectly, are cited in the majority report. I will add a reference to but a single case. That of *Endleman et al. vs. United States*.”).

<sup>206</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1954 (Feb 19, 1900) (statement of Rep Dalzell).

<sup>207</sup> For example, Senator Teller explained: “You must amend the Constitution to levy this tariff and pass this bill, or *you must get the Supreme Court of the United States to stultify itself and reverse its decisions*.” 56 Cong, 1st Sess, in 33 Cong Rec S 3671 (Apr 3, 1900) (statement of Sen Teller) (emphasis added). See also 56 Cong, 1st Sess, in 33 Cong Rec H 2037 (Feb 21, 1900) (statement of Rep Ray).

<sup>208</sup> Interestingly, even when Congress was debating the Treaty of Guadalupe and the annexation of Mexico, Representative Stephens denounced what he described as a war of conquest as contrary to the spirit of the Constitution. See Cong Globe App, 30th Cong, 2d Sess 146 (Feb 17, 1849) (statement of Rep Stephens) (“We have seen an Executive, in open disregard of the Constitution, and in palpable violation of its plain letter, make war with a neighboring country.”).

to ascertain [the intention of the Framers] from the language used.”<sup>209</sup> Representative Henry Boutell, for his part, observed that Jefferson had first doubted the constitutional right to acquire Louisiana.<sup>210</sup> Senator Mason added that the Constitution mandated that “when you levy an impost duty, that duty which the fathers were afraid of, that duty which they went to war about, that duty which invited the Boston tea party—it says when you levy that sort of a duty you must make it uniform throughout the United States.”<sup>211</sup>

Thus, although the administration and Congress could have retained exclusive power to settle the status of the territories, the political branches facilitated judicial intervention by recasting American foreign policy toward the newly acquired islands—an area historically understood as quintessentially political—as a constitutional matter validly referred by the Court.<sup>212</sup>

#### E. Proposing Nonlegal Factors to Compensate for the Absence of Traditional Judicial Standards

Of course, aside from typical forms of legal reasoning, political leaders raised nonlegal arguments for and against American expansionism.<sup>213</sup> Various nonlegal considerations figured prominently in the

<sup>209</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1953–54 (Feb 19, 1900) (statement of Rep Dalzell) (considering the Framers’ intent in the context of determining the definition of the “United States”). See also Cong Globe App, 30th Cong, 2d Sess 145 (Feb 27, 1849) (statement of Rep Stephens); Palfrey, 13 Harv L Rev at 371–72 (cited in note 196).

<sup>210</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 1948 (Feb 19, 1900) (statement of Rep Richardson) (noting that Representative Boutell from Illinois had reported that “Mr. Jefferson[] at first doubted the constitutional right to acquire the Louisiana territory. But this doubt was soon dispelled, and all agreed that an amendment was unnecessary.”).

<sup>211</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3669 (Apr 3, 1900) (statement of Sen Mason). Senator George Hoar also invoked this originalist mode of argument when he said, “that Washington lived and that Lincoln died only that we might have another Rome or another Spain; that Spain has so revenged herself upon us as that her spirit and ideals have entered into and taken possession of us—these things shall never happen while America is America, and while Massachusetts is Massachusetts.” *Senator Hoar’s Views*, 55 Friends’ Intelligencer at 831 (cited in note 161).

<sup>212</sup> The Republican Party platform of 1900 declared, for example, that “[t]he largest measure of self-government consistent with their welfare and our duties shall be secured to them by law.” See John T. Woolley and Gerhard Peters, eds, *The American Presidency Project: Republican Party Platform of 1900* (University of California, Santa Barbara, 2009), online at <http://www.presidency.ucsb.edu/ws/index.php?pid=29630> (visited Jan 29, 2010).

<sup>213</sup> Secretary of War Root stated in his annual report, which was cited in the Congressional Record: “The highest considerations of justice and good faith demand that we should not disappoint the confident expectation of sharing in our prosperity with which the people of Porto Rico so gladly transferred their allegiance to the United States.” 56 Cong, 1st Sess, in 33 Cong Rec S 3672 (Apr 3, 1900) (statement of Sen Mason) (reading aloud quotes from particular individuals regarding the tariff rate imposed on Puerto Rico). Likewise, Representative Culberson urged that the custom duties be removed: “In my judgment these duties are indefensible upon moral,

political and public debate over American expansionism, including foreign opinion,<sup>214</sup> racist rhetoric,<sup>215</sup> and the commercial needs of the economy.<sup>216</sup> And to the extent politicians deemed these arguments relevant, they explicitly instructed the Supreme Court to consider these nonlegal considerations in making its legal decisions. For example, Solicitor General John K. Richards seemed uncharacteristically political in his argument before the Supreme Court:

[T]he acquisition of these territories, situated in distant tropical seas, and inhabited by alien races, savage or semi-civilized, strangers to our system of law and mode of government, with the accompanying obligation of so governing them so as to secure and preserve peace and order and protect life and property, has brought us face to face with problems.<sup>217</sup>

Members of Congress were equally explicit in proffering nonlegal factors to the Court. Political expediency was the predominant nonlegal factor emphasized by leaders. For example, in a letter to Justice Harlan, Philippine Governor William Howard Taft stressed that the Supreme Court should weigh the prudential consequences of a ruling. Taft wrote that if the Supreme Court found the territories to be domestic and thereby deemed the tariffs on trade unconstitutional, this would “result in a very narrow colonial policy for the islands.”<sup>218</sup> Taft

economic, and constitutional grounds.” 56 Cong, 1st Sess, in 33 Cong Rec H 3677 (Apr 3, 1900) (statement of Rep Culberson). See also 56 Cong, 1st Sess, in 33 Cong Rec S 3673 (Apr 3, 1900) (statement of Sen Mason) (“For if Congress has not a free hand to deal with these islands as their different conditions and changing needs demand, it is not only inexpedient but it may be impossible to hold them.”); 56 Cong, 1st Sess, in 33 Cong Rec S 3690 (Apr 3, 1900) (statement of Sen Wellington) (“I believe more income will be realized by the extension of the American impost duties and internal revenue than by the imposition of this illegal and unjustifiable 15 per cent duty.”); 56 Cong, 1st Sess, in 33 Cong Rec S 3692–93 (Apr 3, 1900) (statement of Sen Lindsay) (quoting a professor who studied taxation on the island territories).

<sup>214</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec S 3671 (Apr 3, 1900) (statement of Sen Teller) (stressing the foreign diplomatic problems with making contradictory comments to Europe and Puerto Rico).

<sup>215</sup> See, for example, Sparrow, *Emergence of American Empire* at 63 (cited in note 1) (noting that the Democratic platform declared that “Filipinos cannot be citizens without endangering our civilization”).

<sup>216</sup> See, for example, 56 Cong, 1st Sess, in 33 Cong Rec H 3721 (Apr 3, 1900) (statement of Rep Lane) (“Are we to sacrifice the principles of the Declaration of Independence to sell a few bales of cotton or a few bushels of wheat? Trade is valuable; but, purchased by the sacrifice of the principles of the Declaration of Independence and of the Farewell Address of Washington and of the Monroe doctrine, it is not worth the price.”); S Rep No 439 at 3 (cited in note 191).

<sup>217</sup> Sparrow, *Emergence of American Empire* at 60 (cited in note 1).

<sup>218</sup> Linda Przybyszewski, *The Republic According to John Marshall Harlan* 138 (UNC 1999) (detailing Taft’s letter to Justice Harlan). Other representatives also took positions on territorial governance on the basis of its impact on the country. Representative Richardson maintained that

therefore requested of the Court: “If there is room for two constructions [ ] take the one that avoids such a result.”<sup>219</sup>

Representative Albert J. Hopkins highlighted other nonlegal variables for the Court to consider in deciding the cases:

We are confronted in this legislation with the acquisition of territory under different terms from any previous acquisition in the history of the Republic. The location of the islands, climatic conditions, the inhabitants themselves and their known incapacity at the present time for self-government will all have a powerful influence with the court in determining the constitutionality of our action.<sup>220</sup>

Finally, Senator Teller sought to cast prior practice as a source of precedent: “I ask, in the name of common sense, if the practice of a century of this Government is not a fair interpretation of law.”<sup>221</sup>

Such political direction addressed a central weakness in the legal determination of a political question—the lack of judicially determinable standards. Instructions given by the political branches seemingly authorized the Supreme Court to weigh political (that is, nonlegal) factors. Under these circumstances, it should not be surprising that such considerations dominated the Court’s decisions.<sup>222</sup>

Justice White, for example, apparently explained that significant to his votes was the political fear that a contrary ruling in *Downes* would have created a precedent that constrained Congress’s governance of the Philippines:

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the country was able to grow and acquire even when acting in accordance with Constitution. See 56 Cong, 1st Sess, in 33 Cong Rec H 1947 (Feb 19, 1900) (statement of Rep Richardson) (“The Louisiana territory, Florida, Texas, California, New Mexico, Oregon, and Alaska have all been acquired under our Constitution without a jar or strain to any of its wise and beneficent provisions and without any demand for its amendment.”).

<sup>219</sup> Sparrow, *Emergence of American Empire* at 78 (cited in note 1).

<sup>220</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 2005 (Feb 20, 1900) (statement of Rep Hopkins).

<sup>221</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3670 (Apr 3, 1900) (statement of Sen Mason) (noting that the United States had never imposed an “impost duty between the United States and the newly acquired territory”).

<sup>222</sup> See, for example, Rowe, 18 *Annals Am Acad Polit & Soc Sci* at 41 (cited in note 101):

In comparing the majority and minority opinions the most striking difference is in the relative importance given to the factor of “expediency.” The majority opinion adopts certain hard and fast rules of interpretation, and shows an evident disinclination to give any weight to the inconvenience which might result to the political organs of the government because of such interpretation. The minority opinion, on the other hand, contains a broad treatment of the relation between the different departments of the government, and it is easy to detect a settled determination to leave to Congress and the Executive a free hand in dealing with our new possessions.

[I]n a conversation subsequent to the decision [Justice White] told me of his dread lest by a ruling of the Court it might have become impossible to dispose of the Philippine Islands . . . . It was evident that he was much preoccupied by the danger of racial and social questions of a very perplexing character and that he was quite as desirous as Mr. Justice Brown that Congress should have a very free hand in dealing with the new subject populations.<sup>223</sup>

Even Justice Brown, who believed that the cases were fit for judicial review, acknowledged the close proximity between the questions before the Court and classic political questions: “We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it.”<sup>224</sup> Justice Brown went on to say that Congress “may do for the Territories what the people, under the Constitution of the United States, may do for the States,” adding that the authority arose “not necessarily from the territorial clause of the Constitution, *but from the necessities of the case.*”<sup>225</sup> The dissenting justices in *Downes* reasoned that “these arguments are merely political, and ‘political reasons have not the requisite certainty to afford rules of judicial interpretation.’”<sup>226</sup> That view, of course, did not carry the day.

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<sup>223</sup> Terrasa, 31 John Marshall L Rev at 79 (cited in note 75), citing Coudert, 26 Colum L Rev at 832 (cited in note 81). See also *De Lima*, 182 US at 218 (McKenna dissenting):

That principle [that all laws apply] is asserted by counsel, and is very simple, but, applied as counsel apply it, is fraught with grave consequences. It takes this great country out of the world and shuts it up within itself. It binds and cripples the power to make war and peace. It may take away the fruits of victory, and, if we may contemplate the possibility of disaster, it may take away the means of mitigating that. All those great and necessary powers, are, as a consequence of the argument, limited by the necessity to make some impost or excise “uniform throughout the United States.”

<sup>224</sup> *Downes*, 182 US at 286.

<sup>225</sup> *De Lima*, 182 US at 196 (emphasis added).

<sup>226</sup> See *Downes*, 182 US at 374–75 (Fuller dissenting):

Briefs have been presented at this bar, purporting to be on behalf of certain industries, and eloquently setting forth the desirability that our government should possess the power to impose a tariff on the products of newly acquired territories so as to diminish or remove competition. That however, furnishes no basis for judicial judgment, and if the producers of staples in the existing States of this Union believe the Constitution should be amended so as to reach that result, the instrument itself provides how such amendment can be accomplished.

#### IV. THE NORMATIVE CASE FOR POLITICAL REINFORCEMENT OF JUDICIAL LEGITIMACY

The prior Part argued that in the years leading to the *Insular Cases*, the political branches essentially consented to judicial adjudication of issues that otherwise would have fallen to them to decide. But the “consent and certify” theory is not meant only as a descriptive explanation of the events preceding the Court’s consideration of the *Insular Cases*. Those cases can also be understood as an illustration of a valid and defensible process of institutional dialogue between the political branches and the judiciary, a process that can sometimes authorize and validate the final settlement by the Supreme Court of even the most bitter national disputes. This Part offers three arguments to rationalize this process.

##### A. Diminished Justification of Doctrinal Bar

First, in “consent and certify” cases, that is, where the political branches have affirmatively certified a political question to the courts, the traditional doctrinal justification for prohibiting judicial review is somewhat weaker. In *Baker v Carr*,<sup>227</sup> the Supreme Court identified six factors to use to test the existence of a political question:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>228</sup>

The criteria set forth in *Baker* can be restated as reflecting three sets of concerns that animate modern political question doctrine: (1) referring a textually committed task to a different branch of government upsets the proper allocation of constitutional authority; (2) the judiciary lacks the standards and judgment to resolve issues that fall outside its institutional competence; and (3) conflicting or competing

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<sup>227</sup> 369 US 186 (1962).

<sup>228</sup> *Id.* at 217.

pronouncements risk embarrassment (or worse) and undermine principles of comity. So how does the proposed “consent and certify” process account for these problems? The remainder of this Article argues that these difficulties are not present or are significantly attenuated in cases where the political branches have themselves invited and facilitated judicial review.

1. Proper allocation of authority.

To be sure, the consent and certify process does the least, on its face, to address the concerns implicated by the first *Baker* criterion. After all, where the text of the Constitution has assigned responsibility over an issue to a specific political branch of government, why should that branch’s efforts to transfer responsibility be significant? Why is it relevant that the political branches have consented to judicial review or sought to certify the question if the Constitution allocates authority to a political actor? The force of these questions, though, assumes that the political branches have been vested by the Constitution with exclusive (rather than primary) jurisdiction with respect to a particular issue.<sup>229</sup> It is true that, in some contexts, the text of the Constitution will indicate that a political branch has exclusive, *nondelegable* authority to decide a question. For example, Article I of the Constitution states that the House of Representatives “shall have the *sole* Power of Impeachment,”<sup>230</sup> and that the Senate “shall have the *sole* Power to try all Impeachments.”<sup>231</sup> In most other contexts, however, the political branches may be thought to have primary responsibility—but not exclusive, nondelegable authority—to address an issue. Consider, for example, the Constitution’s instruction in Article III that “Congress shall have [the] Power to declare the Punishment of Treason.”<sup>232</sup> If an individual were convicted pursuant to the Treason Clauses, but objected to the penalty imposed by Congress on the ground that it constituted cruel and unusual punishment, would a federal

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<sup>229</sup> The distinction between exclusive and primary jurisdiction has found some currency in the administrative law context. See, for example, *Ricci v Chicago Mercantile Exchange*, 409 US 289, 302–06 (1973) (discussing the doctrine of primary jurisdiction). Although I do not mean to invoke the doctrine of primary jurisdiction in any real sense, it is an instructive analogy. In *Ricci*, the Supreme Court described the notion of primary jurisdiction in this way: “It has been argued that the doctrine of primary jurisdiction involves a mere postponement, rather than relinquishment of judicial jurisdiction.” *Id.* at 320 (Marshall dissenting), citing Kenneth Culp Davis, 3 *Administrative Law Treatise* § 19.01 at 3–4 (West 1958).

<sup>230</sup> US Const Art I, § 2, cl 5 (emphasis added).

<sup>231</sup> US Const Art I § 3, cl 6 (emphasis added).

<sup>232</sup> US Const Art III, § 3, cl 2.



court be barred from considering the matter because the Constitution had assigned to Congress the task of declaring the punishment for treason?<sup>233</sup> Presumably, the fact that Congress has primary authority to set punishment does not categorically foreclose judicial review of constitutional issues raised by the legislature's corresponding action. Similarly, in the context of the *Insular Cases*, Article IV authorized Congress "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States";<sup>234</sup> but that does not mean that the Supreme Court was prohibited under all circumstances from determining whether congressional legislation violated a provision of the Constitution—for example, the Uniformity Clause. Thus, at the very least, courts should be able to adjudicate issues over which the political branches only have primary, but not exclusive, authority.

In that case, however, shouldn't the question of whether Congress has exclusive or primary jurisdiction dictate whether political question doctrine precludes judicial review? In other words, if the Constitution grants Congress exclusive authority, then perhaps the judiciary cannot intercede; if the Constitution does not confer exclusive authority, then a court is not prevented from addressing the issue. What does it matter that the political branches have engaged in the "consent and certify" process described in Part III? But this oversimplifies matters for at least two reasons.

First, as Justice Jackson explained in *Youngstown Sheet & Tube Co v Sawyer*, "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."<sup>235</sup> Justice Jackson therefore concluded in the *Youngstown* case that the authority of the executive branch of government to act depended on whether it was consistent with how the legislative branch desired to proceed: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>236</sup> The dynamic between Congress and the (unelected) Court is obviously

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<sup>233</sup> To be clear, I am not pressing the substantive argument that Congress only has nonexclusive authority over the punishment for treason, or that a court is definitely entitled to review whether a specific punishment is constitutionally excessive. I only mean to suggest that some such examples exist under the Constitution where the textual commitment of a duty is presumptive, but not exclusive.

<sup>234</sup> US Const Art IV, § 3, cl 2.

<sup>235</sup> 343 US at 635 (Jackson concurring).

<sup>236</sup> *Id.*

different than the relationship between two political branches;<sup>237</sup> still, Justice Jackson's view that "practice will integrate the dispersed powers into a workable government" carries at least some force with respect to the Supreme Court and the political branches, to whose judgments the courts routinely defer in the spirit of sustaining Justice Jackson's workable government.<sup>238</sup>

Second, legislators' appeals to the courts are significant because, where the political branches have publicly wrestled with the issue and where elected representatives are on record as to their views, the "democratic" risks of the political branches ducking an issue are diminished. Put another way, the fact that Congress is allowed to transfer its assigned task to another branch of government does not mean that it is always proper to do so. The nondelegation principle established in administrative law is commonly justified by reference to the temptation of elected officials to avoid deciding politically vexing questions.<sup>239</sup> Although the "consent and certify" process does not guarantee that political actors will be compelled to take a position and be held accountable for their views, a vigorous public debate in advance of certification ensures that some of the advantages and safeguards of public discourse are preserved even if the judiciary settles the issue in the end.

## 2. Institutional competence.

The second and third *Baker* factors are seemingly concerned with judicial competence. Thus, the political question doctrine reflects the view that, without judicially "manageable standards" and faced with policy judgments "clearly" meant "for nonjudicial discretion," a court should not be entrusted to resolve the matter.<sup>240</sup> But this problem may be mitigated when substitute standards have been supplied by the political branches. As the *Insular Cases* illustrate, the political branches may, over the course of the "consent and certify" process,

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<sup>237</sup> But see Rosen, *Atlantic Monthly* at 57 (cited in note 84) ("Throughout American history, the Supreme Court, often derided as the least democratic branch of the federal government, has, paradoxically, best maintained its legitimacy when it has functioned as the most democratic branch—that is, when it has deferred to the constitutional views of Congress, the president, and the country as a whole.").

<sup>238</sup> See, for example, *Chevron U.S.A. Inc v NRDC*, 467 US 837, 844 (1984) (formulating the principle of deferring to administrative agencies in interpretations of federal statutes for which the agency is responsible); *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 866 (2007) (Breyer dissenting) (urging "respect for democratic local decisionmaking by States and school boards").

<sup>239</sup> See, for example, Cass Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 323 (2000); Jerry L. Mashaw and David L. Harfst, *The Struggle for Auto Safety* 232–33 (Harvard 1990).

<sup>240</sup> *Baker*, 369 US at 217.

supply a variety of alternate standards for a court's consideration.<sup>241</sup> Some of these factors (for example, "climactic conditions") will be foreign to the judiciary; other standards, even though they are not classically legal (for example, the impact on the economy, the capacity for self-government), nonetheless resemble the types of considerations that courts commonly examine in rendering decisions.<sup>242</sup>

It is worth acknowledging that this proposition assumes that the existence or nonexistence of viable standards is not a fixed, unchangeable condition—that is, it assumes that judicial standards can be developed, or may emerge over time, even if they were not present at first. This assumption is consistent with the views of several members of the current Supreme Court, at least based upon the efforts of multiple justices to craft judicial standards in the last political gerrymandering case, *Vieth v Jubelirer*.<sup>243</sup> Although the Court ultimately concluded in *Vieth* that the matter was not justiciable, Justice Kennedy's concurring opinion made it clear that even he believed that judicially manageable standards could be fashioned or found in the future even though they were not apparent at the time: "That no such standard has emerged in this case should not be taken to prove that none will emerge in the future."<sup>244</sup>

### 3. Competing pronouncements.

The remaining three prongs of the *Baker* test concern the symbolic and tangible problems created by the judiciary meddling with legislative affairs. None of these concerns are seriously implicated, however, when the legislature has itself solicited the courts to intervene. First, the political branches can hardly feel that their authority has been usurped by the courts, or that the courts have failed to show

<sup>241</sup> See Part III.

<sup>242</sup> See, for example, *Department of Transportation v Public Citizen*, 541 US 752, 771–73 (2004) (assessing the environmental effects of a new program); *Citizens Bank v Alafabco, Inc.*, 539 US 52, 57–58 (2003) (considering the impact on the national economy); *Santa Clara Pueblo v Martinez*, 436 US 49, 59–60 (1978) (considering how a particular statutory interpretation would affect Indian tribes' ability to self-govern).

<sup>243</sup> 541 US 267 (2004). See *id.* at 347–51 (Souter dissenting) (proposing a judicial standard with five elements to establish a political gerrymandering claim); *id.* at 365 (Breyer dissenting) ("[C]ourts can identify a number of strong indicia of abuse. The presence of actual entrenchment, while not always unjustified (being perhaps a chance occurrence), is such a sign, particularly when accompanied by the use of partisan boundary-drawing criteria."); *id.* at 336 (Stevens dissenting) ("The racial gerrymandering cases therefore supply a judicially manageable standard for determining when partisanship, like race, has played too great of a role in the districting process.").

<sup>244</sup> See *id.* at 311 (Kennedy concurring) (suggesting that First Amendment principles could supply judicially manageable standards where principles of equal protection had failed).

them “the respect due [a] coordinate branch[] of government” in situations where the court is answering an explicit invitation by the legislature to mediate a debate. Moreover, in cases where the legislature has not issued a decision on the question in dispute, there is neither “an unusual need for unquestioning adherence” nor is there any risk of “embarrassment from multifarious pronouncements.” Thus, in contexts such as the *Insular Cases*, this last set of concerns does not justify the unbending application of the political question doctrine.

For these reasons, the structural, symbolic, and practical considerations underlying modern political question doctrine, as formulated in *Baker*, are at their weakest where political actors have purposefully consented to judicial review.

## B. Political Stewardship of the Constitution

Second, separate from the doctrinal arguments supporting a “consent and certify” procedure, this dialogic process supports a broader theory of the shared responsibility of both the judiciary and political branches to interpret and abide by the Constitution.<sup>245</sup> Scholarship that defends the affirmative role of the political branches in applying the Constitution is especially salient in the context of the *Insular Cases*. In fact, just before those cases were heard, elected officials debated the legality of American expansionism in expressly constitutional terms.<sup>246</sup> Some, like Senator Mason, premised his entire view

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<sup>245</sup> See, for example, Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 108 (Yale 2004) (identifying instances “of partnership between the Supreme Court and Congress in the enterprise of securing constitutional justice”); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 207–28 (Harvard 1999) (advocating that the Constitution exists in the political realm—binding policymakers even as they are crafting government policy—as well as in the judicial realm); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L Rev* 113, 113 (1993) (“Every day, officers or employees in the executive branch must interpret the Constitution.”). At the time of the *Insular Cases*, and even today, legislators regularly submit their views as to how constitutional issues should be decided. Compare 56 Cong, 1st Sess, in 33 Cong Rec H 2680 (Mar 8, 1900) (cataloging the views of legislators with respect to the proper disposition of the *Insular Cases*) with Brief of United States Senator Arlen Specter as Amicus Curiae in Support of Petitioners, *Boumediene v Bush*, Nos 06-1195, 06-1196, \*27 (US filed Aug 24, 2007) (available on Westlaw at 2007 WL 2441578) (“Specter Brief”) (“By making clear that certain constitutional minimums apply, this Court will preserve Congress’ role in mapping out the path forward while simultaneously allowing the detainees the opportunity to be heard and to advance the merits of their individual cases without further delay.”).

<sup>246</sup> There is widespread scholarly agreement that the political branches can and do interpret the Constitution independent of the judiciary. See, for example, Susan R. Burgess, *Contest for Constitutional Authority: The Abortion and War Powers Debates* 109–26 (Kansas 1992) (denying that any single interpreter is supreme); Mark Tushnet, *Taking the Constitution away from the Courts* x–xi (Princeton 1999) (same); Neal Devins, *Shaping Constitutional Values: Elected Gov-*

of expansionism on his obligation to protect and uphold the Constitution: “We took the oath at this desk to support this Constitution. . . . It is the very sun of our political existence. It gives life and power to this legislative body.”<sup>247</sup> Others countered that those who favored expansionism did so at the expense of the Constitution: “The Republican party is tired of the Federal Constitution, and desires to exploit our new possessions without its restraints.”<sup>248</sup>

One does not have to accept, however, the position that political actors always, in all contexts, have a valuable perspective to provide as independent arbiters of the Constitution. Nor is that broad proposition necessary to justify the “consent and certify” process. Rather, one must only accept the narrower claim that the political branches have a legitimate role to play in helping resolve what amounts to a constitutional boundary dispute. Political and judicial actors should be able to validly submit their views at least as to where the elusive, constitutional line falls between political questions, on the one hand, and justiciable legal issues, on the other—that is, what matters have been exclusively assigned to the political branches and what issues are perhaps also the proper subject of judicial review.<sup>249</sup>

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*ernment, the Supreme Court, and the Abortion Debate* 157–62 (Johns Hopkins 1996) (same); Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* 231–74 (Princeton 1988) (same); Sanford Levinson, *Constitutional Faith* 27–37 (Princeton 1988) (studying “Protestant” forms of interpretation); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *Georgetown L J* 217, 219–20 (1994) (examining the President as a challenger to judicial supremacy); Frank H. Easterbrook, *Presidential Review*, 40 *Case W Res L Rev* 905, 905–06 (1990) (same); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 *Rev Polit* 401, 413 (1986) (noting that “the American system displays a general pattern of accepting the Court’s constitutional interpretations” but enumerating many ways in which other interpretations provide influence).

<sup>247</sup> 56 Cong, 1st Sess, in 33 Cong Rec S 3669 (Apr 3, 1900) (statement of Sen Mason).

<sup>248</sup> 56 Cong, 1st Sess, in 33 Cong Rec H 2010 (Feb 20, 1900) (statement of Rep Swanson). Admittedly, it is of course “next to impossible to ascertain whether these constitutional pronouncements [were] part of a forthright search for constitutional truth or, instead, whether the Constitution [was] being used as a smoke-screen for overriding policy concerns.” Devins, *Shaping Constitutional Values* at 123 (cited in note 246). But these statements suggest that legislators believed it was valid for them to invoke the Constitution either to justify their position or to attack their opponents.

<sup>249</sup> Interestingly, emulating the traditional analytical approach of courts, political leaders relied heavily on prior rulings by the Supreme Court in trying to decide for themselves the constitutionality of American expansionism. Congress could have exclusively argued that Article IV of the Constitution and the Treaty of Paris gave it the power to govern the newly acquired territories as it saw fit. Instead, members of Congress argued on the basis of cases such as *Callan v Wilson*, 127 US 540 (1888), *American Publishing Co v Fischer*, 166 US 464 (1897), and *American Insurance Company v Canter*, 28 US 307 (1830). See 56 Cong, 1st Sess, in 33 Cong Rec H 1958 (Feb 19, 1900) (statement of Rep Dalzell) (“In *Callan vs. Wilson* the point at issue was whether a citizen of the District of Columbia was entitled to the provisions of the Constitution relating to trial by jury. Held that he was.”); 56 Cong, 1st Sess, in 33 Cong Rec H 1575 (Feb 6, 1900) (state-

### C. Cooperative Constitutional Interpretation

Finally, recognizing a “consent and certify” process could provide a useful means by which to obtain the judiciary’s view on a question that the political branches have failed to settle. Some of the advantages of this coordinated approach can be gleaned from the analogous practice of certifying legal questions from one court to another, which is now common in federal and state courts.<sup>250</sup> As the Supreme Court has said: “Certification procedure . . . allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.”<sup>251</sup> The practice of summoning the state court to resolve uncertainty also obviates the danger that the federal court will reach a result (or rely upon an assumption) that is contrary to the state court’s view on a matter over which it (the state court) has authority. A similar benefit is available if elected officials are able to ask a court to mediate a longstanding, unsettled dispute that, despite its political dimensions, also raises legal questions whose resolution would allow the legislative and executive branches to move beyond the political disagreement.<sup>252</sup> As the political branches at the time of the *Insular Cases* seemingly believed, the delay, missed opportunities, and uncertainty produced by a deadlocked

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ment of Rep Williams) (“In *Callan vs. Wilson* . . . [the] court held that the [Fifth and Sixth amendments] applied to the District of Columbia.”); 56 Cong, 1st Sess, in 33 Cong Rec H 1958 (Feb 19, 1900) (statement of Rep Dalzell) (using *Fischer* as evidence for his argument that the Court approved of cases upholding constitutional rights for citizens of territories who were granted such rights through treaty); 56 Cong, 1st Sess, in 33 Cong Rec S 1931 (Feb 19, 1900) (statement of Sen Foraker) (“I will read for just a moment from the decision of the Supreme Court of the United States in the *American Insurance Company vs. Canter*.”). See also generally *Cross v Harrison*, 57 US 164 (1853), cited in 56 Cong, 1st Sess, in 33 Cong Rec H 1581 (Feb 6, 1900) (statement of Rep Morris) (distinguishing the holding in *Cross*—that duties were lawfully collected on foreign imports—by arguing it should be confined only to times of war).

<sup>250</sup> See *Arizonans for Official English v Arizona*, 520 US 43, 76 (1997) (“Most States have adopted certification procedures.”). See also Judith S. Kaye and Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 Fordham L Rev 373, 381–86 (2000) (providing a history of the development of certification practices in the United States, with a focus on New York). Though less common, the Supreme Court has itself also certified questions to lower federal courts to clarify matters of state law. See, for example, *Ayotte v Planned Parenthood of Northern New England*, 546 US 320, 331 (2006) (“Because this is an open question, we remand for the lower courts to determine legislative intent in the first instance.”).

<sup>251</sup> *Arizonans for Official English*, 520 US at 76.

<sup>252</sup> The “consent and certify” process is only meant as an exception to political question doctrine; thus, it does not override other rules such as traditional standing requirements. Hence, a court cannot issue an advisory opinion in order to assist the political branches in extricating themselves from some form of political gridlock.

legislature or a divided public may be more costly to *both* sides than a final, authoritative answer to which all agree to submit.

One could object to this last justification for the “consent and certify” process on the ground that the Court’s intervention in the *Insular Cases* is emblematic of the purportedly flawed approach of the *Lochner* era, and that endorsing judicial involvement in matters that fall anywhere outside the traditional purview of the courts only invites greater activism. Judge Learned Hand, for one, claimed that *Lochner* revealed the Court’s establishment of a tricameral legislature where the courts served as a “third camera with a final veto upon legislation with whose economic or political expediency [the Court] totally disagrees.”<sup>253</sup> In the past, others have defended the alleged activism<sup>254</sup> of the *Lochner* Court on various grounds, including precedent,<sup>255</sup> political necessity,<sup>256</sup> or protection of individual liberty,<sup>257</sup> disenfranchised groups,<sup>258</sup> and poorer classes.<sup>259</sup> The “consent and certify” process is not meant, of course, to provide validation for the perceived “activism” of the early *Lochner* Court in the *Insular Cases*. If anything, it is meant to distinguish the *Insular Cases* from instances where the political branches did not facilitate and insist upon judicial review. After all, the main objection to *Lochner* and its progeny was that the courts unilaterally arrogated power to decide matters beyond their traditional jurisdiction. The

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<sup>253</sup> Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv L Rev 495, 500 (1908). More recently, scholars have continued to criticize the *Lochner* era for allegedly violating separation of powers principles. See, for example, Henry P. Monaghan, *Our Perfect Constitution*, 56 NYU L Rev 353, 382–83 (1981); Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 380–81 (Chicago 1980) (“[T]he Court’s exercise of review transgresses the division of national power decreed by the Constitution and usurps functions delegated to Congress and the President.”).

<sup>254</sup> Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism* 120 (Oxford 2000) (“[T]he *Lochner* Court had been guilty of judicial activism because it had intruded into the institutional role of the legislature.”).

<sup>255</sup> See, for example, Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 S Ct Hist Socy Yearbook 20, 33 (concluding that *Lochner* was consistent with earlier lower court rulings).

<sup>256</sup> See, for example, Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 54–55 (Oxford 1998) (attributing activist case law to concern over the scope of the states’ police powers).

<sup>257</sup> See, for example, Fiss, 8 *Troubled Beginnings* at 165 (cited in note 81) (justifying *Lochner* as the Court’s attempt to set boundaries for government regulation to protect individual liberty).

<sup>258</sup> See, for example, David E. Bernstein, *Only One Place of Redress: African Americans, Labor Regulations and the Courts from Reconstruction to the New Deal* 3–7 (Duke 2001) (concluding that *Lochner* may have aided African-Americans by invalidating labor laws that were harming them specifically).

<sup>259</sup> See Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in Harry N. Scheiber, ed., *The State and Freedom of Contract* 161, 169–70 (Stanford 1998) (adopting the view that *Lochner* was motivated by hostility to “class legislation”).

“consent and certify” process is meant, by contrast, to exalt a cooperative model of constitutional interpretation, one where the judiciary addresses matters whose primary responsibility falls to the political branches *only* where a broad spectrum of elected officials have invited the courts to intervene.

In summary, this Article has argued (1) that a “consent and certify” process is consistent with the doctrinal justifications for political question doctrine; (2) that the process recognizes the valid role political actors may play in interpreting what matters the Constitution forbids courts to decide; and (3) that it can facilitate, in some circumstances, a collaborative, restrained approach to constitutional analysis. Thus, the events leading up to the Supreme Court’s review of the *Insular Cases* do not only explain the Court’s unusual intervention; they also help to justify it. However much one might disagree with the substantive outcome of the Court’s rulings, its decision to consider and resolve the dispute was valid, and it would be similarly proper for a federal court to do the same thing today.

#### CONCLUSION

In the *Insular Cases*, the Supreme Court was entrusted by the political branches with the task of deciding whether three newly acquired territories—Puerto Rico, Guam, and the Philippines—were foreign or domestic, and hence what authority the federal government could exercise over these new acquisitions. Through its decisions, the Court became an unexpected instrument of American expansionism. At the same time, the Court also put to rest a simmering political debate that had divided the nation for years. This Article has argued that the Court’s intervention was neither a unilateral usurpation of power, nor an illegitimate act that exceeded the Court’s constitutional authority. Rather, the *Insular Cases* were the natural and justifiable consequence of a political mandate issued by the legislature and the public. This Article is therefore meant as an institutional and constitutional defense of the Court’s role in the *Insular Cases*.

But this conclusion, insofar as it suggests and endorses a process by which a controversial Supreme Court decision can derive legitimacy and enduring validity from the political branches, raises as many questions as it answers.<sup>260</sup> For one thing, what are the implications of this “consent and

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<sup>260</sup> Indeed, the debate over the proper role of Congress and the Court is hardly put to rest by the consent and certify theory. Even when prominent legislators invite and endorse judicial intervention, the judiciary itself may resist and dispute the propriety of its involvement. For



certify” process for political question doctrine itself? Is the legislative invitation merely a factor in deciding whether an issue qualifies as a political question, or did the *Insular Cases* create an outright exception to political question doctrine in an act of common law constitutionalism? More broadly, what are the outer limits of the consent and certify process? Are there political subjects of such an exquisitely legislative nature that judicial mediation of the dispute cannot be defended no matter how supportive the political branches are?<sup>261</sup> Does the *absence* of legislative consent mean that judicial intervention may be sapped of its legitimacy in cases where the political branches object to the courts’ involvement? To what extent does popular support for judicial resolution of difficult, politically charged questions answer—or at least allay—the concerns of those who accuse the modern Supreme Court of being overly activist? For example, could the consent and certify theory explain and justify the Court’s intervention in *Bush v Gore*?<sup>262</sup> Gay marriage? The rights of terrorist detainees?

Ultimately, these unresolved issues arise from an effort to reimagine the sources of judicial legitimacy, particularly where the Court is invited to tackle vexing political controversies. In a nation where the democratic branches often seek the counsel of the Supreme Court, the enduring validity of the Court’s decisions in these cases may be determined in part by precursive political affirmation of judicial action.

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example, just before the Supreme Court’s decision in *Boumediene*, Senator Arlen Specter, former Chairman of the Senate Committee on the Judiciary, stated in an amicus brief to the Court: “While Congress will undoubtedly continue to work its will, it is incumbent upon this Court to provide appropriate constitutional guidance and to restore habeas to its rightful place.” *Specter Brief* at \*27 (cited in note 245). See also Arlen Specter, *The Chamber of Secrets: The High Court Should Accept More Cases—and Open Itself to Television Cameras*, Natl L J (Aug 3, 2009), online at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432681137> (visited Feb 24, 2010).

Specter’s solicitation prompted a stern rebuke from a distinguished member of the judiciary. Fourth Circuit Judge J. Harvie Wilkinson III, commented:

Still others, such as Senator Arlen Specter, claim that the Supreme Court ought to be deciding more hot-button cases touching on major political issues of the day. But sniffing out political questions is not the Court’s job. Its mandate is limited to resolving “cases and controversies.” In fact, the more dry and technical the controversy, the more the Supreme Court may appear to be acting like a court of law. Conversely, an overload of hot-button issues might diminish the public’s confidence that the Court is truly upholding the rule of law.

J. Harvie Wilkinson, III, *If It Ain’t Broke . . .*, 119 Yale L J Online 67 (2009), online at <http://www.yalelawjournal.org/2010/01/07/wilkinson.html> (visited Feb 11, 2010).

<sup>261</sup> Consider generally *Mistretta v United States*, 488 US 361 (1989).

<sup>262</sup> 531 US 98 (2000).