Extracts From The Book

The "de facto" Incorporated U.S. Territory of Puerto Rico

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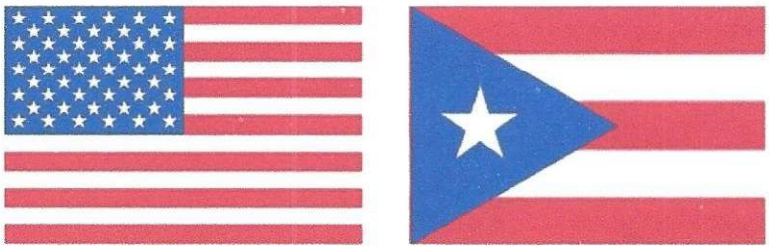

The degree of incorporation of Puerto Rico to be like a state can be considered by implication as strong as to exclude any other view than that it is an incorporated territory of the United States. (Balzac v People of Puerto Rico 258 US 298, 314, (1922.)

INCORPORATION AND NON INCORPORATION POLITICAL STATUS SUMMARY

- **Treaty of Paris**

...The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress....[11] .

Within this original legal source of authority Congress started a local process of gradual incorporation over the years adopting legislation to organize the government of Puerto Rico to be compatible with its federalist structure, like states are to the federal government. In fact, as will be shown, Puerto Rico has been legally incorporated to be "like a state" gradually to the same (or more) extent as any other territory before becoming a state, or as the territories that were incorporated in transit to statehood under the Northwest Ordinance.

U.S. TERRITORIAL POLICY AFTER 1898: THE CURSE OF NON-INCORPORATED TERRITORIES BY JUDICIAL INTERPRETATION

INSULAR CASES OF 1901

In 1901 the U.S. Supreme Court decided the Insular Cases, usurping congressional powers for U.S. territorial policy as set forth in Article IV, Section 3, Clause 2 of the U.S. Constitution. In the Insular Cases the U.S. Supreme Court established its own judicial interpretation of when the U.S. Constitution would apply to newly acquired territories. The Court decided that newly acquired territories could be incorporated by the United States to be like states, or could be kept temporarily as non-incorporated until Congress determined that the residents of those territories could be considered to be part of the "American Family", at which time the U.S. Constitution would fully apply. (See: *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); Huus v. N.Y. & P.R.S.S. Co., 182 U.S. 392 (1901) . See also Balzac v. Puerto Rico, 258 U.S. 298 (1922).* They were adopted by the Supreme Court to justify keeping Puerto Rico and other territorial booty acquired by the United States after the SpanishAmerican War of 1898 in a subjugated colonial status ad infinitum. (*See Juan R. Torruella, The Insular Cases: The Establishment of a Regime of Political Apartheid, 29 U. Pa. J. int'l L. 283 (2007).*

The Court, however, did not offer the criteria that the federal Courts and Congress would use to determine when a newly acquired territory was fit to be part of the American Family, and thus would be ready for the full application of the Constitution of the U.S. In failing to do so the Supreme Court left the door open for the federal courts and for Congress to discriminate against the American citizens residing in Puerto Rico, regardless of where they were born, just as it did concerning American citizens of African ancestry in *Plessy v. Ferguson (163 US 537, 1896)*. Because of the Insular Cases the federal courts have been ever since judicially disposing of cases related to Puerto Rico "switching on and off" the applicability of the U.S. Constitution on a case by case basis, as will be shown. What is being discriminated against is not a piece of land, Puerto Rico, but the human rights of 3.4 million American citizens by birth. This discriminatory practice has continued for more than 120 years. It complicates the political scenario with a detente like effect in fiscal policies and civil rights, without incorporating Puerto Rico, nor admitting it as a state.

Three opinions of the U.S. Supreme Court qualifying Puerto Rico as a non-incorporated territory are cited below:

(a) *DOWNES V. BIDWELL 182 US 244; 1901*

In the Downes case of 1901, as in other cases similarly decided by the U.S. Supreme Court and known as the Insular Cases, the Court said:

> "....Incorporation into the United States of territory acquired by treaty of cession, in which there are conditions against the incorporation of the territory until Congress provides there for, will not take place until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family..."
>
> ".... If those possessions are inhabited by alien races, differencing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible ...." (See also, e.g., *DeLima* v. *Bidwell,* 182 U.S. 1; (1901)).

(b) *BALZAC V. PUERTO RICO 258 US 298, at 312-13 (1922)*

This case involved a claim to trial by jury in a criminal prosecution in which the Court concluded that it was unavailable in Puerto Rico because trial by jury was not a "fundamental right", thus ignoring one of the pillars of the Common Law system, a right dating at least back to the Magna Carta. The application of the Constitution was to be determined by the locality of the person, not the person's citizenship. U.S. Constitution Amendment VI was found not to apply to a territory that belonged to the United States but was not incorporated, and where its population was not familiar with the jury system. The Court Stated:

> "... As previously stated, under the Insular Cases doctrine only fundamental constitutional rights extend to unincorporated United States territories, whereas in incorporated territories all constitutional provisions are in force..."

The fact that American Citizenship had been granted to the residents of the territory of Puerto Rico in 1917 was not legally sufficient for the U.S. Supreme Court to dispose otherwise. (Chief Justice *William H. Taft* wrote the Opinion. He was Governor of the Philippines in 1901 when the first of the Insular Cases was decided.) Moreover, the Court stated that incorporation is an important step that leads to statehood, and also as follows:

> ".... Since the Spanish War, an intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or an implication so strong as to exclude any other view ...."(Id at 306).

The Balzac decision is in contradiction to the Court's holding in *U.S. v Rasmussen 197 U.S. 596, 1905 (Alaska);* and, *Hawaii v Mankichi 190 U.S. 197, 1903*; that incorporation was inferred, and to Congress' constitutional mandate for territories. (U.S. Const. Art. IV, Section 3, Clause 2).

(c) *HARRIS V. ROSARIO (446 US 651, 1980).*

Harris v. Rosario is another judicial opinion decided under the veil of the Insular Cases doctrine affecting Puerto Rico adversely. It was decided under wrong and incorrect legal bases. This case questioned the validity of policy under which Puerto Rico received less assistance than states do in the program of Aid to Families with Dependent Children. (AFDC) The Court held that there was a rational basis for the statutory classification since:

1) Puerto Rico's residents do not contribute to the Federal Treasury. (Incorrect. See IRC 933 and IRS Tax Highlights 2017).
2) The cost of treating Puerto Rico as a state for purposes of AFDC assistance would be high. (Incorrect and discriminatory).
3) Granting greater AFDC benefits could disrupt the Puerto Rican economy. (Discriminatory- Paraphrasing Justice Thurgood Marshall's dissent,..."those programs designed to help those who need them the most should not be extended to Puerto Rico's poor out of concern that if extended they would disrupt the local economy....")

The cases cited above do not define any specific legal criteria to be followed by the courts to confer non-incorporation or incorporation status to a territory. From a reading of the cases above one can conclude that the Courts have decided expressly, or by implication, to classify Puerto Rico as a nonincorporated territory using discriminatory arguments as follows:

1) Puerto Rico is a non-incorporated territory of the United States.
2) The 4th, 5th and 6th generation American citizens of Puerto Rico are still not part of the American Family, and will only be apt when Congress determines.
3) Puerto Rico is a territory belonging to the United States, but is not a part of the United States.
4) Only fundamental constitutional rights extend to the American citizens residing in Puerto Rico, notwithstanding congressional and judicial dispositions to the contrary.
5) The American citizens of Puerto Rico don't pay Federal taxes.
6) The cost of treating Puerto Rico like a state, like an incorporated territory, would be large for purposes of federal assistance (Incorporated with parity in federal funds, like states).
7) Granting greater benefits to Puerto Rico to be treated like a state would disrupt the Puerto Rico economy, as if it were not disrupted already.
8) The blessings of a free government under the Constitution cannot still be extended to the American citizens of Puerto Rico.
9) An intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or animplication so strong as to exclude any other view.
10) Puerto Rico is still inhabited by an alien race. [Aborigines.] (Racist?) (Contrary to US Const. Amendments XIV and XV).

The three cases cited above classifying Puerto Rico as a non-incorporated territory have been used in the past century by the Federal Courts to discriminatorily switch —on and off— the U.S. Constitution in controversies arising in relation to Puerto Rico to be like a state, blatantly ignoring congressional policies that have gradually incorporated Puerto Rico. As a consequence, the in transit to statehood process that the incorporated status carries with it is in "detente". How discriminatory and incorrect is the non-incorporated treatment given to Puerto Rico by the Courts, will be shown below. Should a Federal Court dispose of a case under such discriminatory premises? Can such discriminatory treatment be applied to all future judicial dispositions concerning Puerto Rico? Does the judicial theory of incorporation fit within the U. S. constitutional framework? Before considering the incorporation process of Puerto Rico it is pertinent to consider that the non-incorporation cases cited above were decided with dissident opinions, and/or under wrong legal premises, which evidence that from the outset the majority supporting the non-incorporation theory confronted opposition.

COMMENTS IN OPPOSITION TO THE INSULAR CASES

a) DOWNES Y. BIDWELL, 244 US (1901)

This case was decided with a split vote (5-4) by the Court. Hon. Supreme Court Judge Harlan wrote a dissenting opinion which may be quoted in part as follows:

> "....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 with the words of the U.S. Constitution..."
>
> —....I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United Sates acquired, and which could only have been acquired, in virtue of the Constitution...."
>
> (See: *DeLima v Bidwell, 182 US 1 (1901).* Puerto Rico is part of the U.S. for tariff purposes. Ironically the court said: "...We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic..."

Moreover, contrary to Downes the U.S Supreme Court decided in *González v Williams*, 24 Sup. Ct. Reporter 177, 1903, that the nationality of the residents of Puerto Rico was American. Part of the American Family? See also the case of Mr. Molinas, a native of Puerto Rico, who was qualified as an American artist for purposes of tariffs exemptions of works of art

produced abroad in Biarritz, France (24 Ops. Atty. Gen. 40, 1901). Notwithstanding, until the Insular Cases are revoked by the Supreme Court, and/or until Congress implements legislation to incorporate Puerto Rico, the applicability of the Cases may still be invoked. On the other hand, as will be shown, some Courts have judicially disposed of cases as if Puerto Rico is an incorporated territory. (See: Part III (9) (b))

b) BALZAC OPINION (258 US 298, 1922)

The Court refused to acknowledge that American citizenship granted in 1917, the presence of a U.S. Federal District Court in San Juan, military service, "extension of revenue, navigation, and immigration" laws, and the use of U.S. stamps were de jure and de facto acts of incorporation.

Since the Insular Cases were decided an intention of Congress to incorporate new territory into the Union is not to be admitted without express declaration or an implication so strong as to exclude any other view. *(Balzac v. Puerto Rico).*

c) HARRIS V ROSARIO OPINION
(446 US 651, 1980)

The Harris case was decided on wrong premises. It is incorrect to say (as in Harris) that the American residents of Puerto Rico do not contribute to the Federal Treasury, they do. Today the American citizens residents of Puerto Rico pay more than three billion dollars annually to the U.S. Treasury in taxes from different sources, as required by the Federal Income Tax Law, but with a discriminatory applicability to Puerto Rico by unequal transfer of payments in Federal Funds. (2017 IRS Highlights). There cannot be any rational basis for Congress to discriminate against a class of citizens, the 3.4 million American citizens who live in Puerto Rico. To treat any American citizen differently on a basis other than on individual merit fulfills the dictionary definition of discrimination, especially taking into consideration the fact that the Equal Protection Under the Laws and Due Process clause of the U.S. Constitution applies in Puerto Rico. (*U.S. v. P.R. Police Dept. 922 FS 2nd. 185 (2013).*

INCORPORATION AND NON-INCORPORATION AS A RESULT OF THE INSULAR CASES
Outline Of Subject Related To The Incorporation Process As Applied Gradually To Puerto Rico

I- U.S. TERRITORIAL POLICY

(1) U. S. Territorial Policy Before 1898
(2) U.S. Acquires Puerto Rico In 1898
(3) Territorial Policy After The Curse of Incorporated and non-Incorporated Territories by Judicial Interpretation Insular Cases Of 1901

(3) (a) Downes v. Bidwell 182 US 244; 1901
(3) (b) Balzac v. Puerto Rico 258 US 298, at 312-13 (1922)
(3) (c) Harris v. Rosario (446 US 651, 1980)

(4) Comments in Opposition to the Insular Cases

(a) Downes v. Bidwell, 244 US (1901)
(b) Balzac Opinion US (258 US 298, 1922)
(c) Harris v Rosario Opinion (446 US 651, 1980)

II

Legal Incorporation Process of Puerto Rico

(1) Statement of General Nelson A. Miles-1898
(2) Oath of Loyalty by P.R. Govt. Officials 1898
(3) The Henry Carrol Report /Executive Order 1899
(4) 1900- FORAKER ACT. (31 Stat.77) – (Initial steps to Organize the Puerto Rico Government in republican form of three branches like that of states)
(5) Jones Act. -1917 (39 Stat. 951)- American Citizenship Granted (1951 By Birth)
(6) 1947 — Us Const. Art. IV Section
(7) 1948 - Right to Elect a Governor
(8) Right to Adopt A Constitution as in States
(9) (a) Acts Of Incorporation Of Puerto Rico by The Federal Judicial Branch
(9) (b) Judicial Opinions That are of Particular Importance to The Incorporation Process
(10) Federal Laws Apply in Puerto Rico (39 Stat 954- Law 600 Section 9)
(11) U.S. Agencies Treat Puerto Rico as a State
(12) Federal Taxes Paid From Puerto Rico to the U.S. Treasury
(13) Federal Electoral Process in Puerto Rico
(14) Participation in World Wars by American Citizens Residents of Puerto Rico
(15) Other Support for Incorporation Status of Puerto Rico

CHAPTER V

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CONCLUSION

As it has been shown, for the Federal Courts to continue considering the Insular Cases as the legal basis and precedent for their decisions in the 21st Century is legally unfounded and incorrect. The practice of treating Puerto Rico as a non-incorporated territory where some constitutional dispositions do not apply, and as an incorporated territory for others where it applies must end. The uncertainty of whether the U.S. Constitution applies leads to a capricious, unequal, and discriminatory treatment by each of the three Branches of the Federal Government against its own American Citizens, those residing in Puerto Rico. (3.4 million 4th, 5th and 6th generation American Citizens by birth). (See e.g., *Hon. Judge J. Torruella, Igartua v U.S., 229 F3d 80, 85 (1st Cir. 2000)*; Hon. Judge J. Torruella. The Doctrine of Separate and Unequal 1980; GA Gelpí, The Constitutional Evolution of Puerto Rico and other U.S. Territories (1898 – Present, 2017); G. Igartua, Letter Requesting Treatment of Puerto Rico As An Incorporated Territory - Hon. Colin L. Powell, Sec. Dept. of State, Oct. 1, 2003. Treating Puerto Rico as an

unincorporated territory has the effect of provoking a legal, political, economic, and unfair government practice with its negative consequences. (See, G. Igartua, Muñoz El Americano, Chapter 8, 3rd edition 2015). It has led the Federal Government in most cases to treat Puerto Rico politically not based on what it is, a de facto incorporated territory of the United States with 3.4 million American citizens by birth, but based on what it politically might be. For these purposes the American citizens of Puerto Rico have been ignored as being part of the American Family with the implication of still being considered as if they are an alien race. (See: *Downes v. Bidwell, supra II A (3) (a)*.)

Notwithstanding the conflicting views of the legal and political relation of Puerto Rico to the United States, its gradual assimilation since 1898 by Congress in transit to statehood cannot be ignored. In 2018 the ties between United States and Puerto Rico have strengthened and evolved in such a way, and in such a constitutional significance, that it is definitely an incorporated territory of the United States on its way to statehood, one where the fullness

of the U.S. Constitution applies, just as the U.S. Supreme Court did in 1954 by deciding *Brown v. Board of Education* 347 U.S. 483.(Compare to *Boumediene v. Bush, 553 U.S. 723)*. The theory of a permanent non-incorporated territorial status does not fit within the U.S. constitutional framework. The degree of incorporation of Puerto Rico to be like a state can be considered by implication as strong as to exclude any other view than that it is an incorporated territory of the United States. (Balzac Supra II A (3) (b)). Discriminatory treatment to the 3.4 million American citizens of Puerto Rico will only be eliminated when Congress adopts a resolution certifying Puerto Rico as an incorporated territory of the United States and in transit to statehood with a definite date of admission. This resolution most certainly will be required apriori to the Act of Statehood. (Compare process with, H. *Hills, Not Foreign In Any Sense, Ready For Transition To Taxation, Puerto Rico Reports, December 16, 2017*). The adoption of such a resolution is 120 years overdue.