



Porto Rico

Virgin Islands

Northern Marianas



Philippines



American Sāmoa



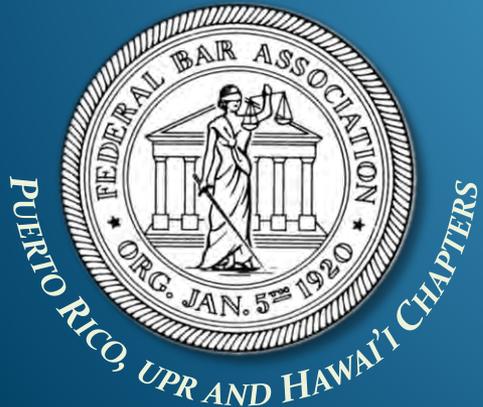
Guam



Hawai'i

*Jon Van Dyke Lecture Series*

# THE CONSTITUTIONAL EVOLUTION OF OVERSEAS U. S. TERRITORIES (1898 – Present)



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*University of Puerto Rico – School of Law  
February 27, 2014*



*UNIVERSITY of HAWAII at MĀNOA  
WILLIAM S. RICHARDSON  
SCHOOL OF LAW  
JON VAN DYKE INSTITUTE*

- This presentation is dedicated to Professor Jon Van Dyke (1943-2011) of the University of Hawai'i, William S. Richardson School of Law, as well as Visiting Professor at the University of Puerto Rico School of Law.
- Professor Van Dyke's scholarly work on the territories of the United States and the rights of the United States citizens residing therein, in large part inspired me to continue researching and expand what was initially a lecture comparing Puerto Rico and Hawai'i to now include all the U.S. territories. I am deeply grateful for the advise and many valuable suggestions given to me by Professor Van Dyke, which have hereby been incorporated.



*“The United States has always governed its territories and possessions separately from its states. During the past two centuries, the legal regime applicable to the territories has evolved in a patchwork ad hoc fashion, with Congress responding to the unique and individual needs of each territory, sometimes with sensitivity and sometimes with indifference or insensitivity . . . . Each of these island communities have demonstrated the ability to exercise local self government. They each have a mature and lively political structure in which the basic values of fairness and full opportunities for participation are maintained at the local level. They each have unique cultures that should be allowed to develop in ways that are true to their traditions. In terms of their subservience to the Congress and the federal agencies, however, they are still colonies.”*

[The Evolving Legal Relationship Between the United States and Its Affiliated U.S.-Flag Islands,](#)  
Jon M. Van Dyke, University of Hawai'i Law Review



# The Declaration of Independence

*“WE hold these Truths to be self-evident,  
that all Men are created equal,  
that they are endowed by their Creator  
with certain unalienable Rights,  
that among these are  
Life, Liberty, and the  
Pursuit of Happiness.”*



# Territorial Clause

*“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.”*

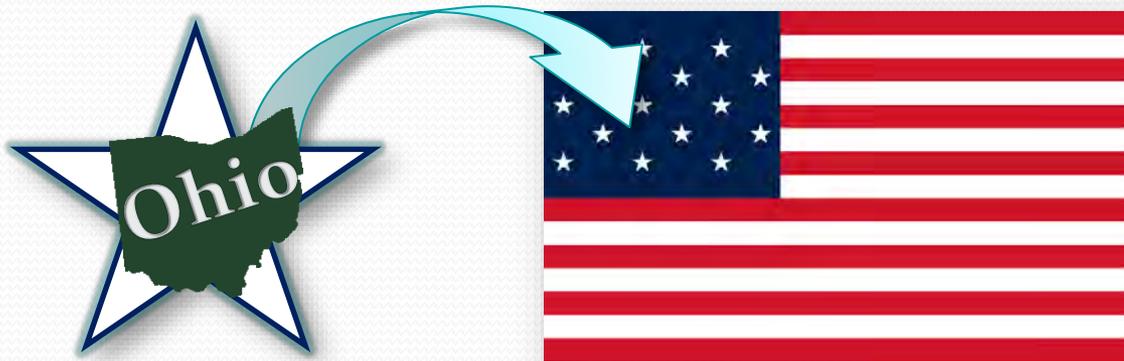


U. S. Const. Art. IV,  
Section 3

# 1789

## Northwest Ordinance

- Congress appointed Governor and Judges for territory
- Established civil rights for territory
- When population exceeded 5,000 adult males, voters could elect legislature and send non-voting delegate to Congress
- When territory or division reached population of 60,000 it could petition for statehood



# 1898

## Newlands Resolution

## Treaty of Paris

### Overseas U.S. Territories

- Hawai`i
- Puerto Rico
- Guam
- **Philippines**



# Subsequently Acquired Other Overseas U.S. Territories

- American Sãmoa (1899)
- Guantánamo Bay (1903) (by lease)
- U. S. Virgin Islands (1917)
- Commonwealth of the Northern Mariana Islands (CNMI) (1976)



**Puerto Rico** **Hawai'i** **Cuba**



“Holding His End Up”  
by Fred Morgan  
Philadelphia Inquirer  
(1898)

**Ladrones  
(CNMI)**

It's really most extraordinary  
what training will do.  
Why, only the other day  
I thought that man unable  
to support himself.”

**John Bull (England)**

*“[it would be unwise] to give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico... the benefits of the Constitution.”*



Simeon E. Baldwin, Yale Law Professor  
and co-founder of the ABA,  
The Constitutional Question Incident to  
the Acquisition and Government by the  
United States of Island Territories,  
12 Harv. L. Rev. 393, 401 (1899)

*“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.”*

Statement of U. S. Representative  
Thomas Spight of Mississippi,  
33 Cong. Rec. 2105 (1900)



*“[B]eware of those 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.”*

Statement of U. S. Senator  
William B. Bate of Tennessee,  
33 Cong. Rec. 3616 (1900)



*“I think it is proper for us to take anything we want on the face of the earth.”*

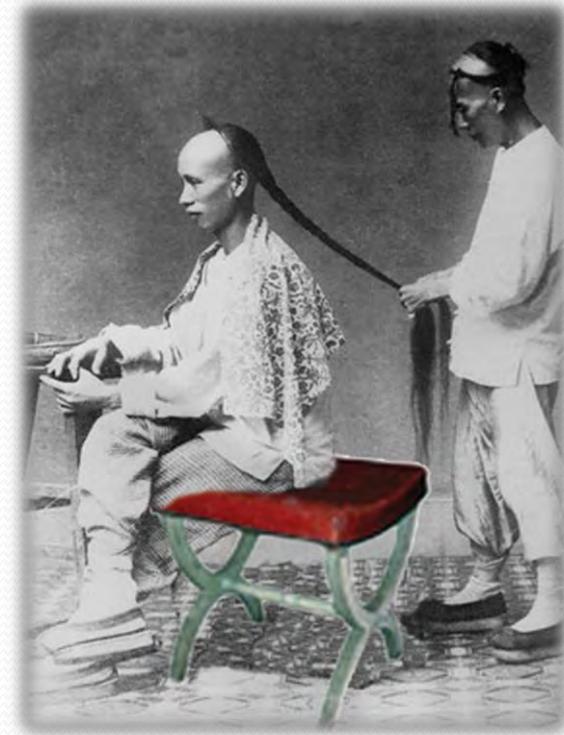
Representative James Beauchamp  
Clark of Missouri 1898



*“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.”*



Statement of U. S. Representative  
James Beauchamp Clark of Missouri,  
Congressional Record  
June 14, 1898 p. 6019





*“We are a conquering race.”*

U. S. Senator Albert Beveridge  
of Indiana (1898)



*“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 savage and servile peoples.”*

Statement of U. S. Senator  
Albert Beveridge of Indiana,  
56 Cong., I Sess pp 704 – 712  
(January 9, 1900)



*“We need Hawai'i just as much and a good deal more than we did California. It is Manifest Destiny.”*

Statement of President William McKinley to his personal secretary George Cortelyou  
H. Wayne Morgan, William McKinley and his America 225



*“In our treatment of the Filipinos we have acted up to the highest standard that has yet been set as marking the proper way in which a powerful and advanced nation should treat a weaker people.”*

President Theodore Roosevelt  
speech at Methodist Episcopal  
Church celebration of the African  
Diamond Jubilee, Washington DC  
(January 18, 1909)





*“The rude fierce settler who drives the savage from the land lays all civilized mankind under his debt”*

Theodore Roosevelt, *The Winning of the West*, Vol 1 (1899)

*“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 the island (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.”*

President Theodore Roosevelt  
Address at Hartford Coliseum,  
Connecticut (August 22, 1902)

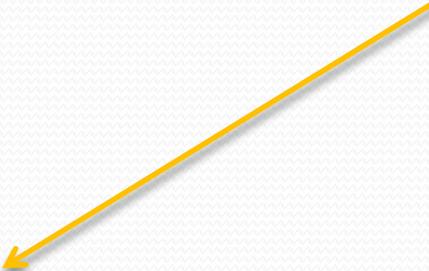


*“The flag cannot stand for the benevolent policies of an administration. It stands for more permanent things -- for things that changing administrations have no power to change. Is it not in the nature of a mockery to raise the flag in Porto Rico and bid its hopeful people hail it as an emblem of emancipation, while the Governor we have sent them reads a proclamation, from the foot of the staff, announcing the absolute power of Congress over them ?”*

**Benjamin Harrison, Former US  
President (1901)**

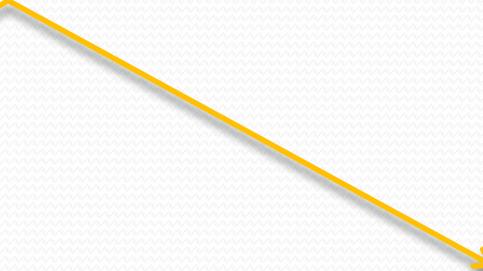


# U. S. Supreme Court's Doctrine of Territorial Incorporation



## Incorporated Territories

- Constitution fully applies
- Destined for statehood



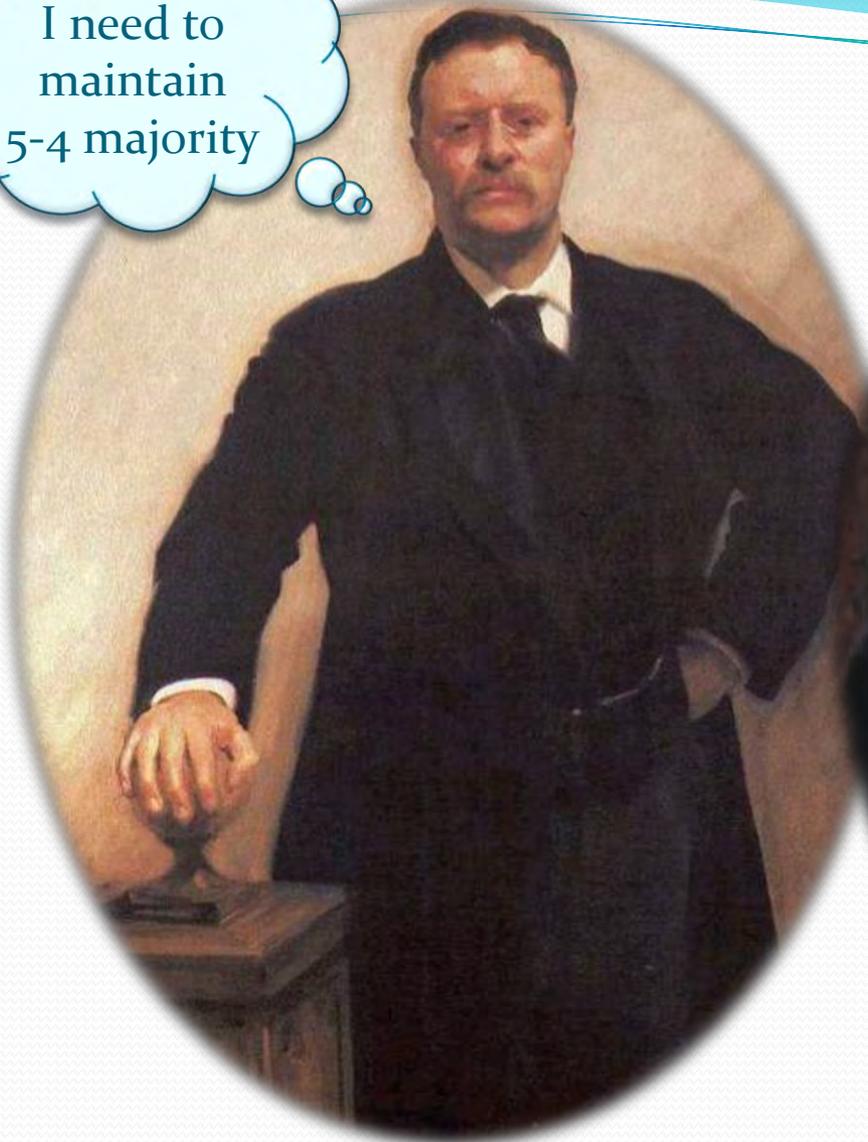
## Unincorporated Territories

Guarantees of  
“fundamental”  
personal rights apply

*“It is obvious that in the annexation of outlying and distant possessions **grave questions will arise from differences of race, habits, laws and customs of the people,** and from 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.”*

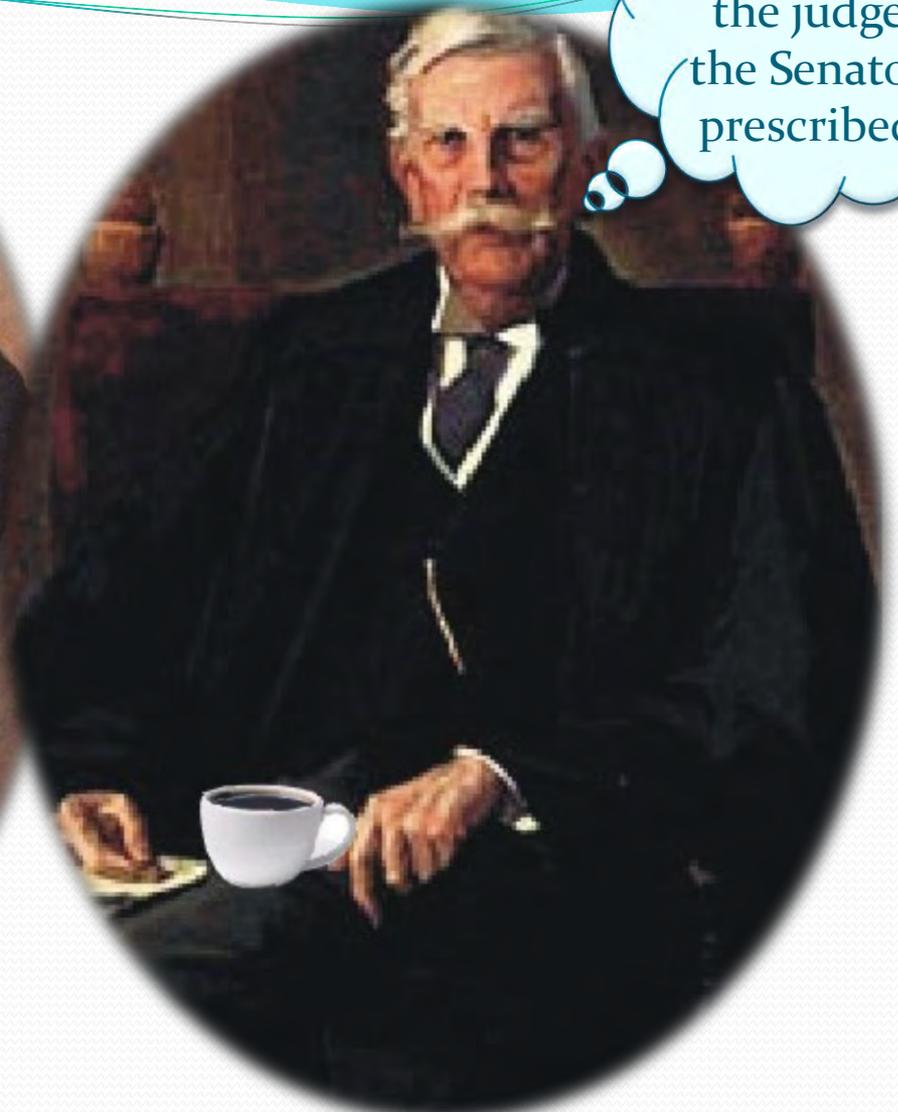
Downes v. Bidwell, 182 U.S. 244, 282 (1901)

I need to  
maintain  
5-4 majority



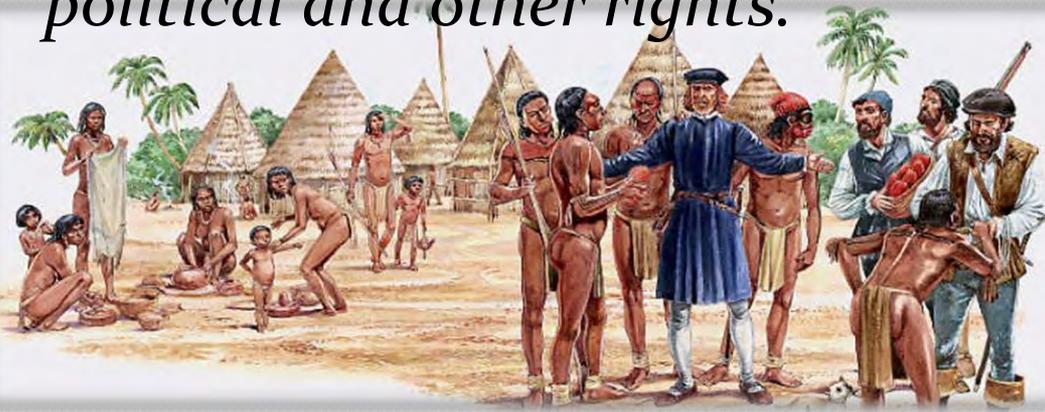
*President Theodore  
Roosevelt*

I'm just  
the judge  
the Senator  
prescribed



*Justice Oliver  
Wendell Holmes*

*“Congress has thought that a people like the Filipinos, or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions... In making Porto Ricans American citizens,... is the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper, and there without naturalization to enjoy all political and other rights.”*



Balzac v. Porto Rico,  
258 U.S. 298, 310-  
311 (1922)

*“[Puerto Rico is a] distant ocean communit[y] of a different origin and language from those of our continental people.”*

Balzac v. Porto Rico, 258 U.S. 298, 311 (1922)



*“Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled, and offering opportunity for immigration and settlement by American citizens. It was on American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents.”*

Balzac v. Porto Rico,  
258 U.S. 298, 309 (1922)



*“The right to suffrage is not a personal and fundamental right and, therefore, the [Nineteenth] Amendment as framed is not in force in Porto Rico.*

*The right of suffrage, therefore, is a noble right, or ought to be so; but is not a [fundamental] right. It is a political right.*

*The [Puerto Rico] Legislature has not conferred upon women the right to vote in this Island...”*



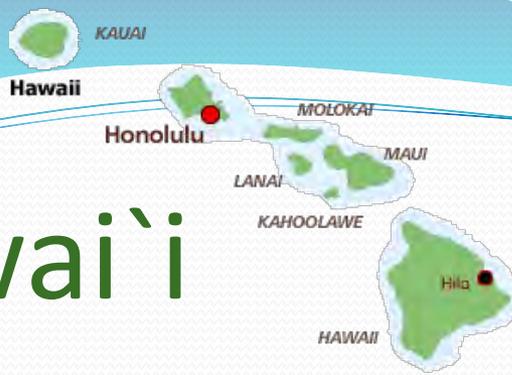
Morales v. Board of Registration,  
33 P.R.R. 76 (1924)

*“[W]e are now informed that Congress possesses powers outside of the Constitution, and may deal with new territory, acquired by treaty or conquest, in the same manner as other nations have been accustomed to act with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our government, or any branch or officer of it, may exert at any time or at any place. Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers.”*

Downes v Bidwell, 182 U.S. 244,  
379-380 (1901) (Harlan, J. dissenting)

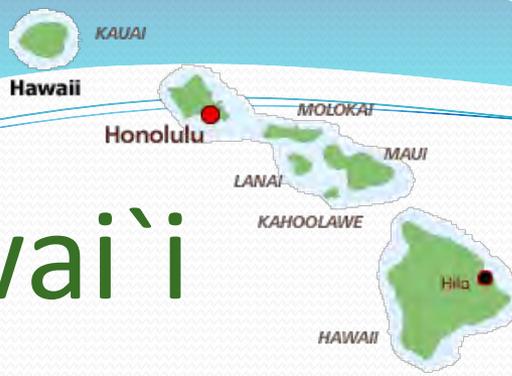


# Hawai`i



Date	Congressional / Judicial / Other Event	Effect
1898	Newlands Resolution	Republic of Hawai`i annexed as U. S. territory by way of joint Congressional resolution
1900	Organic Act	<ul style="list-style-type: none"> <li>•Conferred U. S. Citizenship</li> <li>•Local Civil Government Established</li> <li>•Bi-Cameral Legislature</li> <li>•Creates U. S. Territorial Court</li> </ul>
1903	Hawai`i v. Mankichi	<ul style="list-style-type: none"> <li>•Hawai`i became incorporated territory in 1900 following Organic Act</li> <li>•All constitutional rights extend to Hawai`i</li> </ul>

# Hawai`i



Date	Congressional / Judicial / Other Event	Effect
1959	Hawai'i Admission Act	<ul style="list-style-type: none"><li>•Hawai`i joins Union</li><li>•State government is republican in form</li><li>•Article III U. S. District Court established</li><li>•Hawai`i Constitution approved</li><li>•Palmyra Atoll excluded from statehood</li></ul>
1993	Apology Resolution	<ul style="list-style-type: none"><li>•Joint Congressional Resolution acknowledging 100th anniversary of overthrow of Hawai'ian Monarchy and apologizing to native Hawaiians</li></ul>

# Puerto Rico



Date	Congressional / Judicial / Other Event	Effect
1898	Treaty of Paris	Puerto Rico annexed as U. S. territory
1899	Carroll Report	Presidential Commission Report recommends: <ul style="list-style-type: none"><li>• Constitution and Laws of U. S. be fully extended to Puerto Rico</li><li>• U. S. citizenship be granted</li><li>• Territorial government similar to Oklahoma be established</li></ul>
1900	Organic Act	<ul style="list-style-type: none"><li>• Local Civil Government Established</li><li>• Creates U. S. territorial court</li></ul>
1901-1905	Insular cases decided	U. S. Constitution applies ex proprio vigore to Puerto Rico, however not all constitutional rights extend to unincorporated territory
1904	Gonzalez v. Williams	Citizens of Puerto Rico are U. S. nationals
1917	Jones Act	<ul style="list-style-type: none"><li>• Conferred U. S. citizenship to citizens of Puerto Rico</li><li>• Bi-cameral Legislature established</li></ul>

# Puerto Rico (cont.)



Date	Congressional/Judicial/ Other Event	Effect
1922	Balzac v. Porto Rico	<ul style="list-style-type: none"><li>• Granting of U. S. citizenship did not incorporate Puerto Rico</li><li>• VI th Amendment Right to Jury Trial in Criminal Cases inapplicable</li></ul>
1947	Elective Governor Act	For the first time in 430 years of Spanish and US dominion, the People of Puerto Rico elect their Governor in 1948
1950	Ruiz Alicea v. US	First Circuit rejects argument that Treaty of Paris is null and void
1950	Law 600	Congress authorizes Puerto Rico to draft Constitution
1952	8 USC sec 1402	US citizenship provision of 1917 Organic Act codified at US Immigration and Nationality Act (shortly before Commonwealth established)

# Puerto Rico (cont.)



Date	Congressional/Judicial/Other Event	Effect
1952	Law 477	<ul style="list-style-type: none"><li>• Puerto Rico Constitution approved by Congress (before that of Hawai`i)</li><li>• Puerto Rico government is republican in form</li></ul>
1954	Brown v. Board of Education	Doctrine of “Separate but Equal” violates Equal Protection
1961	PL 87-189 (28 USC sec 1258)	As with all States, appeals from PR Supreme Court must be taken to US Supreme Court; previously to First Circuit
1966	PL 89-571	Article III Court established in Puerto Rico
1970	Garcia Mercado v Superior Court	<ul style="list-style-type: none"><li>• Right to jury trial in civil cases locally inapplicable because of civil law tradition (constitutional ramifications not addressed)</li><li>• Ruling questioned on constitutional grounds by federal court in 2011</li></ul>

# Puerto Rico (cont.)



Date	Congressional/Judicial/Other Event	Effect
1976	HR 11200	<ul style="list-style-type: none"><li>• House subcommittee on Territorial and Insular Affairs proposed bill to enhance Commonwealth status.</li><li>• Entitled "Compact of Permanent Union" and included provisions such as:<ul style="list-style-type: none"><li>• 1 seat in US House</li><li>• 1 seat in US Senate</li><li>• ability of US President to suspend application of particular federal laws in PR (as existed before Commonwealth status);</li><li>• ability of President and Governor to agree to limits to immigration laws.</li><li>• Article III court would remain.</li></ul></li><li>• US Senate passed parallel Resolution 215.</li><li>• Following President Ford's defeat Bill was not further considered.</li></ul>

# Puerto Rico (cont.)



Date	Congressional/Judicial/Other Event	Effect
1976	Examining Board v Flores de Otero	US Supreme Court recognizes congressional relinquishment of control over local matters
1978	PL 95-48	Additional Article III judgeships created for Puerto Rico
1982	Rodriguez v PDP	US Supreme Court recognizes that Puerto Rico like the States is sovereign over matters not governed by US Constitution.
1992	Igartua v US	First Circuit holds that because Puerto Rico is not a State US citizens therein lack Presidential vote. Ruling reaffirmed in subsequent Igartua plaintiff cases in 2000 and 2004 and extended to congressional elections in 2009.

# Puerto Rico (cont.)



Date	Congressional/Judicial/Other Event	Effect
2001	Romeu v Cohen	Second Circuit holds that US citizen who moved from New York to Puerto Rico lost right to vote for President.
2009	People v. Santana Vélez	Vlth Amendment Right to jury trial is fundamental and applies to Puerto Rico
2011	Presidential Task Force Report on Puerto Rico's Status	Recognizes that Insular Cases “have been viewed negatively on the Island and do not address the development of the relationship between Puerto Rico with the United States”.
2012	Commonwealth of PR v Northwest Selecta, Inc.	Commerce Clause applicable to Puerto Rico (overrules prior ruling to the contrary; in accord with First Circuit).

# Philippines



Date	Congressional / Judicial / Other Event	Effect
1898	Treaty of Paris	Philippines annexed as U. S. territory
1899	Senate Resolution	Philippines not to be annexed permanently
1901	The Diamond Rings	1899 Senate Resolution has no effect
1902	Organic Act	<ul style="list-style-type: none"><li>• Local Civil Government Established</li><li>• No U. S. territorial court is established</li></ul>
1904-1905	Dorr v. U. S. Rasmussen v. U. S.	Philippines is unincorporated territory
1916	Organic Act	Congress announces intention to grant Philippines independence

# Philippines



Date	Congressional / Judicial / Other Event	Effect
1935	Tydings-McDuffie Act	<ul style="list-style-type: none"><li>• 10 years transitory intention to grant Philippine independence</li><li>• Creation of Commonwealth of the Philippines Islands</li><li>• Constitutional Convention enacts Constitution which is approved by President Roosevelt</li></ul>
1937	Cincinnati Soap Co. v U. S.	Congress may cede to newly established Commonwealth plenary powers exercised previously under territorial status
1946	Philippines Independence	

# Guam



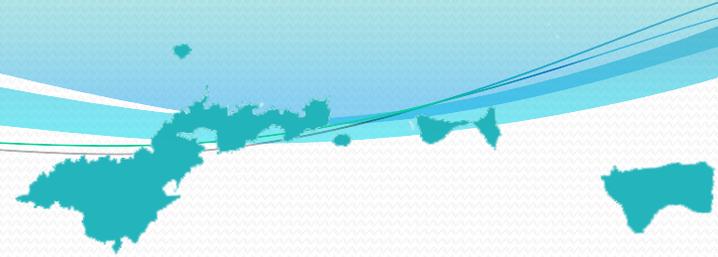
Date	Congressional/ Judicial/Other Event	Effect
1898	Treaty of Paris	Guam annexed as U. S. territory
1898 – 1950	Military Occupation	Guam under jurisdiction of U. S. Navy
1950	Organic Act	<ul style="list-style-type: none"><li>• Local civil government established</li><li>• U. S. Citizenship</li><li>• Article I Court established</li></ul>
1952	Section 307 of Immigration and Nationality Act	U. S. citizenship granted to all persons born in Guam after April 11, 1899
1968	Elective Governor Act	Right to vote for own governor
1979	Constitutional Referendum authorized by U. S. Public Law 92-582	Guam Constitution rejected by people of Guam
1984	Attorney General of Guam v U.S.	U.S. Citizens in U.S. territory of Guam cannot vote for President of the U.S.

# Guam



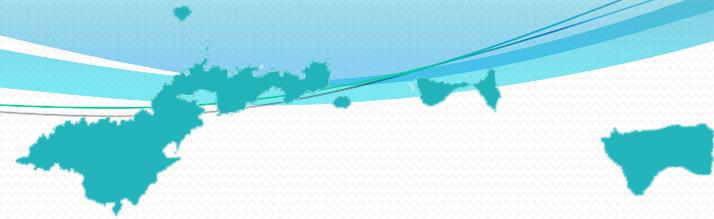
Date	Congressional/ Judicial/Other Event	Effect
1996	Guam Supreme Court is established pursuant to 1984 Congressional authorization	Ninth Circuit entertains appeals
2006	118 Stat 2208 (42 USC sec 1424-2)	Appeals from high court are taken to US Supreme Court

# American Sãmoa



Date	Congressional/Judicial /Other Event	Effect
1899	Treaty with Germany	American Sãmoa annexed as U. S. territory
1899 – 1951	Military Occupation	American Sãmoa under jurisdiction of U. S. Navy
1956	Transfer to Civil Authority	American Sãmoa under jurisdiction of U. S. Department of the Interior
1967	Local Constitution enacted	Not approved by U. S. Congress
1977	First Local Elections	Governor Elected

# American Sāmoa



Date	Congressional/Judicial /Other Event	Effect
2013	Leneuotti Fiafia Tuau v US	<ul style="list-style-type: none"><li>• American Samoa is unincorporated territory</li><li>• no US birthright citizenship</li></ul>
Present	“Unorganized territory”	<ul style="list-style-type: none"><li>• No U. S. Citizenship (“U. S. Nationals”)</li><li>• No Organic Act</li><li>• No Territorial Court</li><li>• Justices of High Court of American Sāmoa appointed by Secretary of the Interior</li><li>• Most federal cases are presented in Hawai`i and DC federal district courts</li></ul>

# Commonwealth of Northern Mariana Islands (CNMI)

Date	Congressional/ Judicial/Other Event	Effect
1976	CNMI Established pursuant to “Covenant” 48 U.S.C. § 1801	<ul style="list-style-type: none"><li>• Former U. S. Trust Territory</li><li>• Established by Joint Congressional Resolution rather than by Treaty</li><li>• Republican form of government</li></ul>
1977	48 U.S.C. § 1821	U. S. District Court for the CNMI established (non-Article III Court)
1978	CNMI Constitution	CNMI Constitution enters into effect
1986	U. S. Congress extends U. S. Citizenship	U. S. Citizenship pursuant to “Covenant”
1989	CNMI Supreme Court created under terms of Covenant	Appeals taken to 9 <sup>th</sup> Circuit

# Commonwealth of Northern Mariana Islands (CNMI)

Date	Congressional/ Judicial/Other Event	Effect
1993	U. S. ex rel Richards v. De León Guerrero	Even if Territorial Clause provides Constitutional basis for Congress' authority in CNMI, legislative power is limited by Covenant.
2004	CNMI Supreme Court equated to State Supreme courts	CNMI Supreme Court appeals are taken to U. S. Supreme Court
2009	CNMI vs. USA	<ul style="list-style-type: none"><li>• U. S. Immigration Laws apply to CNMI</li><li>• U. S. Department of Homeland Security over immigration and border controls</li><li>• Despite Covenant, Congress may legislate in regards to CNMI's internal affairs.</li></ul>

# U. S. Virgin Islands (USVI)



Date	Congressional/ Judicial/Other Event	Effect
1917	Treaty of Cession with Denmark	USVI becomes U. S. territory
1917- 1931	Military Government	<ul style="list-style-type: none"> <li>• USVI under jurisdiction of U. S. Navy</li> <li>• In 1931, transferred to U. S. Department of the Interior</li> </ul>
1927	8 U.S.C § 1406	U. S. Citizenship
1936 & 1954	Organic Act	<ul style="list-style-type: none"> <li>• Creates U. S. Territorial Court</li> <li>• Unincorporated Territory</li> <li>• VI and VII Amendment Rights to jury trial extended to USVI</li> <li>• Republican form of government</li> </ul>
1970		First Local Elections

# U. S. Virgin Islands (USVI)



Date	Congressional/ Judicial/Other Event	Effect
1994	Pub L. 94-584	Vth Constitutional Convention
2004	Congressional Authorization	USVI Supreme Court created
2007	Ballentine v U.S.	<ul style="list-style-type: none"><li>• U.S. citizens in U.S. Virgin Islands cannot vote for President of the U.S, nor have constitutional right to be represented in Congress by regular voting member.</li><li>• Congress can constitutionally designate USVI as unincorporated territory.</li></ul>
2010	Congress does not approve USVI Constitution	USVI Constitution referred back to Constitutional Convention
2012	P. Law 112-226 (28 U.S.C. § 1260)	Appeals from USVI Supreme Court are taken to US Supreme Court

- Puerto Rico annexed
- Hawai`i annexed
- Philippines annexed

1<sup>st</sup> Philippines  
Organic Act

1898

1900

1902

- 1<sup>st</sup> Puerto Rico Organic Act
- Hawai`i Organic Act
- Hawai`i U. S. Citizenship
- Hawai`i Incorporated  
(USSCt 1903)

- 2nd Philippines Organic Act
- Philippines to become independent

Philippines  
10 year  
transition

Puerto Rico  
authorized to draft  
Constitution



1916

1917

1935

1946

1950

- 2<sup>nd</sup> Puerto Rico Organic Act
- Puerto Rico U. S. Citizenship
- Puerto Rico not incorporated (USSCt 1922)

Philippines  
Independence

- Puerto Rico Constitution Approved
- Republican form of government

- Hawai`i Statehood
- Republican form of government
- Hawai`i Constitution Approved
- Article III U. S. District Court
- Palmyra Atoll remains incorporated territory

1952

1954

1959

Brown v. Board of Education

## 2008

- Article III  
U. S. District Court
- (Additional  
judgeships in 1978)

- Boumediene v. Bush
- Guantánamo Bay is  
unincorporated territory
- Fundamental Constitutional  
rights extend in  
unincorporated territory

1966



U. S. Supreme Court, First Circuit and  
Puerto Rico Supreme Court  
continue to recognize and extend  
fundamental and non-fundamental  
Constitutional provisions to Puerto Rico



2014

*“We the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, in the exercise of our natural rights, we now create within our union with the United States of America.*

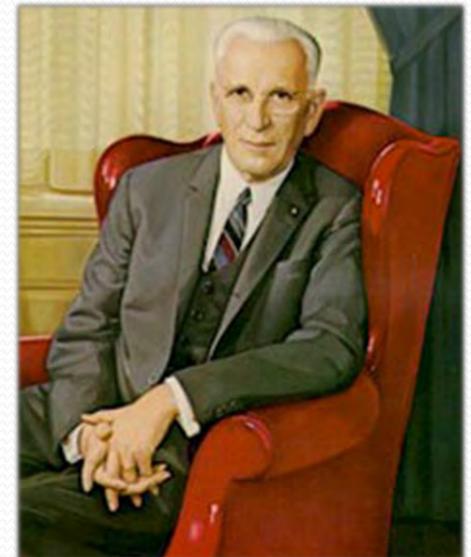
*. . . We Consider as determining factors in our life our citizenship of the United States of America and our aspiration continually to enrich our democratic heritage in the individual and collective enjoyment of its rights and privileges; our loyalty to the principles of the Federal Constitution; the coexistence in Puerto Rico of the two great cultures of the American Hemisphere.”*

Preamble to the Constitution of Puerto Rico (approved by Congress and the People of Puerto Rico)



*“[Law 600 is] a new experiment; it is turning away from the territorial status; it is something intermediary between the territorial status and statehood.”*

Statement of Approval of Puerto Rico  
Constitution of House Majority  
Leader Hon. John McCormack,  
98 Cong. rec. 5128 (1952)



*“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.”*

United States v. Laboy Torres,  
553 F.3d 715 (3<sup>rd</sup> Cir. 2009)  
(O’Connor, J (retired))



*“Puerto Rico 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. This government enjoys the same immunity from suit possessed by the States. Like the States, Puerto Rico lacks “the full sovereignty of an independent nation,” for example, the power to manage its “external relations with other nations,” which was retained by the Federal Government. As with citizens of the States, Puerto Rican citizens are accorded United States citizenship, and the fundamental protections of the United States Constitution. The rights, privileges, and immunities attendant to United States citizenship are “respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union. Finally, Puerto Rican judgments are guaranteed the same full faith and credit as are those of the States.”*

United States v. Laboy Torres, 553 F.3d 715 (3<sup>rd</sup> Cir. 2009)  
(O’Connor, J (retired))



*“The purpose of Congress in the 1950 and 1952 legislation was to accord Puerto Rico the degree of autonomy and independence normally associated with a State of the Union.”*

Examining Board v. Flores de Otero, 426 U.S. 572, 594 (1976)

*“Prior to 1950 Puerto Rico’s legal status was closer to that of a “territory” than that of a “state”, and that since 1952 Puerto Rico’s status changed from that of a mere territory to the unique status of Commonwealth. And the federal government’s relations with Puerto Rico changed from being bounded merely by the territorial Clause, and the rights of the People of Puerto Rico as United States Citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rico Federal Relations Act and the rights of the People of Puerto Rico as United States Citizens.”*

[Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank, 649 F.2d 36, 41 \(1<sup>st</sup> Cir. 1981\) \(Breyer, J.\)](#)

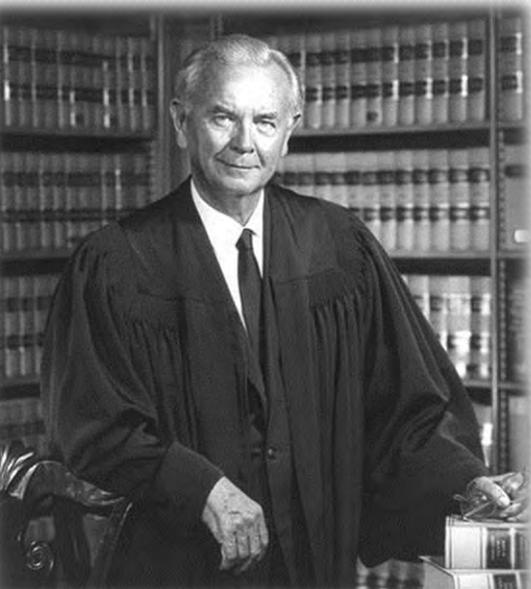




*“The ‘Insular Cases’ can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern **temporarily** territories with wholly dissimilar traditions and institutions.”*

[Reid v. Covert](#), 354 U.S. 1, 14 (1957)

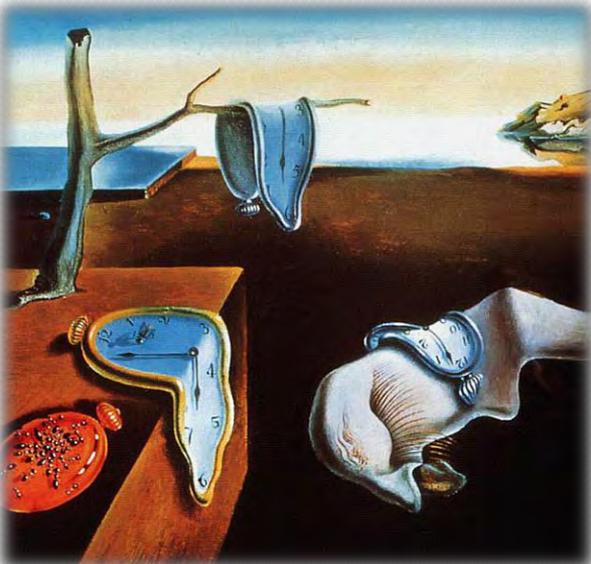
*“Whatever the validity of [the Insular Cases], in the particular historical context in which they were decided, those cases are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970s. As Justice Black declared in Reid v. Covert: “neither the cases nor their reasoning should be given any further expansion. **The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperant 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.**”*



Torres v. Commonwealth of Puerto Rico,  
442 U.S. 465, 475-476 (1979)  
(Brennan, J., concurring, joined by  
Stewart, Marshall and Blackmun, JJ.)

*“The Insular Cases involved territories **“with wholly dissimilar traditions and institutions”** that Congress intended to govern only **“temporarily”**.”*

*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.”*



[Boumediene v. Bush](#), 553 U.S. 723,  
128 S. Ct. 2229, 2255 (2008)

*“Our basic charter cannot be contracted away like this. 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.** Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the Constitution.” Abstaining from questions involving forward sovereignty and territorial governance is one thing. **“To hold the political branches have the power to switch the Constitution on or off at will is quite another.”***

Boumediene v. Bush, , 553 U.S. 723, 128 S. Ct. 2229, 2259 (2008)

*“To acknowledge the continuing validity of Balzac following Duncan v Louisiana would negate equality of fundamental rights to United States citizens in Puerto Rico, something contrary to Congress' intent that Puerto Rico be treated in a manner analogous to that of a federated state and our own constitutional duty of guaranteeing federal constitutional justice.”*



[People v. Santana-Velez](#), 177 D.P.R 61, 2009 TSPR 158 (2009) (Martinez Torres, J., concurring)

*“[I]n light of the ever-increasing integration of Puerto Rico to the federal system, the justification of [the Commerce] Clause to the island is simple. . . . If in practical terms Puerto Rico is akin to a state, of equal application then should be the limitations that befall over [the states] by virtue of the Commerce Clause. It would be inconceivably possible for there to exist a jurisdiction that is considered as a state within the United States which is not subject to the Clause which constitutes the most important tool for economic and national integration of the Federal Constitution.”*

Commonwealth of Puerto Rico v  
Northwest Selecta, Inc,  
185 DPR 40 (2012) (Feliberti, J. )



*“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.”*

Igartua v. United States of America, \_\_ F. 3d \_\_,  
2010 WL, 4751781 \* 17-18 (1<sup>st</sup> Cir. 2010)  
(Torruella, J. concurring in part; dissenting in part)  
(Citations to Supreme Court cases omitted)



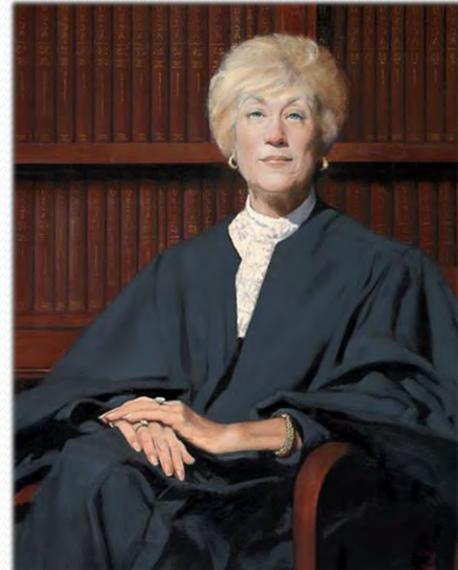
*“This Court . . . is of the opinion that it is inexcusable that there still exists a substantial number of US citizens who cannot legally vote for the President and Vice President of the United States.”*

Sanchez v. U.S., 376 F. Supp. 239, 242  
(DPR 1974) (Youngdahl, J.)



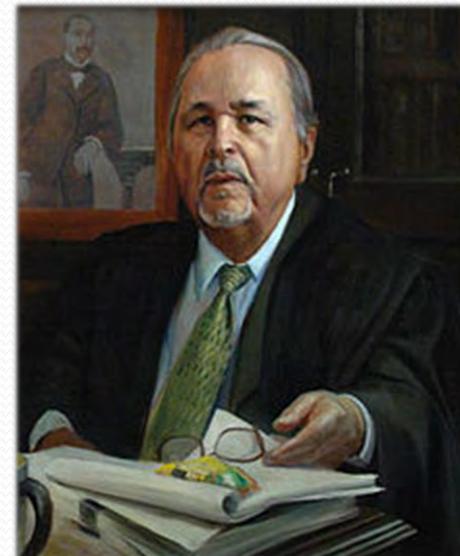
*“Although I am unable to afford [plaintiff] the relief he seeks, there is little doubt that all American citizens living in Puerto Rico are suffering a grave injustice. As American citizens, they should be allowed to vote for their national leader.”*

Romeu v Cohen, 121 F. Supp. 2d 264, 283  
(S. D. N. Y. 2000) (Scheindlin, J.)



*“Under the present status, the residents of Puerto Rico enjoy some benefits and responsibilities but are deprived of others. Ultimately, it is this political conundrum that has characterized the present status of Puerto Rico; a status of subordination through disenfranchisement. It is a status, which despite providing for citizenship, denied the right to have a voting Congressional delegation. It is a status that stands at odds with the words of Lincoln that no man is good enough to govern without the other's consent.”*

Igartua v. U.S., 107 F. Supp. 2d 140, 148  
(DPR 2000) (Pieras, J.)



*“Equally acidulous are the noble pronouncements written into treaty obligations assumed by the United States such as the ICCPR which employs the following language” Every citizen shall have the right . . . to vote and be elected at genuine periodic elections which shall be by universal and equal suffrage” and “all persons are equal before the law”. Obviously, these noble utterances about the rights of all citizens before the law sits ill at ease with the notion that there is an exception to that right if one is a resident of Puerto Rico.”*

Igartua v. U.S., 331 F. Supp. 2d 76, 80–81  
(2004)(Acosta, J.)



*“Not surprisingly, the Insular Cases have been, and continue to be, severely criticized as being founded on racial and ethnic prejudices that violate the very essence and foundation of our system of government as embodied in the Declaration of Independence and repeated in such documents as the Gettysburg Address and the Civil Rights laws. . . . [T]he nature and extent of the citizenship of residents of the Virgin Islands have been controlled up to now by a thoroughly ossified set of cases marked by the intrinsically racist imperialism of a previous era of United States colonial expansion.”*

[Ballentine v. US, 2001 WL 1242571](#)  
[\(Moore, J.\)](#)



*“In 1950 Congress approved Law 600 which afforded the island's voters a process of adoption of a local constitution. This ultimately led to the Establishment of the Commonwealth of Puerto Rico, under a republican form of government. . . . [T]he [Supreme] Court in Balzac could not have conceived of a territorial constitutional development of such magnitude”*

Consejo de Salud Playa Ponce v Rullan,  
593 F. Supp. 25 386 (DPR 2009) (Gelpi , J.)



*“[T]he following territorial anomaly further illustrates the erosion and inadherence by Congress of Balzac's language to the effect that the incorporation of a territory will necessarily lead to statehood. When the "incorporated territory" of Hawai'i became a state, a portion of it was segregated and not made part of the State . . . The result is that today, Palmyra Atoll, by virtue of Congressional action, is an unpopulated and unorganized, yet incorporated territory of the United States. Under the ratio decidendi of Balzac, this is not possible, given that Palmyra did not become a state, nor will ever likely become one. Ironically, the United States Constitution affords greater protections and rights to a citizen in Palmyra Atoll than in an unincorporated territory ”.*

Consejo de Salud Playa Ponce v Rullan,  
593 F Supp 25 386 (DPR 2009) (Gelpi, J.)



*“Puerto Rico is the only United States jurisdiction in which its American citizens are not afforded any right to trial by jury in civil cases before local courts... From a judicial perspective, this creates a significant constitutional anomaly for litigants in this jurisdiction. It is the underlying reason scores of plaintiffs will go to unsurmountable lengths (i.e., relocating to the U.S. mainland) to create diversity jurisdiction, and hence obtain a jury trial. [I]n this District... in diversity cases the Seventh Amendment bestows upon United States citizens in Puerto Rico all its guarantees... Such constitutional provision, like numerous others, has been fully incorporated into Puerto Rico as if it were a State of the Union. The right to be judges by your peers in civil cases is thus a constitutionally protected Fundamental Right. It is one of the most longstanding natural rights in our legal system, having derived from the Magna Carta.*

[continued on next page...](#)

*“...Such judicial reality, hence, cannot tolerate any form of state-federal court constitutional segregation as it pertains to the Seventh Amendment rights of the nearly four million citizens residing in Puerto Rico... At this time it behooves the courts of Puerto Rico, and ultimately its Supreme Court, to affirmatively recognize the fundamental right to civil trial by jury in actions arising under the common law or their equivalent under the civil law.*

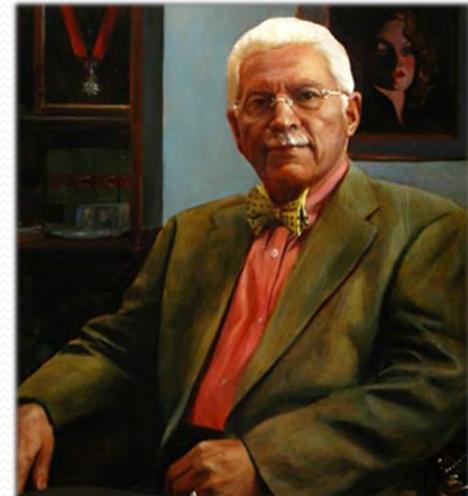
*Only then will Puerto Rico cease to be the only United States jurisdiction in which US citizens have the guarantees of the Seventh Amendment switched on and off depending on the forum where the case is being tried.”*



Bouret-Echevarria v. Robinson Helicopter Co.,  
824 F. Supp. 2d 275, 282 (DPR 2011) (Gelpi, J.)

*"Over a half-century after the Commonwealth was established, the principle of the consent of the governed, in the case of Puerto Rican-Federal relations, has been substantially eroded, largely due to the widening sphere of federal authority. "*

*"It is time for both parties-namely, the People of Puerto Rico and the political branches in Washington, D.C.- to urgently review the relationship in order to provide for greater participation and a more specific mechanism of consent by the People of Puerto Rico to the applicability of federal laws in the Commonwealth. Such mechanisms have existed in the past, and have been suggested on various occasions by competent bodies."*

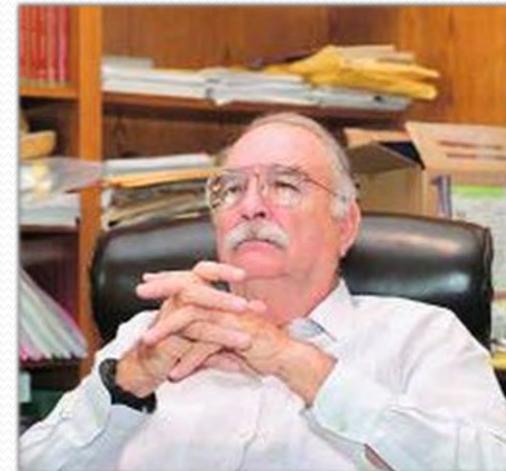


Hon. Salvador E. Casellas,  
Commonwealth Status and the Federal Courts,  
80 Rev. Jur. U.P.R. 945, 962, 964 (2011)



*"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."*

Hon. Juan R. Torruella, [The Insular Cases: A Declaration of their Bankruptcy and My Harvard Pronouncement](#), Speech at Harvard Law School, February 19, 2014





*"United States citizens residing in Puerto Rico, have historically lived under a system of federal laws in which the constitutional principle of consent of the governed is a fallacy. . . . [T]he Federal District Court in Puerto Rico [thus] continue[s] to be part of a constitutionally valid, yet flawed system of American Government."*

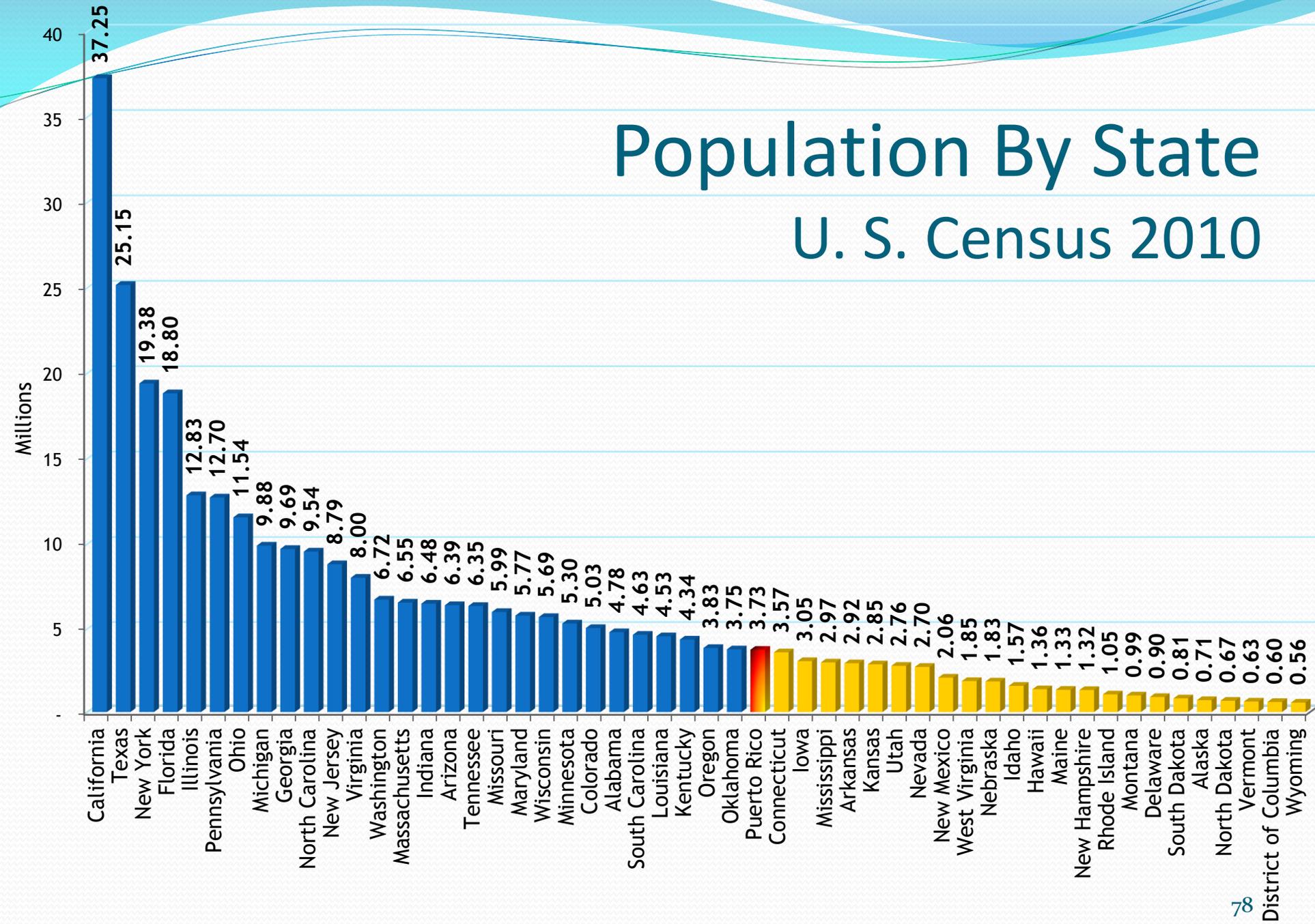
**United States v. Amaro-Santiago, \_\_\_ F. Supp. 2d \_\_\_, 2104 WL 576342 (D.P.R. 2014) (Gelpi, J.)**

# Boumediene v. Bush



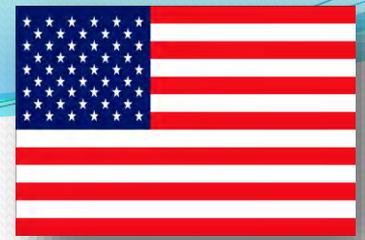
# Population By State

## U. S. Census 2010





# Puerto Rico 2014

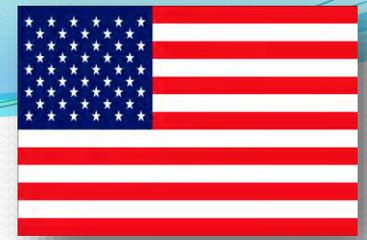


- U. S. Citizens
- Congressionally Approved Constitution
- Republican form of government
- Article III Court
- All U. S. Criminal and Civil laws apply (limited exceptions)
- Federal Executive Presence
- Only U. S. territory within U. S. Customs and Immigration zone





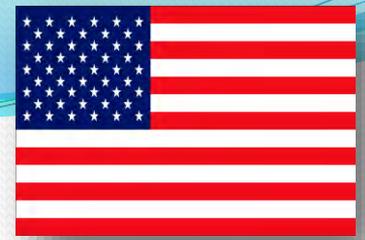
# Puerto Rico 2014



- Puerto Rico residents pay full Social Security and Medicare payroll taxes, as well as federal import, export, and commodity taxes.
  - Federal employees and persons with federal income file federal income tax returns
  - In 2010, the U. S. Internal Revenue Service collected **\$3.6 billion** in individual income taxes, employment taxes, and business income taxes in Puerto Rico.
    - This is more than the IRS collected in one state, and not significantly less than it collected in at least four (4) other states.
- **A jurisdiction with one of the largest per capita enlistment in United States Armed Forces.**
- **Non-fundamental constitutional provisions extended by Federal Courts and the Puerto Rico Supreme Court.**



# Puerto Rico 2014



... BUT ...

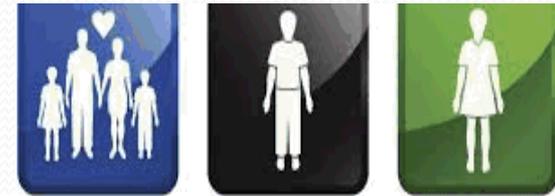
- No presidential vote
- No Congressional Representation with voting power
  - 2 Senators
  - 5 Representatives
- Discrimination in federal benefits in welfare and social programs.
- Only jurisdiction in the U. S. where U. S. citizens are not afforded fundamental right to jury trial in civil cases in state court.

# U.S. Territories 2014

JURISDICTION	CONSTITUTION	U.S. CITIZENSHIP	SUPREME COURT	PRESIDENTIAL VOTE	CONGRESSIONAL REPRESENTATION WITH VOTE	ARTICLE III COURT
 U.S. Virgin Islands						
 Guam						
 CNMI						
 American Sãmoa						

**Legend:**  Yes  No  
 U.S. Citizens who previously voted in States or DC can do so under UOCAVA

- The POWER the CONSTITUTION GRANTS IT ALSO RESTRAINS. AND THOUGH CONGRESS HAS GREAT AUTHORITY TO DESIGN LAWS TO FIT ITS OWN CONCEPTION OF SOUND NATIONAL POLICY, IT CANNOT DENY THE LIBERTY PROTECTED BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT."
- "What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of [DOMA] are to demean those persons who are in lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."
- " The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes the Fifth Amendment right all the more specific and all the better understood and preserved."



United States v. Windsor, 570 U.S. \_\_\_\_ (2013)

# U.S. Supreme Court 1954 - 2014



Year	Case
1954	Brown v. Board of Education
2008	Boumediene v. Bush
2013	United States v. Windsor
????	_____?_____ v. _____?_____

# Issues for Academic Debate and Discussion

- In the U.S. non-state areas, are there still “grave questions [that] will arise from differences of race, habits, laws and customs of the people,” as the Supreme Court in 1901 observed in *Downes v. Bidwell*?
- More than 50 years have passed since the Supreme Court decided *Brown v Board of Education*. Does the present constitutional and legal condition of the US citizens residing in non-state areas run afoul to the principle that separate is not equal ? What would be the public reaction today if Justices of the Supreme Court, Members of Congress and the President used similar language when speaking about the People of Puerto Rico, US Virgin Islands, Guam, CNMI and American Sãmoa?



# Issues for Academic Debate and Discussion

- 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 time (in the case of Puerto Rico, the past 115 years) ?
- US Senator Ron Wyden remarked this year in a Congressional hearing that Puerto Rico’s current relationship “undermines the United States moral standing in the world. For a nation founded on the principles of democracy and the consent of the governed, how much longer can America allow a condition to persist in which nearly four million US Citizens do not have a vote in the government that makes the national laws which affect their daily lives”. Are you in agreement or disagreement with this statement? Explain your answer.



# Issues for Academic Debate and Discussion



- In 2011 the President's Task Force Report on Puerto Rico's Status noted that the Insular Cases do not address the development of the relationship between Puerto Rico with the United States. Are you in agreement or disagreement? Explain your answer. What about the other non-state areas?
- Should Congress and the Supreme Court address and remedy the current politico-legal and constitutional status of US non-state areas? If you were a member of Congress or the Court, what would you do? Does the recent DOMA opinion create a more favorable environment for revisiting the continued discrimination of U.S. citizens residing in the non-state areas under the American flag?
- Has the politico-legal and constitutional development that Puerto Rico has undergone, and that other non-state jurisdictions are undergoing, created a legal and constitutional binding permanent union with the United States?

# Issues for Academic Debate and Discussion

- Is Congress under any obligation to US citizens in non-state areas to continue developing its constitutional relationship?
- Pick a particular non-state area. Discuss from your perspective why independence, free association, commonwealth, enhanced commonwealth or statehood is in your opinion the most beneficial status option, and why other options are not. Do so first only from a constitutional perspective. Then argue based on any other grounds you deem important.



# For Further Reading

- Gelpi, G. A. The Insular Cases: A Comparative Historical Study of Puerto Rico, Hawai'i and the Philippines, The Federal Lawyer March/April 2011
- Van Dyke, Jon, The Evolving Legal Relationship Between the United States and Its Affiliated US-Flag Islands, University of Hawai'i Law Review
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- Rivera-Ramos, Efren, American Colonialism in Puerto Rico: The Judicial and Social Legacy (2007)

Mahalo Nui Loa

A hui hou kākou



*Muchas gracias!*



# Comments and Observations

- Use any of the microphones located in the aisles.
- Please be brief



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Constitutional\\_Evolution\\_Overseas\\_US\\_Territories.pdf](http://www.prd.uscourts.gov/sites/default/files/pdf/gag/Constitutional_Evolution_Overseas_US_Territories.pdf)