New York State Bar Association

Task Force on the U.S. Territories

M E M O R A N D U M

The New York State Bar Association (NYSBA) Task Force on the U.S. Territories (Task Force) respectfully submits the attached proposed resolutions and related materials for the NYSBA Executive Committee's consideration.

Consistent with NYSBA's mission to promote adherence to the Rule of Law; diversity, equity, and inclusion; and equal access to justice for all both within the State of New York and throughout the United States, the Task Force is working to address the separate and unequal status of residents of the inhabited U.S. Territories of Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa.

These territories and their residents have a close relationship to New York. For example, according to the Pew Research Center, 20% of the U.S. mainland Puerto Rican population of 5.6 million resides in New York State. New York and Puerto Rico have maintained close ties for a century. Those ties strengthened in the aftermath of Hurricane Maria in 2017 and in ensuing years. The U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa similarly have significant ties to New York given migration patterns and New York's position as a national and global capital.

New York's close ties with residents of the U.S. Territories and their diaspora impel a response to stark inequities facing the territories because of their legal status. Territorial residents do not have the right to vote for the U.S. President or Congress, they do not enjoy the full panoply of constitutional rights, and they are subject to starkly unequal treatment as was evidenced in the recent Supreme Court decision in *U.S. v. Vaello-Madero* denying an equal protection challenge to the rescission of SSI benefits based solely on Puerto Rico residency. These inequities stem directly from the *Insular Cases*, which established a separate and unequal status for "unincorporated" U.S. Territories that remains in law today. That must change.

NYSBA is a leader in ensuring equal justice for all and in upholding the rule of law. It therefore has an important role to play in exposing and addressing the "colonies problem" presented by the U.S. treatment of the Territories based on the continued operation of the *Insular Cases*. NYSBA has embraced that work in earnest, holding a series of events such as those noted in Exhibit 2.

The proposed resolutions seek to continue that work. They support efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and to dismantle the colonial framework they establish, including but not limited through the filing of amicus curiae briefs in appropriate litigation.

Proposed Resolution for Consideration by the Executive Committee

WHEREAS, it is the mission of the New York State Bar Association to promote equal access to justice for all both within the State of New York and throughout the United States; and

WHEREAS, consistent with its mission, the New York State Bar Association established the Task Force on the U.S. Territories, and vested it with the mission, among other things, to evaluate and study judicial decisions, including the *Insular Cases*, affecting the individual rights and liberties of the people of the U.S. Territories; and

WHEREAS, the New York State Bar Association has established a chapter within the U.S. Virgin Islands, and executed a memorandum of understanding with the Virgin Islands Bar Association in which among other things the New York State Bar Association and the Virgin Islands Bar Association mutually recognized the need to develop and improve understanding of the law in both of their jurisdictions, including human rights laws; and

WHEREAS, the relationship between the federal government and the five inhabited United States territories—the U.S. Virgin Islands, Puerto Rico, Guam, the Northern Mariana Islands, and American Samoa—continues to be governed by the *Insular Cases*, a series of early 20th century decisions in which the Supreme Court of the United States held that the United States Constitution and its Bill of Rights did not extend *ex proprio vigore* to these territories because they 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;" and

WHEREAS, the *Insular Cases* and the doctrine of territorial incorporation that they established rest on racial views and stereotypes from the era of *Plessy v. Ferguson,*163 U.S. 537 (1896) that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession; and

WHEREAS, sitting justices of the Supreme Court of the United States, including Justices Neil Gorsuch and Sonia Sotomayor, have called for overruling the *Insular Cases* in an appropriate case, with Justice Gorsuch identifying the decision of the United States Court of Appeals for Tenth Circuit in *Fitisemanu v. United States,*1 F.4th 862 (2021) as an appropriate vehicle to consider that issue; and

WHEREAS, a petition for writ of certiorari was filed with the Supreme Court of the United States in the *Fitisemanu* matter on April 27, 2022, with the respondents' brief due on or before July 29, 2022; and

WHEREAS, if no further extensions of time are granted, it is likely that the Supreme Court of the United States will consider the *Fitisemanu* certiorari petition at an October 2022 conference and, if certiorari is granted, issue a briefing schedule in which the petitioner's brief and any *amicus curiae* briefs in support of the petitioner would be due in November or December 2022; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit

the New York State Bar Association to file an *amicus curiae* brief in support of the petitioner in the *Fitisemanu* matter;

WHEREAS, the American Bar Association House of Delegates will meet on August 8-9, 2022, and state and territorial bar associations may submit a resolution for consideration at that meeting on or before August 6, 2022; and

WHEREAS, the American Bar Association has filed *amicus curiae* briefs in support of equal rights for the people of the U.S. territories in other cases before the Supreme Court of the United States, such as *United States v. Vaello-Madero*, but has no policy directly urging that the *Insular Cases* be overruled; and

WHEREAS, the Virgin Islands Bar Association has asked that the New York State Bar Association co-sponsor a resolution for the August 8-9, 2022 meeting of the American Bar Association House of Delegates which, if adopted, would establish policy urging the overruling of the Insular Cases and permit the American Bar Association to file an *amicus curiae* brief in the *Fitisemanu* matter if certiorari is granted; and

WHERAS, if such a resolution is not submitted for and approved at the August 8-9, 2022, meeting, the American Bar Association will not be able to file an *amicus curiae* brief in the *Fitisemanu* matter, given that the next meeting of the American Bar Association House of Delegates would not be until February 6, 2023, well after briefing has concluded; and

WHEREAS, the New York State Bar Association Task Force on U.S. Territories has collaborated with the Virgin Islands Bar Association to draft such a resolution and report for consideration by the American Bar Association House of Delegates at its August 8-9, 2022, meeting, approved a draft resolution and report after its July 11, 2022, meeting; and

WHEREAS, because the next meeting of the New York State Bar Association House of Delegates will not occur until November 5, 2022, approval of the Executive Committee is needed to permit the New York State Bar Association to co-sponsor such a resolution with the Virgin Islands Bar Association for the August 8-9, 2022, meeting of the American Bar Association House of Delegates; and

WHEREAS, the Task Force on U.S. Territories has requested that the Executive Committee authorize the New York State Bar Association to support and work on efforts to overrule the *Insular Cases*, which may include, but are not necessarily limited to, the filing of an *amicus curiae* brief in the *Fitisemanu* matter and co-sponsor a resolution and report with the Virgin Islands Bar Association for consideration by the American Bar Association House of Delegates;

NOW, THEREFORE, IT IS

RESOLVED, that the New York State Bar Association supports efforts to overrule the *Insular Cases* and the territorial incorporation doctrine and dismantle the colonial framework they establish, including but not limited through the filing of *amicus curiae* briefs in appropriate litigation; and it is further

RESOLVED, that the New York State Bar Association is authorized to co-sponsor with the Virgin Islands Bar Association the draft resolution and report attached as "Exhibit 1" to this resolution for consideration at the August 8-9, 2022 meeting of the American Bar Association House of Delegates; and it is further

RESOLVED, that the President of the Association is authorized to take such other and further action as may be required to implement this resolution, including agreeing to any changes in language or form to the draft resolution and report suggested by the American Bar Association House of Delegates Committee on Rules and Calendar or other entities represented in the American Bar Association House of Delegates.

Exhibit 1 - Draft ABA Resolution and Report

AMERICAN BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION
VIRGIN ISLANDS BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association recognizes that the United States Supreme Court's decisions in the *Insular Cases* and the "territorial incorporation doctrine" are relics of a colonial past, are contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence, rest on racial views and stereotypes that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession.

FURTHER RESOLVED, That the American Bar Association supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," and dismantle the colonial framework they establish.

REPORT

> *A century ago in the* Insular Cases*, this Court held that the federal government could rule Puerto Rico and other Territories largely without regard to the Constitution. It is past time to acknowledge the gravity of this error and admit what we know to be true: The* Insular Cases *have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.*
>
> \- Justice Neil M. Gorsuch[1]

When one thinks of colonial powers, the United States may not immediately come to mind. After all, the United States only became a nation after it declared independence from Great Britain in 1776 – the first instance of a European colony successfully rebelling against its European colonizer in modern history.

But the United States has a colonies problem. Today, more than 3.5 million Americans—98% of whom are racial or ethnic minorities—reside in the territories of the U.S. Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, and Puerto Rico. They are treated differently from the approximately 330 million people that live in the 50 states and the District of Columbia. While those who live in the mainland United States know they enjoy the full protections of the Bill of Rights of the United States Constitution, the extension of those rights to the people of these five territories is not a guarantee, but a matter of legislative and judicial discretion.

This was not always the case. Prior to 1901, the people of America's territories possessed the full panoply of civil rights and liberties protected by the Bill of Rights. This changed in 1901 when the Supreme Court of the United States decided the first of the *Insular Cases*, a series of decisions which denied certain constitutional rights to residents of America's insular territories—who were described as "alien races," "savage," "half-civilized," and "ignorant or lawless"—based on conceptions of racial inferiority and the white man's burden.[2]

This resolution calls upon the American Bar Association to recognize what many already have: that the *Insular Cases* and the "territorial incorporation doctrine" they established are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes that have long been rejected and cannot be reconciled with

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[1] *United States v. Vaello-Madero*, 142 S.Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

[2] The *Insular Cases* typically refers to a series of six opinions issued by the Supreme Court of the United States during its 1901 term, including *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). However, some jurists and scholars include additional cases within the *Insular Cases*, such as *Dooley v. United States*, 183 U.S. 151 (1901), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), *Kepner v. United States*, 195 U.S. 100 (1904), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Puerto Rico*, 442 U.S. 465 (1922). As used in this resolution, the term Insular Cases refers to all of these cases from *De Lima* to through *Balzac*.

basic constitutional and democratic principles or the values of the legal profession. It further calls upon the ABA to support efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," which would include the filing of an *amicus curiae* brief in an appropriate case.

I. HISTORICAL BACKGROUND

To understand the legal bankruptcy of the "territorial incorporation doctrine," one must consider the law as it existed prior to the *Insular Cases*. When we think of the original 13 colonies that would come together on July 4, 1776, and become the United States of America, we may envision a map such as this:

But while that is what those 13 states may look like today, the actual borders as they existed at the time of Independence were vastly different:

While the 13 states were united against British rule, from 1776 through 1781 they also competed against each other to acquire new lands for themselves to the West. Recognizing that this would eventually lead to a weak and internally divided country always on the verge of a potential civil war, the Founders, through the Articles of Confederation and later the United States Constitution, established a more stable framework in which the existing 13 states were essentially "locked in" to their borders while new lands to the West would be administered by the federal government until they achieved sufficient population and established appropriate institutions to allow for admission as a new state co-equal to the original 13 states.

In the 120 years from ratification of the Articles of Confederation in 1781 up until the Supreme Court decided the first of the *Insular Cases* in 1901, it was beyond dispute that the people of the territories were at an absolute minimum entitled to the same civil rights and liberties as the people of the states. n fact, the Northwest Ordinance of 1787 – the governing document of the first United States territory that would eventually become the states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and Minnesota – not only codified extended rights such as freedom of speech and freedom of religion but provided the people of the territory with even greater rights than the minimum conferred by the United States Constitution, such as a right to education. And throughout the 19th century, the Supreme Court repeatedly held, in an unbroken line of cases, that the Bill of Rights to the United States Constitution applies to the territories by its own terms and cannot be

infringed upon by either Congress or a territorial government.[3]

II. THE *INSULAR CASES*

At the end of the 19th Century and the start of the 20th century, the United States became a colonial power. In 1898, the United States acquired Guam, the Philippines, and Puerto Rico from Spain at the conclusion of the Spanish-American War. The following year, the islands comprising the Samoan archipelago were partitioned between Germany and the United States, resulting in the transfer of sovereignty over the islands of Tutuila and Aunu'u to the United States on April 17, 1900, which thereafter would collectively be known as American Samoa. Shortly thereafter, in 1903, the United States acquired the Panama Canal Zone from Panama through the Hay-Bunau-Varilla Treaty. And effective March 31, 1917, the United States purchased from Denmark the islands of St. Croix, St. John, and St. Thomas, as well as many surrounding minor islands, which collectively became the U.S. Virgin Islands.

Unlike other territories acquired by the United States in the late 18th and early-to-mid 19th Century, these new territories were not contiguous with the mainland United States and had overwhelmingly non-white populations. For reasons stemming from nothing more than naked racism, the most famous and influential attorneys and law professors of the time "sought to devise new theories by which Congress could permanently rule the country's new acquisitions as a European power might, unrestrained by domestic law."[4] These included Simeon Baldwin, widely recognized as the founder of the American Bar Association, as well as scholars such as Christopher Columbus Langdell and Abbott Lawrence Lowell whose influence over legal education continues to this day.[5]

Unfortunately, the views of Baldwin, Langdell, and Lowell would ultimately receive the imprimatur of law by the Supreme Court in the *Insular Cases*. In *Downes v. Bidwell* (182 U.S. 244 (1901)), the first and most prominent of the Insular Cases, Justice Henry Billings Brown, the author of *Plessy v. Ferguson*'s doctrine of "separate but equal", wrote the judgment of the Court 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."[6] Writing for three justices, Justice Edward White developed the territorial incorporation doctrine, which he found necessary due to the "evils" of admitting "millions of inhabitants" of "unknown

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[3] *See, e.g., Webster v. Reid,* 52 U.S. (11 How) 437 (1850); *Reynolds v. United States*, 98 U.S. 145 (1879); *Murphy v. Ramsey*, 114 U.S. 15 (1885); *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Springville v. Thomas*, 166 U.S. 707 (1897); *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897); *Thompson v. Utah*, 170 U.S. 343 (1898).

[4] *Vaello-Madero*, 142 S.Ct. at 1552 (Gorsuch, J., concurring).

[5] *See* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); Simeon E. Baldwin, The People of the United States, 8 YALE L.J. 159 (1899); Christopher Columbus Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899).

[6] 182 U.S. 244, 287 (1901).

islands, peopled with an uncivilized race," who he believed would be "absolutely unfit" for citizenship.[7] Under this territorial incorporation doctrine, the United States Constitution—let alone its Bill of Rights—did not extend *ex proprio vigore* to the so-called "unincorporated" territories; rather, the Constitution applied in full only to "incorporated" territories. Not surprisingly, each and every one of the "incorporated" territories were those with majority-white populations—such as Alaska—while all the "unincorporated" territories were those whose populations were overwhelmingly non-white. In doing so, the Supreme Court overturned 120 years of historical practice and judicial precedent.

III. THE LEGACY OF THE *INSULAR CASES*

Today, the reasoning of the *Insular Cases* has been emphatically repudiated by all corners of the legal community, to the point where the *Insular Cases* are said to have "nary a friend in the world." [8] In fact, as early as 65 years ago the United States Supreme Court repudiated their reasoning, directing that "[n]either the [*Insular Cases*] nor their reasoning should be given any further expansion."[9] The Supreme Court, however, stopped short of declaring the *Insular Cases* overruled. And within years of the last of the *Insular Cases* being decided, Congress provided some legislative relief from the rulings by extending by statute many provisions of the Bill of Rights to the remaining unincorporated territories.

The *Insular Cases*, however, are not a mere historic relic that, if overturned, would have nothing but a symbolic effect. The actions by the Supreme Court and Congress to minimize the effects of the *Insular Cases*, while commendable, have not undone the legacy of the *Insular Cases* and the harm they continue to inflict on the territories. While Congress extended most constitutional rights by statute, it did not extend every right to every territory. To give just two examples, Congress has not enacted legislation providing those born in American Samoa with birthright citizenship and has exempted the U.S. Virgin Islands from the requirement that prosecutions—even federal prosecutions—be by grand jury indictment. And even with rights that Congress extended by statute, there remains the ever present concern that a future Congress could repeal those rights at any time.

Perhaps more significantly, the lower federal courts have not abided by the clear directive of the United States Supreme Court to not give the *Insular Cases* any further expansion. The United States Court of Appeals for the Third Circuit cited to the Insular Cases as legal authority for withholding from residents of the U.S. Virgin Islands rights which are plainly conferred by the Bill of Rights, and relied on the *Insular Cases* as the sole authority for setting aside the Fourth Amendment and authorizing the warrantless searches of all individuals traveling from the U.S. Virgin Islands to the mainland United States.[10] Like the Third Circuit, the Ninth Circuit has not only repeatedly cited favorably

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[7] *Id.* at 306.
[8] Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1536 (2008).
[9] *Reid v. Covert*, 354 U.S. 1, 14 (1957).
[10] *See United States v. Ntreh*, 279 F.3d 255, 256-57 (3d Cir. 2002); *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994).

to the *Insular Cases* and applied them as substantive law,[11] but extended them to other contexts, even using them as the basis to withhold the right to a jury trial in the Northern Mariana Islands as late as 1984.[12] And while the District of Columbia Circuit and the Tenth Circuit do not hear cases involving the territories with any regularity, they too have extended the result and reasoning of the *Insular Cases*.[13]

Perhaps most shockingly, in doing so the Tenth Circuit took the position that the *Insular Cases* "can be repurposed to preserve the dignity and autonomy of the peoples of America's overseas territories" since "the *Insular Cases*' framework gives federal courts significant latitude to preserve traditional cultural practices that might otherwise run afoul of individual rights enshrined in the Constitution."[14] This reasoning is extraordinarily reminiscent of legal arguments made to support retaining precedents such as *Plessy v. Ferguson* and *Dred Scott v. Sanford*, such as by contending that African-Americans benefited from slavery and Jim Crow laws. For instance, the lower court decision in *Brown v. Board of Education,* famously reversed by the United States Supreme Court, had upheld school segregation not on grounds that African-Americans were an inferior race, but because of the purported benefits that African-Americans received from segregation and the separate-but-equal regime that were not afforded to whites, such as how "the school district transports colored children to and from school free of charge" while "[n]o such service is furnished to white children."[15]

IV. THE ROLE OF THE AMERICAN BAR ASSOCIATION

It is the mission of the American Bar Association to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, and to work for just laws, including human rights.[16] As the voice of the legal profession in the United States, the ABA is uniquely situated to recognize the "rotten foundation" of the *Insular Cases* and support efforts to overrule the *Insular Cases* and their "territorial incorporation doctrine."[17]

The ABA, however, possesses a special obligation to adopt this as ABA policy. One of the architects of the racist legal reasoning that formed the analytical foundation for the result of the *Insular Cases* was Simeon Baldwin, a former ABA President who is also widely credited as the primary founder and "Father" of the ABA. Baldwin is widely credited as having "fed the doctrine that encouraged these cases."[18] In an article

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[11] *See, e.g., Friend v. Reno*, 172 F.3d 638 (9th Cir. 1999); *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994); *Sakamoto v. Duty Free Shoppers, Ltd*., 764 F.2d 1295 (9th Cir. 1985).
[12] *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984).
[13] *See Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015); *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021).
[14] *Fitisemanu*, 1 F.4th at 870.
[15] 98 F.Supp. 797 (D. Kan. 1951), *rev'd*, 349 U.S. 294 (1955).
[16] *See* 2008A121.
[17] *Vaello-Madero*, 142 S.Ct. at 1556 (Gorsuch, J., concurring).
[18] Paola Marie Sepulveda-Miranda, *Second-Class Health in the Absence of Self-Determination and Governance: The Effect of Colonial Governance Over the Healthcare System of Puerto Rico in Comparison to Hawaii and Massachusetts*, 14 NE. U. L. REV. 491, 514 (2022).

published in the *Harvard Law Review,* Baldwin wrote:

> Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities from the sharp and sudden justice — or injustice — which they have been hitherto accustomed to expect, would, of course, be a serious obstacle to the maintenance there of an efficient government.[19]

Baldwin would also advocate against the conferral of constitutional rights on the people of these territories in an article published in the Yale Law Journal, where he wrote:

> Our recent extension of territory by including Hawaii has probably made all the natives of that country citizens of the United States. They are not, however, and probably never will be, the people of a state. Would it be wise to invest them with a right to bear arms, which they never enjoyed by force of a similar guaranty, under their former government? We may incorporate Puerto Rico and the Philippines. Would it be safe to extend to all their population these immunities which Americans rightfully claim as their proper birthright?[20]

These views were wrong then, and certainly remain wrong now. The ABA has long since moved beyond the racism of Baldwin and its other early leaders, and now stands as a champion for human rights and diversity and inclusion both within the legal profession, the United States, and the world. By adopting this resolution, the ABA will not just further its mission, but help remedy and undo the harm caused by Baldwin and his racist ideology.

V. CONCLUSION

> *The flaws in the* Insular Cases *are as fundamental as they are shameful. Nothing in the Constitution speaks of "incorporated" and "unincorporated" Territories. Nothing in it extends to the latter only certain supposedly "fundamental" constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.*
>
> \- Justice Neil M. Gorsuch[21]

The *Insular Cases* and their lower court progeny are one of the last vestiges of both American colonialism and the *Plessy*-era Supreme Court. This resolution highlights

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[19] Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899);
[20] Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 164 (1899).
[21] *Vaello-Madero*, 142 S.Ct. at 1554 (2022) (Gorsuch, J., concurring).

the ABA's strong support for the rights of territorial and indigenous peoples as well as its continued unwavering commitment to and support for human rights.

Respectfully submitted,

Sherry Levin Wallach, Esq.
President, New York State Bar Association

Alisha Udhwani, Esq.
President, Virgin Islands Bar Association

August 2022

GENERAL INFORMATION FORM

1. Summary of Resolution

This resolution provides that the American Bar Association recognizes that the United States Supreme Court's decisions in the *Insular Cases* and the "territorial incorporation doctrine" are relics of a colonial past, are contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence, rest on racial views and stereotypes that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession. It further provides that the American Bar Association supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," and dismantle the colonial framework they establish.

2. Indicate which of the ABA's Four goals the resolution seeks to advance (1-Serve our Members; 2-Improve our Profession; 3-Eliminate Bias and Enhance Diversity; 4-Advance the Rule of Law) and provide an explanation on how it accomplishes this.

This resolution advances Goals III and IV, in that the *Insular Cases* withheld constitutional rights to the people of the so-called "unincorporated" territories—virtually all of whom are racial minorities—because those 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."

3. Approval by Submitting Body

Approved by the New York State Bar Association on July 19, 2022.
Approved by the Virgin Islands Bar Association on July 5, 2022.

4. Has this or a similar Resolution been submitted to the House or Board previously?

No.

5. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

There are no existing Association policies that are directly relevant to the issues raised in this resolution. However, it is the mission of the ABA to increase public understanding and respect for the rule of law and the legal process, to hold governments accountable under the law, and to work for just laws, including human rights. Moreover, the ABA has repeatedly urged that Americans who reside in United States territories receive the same rights and benefits as those who reside in the fifty states and the District of Columbia. *See, e.g.,* 21M10D (supporting an interpretation of the Fourth Amendment which would preclude application of the border-search exception to travel to or from a United States

territory); 20A10B (supporting an interpretation of the Equal Protection Clause guaranteeing federal benefits to persons residing in territories on the same basis as those who reside elsewhere in the United States); 20A10C (opposing as violative of the Equal Protection Clause provisions of federal absentee voting act treating territories in a discriminatory manner); 20M10C (supporting an interpretation of the Citizenship Clause of the Fourteenth Amendment that recognizes all persons born in the territories as natural-born citizens of the United States); 14A10A (urging an amendment to 28 U.S.C. § 44(c) to grant each territory representation on its respective federal court of appeals); 99M107 (urging Congress to establish an Article III district court in the U.S. Virgin Islands).

6. If this is a late Report, what urgency exists which requires action at this meeting of the House?

N/A.

7. Status of Legislation (if applicable).

N/A

8. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

If adopted, this policy would support the filing of an *amicus curiae* brief in an appropriate case. The ABA would also support the passage of appropriate legislation consistent with the policy.

9. Cost to the Association (both indirect and direct costs).

None.

10. Disclosure of Interest.

None.

11. Referrals

ABA Coalition on Racial and Ethnic Justice
ABA Commission on Hispanic Legal Rights & Responsibilities
ABA Government & Public Sector Lawyers Division
ABA Section of Business Law
ABA Section of Criminal Justice
ABA Section on Civil Rights & Social Justice
ABA Section on International Law
ABA Section on State & Local Government Law
ABA Young Lawyers Division

12. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address.)

Anthony M. Ciolli
Past President, Virgin Islands Bar
PO Box 590
St. Thomas, VI 00804
340-774-2237
aciolli@gmail.com

13. Contact Name and Address Information. (Who will present the Resolution with Report to the House?

To be determined.

EXECUTIVE SUMMARY

1. **Summary of Resolution.**

This resolution provides that the American Bar Association recognizes that the United States Supreme Court's decisions in the Insular Cases and the "territorial incorporation doctrine" are relics of a colonial past, are contrary to the principles enunciated by the United States Constitution and subsequent civil rights jurisprudence, rest on racial views and stereotypes that have long been rejected and cannot be reconciled with basic constitutional and democratic principles or the values of the legal profession. It further provides that the American Bar Association supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," and dismantle the colonial framework they establish.

2. **Summary of the Issue which the Resolution addresses.**

In the *Insular Cases*, the Supreme Court of the United States held the United States Constitution—let alone its Bill of Rights—did not extend *ex proprio vigore* to the so-called "unincorporated" territories due to the race of their inhabitants. As such, to this day which constitutional rights extend to the people of these "unincorporated" territories remains a matter of legislative and judicial discretion.

3. **An explanation of how the proposed policy position will address the issue.**

This resolution supports efforts to overrule the *Insular Cases* and the "territorial incorporation doctrine," and dismantle the colonial framework they establish.

4. **A summary of any minority views or opposition internal and/or external to the ABA which have been identified.**

No minority or opposing views have been identified.

Exhibit 2 – Listing of Relevant Programming and Articles on the *Insular Cases* and the U.S. Territories

Links to recent programming produced by the Association on the "Insular Cases" and the U.S. territories.

These on-demand programs are accessible at the links below upon logging on to the NYSBA website. Materials are linked with the videos once accessed.

An Argument Against Second Class Citizenship in the U.S. Territories: A Movement for Equality and Overturning the Insular Cases
Presented Friday, April 1, 2022
https://nysba.ce21.com/ViewerUnAutheticatedLink?x=pTAJBuYUEII4ayREjLOL4A==&p=ikxj5w2ddq. (Please don't externally circulate this link – please use the following link for external circulation as the video is technically an on-demand CLE product: https://nysba.org/products/diversity-symposium-awards/).

America Has a Colonies Problem: Constitutional Rights and U.S. Territories (free)
Link to on-demand video (NYSBA login required): https://nysba.org/products/america-has-a-colonies-problem-constitutional-rights-and-u-s-territories/

2022 Constance Baker Motley Symposium - What do the Insular Cases, Voter Suppression Efforts and the Anti-CRT Movement Have in Common? (free)
Link to on-demand video (NYSBA login required): https://nysba.org/products/am2022-constance-baker-motley-symposium/
Link to agenda: https://nysba.org/am2022/annual-meeting-2022-constance-baker-motley-symposium/

NYSBA also produced a series of programming on "How You Can Lose Your Rights as an American Citizen".

Part 1 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-1/
Part 2 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-2/
Part 3 – https://nysba.org/products/how-you-can-lose-your-rights-as-an-american-citizen-part-3/

NYSBA articles touching on territorial issues:

What U.S. v. Vaello-Madero and the Insular Cases Can Teach About Anti-CRT Campaigns: https://nysba.org/what-u-s-v-vaello-madero-and-the-insular-cases-can-teach-about-anti-crt-campaigns/

Puerto Rico's 'Insular Cases': https://nysba.org/why-ny-court-of-appeals-judge-jenny-rivera-has-a-keen-interest-in-the-outcome-of-one-of-puerto-ricos-insular-cases/