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THE POLITICAL ROOTS OF
JUDICIAL LEGITIMACY:
EXPLAINING THE ENDURING
VALIDITY OF THE INSULAR CASES

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THE POLITICAL ROOTS OF JUDICIAL LEGITIMACY:
EXPLAINING THE ENDURING VALIDITY OF THE INSULAR CASES

~ Krishanti Vignarajah ~

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Introduction

At the dawn of the twentieth century, the United States was embroiled in a bitter debate over expansionism. The Spanish-American War of 1898 had left America with three new territories — Puerto Rico, Guam, and the Philippines — whose fate and future governance were uncertain.¹ 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.² 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.³ 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 interceded to settle the protracted political feud over the status of American territories and the legitimacy of American expansionism.⁴

¹ Under the Treaty of Paris, Spain also ceded Cuba to the United States. See Treaty of Paris (1898), Art. I (“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 Teller Amendment (Apr. 20, 1898) (stating 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”). Accordingly, the United States left Cuba in 1902. Hispanic Division, Library of Congress, Teller and Platt Amendments, available at <http://www.loc.gov/rr/hispanic/1898/teller.html>; see generally BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 135 (2006).

² See, e.g., 33 Cong. Rec. 2128 (“In the last Congress, when discussing the relations to 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 had contemplated establishing a colonial system in this country.”) (remarks of Senator George G. Vest); 33 Cong. Rec. 3669 (“[W]hen 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.”) (remarks of Senator William E. Mason).

³ See *infra* Part II (describing the political questions answered by the Insular Cases).

⁴ See Efren Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 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.”).

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.⁵ And there should be renewed interest today in the doctrine of the Insular Cases because those opinions (originally decided in 1901) have recently formed the legal edifice of the Court’s landmark decision in *Boumediene v. Bush*.⁶ 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 had placed itself in a position 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.⁷

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; many were aware of the “gravity of the issues at stake,”⁸ and at first had questioned the wisdom of the Supreme Court’s involvement.⁹ Moreover, the issues presented by the Insular Cases bore a close resemblance to the

⁵ See generally SPARROW, *supra* note 1.

⁶ 553 U.S. ___ (2008). In light of Justice Kennedy’s heavy reliance on the Insular Cases, it may be that the legitimacy of the Court’s approach toward the habeas corpus rights of Guantanamo Bay detainees is now inextricably linked to the legitimacy of the Insular Cases themselves. Although I began this project well before those cases proved crucial to one of this country’s greatest and most divisive *contemporary* debates, their newfound significance only underscores the importance of revisiting and better understanding the history and implications of the Insular Cases.

⁷ See generally *infra* Part II.

⁸ See *supra* note 78 (quoting Carman F. Randolph, *Notes on the Law of Territorial Expansion*, Submitted to The Committee on the Judiciary of the Senate of the United States, March 16, 1900).

⁹ See generally *infra* Part II.A.

kinds of political questions that courts, even in 1901, were forbidden to consider.¹⁰ It is true that each of the Insular Cases had been framed as an issue of statutory interpretation and positive law; each also implicated, however, a roiling political debate concerning American imperialism.¹¹ 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 (*e.g.*, Puerto Rico, the Philippines) were foreign or domestic.¹² For these reasons, the Court could easily have declined to consider the cases, and its failure to do so only reinforces the perception that the Supreme Court of the “*Lochner* era” was comfortable injecting itself into extralegal controversies with significant policy and political dimensions.¹³ Despite all this, the Court's decision to intercede — and the legitimacy of the Insular Cases themselves — have stood the test of time. This paper seeks to understand why.

Accordingly, it 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 leads to 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 principally political in nature. Among other things, for

¹⁰ *Marbury v. Madison*, 5 U.S. 137, 170 (1803). See also *Luther v. Borden*, 48 U.S. 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.”).

¹¹ See *infra* notes 108-21 and text accompanying.

¹² Of the nine Insular Cases, seven of them concerned the status of Puerto Rico. See *Dooley v. United States II*, 183 U.S. 151 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States I*, 182 U.S. 222 (1901); *Crossman v. United States*, 182 U.S. 221 (1901). In addition, one dealt with Hawaii, see *Goetze v. United States*, 182 U.S. 221 (1901) (consolidated with *Crossman*), and one addressed the Philippines, see *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). For a more detailed description of these cases, see Part I.A., *infra*.

¹³ See, *e.g.*, 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).

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 properly 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 at once 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 unexplored and unexpected, source of judicial legitimacy: the political branches of government.

To establish and defend this process where political actors bolster the legitimacy of judicial actions, this paper proceeds in five parts. Part I (pp. 8-21) 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 scholarship on the sources of judicial legitimacy, noting that most connect the validity of judicial decisionmaking to the logic of the opinions 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 no one has examined how the Supreme Court was able in the Insular Cases to navigate and put to rest a raging political debate about expansionism without calling into question the legitimacy of the judiciary and the validity of its decisions. This paper means to address these apparent gaps in the literature and, in doing so, to highlight the power of the political branches to reinforce the legitimacy of judicial decisions.

To do so, Part II (pp. 21-36) begins by establishing the basic predicate of this paper — that 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 describes why this was unexpected, noting (1) that an impassioned public was deeply divided over the issue of expansionism and closely monitored the Court’s involvement, (2) that many recalled the Court’s fateful decision in *Dred Scott* and warned that the Insular Cases might contribute to similar consequences, and (3) that 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, I provide a brief overview of political question doctrine itself (as it stood at the turn of the twentieth century). I then contend that, even measured against those 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 statements by individual Justices, by the highly political considerations that dominated their opinions, and by the historical context surrounding the cases.

Next, Part III (pp. 36-53) documents 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; nonetheless, it is possible to discern and document 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 involvement, (4) casting the political issue in legal and constitutional terms, and (5) proposing non-legal factors that could compensate for the absence of traditional standards, the popular branches helped transform arguably political questions into justiciable ones.

Part IV (pp. 53-62) 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 view. 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 could cast doubt upon a decision’s legitimacy — are substantially diminished. In those circumstances, the validity of assertive judicial action is properly enhanced by the political branches’ recommendation to intervene, creating the kind of interdependent, “workable government” envisioned by Justice Jackson in the *Steel Seizure* case.¹⁴ Second, political actors can validly help discern the elusive line between the kind of question reserved exclusively for political branches and the kind that is appropriate for judicial resolution — and their views in this regard can inform and validate the judiciary’s decision to consider questions that fall near the line. Finally, just as federal courts can certify questions to their state counterparts, the political branches should also be permitted to 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 pronouncement if it is to endure and lay the foundation, as they Insular Cases have, for further pronouncements a hundred years hence.

* * * * *

¹⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, *J.*, concurring).

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.”¹⁵ It had lasted a mere four months, yet at its conclusion Spain had transferred to the United States possession of Puerto Rico, Guam and the Philippines, and governing authority over an independent Cuba.¹⁶ Cuba was treated differently from the three other territories because, immediately before formal military conflict commenced, the United States Congress had passed the Teller Amendment to express America's commitment to liberating the people of Cuba. Among other things,¹⁷ the Amendment prospectively bound the United States to free Cuba from all colonial rule once the conflict abated. Accordingly, the Treaty of Paris — which formally ended the war — established limited ties between America and Cuba, explicitly providing that the sovereign people of Cuba would rule themselves.¹⁸

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.

¹⁵ HUCHTHAUSEN, PETER, *AMERICA'S SPLENDID LITTLE WARS*, New York: Penguin Books, 2003, xv.

¹⁶ The Treaty of Paris was signed on December 10, 1898, *see* Efrén Rivera Ramos, *The Legal Construction of American Colonialism*, 65 REV. JUR. U.P.R. 225, 226 (1996), and ratified on April 11, 1899, *see* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 806 (2005).

¹⁷ *See* Hispanic Division, Library of Congress, *Teller and Platt Amendments*, available at <http://www.loc.gov/rr/hispanic/1898/teller.html> (last accessed Feb. 20, 2008) (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”).

¹⁸ JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL*, 95 (1985); AMERICAN IMPERIALISM IN 1898 chs. 7-10 (T. P. Greene, ed. 1955).

A. *The Insular Cases* — The Supreme Court heard the nine Insular Cases over the course of two Terms: seven were decided on May 27, 1901,¹⁹ and two were postponed until the following term and decided on December 2, 1901.²⁰

Many consider *Downes v. Bidwell* the lead decision among the Insular Cases.²¹ According to Justice John Marshall Harlan, it “involve[d] consequences of the most momentous character,” and the other rulings were somewhat derivative of *Downes*.²² 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 that he had paid on his “imports.” Downes claimed that the Treaty of Paris, which made Puerto Rico a U.S. 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*.”²³ Accordingly, Downes argued that the federal law permitting the New York duty (which imposed greater burdens on 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

¹⁹ The seven cases settled on May 27, 1901 were: *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & P.R. Steamship Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States I*, 182 U.S. 222 (1901); *Crossman v. United States*, 182 U.S. 221 (1901); *Goetze v. United States*, 182 U.S. 221 (1901).

²⁰ The two cases settled in December 2, 1901 were *Dooley v. United States II*, 183 U.S. 151 (1901) and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901). See SPARROW, *supra* note 1, at 122 (“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.”).

²¹ See, e.g., FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 7 (Christina Duffy Burnett & Burke Marshall, eds.) (2001) (emphasizing the significance of *Downes* partly on the basis that “it produced the most detailed exposition of Justice White’s doctrine of incorporation”); SPARROW, *supra* note 1, at 11.

²² *Downes*, 182 U.S. at 379 (Harlan, J., dissenting).

²³ U.S. CONST., Art. I, Sec. 8 (emphasis added).

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.²⁴

Proponents of American imperialism found Downes' position repugnant since it doubted the power of Congress to establish territories that remained forever outside the United States; moreover, it specifically challenged Congress's authority to create laws with respect to U.S. territories that would have been unconstitutional had they been directed at states fully within the union.²⁵

By a vote of five to four, a fractured Court rejected Downes' 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 U.S. 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."²⁶ Or as Justice Edward White famously put it, Puerto Rico was "foreign to the United States in a domestic sense."²⁷ In effect, the Court endorsed Congress's authority to operate Puerto Rico as a satellite colony, formally validating the territory's hybrid status somewhere between foreign sovereign and domestic state.

Justice Henry Brown, who cast the decisive vote,²⁸ 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. Thus, he claimed that, absent a contrary constitutional directive, the United States should have the same power over newly-acquired

²⁴ *Downes*, 182 U.S. at 311-12 (White, J., concurring).

²⁵ *Downes*, 182 U.S. at 286 ("A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire.").

²⁶ *Id.* at 287.

²⁷ Justice White was joined by Justices George Shiras and Joseph McKenna. Years later, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922), the Court unanimously affirmed this view.

²⁸ 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, *supra* note 1, at 112.

territories that other nations historically possessed.²⁹ 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 on the path to statehood at the outset.³⁰ 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,*’”³¹ the Thirteenth Amendment implied “that there may be places within the jurisdiction of the United States that are no part of the Union.”³²

Also crucial, according to Justice Brown, was the impact 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.”³³ 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.”³⁴ And contracting the scope of Congress’s authority over Puerto Rico was tantamount to limiting America’s power to acquire territories in the first place:

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,

²⁹ *Downes*, 182 U.S. 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.”).

³⁰ *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.”).

³¹ *Id.* at 251 (emphasis added).

³² *Id.* at 251.

³³ *Id.* at 286.

³⁴ *Id.* at 286.

however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.³⁵

For these reasons (among others),³⁶ 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.”

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 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. . . .³⁷

He added that “[t]he people of all the states are entitled to a voice in the settlement of [this] subject,”³⁸ 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.³⁹ He

³⁵ *Id.* at 279-80.

³⁶ Justice Brown also distinguished adverse prior rulings. For example, in order to diminish *Dred Scott v. Sandford*, 60 U.S. 393, 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 economic regulations were distinguishable in any event. See *Downes*, 182 U.S. at 273-274 (“The power to prohibit slavery in the territories is so different from the power to impose duties upon territorial products.”).

³⁷ *Downes*, 182 U.S. at 372, 373-374 (Fuller, C.J., dissenting).

³⁸ *Downes*, 182 U.S. at 374 (Fuller, C.J., dissenting).

³⁹ 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.” *Downes*, 182 U.S. at 386 (Harlan, J., dissenting). Justice Harlan also highlighted the tension between the *Downes* decision and the Court’s ruling in *De Lima v. Bidwell*, 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

too insisted that an amendment was required to allow the usurpation 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.⁴⁰

Because they implicated many of the same considerations, the other Insular Cases were equally contentious. For example, *De Lima v. Bidwell* 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 & Co.* had filed suit to recover duties it had paid on sugar imports from Puerto Rico. According to the plaintiff, Puerto Rico was not a foreign country under the U.S. Tariff Act of 1897. 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.⁴¹ Obliquely acknowledging the tension between the decisions, the Court remarked that the rulings should not be read to negatively affect one another.⁴² 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 States.”⁴³ Accordingly, because the treaty

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.*

⁴⁰ *Downes*, 182 U.S. at 386-387 (Harlan, J., dissenting).

⁴¹ *De Lima v. Bidwell*, 182 U.S. 1 (1901)

⁴² 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*. 183 U.S. at 181. The Court summarily dismissed the suggestion: “The ruling in the case of *De Lima* remained unaffected, and controls that under consideration.” *Id.*

⁴³ *De Lima*, 182 U.S. at 180.

with Spain transferred the territory of Puerto Rico to the United States, it was no longer a foreign country: “We are therefore of opinion that at the time these duties were levied [Puerto 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.”⁴⁴ The consolidated cases of *Goetze v. United States* and *Grossman v. United States*⁴⁵ simply affirmed the basic principle of *De Lima*, reiterating that Puerto Rico and Hawaii were not foreign countries under American tariff law and on that ground reversing the administrative decision to tax merchandise imported into the United States.

The prior cases were all predicated upon goods that were 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*,⁴⁶ 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.⁴⁷ After ratification of the Treaty, however, Puerto Rico “ceased to be a foreign country,”⁴⁸ and hence export levies were invalid. Relatedly, *Armstrong v. United States*⁴⁹ concerned duties imposed upon goods imported into San Juan before and after ratification of the Treaty of Paris. Viewing *Dooley* as controlling, the Court upheld “duties exacted by the collector of the port of San Juan on goods imported from the United States.”⁵⁰

Adding some confusion was *Huus v. New York & Porto Rico S.S. Co*, which merely reinforced the impression that these territories remained in a muddy purgatory somewhere between foreign

⁴⁴ *De Lima*, 182 U.S. at 200.

⁴⁵ *Goetze v. United States*, 182 U.S. 221 (1901).

⁴⁶ *Dooley v. United States*, 182 U.S. 222 (1901).

⁴⁷ 182 U.S. 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.”).

⁴⁸ 182 U.S. at 234.

⁴⁹ 182 U.S. 243 (1901).

⁵⁰ 182 U.S. at 244.

sovereign and domestic state.⁵¹ 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.”⁵² In this narrow context, a unanimous Court held that the Foraker Act (the federal law that established civilian government in Puerto Rico) had nationalized Puerto Rico and entitled its ports to be considered within the United States for shipping purposes alone. In contrast to the other Insular Cases, the Court rested its conclusion on Section 9 of the Foraker Act, which provided for the “nationalization of all vessels” and guaranteed that “the coasting trade between Puerto 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.”⁵³ 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.”⁵⁴

Thus, by December 1901, the Court had set forth its affirmative view of the status of U.S.-controlled territories. They were “foreign to the United States in a domestic sense.” 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 not *foreign* entities — and hence import and export levies applicable to foreign nations could not be collected. 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 traditional colonies, 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 the overall result. In *Dooley II*,⁵⁵ the Court took up the issue of the constitutionality of the Foraker Act itself. The Act

⁵¹ 182 U.S. 392 (1901).

⁵² The Court answered the latter two questions in the affirmative without reaching the first question.

⁵³ *Huus*, 182 U.S. at 396.

⁵⁴ *Id.* at 397.

⁵⁵ *Dooley v. United States*, 183 U.S. 151 (1901).

fixed duties on imports into Puerto Rico, and was challenged as a violation of Article I, Section 9 of the Constitution, which states that “no tax or duty shall be laid on articles exported from *any state*.”⁵⁶ 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.

Finally, *Fourteen Diamond Rings* simply extended to the context of the Philippines principles that had been established with respect to Puerto Rico (and, in one instance, Hawaii). Specifically, the Court considered whether rings brought from Luzon, Philippines to California after the ratification of the peace treaty were illegally imported 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.”⁵⁷

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.⁵⁸ 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.⁵⁹ Before documenting the profoundly political nature of the questions resolved by the Court (Part II), and

⁵⁶ *Dooley*, at 153 (emphasis added).

⁵⁷ 183 U.S. at 178.

⁵⁸ See, e.g., *Porto Rico is Subject to Congress*, *The Philadelphia Inquirer*, V.144, Issue 148; p.8 (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.”). See generally TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 61 (1985) (“[T]hus, 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.* 147, 148 (2006).

⁵⁹ See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases*, *REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO* 65 (1996); see also *Philadelphia Record* (“The Supreme Court of the United States has sustained President McKinley and reversed Chief Justice Marshall. It has reasserted the right to taxation without representation that the colonies fought to overturn.” (quoted in Sparrow, *supra* note 1, at 103) (2006).

before trying to explain why the Court may have validly considered these questions (Part III), it is useful to consider what prior commentators have said about these cases.

B. Review of the Literature — Despite their historical significance, the Insular Cases have received scant scholarly attention from future generations.⁶⁰ 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.” Judge Jose 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.”⁶¹ Thankfully, the Insular Cases have received greater attention over the last decade.⁶² But the scope of current scholarship still remains relatively limited and clusters around two subjects.

Among scholarship alluding to the Insular Cases, a substantial share of it merely chronicles the political controversies and public climate during the Spanish-American War and in its aftermath.⁶³ Walter LaFeber, for example, explains American expansionism at the end of the Spanish-American War as largely driven by a search for new markets in Asia and Latin America.⁶⁴ By comparison, Robert Beisner studied the grassroots movement of anti-imperialism and the twelve

⁶⁰ See Sanford Levinson, Symposium, *The Canon(s) of Constitutional Law: Why the Canon Should be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENTARY 241, 246 (2000) (describing the Insular Cases as a “topic that is remarkably understudied by constitutional scholars, much to our detriment”).

⁶¹ Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. Marshall L. Rev. 55, 93 n.13 (quoting from Judge Jose Cabranes’s Remarks at the Judicial Conference of the First Circuit 1986).

⁶² See, e.g., Bartholomew H. Sparrow, *The Insular Cases And the Emergence of American Empire* (2006); Burnett & Marshall, *Foreign in a Domestic Sense*, *supra* note 21; Alan Tauber, *The Empire Forgotten: The Application of the Bill of Rights to U.S. Territories*, 57 Case W. Res. 147, 148 (2006); Christian Burnett, *United States: American Expansion and Territorial Deannexation*, *supra* note 16.

⁶³ 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 LAUGHLIN, *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* (1995); J. BLUM, E. MORGAN, W. ROSE, A. SCHLESINGER, JR., K. STAMPP & C. WOODWARD, *THE NATIONAL EXPERIENCE* 534-37 (5th ed. 1981); Arnold Leibowitz, *Defining Status: A Comprehensive Analysis of United States - Territorial Relations*, Springer; 1st edition (July 10, 1989); Rubin Francis Weston, *Racism in U.S. Imperialism*, Columbia: University of South Carolina Press (1972); Thomas Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 Miss. Valley Hist. Rev. 43 (1937).

⁶⁴ WALTER LAFEBER, *THE NEW EMPIRE: AN INTERPRETATION OF AMERICAN EXPANSION, 1860-1898* (1963).

public figures, including former President Benjamin Harrison and Massachusetts Senator, who spear-headed the movement.⁶⁵ 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.⁶⁶ 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.⁶⁷ 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 American empire.⁶⁸ For example, Christina Burnett has argued that the Insular Cases facilitated imperialism by allowing America to acquire territory only to then formally and permanently distance itself from those territories: "[T]he doctrine of territorial incorporation thus amounted to a constitutional doctrine of territorial deannexation."⁶⁹

⁶⁵ ROBERT BEISNER, *TWELVE AGAINST EMPIRE: THE ANTI-IMPERIALISTS, 1898-1900* (Chicago 1985).

⁶⁶ See, e.g., SPARROW, *supra* note 1.

⁶⁷ See, e.g., Owen Fiss, *History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, Vol. 8 (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 (1992); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926); David K. Watson, *Acquisition and Government of National Domain*, 41 AM. L. REV. 239, 253 (1907).

⁶⁸ See, e.g., *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Christina Duffy Burnett & Burke Marshall, eds.) (2001); James Edward Kerr, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 6 (1982); Bartholomew H. Sparrow, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006); Jose A. Cabranes, *Puerto Rico: Colonialism As Constitutional Doctrine*, 100 HARV. L. REV. 450 (1986); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases, 1901-1922*, 65 *Revista Jurídica Universidad de Puerto Rico* 225 (1996); 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 (1997); Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate And Unequal*, Río Piedras, Puerto Rico: University of Puerto Rico (1985).

⁶⁹ Christian Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 802 (2005).

There is a final body of scholarship that does not deal directly with the Insular Cases but is nonetheless relevant to this paper. It concerns the sources and significance of judicial legitimacy. This line of literature is far better developed, and 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.⁷⁰ Scholars have also long debated where judicial legitimacy comes from. Some, like Ronald Dworkin and Ken Kress, link the authority with which a decision speaks to the coherence of its philosophical underpinnings.⁷¹ Others, including Owen Fiss and Joseph Raz, emphasize 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, *e.g.*, “the value of judicial interpretation,” the “worth of the Constitution,” and “the place of constitutional values in the American system.”⁷² 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.⁷³ But scant attention has been paid to the notion that judicial legitimacy may be derived from the political branches themselves. 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 into 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*

⁷⁰ See, *e.g.*, Jeffrey Rosen, *The Day After Roe*, The Atlantic.com (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.”). Indeed, the importance of the legitimacy of Supreme Court rulings has been expressly recognized by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which invoked “principles of institutional integrity” as a reason for holding that the decision in *Roe v. Wade* could not be overturned.

⁷¹ See, *e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* 190-216 (1986) (discussing the Supreme Court’s legitimacy as rooted in the philosophical underpinnings of the decisions); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 290-95 (1989) (reviewing various versions of philosophical legitimacy).

⁷² Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 756 (1982); JOSEPH RAZ, *Legitimate Authority*, in *THE AUTHORITY OF LAW* 1-27 (1979) (same).

⁷³ 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 (2006) (noting that the legitimacy of rulings is rooted in the Justices and the interpretive modes of analysis they applied).

(2007), 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.⁷⁴ Whittington's well-documented 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. But Whittington does not purport to examine what supplies a particular judicial action with legitimacy or what saps a specific judicial pronouncement of its enduring vitality. In other words, once one accepts that it is the Court's role to interpret the Constitution (or a particular law for that matter), what determines whether a facially questionable pronouncement will command sufficient legitimacy to withstand the rigors of time? It is this question that others have answered by reference to the logic of the decision, or to the intuitive appeal of the interpretive approach. But no one, so far as I have found, has explored the view that the political branches (through floor statements by legislators for example) can impact the legitimacy of the Court's decisions. That is the lesson that I believe can be extracted from the Insular Cases.

To be sure, some scholarship has 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? Shouldn't 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? These were concerns that Justice Joseph McKenna explicitly raised in his dissenting opinion in *De Lima*: "It is not for the judiciary to

⁷⁴ KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENT, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (showing that political leaders have advocated and actively thrust the Court into the principal role of interpreting the Constitution).

question it. It involves circumstances which the judiciary can take no account of or estimate. It is essentially a political function. . . . [E]ssentially the whole matter is legislative, not judicial.”⁷⁵ In the end, Justice McKenna’s reproving argument against judicial involvement went unheeded, and the Supreme Court effectively quieted a national political firestorm. The questions that linger a full century later are why and how — that is, 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. A Modest Aftermath

As described earlier, the Insular Cases squarely came down in favor of American expansionism, removing the supposed constitutional barriers to Congress’s plans to indefinitely maintain the new territories as satellite colonies.⁷⁶ As Justice McKenna said with respect to one representative case, *De Lima* ultimately did “more than declare [the legality of sugar duties]. It vindicated the government from national and international weakness [and] enabled 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.’”⁷⁷ 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 island territories and the future of American expansionism.

Thus, before describing a process that supposedly legitimized the Court’s involvement, it is instructive to confirm that, to everyone’s surprise, the Insular Cases were in fact accepted by the

⁷⁵ *De Lima v. Bidwell*, 182 U.S. 1, 209, 219 (1901) (McKenna, J., dissenting).

⁷⁶ See Part I.A., *supra*.

⁷⁷ *De Lima*, 182 U.S. at 220 (alterations and internal quotations marks omitted).

public without significant backlash. Accordingly, Part II.A. explains why public acquiescence was improbable, and Part II.B. reports that the Insular Cases were nonetheless widely received as the valid and final word on what was previously a fierce political conflagration.

A. Predicted Outcome. There were at least five reasons why one might have expected the public to reject the Supreme Court’s decisions in the Insular Cases.

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 indicated that disputes involving treaties and foreign relations were beyond the judiciary’s proper reach.⁷⁸ Two cases help illustrate this point. First, in *Doe v. Braden* (1854) — on its surface, a simple property dispute — the Court refused to consider claims that called into doubt the validity of a treaty with a foreign nation. The opening line of Chief Justice Taney’s opinion read: “This controversy has arisen out of the treaty with Spain by which Florida was ceded to the United States.”⁷⁹ The Court did not wish to risk encouraging objections to the validity of the treaty on the ground that “it would be impossible for the executive department . . . to conduct our foreign relations . . . and fulfill the duties which the Constitution has imposed upon it,” if this kind of treaty-based dispute became routine.⁸⁰ Admittedly, the Court acknowledged its “duty to interpret [a treaty] and administer it according to its terms.”⁸¹ But *Braden* signaled a general reluctance for courts to intervene when issues typically negotiated and settled by treaty are at stake. Similarly, in *Foster v. Neilson* (1829), 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, “even when individual rights depended on [those]

⁷⁸ In *United States v. Arredondo*, for example, the Court held “the judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided” 31 U.S. 691, 711 (1832). 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” *Id.*

⁷⁹ *Doe v. Braden*, 57 U.S. 635, 654 (1854).

⁸⁰ *Id.*

⁸¹ *Id.*

boundaries”: “[T]he settlement of boundaries [is not] a judicial but a political question.”⁸² A contrary ruling threatened to interfere with foreign negotiations. In light of these cases, and given that the precise designation of U.S. territories after the Spanish-American War implicated both treaty interpretations and America’s negotiations with foreign powers, the issues 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.⁸³ 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.”⁸⁴

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.⁸⁵ 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. Maine Congressman Charles Littlefield, for example, underscored the value of political resistance to unwarranted judicial intrusions; accordingly, he applauded President Lincoln’s scathing criticism of the Court’s prior role:

⁸² *Foster v. Neilson*, 27 U.S. 253, 314 (1829) (quoted in *United States v. Arredondo*, 31 U.S. 691, 711 (1832)).

⁸³ See, e.g., 33 Cong. Rec. 3744 (April 3, 1900) (probing “if the question [about the tariff bill for PR] is a constitutional one” (remarks by Rep Mondell); see also Sparrow, *supra* note 1, at 82, 110 (noting that U.S. Attorney General Griggs and solicitor general Richards believed the Insular Cases decided political questions).

⁸⁴ Carman F. Randolph, *Notes on the Law of Territorial Expansion*, Submitted to The Committee on the Judiciary of the Senate of the United States, March 16, 1900. L.S. Rowe, *The Supreme Court*, *supra* note 73, at 38-39.

⁸⁵ See, e.g., Abraham Lincoln on the Dred Scott Decision (June 26, 1857), available at http://afroamhistory.about.com/library/bllincoln_dred_scott.htm (“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.”). After all, prior or subsequent Court decisions had not been immune from widespread public resistance. See, e.g., *Cooper v. Aaron*, 358 U.S. 1 (1958); *Worcester v. Georgia*, 31 U.S. 515 (1832) (prompting President Jackson’s oft-quoted rejoined: “John Marshall has made his decision; now let him enforce it.”)

“Abraham Lincoln, in his great debate with Douglass, bitterly and savagely attacked the Supreme Court for its decision in the *Dred Scott* case.”⁸⁶ Senator Teller similarly referred to *Dred Scott* as an example of Congress’s capacity to overrule a decision of the Court: “I do not say that you can not change the decision of the court by changing the Constitution. We changed the Constitution in order to meet the opinion in the *Dred Scott* case.”⁸⁷ Indeed, as one commentator noted, a similar 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.”⁸⁸

Fourth, public opinion was not sufficiently one-sided to suggest that one outcome might be more palatable to the polity than another. If anything, the country appeared deeply and *evenly* divided. The presidential election results of 1900 provide some measure of the disagreement.⁸⁹ Incumbent President William McKinley had 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.⁹⁰ Likewise in Congress, American expansionism was considered a significant, if not the key, determinant of the 1900

⁸⁶ See, e.g., Charles Littlefield, *The Insular Cases: The American Bar Association Annual Address*, Denver, Colorado on Aug. 22, 1901, 29.

⁸⁷ 33 Cong. Rec. 3671 (April 3). Senator Teller ultimately went on to warn against relying on this mechanism, noting: “You know how much it cost.” *Id.*

⁸⁸ Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926). See also SPARROW, *supra* note 1, at 5 (“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*.”).

⁸⁹ See, e.g., 33 Cong. Rec. 3719 (April 3) (“The question of expansion, or imperialism . . . is one of the issues on which the next national campaign will be fought.”) (NC House Thomas); Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926) (“The election of 1900 largely turned upon the so-called issue of imperialism.”).

⁹⁰ See, e.g., Bryan Praises the Irish: Democratic Candidate Addresses United Societies of Cook County, N.Y. TIMES (Aug. 15, 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.”).

election.⁹¹ The election results therefore provide a crude barometer of the degree of disagreement: McKinley won 7.2 million votes, while Bryan collected roughly 6.3 million votes.⁹² The validity of this measure of the level of the public's disagreement was corroborated by a report to the Senate Judiciary Committee, which 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."⁹³ 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.⁹⁴ The remainder of Part II explores this possibility in greater detail.

To do so, I first argue, 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, I look to what the Justices themselves said and to the key political and policy considerations that dominated their opinions. Third, I present 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.

⁹¹ See, e.g., Trade of Puerto Rico, 33 Cong. Rec. 1995 (1900) ("It is unfortunate that we should go into a great Presidential contest over a question involving extra territorial policy.") (remarks by Rep. Payne); The Anti-Imperialist League declared, although surely in part from wishful thinking, that the decision to retain the island possession was the central issue of the 1900 campaign: "one momentous, vital, paramount issue, Anti-Imperialism and the preservation of the Republic!" prim source cite available Tompkins, *Scylla and Charybdis*, at 144. 154-55, First Annual Mtg of the Anti-Imperialist League; 31 J. Marshall L. Rev. 55, 64 ("The status of the territories quickly became a prominent issue in the 1900 presidential campaign.").

⁹² E. Berkeley Tompkins, *Scylla and Charybdis: The Anti-Imperialist Dilemma in the Election of 1900*, 36 Pacif. Hist. Rev. 143, 160 (May 1967).

⁹³ Carman F. Randolph, Notes on the Law of Territorial Expansion, Submitted to The Committee on the Judiciary of the Senate of the United States, March 16, 1900. L.S. Rowe, *The Supreme Court*, *supra* note 73, at 38-39.

⁹⁴ See, e.g., *Luther v. Borden*, 48 U.S. 1 (1849); *Baker v. Carr*, 369 U.S. 186 (1962); *Vieth v. Jubilerer*. See generally Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); 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 (2002).

1. *Doctrine Indicates Political Core* — From the time of *Marbury v. Madison*, 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.”⁹⁵ By 1901, when the Court considered the Insular Cases, the doctrine had developed sufficiently to establish, as a matter of law, that the Court should have declined to consider the cases (absent perhaps the sort of “consent and certify” process I identify and defend in Parts III & 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.⁹⁶

For example, in 1849, the lack of legal standards prompted the Supreme Court to decline to decide the case of *Luther v. Borden*.⁹⁷ There, the Court was asked to determine whether a particular state government was “republican” within the meaning of the Guarantee Clause of the Constitution. This meant the Court needed to decide whether the convention had voted against or in favor of forming a new government, but the Court had no means however of taking a census, for example, to see who voted. In light of these practical difficulties and the absence of typical judicial standards to

⁹⁵ 5 U.S. 137 (1803). More modern formulations elaborated upon early political question doctrine, setting forth a number of additional criteria that could help identify a political question. *See, e.g., Baker v. Carr*, 369 U.S. 186, 217 (1962) (“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.”).

⁹⁶ *See* Oliver P. Field, *Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485, 512 (1924).

⁹⁷ 48 U.S. 1, 47 (1849).

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.⁹⁸

From this perspective, the Insular Cases seemingly raised political questions. After all, just as *Luther v. Borden* 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 U.S. 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. In fact, 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.”⁹⁹ Moreover, as Part II.B. explains, *infra*, the absence or unimportance of judicial standards was confirmed by the Justices’ principal reliance on political and policy considerations concerning what was better for the future prospects of American expansionism.

In addition, although the cases technically involved the Uniformity Clause and various federal tariff laws, the answer to each of the putatively legal questions depended (like *Borden*) upon a political determination of “what was ‘domestic’ and what was foreign.”¹⁰⁰ As one political

⁹⁸ *Id.*

⁹⁹ *Jones v. United States*, 137 U.S. 202, 212 (1839).

¹⁰⁰ *See, e.g.*, 33 Cong. Rec. 2037 (1900) (“[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 ports of Puerto Rico as domestic ports, then we are met with the controlling provision of the Constitution”) (remarks by Rep. Bromwell); *See, e.g.*, 33 Cong. Rec. 2038 (remarks Rep Ray) (Feb 21 1900) (“Now, if the authors of the Standard Dictionary are correct [that an export refers only to goods exported to a foreign country] . . . then that settles the proposition does it not? Because Puerto Rico is not a foreign country.”); 33 Cong. Rec. 2138 (“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?”) (remarks by Sen. Vest); *see also* Sparrow, *supra* note 1, at 80.

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.”¹⁰¹

(b) *Delegation by Law and Treaty*. A second significant factor, which was announced by Chief Justice Marshall in *Marbury* itself, was whether the question had been committed “by the constitution and laws” to one of the elected branches of government.¹⁰² This too supports the conclusion that the Insular Cases answered political questions, since (a) the political status of the territories was an issue that had been unequivocally submitted to Congress by treaty, and (b) all matters of governance of U.S. 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.”¹⁰³ Accordingly, the Department of War’s annual report noted 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.”¹⁰⁴ Significantly, vesting authority in Congress to specify the “political status” of Puerto Ricans was neither an accident nor a matter of course. The Treaty of Guadalupe (1848), for example, had left to Congress only the *timing* of when Mexicans would become U.S.

¹⁰¹ L.S. ROWE, THE SUPREME COURT AND THE INSULAR CASES, ANNALS OF THE AMERICAN ACADEMY 38-39 (1901).

¹⁰² 5 U.S. 137 (1803). 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 Marbury*, 5 U.S. at 166-167.

¹⁰³ Treaty of Paris, Article IX, A Treaty of Peace Between the United States and Spain (1899) (emphasis added).

¹⁰⁴ *See generally* Justice Story, COMMENTARIES, section 1328 (“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 affected by stipulations in the cessions or by the ordinance of 1787, under which any part of it has been settled.”).

citizens, not what their political status would be under the Constitution.¹⁰⁵ And Congressmen noted this difference — between the Treaty of Paris and prior territorial treaties — in order 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.¹⁰⁶

Even apart from the Treaty of Paris, the Constitution itself explicitly granted to Congress full governance authority over U.S. 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.”¹⁰⁷ During a debate about Congress’s power to govern the territories, Senator Joseph Foraker — architect of the Foraker Act — 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 U.S. Government to make war, a grant of power to make treaties, each and both carrying along with it and with them the power also to acquire territory and, as a result of that, the power to govern territory.”¹⁰⁸

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 doctrinal analysis is reinforced by the Justices’ own statements and the approach they assumed in their opinions. Several Justices explicitly recognized

¹⁰⁵ See Treaty of Guadalupe, Article IX (February 2, 1848), available in Charles E. Littlefield, *The Insular Cases: The American Bar Association Annual Address*, Denver, Colorado on Aug. 22, 1901 (“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 Constitution.” (emphasis added)).

¹⁰⁶ See 33 Cong. Rec. 3719 (April 3) (comparing the treaty of cession of Louisiana (Article 3) and Mexico (Article 9) with the Treaty of Paris (Article 9)) (remarks by Rep. Thomas).

¹⁰⁷ U.S. CONST. Art. IV, Sec. 3, Clause 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 CONST. Art. II, Sec. 2.

¹⁰⁸ WINFRED LEE THOMPSON, *THE INTRODUCTION OF AMERICAN LAW IN THE PHILIPPINES AND PUERTO RICO: 1898-1905*, at 44 (1989); Ramos 322.

the political nature of the issues raised in the Insular Cases. Justice McKenna, for instance, 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.”¹⁰⁹ 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 desirableness of this or that acquisition, but this is solely a political question.”¹¹⁰

Moreover, throughout the decisions, the Justices depend upon political and policy-based considerations of what position would least endanger the security, prosperity, and growth of the country, the very sorts of arguments the political branches would ordinarily contemplate. The opinions of the two architects of the Insular Cases are especially instructive on this point. Justice Brown, who wrote eight of nine of the Court’s 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.”¹¹¹ He also remarked: “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.”¹¹²

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

¹⁰⁹ *De Lima*, 182 U.S. at 219.

¹¹⁰ *Downes*, 182 U.S. at 286 (emphasis added).

¹¹¹ *Downes*, 182 U.S. at 286 (1901).

¹¹² *Id.* at 279-280.

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?¹¹³

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.*¹¹⁴

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.

(3) *Context Confirms Political Core* — American reign over Guam, Puerto Rico and the Philippines represented a “great departure”¹¹⁵ because the country had never before governed such heavily-populated and far-flung territories.¹¹⁶ 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 California¹¹⁷ — ignited an incendiary national debate that divided the

¹¹³ *Downes*, 182 U.S. at 311 (White, J., concurring).

¹¹⁴ *Id.* at 312 (White, J., concurring).

¹¹⁵ Beisner, TWELVE AGAINST EMPIRE, *supra* note 61.

¹¹⁶ *See, e.g.*, CHARLES MORRIS, OUR ISLAND EMPIRE (1899); SPARROW, *supra* note 1, at 4 (“[N]ever before had the United States added areas this populated and this remote from American shores.”).

¹¹⁷ Juan F. Perea, Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases, 140, 148 *in* Burnett & Duffy, *supra* note 16.

American public and political parties.¹¹⁸ Indeed, not since *Dred Scott* had the country been so divisively splintered,¹¹⁹ 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 1861.¹²⁰

Some insisted that holding the islands as colonies would produce an identity crisis and threaten to betray the principles of self-governance that animated the American Revolution.¹²¹ Democratic presidential candidate William Bryan Jennings, for example, reminded the country:

Today, 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 today we are willing to abandon those principles, then we must stand before the world convicted of having brought people here under false pretenses.¹²²

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

¹¹⁸ As the *New York World* reported, “[l]egal and political opinion was never so divided.” Sparrow, *supra* note 1, at 78; Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823, 823 (1926) (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 new acquisitions presented a set of new and pressing questions.

The legal academy also sharply disagreed. While scholars including Christopher Columbus Langdell (former dean of the Harvard Law School), Charles A. Gardner (New York Bar Association), and James Bradley Thayer (HLS 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. Sparrow, *supra* note 1.

¹¹⁹ See Cabranes, Book Review, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 455 (1986).

¹²⁰ 33 Cong. Rec. 3718 (April 3, 1900) (remarks by House Thomas of NC). And Thomas was not alone. For example, in reference to Puerto Rico, Representative 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.” 33 Cong. Rec. 1947 (Feb. 19, 1900).

¹²¹ *Bryan Praises the Irish*, N.Y. Times (Aug. 15, 1900) (“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 our Government to share in the seizure of territory, which is the distinguishing mark of the nation that throttled liberty upon this continent, burned it Capitol at Washington . . .”) (proclamation of the United Irish Societies of Cook County); see also *supra* note 3. See generally Brook Thomas, “A Constitution Led by the Flag: The *Insular Cases* and the Metaphor of Incorporation,” in Burnett, Foreign in a Domestic Sense 82, 84 (arguing that “what was at stake” in the *Insular Cases* was “how the United States thought of itself—or themselves—as a nation”).

¹²² *Bryan Praises the Irish: Democratic Candidate Addresses United Societies of Cook County*, NYT (Aug. 15 1900). See also L.S. Rowe, *The Supreme Court*, *supra* note 73, at 38-39 (denouncing colonialism as “profoundly affecting the fabric of our institutions”).

Empire, and transforming a peaceful democracy into an imperial conqueror,”¹²³ while for another, “[t]he ‘giant issue now’ [was] whether the flag shall stand for freedom or oppression.”¹²⁴ 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.¹²⁵

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.¹²⁶ For others, what path America chose risked imperiling the country’s very existence.¹²⁷ 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.¹²⁸

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

In light of (a) the doctrine at the time, (b) the Justices’ statements and opinions in the cases themselves, and (c) the surrounding circumstances, it seems fair to say at least that the Supreme

¹²³ Tompkins, *Scylla and Charybdis*, at 153.

¹²⁴ This was stated in an article published in *The Arena* “The Giant Issue of 1900” by Frank Parsons, Tompkins, *Scylla and Charybdis*, at 153-5.

¹²⁵ Hon. George F. Edmunds (former Vermont Senator), *The Insular Cases*, Published by New England Anti-Imperialist League, *North American Review*, 9 (Aug. 1901).

¹²⁶ *De Lima*, 182 U.S. at 220 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.”

¹²⁷ See, e.g., JAMES FERNALD, *IMPERIAL REPUBLIC* (1899).

¹²⁸ The American Presidency Project, *Democratic Party Platform of 1900*, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=D1900>.

Court *could* have validly declined (and probably *should* have refused) to resolve the cases. But just as these considerations indicate that the Court should have turned the cases down, they also suggest that the public and their political leaders would have resisted, and afterwards objected to, the Court's unwarranted interference. Yet, as the next subsection 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 the Insular Cases closely.¹²⁹ As the *New York World* declared, "[n]o case ever attracted wider attention."¹³⁰ The *New York Times* similarly reported that the public was feverishly watching to see if the Court would uphold the "McKinley policy of imperialism."¹³¹

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.¹³²

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."¹³³

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.¹³⁴ But, upon

¹²⁹ CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 430 (1924) (describing the cases as a "judicial drama of truly Olympian proportions" that "constituted by far the most important fact in the Court's history during the period since Waite's death").

¹³⁰ SPARROW, *supra* note 1, at 78.

¹³¹ *Id.*

¹³² *Id.* at 85-86.

¹³³ *New York Daily Tribune* (May 27, 1901).

announcement of the decisions, predictions surfaced that the Insular Case decisions 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.”¹³⁵

In the end, however, the Court’s decisions appeared to squelch political and public debate rather than set it off. Peter Dunne’s cartoon featuring the fictitious Mr. Dooley hints at the view that the Court had successfully ensconced itself in the middle of the debate over expansionism:

“I see,” said Mr. Dooley, “th’ Supreme Court 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 raymember clearly bow 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’ army 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 Court.’”¹³⁶

This popular cartoon reflects an apparent perception among the public that the Supreme Court could engage questions concerning the political status of the newly-acquired territories. Ultimately, even those who doubted the reasoning and consistency of the rulings nevertheless accepted them as the authoritative and final judgment on American expansionism.¹³⁷ Indeed, Puerto Rico and Guam continue to be “unincorporated territories” of the United States. And the Insular Cases have remained not only valid law throughout the twentieth century,¹³⁸ but as of June 2008, exceptionally important constitutional precedent for determining where and to whom the freedoms of the

¹³⁴ 33 Cong. Rec. 1946 (1900) (remarks by Rep. Payne).

¹³⁵ SPARROW, *supra* note 1, at 107.

¹³⁶ SPARROW, *supra* note 1, at 79 (*quoting* from Finley Peter Dunne, “The Supreme Court’s Decisions, *Mr. Dooley at His Best*, 1938).

¹³⁷ *See* Hon. George F. Edmunds (formerly VT Senator), *The Insular Cases*, Published by New England Anti-Imperialist League, *North American Review* Aug 1901, 4-5

¹³⁸ *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 475 (1979) (Brennan, *J.*, concurring); *see also* *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85 (D.D.C. 2007); *Historians’ Amicus Brief in Boumediene*; Tauber, *supra* note 58, at 148.

Constitution apply.¹³⁹ As Justice Kennedy recently 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.*”¹⁴⁰

III. The “Consent and Certify” Explanation

For the reasons described in Part II, the acquiescence of the political branches and the public to the Supreme Court’s decisions in the Insular Cases was rather remarkable. In an effort to why the Court’s pronouncements in the Insular Cases were not publicly repudiated, the main goal of Part III is to identify and elaborate upon five steps that political actors took that made it easier and more appropriate for the Court to address the controversial and politically-charted questions presented by the Insular Cases. These steps constituted, I submit, a transformative process by which fundamentally political questions were converted into justiciable ones.

A. Making Political Questions Justiciable. What is hard to understand is 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. The answer, I submit, maybe found in 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 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 their own authority to settle the dispute, (2) publicly inviting the Court to mediate the controversy, (3) endorsing the validity of judicial involvement, (4) casting the

¹³⁹ See *Boumediene v. Bush*, 553 U.S. ___ (2008).

¹⁴⁰ *Id.* at *29 (slip copy).

political issue in legal and constitutional terms, and (5) proposing non-legal factors that could compensate for the absence of traditional judicial standards. The following documents these steps.

1. *Disavowing congressional authority to settle the dispute.* Toward the end of the Spanish-American War, the legitimacy of expansionism divided the country and remained relentlessly contentious. Both chambers of Congress were fractured by 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 controversy, arguing that the political arena was an improper forum to decide this particular issue. The reasons for this view varied.

Senator Hoar, for example, warned of the risks of deciding the politically-charged issue in chambers susceptible to heightened public passions:

The cry that we have outgrown Washington; that the old foundation can no longer support our temple; that the doctrines of the Declaration of Independence and the Constitution of Massachusetts are not eternal verities, but only make-shifts of a generation; that they are for little countries and not for large ones; 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, than they were of old in the quiet chamber where Madison and Hamilton sat in council . . .¹⁴¹

Others also questioned congressional debate since all controversies were vulnerable to politicization, especially in the days preceding a presidential election. As Senator Teller said:

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.¹⁴²

Senator Teller believed that if Congress were to decide the legitimacy of American expansionism, it should only be done after the 1900 presidential election. The basic fear of political leaders like Teller was that expansionism would be exploited as an electoral issue and used to pander to the

¹⁴¹ Senator Hoar's Views: Extracts from his address at Worcester, Mass., *Friends' Intelligencer*, 55, 46 (Nov. 12, 1898).

¹⁴² 33 Cong. Rec. 3685.

public.¹⁴³ Moreover, politicizing the issue left it vulnerable to sudden shifts in popular opinion¹⁴⁴ and special interests.¹⁴⁵ Congressman Lane, for example, criticized the special interests lobbying for American expansionism on the ground that America's cotton trade with China would improve if the U.S. controlled the Philippines:

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.¹⁴⁶

Lane argued that such base political considerations should be subordinated to the ideological implications of ruling non-consenting territories.

Political leaders consequently argued in favor of an alternative way of deciding the legitimacy of territorial governance. Congressmen Payne said:

Now, Mr. Chairman, all political parties have approved this treaty and accepted the cession of the Philippine Islands to the United States and the island of Puerto Rico to the United States. As patriots, instead of trying to make some political capital for the Presidential campaign, we should sit down with deliberate, dispassionate

¹⁴³ Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 64 (1997) (“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.”).

¹⁴⁴ See, e.g., 33 Cong. Rec. 3677 (“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” Mason); House Rep Boutell of Illinois: “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.” 33 Cong. Rec. 3724 (April 3).

¹⁴⁵ See, e.g., 33 Cong. Rec. 3672 (“What can we say to the laboring men . . . they are not for this bill.” Mason; House Rep Robinson of Indiana: “[I]n these troublous times of acquiring and governing outlying possessions and efforts at once to sustain the Constitution the interest of labor seems neglected.” 33 Cong. Rec. 3710 (April 3); *Id.* (“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 from their convention in Detroit said on Dec 19, 1899); 31 J. Marshall L. Rev. 55, 63-64 (“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.”. See also *id.* (“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. See *id.* at 116. 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. Margaret Leech, *In the Days of McKinley* 396-97 (1959).”).

¹⁴⁶ 33 Cong. Rec. 3721 (April 3, 1900).

judgment and consider the questions that confront us with reference to these islands.¹⁴⁷

Senator Teller expressed a similar view that, at least until after the presidential election, the political arena could not serve as a deliberate and dispassionate forum in which to debate American expansionism: “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.”¹⁴⁸ In this way, political leaders disclaimed the political process as the appropriate venue in which to resolve the controversy over American expansionism. Instead, as the next section shows, political leaders selected the Supreme Court as a superior forum.

2. *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 U.S. 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.”¹⁴⁹ That same month, the U.S. Minister to Spain, the Honorable Perry Belmont (who served as a Democratic Congressman before his appointment), criticized proponents of imperialism for objecting to judicial review:

That new issue is well enough described as imperialism. Everybody understands its meaning. 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

¹⁴⁷ 33 Cong. Rec. 1941 (Feb 19, 1900) (remarks by Rep. Payne) (discussing the trade of Puerto Rico).

¹⁴⁸ 33 Cong. Rec. 3685 (April 3, 1900).

¹⁴⁹ *The President’s Attitude: Has Not Changed His Opinion, but Approves House Bill*, N.Y. Times (Mar. 6, 1900).

as Queen Victoria and Parliament have over India. It defies and denies the control of the Supreme Court.¹⁵⁰

The Minister to Spain also expressly endorsed Supreme Court involvement in order to curb 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 judicial power can, in a proper case, sit in judgment on whatever Congress may do. The essential thing is Constitutional control.*¹⁵¹

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.”¹⁵²

Secretary of War Root agreed with the Ambassador. He wrote Senator 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.”¹⁵³

Explicit endorsements of 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 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

¹⁵⁰ Mr. Belmont on the Issue: Attacks the Administration’s Expansion Policy—Will Work for Mr. Bryan’s Election, NYT (Aug. 15, 1900).

¹⁵¹ *Id.* at 12 (emphasis added).

¹⁵² Honorable Perry Belmont, Formerly United States Minister to Spain, The President’s War Power and An Imperial Tariff, The North American Review, Mar 1900, Vol. 170, p.433 P.7 of 13.

¹⁵³ Sparrow, *supra* note 1, at 124.

questions appeal may be had and a writ of error may lie to the Supreme Court of the United States.”¹⁵⁴

The resemblance between this exchange and the Mr. Dooley cartoon dialogue suggests how broadly shared this view may have been in the public.¹⁵⁵ Congressman Gaines also 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 affirmed by our highest courts that a law passed by Territorial legislatures ‘contrary to the Constitution of the United States is void,’ which goes to prove that Congress is without power to enact laws beyond the limitation of or its powers granted.”¹⁵⁶

Aside from explicit solicitations, political leaders also invited judicial review through congressional action. Representative Richardson observed that the ambiguous meaning of legislation, for example, elicited 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 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.¹⁵⁷

Other members of Congress were more explicit about passing legislation in order to elicit judicial review. Congressman Sereno E. Payne, Chairman of the House Ways and Means Committee, advocated passing legislation or formulating 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

¹⁵⁴ 33 Cong. Rec. 3801.

¹⁵⁵ See *supra* note **Error! Bookmark not defined.** and accompanying text.

¹⁵⁶ 33 Cong. Rec. 2000 (remarks by Rep. Gaines).

¹⁵⁷ 33 Cong. Rec. 2034.

the limitation of 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.

Representative Lane described this strategy to secure judicial review as held 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.”

Finally, having chosen to review congressional legislation for the territories, when the Supreme Court announced its decisions, the presence of several members of Congress and the Administration 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.”¹⁵⁸ Since their attendance was widely reported, it may have had a broader effect, signaling political leaders’ acceptance of the Court’s decisions.¹⁵⁹

3. *Endorsing the validity of judicial involvement.* Members of Congress also implicitly endorsed judicial settlement of the hotly-contested issue of American expansionism through (1) acceptance of the inevitability of Supreme Court review; (2) hopeful, or at least uncritical, anticipation that the Court would intervene; and (3) express acknowledgment of the judicial supremacy of any decision with respect to unincorporated territories.¹⁶⁰

¹⁵⁸ Sparrow, *supra* note 1, at 78.

¹⁵⁹ The *New York Herald Tribune* noted that Secretary Root, Attorney General Philander Knox, Solicitor General Richards, Senators Lodge and William E. Mason, and Representatives James D. Richardson and Charles Grosvenor.

¹⁶⁰ *See, e.g.*, 33 Cong. Rec. 3672 (“What can we say to the laboring men if this revenue tariff goes through, even though the Supreme Court should sustain it?”) (remarks by Mason); *Id.* (“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.”) (remarks by Representative Dalzell); 33 Cong. Rec. 1954 (1900); Payne: “During all these one hundred years no citizen of the United States, feeling aggrieved by these alleged imperial laws, has gone into the United

The view that territorial governance would inevitably come before the Court was expressed, for example, by Representative Hopkins:

All of these cases arose under such different conditions from those that now confront us that it is preposterous to hold that all or any of them are authorities to guide us in legislating for Puerto Rico or the Philippine Islands. I venture the assertion that none of these decisions would have any weight with the Supreme Court, or at the most very little weight, *when called upon to decide the constitutionality of the bill which we are now considering.*¹⁶¹

Representative Morris offered a similarly upbeat view of judicial intervention: “[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.”¹⁶² A slightly less deterministic view was expressed by Congressman De Armond, who nevertheless expressed confidence that the Supreme 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 on¹⁶³

Senator Mason was even more convinced that that the Supreme Court *could* intervene and settle the debate over American expansionism if it so chose:

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?¹⁶⁴

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

States court . . . This uniform interpretation of the Constitution by Congress has not been questioned by any citizen of the United States in any court.” 33 Cong. Rec. 1946.

¹⁶¹ 33 Cong. Rec. 2005 (remarks by Rep. Hopkins) (emphasis added) (Feb 20, 1900).

¹⁶² 33 Cong. Rec. 1577 (Feb. 6 1900) (remarks by Rep. Morris).

¹⁶³ 33 Cong. Rec. 3751 (April 3 1900).

¹⁶⁴ 33 Cong. Rec. 3671 (1900) (remarks by Sen. Mason); *see also id.* at 3669 (April 3 1900) (“[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 ingernet force and right to take a man’s life without due process of law.”) (Senator Mason).

Such are a few of the considerations tending to show that the profession and the country may not feel like unreservedly acquiescing 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.*¹⁶⁵

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 other departments of the Government must look to the judicial for light, that light should burn steadily."¹⁶⁶ In a private communication, Justice Harlan wrote: "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."¹⁶⁷

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, it said "that the Democratic party will abide by the decision of the Supreme Court of the United States on the questions of constitutional law."¹⁶⁸ Referring to matters related exclusively to American expansionism, the Platform declared: "Resolved, That the Democratic party will abide by the

¹⁶⁵ Littlefield 47 (emphasis added).

¹⁶⁶ Sparrow, *supra* note 1, at 79.

¹⁶⁷ Letter to Taft on July 16, 1900 Sparrow, *supra* note 1, at 79.

¹⁶⁸ *Democratic Party Platform; June 18, 1860*, available at <http://www.yale.edu/lawweb/avalon/dem1860.htm> (last accessed November 29, 2007). *See also* Littlefield 31.

decision of the Supreme Court of the United States upon these questions of Constitutional Law.”¹⁶⁹

The Platform went even further and advised its citizenry to also respect Court decisions concerning territorial governance:

Resolved, That it is in accordance with the 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.¹⁷⁰

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. One legislator put it thus: “Now, no constitutional amendment was made, not because Mr. Jefferson . . . 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.”¹⁷¹

4. *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,¹⁷² politicians chose 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

¹⁶⁹ See Democratic Party Platform; June 18, 1860, available at <http://www.yale.edu/lawweb/avalon/dem1860.htm> (last accessed November 29, 2007). 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.*

¹⁷⁰ EDWARD MCPHERSON, THE POLITICAL HISTORY OF THE UNITED STATES OF AMERICA DURING THE PERIOD OF RECONSTRUCTION 362 (2007).

¹⁷¹ 33 Cong. Rec. 3672 (remarks by Representative Dalzell).

¹⁷² See, e.g. The “Deadly parallel” on Cuban tariff reduction, Compiled by Truman G. Palmer. June 27, 1902. Serial Set Vol. No. 4249, Session Vol. No.30, 57th Congress, 1st Session, S.Doc. 439, at 3 (noting the views of the economic interests of the Secretary of War and governor-general on tariffs with respect to the islands); 33 Cong. Rec. 3671 (remarks by Sen. Teller) (April 3, 1900) (asserting the foreign diplomatic concerns with saying one thing to Europe and saying another to Puerto Rico).

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.”¹⁷³ 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. And political leaders relied heavily on the text of the Constitution and earlier Supreme Court decisions during these debates over American expansionism.¹⁷⁴

First, what authority the United States had to acquire territories was debated on the basis of what the Constitution permitted. Senator George Vest (D-Mo.) on December 10, 1898 proposed the Vest Resolution in such terms:

Under the Constitution of the United States no power is given to the federal government to acquire territory to be held or governed permanently as colonies. The colonial system of European nations cannot be established under our present Constitution, but all territory acquired by the government . . . must be acquired and governed with the purpose or intent of organizing such territory into states suitable for admission into the Union.

Likewise, Congressman De Armond said, “the controversy must be settled by appealing to the Constitution, by getting the correct decision from the words of the Constitution. . . . The

¹⁷³ See Cabranes, Book Review, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 Harv. L. Rev. 450, 455 (1986).

¹⁷⁴ Public debates in newspapers and elsewhere reflected a similar dialogue. See, e.g., American League of Philadelphia hosted “Eastern Conference of Anti-Imperialists,” *New York Evening Post*, “Special Anti-Imperialist Supplement,” Feb. 24, 1900, p.2 (“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.”); Hon. George F. Edmunds (formerly VT Senator), *The Insular Cases*, Published by New England Anti-Imperialist League, *North American Review* Aug 1901, 8 (“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.”).

Constitution is the fountain head,”¹⁷⁵ just as Judge Charles A. Gardiner described it as a “constitutional” quandary in a speech at President McKinley’s reelection headquarters: “The Republic 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.”¹⁷⁶

Second, politicians argued that the islands were domestic or foreign on the basis of whether they fell under the constitutional terms of “territories” and the “United States.”¹⁷⁷ 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.¹⁷⁸ Representative 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.¹⁷⁹

Representative Ray made clear 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 Supreme Court of the United States and in such a way that no lawyer or man capable of comprehending legal reasoning¹⁸⁰

Third, politicians framed the question of what rights to accord to the newly-acquired territories — an issue charged by the Treaty of Paris to Congress¹⁸¹ — as a legal inquiry. The

¹⁷⁵ 33 Cong. Rec. 3750 (April 4, 1900) (remarks by Rep. De Armond).

¹⁷⁶ *The Policy of Expansion*, N.Y. Times, September 23, 1900. See generally John Gorham Palfrey, 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).

¹⁷⁷ CONST. Art. IV, Sec. 3, Clause 2.

¹⁷⁸ E.g., 33 Cong. Rec. 3750 (April 4, 1900).

¹⁷⁹ 33 Cong. Rec. 1953 (Dalzell).

¹⁸⁰ 33 Cong. Rec. 2037 (1900).

¹⁸¹ See *supra* note 18.

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?”¹⁸² 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.”¹⁸³ In the House of Representatives, Representative Newlands also contended that the Constitution settled the debate and on this basis directed the country chart a specific course in its treatment of the colonies: “I contend that good faith, self-interest, and constitutional obligation compel us to the latter course, which will result in the pacification of the islands, the identification of the insurgents with building up the fabric of the new government, the establishment of order, the security of business interests.”¹⁸⁴ Formulation of these different political questions as 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 legitimated judicial intervention by relying on modes of classical legal reasoning in debating territorial governance. Rather than acting as independent constitutional interpreters on the basis of 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.¹⁸⁵ The House majority report,

¹⁸² DONALD B. JOHNSON, NATIONAL PARTY PLATFORMS, rev. ed. (Urbana: University of Illinois Press, 1978), 1: 112; OWEN FISS, UNITY OF THE FLAG AND CONSTITUTION 251.

¹⁸³ *Id.* at 245, 251.

¹⁸⁴ 33 Cong. Rec. 1994 9 (remarks By Rep. Newlands)

¹⁸⁵ *See, e.g.*, 33 Cong. Rec. 3564 (March 31, 1900) (“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 support of one or the other contention and with which the country and the Senate have not already become entirely familiar.”) (remarks by Senator Fairbanks); 33 Cong. Rec. 2004 (“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 . . .”) (remarks by Rep. Swanson); 33 Cong. Rec. 2003 (1900) (“I think, [Mr. Chairman], that a careful analysis of the decisions of the Supreme Court of the United

for example, included a lengthy discussion of Supreme Court precedents in elaborating its position.¹⁸⁶ Representative Dalzell, in a quote representative 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.”¹⁸⁷ By citing the holdings and opinions of the Court in this way, elected officials endorsed judicial authority to decide political issues arising out of American expansionism.¹⁸⁸

Second, to the extent politicians engaged in independent inquiry, they relied heavily on classical forms of legal analysis like probing Framers’ intent¹⁸⁹ rather than political factors: “We ought to be able to ascertain [the intention of the framers] from the language used.”¹⁹⁰ Representative Boutwell, for example, noted that Thomas Jefferson had first doubted the constitutional right to acquire Louisiana.¹⁹¹ More generally, Senator Mason said that the Constitution mandated that “when you levy an impost duty, that duty which the fathers were afraid

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*.”) (remarks by Rep. Albert J. Hopkins); 33 Cong. Rec. 3750 (April 4, 1900) (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”) (remarks by House Rep De Armond); 33 Cong. Rec. 1949-50 (1900) (remarks by Rep. Richardson); 33 Cong. Rec. 1948 (“This is a tax measure. The power to tax is the power to destroy. This is the language of the Supreme Court”) (remarks by Rep. Richardson); 33 Cong. Rec. 1968-69 (Rep. Kenney); 33 Cong. Rec. 3670-71 (April 3, 1900) (citing case law like *Capital Traction Company vs. Hoff* and *United States v. McAllister*); 33 Cong. Rec. 3691 (quoting Justice Bradley’s arguments in different Supreme Court opinions) (remarks by Rep. Gallinger); 33 Cong. Rec. 1953-1954 (Feb 19 1900) (engaging in a lengthy discussion of five Supreme Court cases) (remarks by Rep. Dalzell).

¹⁸⁶ 33 Cong. Rec. 1995 (1900) (“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 . . .*”) (remarks of Congressman Payne).

¹⁸⁷ 33 Cong. Rec. 1954 (Feb. 19, 1900).

¹⁸⁸ Senator Teller: “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.*” 33 Cong. Rec. 3671 (April 3, 1900).

¹⁸⁹ Historically debated conquests as constitutional question: When Congress was debating the Treaty of Guadalupe and the annexation of Mexico, Mr. Stephens denounced what he described as a war of conquest as contrary to the spirit of the constitution.

¹⁹⁰ 33 Cong. Rec. 1953-54 (Feb 19 1900) (remarks by Rep. Dalzell). *See also* Cong. Globe, 30th Cong. 2d Sess. App. 227 at 145; 13 Harv. L. Rev. 171.

¹⁹¹ 33 Cong. Rec. 1948 (1900).

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.”¹⁹²

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 — into a constitutional matter validly referred by the Court.¹⁹³

5. *Proposing non-legal factors that could compensate for the absence of traditional judicial standards.* Of course, aside from classical forms of legal reasoning, political leaders raised non-legal arguments for and against American expansionism.¹⁹⁴ Various non-legal considerations figured prominently in the political and public debate over American expansionism, including foreign opinion,¹⁹⁵ racist rhetoric,¹⁹⁶ and the commercial needs of the economy.¹⁹⁷ And to the extent politicians deemed these arguments relevant, they explicitly instructed (and thereby enabled) the Supreme Court to consider

¹⁹² 33 Cong. Rec. 3669 (remarks by Sen. Mason). Senator 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: Extracts from his address at Worcester, Mass., *Friends’ Intelligencer*, Nov. 12, 1898; 55, 46.

¹⁹³ 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 Republican Party Platform of 1900, available at <http://www.presidency.ucsb.edu/showplatforms.php?platindex=R1900>.

¹⁹⁴ 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.” 33 Cong. Rec. 3672 (Apr. 3, 1900). Likewise, Representative Culberson urged that the custom duties be removed: “In my judgment these duties are indefensible upon moral, economic, and constitutional grounds.” *Id.* at 3677. See also *id.* at 3673 (April 3, 1900) (“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.”) (remarks by Sen. Mason); *id.* at 3690 (April 3, 1900) (“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”) (remarks by Sen. Wellington); *id.* at 3692-3 (quoting a professor who studies taxation on the island territories) (remarks by Sen. Fairbanks).

¹⁹⁵ See, e.g., 33 Cong. Rec. 3671 (remarks by Sen. Teller) (April 3, 1900) (stressing the foreign diplomatic problems with making contradictory comments to Europe and Puerto Rico).

¹⁹⁶ See, e.g., SPARROW, *supra* note 1, at 63 (noting that the Democratic Platform declared that “Filipinos cannot be citizens without endangering our civilization.”).

¹⁹⁷ See, e.g., 33 Cong. Rec. 3721 (April 3) (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.”); The “Deadly parallel” on Cuban tariff reduction, Compiled by Truman G. Palmer. June 27, 1902. Serial Set Vol. No. 4249, Session Vol. No.30, 57th Congress, 1st Session, S.Doc. 439, at 3 (noting the views of the Secretary of War and Governor-General on American economic interests in the islands).

them. 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.¹⁹⁸

Members of Congress were equally explicit in submitting non-legal factors to the Court. Political expediency was the predominant non-legal factor emphasized by leaders. For example, in a letter to Justice Harlan, Philippine Governor 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.”¹⁹⁹ Taft therefore requested of the Court: “If there is room for two constructions . . . take the one that avoids such a result.”²⁰⁰

Representative Hopkins highlighted other non-legal 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, climactic 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.²⁰¹

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.”²⁰²

¹⁹⁸ Sparrow, *supra* note 1, at 60.

¹⁹⁹ *Id.* at 78. Other representatives also took positions on territorial governance on the basis of its impact on the country. Representative Richardson maintained that the country was able to grow and acquire even when acting in accordance with Constitution. See 33 Cong. Rec. 1947 (“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.”).

²⁰⁰ Sparrow, *supra* note 1, at 78.

²⁰¹ 33 Cong. Rec. 2005 (remarks by Rep. Hopkins) (Feb 20, 1900).

²⁰² 33 Cong. Rec. 3670 (April 3, 1900) (noting that the United States had never imposed an “impost duty between the United States and the newly acquired between the United States and the newly acquired territory”).

Such political direction remedied 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 factors. Under those circumstances, it should not be surprising that such considerations dominated the Court’s decisions.²⁰³

Justice White, for example, explained that significant to his vote was a political fear that a contrary ruling in *Downes* would have set a precedent constraining Congress’s governance of the Philippines:²⁰⁴

In 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.”²⁰⁵

Even Justice Brown, who believed the cases appropriate for judicial adjudication, acknowledged the close proximity between the questions before the Court and classical 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.”²⁰⁶ Justice Brown continued on to say that Congress “may do for the Territories what the people, under the Constitution, may do for the

²⁰³ See, e.g., L.S. ROWE, THE SUPREME COURT AND THE INSULAR CASES, ANNALS OF THE AMERICAN ACADEMY 41 (1901) (“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.”).

²⁰⁴ See also *De Lima v. Bidwell*, 182 US 1, 218 (1901) (“That principle [that all laws applyis 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.’”) (McKenna, J.).

²⁰⁵ 31 J. Marshall L. Rev. 55, 79 n.147.

²⁰⁶ *Downes v. Bidwell*, 182 U.S. 244, 286 (1901) (Brown, J.) (emphasis added).

States,” adding that the authority arose “not necessarily from the territorial clause, but from the necessities of the case.”²⁰⁷ The dissenting justices in *Downes* responded that “these arguments are merely political, and ‘political reasons have not the requisite certainty to afford rules of judicial interpretation,’”²⁰⁸ though, of course, this view did not carry the day.

IV. Normative Implications

The prior section 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, and certified specific questions to the Court for its consideration. 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 authorizes and validates the final settlement by the Supreme Court of even the most bitter national disputes. This Part offers three preliminary arguments in order to justify why this process should be normatively defended and credited with this effect.

A. Diminished justification of doctrinal bar. First, in “consent and certify” cases, *i.e.*, where the political branches have affirmatively certified a political question to the courts, the traditional doctrinal justification for prohibiting judicial review is quite weak. In *Baker v. Carr*,²⁰⁹ the Supreme Court identified six factors it would 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

²⁰⁷ *Id.*

²⁰⁸ *See Downes*, 182 U.S. at 374 (“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.”).

²⁰⁹ 369 U.S. 186 (1962).

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.²¹⁰

The criteria set forth in *Baker* reflect 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 pronouncements risk embarrassment (or worse) and undermine principles of comity. So how does the proposed “consent and certify” process account for these problems? I argue 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? In other words, why is it relevant that the political branches have consented to judicial review or sought to certify the question if authority was allocated by the Constitution to a political actor? The force of these questions assumes that the political branches have been vested by the Constitution with exclusive (rather than primary) jurisdiction with respect to a particular issue.²¹¹ It is true that, in some contexts, the text of the Constitution will indicate that a political branch has exclusive, *non-delegable* authority to decide a question. For example, Article I of the Constitution states that the House of

²¹⁰ *Id.* at 217.

²¹¹ The distinction between exclusive and primary jurisdiction has found some currency in the administrative law context. See, e.g., *Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289 (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 (quoting from 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 3-4 (1958)).

Representatives “shall have the *sole* Power of Impeachment,”²¹² and that the Senate “shall have the *sole* Power to try all Impeachments.”²¹³ In most other contexts, however, the political branches may be thought to have primary responsibility — but not exclusive, non-delegable 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.”²¹⁴ 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 court be barred from considering the matter because the Constitution had assigned to Congress the task of declaring the punishment for treason?²¹⁵ 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”²¹⁶; but that did not mean that the Supreme Court was prohibited under all circumstances from determining whether congressional legislation violated a provision of the Constitution, *e.g.*, 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? What does it matter that the political branches have engaged in the “consent and certify” process described in Part III? If the Constitution grants Congress exclusive authority, then the judiciary cannot intercede;

²¹² U.S. CONST., Art. I, Sec. 2 (emphasis added).

²¹³ *Id.* at Sec. 3 (emphasis added).

²¹⁴ *Id.*

²¹⁵ To be clear, I am not pressing the substantive argument that Congress only has non-exclusive 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.

²¹⁶ U.S. CONST. Art. IV, Sec. 3, Clause 2.

if the Constitution does not confer exclusive authority, then a court is not prevented from addressing the issue. 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.”²¹⁷ Justice Jackson therefore concluded in the *Steel Seizure* 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.”²¹⁸ The relationship between Congress and the Supreme Court (a countermajoritarian institution) is obviously different than the relation between the two political branches²¹⁹; 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 judiciary routinely defers in exactly that spirit.²²⁰

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 non-delegation principle established in

²¹⁷ *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring).

²¹⁸ *Id.*

²¹⁹ *But see* Rosen, *supra* note 11 (“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.”).

²²⁰ *See, e.g., Chevron v. National Resources Defense Council*, 467 U.S. 837 (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 Dist. 1*, 127 S. Ct. 2738, 2835-36 (2007) (urging “respect for democratic local decisionmaking by States and school boards”) (Breyer, J., dissenting).

administrative law is commonly justified by reference to the temptation of elected officials to avoid deciding politically vexing questions.²²¹ Although the “consent and certify” process does not guarantee that political actors will be compelled to take a position and 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, 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. 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 supply a variety of alternate standards for a court’s consideration.²²² Some of these factors (*e.g.*, “climactic conditions”) will be foreign to the judiciary; other standards, even though they are not classically legal (*e.g.*, the impact on the economy, the capacity for self-government), nonetheless resemble the types of considerations that a court commonly examines in rendering decisions.²²³

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 a *majority* of the current Supreme Court, at least based upon the efforts of multiple Justices to craft judicial standards in the last political gerrymandering

²²¹ See, *e.g.*, JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability*, 57 *LAW & CONTEMP. PROBS.* 185, 233-38 (Spring 1994).

²²² See *supra* Part III.

²²³ See, *e.g.*, *DOT v. Public Citizen*, 541 U.S. 752 (2004) (assessing the environmental effects of a new program); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003) (considering the impact on the national economy); *Santa Clara Pueblo v. Martinez*, 436 U. S. 49 (1978) (considering how a particular statutory interpretation would affect Indian tribes’ ability to self-govern).

case, *Vieth v. Jubelirer*.²²⁴ Although the Court ultimately concluded in *Vieth* that the matter was not justiciable, Justice Kennedy’s concurring opinion made it clear that he (and thus a majority of the Court) believed that judicially manageable standards could be fashioned or found in the future even though they were not apparent at that time: “That no such standard has emerged in this case should not be taken to prove that none will emerge in the future.”²²⁵

3. *Competing pronouncements.* The last 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 summoned 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 them “the respect due [a] coordinate branch[] of government,” in situations where the court is answering an explicit request 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 an unbending application of political question doctrine.

For these reasons, the structural, symbolic, and practical considerations underlying modern political question doctrine, as formulated in *Baker v. Carr*, 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 favoring a “consent and certify” process, this dialogic process is also supported by a broader view of

²²⁴ See *Vieth v. Jubelirer*, 541 U.S. 267, 324-28 (Souter, J., dissenting, joined by Justice Ginsburg) (proposing a judicial standard with five elements to establish a political gerrymandering claim); *id.* at (Breyer, J., 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, J., 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.”).

²²⁵ See *id.* at 311 (opinion of Justice Kennedy) (suggesting that First Amendment principles could supply judicially manageable standards where principles of equal protection had failed).

the shared responsibility of both the judiciary and political branches to interpret and abide by the Constitution.²²⁶ 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, political officials debated the legality of American expansionism in expressly constitutional terms.²²⁷ Some, like Senator Mason, premised his entire view 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.”²²⁸ 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.”²²⁹

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

²²⁶ See, e.g., LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2006); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANINGS 7-71, 207-228 (1999); David S. Strauss, *Presidential Interpretation of the Constitution*, 15 CARD. L. REV. 113 (1993). At the time of the Insular Cases, and even today, legislators regularly submit their views as to how constitutional issues should be decided. Compare, e.g., 33 Cong. Rec. 3680 (1900) (cataloging the views of legislators with respect to the proper disposition of the Insular Cases), with Brief of Sen. Arlen Specter in *Boumediene v. Bush*, No. 06-1195 (pending) (“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. 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.”).

²²⁷ SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY 109-26 (1992) (denying that any single interpreter is supreme); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS x-xi (1999) (denying that any single interpreter is supreme); NEAL E. DEVINS, SHAPING CONSTITUTIONAL VALUES 157-62 (1996) (same); LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231-74 (1992) (same); SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-37 (1988) (studying “Protestant” forms of interpretation); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 905-06 (1990) (examining the President as a challenger to judicial supremacy); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 413 (1986) (denying that any single interpreter is supreme); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 219-20 (1994) (examining the President as a challenger to judicial supremacy).

²²⁸ 33 Cong. Rec. 3669 (remarks by Sen. Mason).

²²⁹ 33 Cong. Rec. 2010 (remarks by 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.” See DEVINS, *supra* note 212. 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.

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 view at least as to where the elusive, constitutional line falls between political questions, on the one hand, and justiciable legal issues, on the other, *i.e.*, what matters have been exclusively assigned to the political branches and what issues are perhaps also the proper subject of judicial consideration.²³⁰

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.²³¹ 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.”²³² 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 has principal authority. A comparable benefit is available if elected officials are able to ask a court to mediate a longstanding, unsettled

²³⁰ 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*, 33 CR 1958 (House Rep. Dalzell) (Feb 19 1900); 33 CR 1575 (House Rep Williams), *American Publishing Company v. Fischer*, 33 CR 1958 (Feb 19, 1900) (remarks by Rep. Dalzell) (citing (166 U.S. 467)), and *American Insurance Company v. Canter*, 33 CR 1931 (Feb 19, 1900) (remarks by Sen. Foraker); *see also* *Cross v Harrison*, 33 CR 1581 (Feb. 6, 1900) (remarks by Rep. Morris) (citing 1 Peters, 511).

²³¹ *See Arizonaans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (“Most States have adopted certification procedures.”); *see also* Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism*, 69 FORDHAM L. REV. 373, 381 (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, e.g., Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 331 (2006) (“Because this is an open question, we remand for the lower courts to determine legislative intent in the first instance.”).

²³² *Arizonaans for Official English*, 520 U.S. at 76.

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.²³³ As the political branches at the time of the Insular Cases seemingly believed, the delay, missed opportunities, and uncertainty produced by a deadlocked 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 flawed, activist 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 expedience [the Court] totally disagrees.”²³⁴ In the past, others have defended the alleged activism of the *Lochner* Court on various grounds²³⁵: common justifications point to precedent²³⁶; political necessity²³⁷; or protection of individual liberty,²³⁸ disenfranchised groups,²³⁹ and poorer classes.²⁴⁰ The “consent and certify” process is not meant, of course, to provide blanket validation for the

²³³ 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.

²³⁴ 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 power principles. See, e.g., Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); J. CHOPER, *THE SUPREME COURT AND THE NATIONAL POLITICAL PROCESS* (1980).

²³⁵ STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM* 120 (2000) (“[T]he *Lochner* Court had been guilty of judicial activism because it had intruded into the institutional role of the legislature.”).

²³⁶ See, e.g., Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 Sup. Ct. Hist. Soc’y Y.B. 20 (concluding that *Lochner* was consistent with earlier lower court rulings).

²³⁷ See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998) (attributing activist case law to concern over the scope of the states’ police powers).

²³⁸ See, e.g., OWEN FISS, *THE TROUBLED BEGINNINGS OF THE MODERN STATE* (1993) (justifying *Lochner* as the Court’s attempt to set boundaries for government regulation to protect individual liberty).

²³⁹ See, e.g., DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS: FROM RECONSTRUCTION TO THE NEW DEAL* (2001) (concluding that *Lochner* may have aided African-Americans by invalidating labor laws that were harming them specifically).

²⁴⁰ See CHARLES W. MCCURDY, *THE LIBERTY OF CONTRACT REGIME IN AMERICAN LAW, IN THE STATE AND FREEDOM OF CONTRACT* 161 (1998) (adopting the view that *Lochner* was motivated by hostility to “class legislation”).

perceived “activism” of the early *Lochner* Court in the Insular Cases. If anything, it is meant to distinguish the Insular Cases from circumstances 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 “consent and certify” process is meant, in contrast, to exalt a cooperative model of constitutional interpretation, one where the judiciary intrudes in matters whose primary responsibility falls to the political branches *only* where elected officials have invited the courts to intervene.

In summary, I have argued (a) that a “consent and certify” process is consistent with the doctrinal justifications for political question doctrine; (b) that it recognizes the valid role political actors may play in interpreting what matters the Constitution forbids courts to decide; and (c) 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; I submit that they also 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 paper 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 paper is therefore meant as an institutional and constitutional defense of the *Lochner* 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. For one thing, what are the implications of this “consent and certify” process for political question doctrine itself? Is it merely a factor in deciding whether an issue qualifies as a political question, or is perhaps an exception that the Insular Cases created in an act of common law constitutionalism? More broadly, what are there limits to the effects of the process? Are there decisions that cannot maintain their legitimacy no matter how supportive the political branches are? Must be the process be asymmetric in its application such that a decision is not sapped of its legitimacy simply because the political branches disagree? What would the consent and certify process look like today in light of the changes to the character of the Court and Congress? 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 the Court's intervention in *Bush v. Gore*? *Roe v. Wade*? Gay marriage? The Second Amendment? Although these questions exceed the scope of this paper, they reflect an effort to reimagine the sources from which the legitimacy of judicial decisions is derived. In a country where the political branches often seek the counsel of the Supreme Court,²⁴¹ it is hard to believe that their declarations of assent or disapproval do not impact the enduring validity of the Court's decisions.

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²⁴¹ See, e.g., Brief of Sen. Arlen Specter in *Boumediene v. Bush*, No. 06-1195 (“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.”).