

117TH CONGRESS
1ST SESSION

H. RES. 279

Acknowledging that the United States Supreme Court’s decisions in the Insular Cases and the “territorial incorporation doctrine” are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of Plessy v. Ferguson that have long been rejected, are contrary to our Nation’s most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.

IN THE HOUSE OF REPRESENTATIVES

MARCH 26, 2021

Mr. GRIJALVA (for himself, Ms. PLASKETT, Mr. SABLAN, Mr. SAN NICOLAS, Miss GONZÁLEZ-COLÓN, Ms. VELÁZQUEZ, Mr. GARCÍA of Illinois, and Mr. TORRES of New York) submitted the following resolution; which was referred to the Committee on the Judiciary, and in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

RESOLUTION

Acknowledging that the United States Supreme Court’s decisions in the Insular Cases and the “territorial incorporation doctrine” are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of Plessy v. Ferguson that have long been rejected, are contrary to our Nation’s most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.

Whereas territories have been an important part of the United States since the beginning of our Nation, starting with the Northwest Territory in 1787, with Chief Justice John Marshall writing for the Supreme Court in 1820 that “the United States” is “the name given to our great republic, which is composed of States and territories” (*Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820));

Whereas today the United States has 5 populated territories, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the Virgin Islands of the United States, which together have a population of over 3,500,000 residents, equal to the population of the 5 smallest States combined, more than 95 percent of whom are racial or ethnic minorities;

Whereas Puerto Rico and Guam have now been a part of the United States since 1898, American Samoa since 1900, the Virgin Islands of the United States since 1917, and the Commonwealth of the Northern Mariana Islands since 1986;

Whereas until the *Insular Cases* were decided in the early 1900s, the Supreme Court long recognized that Congress’ powers over the territories, while broad, were “not absolute and unlimited”, but rather subject “to such restrictions as are expressed in the Constitution” (*Murphy v. Ramsey*, 114 U.S. 15, 44 (1885));

Whereas following the acquisition of Hawaii, Puerto Rico, Guam, and other overseas territories in 1898, the Supreme Court’s decisions in the *Insular Cases* broke from its prior precedent to establish a doctrine of territorial incorporation, creating for the first time a distinction between so-called “incorporated” territories, where the

United States Constitution applies “in full”, and “unincorporated” territories, where the Constitution applies “only in part” (*Boumediene v. Bush*, 553 U.S. 723, 757 (2008));

Whereas the judgment of the Court in *Downes v. Bidwell* (182 U.S. 244 (1901)), the most prominent of the Insular Cases, was delivered by Justice Henry Billings Brown, the author of *Plessy v. Ferguson*’s doctrine of “separate but equal”, who wrote that America’s newly acquired overseas territories were “inhabited by alien races, differing from us in religion, customs, . . . and modes of thought”, making it impossible to govern “according to Anglo-Saxon principles”;

Whereas Justice Edward White, who in a separate 3-Justice plurality developed the territorial incorporation doctrine in *Downes*, expressed concerns over the “evils” of admitting “millions of inhabitants” of “unknown islands, peopled with an uncivilized race”, who he believed would be “absolutely unfit” for citizenship;

Whereas 4 Justices dissented in *Downes*, with Chief Justice Melville Fuller commenting that “[g]reat stress is thrown upon the word ‘incorporation,’ as if possessed of some occult meaning”, and Justice John Marshall Harlan expressing that the “idea of ‘incorporation’ . . . is enveloped in some mystery which I am unable to unravel”;

Whereas Justice Harlan, who penned the lone dissent to *Plessy v. Ferguson*, also wrote a series of powerful dissents to the Insular Cases, declaring in *Downes* that “[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses

to accord to them—is wholly inconsistent with the spirit and genius, as well as with the words, of the Constitution”;

Whereas the Insular Cases and the territorial incorporation doctrine have long received significant criticism from the Supreme Court and a broad range of jurists and legal scholars;

Whereas, in 2008, the Supreme Court stated that “[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply”, expressing further that “over time the ties between the United States and any of its unincorporated Territories [may] strengthen in ways that are of constitutional significance” (*Boumediene v. Bush*, 553 U.S. at 758, 765 (2008));

Whereas, in 2020, the Supreme Court questioned the “continued validity” of the Insular Cases, indicating “that the Insular Cases should not be further extended” (*Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv.*, 140 S.Ct. 1649, 1665 (2020));

Whereas Judge Juan Torruella, who served on the United States Court of Appeals for the First Circuit from 1984 until his death in 2020, labeled the territorial incorporation doctrine a “doctrine of separate and unequal”, writing that “the Insular Cases represent classic *Plessy v. Ferguson* legal doctrine and thought that should be eradicated from present-day constitutional reasoning” because they run contrary to “the most basic precept for which this nation stands: the equality before the law of all its citizens”;

Whereas Chief Judge Gustavo Gelpí, who has served on the United States District Court for the District of Puerto Rico since 2006, has called the Insular Cases’ territorial incorporation doctrine “a doctrine of pure judicial invention, with absolutely no basis in the Constitution and one that is contrary to all judicial precedent and territorial practice”;

Whereas legal scholars with a wide range of views have criticized the Insular Cases and the territorial incorporation doctrine, with prominent originalist legal scholar Gary Lawson writing that “there is nothing in the Constitution that even intimates that express constitutional limitations on national power apply differently to different territories”, and leading Constitutional Law Professor Sanford Levinson calling the Insular Cases “central documents in the history of American racism”;

Whereas the territorial incorporation doctrine established by the Insular Cases is still used to perpetuate the second-class treatment of Americans living in the territories, from the denial of citizenship, to the denial of voting rights, to the denial of equality in Federal benefits programs; and

Whereas the time has come to expressly reject the Insular Cases as both contrary to the Constitution’s text and history and as incompatible with our Nation’s core values: Now, therefore, be it

- 1 *Resolved*, That the House of Representatives—
- 2 (1) recognizes that America’s constitutional and
- 3 democratic principles apply throughout the United
- 4 States, including both States and territories;

1 (2) acknowledges that the Insular Cases are
2 contrary to the text and history of the Constitution;

3 (3) acknowledges that the Insular Cases are rel-
4 ics of the racial views of an earlier era that have no
5 place in our Nation today; and

6 (4) rejects the Insular Cases and their applica-
7 tion to all present and future cases and controversies
8 involving the application of the Constitution in
9 United States territories.

○