

## NOTES

# The Insular Cases of Macroaggressions: Judicial Colonialism and the Path to Puerto Rican Sovereignty

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This Note argues that the Insular Cases constitute not merely judicial missteps but enduring macroaggressions—systemic, institutionalized acts of colonial domination that continue to shape the legal and lived realities of Puerto Ricans. By tracing the doctrinal lineage from *Downes v. Bidwell* to the Jones-Shafroth Act, the Ponce Massacre, the Gag Law, and the atrocities at the Academy of Truth, the Note demonstrates how the Supreme Court’s territorial jurisprudence enabled a dual constitutional regime that legitimized inequality and suppressed self-determination. Drawing on definitions of microaggressions and macroaggressions from legal and sociological literature, the Note distinguishes between interpersonal bias and structural violence, arguing that the Insular Cases operate as macroaggressions—codifying coloniality through law. The Note concludes by advocating for a macrointervention in the form of Puerto Rican sovereignty, rejecting annexation as it is the final fulfillment of colonialism. Alternatively proposed is the acquisition of self-determination through Puerto Rican independence as the only ethically and legally coherent remedy.

## INTRODUCTION

Puerto Rico has long been a target of derision. In 1931, Dr. Cornelius P. Rhoads, a prominent American pathologist conducting cancer research on behalf of the Rockefeller Institute at the Presbyterian Hospital in San Juan declared “What the island needs is not public health work but a tidal wave . . . to totally exterminate the population.”<sup>1</sup> The quotation originates from an unsent letter drafted by Rhoads to a former colleague, pathologist Fred Stewart; however, the document was instead intercepted by Pedro Albizu Campos, President of the Nationalist Party and a prominent leader of the Puerto Rican independence movement.<sup>2</sup> Although Rhoades claimed the

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<sup>1</sup> Savita Sukul, *The Misconception of Cornelius Packard Rhoades* 11 (May 30, 2020) (Ph.D. theses and dissertation, St. John’s University) (on file with author); THROUGHLINE, *The Complicated Relationship Between Puerto Rico And U.S. Mainland*, NPR (September 23, 2019), <https://www.npr.org/2019/09/23/763323794/the-complicated-relationship-between-puerto-rico-and-u-s-mainland>

<sup>2</sup> Sukul, *supra* note 1, at 11.

letter was a joke, its sentiments seemed to belie Rhoades's true view of the Puerto Rican people.<sup>3</sup> Indeed, Rhoades was accused of injecting cancer cells into Puerto Rican patients without their consent as part of an experiment.<sup>4</sup>

The letter and subsequent scandal tainted Rhoades's legacy.<sup>5</sup> But his words reveal more than his own individual bias; they serve as a window into the contempt with which many Americans viewed Puerto Ricans at the time. Rhoades's words revealing not only the societal views and norms, but also the way law was shaped by those who held those views. Indeed, by the time Rhoades wrote his letter, colonial views about Puerto Rico had already been enshrined into law for decades by the United States Supreme Court in its Insular Cases.

The Insular Cases are a series of early twentieth-century decisions that established a constitutional framework for governing newly acquired overseas territories following the Spanish-American War.<sup>6</sup> Decided between 1900 and 1930, these cases addressed whether and to what extent constitutional rights applied in territories such as Puerto Rico, Guam, and the Philippines.<sup>7</sup> The Court's rulings in these cases created a doctrinal distinction between "incorporated" territories, those destined for statehood, and "unincorporated" territories, which were not.<sup>8</sup> In the latter, only "fundamental" constitutional rights were deemed applicable, and other protections could be withheld at Congress's discretion.<sup>9</sup> This doctrine of territorial incorporation effectively sanctioned a dual constitutional regime, permitting the United States to exercise sovereignty over territories without extending full constitutional protections to their inhabitants.<sup>10</sup>

The most emblematic of these decisions, *Downes v. Bidwell*, upheld a tariff imposed on goods imported from Puerto Rico, on the basis that the territory was "foreign in a domestic sense."<sup>11</sup> Justice Brown's plurality opinion, joined by concurring opinions steeped in racialized and imperialist logic, articulated a vision of constitutional flexibility that accommodated colonial governance.<sup>12</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 12.

<sup>6</sup> Richard L. Wilson, *Insular Cases and the Supreme Court*, EBSCO (2023) <https://www.ebsco.com/research-starters/law/insular-cases-and-supreme-court#full>. article.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>12</sup> *Id.*

The court drew a sharp distinction between those living on the mainland and on the island, reasoning that Puerto Ricans were unfit for the virtues of being full members of the body politic due to their color and foreignness.<sup>13</sup>

The Court also grounded its decision in the need to continue an apartheid style colonial domination of the island.<sup>14</sup> The Court reasoned that if Congress lacked the authority to determine the political and legal status of the inhabitants of newly acquired territories (and of “their children thereafter born, whether savages or civilized”) then those individuals might automatically acquire American citizenship by virtue of territorial acquisition alone.<sup>15</sup> This, the Court feared, would undermine the nation’s ability to control the scope and consequences of its expansion.<sup>16</sup> The Court further expressed, “A false step at this time might be fatal to the development of what Chief Justice Marshall called the “American Empire.”<sup>17</sup>

The *Downes* decision had more lasting impacts than the tariff at the heart of its litigation. *Downes* and the other Insular Cases impacted the way Puerto Rico was governed and viewed. The *Downes* decision exemplifies what might be characterized academically as both a “microaggression” and a “macroaggression.” Although these terms have gained acceptance in common parlance, they remain misunderstood and misused.

Dictionary definitions provide a starting point for understanding each term. The Oxford Dictionary defines a microaggression as a “statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination or prejudice against members of a marginalized group.”<sup>18</sup> Merriam-Webster Dictionary defines a microaggression as, “a comment or action that subtly and often unconsciously or unintentionally expresses a prejudiced attitude toward a member of a marginalized group.”<sup>19</sup>

The definitions may contain subtle variations, but both express the same crucial point: a microaggression is a comment or action, even if conscious, subtle, or indirect, that can (un)intentionally harm a marginalized group. At the micro level, *Downes* contains language that reflects racial and cultural derision toward the inhabitants of newly acquired territories. The Court’s reference to “savages or civilized” children born in Puerto Rico is a textbook example of a microaggression—a subtle, often unexamined insult that reinforces racial hierarchies.<sup>20</sup> Though masked by judicial reasoning, this

13 *Id.* at 340; Ernesto Sagás & Ediberto Román, *The Mismeasure of Puerto Rico: Xenophobia and the Moral Bankruptcy of U.S. Colonialism*, 32 J.L. & Pol’y 54, 59 (2024).

14 Sagás & Román, *supra* note 13, at 59; Juan Torruella, *The Insular Cases: The Establishment of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 347 (2007).

15 *Downes*, 182 U.S. at 279.

16 *Id.* at 279-80; Sagás & Román, *supra* note 13, at 60.

17 *Id.* at 279.

18 *Microaggression*, Oxford Dictionary (3d ed. 2018).

19 *Microaggression*, Merriam-Webster (11th ed 2017).

20 *Id.*; *Downes*, 182 U.S. at 279.

framework dehumanizes territorial populations and expressly denotes that their worthiness for constitutional protection depends on perceived cultural advancement. This language isolates, subordinates and excludes the territories, even as the Court's decision purports to resolve a legal question. The language used by the Justices in *Downes* itself is a microaggression.

Although dictionaries define the term microaggression, dictionary definitions are less readily available for the term "macroaggression."<sup>21</sup> Although academic research remains sparse, some scholars have defined the term.<sup>22</sup> For example, the Academy of Diversity & Inclusion in Emergency Medicine loosely defines macroaggressions as "[b]ig, systemic forms of oppression rather than interpersonal forms of bias or discrimination."<sup>23</sup> Similarly, the Children's Hospital of Philadelphia Center for Injury Research & Prevention defines macroaggressions as "systemic and institutionalized forms of bias and oppression that impact the lives of entire groups of minoritized people."<sup>24</sup>

As is the case for definitions of the term microaggression, the definitions of the term macroaggression have subtle variations. Each of these definitions nonetheless express the same point: a macroaggression is a systemic or institutionalized form of oppression. Microaggressions can be interpersonal. In contrast, macroaggressions are systematic.

The legal impact of the *Downes* decision operates as a macroaggression. By establishing the doctrine of territorial incorporation, *Downes* authorized the federal government to govern newly acquired territories, including Puerto Rico, without extending full constitutional protections to the Puerto Rican people. This legal framework did not merely reflect interpersonal bias; it cemented a judicially imposed structural hierarchy that treated territorial populations as constitutionally and racially inferior. The holding justified the denial of equal rights and political representation on the basis of perceived cultural difference. In doing so, *Downes* laid the foundation for a series of subsequent Insular Cases that entrenched this dual constitutional apartheid. The decision thus exemplifies a macroaggression: a judicial act that legitimized and perpetuated systemic exclusion, shaping the lived realities of millions of people in the territories with imposed U.S. Citizenship through the law.

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21 Rui Fu & Stephen Leff, *Microaggressions and Macroaggressions: How can We Respond*, Childrens Hospital of Philadelphia (January 9, 2024), <https://injury.research.chop.edu/blog/posts/microaggressions-and-macroaggressions-how-can-we-respond>.

22 *Id.*

23 Tara Overbeeke, MD, *Everyday Indignities: Microaggressions, Microassaults, Microinsults, Microinvalidation, Microinequities, and Macroaggressions*, ACADEMY FOR DIVERSITY & INCLUSION IN EMERGENCY MEDICINE, <https://www.saem.org/aboutsaem/academies/adiemnew/education/dei-curriculum/microaggressions-macroaggressions-microinequity-microinsults>.

24 Fu & Leff, *supra* note 21.

The effects of *Downes* are still felt to this day. Pursuant to *Downes* and the other Insular Cases, Puerto Rican people continue to be treated as second-class citizens, suffering with a devastated economy, dying industries, and an insurmountable debt.<sup>25</sup> This demonstrates how judicial interpretation can lead to the largest macroaggression of all: the perpetuation of colonialism.

Part II defines microaggressions, macroaggressions, and colonialism, illustrating the various ways they can manifest. With these definitions in mind, Part III traces the history of the Insular Cases, explaining how earlier cases continue to impact the Supreme Court's decisions today. Part IV demonstrates how the macroaggression of the Insular Cases leads to disparate treatment today, using the lens of the Free and Associated State of Puerto Rico. Finally, Part V argues for a macrointervention in the form of sovereignty.

## II. Defining Microaggression, Macroaggressions, And Colonialism

What is a microaggression? As previously noted, a microaggression may be defined as a statement, action, or incident that reflects indirect, subtle, or unintentional discrimination or prejudice against members of a marginalized group.<sup>26</sup> It may also take the form of a comment or behavior that unconsciously or inadvertently conveys a prejudiced attitude toward an individual from such a group.<sup>27</sup> In other words, microaggressions are subtle verbal and nonverbal insults directed towards marginalized persons, often done automatically, or unconsciously, as a layered insult.<sup>28</sup>

An example of a microaggression is President Hoover's comments about the Virgin Islands. In March 1931, President Hoover became the first sitting United States president to visit the Virgin Islands.<sup>29</sup> His Caribbean tour included stops in Puerto Rico and the Virgin Islands, aboard the USS Arizona.<sup>30</sup> At the time Hoover traveled there, the United States had owned the Virgin Islands for just over a decade, having purchased the territory from Denmark in 1917, for \$25 million.<sup>31</sup>

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25 GOV. ACCOUNTABILITY OFF., PUERTO RICO: FISCAL CONDITIONS HAVE IMPROVED BUT RISKS REMAIN 1, 11-14 (2025), <https://www.gao.gov/assets/890/880052.pdf>.

26 *Microaggression*, Merriam Webster (11th ed 2017).

27 *Id.*

28 Daniel Solórzano, Walter R. Allen & Grace Carroll, *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 17 (2002); see generally Rita Kohli & Daniel Solórzano, *Teachers, please learn our names: racial microaggressions and the K-12 classroom*, 15 RACE ETHNICITY & EDUC. 444 (2012), <https://doi.org/10.1080/13613324.2012.674026> (A layered insult/assault is the intersectional of basing a subtle verbal and non-verbal insult/assaults directed towards people of color that are based on their race, gender, class, sexuality, language, immigration status, phenotype, accent, or name).

29 Remarks President Herbert Hoover Made About His Visit ~ 1931, VIRGIN IS. HIST., <http://valeriesims.com/president-herbert-clark-hoover-visits-us-virgin-islands-1931/> (last visited Oct. 25, 2025).

30 *Caribbean Vacation*, Hoover Heads (Mar. 23, 2016), <https://hoover.blogs.archives.gov/2016/03/23/caribbean-vacation/> (last visited Oct. 25, 2025); *Hoover Begins Trip to Our West Indies: President and Party Leave*, N.Y. TIMES (Mar. 19, 1931), <https://www.nytimes.com/1931/03/19/archives/hoover-begins-trip-to-our-west-indies-president-and-party-leave.html> (last visited Oct. 25, 2025).

31 Danish West Indies, cession of. 39 Stat. 1706 (1916).

During or shortly after this visit, Hoover remarked, “The Virgin Islands may have some military value sometime. Opinion upon this question is much divided. In any event, when we paid \$25 million for them, we acquired an effective poorhouse, comprising 90 percent of the population.”<sup>32</sup> President Hoover’s remark, describing the U.S. Virgin Islands as, “an effective poorhouse” exemplifies a microaggression, because it subtly reinforces a narrative of inferiority and marginalization toward the territory’s predominantly Black population. Although nominally framed as a fiscal observation, the statement carries an implicit judgment about the worth and dignity of the island’s residents. By devaluing an entire community as an economic burden, Hoover’s language dehumanized the people of the Virgin Islands, and casted them as liabilities, rather than citizens deserving of investment, representation, and respect.<sup>33</sup>

The prefix “micro” in the term microaggression is a misnomer because it misleadingly suggests that the harm caused by such acts is trivial or negligible. Although “micro” denotes subtlety or smallness in scale, the impact of microaggressions can be profound, especially when they are repeated over time, or embedded within institutional settings.<sup>34</sup> Microaggressions manifest in three primary ways, as microassaults, microinsults, and microinvalidations.<sup>35</sup> Each is damaging.<sup>36</sup>

What is a microassault? A microassault is a specific type of microaggression that involves explicit, intentional, and often verbal or behavioral, expressions of bias or discrimination.<sup>37</sup> Unlike other forms of microaggressions, which may be subtle, unconscious, or ambiguous, microassaults are deliberate acts meant to insult, demean, or marginalize someone based on their race, ethnicity, gender, sexual orientation, or other identity.<sup>38</sup>

An example of a microassault is the longstanding disparate treatment by the American Bar Association (ABA) of members hailing from United States territories. The ABA is the largest voluntary professional organization for lawyers and legal professionals in the United States.<sup>39</sup> Established in 1878,

32 President Herbert Hoover, Statement on Porto Rico and the Virgin Islands, THE AM. PRESIDENCY PROJECT (March 26, 1931), <https://www.presidency.ucsb.edu/documents/statement-porto-rico-and-the-virgin-islands>.

33 Many people experience interpersonal microaggressions in their daily lives. For example, being told “your English is really good for someone who is Asian” or “you’re attractive because you’re light skinned” are microaggressions on a smaller scale than Hoover’s remarks made on the national stage. Terri R. Day, *Revisiting Masterpiece Cakeshop - Free Speech and the First Amendment: Can Political Correctness Be Compelled?*, 48 HOFSTRA L. REV. 47, 61 (2019) (providing examples of interpersonal microaggressions).

34 See Daniel G. Solorzano, Lindsay Perez Huber & Layla Huber-Verjan, *Theorizing Racial Microaffirmations as a Response to Racial Microaggressions: Counterstories Across Three Generations of Critical Race Scholars*, 18 SEATTLE J. FOR SOC. JUST. 185, 205 (2020).

35 Anthony M. Ciolli, *Microaggressions against United States Territories and Their People*, 50 S.U. L. REV. 54, 57, 59, 67 (2022).

36 Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176, 202, 204-05 (2017).

37 See Lauren Munro, *Everyday Indignities: Using the Microaggressions Framework to Understand Weight Stigma*, 45 J.L. MED. & ETHICS 502, 503 (2017).

38 *Id.*

39 ABA, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/).

the ABA plays a central role in shaping the legal profession through its work in law reform, professional standards, legal education, and public policy advocacy.<sup>40</sup>

Despite the ABA's longstanding public commitment to diversity, equity, and inclusion, territorial bar associations were historically excluded from full participation in the ABA's highest decision-making bodies.<sup>41</sup> This exclusion persisted for decades, even as the ABA promoted initiatives aimed at eliminating bias and enhancing inclusion across the legal profession.<sup>42</sup> The contradiction between the ABA's stated values and its governance structure became a focal point of advocacy by territorial legal leaders.<sup>43</sup>

In August 2025, during the ABA's annual meeting, the House of Delegates adopted Resolution 11-2 by a two-thirds majority vote, amending the ABA Constitution to grant full representation to these territories.<sup>44</sup> The resolution formally recognized Guam, the Northern Mariana Islands, American Samoa, and the U.S. Virgin Islands, as a unified "single state" for governance purposes, thereby securing them a seat on the Board of Governors, and access to the Nominating Committee.<sup>45</sup>

What is a microinsult? A microinsult is the complete opposite of a micro assault. A microinsult can be described as an unconscious communication that displays rudeness and insensitivity to the recipient's heritage.<sup>46</sup> Microinsults include subtle snubs, dismissive comments, or insensitive behaviors that convey disrespect or demean a person's identity, often without overt hostility.<sup>47</sup> Unlike microassaults, which are explicit and intentional, microinsults are typically unconscious or indirect, making them harder to detect but still deeply impactful.<sup>48</sup>

An example of such an aggression is, the issue about the populace of the territories being relegated to insignificant matters. How the issue about the Populace of the territories are relegated to insignificant matters.<sup>49</sup> More specifically, any issue about the territories, is dismissed as a marginal debate about marginal places.<sup>50</sup> To cite the Columbia Associate Professor of Law,

<sup>40</sup> *Id.*

<sup>41</sup> About the American Bar Association, AMERICAN BAR ASSOCIATION, [https://www.americanbar.org/about\\_the\\_aba/](https://www.americanbar.org/about_the_aba/) (last visited Oct. 10, 2025); *American Bar Association Grants Full Governance Rights to Virgin Islands and Pacific Bar Associations After 40 Years*, THE VIRGIN ISLANDS CONSORTIUM, August 27, 2025, <https://viconsortium.com/vi-legal/american-bar-association-grants-full-governance-rights-to-virgin-islands-and-pacific-bar-associations-after-40-years> (last visited Oct. 10, 2025).

<sup>42</sup> Ciolli, *supra* note 35, at 59.

<sup>43</sup> *Id.*

<sup>44</sup> THE VIRGIN ISLANDS CONSORTIUM, *supra* note 41.

<sup>45</sup> *Id.*

<sup>46</sup> Strand, *supra* note 36, at 202.

<sup>47</sup> Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM PSYCHOL. 271, 274 (2007), doi: 10.1037/0003-066X.62.4.271.

<sup>48</sup> *Id.*

<sup>49</sup> Ciolli, *supra* note 35, at 60.

<sup>50</sup> *Id.*

Christina D. Burnett, even when first rate legal scholars begin to produce valuable scholarship, issues about territories are still relegated to miniscule matters, and even legal precedent of historic proportions, like the insular cases, are devalued as U.S. Constitutional jurisprudence.<sup>51</sup> More importantly, matters about the insular cases are viewed as debates seldomly important to the major American populace, and only debated amongst those affected by it, in the far away territories.<sup>52</sup> Microinsults are not solely reserved for legal debates or even intentional offenses; sometimes, even the best of intentions from the major body politic of the U.S., minoritizes the territories and its concerns.<sup>53</sup>

What is a microinvalidation? A microinvalidation is a type of microaggression that dismisses, negates, or undermines the thoughts, feelings, experiences, or identity of a marginalized person or group. Unlike microassaults (which are overt) or microinsults (which subtly demean), microinvalidations often take the form of denial or erasure, making individuals feel invisible or unheard.<sup>54</sup>

However, it is important to note that this goes beyond the pale of simply ignoring people, as a microinvalidation can take place by simply acknowledging the issues affecting the territories, and nothing more.<sup>55</sup> This type of acknowledgement particularly appears in legal scholarship, where authors opining on the territories propose solutions to problems they have never faced, in territories they have never lived, which sometimes has them fall into the Savior Complex trap.<sup>56</sup> The savior complex is a compulsion to save others and a driving desire to solve problems, which often manifests through unconscious processes.<sup>57</sup> So, these burning desires to be altruistic typically do not go away on their own until they feel the situation is resolved in the way they want to resolve it.<sup>58</sup> This role of a white savior is a kind

51 Christina D. Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 1040-41 (2009).

52 *Id.* at 1041.

53 (However, there is a silver lining: We are now seeing law schools writing about the territories, yet there is a caveat: while well-intentioned, many of those articles and journal entries themselves are riddled with microinsults, such as the people of the territories are “politically powerless,” or “living on a crumbling island) Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1252-81 (2019); see also *Territorial Federalism*, 130 HARV. L. REV. 1632-54 (2017); Russell Rennie, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683 (2017); Daniella Diaz, see, e.g., *Trump says he spoke to US Virgin Islands’ ‘president’ – which is him*, CNN. (Oct. 13, 2017), <https://www.cnn.com/2017/10/13/politics/virgin-islands-president-donald-trump>; See, e.g., *Marjorie Taylor Greene Called This US Territory a Foreign Country*, CNN POL. (Mar. 16, 2021), <https://www.cnn.com/videos/politics/2021/03/16/marjorie-taylor-greene-guam-michael-san-nicholas-nr-vpx.cnn>. (discuss how President Trump and Representative Green did not realize the territories they were referencing were not independent nations); Ciolli, *supra* note 35, 62; Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1636, 1646 (2021) (The two articles are a play on each other. They discuss a continuous notion and belief that extending all the welfare benefits to the unincorporated territories will place them on par with the rest of the fifty (50) states and DC. This claim is as preposterous as saying that ending the crack cocaine epidemic and sentencing disparities would place black Americans on par with white Americans. Once again, while their intentions are pure, the comments embedded in their analysis of the territories are the core of the world’s oldest and most classic trap: The Savior Complex).

54 Strand, *supra* note 36, at 202, 204-05.

55 See Puerto Rico: ‘Trump paper towel-throwing’ ‘abominable’. BBC (Oct. 4, 2017), <https://www.bbc.com/news/world-us-canada-41504165>.

56 *Save Yourself From the Savior Complex*, CLEVELAND CLINIC (Sept. 24, 2024) <https://health.clevelandclinic.org/savior-complex>; Ciolli, *supra* note 35, at 60-1.

57 *Id.*

58 *Id.*

of microinvalidation that perpetuates the marginalization of the territorial peoples and often permits the continuing cycle of microinsults and even micro assaults.<sup>59</sup>

As demonstrated herein, microaggressions in their many forms can do serious harm. So too can macroaggressions.

What is a Macroaggression? Macroaggressions are not isolated incidents but embedded structures, policies, legal doctrines, and governance frameworks, that perpetuate inequality on a societal scale.<sup>60</sup> Unlike microaggressions, which are often interpersonal and subtle, macroaggressions operate at the level of law, governance, education, healthcare, and other foundational systems.<sup>61</sup> They manifest through exclusionary practices, unequal resource distribution, discriminatory legal doctrines, or institutional neglect.<sup>62</sup> Macroaggressions can be codified in legislation, reinforced by judicial decisions, or perpetuated through organizational norms, making them harder to challenge and more enduring in their impact.<sup>63</sup>

The crackdown on Black communities during the crack-cocaine epidemic of the 1980s and 1990s is a stark illustration of a macroaggression. Fueled by sensational media coverage and racially charged political rhetoric, federal and state governments enacted punitive drug policies that disproportionately criminalized crack cocaine, a substance more prevalent in low-income Black neighborhoods, while treating powder cocaine (a substance more common among white and affluent users) with relative leniency.<sup>64</sup> The Anti-Drug Abuse Act of 1986, for example, imposed a 100-to-1 sentencing disparity between crack and powder cocaine, resulting in dramatically longer prison terms for Black defendants.<sup>65</sup>

These policies were not isolated acts of bias but part of a broader legal and political framework that framed addiction as criminality in Black communities but a public health issue in White communities.<sup>66</sup> The result was mass incarceration, family disruption, and generational trauma, all

<sup>59</sup> *Id.*

<sup>60</sup> See Derald Wing Sue et al., *Racial microaggressions in everyday life: implications for clinical practice*, 62 *THE AMERICAN PSYCHOLOGIST* 271, 272-75 (2007); see also Peggy Cooper Davis, Law as Microaggression, 98 *YALE L.J.* 1559, 1559-60 (1989); Bryan L. Adamson, *Case Western Reserve University School of Law's Academy for Inclusive Leadership Development: A New Pedagogy Integrating Diversity, Equity, and Inclusive Belonging into Legal Education*, 75 *WASH. U. J.L. & POL'Y* 1, 23 (2024).

<sup>61</sup> *Id.*; Adamson, *supra* note 60, at 23-4.

<sup>62</sup> See Michael Awad, *Disarming Microaggressions & Macroaggressions to Promote a Diverse & Inclusive Prevention Workforce*, 10, 12 (2024); Michael N. Awad, Cindy A. Crusto & Lisa M. Hooper, *Macrointervention processes and strategies for leaders, changemakers, advocates, allies, and targets: A new framework to address macroaggressions in systems*, 62 *NEW IDEAS IN PSYCHOLOGY* 3 (2021), <https://doi.org/10.1016/j.newideapsych.2021.100858>.

<sup>63</sup> *Id.*

<sup>64</sup> Misty L. Schlabaugh, *Concepcion v. United States: Compassionate Drug Sentencing Reform Against a Criminal Legal System Built on Racialized Social Control*, 101 *DENV. L. REV. F.* 1, 8 (2023-2024).

<sup>65</sup> Renee Sanford, *The Disparate Treatment of Crack Cocaine and the Opioid Epidemic: Unveiling Racial Bias in Drug Policy*. SANTA CLARA MARKKULA CENTER FOR APPLIED ETHICS (2024), <https://www.scu.edu/government-ethics/resources/the-disparate-treatment-of-crack-cocaine-and-the-opioid-epidemic/>.

<sup>66</sup> Schlabaugh, *supra* note 64, at 6, 9.

sanctioned by law and reinforced by institutional practices.<sup>67</sup> This systemic targeting of Black communities under the guise of drug enforcement exemplifies a macroaggression: a structural assault on civil rights, dignity, and opportunity, carried out through legislation, policing, and judicial discretion.<sup>68</sup>

Recognizing the pervasive harm of macroaggressions begs the question of remedy. If macroaggressions are embedded in laws, policies, and governance structures, then meaningful change requires more than interpersonal awareness; it demands macrointerventions.

What is a macrointervention? These are large-scale, structural responses designed to dismantle entrenched inequities and rebuild systems in ways that promote justice, inclusion, and accountability.<sup>69</sup> Macrointerventions may take the form of legislative reform, institutional restructuring, targeted resource allocation, or constitutional change.<sup>70</sup> Just as macroaggressions operate through the architecture of power, macrointerventions seek to reengineer that architecture to reflect the values of equity and dignity.<sup>71</sup> Transitioning from critique to action, the focus shifts from identifying harm to designing solutions that are as expansive and enduring as the injustices they aim to correct.<sup>72</sup>

Macrointerventions are being implemented today. One example is the revision of judicial sentencing guidelines to account for implicit bias and systemic disparities. Rather than eliminating discretion altogether, these reforms introduce structured decision-making tools, training modules, and data tracking that help judges recognize patterns of inequity.<sup>73</sup> These interventions don't dismantle the judiciary but push it toward fairer outcomes by inserting checks against unconscious bias.<sup>74</sup> Though incremental, such policy-level microinterventions can accumulate into broader cultural and institutional shifts—especially when paired with transparency, public engagement, and ongoing evaluation.<sup>75</sup> They exemplify how small, targeted changes in legislative or regulatory frameworks can begin to redress the harms of macroaggressions.<sup>76</sup>

<sup>67</sup> *Id.* at 23.

<sup>68</sup> *Id.* at 17.

<sup>69</sup> Awad, et al., *supra* note 62, at 8; Awad, *supra* note 62, 18.

<sup>70</sup> Ivan Hartmann, *A Right to Free Internet? On Internet Access and Social Rights*, 13 J. HIGH TECH. L. 297, 352 (2013).

<sup>71</sup> See generally Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 15 GA. L. REV. 795, 803-04 (1981).

<sup>72</sup> (Also known as macro social work which refers to interventions and strategies at a broader societal level, in situations like advocacy for policy changes, community-based initiatives and social justice movements that target large, macro-level social issues) Yeshiva University, *Micro vs. Macro Social Work: What Is the Difference?*, WURZWEILER SCHOOL OF SOCIAL WORK BLOG (Apr. 21, 2022), <https://online.yu.edu/wurzweiler/blog/micro-vs-macro-social-work> (last visited Oct. 25, 2025).

<sup>73</sup> Jelani J. Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AMERICAN CRIMINAL LAW REVIEW 1685, 1712-14 (2021).

<sup>74</sup> *Id.*

<sup>75</sup> Hartmann, *supra* note 70, at 32; Emerson, *supra* note 71, at 803-04.

<sup>76</sup> Hartmann, *supra* note 70, at 32.

As these examples illustrate, microaggressions and macroaggressions are pervasive. They often require macrointerventions. Microaggression and macroaggressions originate from other systems of oppression. This includes colonialism, the historical and ongoing process by which dominant powers subjugate, exploit, and restructure societies for their own gain.

What is Colonialism? The word colonialism is often invoked in popular culture.<sup>77</sup> One of the most common reasons it is invoked is to acknowledge the legal status of a territory of a place like Puerto Rico and its ongoing status debate, and the innate unfairness of the current status, or the suffering of its people like we see in the constant cease fire breaches in Gaza.<sup>78</sup> But this invocation falls short of truly defining the concept.

The Cornell Law Legal Information Institute defines colonialism as “the act of power and domination of one nation acquiring or maintaining full or partial political control over another sovereign nation.”<sup>79</sup> The country or nation that falls under the control of a foreign nation is known as a colony of that dominating country.”<sup>80</sup> However, this cannot be confused with imperialism, which involves the outward military use and economic pressure that aids in expansion and overall domination.

Beyond its definition, colonialism is understood in the context of the doctrines and practices that enabled it. One such doctrine is the doctrine of discovery. This doctrine is an international law that recognizes that when a nation discovers land, it acquires rights to it.<sup>81</sup> The doctrine ignores the fact that small nations and their peoples live on so-called “discovered” land.<sup>82</sup> Generally, this doctrine was used to legitimize the colonization of lands outside of Europe.<sup>83</sup>

Another enabling concept is that of “terra nullis.” This means a territory without a master.”<sup>84</sup> When used in public international law, terra nullis describes a space that can be inhabited but does not belong to a State,

<sup>77</sup> See Austin Gonzalez, *Puerto Rico, The World's Oldest Colony, Charts a New Course*. PROGRESSIVE INTERNATIONAL (2020), <https://progressive.international/wire/2020-11-02-puerto-rico-the-worlds-oldest-colony-charts-a-new-course/en>.

<sup>78</sup> See generally T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP*, 5, 7, 74-94 (2002), <http://site.ebrary.com/id/10318344> (last visited Nov 12, 2025). (discussing contested issue of sovereignty in U.S.-Puerto Rico relations); *Media Colonial Legacies*, LIFESTYLE SUSTAINABILITY DIRECTORY (last visited November 12, 2025), <https://lifestyle.sustainability-directory.com/term/media-colonial-legacies/>.

<sup>79</sup> *Colonialism*, Wex, Cornell Law (last updated April 2022), <https://www.law.cornell.edu/wex/colonialism>.

<sup>80</sup> Nelson Maldonado-Torres, *ON THE COLONIALITY OF BEING Contributions to the development of a concept*, 21 *CULTURAL STUDIES-ANDOVER* 240-42 (2007); FRANTZ FANON, *A DYING COLONIALISM I*, 17 (HAAKON CHEVALIER tran., 1965).

<sup>81</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823) (Stands for the proposition that that power of discovery is the absolute right to title of possession and can even eradicate the power of possession for native peoples); *doctrine of discovery*, Wex, Cornell Law (last updated April 2022), [https://www.law.cornell.edu/wex/doctrine\\_of\\_discovery](https://www.law.cornell.edu/wex/doctrine_of_discovery).

<sup>82</sup> *Id.*

<sup>83</sup> Karin Mickelson, *The Maps of International Law: Perceptions of Nature in the Classification of Territory*, 27 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 621 (2014).

<sup>84</sup> Mickelson, *supra* note 83, at 622; *terra nullius*, Wex, Cornell Law (last updated April 2022), [https://www.law.cornell.edu/wex/terra\\_nullius](https://www.law.cornell.edu/wex/terra_nullius).

meaning no one owns it.<sup>85</sup> Once again, this concept ignores the fact that land may already be occupied by a nation or a minority.<sup>86</sup> Nonetheless, this concept was used as a justification for colonization.

The most notable impact of colonialism is not its doctrines and concepts, but its effects. Coloniality, which is a direct consequence of colonialism, remains long after colonialism has gone.<sup>87</sup> Colonialism denotes political and economic relations in which the sovereignty of a nation or a people rests on the power of another nation, which makes such a nation an empire.<sup>88</sup> Coloniality refers to long-standing patterns of power that emerged as a result of colonialism, which defined culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations.<sup>89</sup> Coloniality can be kept alive in books, criteria for academic performance, cultural patterns, and even self-image and aspirations of the self.<sup>90</sup> Coloniality is more than just a residual effect or after-the-fact manifestation of colonialism.<sup>91</sup>

Coloniality refers to the two axes of power that became operative and defined the spatio-temporal matrix of what was called America.<sup>92</sup> The two axes were described by the Peruvian sociologist and humanist thinker Anibal Quijano as: the conquerors creating and spreading the idea of “race” to justify why some people were seen as naturally inferior to others. Conquerors used this belief to build and defend their dominance over the people they conquered. Based on this idea, they organized and ranked the people of the Americas—and eventually the rest of the world—within a new global system of power.<sup>93</sup>

At the same time, these conquerors built a new way to control work, resources, and production. This system combined older forms of labor control—like slavery, serfdom, independent small producers, and systems of mutual exchange—into one global structure centered around capitalism and

85 (For nineteenth-century empire, some historians point to the importance of terra nullius but disagree on the details of how and when it was invoked as a legal doctrine, but others argue that it is significant that explicit references to terra nullius are in fact absent from the historical record of debates about colonial sovereignty. Suggesting, for example, that by the middle of the nineteenth century British observers and Australian courts had embraced terra nullius as a rationale for settlement in Australia without compensation to Aborigines, John Gascoigne asserts that this position was “part of the mental furniture of the founders,” while Kercher places its emergence at the end of a period of legal confusion about Aborigines’ legal status.) Lauren Benton & Benjamine Straumann, *Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice*, 28 LAW & HIST. REV. 1 (2010).

86 *Id.*

87 Maldonado-Torres, *supra* note 80, at 243.

88 *Id.*

89 *Id.*

90 *The Puerto Rican Psyche*, at 7:14, DIASPORICA EL PODCAST (May 6, 2024) <https://open.spotify.com/episode/0wWpzFXlcyV1fv3Fdn4zRK?si=rTBAHiRdRyK1lqNfgHKZuA>. (Dr. Merari Fernández Castro and Daniel Gaztambide discussing internalized derogatory language Puerto Ricans internalize about themselves, their culture, and abilities, the Puerto Rican psyche).

91 Maldonado-Torres, *supra* note 80, at 243.

92 *Id.*

93 Anibal Quijano, *Coloniality of Power, Eurocentrism, and Latin America*, 1 NEPANTLA: VIEWS FROM SOUTH 533 (2000).

the world market. Vestiges of this system remain throughout many institutes today, including the decisions of the United States Supreme Court in its Insular Cases.

### III. The History Of The Insular Cases

The Insular Cases are a series of U.S. Supreme Court decisions from 1900-1930 that established the legal framework for how constitutional rights apply, or don't apply, in United States territories.<sup>94</sup> These rulings created a distinction between “incorporated” and “unincorporated” territories.<sup>95</sup> Incorporated territories, like Alaska and Hawaii, were territories considered to be a permanent part of the United States.<sup>96</sup> Because these territories were presumed to be on a path to potential statehood, their residents received constitutional protections by default while statehood was pursued.<sup>97</sup> Once recognized as states, these territories would be treated like all other states—their residents would receive the full force and application of the Constitution as American citizens.<sup>98</sup>

In contrast, unincorporated territories, including Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Northern Mariana Islands, belonged to the United States but were not designated on a path to statehood.<sup>99</sup> Residents of these territories did not receive full constitutional rights.<sup>100</sup> Instead, only fundamental rights applied.<sup>101</sup> All other constitutional protections would be withheld. Residents of these territories would never receive the same array of rights as other American citizens.<sup>102</sup>

This legal distinction has practical implications. Residents of unincorporated territories may be denied full constitutional rights, such as voting representation in Congress or access to certain federal programs.<sup>103</sup> For these residents, the spirit of the Constitution applies when Congress says it does.<sup>104</sup> In effect, this means Congress has full uninhibited dispositional authority to curtail many rights for these citizens.<sup>105</sup> It need only apply

<sup>94</sup> Adriel I. Cepeda Derieux & Neil C. Weare, *After Aurelius: What Future for the Insular Cases?*, 130 YALE L.J.F. 284, 287 (2020-2021).

<sup>95</sup> U.S. DEPT. OF INTERIOR, DEFINITIONS OF INSULAR AREA POLITICAL ORGANIZATIONS, <https://www.doi.gov/oia/islands/politicatypes> (A United States insular area in which the United States Congress has determined that only selected parts of the United States Constitution apply.)

<sup>96</sup> *Downes*, 182 U.S. at 304-05, 345.

<sup>97</sup> *Boumediene v. Bush*, 553 U.S. 723, 757 (2008).

<sup>98</sup> See *Dorr v. United States*, 195 U.S. 138, 143 (1904) (“Until Congress shall see fit to incorporate territory ceded by treaty into the United States . . . the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.”).

<sup>99</sup> *Downes*, 182 U.S. at 257.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Colleen Walsh, *Reexamining the Insular Cases. Again.* HARV. L. BULLETIN (May 3, 2024), <https://hls.harvard.edu/today/reexamining-the-insular-cases-again/>.

<sup>104</sup> *Downes*, 182 U.S. at 268-69.

<sup>105</sup> *Id.* at 277.

the letter and spirit of the Constitution; in essence, that means about that congress had the right to dispose of and make all needful rules and regulations over the territories or other property belonging to the US.<sup>106</sup> The framework has been widely criticized for its colonial underpinnings, as it effectively creates a second-class status for millions of people based on geography and race.

Although the initial Insular Cases date back to the 1930s, their effects can be seen in contemporary Supreme Court decisions. An understanding of recent cases like *Torres v. Puerto Rico*, and *United States v. Vaello-Madero* is best informed by contextualizing these recent decisions in earlier cases like *De Lima v. Bidwell* and *Downes v. Bidwell*. The earlier Insular Cases developed the concept of unincorporated territories and set in motion a system that impacts how these territories continue to be treated by the Court.

*De Lima*, decided in 1901, was one of the earliest and most consequential of the Insular Cases.<sup>107</sup> The Court in *De Lima*, faced several issues, but the main concern was the legality of customs duties on goods imported from Puerto Rico after its cession to the United States from Spain. In other words, the Court had to decide whether a territory acquired by the United States through cession from a foreign power still counted as a foreign country under tariff laws.

To fully grasp the legal stakes in *De Lima*, it is essential to situate the case within the geopolitical and constitutional shifts triggered by the Spanish-American War. The Court's inquiry into Puerto Rico's status under tariff law did not occur in a vacuum—it followed a rapid and complex sequence of military occupation, diplomatic negotiation, and formal cession. The timeline of Puerto Rico's transition from Spanish colony to United States territory, culminating in the ratification and proclamation of the Treaty of Paris, provides the necessary backdrop for understanding why the legal classification of Puerto Rico became so contested. With sovereignty transferred, the question arose: could Congress still treat Puerto Rico as “foreign” for purposes of taxation, or had it become, in effect, part of the United States? This tension between formal acquisition and constitutional integration set the stage for the litigation that brought *De Lima* before the Supreme Court.

In July 1898, Puerto Rico was invaded by United States military forces led by General Miles.<sup>108</sup> On August 12, 1898, through the intervention of the Secretary of State and the French Ambassador, hostilities ended, agreements were reached, and final negotiations commenced.<sup>109</sup> On October 18, 1898, the Spanish forces evacuated the island, and on December 10, 1898, the Treaty of

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<sup>106</sup> *Id.* at 250.

<sup>107</sup> *De Lima v. Bidwell*, 182 U.S. 1 (1901).

<sup>108</sup> Brief for Petitioner, at 2, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (No. 456).

<sup>109</sup> *Id.*

Peace, known as the Treaty of Paris, was signed.<sup>110</sup> It was also on that very day that Spain officially ceded Puerto Rico to the United States.<sup>111</sup> The President of the United States and the Senate ratified the Treaty on February 6, 1899.<sup>112</sup> The Queen Regent of Spain ratified it on March 19, 1899, and on April 11, 1899, the ratifications were exchanged, and the treaty was proclaimed at Washington.<sup>113</sup>

Following the execution of the Treaty of Paris, a pressing legal question emerged: how should goods imported from Puerto Rico—now a U.S. territory—be treated under federal tariff laws? George R. Bidwell, the customs collector at a New York port, demanded import duties from the De Lima Sugar Company, which was bringing sugar from San Juan, Puerto Rico.<sup>114</sup> Bidwell insisted on payment under threat of retaining the goods, effectively placing the company under duress.<sup>115</sup> The total amount collected from De Lima was \$13,145.36.<sup>116</sup> Thus, on March 22, 1900, De Lima filed suit to recover the duties with the Supreme Court of New York.<sup>117</sup>

On March 22, 1900, the De Lima Sugar Company initiated legal action in the Supreme Court of New York, seeking to recover the duties paid.<sup>118</sup> Bidwell, through his attorney, responded by filing a writ of certiorari and successfully removed the case to federal court.<sup>119</sup> The matter was ultimately heard by the Circuit Court for the Southern District of New York, setting the stage for a constitutional challenge that would reach the Supreme Court.<sup>120</sup>

By the time the Supreme Court was hearing the case, the decision had been reduced to a single issue: whether Puerto Rico, having been ceded by Spain, should still be considered a “foreign country” for tariff purposes.<sup>121</sup> The Court started its analysis by defining what a foreign country was.<sup>122</sup> The Court defined a foreign country as one that is “exclusively within the

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 3.

<sup>115</sup> *History, Art, & Archives, U.S. House of Representatives, Crafting an Identity*, <https://history.house.gov/Exhibitions-and-Publications/HAIC/Historical-Essays/Foreign-Domestic/Crafting-Identity/> (last visited Feb. 11, 2026) (In the original opinion “Puerto Rico” is spelled “Porto Rico.” The spelling stems from the Treaty of Paris itself. Given that the United States was acquiring the island, it elected to anglicize the spelling to facilitate its pronunciation. There were a few reasons for this change. First, the Porto Rico spelling was a typographic mistake that the US government had signed on the document. Second after they recognized the mistake, they codified into law as part of the Americanization of Puerto Rico. Why is this important? A few reasons: The rising nationalist tied that was growing on the island demanding independence. Second, Puerto Rico’s resistance to assimilation. Third, and most importantly, this conveys a subtle depiction of coloniality’s attempt to erase the Puerto Rican people and its spirit to perpetuate the macroaggression known as colonialism.)

<sup>116</sup> Brief for Petitioner, at 3-5, *De Lima v. Bidwell*, 182 U.S. 1 (1901) (No. 456).

<sup>117</sup> *Id.* at 5.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *De Lima*, 182 U.S. at 174.

<sup>122</sup> *Id.* at 180, (citing *Taber v. United States*, No. 24-2943, 2025 LX 372131 (2d. Cir. Aug. 4, 2025); *The Eliza*, 8F. Cas. 455 (1813); *The Adventure*, 1 F. Cas. 202 (1812)).

sovereignty of a foreign nation, not subject to the sovereignty of the United States.”<sup>123</sup> The Court further explained that for a territory to be considered domestic, it must be both ceded by a foreign power and subsequently occupied or governed by the United States.<sup>124</sup>

To illustrate the legal distinction between foreign and domestic territory, the Court referenced the historical dispute over the port city of Tampico, which had been temporarily occupied by American forces.<sup>125</sup> Despite the military presence, Tampico was not considered domestic under American law because Congress had not formally established a customs house or appointed a civilian collector of customs.<sup>126</sup> As a result, there was no official American office authorized to authenticate cargo, as required by law.<sup>127</sup> The customs collector in Tampico had been appointed by a military commander, and the coasting manifest he issued could not be recognized as valid documentation for vessels engaged in domestic coasting trade.<sup>128</sup> Consequently, goods arriving from Tampico were subject to import duties.<sup>129</sup> This precedent helped the Court clarify that territorial status must be determined by formal legislative action, not by executive or military control alone.<sup>130</sup>

To further highlight this principle, the Court explained that a newly acquired territory has never been recognized as a domestic port unless Congress acted.<sup>131</sup> While a treaty may transfer sovereignty, it does not, by itself, establish the legal infrastructure necessary for domestic commercial treatment.<sup>132</sup> The Court invoked the well-established doctrine in the law of nations: each sovereign has the exclusive authority to designate the terms, ports, and places through which foreign commerce may enter its territory.<sup>133</sup> Any attempt to introduce foreign goods outside those designated channels constitutes a violation of that sovereignty.<sup>134</sup> This framework reinforced the idea that legal status under American tariff law depends not merely on possession or treaty, but on legislative incorporation and administrative implementation.<sup>135</sup>

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<sup>123</sup> *Id.* at 182-83.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 184.

<sup>132</sup> *Id.* at 186.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 187, 190.

After laying this foundation, the Court then turned its analysis to Puerto Rico itself. The Court noted that the Foraker Act did not classify Puerto Rico as a foreign country, yet the territory was not fully embraced as part of the United States either.<sup>136</sup> At the time, Puerto Rico was considered an unorganized territory meaning it lacked the formal governmental structure and statutory recognition that define an “organized” territory under United States law.<sup>137</sup> This ambiguity stemmed from Congress’s broad authority under the Territory Clause (often referred to as the “Necessities Clause”), which permits Congress to manage and dispose of territories acquired by treaty in much the same way it governs the District of Columbia.<sup>138</sup> Once a territory is acquired, Congress retains discretion to determine its political and legal status, including whether, and to what extent, it will be integrated into the constitutional framework of the United States.<sup>139</sup>

The crux of the Court’s reasoning is that an unorganized or unincorporated territory cannot be treated as a foreign port under United States tariff laws, even if it retains a distinct political or administrative status.<sup>140</sup> Although Congress may treat such a territory differently for certain purposes, it may not impose duties on goods as if they originated from a foreign country once the territory has been formally acquired.<sup>141</sup> Accordingly, the Court rejected the government’s tariff theory, holding that once a territory becomes part of the United States, even if unincorporated, it enters the Customs Union, and its goods must be treated as domestic for tariff purposes.<sup>142</sup>

The Court’s tariff decision laid the groundwork for the constitutional questions addressed in *Downes* by establishing that newly acquired territories, even if unincorporated, could not be treated as foreign for customs purposes. In *Downes*, the Court confronted whether constitutional provisions, specifically the Uniformity Clause, automatically applied to unincorporated territories.<sup>143</sup> Although the *De Lima* decision acknowledged that Puerto Rico was part of the United States for tariff purposes, it held that not all constitutional protections extended to such territories. The tariff ruling’s rejection of Puerto Rico’s “foreign” status forced the Court to articulate

<sup>136</sup> *De Lima*, 182 U.S. at 194; The Foraker Act was a measure enacted by Congress to institute a civilian government and provide funds to Puerto Rico, <https://www.britanica.com/Foraker-Act>.

<sup>137</sup> U.S. DEPT. OF INTERIOR, DEFINITIONS OF INSULAR AREA POLITICAL ORGANIZATIONS, <https://www.doi.gov/oia/islands/politicatypes> (An unincorporated United States insular area for which the United States Congress has not enacted an organic act.); U.S. DEPT. OF INTERIOR, DEFINITIONS OF INSULAR AREA POLITICAL ORGANIZATIONS, <https://www.doi.gov/oia/islands/> politic types (A United States insular area for which the United States Congress has enacted an organic act).

<sup>138</sup> *De Lima*, 182 U.S. at 196.

<sup>139</sup> *Downes*, 182 U.S. at 346.

<sup>140</sup> This is a doctrine that was developed by the majority language in *De Lima*, and the majority language, as well as the concurrence of Justice White in *Downes*.

<sup>141</sup> *De Lima*, 182 U.S. at 197.

<sup>142</sup> *De Lima*, 182 U.S. at 200.

<sup>143</sup> *Id.*

a broader framework for territorial governance.<sup>144</sup> This left the door open for the Court to prescribe, as it did in *Downes*, a more limited subset of constitutional protections afforded to residents of unincorporated territories like Puerto Rico.<sup>145</sup>

As previously noted, the legal reasoning in *De Lima* influenced the Court's contrasting decision in *Downes*. This contrast is particularly striking because both cases were decided on the same day.<sup>146</sup> Although *Downes* addressed a related issue, the central question in *Downes* was whether the United States Constitution, specifically its revenue clauses, automatically applied to newly acquired territories without congressional action.<sup>147</sup>

To understand the factual and procedural posture of *Downes*, some context is necessary about the events of November 1900 that led to the case. S.B. Downes imported oranges from San Juan, Puerto Rico, into New York following the enactment of the Foraker Act, which had established a temporary civil government and revenue system for the island.<sup>148</sup> Upon arrival, the New York port collector imposed a duty of \$659.35, which Downes paid under protest.<sup>149</sup> He then initiated suit to recover what he had paid.<sup>150</sup> Ultimately, the case reached the Supreme Court.<sup>151</sup> The case required the Court to decide whether the Uniformity Clause applied to Puerto Rico.<sup>152</sup>

In seeking historical grounding for its interpretation, the Court turned to America's first founding document, the Articles of Confederation.<sup>153</sup> Reviewing the Articles of Confederation, the Court noted that, aside from authorizing the admission of Canada, the Articles never mentioned or applied to territories or other lands.<sup>154</sup>

The Court then highlighted the fact that when the Constitution was formed in 1787, the Constitution did not extensively detail anything about territories as separate portions of the United States.<sup>155</sup> In fact, as the Court noted, the only mention of the territories was that Congress had the right to "dispose of and make all the necessary rules and regulations about territory or other property belonging to the United States."<sup>156</sup>

<sup>144</sup> *De Lima*, 182 U.S. at 197.

<sup>145</sup> *Downes*, 182 U.S. at 342.

<sup>146</sup> *Id.* at 244.

<sup>147</sup> *Id.* at 249.

<sup>148</sup> *Id.* at 247.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 249.

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

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 250.

<sup>156</sup> *Id.*

The Court concluded that none of the foundational instruments creating the United States inferred that any United States territory was considered a part of the United States.<sup>157</sup> In fact, the Constitution only dealt with the states, their representatives, and the people therein.<sup>158</sup>

The Court then turned to the language of the Thirteenth and Fourteenth Amendments of the Constitution more specifically.<sup>159</sup> The Court's analysis of the Fourteenth Amendment, particularly the language on U.S. Citizenship was a mechanism they used to support alienation of territories.<sup>160</sup> The language expressly stated that citizenship is limited to persons born or naturalized in the U.S., and it does not extend to persons born in any place subject to its jurisdiction.<sup>161</sup> In other words, that was the Court holding certain Constitutional rights can be stripped from the people of the territories because differential treatment was not only foreseen, but deemed appropriate for any future possession under U.S. jurisdiction.<sup>162</sup> The Court further supported this theory by analyzing the Thirteenth Amendment, more specifically, the language of what was considered the United States and "any place subject to their jurisdiction."<sup>163</sup> To be more precise, when looking at the prohibition of slavery and involuntary servitude, the language of the amendment applied to the United States, or in any place subject to its jurisdiction.<sup>164</sup> Phrasing it differently, the Court held that the under the language of the thirteenth amendment, it was clear that belong to the U.S. but are not considered the U.S. in the completest sense of the word.<sup>165</sup>

The Court held that the very phraseology of those two amendments recognized that an important distinction existed between the U.S. and its possessions.<sup>166</sup> It further supported such its legal conclusion by referencing that Congress in 1804 adopted C. 56, 2 Stat. 298, that provided the framework for public records and its application to evert court and office of the U.S., "but to the" courts and offices of the territories and countries in its jurisdiction.<sup>167</sup> In essence, the Court was reasoning that based on the "but to the" language used to describe territories the appropriate legal inference was that there could be territories subject to US jurisdiction, which are not part

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<sup>157</sup> *Id.* at 251.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 251, 277.

<sup>164</sup> *Id.* at 251.

<sup>165</sup> *Id.* at 336-37.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 277.

of US, which thus permitted the alienation of some Constitutional rights, as anything less would destroy the very Constitution and. The foundation of the which the U.S. stands on<sup>168</sup>

The Court then referred to the thoughts and writings of Thomas Jefferson on this issue.<sup>169</sup> Although Jefferson's thoughts and writings on the Louisiana Purchase were not binding law, the Court found them demonstrative and enlightening to the central issue. The writings showed that during the deliberations over the Louisiana purchase, the Democratic-republican party firmly believed that the Constitution granted ample power, not just for the formation of treaties allowing for the acquisition of foreign territory, but also the ability to hold that territory indefinitely without incorporation until Congress wished it so.<sup>170</sup> Moreover, the writings showed that the Democratic-republicans party argued that the uniformity clause was inapplicable as it stood to colonial or territorial possessions.<sup>171</sup>

To support this contention, the Court then turned to the passage of two bills. The first bill 2 Stat. 245, which authorized the President to take possession of territory and continue its existing government.<sup>172</sup> The second was 2 Stat, 283, c. 38, which held that all legislative power of in a territory could be passed to a governor and legislative council of the Presidents choosing.<sup>173</sup> Taking these acts together, they furthered two crucial concepts: (1) territories can be lawfully obtained via treaty, with a provision of complete incorporation, and (2) that discrimination in favor of certain foreign vessels at ports of newly acquired territories is not a violation of the Constitution's Uniformity Clause.<sup>174</sup> The Court notes that this notion is supported by the Treaty of Peace with Spain and the annexation of the Republic of Hawai'i.<sup>175</sup>

Against this backdrop, the Court revisited the reasoning in *De Lima*, emphasizing its central theme: that the Constitution and federal laws apply differently to organized versus unorganized territories.<sup>176</sup> This distinction was crucial because Puerto Rico, at the time, was not considered an organized territory in the technical sense.<sup>177</sup> The Court underscored this point by citing *Scott v. Sandford*, to reaffirm the principle that Congress possesses

<sup>168</sup> *Id.* at 278, 313.

<sup>169</sup> *Id.* at 253.

<sup>170</sup> *Id.* at 254.

<sup>171</sup> *Id.* at 255.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 256.

<sup>176</sup> *Id.* at 257.

<sup>177</sup> *See supra* note 138; *De Lima*, 182 U.S. at 196.

broader authority over territories than it does over states.<sup>178</sup> To support this interpretation, the Court referenced examples of numerous instances where Congress applied specific constitutional provisions to territories only when expressly stated.<sup>179</sup>

Building on its earlier reasoning, the Court then turned to the issue of taxation, relying on its analysis in *Loughborough v. Blake*, 18 U.S. 317 (1820), which was an action for replevin brought in the circuit court about imposing taxes on the District of Columbia, and if that would constitute double taxation.<sup>180</sup> The Court in *Loughborough* concluded that Article I, Section IX does not mandate a uniform system of direct taxation in the territories.<sup>181</sup> In essence, Congress may impose taxes on territorial populations without triggering the constitutional requirement of uniformity. Having established this principle, the Court buttressed its conclusion through several assertions. First, it distinguished between foreign and domestic contexts, asserting that while the term “United States” may encompass all territories in dealings with foreign sovereignties, it does not automatically extend federal governance or constitutional protections to those territories in domestic matters.<sup>182</sup> Second, the Court reaffirmed its holding in *American Insurance Co. v. Canter*, 26 U.S. 511 (1828) (the Supreme Court ruled that Congress may create “legislative courts” in U.S. territories whose judges do not have the lifetime tenure protections required for “constitutional courts” under Article III. The decision established that in legislating for territories, Congress exercises the combined powers of both a general and a state government and is not limited by the same judicial constraints that apply within the states.) emphasizing that the acquisition of territory through treaty does not itself trigger the application of the judicial clause of the Constitution.<sup>183</sup> Instead, territorial governance remains within the discretion of Congress, reinforcing the notion that constitutional rights do not automatically follow the flag.<sup>184</sup>

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<sup>178</sup> *Id.* at 257.

<sup>179</sup> *Id.* at 257-58 (Examples of Congressional application of constitutional provisions when they expressly state they should apply) (These are found in the laws prohibiting the slave trade with “the United States or territories thereof;” or equipping ships “in any port or place within the jurisdiction of the United States;” in the internal revenue laws, in the early ones of which no provision was made for the collection of taxes in the territory not included within the boundaries of the existing States, and others of which extended them expressly to the territories, or “within the exterior boundaries of the United States;” and in the acts extending the internal revenue laws to the Territories of Alaska and Oklahoma).

<sup>180</sup> *Id.* at 260.

<sup>181</sup> *Id.* (Loughborough held that a direct system of taxation was not needed to enforce taxation on the territories).

<sup>182</sup> *Id.* at 263-64.

<sup>183</sup> *Id.* at 265; 267-69.

<sup>184</sup> *Id.* (Appurtenant refers to rights or restrictions that run with the land. This is usually used in the context of easements or covenants. Here, the Court is viewing it as an appurtenant easement, which is distinguished by the existence of a dominant estate that receives the benefit of the easement. Hence, the United States is the dominant estate receiving the benefits of ownership, and Puerto Rico is subservient to its congressional authority; *appurtenant*, *Wex*, Cornell Law (last updated June 2021), <https://www.law.cornell.edu/wex/appurtenant>).

Thus, based on its analysis, the Court concluded that Puerto Rico is a territory appurtenant to the United States, yet not part of it for purposes of the Constitution's revenue clauses.<sup>185</sup> In effect, the Court articulated, if not explicitly adopted, the foundational premise of the territorial incorporation doctrine: that unincorporated territories like Puerto Rico may be considered "foreign in a domestic sense."<sup>186</sup> This conceptual framework would come to define the constitutional status of such territories, legitimizing a dual system in which sovereignty does not entail full constitutional inclusion.

Although Justice White concurred in the majority's holding, he expressed concern that key constitutional questions remained underdeveloped. In his view, the more precise inquiry was whether Puerto Rico had become an incorporated and integral part of the United States at the time Congress enacted the Foraker Act.<sup>187</sup> To address this, Justice White began by reaffirming the principle that a conquered territory remains under military occupation until the acquiring nation determines its political status.<sup>188</sup> He answered the question by looking at how a similar issue about the Foraker Act was posed in *Jones v. United States*, 137 U.S. 202 (the Supreme Court held that a person in **actual, peaceable possession of land under claim of right** can maintain an action against a trespasser even if their title is imperfect or later found invalid. The Court ruled that **possession alone is sufficient evidence of ownership against all but the true owner**, establishing the principle that possession gives a presumptive title good against stranger) where the question was whether the act was a valid and lawful exercise of congressional power, and thus the islands were appurtenant territories.<sup>189</sup> Drawing on that precedent, Justice White concluded that Puerto Rico was properly classified as an appurtenant territory; subject to U.S. jurisdiction but not fully incorporated.<sup>190</sup>

Justice White further clarified that the United States may possess and govern a territory without incorporating it into the constitutional framework—a posture he likened to indemnification.<sup>191</sup> In his view, to hold otherwise would contradict the Constitution by allowing a foreign population to be automatically absorbed into the Union without congressional action, thereby enabling treaties to override constitutional boundaries.<sup>192</sup>

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<sup>185</sup> *Id.* at 287.

<sup>186</sup> *Id.* at 342.

<sup>187</sup> *Id.* at 299.

<sup>188</sup> *Id.* at 303.

<sup>189</sup> *Id.* at 307.

<sup>190</sup> *Id.* at 308.

<sup>191</sup> *Id.* at 309.

<sup>192</sup> *Id.* at 312-13; 325-26; 333; 340.

Taken in full context, White concluded that Puerto Rico could not have been considered incorporated into the United States.<sup>193</sup> Although not foreign in an international sense, Puerto Rico remained foreign in a domestic constitutional sense.<sup>194</sup> As such, at the time of the Foraker Act's passage, it was neither incorporated nor an integral part of the Union.<sup>195</sup>

However, before moving on to the modern-day application, I would be

remiss if I did not acknowledge, outside of the footnotes, the *Dorr v. United States* decision in 1904. De Lima and Downes may have set the stage and language, which helped craft the legal doctrine known as the unincorporated territory doctrine, but *Dorr v. United States*, is the case where the Supreme Court officially adopted the doctrine, which allows for disparate applications of the Constitution towards the unincorporated territories.<sup>196</sup> Having done this, we now turn to the modern-day application of the Insular Case doctrine.

The early Insular Case doctrine from the early twentieth century had a cascading effect on how the unincorporated territories have been viewed and treated in more contemporary Supreme Court cases. Recent Supreme Court decisions in *Torres v. Puerto Rico*, *United States v. Vaello-Madero*, as well as similar reasoning in cases decided by lower courts, demonstrate the reverberating effects of the Insular Cases even today.

In *Torres v. Puerto Rico*, the Court addressed whether the Fourth Amendment's protections against unreasonable searches and seizures applied to the unincorporated territory of Puerto Rico. The appellant, Terry Torres, had traveled from Miami to Puerto Rico.<sup>197</sup> Upon arrival, his nervous demeanor and persistent attention to a nearby officer drew suspicion.<sup>198</sup> An officer approached Torres, introduced himself, and gave Torres a card explaining Public Law 22 was.<sup>199</sup>

Public Law 22 authorized airport searches of luggage without probable cause.<sup>200</sup> After reading the card, Torres objected and requested to speak with his uncle, a Puerto Rican attorney.<sup>201</sup> The request was denied, and officers searched Torres's luggage, finding an ounce of marijuana, a wood pipe, and

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<sup>193</sup> *Id.* at 340.

<sup>194</sup> *Id.* at 342 (White, J., concurring).

<sup>195</sup> *Id.* at 344.

<sup>196</sup> *Dorr*, 195 U.S. 138 (1904).

<sup>197</sup> *Torres v. Puerto Rico*, 442 U.S. 465, 467 (1979).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

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

<sup>201</sup> *Id.*

approximately \$250,00 in cash.<sup>202</sup> Torres was convicted and sentenced to three years in prison.<sup>203</sup> He appealed to the Puerto Rico Supreme Court, which upheld the conviction, citing constitutional constraints that prevented it from invalidating a law without a majority of all members.<sup>204</sup>

Torres then appealed to the United States Supreme Court, which was tasked with determining the constitutionality of Public Law 22.<sup>205</sup> In its analysis, the Court revisited foundational language from the Insular Cases.<sup>206</sup> It reaffirmed *Dorr v. United States*, which held that certain constitutional guarantees, such as the right to a grand jury or petit jury, may be withheld from unincorporated territories.<sup>207</sup>

The Court emphasized that limiting the automatic application of constitutional provisions in unincorporated territories was essential to preserving Congress's authority over territorial governance.<sup>208</sup> It also noted that legislative determinations regarding constitutional applicability in such territories carry significant weight.<sup>209</sup> In this case, Congress had required the inclusion of a bill of rights in the Puerto Rican Constitution, which incorporated language mirroring the Fourth Amendment.<sup>210</sup>

Accordingly, the Court held that the Fourth Amendment of the Constitution applied, and that the search under Public Law 22 violated the Constitution.<sup>211</sup> The Court further underscored that Puerto Rico, despite its unique status, lacks independent sovereignty.<sup>212</sup> Puerto Rico's borders are subject to U.S. control, and its legal framework remains contingent on congressional discretion.<sup>213</sup>

The significance of *Torres* lies not only in the vindication of individual rights but in the reaffirmation of broader constitutional principles. First, Puerto Rico does not possess sovereignty independent of the United States. Second, it remains subject to congressional disposition. Third, and most critically, the decision reaffirmed that unincorporated territories may be treated differently under the Constitution, effectively rendering their residents' second-class citizens. This foundation sets the stage for its twenty-first century application in *Vaello-Madero*.

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202 *Id.*

203 *Id.*

204 *Id.* at 467-68 (The Puerto Rico Supreme Court has eight Justices, only seven were present, and only four of them wanted to overturn the lower court decision).

205 *Id.* at 465.

206 *Id.* at 469-70.

207 *Id.* (citing *Dorr*, 195 U.S. at 145-46, 148).

208 *Id.* at 470.

209 *Id.*

210 *Id.*

211 *Id.* at 474.

212 *Id.* at 472-73.

213 *Id.*

Among the modern applications of the Insular Cases, *Vaello-Madero* stands out as one of the most troubling and consequential. At issue was a single constitutional question: Does the Equal Protection Clause of the Fifth Amendment require Congress to extend Supplemental Security Income (SSI) benefits to residents of Puerto Rico?<sup>214</sup> The Court unequivocally answered “no.”<sup>215</sup>

Before turning to the Court’s reasoning, it is important to understand how the case reached the Supreme Court. Jose Luis Vaello-Madero, a longtime resident of New York, had been receiving SSI benefits lawfully while residing there.<sup>216</sup> In 2013, he relocated to Puerto Rico, unaware that his move rendered him ineligible for continued SSI payments.<sup>217</sup> For several years, the federal government also failed to detect the change in residence, resulting in \$28,000 in overpayments.<sup>218</sup>

The United States filed suit in federal district court to recover the funds.<sup>219</sup> Vaello-Madero defended against the claim by arguing that his exclusion from the SSI program violated the Fifth Amendment’s guarantee of equal protection.<sup>220</sup> Both the District Court and the Court of Appeals agreed, holding that the denial of benefits was unconstitutional.<sup>221</sup> The Supreme Court, however, reversed.

In reaching its decision, the Court invoked the Territorial Clause of Article IV, § 3, Clause 2, which grants Congress broad authority to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” Under this clause, the Court reasoned, Congress may determine the scope of duties and benefits applicable to territories.<sup>222</sup> just as Puerto Rico is exempt from certain federal obligations, it may also be excluded from certain federal entitlements.<sup>223</sup>

In so reasoning, the Court relied heavily on precedent, citing *Califano v. Torres* and *Harris v. Rosario*, both of which upheld Congress’s authority to exclude Puerto Rico from federal benefit programs so long as a rational basis existed.<sup>224</sup> In *Vaello-Madero*, the Court found such a basis: Congress had

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<sup>214</sup> *United States v. Vaello-Madero*, 596 U.S. 159, 162 (2022).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 164.

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

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 164.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 163.

<sup>223</sup> *Id.* at 162.

<sup>224</sup> *Id.* at 164-65.

exempted Puerto Rico from federal income taxes and provided an alternative local program for supplemental income.<sup>225</sup> Therefore, the exclusion from SSI was constitutionally permissible.<sup>226</sup>

Justice Gorsuch, in his concurring opinion, acknowledged, repeatedly and forcefully, that the Insular Cases rest on a foundation of racialized legal fiction, born of notions of white supremacy and colonial exceptionalism.<sup>227</sup> He declared that such doctrines have no rightful place in our constitutional order.<sup>228</sup> And yet, despite this recognition, he joined the majority in reversing the lower court's decision.<sup>229</sup>

His opinion suggested that the Court's hands were tied because the case had not presented the "right" question, and therefore no remedy could be offered. But this raises a deeper concern: What, then, is the right question? And more importantly, when will it ever be asked? The questions before the Court already opened the door to confronting the legacy of the Insular Cases. The opportunity was there.

This decision reaffirmed a stark constitutional reality: residents of unincorporated territories may be subject to disparate treatment under federal law, not because of individual conduct, but because of their geographic and political status. The Court's reasoning, rooted in the logic of the Insular Cases, underscored the enduring power of territorial incorporation doctrine to justify unequal treatment of United States citizens.

Puerto Rico is not alone in bearing the burdens imposed by the Insular Cases. Recent federal decisions continue to entrench the doctrine of territorial exceptionalism across multiple U.S. territories.

In *Fitisemanu v. United States*, the Tenth Circuit upheld Congress's designation of American Samoans as "non-citizen nationals" under the Immigration and Nationality Act.<sup>230</sup> This status denies them the right to vote, run for office, or serve on juries outside the territory.<sup>231</sup> The court relied on the Insular Cases to conclude that birthright citizenship does not automatically extend to unincorporated territories without congressional action.<sup>232</sup>

Similarly, *United States v. Baxter* involved a warrantless search of packages sent from South Carolina to the United States Virgin Islands.<sup>233</sup> Although the district court found the search unconstitutional under the Fourth

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 181-89.

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

<sup>229</sup> *Id.*

<sup>230</sup> *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).

<sup>231</sup> *Fitisemanu*, 1 F.4th at 865.

<sup>232</sup> *Downes*, 182 U.S. at 244; *see also U.S. v. Wong Kim Ark*, 169 U.S. 649, 649 (1898).

<sup>233</sup> *United States v. Baxter*, 951 F.3d 128, 129 (3d Cir. 2020).

Amendment, the appellate court reversed, invoking the border search exception and asserting that Congress may establish customs boundaries; even within domestic territories.<sup>234</sup> The court further narrowed the reach of *Torres v. Puerto Rico*, holding that its protections applied only to Puerto Rico, not other territories.<sup>235</sup> Baxter was appealed to the Supreme Court, which denied certiorari suggests tacit acceptance of its reasoning.<sup>236</sup>

Together, these cases illustrate that the logic of the Insular Cases remains active, shaping the rights and status of territorial residents far beyond Puerto Rico. Even today, nearly one hundred years later, the Insular Cases impact residents of United States territories. And these impacts constitute macrogressions.

#### **IV. The Insular Cases Constitute A Microaggression In The Form Of Judicial Colonialism**

One of the earliest manifestations of the Supreme Court's judicial colonialism was a legislative macroaggression known as the Jones-Shafroth Act of 1917. This legislative macroaggression rooted in the Supreme Court's racially inflected constitutional reasoning in the Insular Cases. As noted in Missouri House Concurrent Resolution 8, the Act conferred U.S. citizenship on Puerto Ricans, enabling their conscription into World War I.<sup>237</sup> Yet upon returning home, they remained disenfranchised: unable to vote for the president, lacking congressional representation, and excluded from full constitutional participation.

This arrangement exemplifies a macroaggression—an ideological and structural framework that legitimizes the dominance of one group over another. Puerto Ricans were granted citizenship, but only conditionally and geographically constrained. Their constitutional status was, and remains, defined not by equal membership in the polity, but by their zip code. For over a century, congressional and judicial interpretations have reinforced this hierarchy, treating island residents as expendable in service but peripheral in sovereignty. The Insular Cases made it possible for legislation to be passed which led to the death of Puerto Ricans who lack basic rights in the country they fought to protect.

Although the Jones-Shafroth Act subtly reflected the logic of the Insular Cases, the Ponce Massacre of 1937 revealed their consequences in stark and violent terms. On March 21, in Ponce, Puerto Rico, the Nationalist Party gathered for a peaceful parade—lawfully permitted and attended by hundreds of unarmed men, women, and children dressed in their Sunday best.<sup>238</sup>

<sup>234</sup> *Id.* at 131-32.

<sup>235</sup> *Id.*

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

<sup>237</sup> 2023 Bill Text MO H.C.R. 8

<sup>238</sup> NELSON DENIS, WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY I, 65 (2015).

Moments before the parade began, the Mayor of Ponce and the Insular Police abruptly revoked the permit and ordered the crowd to disperse.<sup>239</sup> Behind the scenes, the American-appointed military governor had called for heightened surveillance, setting the stage for tragedy.<sup>240</sup>

As the nationalist band began playing *La Borinqueña*, the crowd found itself surrounded by over 200 armed Insular police officers.<sup>241</sup> Without warning, the officers opened fire.<sup>242</sup> Seventeen civilians were killed, and more than 200 wounded—none of them armed.<sup>243</sup> The colonial government attempted to justify the massacre by portraying the nationalists as “savages,” echoing the dehumanizing language of *Downes* and *De Lima*.<sup>244</sup> Despite a finding that the government was behind the massacre, no one was held accountable.<sup>245</sup>

This massacre exemplifies the enduring legacy of judicial colonialism. The racialized logic of the Insular Cases, codified in law, was mirrored in the actions of colonial officials, including Puerto Rican leaders who had internalized the belief that their own people were expendable. The government’s decision not act is a textbook example of macroaggression reinforced by microinvalidation: acknowledging harm while refusing redress. Once again, the doctrine of “foreign in a domestic sense” proved deadly—not just in theory, but in blood.

Some oppression justified by the Insular Cases was more insidious than the Ponce Massacre. One such example is Public Law 53, known as *La Ley de la Mordaza*—the Gag Law. Enacted in 1948 by the Puerto Rican legislature, the law criminalized expressions of national identity and aspirations for sovereignty.<sup>246</sup> Under this law, it became illegal to display the Puerto Rican flag, sing the national anthem, advocate for independence, or organize groups promoting liberation.<sup>247</sup> Violations carried penalties of up to ten years in prison, a \$10,000 fine, or both.<sup>248</sup> For nearly a decade, this law enabled warrantless searches and suppressed core constitutional rights.

What makes this episode especially troubling is the Supreme Court’s silence. During the Gag Law’s enforcement, the Court issued landmark First Amendment decisions, *West Virginia State Board of Education v. Barnette*,

<sup>239</sup> *Id.* at 65.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 45.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 72.

<sup>244</sup> *Id.* at 75.

<sup>245</sup> *Id.* at 77-79.

<sup>246</sup> Carmelo Delgado Cintrón, *La obra jurídica del Profesor David M. Helfeld* 7 REVISTA DE LA ACADEMIA PUERTORRIQUEÑA DE JURISPRUDENCIA Y LEGISLACIÓN 1 (2008), <https://www.academiajurisprudenciapr.org/la-obra-juridica-del-profesor-david-m-helfeld-1948-2008/>

<sup>247</sup> *Puerto Rican History - 1948*, WELCOME TO PUERTO RICO, <https://welcome.topuertorico.org/history5.shtml> (last visited November 12, 2025); Public Law 53 of 1948 (it remained in effect until 1958).

<sup>248</sup> *Id.*; Public Law 53 of 1948 (it remained in effect until 1957).

319 U.S. 624 (1943), *Thornhill v. Alabama*, 310 U.S. 88 (1940), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), affirming the right to speak, protest, and express dissent by its owner the United States. Yet none of these protections were extended to Puerto Rico until 1957, long after the damage had been done. The Court's failure to intervene reflected the logic of the Insular Cases: constitutional rights apply to unincorporated territories only when Congress permits.

This episode exemplifies macroaggression, colonialism, and coloniality. The denial of free speech and protection from unreasonable searches was not incidental—it was structurally sanctioned.<sup>249</sup> The Supreme Court's inaction enabled a colonial government to suppress its own people, and the complicity of Puerto Rican officials in enforcing the law reveals the internalized subjugation at the heart of coloniality. The Gag Law was not just a legal failure—it was a psychological and political wound inflicted by the legacy of the Insular Cases.<sup>250</sup>

One final example demands attention. The infamous Academy of Truth, located in Aguadilla, Puerto Rico (then known as Ramey Air Force Base), stands as a stark illustration of constitutional betrayal.<sup>251</sup> Despite the Supreme Court's 1910 ruling in *Weems v. United States*, which affirmed that the Eighth Amendment's protection against cruel and unusual punishment applied to Puerto Rico, the Academy operated as if that protection did not exist for detainees held there.<sup>252</sup> Nationalist detainees were tortured, electrocuted, waterboarded, confined in dark cells infested with bedbugs, and subjected to near-starvation.<sup>253</sup> These atrocities exemplify the selective application of constitutional rights in Puerto Rico—even after judicial recognition of their applicability.

This episode once again shows the dehumanizing effects of the Insular Cases. It reflects a macro-aggressive assault on Puerto Rican identity, rooted in the perception that its people are expendable—neither integral to the United States nor entitled to full constitutional protection. Instead, they are treated as possessions, subject to the whims of Congress, the Executive, and the judiciary.

The Jones-Shafroth Act, the Ponce Massacre, the Gag Law, and the atrocities at the Academy of Truth all trace their roots back to the Insular Cases. These events are not microaggressions but rather overt, institutional acts of domination. The Insular Cases enabled these macroaggressions by creating a legal regime in which constitutional exceptionalism justified colonial control. The jurisprudence of the Supreme Court, while often

<sup>249</sup> *Downes*, 182 U.S. at 250.

<sup>250</sup> See *supra* notes 79, 81, 84.

<sup>251</sup> Denis, *supra* note 238, at 171.

<sup>252</sup> *Weems v. United States*, 217 U.S. 349 (1910) (overturning the conviction of a government officer in the Philippines sentenced to fifteen years of *cadena temporal*—hard labor while shackled—plus permanent civil disability for the minor offense of falsifying a public document).

<sup>253</sup> Denis, *supra* note 238, at 171-81.

couched in microaggressive language that reflects paternalism and discriminatory assumptions, has produced systemic harms that are unmistakably macroaggressive in effect. Most insidiously, these decisions perpetuate the coloniality of power by fostering poor self-image and cultural erasure, paving the way for the ultimate macroaggression: annexation. Far from a remedy, annexation represents the culmination of colonialism; the complete assimilation and domination of a people deemed inferior and in need of Anglo-American constructs of civility. In this context, sovereignty emerges not as a political preference but as a legal and ethical imperative.

What Puerto Rico needs is not the literal tidal wave envisioned by Cornelius Rhoads, a man whose written expressions embodied an ugliest form of racism, but a metaphorical tsunami of justice, one powerful enough to dismantle the legal architecture of colonial subjugation erected by the Insular Cases. These cases, beginning with *Downes*, codified a doctrine of second-class constitutional status for Puerto Rico and other territories, legitimizing a regime where fundamental rights are contingent, and sovereignty is perpetually deferred. This is not merely a legal anomaly, it is a sustained macroaggression, a structural violence that reverberates through every microaggression Puerto Ricans endure, from bureaucratic neglect to cultural erasure.

## V. Conclusion

Sovereignty is not a symbolic gesture; it is a structural intervention. It is the only plausible and principled remedy to the colonial condition. Unlike annexation, which risks deepening dependency and erasing cultural identity, sovereignty affirms Puerto Rico's right to self-determination, to define its own constitutional order, and to redress the harms inflicted by a century of territorial limbo. It transforms the legal fiction of "unincorporated territory" into a reality of autonomous nationhood. Such actions are supported by the United States own independence from Great Britain over its unfair subjugation and treatment of the American colonies and its people over taxation and other unjust obligations such as forcing civilians to house members of its military. It is further exemplified by the U.S.'s own Compacts of Sovereignty through a Treaty of Free Association with the Republics of Palau, Marshall Islands, and Micronesia. And, yes, this is also highlighted by the many successful nations in Latin America such as, Uruguay, Panama, Chile, and Costa Rica. Albeit, nationhood and sovereignty have a plethora of unknown factors, but they serve as the most important macrointervention: To preserve and foster true equality, freedom, and autonomy.

This Note does not engage with the logistical or political feasibility of sovereignty—that is an evaluation for another time. Instead, it insists on the moral and doctrinal imperative: that sovereignty is the only solution commensurate with the scale of the harm. Just as *Downes* introduced the language of constitutional exclusion, the United States must now introduce

the language of constitutional liberation. Only then can the legacy of Rhoads and the Insular Cases be washed away—not by violence, but by a tidal force of justice.



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