



The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai‘i, and the Philippines

By Hon. Gustavo A. Gelpí

In 1898, the United States became an overseas empire. With the signing of the Treaty of Paris ending the Spanish-American War, the former Spanish territories of Guam and the Philippines in the Pacific Ocean and Puerto Rico in the Atlantic Ocean came under the American flag. Simultaneously, the Republic of Hawai‘i, by way of treaty, relinquished its sovereignty in exchange for territorial status by virtue of what is commonly known as the Newlands Resolution.¹

For more than 100 years, the Northwest Ordinance of 1789 provided the path that newly acquired U.S. territories followed: Congress would initially appoint a governor and judges for the territory and also establish civil rights therein. When the territorial population exceeded 5,000 adult males, voters would elect a legislature and send a nonvoting delegate to Congress. Finally, when the territory or division thereof reached a population of 60,000, the territory would petition for statehood and eventually be admitted to the Union.

The arrival of the 20th century witnessed the awakening of rampant racist and imperialist sentiment toward the inhabitants of the newly acquired island possessions. The American expansionist paradigm, in turn, would no longer be followed. Members of the U.S. Congress and even the President himself openly expressed their feelings of American superiority over territorial inhabitants. Rep. Thomas Spight of Mississippi, for example, commented that the Filipinos, who “[are] Asiatics, Malays, negroes and of mixed blood have nothing in common with us and centuries cannot assimilate them. . . . They can never be clothed with the rights of American citizenship nor their territory be admitted as a State of the American Union.” His colleague, Rep. Champ Clark of Missouri, spoke of Hawai‘ians in a similar demeaning tone: “How can we endure our shame, when a Chinese Senator from Hawai‘i, with his pig-tail hanging down his back, with his pagan joss in his hand, shall rise from his curule chair and in pidgin English proceed to chop logic with George Frisbie Hoar or Henry Cabot Lodge.”²

Matters fared no better in the U.S. Senate, as Sen. William Bate of Tennessee remarked: “[B]eware of these mongrels

of the East, with breath of pestilence and touch of leprosy. Do not let them become part of us with their idolatry, polygamous creeds and harem habits.” And Sen. Albert Beveridge of Indiana sounded just like the leader of the future Third Reich: “God has not been preparing the English-speaking and Teutonic peoples for a thousand years for nothing but vain and idle self-contemplation and self-admiration. No! He has made us the master organizers of the world to establish a system where chaos reigns. He has made us adept in government that we may administer government among the savage and servile peoples.”³

On Sept. 12, 1901, President William McKinley died after being shot days earlier at the Pan-American Trade Exposition in Buffalo, N.Y. Vice President Theodore Roosevelt, former Rough Rider and hero of the Battle of San Juan Hill in Cuba during the Spanish-American War, succeeded him in office. Roosevelt also considered the inhabitants of the new American possessions inferior beings: “Besides acting in good faith, we have acted with good sense, and that is also important. We have not been frightened or misled into giving to the people of [Puerto Rico] a form of government unsuitable to them. While providing that the people should govern themselves as far as possible we have not hesitated in their own interests to keep the power of shaping their destiny.” At the conclusion of his presidency, he also spoke about the Filipinos in a derogatory manner: “In our treatment of the Filipinos we have acted up to the highest standard that has yet been set at marking the proper way in which a powerful and advanced nation should treat a weaker people.”⁴

The highest court of the land, whose justices had decided *Plessy v. Ferguson* only years earlier (in 1896), added insult to injury. In a series of cases decided from 1901 to 1905—known as the “Insular Cases”—the U.S. Supreme Court constitutionally justified imperialist policy toward the territories of Hawai‘i, Puerto Rico, and the Philippines.⁵ From this point on, as a matter of “constitutional” precedent rather than congressional policy, the Northwest Ordinance was de facto repealed. In its place, the Court

devised the doctrine of “territorial incorporation,” according to which two types of territories exist: *incorporated* territory, in which the Constitution fully applies and which is destined for statehood, and *unincorporated* territory, in which only “fundamental” constitutional guarantees apply and which is not bound for statehood.

President Roosevelt clearly favored the Court’s imperialist groundwork. The initial Insular Cases, however, were decided by a 5-4 plurality. When Justice Horace Gray retired, it became paramount for Roosevelt to fill the vacancy with a candidate who would uphold the Court’s precedent. Oliver Wendell Holmes was his man. Letters to and from Roosevelt to the U.S. senator from Massachusetts, Henry Cabot Lodge, are evidence of Holmes’ commitment to the Insular Cases policy as a condition of his appointment. Holmes joined the Court in 1902 and thereafter voted consistently with the majority in support of the doctrine.⁶

The ratio decidendi for the novel judicial territorial policy of the Insular Cases was laid forth in the Court’s 1901 decision in *Downes v. Bidwell*: “It is obvious that in the annexation of outlying and distant possessions grave questions will arise from the differences of race, habits, laws and customs of the people, and from the differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race or by scattered bodies of native Indians.”

By virtue of this judicial constitutional fiat, the U.S. territories and their inhabitants have now for over a century been treated in an anomalously separate and unequal manner. For example, in 1901, the Court held that the Uniformity Clause of the Constitution, which provides that “all duties, imposts and excises shall be uniform throughout the United States” did not apply to unincorporated territories. After that, in 1903 and 1922, the Court held that citizens of the unincorporated territories of Hawai’i and Puerto Rico were not entitled to indictment by grand jury nor trial by jury, as these were not fundamental rights. Following in these footsteps, in 1924, the Puerto Rico Supreme Court, whose members themselves were presidential appointees at that time, went so far as to hold that the Nineteenth Amendment, which grants suffrage rights to women, was not a fundamental right. Hence, women in Puerto Rico were not entitled to vote at the time. In 1978 and 1980, the Insular Cases were again relied upon by the Supreme Court when it dismissed constitutional challenges against significant discrimination in Social Security and federal welfare programs to U.S. citizens residing in Puerto Rico.⁷

The Supreme Court’s interpretation of its own concocted doctrine has been fraught with irreconcilable inconsistencies. In the early Insular Cases, the Court held that Hawai’i, Puerto Rico, and the Philippines were unincorporated territories when they were acquired in 1898. However, in *Hawai’i v. Mankichi*, the Court concluded that, by virtue of the Hawai’i Organic Act of 1900, which conferred U.S. citizenship to native Hawaiians, the territory became incorporated. The inhabitants of Puerto Rico, by virtue of their 1917 Organic Act, likewise became U.S. citizens. However, in *Balzac v. Porto Rico* decided in 1922, the Supreme Court

contrariwise held that this identical congressional act did not “incorporate” Puerto Rico. Justifying such illogical ruling, the Court, in a 9-0 opinion penned by Justice William Howard Taft (and 81-year-old Oliver Wendell Holmes, concurring in the opinion), described the Filipinos and Puerto Ricans as “living in compact and ancient communities, with definitely formed customs and political conceptions.” Justice Taft also concluded that “[Puerto Rico is a] distant ocean communit[y] of a different origin and language from those of our continental people.”⁸ Taft was an offspring of American imperialist policy: a former U.S. President from 1909 to 1913, secretary of war from 1904 to 1908, and governor of the Philippines from 1901 to 1904. During his gubernatorial term, a major insurrection against American dominance broke out in the Philippines, and thousands of American soldiers lost their lives or were injured—hence, Taft’s distaste for the territorial populations.

Congressional treatment of U.S. territories sharply varied following the Insular Cases decisions. In the Philippines, unlike in Hawai’i and Puerto Rico, Congress never established a U.S. territorial court. Congress also did not confer U.S. citizenship to Filipinos and passed organic acts in 1916 and 1935, which would culminate in the independence of the Philippines in 1946.

Hawai’i remained an incorporated U.S. territory from 1900 until its admission as a state in 1959. Throughout this period Hawaiians were U.S. citizens and the state had a U.S. territorial court. The Hawaiian Constitution was approved by Congress at the time the state was admitted to the union. Upon statehood, an Article III U.S. district court was established. Interestingly, Palmyra Atoll, an uninhabited part of the former territory of Hawai’i was segregated by Congress and not made part of the new state. Palmyra Atoll today retains its incorporated status.

The case of Puerto Rico, however, is quite more complex and perplexing, to say the least. In 1952, seven years before the approval of Hawai’i’s Constitution and admission as a state, Congress approved Puerto Rico’s Constitution, which provided for a republican form of government, thus establishing the Commonwealth of Puerto Rico. Notwithstanding, coetaneous with this act, Congress did not admit Puerto Rico into the union as it would do when it approved Hawai’i’s Constitution. Rather, as House Majority Leader John McCormack would put it, Puerto Rico became “a new experiment; it is turning away from the territorial status; it is something intermediary between the territorial status and statehood.” A decade and a half later, in 1966, Congress transformed the U.S. territorial court in Puerto Rico into an Article III U.S. District Court “because the Federal District Court in Puerto Rico ‘is in its jurisdiction, powers and responsibilities the same as the U.S. District Courts in the (several) states.’”⁹ To date, this court, where the author of this article sits, is the only Article III court to be created by Congress for any of the overseas territories acquired by the United States since 1898, including Guam, American Samoa (acquired in 1899), the U.S. Virgin Islands (acquired in 1917), and the Commonwealth of the Northern Marianas (which became a territory in 1976). Ironically, in Hawai’i, as in all other 49 states of the union, no Article III court was established until actual statehood.

Despite Puerto Rico's achievement of commonwealth status in 1952, even today the constitutionally denigrating ripple effects of the Insular Cases doctrine continue to foster a separate and unequal treatment to U.S. citizens therein. Since 1900, in the U.S. District Court, criminal defendants have enjoyed the fundamental right to trial by jury, as guaranteed by the Sixth Amendment. In 1922, however, this federal constitutional guarantee, as mentioned earlier, was held by the Supreme Court to be inapplicable to local prosecutions.¹⁰ It was not until the enactment of Puerto Rico's Constitution in 1952 that criminal defendants were, in fact, guaranteed any kind of *constitutional* right to a jury trial in the island's courts, instead of the statutory right that existed since 1901.

Similarly, in the U.S. District Court in Puerto Rico, civil litigants have since 1900 enjoyed the fundamental right to trial by jury, as guaranteed by the Seventh Amendment. Civil litigants in Puerto Rico's local court system today, on the other hand, are not afforded the same right by way of locally applicable constitutional or statutory mandate, as they are in the states and other U.S. territories. Instead, because of the traditions of Spanish civil law, civil cases are tried before the bench. However, this is not the case in Louisiana, which also has a similar legal heritage, but affords civil litigants the right to a jury trial.¹¹

Justice Sandra Day O'Connor, sitting by designation in the Third Circuit, recently commented that—

It is thus not surprising that, although Puerto Rico is not a state in the Federal Union, it ... seem[s] to have become a state within a common and accepted meaning of the word. ... It possesses a measure of autonomy comparable to that possessed by the States. Like the States it has a republican form of government, organized pursuant to a constitution adopted by its people, and a bill of rights. ... Like the States, Puerto Rico lacks the full sovereignty of an independent nation. ... As with citizens of States, Puerto Rican citizens are accorded United States citizenship and the fundamental protections of the United States Constitution.¹²

Today, the internal government of Puerto Rico established by its congressionally approved Constitution mirrors that of any state. The government of the commonwealth is divided into three co-equal branches. It has a governor, a bicameral legislature, and a Supreme Court. As in any state, the judgments of its court of last resort may be reviewed by the U.S. Supreme Court. As mentioned earlier, an Article III federal court sits on the island, and Puerto Rico is part of the First Circuit. All federal laws that are criminal and civil in nature apply to Puerto Rico, as they apply to the states, with very few limited exceptions. All federal executive branch agencies have a significant presence on the island, which lies within U.S. customs and immigration territory. The island's economic, commercial, and banking systems are integrated with those of the United States. Residents of Puerto Rico pay full federal payroll taxes to finance Social Security and Medicare, just as stateside residents do. Puerto Ricans also pay federal import and export taxes, and, when required by law, they file federal income tax returns.

Even more significant is the fact that, since the annexation of Puerto Rico by the United States, the territory's American citizens have formed an integral part of the nation's Armed Forces—not only in times of conflict but also in times of peace. Historically, Puerto Rico has been one of the jurisdictions with the largest per capita enlistment in the U.S. Armed Forces. A notable percentage of service members from the island have served with pride and honor and paid the ultimate price in the service and defense of the nation.

In light of the preceding discussion, it is unfathomable to understand how, in 2011, U.S. citizens in Puerto Rico (as well as in the territories) still cannot vote for their President and Vice President or elect their voting representatives in either house of Congress. (The author himself, while a stateside resident, voted in several presidential and congressional elections, only to involuntarily “relinquish” his right to vote by moving to Puerto Rico). This undemocratic predicament within a federalist government is but the historical outcome of the Insular Cases—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. To date, the U.S. Courts of Appeal for the First, Third, and Ninth Circuits, where all the U.S. territories lie, as well as the Second Circuit have rejected constitutional claims made by U.S. citizens living in territories who seek to vote for the very federal officials who enact and execute the very laws that shape these citizens' daily lives. The U.S. Supreme Court has denied further review.¹³

Over the years, various Supreme Court justices, as well as appellate and district judges, have voiced concerns about the continued validity of the Insular Cases doctrine. As early as 1901, Justice Harlan (a dissenter in the *Plessy* decision) staunchly asserted the following in his dissent in *Downes v. Bidwell*:

Congress ... , by action taken outside the Constitution, engraft[s] upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. ... 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 Congress chooses to accord to them is wholly inconsistent with the spirit and genius as well as the words of the Constitution.

In 1974, Justice Brennan, in a concurring opinion joined by three fellow justices, came to a similar conclusion:

Whatever the validity of [the Insular Cases], in the particular historical context in which they were decided, those cases are clearly not the authority for granting the application of ... any ... provision of the Bill of Rights to the Commonwealth of Puerto Rico in the 1970s. ... The concept that the Bill of Rights and other Constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a

very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our government.¹⁴

In 2008, following nearly three decades of judicial hibernation, the Insular Cases doctrine again became the source of national controversy before the Supreme Court in the case of *Boumediene v. Bush*. The case involved aliens detained as enemy combatants at the United States Naval Station at Guantanamo Bay, Cuba. These individuals petitioned for writs of habeas corpus. Guantanamo Bay is not formally part of the United States but has been leased from Cuba since 1903, the latter nation retaining ultimate sovereignty over the territory and the United States retaining control of jurisdiction. The Supreme Court decided that the right to habeas corpus was a fundamental right applying to an unincorporated territory such as Guantanamo Bay.¹⁵

Of profound importance to Puerto Rico are several pronouncements in *Boumediene* regarding the Insular Cases and how these might now apply to the commonwealth. First, the Court recognized that the Insular Cases involved territories “with wholly dissimilar traditions and institutions” that Congress intended to govern only “temporarily.” Second, quoting Justice Brennan, the Court held that “it may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance.” Finally, the Court held 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. ... Abstaining from questions involving forward sovereignty and territorial governance is one thing. To hold that the political branches have the power to switch the Constitution on or off at will is quite another.”

In light of the ruling in *Boumediene*, in the future the Supreme Court will be called upon to re-examine the Insular Cases doctrine as applied to Puerto Rico and other U.S. territories. In doing so, several questions may arise that will need to be answered.

- In the U.S. territories, are there still “grave questions [that] will arise from differences of race, habits, laws and customs of the people,” as the Supreme Court observed in *Downes v. Bidwell* in 1901?
- More so, given that more than 50 years have passed since the Court decided *Brown v. Board of Education*, can such insidious racial and ethnic discrimination be constitutionally justified today?
- How long may Congress “temporarily” hold a territory when the territory has evolved into a model of a federated state without having been formally admitted to the union? What is the effect, if any, of the constitutional strengthening of ties between the territory and the United States over the past 110-plus years?

Where does the future of Puerto Rico lie within the United States Constitution? No U.S. jurisdiction has ever been maintained in territorial status as long as Puerto Rico and Guam have. The Philippines became an independent nation

while Puerto Rico did not. As ties with the Philippines were gradually severed, ties with Puerto Rico were strengthened. Hawai'i became a state but Puerto Rico has not. Puerto Rico possesses all the attributes of a state, including a federal Article III court. However, U.S. citizenship therein is constitutionally deficient, because residents of the island lack a vote in Congress and are ineligible to elect the President.

Clearly, Puerto Rico cannot be compared today to Guantanamo Bay. And finally, Puerto Rico is not like the incorporated, yet uninhabited, territory of Palmyra Atoll. Under the Insular Cases' patently absurd rationale, Palmyra Atoll is necessarily destined for statehood and visitors to the area, while there, necessarily enjoy full constitutional rights.

Hon. Juan R. Torruella, a scholar on the subject, as well as a judge of the U.S. Court of Appeals for the First Circuit has correctly termed the Insular Cases “the Doctrine of Separate and Unequal.” In a very recent dissent from an opinion denying U.S. citizens the right to elect members to the House of Representatives, Judge Torruella vociferously stated the following:

This is a most unfortunate and denigrating predicament for citizens who for more than one hundred years have been branded with a stigma of inferiority, and all that follows therefrom. At the root of this problem is the unacceptable role of the courts. As in the case of racial segregation, it is the courts that are responsible for the creation of this inequality. ... Changed conditions have long undermined the foundations of these judge-made rules, which were established in a by-gone era in consonance with the distorted views of that epoch. Although the unequal treatment of persons because of the color of their skin or other irrelevant reasons was then the modus operandi of governments, and an accepted practice of societies in general, the continued enforcement of these rules by the courts is today an outdated anachronism, to say the least.¹⁶

The time has very much belatedly come for the U.S. Supreme Court to revisit and remedy the anachronistic and denigrating judicial predicament that today nearly five million United States citizens residing in Puerto Rico and other U.S. territories have sustained for more than 110 years. **TFL**

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ing partners and businesses throughout the world, and doing so will be necessary for it to continue to progress as an advanced society. Starobin notes that China has forged strong relationships not only with Hugo Chavez's Venezuela for obtaining oil, but with democratic Chile, which owns 38 percent of the world's copper production. China's economy has expanded at a rate of close to 10 percent annually for the past 30 years—a faster rate than that of the United States in its heyday, and certainly faster than our current (2009) rate of about 3 percent, Japan's of 2.2 percent, or Germany's of 2.7 percent. Starobin envisions China's combination of economic expansion, military strength, and diplomatic aggressiveness as the path to its future global dominance.

Starobin labels a fourth possible outcome of American decline as "City-States"—a modern version of those in ancient and medieval times. Under this scenario, the importance of the nation-state would diminish as populations feel more connected to the cultural developments of their more immediate regions. Although this notion may seem unlikely, Starobin notes that 40

areas that surround and encompass cities produce most of the world's wealth. Not only established cities such as New York, London, Paris, Moscow, Hong Kong, Shanghai, and Tokyo, but emerging cities such as Tel Aviv, Dubai, Abu Dhabi, Bangalore, and Santiago could become economically and culturally more important than the countries of which they are a part.

Starobin calls his fifth "after America" possibility universal civilization. As America evolved from individual states to a centralized nation and European countries joined together to form the European Union, so could the world join together to create a single governing entity. Many nations are already moving in this direction in their trade negotiations, defense alliances such as the North Atlantic Treaty Organization, and the World Court. Moreover, advanced technology, convenient travel, and instant communications have produced worldwide interacting economies. Toyota has become a successful "American" company, while General Motors and Burger King are successful in Japan and other countries throughout the world. China imports coal, iron ore,

and other materials and exports clothes and automobile parts; the United States imports oil and exports computer software and agricultural products. These transactions require international cooperation and regulation.

Starobin looks forward to the United States becoming a less dominant and less militaristic power, with a more peace-loving and culturally advanced population; he somehow sees California as a model to emulate. *After America* is a wide-ranging, fast-paced narrative, with material garnered from extensive conversations with high-level officials and experts as well as with ordinary citizens throughout the world. It contains both statistical and analytical research, as well as more than a little speculation. The reader need not agree with all of its premises or conclusions to find the book of considerable value. **TFL**

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Endnotes

¹See Treaty of Peace, Dec. 10, 1898, U.S. Spain, 30 Stat. 1754; Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, Res. No. 55, 55th Cong., 30 Stat. 750 (1899).

²33 CONG. REC. 2105 (1900); CONG. REC. 6019 (June 14, 1898).

³33 CONG. REC. 3616 (1900); 56th Cong., 1st Sess. pp 704–712 (Jan. 9, 1900).

⁴Theodore Roosevelt, Address at the Hartford Coliseum, Connecticut (August 22, 1902); Theodore Roosevelt, Speech at Methodist Episcopal Church Celebration of the African Diamond Jubilee, Washington, D.C. (Jan. 18, 1909).

⁵E.g., *Downes v. Bidwell*, 182 U.S. 244 (1901); *Hawai'i v. Mankichi*, 190 U.S. 197 (1903); *Dorr v. United States*, 195 U.S. 138 (1904).

⁶G. Edward White, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF, 298–301 (Oxford Univ. Press 1993); Liva Baker, JUSTICE FROM BEACON HILL, 346–49 (Harper Collins 1991); Sheldon M. Novick, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES, 234–37 (Little, Brown & Co. 1989).

⁷*Downes v. Bidwell*, 182 U.S. 244, 282 (1901); *Hawai'i v. Mankichi*, 190 U.S. 197 (1903); *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Morales v. Bd. of Registration*, 33 P.R.R. 76 (1924);

Califano v. Torres, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

⁸*Balzac v. Porto Rico*, 258 U.S. 298 (1922).

⁹98 CONG. REC. 1528 (1952); *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 595 n.26; 1966 U.S.C.C.A.N. 2786–90.

¹⁰*Balzac v. Porto Rico*, *supra*, note 8.

¹¹E.g., LSA-C.C.P. Article 1731–1841; Pub. L. No. 42, 3d Guam Legis., 1st Sess. §§ 3 and 4 (1955); U.S. Virgin Islands Rev. Organic Act of 1954 § 3, 48 U.S.C. § 1561.

¹²*United States v. Laboy-Torres*, 553 F.3d 715, 721 (3rd Cir. 2009).

¹³E.g., *Igartua De la Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (en banc), *cert. denied*, 547 U.S. 1035 (2006); *Balentine v. United States*, 486 F.3d 806 (3rd Cir. 2007); *Attorney General of Territory of Guam v. United States*, 738 F.2d 1017 (9th Cir. 1984), *cert. denied*, 469 U.S. 1209 (1985); *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001).

¹⁴*Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 475–76 (1979).

¹⁵*Boumediene v. Bush*, 553 U.S. 723 (2008).

¹⁶*Igartua v. United States*, 626 F.3d 592, 612–38 (1st Cir. 2010).