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### U.S. TERRITORIES COMMENTARY SERIES

#### ACCOMPLICES OF ABBOTT LAWRENCE LOWELL

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Volume 130's *Developments in the Law*<sup>1</sup> is partly an exercise in "you break it, you fix it." Following a well-worn scholarly path, the Introduction recalls how the *Harvard Law Review* was host to a wide-ranging debate among legal scholars over the constitutional impact of the 1899 U.S. turn toward empire.<sup>2</sup> One entry in this nineteenth-century debate, Professor Abbott Lawrence Lowell's *The Status of Our New Possessions — A Third View*, proposed that territory could be acquired without becoming subject to the full Constitution.<sup>3</sup> The Supreme Court "embraced" this view and promulgated the territorial nonincorporation doctrine.<sup>4</sup> The doctrine reconciled the Constitution to imperial governance. It is easy to see why the *Harvard Law Review* sees this as a "time this journal might rather forget."<sup>5</sup> What follows is a recompense of sorts. The Introduction details the shameful history of U.S. colonialism pursuant to the territorial nonincorporation doctrine.<sup>6</sup> The Chapters that follow identify and promote paths to greater self-determination for these continuing colonies.<sup>7</sup>

Consider this Commentary a friendly amendment. Drawing on my forthcoming book, *Almost Citizens: From the Reconstruction Constitution to Empire*,<sup>8</sup> this Commentary contends that Lowell was only one

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<sup>1</sup> *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616 (2017) [hereinafter *Developments*].

<sup>2</sup> *Id.* at 1617; see, e.g., JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO 25–31 (1985).

<sup>3</sup> Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155, 176 (1899).

<sup>4</sup> *Developments*, *supra* note 1, at 1619.

<sup>5</sup> *Id.* at 1617.

<sup>6</sup> *Id.* at 1620–26.

<sup>7</sup> *Id.* at 1626–27.

<sup>8</sup> SAM ERMAN, ALMOST CITIZENS: FROM THE RECONSTRUCTION CONSTITUTION TO

member of a broader set of influential nonjudicial actors. His legal scholarship was only one piece of the intellectual output that such actors advanced in favor of constitutional change.<sup>9</sup> Senators, representatives, administrators, and the President also drove the doctrinal shifts in response to the new territorial acquisitions. These officials shared Lowell's faith that the Constitution could be remade, or at least reinterpreted. While they acknowledged judicial supremacy and anticipated judicial review, they treated law and courts as pliable.<sup>10</sup> This stance was partly the executive and legislative constitutionalism of President McKinley and Congress seeking to shape constitutional meaning.<sup>11</sup> But it was also administrative constitutionalism, which in this case was bureaucratic discretion exercised to craft influential legal justifications of empire.<sup>12</sup> Aware that the Justices would speak last, elected and administrative officials worked contemporaneously with legal academics to shape a new and congenial constitutional doctrine well before the Supreme Court was called upon to validate it. They shared the Introduction's faith that "ideas have consequences"<sup>13</sup> in matters of constitutional change, then forcefully demonstrated that state institutions and the officials who animate them do too.

Of course, the insight that many actors share blame with the *Harvard Law Review* for the creation of the early-twentieth-century constitutional law of empire is no reason to abandon the search for solutions. Indeed, rereading the Chapters with nonjudicial officials in mind provides new insights and optimism as well as grounds for skepticism. That is all to the good. The need for new approaches is acute. Recent events vividly illustrate the harms that Puerto Rico still suffers as "the oldest colony in the world."<sup>14</sup>

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EMPIRE (forthcoming 2018).

<sup>9</sup> *Id.*

<sup>10</sup> For critiques of scholarship that treats courts as relatively subservient to external forces, see Matthew E.K. Hall, *Rethinking Regime Politics*, 37 LAW & SOC. INQUIRY 878, 879 (2012); Thomas M. Keck, *Party Politics or Judicial Independence? The Regime Politics Literature Hits the Law Schools*, 32 LAW & SOC. INQUIRY 511, 513–14 (2007).

<sup>11</sup> See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007). Judge Pillard reviews theoretical defenses of executive constitutionalism in Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 678–79 (2005). See also Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

<sup>12</sup> See Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1807 (2013); cf. DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY* (2001) (defining bureaucratic autonomy).

<sup>13</sup> *Developments*, *supra* note 1, at 1626.

<sup>14</sup> JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1999).

### I. U.S. EXPANSION AND THE CONSTITUTIONAL BATTLE LINES

When the United States declared war on Spain in mid-1898, it was conventional legal wisdom that the constitutional consequences of annexation included eventual statehood for acquired territories and U.S. citizenship and full constitutional rights for their populations. Elected officials had made the point without fear of rebuttal for thirty years. All three legal results flowed to Hawai‘i after its 1898 annexation. After the U.S. invasion of Puerto Rico in July of that year, the military leaders preparing the island for annexation presumed that it would follow a similar path.<sup>15</sup>

But then in late 1898, nearly a year before Lowell’s article would be published in November 1899, Republican President William McKinley challenged the consensus on the constitutional consequences of empire and initiated rapid constitutional innovation when he exercised his prerogative as military victor by seeking annexation of the Philippines. Like most white mainlanders, he judged Filipinos racially unassimilable.<sup>16</sup> President McKinley thus did not recommend citizenship, full rights, or statehood. But he also did not propose an alternative. Instead, in an implicit invitation to federal courts to reshape the constitutional law of empire, he negotiated a peace treaty that left the political status of Puerto Ricans and Filipinos to Congress, with only the Constitution as a backstop.<sup>17</sup>

President McKinley’s December 1899 submission for Senate approval of the treaty to annex the Philippines sparked a wide-ranging constitutional debate, not only in the legal academy, but also among the senators.<sup>18</sup> All sides saw the Philippines as different in kind from the other annexations of the day: Hawai‘i, Guam, Puerto Rico, and soon American Samoa. The Philippines were vastly larger and more populous than the other islands<sup>19</sup> and home to a militarized independence

<sup>15</sup> This paragraph summarizes material elaborated in Sam Erman, *The Reconstruction Constitution as a Restraint on Empire* (Nov. 11, 2017) (unpublished manuscript) (on file with the Harvard Law School Library). *See also* ERMAN, *supra* note 8 (manuscript at ch. 1–2).

<sup>16</sup> On President McKinley’s depreciation of Filipinos, see ERIC T. LOVE, *RACE OVER EMPIRE* 176 (2004).

<sup>17</sup> S. DOC. NO. 56-148, at 9, 35, 53 (1901).

<sup>18</sup> On interrelationships among race, legal policy, and empire, see, for example, PAUL A. KRAMER, *THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES, AND THE PHILIPPINES* (2006); Lanny Thompson, *The Imperial Republic: A Comparison of the Insular Territories Under U.S. Dominion After 1898*, 71 PAC. HIST. REV. 535 (2002); and Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in *FOREIGN IN A DOMESTIC SENSE* 48 (Christina Duffy Burnett & Burke Marshall eds., 2001).

<sup>19</sup> Compare OFFICE DIR. CENSUS OF PORTO RICO, WAR DEP’T, REPORT ON THE CENSUS OF PORTO RICO, 1899, at 156 (1900) (showing population of 953,243), with 1 REPORT OF THE PHILIPPINE COMMISSION TO THE PRESIDENT 15 (1900) (estimating population between 8 and 9 million).

movement with nonwhite leadership.<sup>20</sup> For these and other reasons, senators generally agreed that the Philippines housed a uniquely large, ill-led, and racially inferior population of “Malays, Tagals, Filipinos, Chinese, Japanese, Negritos, and various more or less barbarous tribes,”<sup>21</sup> all “utterly alien.”<sup>22</sup> None supported fully incorporating them into the polity. Where lawmakers and legal scholars divided was on the constitutionality and desirability of ruling distant lands as colonies rather than simply declining to annex them.

Drawing on deep wells of white supremacy, anti-imperialist Democrats and their allies protested that annexing the Philippines would be a disaster. As the *Developments in the Law* Introduction notes, legal academics in this camp presumed that acquisition would bring Filipinos U.S. citizenship, full constitutional rights, and eventual statehood.<sup>23</sup> According to the Fourteenth Amendment: “All persons born . . . in the United States . . . are citizens of the United States . . .”<sup>24</sup> As citizens, Filipinos would enjoy such rights as freedom of movement, opportunities to compete for U.S. jobs, and free trade with the mainland.<sup>25</sup> The spirit of the Fourteenth Amendment required universal male suffrage.<sup>26</sup> And Supreme Court doctrine emphasized that the United States could not simply hold the territories without moving those lands toward statehood and providing them constitutional guarantees. The argument rested in part on the *Dred Scott*<sup>27</sup> decision, which had declared: “There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies . . .”<sup>28</sup> The decision also

<sup>20</sup> Gen. Emilio Aguinaldo: *The Big Man of the Philippines*, L.A. DAILY TIMES, May 11, 1898, at 4.

<sup>21</sup> CARL SCHURZ, AMERICAN IMPERIALISM 7 (1899).

<sup>22</sup> *Id.* at 9; see also ERMAN, *supra* note 8 (manuscript at ch. 2).

<sup>23</sup> *Developments*, *supra* note 1, at 1618–19; see also CARMAN F. RANDOLPH, THE LAW AND POLICY OF ANNEXATION vii (1901); Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented, in FOREIGN IN A DOMESTIC SENSE*, *supra* note 18, at 1, 6.

<sup>24</sup> U.S. CONST. amend. XIV, § 1; see also Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 406–07 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 299, 309–10 (1898). An important exception existed for American Indians. But that would not solve the problem in the Philippines, Randolph wrote, because millions of Filipinos could not be credibly categorized as Indians. *Id.* at 305, 309–10.

<sup>25</sup> Randolph, *supra* note 24, at 308, 310; Baldwin, *supra* note 24, *passim*.

<sup>26</sup> Baldwin, *supra* note 24, at 408–09; see also Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CALIF. L. REV. 1181, 1187 (2014) (“Jurists . . . trumpeted [citizenship’s] importance, . . . even as they recognized the paucity of judicially enforceable constitutional rights that it carried.”).

<sup>27</sup> *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857).

<sup>28</sup> *Id.* at 446.

enforced constitutional rights in the territories, which later precedents affirmed by declaring the Bill of Rights operational there.<sup>29</sup>

Anti-imperialist Senate Democrats equated annexation with national perdition. Fidelity to the Constitution would pollute the U.S. body politic with millions of racially degraded Filipinos. Equally abhorrent to members of the party that had toppled Reconstruction was what they described as the unconstitutional federal overreach that would be necessary to acquire and exclude Filipinos. Making these arguments took breathtaking gall. Men who had fought to preserve slavery and then recreated racial caste after the Civil War now praised equality and consent for all people regardless of race even as they plumbed the racist depths. They tarred Filipinos as “a mongrel and semibarbarous population . . . inferior to but akin to the negro”<sup>30</sup> and permanently “unfit . . . for the glorious privileges . . . of an American citizen.”<sup>31</sup> Imperialism betrayed “consent of the governed” by treating “millions of humans beings” as “mere chattels.”<sup>32</sup> Denying U.S. citizenship would “void”<sup>33</sup> the Fourteenth Amendment and contravene the declaration in the *Slaughter-House Cases*<sup>34</sup> that native-born inhabitants of federal territories were “citizens of the United States.”<sup>35</sup> Upon annexation, the Constitution would endow Filipinos with Fourteenth Amendment “immunities and privileges,”<sup>36</sup> “personal rights” such as those in the Bill of Rights,<sup>37</sup> and perhaps suffrage.<sup>38</sup>

On the other side of the debate, expansionists and their allies were similarly opposed to integrating Filipinos into the nation. They answered the constitutional concerns of anti-imperialist Democrats and their scholarly allies by claiming that the Constitution gave the United States substantial discretion. According to legal scholar Christopher Columbus Langdell, the champion of another academic camp in the debate, the Constitution neither required U.S. citizenship nor full constitutional rights for the inhabitants of annexed territories.<sup>39</sup> President McKinley’s Senate allies rejected the notion that the Constitution barred colonialism. The ongoing territorial status for Arizona and New Mexico

<sup>29</sup> Randolph, *supra* note 24, at 292–93, 297–98; Baldwin, *supra* note 24, at 400–04.

<sup>30</sup> 32 CONG. REC. 639 (1899); *see also id.* at 839; MICHAEL PATRICK CULLINANE, LIBERTY AND AMERICAN ANTI-IMPERIALISM, 1898–1909, at 58 (2012).

<sup>31</sup> 32 CONG. REC. 436 (1899); *see also id.* at 437–38.

<sup>32</sup> *Id.* at 93 (1898).

<sup>33</sup> *Id.* at 94.

<sup>34</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>35</sup> 32 CONG. REC. 94 (1898); *id.* at 433 (1899).

<sup>36</sup> *Id.* at 94 (1898).

<sup>37</sup> Cf. *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

<sup>38</sup> 32 CONG. REC. 94 (1898); *id.* at 433–35 (1899).

<sup>39</sup> C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, *passim* (1899); *see also* James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471–73 (1899); *Developments*, *supra* note 1, at 1618.

demonstrated congressional power over eventual statehood.<sup>40</sup> None of the Fifteenth Amendment, American Revolution, Declaration of Independence, Preamble to the Constitution, or the Civil War guaranteed self-government or broad suffrage: “The right of a citizen to vote guaranteed by the fifteenth amendment! Women are citizens; they do not vote. Minors [and the illiterate] are citizens; they do not vote.”<sup>41</sup> “[T]axation and representation do not go together . . .”<sup>42</sup> Federal discretion in territories was the norm: the “power of Congress over the Territories is general and plenary,”<sup>43</sup> limited only by “moral obligations.”<sup>44</sup>

A compromise was finally struck when a majority of senators united in February to ratify without annexing.<sup>45</sup> The Senate approved the treaty, which the Senate then explicitly resolved was “not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor . . . to permanently annex said islands as an integral part of the territory of the United States.”<sup>46</sup>

In November 1899, Harvard Professor Abbott Lowell entered the debate that had consumed the political branches when he added a constitutional justification for lands “so acquired as not to form a part of the United States,”<sup>47</sup> at least where inhabitants lacked U.S. citizens’ “social and political evolution.”<sup>48</sup> As he conceded, his precedents were “meagre,”<sup>49</sup> consisting of a handful of decisions concerning U.S. legislative and military power that reached beyond U.S. borders without causing individuals’ constitutional rights and Congress’s obligations also to extend extraterritorially.<sup>50</sup> But that claim provided little insight into the central question: could the nation’s borders be extended beyond the reach of the Constitution?

<sup>40</sup> 32 CONG. REC. 832–33 (1809).

<sup>41</sup> *Id.* at 295 (1898).

<sup>42</sup> *Id.* at 833 (1899).

<sup>43</sup> *Id.* at 293 (1898) (quoting Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 1 (1890)).

<sup>44</sup> *Id.* at 295.

<sup>45</sup> LOVE, *supra* note 16, at 194.

<sup>46</sup> 32 CONG. REC. 1846 (1899); see also CULLINANE, *supra* note 30, at 31–49; LOVE, *supra* note 16, at 187–88, 194–95; *How the Vote Was Taken*, N.Y. TIMES, Feb. 7, 1899, at 1.

<sup>47</sup> Lowell, *supra* note 3, at 176.

<sup>48</sup> *Id.*; see also *id.* at 166–66, 175. Though Lowell may have employed “more race-neutral language” than many contemporaries, *Developments*, *supra* note 1, at 1620, he did not escape his time and station. Racism motivated the article and provided it a key argument. See Lowell, *supra* note 3, at 176.

<sup>49</sup> Lowell, *supra* note 3, at 173.

<sup>50</sup> See *id.* at 174–75.

## II. TOWARD A CONSTITUTIONAL BASIS FOR EMPIRE

Lowell's was far from the only mind at work on the challenge of crafting a convincing legal case for imperial governance. With his treaty of peace ratified, President McKinley prioritized the matter by making Elihu Root Secretary of War in August 1899.<sup>51</sup> The War Department governed the Philippines and Puerto Rico.<sup>52</sup> Root, a Wall Street lawyer without any military experience,<sup>53</sup> was an incisive choice as lawyer for U.S. empire. He was among the most talented and successful jurists in the country and a loyal advocate of President McKinley's priorities.<sup>54</sup>

In late 1899 and early 1900, he and his subordinates informed Congress that it had the constitutional discretion to extend few rights and no U.S. citizenship to inhabitants of Puerto Rico and the Philippines.<sup>55</sup> Rather than press Congress to make one or the other of the islands a traditional territory or future state, the men urged lawmakers to legislate that federally appointed administrators — rather than democratically elected officials — govern both locales.<sup>56</sup> Happily, Root related, Congress faced “no legal limitations” in setting such a course.<sup>57</sup> Root's law officer, Charles Magoon, elaborated that U.S. “jurisdiction” and “sovereignty” over the islands did not extend “the territorial boundaries of the United States.”<sup>58</sup> The men cited decisions featuring consular courts, ships on the high seas, occupied lands, the Guano Islands, the District of Columbia, former and current territories, Mormons, slaves, Chinese, immigrants, free people of color before the Civil War, and American Indians.<sup>59</sup> To evade the *Dred Scott* rule that territories receive consti-

<sup>51</sup> 1 PHILIP C. JESSUP, ELIHU ROOT 221–22 (1938).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 183, 187–90, 215.

<sup>54</sup> *Id.* at 183.

<sup>55</sup> CHARLES E. MAGOON, REPORT ON THE LEGAL STATUS OF THE TERRITORY AND INHABITANTS OF THE ISLANDS ACQUIRED BY THE UNITED STATES DURING THE WAR WITH SPAIN, CONSIDERED WITH REFERENCE TO THE TERRITORIAL BOUNDARIES, THE CONSTITUTION, AND LAWS OF THE UNITED STATES, S. DOC. NO. 56-234, at 71–72 (1900); see also U.S. WAR DEP'T, *Report for 1899, in FIVE YEARS OF THE WAR DEPARTMENT* 5, 31–37 (1904).

<sup>56</sup> U.S. WAR DEP'T, *supra* note 55, at 35–37 (focusing on Puerto Rico while telegraphing that the Philippines would not receive more generous treatment).

<sup>57</sup> *Id.* at 31; see also *id.* at 32, 40.

<sup>58</sup> MAGOON, *supra* note 55, at 11; see also *id.* at 1, 23; CHARLES E. MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES 20, 36 (1902); JESSUP, *supra* note 51, at 226.

<sup>59</sup> See MAGOON, *supra* note 55, at 14–16, 19–21, 29, 39–42, 47–48; Memorandum from Elihu Root, Sec'y of War 34–60 (filed Apr. 13, 1904) (on file with the National Archives, College Park, Md., Record Group 350, Series Entry 5A, File 1444:9).

tutional rights and eventual statehood, they declared the decision “overthrown” by the Civil War.<sup>60</sup> Their bottom line was far-reaching. Except for the Thirteenth Amendment, the Constitution did not apply to the newly acquired territories.<sup>61</sup> The “great powers, rights, privileges, and immunities” of U.S. citizenship made the status too precious to be extended to islanders.<sup>62</sup> The federal government could demand allegiance without promising naturalization.<sup>63</sup> “[M]any persons . . . from whom allegiance in some form is due . . . are not citizens of the United States. Many soldiers . . . , temporary sojourners, Indians, Chinese, convicted criminals, and, in another and limited sense, minors and women belong to this class.”<sup>64</sup> So too, Magoon argued, did Puerto Ricans and Filipinos.<sup>65</sup> Root added that the Constitution did not require island-mainland free trade.<sup>66</sup> But he nonetheless recommended it because the economic devastation that had accompanied Puerto Rico’s loss of Spanish markets made the only alternative letting “the people starve.”<sup>67</sup>

In April 1900, Congress signed onto Root and Magoon’s proposal by enacting the Foraker Act,<sup>68</sup> which established a civil government for Puerto Rico. The statute provided for a presidentially appointed governor and upper legislative chamber, and an elected lower legislative chamber.<sup>69</sup> In lieu of a traditional territorial delegate to Congress, the island received a resident commissioner<sup>70</sup> who registered with the Secretary of State as foreign dignitaries did.<sup>71</sup> The law neither declared Puerto Rico to be a territory nor recognized Puerto Ricans as U.S. citizens.

As to island-mainland free trade, the Foraker Act did Root one better. Temporarily instituting very low tariffs,<sup>72</sup> it mitigated economic harm while creating grounds for a rapid Supreme Court test of the legislation.<sup>73</sup> According to Republican senators, the constitutionality of treating the new acquisitions as “territory not a part of the United

<sup>60</sup> MAGOON, *supra* note 55, at 40.

<sup>61</sup> *Id.* at 25–26, 38.

<sup>62</sup> *Id.* at 71.

<sup>63</sup> *Id.* at 71–72.

<sup>64</sup> *Id.* at 71.

<sup>65</sup> *Id.* at 72.

<sup>66</sup> See U.S. WAR DEP’T, *supra* note 55, at 40.

<sup>67</sup> JESSUP, *supra* note 51, at 373 (quoting Letter from Elihu Root to President William McKinley (Aug. 18, 1899)); *id.* at 375; see also U.S. WAR DEP’T, *supra* note 55, at 22–23, 40; Letter from George Davis, Military Governor, Dep’t of P.R., to Elihu Root, Sec’y of War (Feb. 14, 1900) (on file with the National Archives, College Park, Md., Record Group 350, Series Entry 8, File C-182-43).

<sup>68</sup> Ch. 191, 31 Stat. 77 (1900).

<sup>69</sup> *Id.* §§ 17–18, 27–29, 31 Stat. at 81–83.

<sup>70</sup> *Id.* § 39, 31 Stat. at 86.

<sup>71</sup> See JOHN W. FOSTER, THE PRACTICE OF DIPLOMACY 63 (1906).

<sup>72</sup> Foraker Act §§ 2–3, 31 Stat. at 77–78.

<sup>73</sup> 33 CONG. REC. 2659, 3632 (1900); *Changes*, COURIER-J. (Louisville), Mar. 28, 1900, at 2.

States" "would not be safe" until the Court upheld the Act against a challenge.<sup>74</sup> The *New-York Tribune* reported that the McKinley Administration switched to favoring a tariff because "it offer[ed] the opportunity to test the constitutional right of all the islands to claim to be a part of the United States" by having a "suit . . . carried to the Supreme Court and a decision secured on that question."<sup>75</sup> The envisioned tariff-based suit had the added benefit of presenting the Court a narrow, largely economic question rather than what Root termed the question of each individual's "moral right to . . . the underlying principles of justice and freedom . . . in our Constitution."<sup>76</sup>

When the Supreme Court confronted the status of newly acquired people and places in *Downes v. Bidwell*,<sup>77</sup> ambiguity and deference defined the path it navigated through a landscape already marked by President McKinley, Congress, legal academics, and the War Department. Just as Congress envisioned, the issue was the constitutionality of the Foraker Act tariff.<sup>78</sup> In upholding the Act in May 1901, the Court accepted President McKinley's invitation to innovate, conformed to the Senate's resolution that the new territories formed no integral part of the United States, and provided Congress the ruling it equated with validation that the islands were "not a part of the United States."<sup>79</sup> True to the Introduction, the most influential opinion in the case "embraced" Lowell's legal analysis.<sup>80</sup> But it also so closely tracked Magoon's more elaborate analysis that he afterward crowed that his views had won over the Supreme Court.<sup>81</sup> Notably, however, no opinion in the case gained five votes. The leading opinion provided little guidance concerning what constraints the Constitution imposed on imperial governance.<sup>82</sup> With many constitutional questions about empire thus open, administrators, lawmakers, and even those outside federal employ found themselves called upon to provide answers. The result was that constitutional change remained tentative, creative, iterative, ambiguous, and distributed for decades to come.<sup>83</sup>

<sup>74</sup> *Free Trade Abandoned*, N.Y. TRIB., Jan. 28, 1900, at 1.

<sup>75</sup> *Id.*

<sup>76</sup> U.S. WAR DEP'T, *supra* note 55, at 32.

<sup>77</sup> 182 U.S. 244 (1901).

<sup>78</sup> See *id.* at 249.

<sup>79</sup> *Id.* at 287.

<sup>80</sup> See *id.* at 341–42 (White, J., concurring in the judgment); *Developments*, *supra* note 1, at 1619.

<sup>81</sup> MAGOON, *supra* note 58, at 120.

<sup>82</sup> Erman, *supra* note 26, at 1201–03.

<sup>83</sup> For elaboration of these subsequent events, see generally ERMAN, *supra* note 8; Erman, *supra* note 26; and Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905*, J. AM. ETHNIC HIST., Summer 2008, at 5.

### III. CONTEMPORARY LOWELLS AND LESSONS TO BE LEARNED

For the contemporary Lowells who contributed Chapters to Volume 130's *Developments in the Law*, this Commentary presents a challenge. If many diverse actors slowly alter constitutional law by operating in tandem, the prospects for a single piece of legal scholarship to effect dramatic doctrinal change is low. Happily, however, legal analyses do not exist in vacuums. They matter in context and because others take them up and put them to use. Approached from those vantages, *Territorial Federalism*<sup>84</sup> and *American Samoa and the Citizenship Clause*<sup>85</sup> yield additional optimism and insight.

*Territorial Federalism* advocates creating a new constitutional federalism doctrine to structure United States–Puerto Rico relations. It proffers theoretical justifications and argues that little change to existing doctrine would be required.<sup>86</sup> That is an attractive offer for institutional actors committed to such a relationship. As the Chapter observes, the difficulty is that U.S. officials have recently retreated from such quasi-federalism.<sup>87</sup> A focus on the relationship between institutions and academics highlights the difficulty of securing doctrinal change with ideas that no one within the government is willing to champion. But it is also a reminder that the membership of institutions changes. If the Chapter is right that Puerto Rico already benefits from a quasi-federalism with a constitutional cast,<sup>88</sup> those seeking to dismantle it may find doing so to be slow going. That would suggest that the window for *Territorial Federalism* to have relevance for like-minded officials may remain open for some time.

*American Samoa and the Citizenship Clause* argues that federal courts are now following the lead of legal academics who propose to repurpose the *Insular Cases* from colonial facilitators into means to “protect indigenous cultures” from hostile constitutional provisions.<sup>89</sup> American Samoa provides an example. There, many worry that full application of constitutional equal protection requirements might vitiate the island’s “Samoan land for Samoans” rules.<sup>90</sup> That is a key reason why American Samoa’s elected representatives recently asked a federal

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<sup>84</sup> *Developments*, *supra* note 1, at 1632.

<sup>85</sup> *Id.* at 1680.

<sup>86</sup> *Id.* at 1652–54.

<sup>87</sup> *Id.* at 1639–41.

<sup>88</sup> *Id.* at 1934–37.

<sup>89</sup> *Id.* at 1680.

<sup>90</sup> *Id.* at 1697.

court not to extend their polity Fourteenth Amendment birthright citizenship.<sup>91</sup> Partly in deference to those wishes, the court declined to extend the status.<sup>92</sup> But as a focus on institutional roles reveals, the court was deferring to fear of itself, and unnecessarily so. Existing doctrine provides ample tools with which the federal courts could preserve Samoan culture against constitutional assault, citizenship or not.<sup>93</sup> To deny citizenship under such circumstances is not to reclaim the *Insular Cases* for indigenous peoples, but to threaten the opposite.

To permit the *Insular Cases* to further limit territorial residents' horizons would be unfortunate. The decisions have already produced profound and enduring injustices at odds with American ideals. The doctrine has perpetuated a situation where millions of U.S. citizens residing within U.S. borders lack the right to vote in federal elections and thus to participate in governance of their own country. Their governments lack the sovereignty of either states of the union or nations of the world and have been subject to congressional whim for more than a century, with no end in sight. Though the United States is the longest-surviving democracy on earth, the eminent Puerto Rican jurist José Trías Monge has observed that the *Insular Cases* have also abetted the nation in fostering Puerto Rico's status as the "oldest colony in the world."<sup>94</sup>

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<sup>91</sup> *Id.* at 1685.

<sup>92</sup> *Id.* at 1684.

<sup>93</sup> *Id.* at 1699.

<sup>94</sup> TRÍAS MONGE, *supra* note 14.