

“Insular Cases” Made Puerto Rican Status Unclear, Panel Says

After the United States acquired Puerto Rico, Guam, and the Philippines during the Spanish-American War in 1898, Americans weren't sure whether they wanted constitutional rights to “follow the flag.” A series of five Supreme Court rulings from 1901 to 1922, known as the Insular Cases, reflected this ambiguity, as a combination of racist and populist reasoning in the decisions ensured Puerto Rico's relationship with the United States would remain unclear to this day, explained panelists at the Latin American Law Organization spring colloquium March 28.

“The Insular Cases display some of the most notable examples in the history of the Supreme Court in which its decisions interpreting the Constitution evidence an unabashed reflection of contemporaneous politics,” said Judge Juan Torruella of the U.S. Court of Appeals for the First Circuit. Torruella is the first Puerto Rican appointed to a federal appellate court. “The Insular Cases in effect translated the political dispute about the acquisition of foreign territories into the vocabulary of the Constitution, with the Supreme Court eventually echoing the popular sentiment of the day.”

Unlike other territories the United States had gained over the years, Puerto Rico had almost no U.S. residents at the time of the acquisition, in addition to a different culture and style of governance. The ideological underpinnings of the theory on which the Supreme Court based its decision to treat Puerto Rico differently came from articles published in 1898 and 1899 in the Harvard Law Review, Torruella said.

After acquiring Puerto Rico, Congress established a civil government and a taxation system through the Foraker Act. In *Downes v. Bidwell* (1901), the most important Insular Case, justices ruled on whether the Foraker Act was constitutional under the Uniformity Act. As detailed in Justice Edward Douglass White's *Bidwell* opinion, “incorporated” territories that were promised constitutional rights by the treaty of acquisition would receive constitutional protection, while “unincorporated” territories would not.

The Jones Act of 1917 would later grant Puerto Ricans U.S. citizenship and create a new framework of local government. Some thought the legislation meant Puerto Ricans were now incorporated and had constitutional rights, but in 1922 *Balzac v. Porto Rico* affirmed the island's unincorporated status. Torruella pointed to Alaska and Hawaii—considered incorporated by the Supreme Court—as examples of the double standard justices were promulgating.

“My biggest problem at this present time is with the fact that I believe that the United States is in clear violation of not only the Constitution but also the treaties that we have entered into which are of course the law of the land,” Torruella said. At least four treaties or conventions the United States is subject to commit the country to treat citizens equally, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, he said. “The courts of the United States have refused to support these treaties.”

Torruella added that the most common kinds of cases he sees in his circuit related to the Insular Cases are those in which Puerto Ricans are protesting their lack of right to vote in U.S. federal elections.

“The Supreme Court has created a political ghetto in the territories, from which there is no escape or solution by inhabitants because they lack the political power to influence the political institution that can make the necessary changes to the situation.

“The Supreme Court, as in *Plessy*, should step forward to correct the wrong it created,” he said.

Rogers Smith, a University of Pennsylvania political science professor, pointed to the “tutelary” attitude of the late 19th and early 20th centuries as being a foundation for the logic behind the Insular Cases. The United States started as both an imperialist (dominating, oppressing, and enslaving the Native American and African American populations) and anti-imperialist (defying British rule) political project.

“This combination of anti-imperialism and pro-imperialism made perfect political sense in the Revolutionary period, as both policies served the interests of the European-descended settler population ...but there was always an ideological dissonance between these elements of their political projects,” Smith said.

To oppress non-white or unwanted immigrant populations, whites appealed to religious, cultural, and racial doctrines declaring their own superiority. Whites disguised racism—Jim Crow laws, ejecting Native people from their lands—in terms of educating those populations or assimilating them. Reformers and others used similar language and logic to justify public education for the working classes.

Imperialists believed it was permissible for the U.S. government to expand the empire without extending equal rights because at the time of the Declaration of Independence, 80 percent of the population did not have equal rights. In an Atlantic Monthly article written by A. Lawrence Lowell that preceded the Harvard articles, Lowell argued that political equality “should be applied rigorously only to our own race” and those who can assimilate rapidly, Smith explained. Extending self-governance to those who were not accustomed to running a country or state would be “sheer cruelty.” Lowell’s article devised the argument of incorporation later used by White.

The Jones Act of 1917 “imposed” U.S. citizenship on Puerto Ricans—most Puerto Rican leaders at the time opposed it—because during World War I, the United States wanted to consolidate its claims on the strategic island, Smith said. “Puerto Ricans to this day have citizenship as a matter of congressional statute” rather than through the 14th Amendment guarantee of citizenship. “The kind of imperial colonial status created at the turn of the century has never been eradicated.”

Puerto Ricans should decide their status for themselves, Smith argued; as long as it remains in its current state, the United States “remains an imperial nation.”

Christina Duffy Burnett, who will join the Columbia Law School faculty this fall, explained her revisionist take on the Insular Cases. The traditional interpretation of the Insular Cases overstates the degree to which they were a break with the past, she said, as well as exaggerates the difference between incorporation and unincorporation.

“De-annexation is really what these cases are about,” Burnett said. The United States wanted to reserve the right to separate and pull out of the territories, if necessary. “It wasn’t clear that the U.S. could do that, particularly after the Civil War.

“Throughout the 19th century it was never really clear whether the Constitution applies to the territories,” she said. The decision in *Dred Scott* said it did, to protect slavery, but the case also contributed to the Civil War and afterwards it was unclear whether *Scott* still mattered.

The issue was so ambiguous that Congress extended the Constitution to territories by statute once the territory was annexed, Burnett explained. The Supreme Court wanted to think of territories like Puerto Rico as different because the population thought of them as different. At the same time, justices did not explicitly withhold many provisions when they said the Constitution would not apply. They withheld the right to a jury trial, for example, but at the time federal jury trial rights provisions didn’t apply in the states either, she noted.

In *Downes v. Bidwell*, the justices placed “a great deal of emphasis on the importance of reserving the right to get rid of these [territories].” It reflected “the ways in which the shadow of the Civil War loomed over the fate of our empire.” Some imperialists feared global expansion could mean a global conflagration, not unlike the cultural clash over slavery within the United States.

Today in Puerto Rico about half of residents favor statehood and half want commonwealth status, the current relationship, Burnett said. A “tiny fraction” want independence. Supporters of the commonwealth argument often point to the Insular Cases, arguing that Congress can forge any relationship it wants with a territory, so it can enter into a commonwealth compact of permanent union without making Puerto Rico a state.

This claim “is wrong and it is perverse,” Burnett said. Wrong, Burnett argued, because the Insular Cases did not empower Congress to do whatever it wanted in Puerto Rico. Perverse, because “the Insular Cases is the last place you want to go to find a theory of permanent union...What they held was that unincorporated territories can separate from the United States”

However, the theory of de-annexation is an “excellent way” to implement the values of self-determination. Puerto Rico “ought to have the option to leave” as long as it is denied federal representation, she said.

- Reported by Mary Wood

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http://www.law.virginia.edu/html/news/2007_spr/insular.htm