

THE *INSULAR CASES*: A DECLARATION OF THEIR BANKRUPTCY  
AND MY HARVARD PRONOUNCEMENT

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Good afternoon. It is a pleasure to be with you today. I thank Dean Minnow as well as professors Neuman, Brown and Fallon for giving me the opportunity to share my thoughts with this gathering on the subject of the *Insular Cases*<sup>2</sup> and how they impact, negatively in my opinion, the relationship of this nation with the nearly 4 million of its citizens who reside in Puerto Rico. I will attempt to present my views on the unconstitutional condition that has been in place for one hundred and sixteen years within the time allotted to me. Needless to say, I am, of course, expressing my own opinions, for which no one else can or should be held accountable. I should add that I do not feel inhibited in expressing them publicly because, with some few exceptions which will become

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<sup>1</sup> A citizen of the United States residing in Puerto Rico who is a judge on the U.S. Court of Appeals for the First Circuit.

<sup>2</sup> See *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901) (holding that a vessel engaged in trade between Puerto Rico and New York is engaged in coastal trade and not foreign trade); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution); *Armstrong v. United States*, 182 U.S. 243 (1901) (invalidating tariffs imposed on goods exported from the United States to Puerto Rico after ratification of the treaty between the United States and Spain); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that the right of the President to exact duties on imports into the United States from Puerto Rico ceased after the ratification of the peace treaty between the United States and Spain); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that Puerto Rico and Hawaii were not foreign countries within the meaning of United States the tariff laws); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that, once Puerto Rico was acquired by the United States through cession from Spain, it was not a "foreign country" within the meaning of the tariff laws).

apparent before I finish, almost everything that I will say today has previously been stated by me officially, and thus publicly. Somewhat related to this caveat, and also for reasons that will become apparent later during the course of my comments, I should commence my remarks by stating that I was born a U.S. citizen in Puerto Rico, which is my home and where I have my residence and domicile.

Getting directly to the subject at hand, in a nutshell, the *Insular Cases* represent classic *Plessy v. Ferguson*<sup>3</sup> legal doctrine and thought that should be totally eradicated from present day constitutional reasoning. The *Insular Cases* were flawed when decided because (1) they directly clashed with our Constitution, (2) were disobedient to controlling constitutional jurisprudence in place at the time, and (3) contravened, without exception, every single historical precedent and practice of territorial expansion since our beginning as a nation, starting with the lands subject to the Northwest Ordinance of 1789<sup>4</sup> through our final continental expansion in 1848 as a result of the war with Mexico.<sup>5</sup> There is, of course, an additional, powerful reason why the *Insular Cases* should be disavowed by the Supreme Court; and that is because the principles that they promote run

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<sup>3</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>4</sup> Northwest Ordinance of 1781, 1 Stat. 50 (1789). ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 6 (1989) (“The Northwest Ordinance not only set forth the pattern of territorial development which exists even today but also stated the underlying principle of territorial evolution in U.S. law and tradition: that the goal of all territorial acquisition eventually was to be Statehood.”). The lands covered by the Northwest Ordinance were acquired as a result of the Treaty of Paris, ending the war for independence. Great Britain ceded its claims to all lands west of the Appalachian Mountains as far west as the Mississippi River, north to Canada, and south to Florida. *See* Definitive Treaty Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 stat. 80.

<sup>5</sup> Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (hereinafter the Treaty of Guadalupe-Hidalgo).

contrary to the express provisions of international treaties entered into by the United States, including but not limited to, the International Covenant on Civil and Political Rights (ICCPR), which has been the law of the land since its ratification by the Senate on June 8, 1992.<sup>6</sup> Lastly, but perhaps most important even in today's cynical world, the *Insular Cases* should be soundly rejected because they represent the thinking of a morally bankrupt era in our history that goes against the most basic precept for which this nation stands: *the equality before the law of all of its citizens*.

If I have given you the impression that I don't like the *Insular Cases*, I guess I'm making my point!

It is appropriate that this gathering take place here at Harvard, for it was here, and to a lesser extent at Yale, that we find the intellectual origins of both the *Insular Cases* and the discriminatory rules they purposely promoted to keep the several million residents of Puerto Rico, who in 1917 became American citizens, in an inferior colonial status. These policies did not come about by chance or accident, for as Rubin Frances Weston, in his book *Racism in U.S. Imperialism* convincingly states:

Those who advocated overseas expansion faced this dilemma: what kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the reconstruction period, an attempt at political equality for dissimilar races, or was it to be the southern 'counterrevolutionary' point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the negro to a status of second-class citizenship indicated that the southern point of view would prevail. The racism which caused the relegation

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<sup>6</sup> International Covenant on Civil and Political Rights, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (*ratified by the United States* June 8, 1992) (hereinafter the ICCPR).

of the negro to a status of inferiority was to be applied to the overseas possessions of the United States.<sup>7</sup>

There is ample evidence to support Weston's account. To give you just a small smattering, let me quote Simeon Baldwin, at the time a Yale law professor, in his article published in the Harvard Law Review in 1899. According to Baldwin:

[It would be unwise ] to give . . . . the ignorant and lawless brigands that infest Puerto Rico... the benefit[s] of [the Constitution].<sup>8</sup>

Let it be noted for the record that I object to his referring to my grandfather in such a fashion! He may have been a lawless brigand, but his IQ was high enough to get him into an ivy league school, whose name shall remain a secret with me.

Actually, at the time the eminent professor from Yale made this derogatory statement about Puerto Rico, nearly 400 years had passed since the founding of Puerto Rico's capital city, San Juan, in 1509. This means that Puerto Rico's capital city predates the pilgrims landing here in Massachusetts by over 100 years. And when U.S. troops landed in Puerto Rico in 1898 -- the year before Professor Baldwin characterized Puerto Ricans as ignorant and lawless -- Puerto Ricans were already full-fledged Spanish citizens with equal voting rights as other Spanish subjects, including representation in the Spanish parliament where Puerto Rico was entitled to 15 delegates and five senators. Notably, these are rights which we have yet to achieve after 116 years of United States sovereignty.

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<sup>7</sup>RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 15 (1972).

<sup>8</sup>"The Constitutional Question Incident to the Acquisition and Government by the United States of Island Territories," 12 HARV. L. REV. 393, 401 (1899).

Articles like Professor Baldwin's, including those by Harvard's own professors Christopher Langdell,<sup>9</sup> Abbott Lowell<sup>10</sup> and James Thayer,<sup>11</sup> provided the academic ammunition for what eventually became the *Insular Cases* doctrine. This doctrine, concocted out of thin air, created two kinds of territories: first, incorporated territories, which as it turned out, were all those acquired prior to the Spanish American War and included Hawaii and Alaska, and second, unincorporated ones, all of which happened to have been annexed after the Spanish American War, and which included Puerto Rico, the Philippines, Guam, and later, the U.S. Virgin Islands (purchased from Denmark in 1917). It is thus clearly apparent that the *Insular Cases* doctrine -- which held that the Constitution did not apply in full force to the unincorporated territories and instead, extended only a certain subset of rights deemed fundamental by the Court -- was tailor made to squarely fit into the racist views that, as I have described, were prevalent in U.S. society at the time, particularly in the circles of power.

Importantly, under the *Insular Cases* doctrine, Congress was bestowed with "plenary power" to govern both kinds of territories pursuant to the so-called Territorial Clause of the Constitution.<sup>12</sup> Thereafter, in a corollary to the *Insular Cases*, the Supreme Court ruled in 1922 in *Balzac v. Porto*

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<sup>9</sup> C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899) (discussing the definition and scope of the term "United States").

<sup>10</sup> Abbott Lawrence Lowell, *the Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899) (examining the legal status of territories acquired by conquest or cession, and differentiating between territory acquired with the intention of incorporating it into the United States and territory acquired without that purpose).

<sup>11</sup> James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

<sup>12</sup> U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States...").

*Rico*<sup>13</sup>, that not even the 1917 grant of U.S. citizenship to the inhabitants of Puerto Rico changed their constitutional rights as long as they remained residents of Puerto Rico. According to Chief Justice Taft, who authored *Balzac*, locality was what determined which constitutional rights were bestowed upon individuals, not their individual status as citizens. In the case of Puerto Ricans, all that the grant of citizenship meant according to Taft was that they could travel to the mainland and there, upon establishing residency, exercise the full rights of other U.S. citizens. The Court in *Balzac* ultimately concluded that the right to trial by jury was not a fundamental right applicable to the citizens who resided in Puerto Rico. In so ruling, the Court totally bypassed its holdings in *Mankichi v. Hawaii*,<sup>14</sup> and *Rasmussen v. United States*,<sup>15</sup> in which it had ruled that the granting of U.S. citizenship to the inhabitants of Alaska and Hawaii, respectively, upon acquisition of these territories indicated a desire to incorporate these territories into the United States, so the full application of the Constitution to their inhabitants was required, including the right to trial by jury.

I realize that my calling the United States a "colonial" nation is repugnant to most Americans, and thus, when I proceed to make this claim, I do so with some hesitation. As Americans, we do not consider ourselves to be within this anachronistic category. I thus apologize if my statement causes a modicum of discomfort among some of the members of this audience, but do you think that the reality of this fact of life is any less repugnant to those of us who find ourselves in the degrading status of second-class citizens, merely because we reside *as citizens* of the United States in a piece of land that, although belonging to the United States and owing allegiance thereto,

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<sup>13</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>14</sup> 190 U.S. 197 (1903).

<sup>15</sup> 197 U.S. 516 (1905).

has been declared by judicial fiat to be an unequal part of this nation? How do you think this status sits with me who, although sitting on the second highest federal court of the nation, often deciding issues of national importance, am denied the right to vote for those who occupy the national offices who decide my destiny, and pass the laws that I enforce and permeate every facet of my daily life when I return to Puerto Rico tomorrow, or after I sit here in Boston every month? Leaving aside all the legal niceties that we are discussing today, does that make any sense to you? It certainly does not to me.

Let me digress a moment and explain why Puerto Rico's relationship to the United States is a colonial one, regardless of the label we may use, and there have been many, including: "territory," unincorporated territory," my favorite, "the state of eternal inequality," or, as Chief Justice Fuller described it in his masterful dissent in *Downes*, "a disembodied shade."<sup>16</sup> Our official English title, "Commonwealth of Puerto Rico" is translated as "estado libre asociado" or "free associated state," a legal oxymoron, with emphasis on the moron, if ever I have heard one.

I will explain why the relationship between Puerto Rico and the United States is a colonial one and why the resolution of this conundrum that is Puerto Rico's colonial condition, is of prime relevance to the invalidation of the *Insular Cases*, and all that emanates from them.

Unesco's *Dictionary of Social Sciences* defines a "colony" as "[a] territory, subordinated in various ways - political, cultural, or economic - to a more developed country[.] [in which] supreme legislative power and much of the administration rest[s] with the controlling country, which

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<sup>16</sup> *Downes v. Bidwell*, 182 U.S. 244, 372 (Fuller, C.J., dissenting).

[is] usually of a different ethnic group from the colony."<sup>17</sup> This definition, which is one that is generally accepted, fits the U.S.- P.R. relationship like a glove. Because of the limited time that I have, I will only cover the issue of political subordination, although the economic subordination of Puerto Rico to U.S. interests is equally overwhelming.

As I have stated, the U.S. citizens who reside in Puerto Rico have no vote for national offices nor do they have any voting Congressmen in either house. The office of Resident Commissioner, our single so-called representative in Congress, has no vote before that body in the enactment of legislation. This office is, constitutionally speaking, a sad commentary on a nation that prides itself with being the bastion of democracy, and thus, in polite terms, the office is "politically impaired."

Were we treated equally and in the same manner as the rest of the nation, with our present population, we would have a larger Congressional delegation than more than half of the states, and that is a principal reason why Congress keeps us in our present colonial condition.

I will never forget the meeting that I had several years ago with Senator Chafee of Rhode Island when I was the Chief Judge of the Circuit, and met with him on matters related to our court building in old San Juan. At the time, there was pending in Congress one of the interminable Puerto Rico status proposals. And the Senator asked me for my views on what the ultimate status should be. I expressed my well-known personal views, to which he retorted: "I don't know. I come from one of the original 13 colonies. We have 2 senators and one Congressman. If Puerto Rico becomes

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<sup>17</sup> See A DICTIONARY OF THE SOCIAL SCIENCES 102 (Julius Gould & William Kolb eds., 1964) (source sanctioned by UNESCO).

a state, you'll have two senators also, and seven or eight Congressmen, and they'll probably all be democrats! I don't know if I can go for that."

The federal bureaucracy in Puerto Rico follows suit. It is appointed, controlled and led from afar, in a place where we have no political clout, and where we who are without electoral significance must go hat in hand asking for charity. We are at their mercy. "Plenary power," is how the Courts have described Congress's power over us under the *Insular Cases*, which again, in this era where false labeling is commonplace, means "practically unfettered colonial power."

Regarding political subordination, can there be any question that Puerto Rico and the U.S. citizens who reside therein are totally subordinated politically to the United States?

Particularly irritating, to say the least, but illustrative, are two fairly recent cases that rely on the *Insular Cases* as the legal basis for upholding the unequal treatment of Puerto Ricans. In the first case, *Califano v. Torres*,<sup>18</sup> a woman living in Connecticut qualified to receive supplemental security income, or "SSI," as this program is cryptically labeled.<sup>19</sup> SSI is a Social Security program that grants benefits to qualified aged, blind and disabled persons. After qualifying for SSI, the woman found her benefits withdrawn when she moved from Connecticut to Puerto Rico because the Social Security statute only granted SSI benefits to residents of the "United States,"<sup>20</sup> which definition included only the states of the union. The Court, in approving the unequal treatment as authorized by the *Insular Cases*, gave three grounds as justifying this treatment: first, that Puerto Rican residents did not "contribute to the public treasury," a statement that should be irrelevant considering

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<sup>18</sup> 435 U.S. 1 (1978).

<sup>19</sup> 86 Stat. 1465, 42 U.S.C. § 1381 et seq.

<sup>20</sup> 42 U.S.C. §1382c(E).

that the U.S. residents of Puerto Rico fully contribute to the Social Security system. Second, the Court ruled that the cost of giving SSI benefits to qualified aged, blind and disabled citizens residing in Puerto Rico would be great, estimated at \$300 million per year, a factor that is not usually determinative when correcting a constitutional violation and that I find incredible considering the number of residents of Puerto Rico that would qualify for those benefits.<sup>21</sup> And most disturbing of all, the Court's third point, related to its second, was that "inclusion of [Puerto Rico residents in] the SSI program might seriously disrupt the Puerto Rican economy."<sup>22</sup> This is an outrageous reason for denying needy citizens benefits that were provided nation-wide, an argument that is best answered by quoting Justice Marshall's *riposté* in *Harris v. Rosario*,<sup>23</sup> a similar case involving the aid to families with dependent children program in which he said:

This rationale [that giving larger economic relief to the needy would disrupt the Puerto Rican economy] has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be the greatest, simply because otherwise the relative poverty of the recipients compared to other persons in the same geographic area will somehow be upset. Similarly, reliance on the fear of disrupting the Puerto Rican economy implies that Congress intended to preserve or even strengthen the comparative economic position of the states vis-a-vis Puerto Rico...

Setting aside for a moment the subject of where we are today, I would like to briefly turn now to the question of how we got here, which also explains why the *Insular Cases* are flawed. The historical context in which these decisions were crafted speaks volumes as to how they came about.

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<sup>21</sup> See *Rozecki v. Gaughan*, 459 F.2D 6 (1st Cir. 1972).

<sup>22</sup> *Califano v. Torres*, 435 U.S. at 4 n.7.

<sup>23</sup> *Harris v. Rosario*, 446 U.S. 651, 655-56 (1980).

Because my time is limited, and the first panel ably covered this subject, I will only mention some buzz words descriptive of the most important subject-headings in this regard: (1) "manifest destiny," which was the mantra of Darwinian imperialism that promoted American territorial expansion under a mixed bag of geopolitical theory, religious righteousness, and economic entrepreneurship, was at its peak in public opinion and governmental circles before and during the time the *Insular Cases* were decided, (2) the Civil War had just ended, and the nation wanted to focus its attention away from that horrendous fratricidal conflict, (3) *Plessy v. Ferguson*, decided in 1896 by almost the same court as the *Insular Cases*, provided the immediate backdrop and a legal basis for disparate racial treatment of persons under the jurisdiction of the United States, (4) it was argued, although in my opinion not in a constitutionally significant way, that the newly-conquered territories were different from those previously acquired in that they were non-contiguous to the mainland U.S., separated by large expanses of oceans, and home to different races, languages, religions and cultures than the continental U.S.

Nevertheless, I should point out that, in fact, these cases were only decided by a bare 5-4 plurality, in which the opinions of the dissenting justices received the largest number of unanimous votes. The shaky grounds of this plurality led president Theodore Roosevelt in 1902, at the retirement of Justice Horace Gray, a member of the plurality, to ask Massachusetts Senator Henry Cabot Lodge to inquire from Oliver Wendell Holmes, then being considered for appointment to substitute Justice Gray, about his views on the outcomes of these cases. It was only after the

Senator assured that Holmes agreed with their outcome that the President appointed him to the Court.<sup>24</sup>

With this brief historical background in mind, we come to the constitutional and legal failings of the *Insular Cases*, what I would label their original sin or *ab initio* infirmity. We commence with the language of the treaty by which the United States acquired Puerto Rico, that is, Article IX of the Treaty of Paris, which states that:

[T]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States shall be determined by the Congress.<sup>25</sup>

This is clearly in direct contravention to the Constitution, a failing which was not only vehemently pointed out by Justice Harlan in his dissent in the key *Insular Case* of *Downes v. Bidwell*,<sup>26</sup> but which has been equally emphasized by Justice Kennedy in the recent Guantanamo case of *Boumediene*.<sup>27</sup> Concluding that a treaty cannot trump the Constitution does not require the IQ of a rocket scientist. This very point was summed up by Justice Harlan in *Downes* when he stated that:

The 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

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<sup>24</sup> See G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 298-302 (Oxford Univ. Press 1993); LIVA BAKER, *JUSTICE FROM BACON HILL* 346-49 (Harper Collins 1991); SHELDON M. NOVICK, *HONORABLE JUSTICE; THE LIFE OF OLIVER WENDELL HOLMES* 234-37 (Little, Brown & Co. 1989).

<sup>25</sup> Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343.

<sup>26</sup> *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (J. Harlan, dissenting).

<sup>27</sup> *Boumediene v. Bush*, 553 U.S. 723, 727 (2008).

Congress chooses to accord them,-is wholly inconsistent with the spirit and genius, as well as with the words of the Constitution.<sup>28</sup>

To this, Justice Kennedy cogently added in *Boumediene*:

The 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.<sup>29</sup>

The further fact is that there is nothing in the text *or* legislative history (e.g.,the *Federalist Papers*) of the Constitution in which the word "colony" is even mentioned,<sup>30</sup> much less in which colonies or colonial government are made a part of our governmental structure. This is not surprising considering that after our long, cruel, and exhausting war to break our own colonial chains, the idea that those who recently broke those chains would turn around and consider establishing that same method of government as a component of their new nation, would have been unethical to say the least.

That the so-called "Territorial Clause,"<sup>31</sup> on which the *Insular Cases* court relied as the source of power allowing Congress to create an American colonial empire, did not in fact or law grant such power was clearly established by the Supreme Court in two cases decided before the *Insular Cases*.

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<sup>28</sup> *Downes*, 182 U.S. at 380.

<sup>29</sup> *Supra*, n.12.

<sup>30</sup> This statement is not totally accurate in that in *Federalist 43*, Madison talks about the further admission of colonies as states, namely Canada, but not in the sense of the United States itself contemplating having colonies. THE FEDERALIST NO. 43 (JAMES MADISON).

<sup>31</sup> *See* n.11.

In the first of these, *Loughborough v. Blake*,<sup>32</sup> the Supreme Court decided the same issue as came before it in the leading *Insular Case*, *Downes v. Bidwell*, namely, whether the Constitution applied in a territory. In *Loughborough*, which dealt with the District of Columbia, Chief Justice Marshall in clear and unflinching language stated that the term "United States," when used in the Constitution, included both the states and the territories, and that "[t]he District of Columbia, or territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania," and thus the Constitution applied in the territories as well.<sup>33</sup>

The applicability of the Constitution in a territory came up again thirty-six years after *Loughborough* in *Dred Scott v. Sandford*, this time in relation to the Due Process Clause of the Fifth Amendment.<sup>34</sup> Although the *Scott* case is discredited for other reasons, it nevertheless established two important constitutional principles related to the subject of today's discussion. The first principle is that the United States lacks constitutional authority to have colonies or to hold territory in a colonial condition. As Chief Justice Taney stated:

There is certainly no power given by the Constitution to the federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new states...

[No] power is given to acquire a territory to be held and governed [in a] permanently [colonial] character.<sup>35</sup>

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<sup>32</sup>18 U.S. 317 (1820).

<sup>33</sup>*Id.* at 319.

<sup>34</sup>*Dred Scott v. Sandford*, 60 U.S. (19 HOW.) 393 (1856).

<sup>35</sup>*Id.* at 446.

The second principle established by *Scott* relates to the reach of the Territorial Clause,<sup>36</sup> which as you are aware by now is the alleged source for the exercise of plenary power (ie., colonial power) by Congress over Puerto Rico. The *Scott* court had this to say about the Territorial Clause:

[P]laintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,' but, in the judgement of the Court, that provision .... was intended to be confined, to territory which at [the] time [of its independence from great britain] belonged to, or was claimed by, the United States.... and can have no influence upon a territory afterwards acquired from a foreign government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.<sup>37</sup>

Although there are clearly many problems with the *Insular Cases* that warrant discussion, one point that is often overlooked is the fact that these cases have been applied in a selectively discriminatory manner by the Court, even in relatively modern times. A prime example of this is the case of *Reid v. Covert*<sup>38</sup> and its companion case of *Kinsella v. Krueger*,<sup>39</sup> involving the murder convictions of two accompanying wives of servicemen, tried by courts martial in England and Japan, respectively, pursuant to the then-prevalent code of military justice. The convictions by these military tribunals were overturned by the Supreme Court for failure to afford the accused the constitutional benefits of indictment by a grand jury and trial before a petit jury of twelve of their peers. Notably, the Court refused to apply the *Insular Cases* /*Balzac* doctrines. In rejecting the

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<sup>36</sup> See n.15, *ante*.

<sup>37</sup> *Scott*, 60 U.S. at 432.

<sup>38</sup> 351 U.S. 487 (1856), on reh., 354 U.S. 1 (1957).

<sup>39</sup> 351 U.S. 470 (1956).

claim by the government that the convictions should stand under the *Insular Cases*, Justice Frankfurter, in the preliminaries to the rehearing in which the convictions were reversed, stated that this doctrine "represent[ed], historically and juridically, an episode of the dead past about as unrelated to the world of today as the one horse shay to the latest jet plane."<sup>40</sup> I commend to you to read the plurality opinion of Justice Black which gave hope for an early demise of the *Insular Cases*, an expectation which has come to naught as the latter court has continued to breathe life into these cases.

Continuing with the subject of treaties that are relevant to the topic at hand, I turn to the ICCPR,<sup>41</sup> by which the United States undertook "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the [right to vote], without distinction of any kind,"<sup>42</sup> and agreed "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present covenant, to adopt such laws or other measures as may be necessary to give effect to [that right]."<sup>43</sup>

However, the executive branch has vigorously opposed the enforcement of these treaty rights, a position with which the Courts have repeatedly sided,<sup>44</sup> holding that this treaty is not self-executing and thus does not create private causes of action. This outcome clearly ignores the fact that the treaty establishes the United States' affirmative obligation "[t]o ensure that any person

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<sup>40</sup> *Id.* at 482.

<sup>41</sup> *See* n.6.

<sup>42</sup> *Id.* ART. 2(1).

<sup>43</sup> *Id.* ART. 2(2).

<sup>44</sup> *See Igartua de la Rosa v. United States*, 417 F. 3d 145 (1st Cir. 2005)(en banc).

whose rights ... Recognized [in the ICCPR] are violated shall have an effective remedy,"<sup>45</sup> to provide that such person "shall have[ his/her] right determined by a competent judicial . . . authorit[y]," and to "develop the possibilities of judicial remed[ies]."<sup>46</sup> Unfortunately, the Courts of the United States have refused to enforce this treaty domestically. But these outcomes notwithstanding, this treaty is still the law of the land, even if the Courts refuse to allow individuals to enforce these rights.

At the time of ICCPR's ratification by the Senate, the United States Department of State made the affirmative representation that "[i]n general, the substantive provisions of the [ICCPR] are consistent with the letter and spirit of the United States Constitution and laws, both state and federal."<sup>47</sup> This diplomatic double-speak, not to call it by its true name, is sadly in-keeping with the now more than 100-year history of the three branches of government turning a blind eye to the ongoing inequities to which the people of Puerto Rico have been and continue to be subjected.

Although this completes my official presentation regarding the *Insular Cases*, I am compelled to add a brief postscript, which I have pompously labeled "my Harvard pronouncement."

In 1974 Justice Hugo Black stated the case more eloquently than I possibly could:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.<sup>48</sup>

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<sup>45</sup> ICCPR ART. 2(3)(A).

<sup>46</sup> *Id.* ART. 2(3)(B).

<sup>47</sup> S. EXC. REP. NO. 102-23, at 10 (1992).

<sup>48</sup> *Wesberry v. Sanders*, 376 U.S. 1,17 (1964).

Given that the U.S. citizens of Puerto Rico have no political power and that the Courts have turned their backs on Puerto Ricans' rights as citizens, they may soon have no alternative but to look for other peaceful avenues of obtaining relief from these enduring inequities. This is particularly the case given that in a recent referendum, a majority of the Puerto Ricans who voted rejected the continuation of our denigrating colonial status. It is now an unassailable fact that what we have in the U.S.-P.R. relationship is government without the consent or participation of the governed. I cannot imagine a more egregious civil rights violation, particularly in a country that touts itself as the bastion of democracy throughout the world. This is a situation that cannot, and should not, be further tolerated.

Although there is pending before Congress possible legislation to break this Gordian knot, unfortunately, judging by past history and considering what we have seen in recent times, one would have to be optimistic beyond reality to expect that anything significant will emerge in the foreseeable future.

Given the prospect of the continuation of our interminable status quo, Puerto Ricans may reasonably come to believe that the time has come to take some more noticeable action than in the past, because there exists, and has existed, a major civil rights issue that has been lingering for more than one hundred years and does not seem to get resolved by the exercise of only patience and good manners. One step that the U.S. citizens of Puerto Rico may consider is gradually engaging in time-honored civil rights actions, of which there are many successful examples. One that comes to mind, because economics, that is, hitting the pocket book, seems to bring about results, is the use of economic boycotts to attract attention to ongoing civil rights violations. This is a mode of protest that has been used successfully to correct civil rights violations, starting with the Boston Tea Party,

to Mahatma Gandhi's march to the sea and boycott to protest the salt tax by the British in India, to the bus boycott in Montgomery to protest segregation and Rosa Park's treatment by the state authorities, to the California grape boycott, etc., etc.

This is not a call for drastic action, but rather for recognition of the simple fact that Puerto Rico's consumers represent one of the most important markets for United States products, with its citizens constituting the largest per capita importers of U.S. goods in the world,<sup>49</sup> with \$35 billion in annual retail sales alone.<sup>50</sup> Additionally, some of the U.S.-owned companies conducting business in Puerto Rico are among the most successful in the entire nation, against which concerted economic action would quickly attract attention.

When we add to the almost 4 million consumers in Puerto Rico, the equal number of Puerto Ricans residing throughout other parts of the United States, we can begin to imagine the potential scale of such actions. And of course, we ought not forget the larger Latino constituency, which is now the largest minority in the United States, and which could be sympathetic to correcting the inequalities to which the U.S. citizens of Puerto Rico are being subjected, merely because they reside in Puerto Rico. Lack of political clout can be substituted by economic impact, which in many cases is equally or even more effective. There are, of course, others who may be sympathetic to the plight of the U.S. citizens residing in Puerto Rico because of their own experiences with inequality, so the number of possible actors is truly impressive.

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<sup>49</sup> JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* 85 (2000). Considered as a whole, "Puerto Rico ranks among the 10 largest world customers for mainland U.S. Products." KOGAN PAGE, *AMERICAS REVIEW* 2003-2004, 281-82 (2003).

<sup>50</sup> See *Puerto Rico Remains a Retail Mecca*, *CARIBBEAN BUSINESS*, available at [http://www.caribbeanbusinesspr.com/cbdirectory/cb\\_retail.php?cat\\_id=13](http://www.caribbeanbusinesspr.com/cbdirectory/cb_retail.php?cat_id=13).

I believe economic pressure is a logical avenue to consider, because if experience teaches us anything, it is that when there is a just cause that the citizens can sympathize with, combined with national attention and economic concerns, the chances of ultimate success increase exponentially. Thus, because the judiciary and legislature continue to turn a blind eye to the present injustice, we should not be surprised if Puerto Ricans seek a more sympathetic, and powerful, audience.

Mine is but an idea that I place on the public forum. How these civil rights actions might be carried out, if at all, is beyond my expertise or power. But the suggested ideas bear consideration by those in a position to transform them into action.

There is now in circulation a postage stamp that has as its logo, "equality forever." Unfortunately, we as a nation have yet to catch up to the postal department.

I thank you for your patience in listening to me.