THE INCORPORATION OF A FUNDAMENTAL RIGHT IN A U.S.A. TERRITORY: AN ESSAY OF *INTRANATIONAL COMPARATIVE LAW*

ARTICLE

Hon. Héctor Cordero-Vázquez[1] *

> [W]e can have just our usual flag, with the white stripes painted black and the stars replaced by the skull and crossbones. [. . .] Having no powers, *it has to invent them*, and that kind of work cannot be effectively done just by anybody; *an expert* is required.[2]

---

* Appellate Judge of the Court of Appeals for the Commonwealth of Puerto Rico, U.S.A.. Former: Superior Court Judge; District Court Judge; First Amendment and Communications Law Professor; U.S. Postal Inspector; Special Counsel and Special Prosecutor for the Commonwealth of Puerto Rico. *LL.M.*, University of Pennsylvania; *J.D.*, University of Puerto Rico; *B.A.* (Education-History), University of Puerto Rico. For reasons related to our Judicial Code of Ethics, comments provided here are exclusively my own, and do not reflect whatsoever a public or official expression on the subject by the Commonwealth's Judicial Branch.

[1] I am always most thankful for the outstanding aid and support of Theresa, Johanna and Angie, and, of course Mirza G. for her enormous patience, since this enterprise sacrificed time with her and occupied her computer. I also owe special gratitude to my colleague friends who encouraged me on the *dual* objectives of this essay and to those who reviewed over their weekends my *dense* opinions on it. Little could they do with my *English* style, much less of my deeply rooted irreverence on constitutional analysis. I moved, worked, studied, and lived in continental U.S.A., just like the Chief Justice Taft wooed. That has much to do about it.

[2] Mark Twain, *To the Person Sitting in Darkness*, Vol. 172, No. 531 North AmericanN. A. Rev. Review 161, 176 issue 531, 172 (1901).

I. Introduction: the *Heller-Chicago* Cases

Two U.S. Supreme Court Second Amendment decisions concerning the right to **keep and bear** arms, *District of Columbia v. Heller*[3], (hereinafter, *Heller*), and *McDonald v. Chicago*[4], (hereinafter, *City of Chicago*), present a unique perspective to discuss the subject of *unincorporation*.[5] They provide the necessary framework to question *unincorporation*, as it affects the territories of the Union, through the judicial process of selective incorporation.[6]

In *Heller*, the U.S. Supreme Court faced the question whether a District of Columbia prohibition on the possession of usable handguns in the home violates the Second Amendment to the U.S. Constitution. After historical and legal (constitutional) analysis, the Court held that the District of Columbia's ban on handgun possession in the home violates the Second Amendment. They also held that a prohibition against rendering any lawful firearm in the home operable for the purpose of self-defense offends the Constitutional Amendment. "Assuming" petitioners were not disqualified, the Court went further and ordered that the *District of Columbia* must permit the registration of the handguns and must issue the proper license to enable carrying operable weapons at home.[7]

---

[3] 554 U.S. 570 (2008).

[4] 561 U.S. ___ (2010), 130 S. Ct. 3020.

[5] Frederic R. Coudert was counsel for plaintiff in *De Lima v. Bidwell*, 182 U.S. 1 (1901), the first case that brought challenge of the political status of the new possessions when Puerto Rico was deemed to be an unincorporated territory of the United States of America. Coudert was one of the first to comment on the meaning of *incorporation*.

> *The very vagueness of the doctrine was valuable* in that while the doctrine admitted the Constitution was everywhere applicable to the actions of Congress, *it failed anywhere to specify what particular portions of the Constitution were applicable to the newly acquired possessions*. The doctrine has been sufficiently *elastic* to permit of a government, which, while maintaining the essentials of modern civil liberty, has not attempted to impose upon the new peoples certain ancient Anglo-Saxon institutions for which their history had not adapted them.

Frederic R. Coudert, *The Evolution of the doctrine of territorial incorporation*, 26 Colum. L. Rev. 823 (1926).

[6] S*elective incorporation* is the accepted process by which certain rights or guarantees of the *Bill of Rights* become applicable to the States through the Fourteenth Amendment of the U.S. Constitution, under a U.S. Supreme Court's *Mandate*. Presumably, if the right has not been "nationalized", only the Federal Government bears the burden of the limitation (the right cannot be abridged because the guarantees of the Bill of Rights forbid it). When the right has been made applicable to a State ("nationalized"), through the *selective incorporation* approach, then it is recognized as a "fundamental right" of the citizen and is *irrevocable* by Court or Congress, just like a constitutional clause, thus it cannot be abridged by the State under whatever guidelines the Court mandates.

[7] The U.S. Supreme Court also affirmed that:

> [a]lthough we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding

City of Chicago was decided by the same *Heller* majority of the U.S. Supreme Court, except for a *partial* defection.[8] In *City of Chicago*, petitioners argued that city laws violated their rights to **keep and bear arms** for two reasons: *First*, because this right is among the "privileges or immunities of citizens of the United States" and that the narrow interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment adopted in the *Slaughter-House Cases*[9], should be rejected. *Second*, petitioners argued that the Fourteenth Amendment's Due Process Clause "incorporates" the Second Amendment right. However, respondents in *City of Chicago*, argued that their laws—that banned handguns—were constitutional, because the Second Amendment had not been incorporated to the States.

The Court reiterated that it was already established law in *Heller* that self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and that individual self-defense is "the *central component*" of the Second Amendment right. The majority of the Court (Justices Alito, Kennedy, Scalia, and Thomas, and Chief Justice Roberts) agreed that the Fourteenth Amendment allowed the incorporation—into the States—of a Second Amendment right to **keep and bear arms** for the purpose of self-defense.

Also, in *City of Chicago*, the U.S. Supreme Court held that the Second Amendment right was a fundamental right **of the People** and it was fully applicable to the States. This is the new law of the land. Thus, no State can now abridge that fundamental right. However, the plurality refused to "disturb" the narrow construction

---

the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-627. This admonition presumably extends to minors and *quaere* to aliens legally residing in U.S.A. or on interstate travel with firearms.

[8] Justice Thomas broke ranks from the majority, *only* with respects of Parts II-C, IV and V (he also concurred in the judgment of the Court). In his well-articulated opinion, Justice Thomas proposed a different straightforward approach towards the *selective incorporation* as it should apply to the *citizens*. He believed the case presented a wasted opportunity to reexamine, and restore the meaning of the Fourteenth Amendment agreed upon by those who ratified it, namely the People. He presents a *very* compelling discussion that 'held his ground' with the *rights*, *civil liberties*, and *freedoms* of citizens, as they are protected by *the_Privileges and Immunities Clause* of the Fourteenth, not the Due Process Clause in abstract. The plurality, found it necessary to briefly argue against going into his proposal and disturbing his questioned scope of the *Slaughter-House Cases*, *infra* n. 9. If for no other reason, Justice Thomas arguments appeared favorable to similar privileges requested by the U.S. citizens' residents of the "territories acquired from Spain."

[9] *Slaughter-House Cases*, 83 U.S. 36 (1873). In a nutshell, a Louisiana provision allowed or promoted monopoly of a particular slaughtering business. Competitors argued that this created involuntary servitude, abridged privileges and immunities, denied equal protection and deprived them of property without due process. The U.S. Supreme Court held that the butcher plan of New Orleans *did not* violate the Thirteenth or the Fourteenth Amendments (equal protection or due process clauses). The Court ruled that the Louisiana law was constitutional and allowed the New Orleans butcher plan monopoly to go forward.

The strong dissents argued that the Fourteenth Amendment protects *the fundamental rights and liberties of all citizens against state interference*. This was later adopted by the U.S. Supreme Court through the Due Process Clause, which was interpreted to incorporate most of the rights protected in the Bill of Rights against discrimination or deprivation by the States.

of the rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment against state infringement. That plurality (Justices Alito, Kennedy, Scalia and Roberts, CJ), agreed to maintain the Due Process Clause of the Fourteenth Amendment as the judicial force that drives the *selective incorporation* approach.

II. A *Preface* for the Essay

Prior to further development of this essay, some initial comments are necessary.[10] It is not my intention to analyze or discuss the *Heller-City of Chicago* precedents any further, since the purpose of this essay is to question if such a constitutional provision as the right to **keep and bear arms** is deemed applicable in the *unincorporated* territorial Commonwealth. A substantial part of this essay will cover the difficulties that territorial *unincorporation* causes when facing a possible incorporation of a constitutional right. I will sometimes use the term Territory *in lieu* of **territory**, or the concept territorial Commonwealth, and even territorial-real estate (which is a "common law term"), when I refer to the United States of America's archipelago of Puerto Rico. They are all pronouns of the same *unincorporated* territorial entity. Such concept (*unincorporation*) and that of territorial *incorporation* into the United States of America[11] must be carefully distinguished from selective incorporation (nationalization)[12] of fundamental rights.

Part III presents the 'question at issue', while the rest of the essay will provide a summary of the historical and legal context of the territorial *unincorporation*. *If you are familiar with the territorial reality (status) of Puerto Rico, maybe you want to skip Parts IV thru VI*. In Part VII, I try to provide the possible answers for the question at issue.

---

[10] This is a reduced version of my original research. Relevant portions have been omitted to craft this essay into a publishable copy. I dedicate the complete unrated version of my research to my Father, the Judge and Col. Héctor Cordero-Vega, U.S. Army Ret., of whom I, at least, "Thank him for his services."

[11] When the term United States of America (hereinafter just, U.S.A.) is used in this essay, I only mean the government of the Federation or the Corporation of States within the "Union." By default, I also include the elected representatives of our collective brotherhood of fifty States (hereinafter, Congress). Nevertheless, I do *not* make inferences regarding the individual States, or to the "American people", nor to our fellow citizens worldwide, wherever they reside, unless the context warrants it. Much less, my irreverent inferences make allusion of our fellow Hispanic-Latino-Americans, African-Americans, or Native-Americans (our endeared Hawaiian brothers included) residents of the States to whom, at least, the passage of time has awarded various degrees of individual or collective dignity within the Union. Direct references are made to the "experts" on judicial policy, the U.S. Supreme Court, the "constitutional lion", Bartholomew H. Sparrow, The Insular Cases (2006), and, special care is given to distinguish them from the Commonwealth's Supreme Court (hereinafter the C.S.C.), since the latter's contribution to the theories of *incorporation* have been at the most, *de minimis*. Intranational Comparative law is not a misnomer, its use is intentional, and I found precedent in tribal law and, of all places, in *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

[12] Somewhere, I will use the concept *selective integration* when I refer to the incorporation of Federal *fundamental rights* into a territory just to distinguish it from the *selective incorporation* to the States.

I could not evade the excessive use of footnotes; I was tempted and they were inevitable. Those *targeted* to be annoyed with them will be satisfied. I quote here often from Mark Twain's egalitarian essay directed towards the American-Philippines policy: *To the Person Sitting in Darkness*. That article inspired me with a question. This will not invalidate my essay, because, constitutional comparative law is inherently non-original, much to the dismay of Exceptionalism.

III. The Question at Issue

Has a Second Amendment right, to **keep and bear arms**, been fully extended to the territorial Commonwealth through the selective incorporation approach and, will the *Heller-City of Chicago* precedents apply, through the Due Process Clause of the Fourteenth Amendment, to an *unincorporated* territory's deprivation of a right under the Second Amendment? This narrowly construed issue was not directly addressed by the U.S. Supreme Court in *City of Chicago*. We should remember that a Second Amendment right is a constitutional provision and, in 1901 the Court developed a doctrine whereas "those" provisions do not extend to an *unincorporated* territory, like Puerto Rico, with the same "force" as they do in the Federated States or in the *incorporated* Territories.

In the process of construing an answer to the question, I will discuss the scope of the Puerto Rico Federal Relations Congressional Act of 1950 (hereinafter, P.R.F.R.A.)[13] in this issue of selective incorporation. Through a discussion of the rights, privileges and immunities of U.S. citizens in the Territory, I will also face if the U.S. Supreme Court should deny such a Second Amendment right under constitutional analysis due to the *unincorporated* territory doctrine.

A question of this nature requires more than subjective considerations and vague conceptual references about the territories of the U.S.A. In fact, due to recent U.S. Supreme Court expressions, these references face serious judicial problems whenever the Territorial conceptual reality is not addressed fully.

Vague concepts like the *special* relations with the U.S.A., or the obscured significance of a territorial *Commonwealth*, or the judicial construction of the *unincorporated* doctrine, and the *not part of the Union* redundancy, will not stand the test of judicial *certainty* about the future of a Second Amendment right **to keep and bear arms**, in the territorial Commonwealth of the U.S.A.[14] Even local

---

[13] 48 U.S.C. §§ 731 *et seq*., Act of March 2, 1917, Pub. L. 64-368, 39 Stat. 951 (1910-1917), as amended. Since Act of July 3, 1950, Pub. L. 81-600, § 4, 64 Stat. 319 (1946-1951), the Act is known as the Puerto Rico Federal Relations Act (P.R.F.R.A.), which comprises the provisions of Pub. L. 81-600, *supra*, and the remaining active provisions of the Jones-Shafroth Act of 1917.

[14] The reader might want to keep in mind that the historical facts in *City of Chicago* about a right to **keep and carry** (weapons), considered "the palladium of the liberties of a republic"; since it offers a strong moral check against "**usurpation** . . . **arbitrary power of rulers**" and of "**tyranny**", thus, the need to keep a well prepared *"*militia*"*, might not fare the same in the thoughts of a 112 years old sovereign of subjects (or citizens) under territorial *unincorporation*. Déjà vu.

consideration of the question at issue could be of no legal consequence *until* the final arbiter of constitutional issues decides to address again its *unincorporated* territory. All this uncertainty is due to a peculiarly obtuse doctrine, still judicially valid, that affirms that even if the U.S. Constitution is *in force* in the *unincorporated* territories, *not all constitutional provisions are applicable*.

These difficulties are magnified by the mere existence of the precedents perpetuated by the ***Insular Cases***[15] since a Second Amendment right might be considered the last of those constitutional provisions *unincorporated*.[16] Until we

---

[15] In a nutshell, a number of U.S. Supreme Court cases that concern the status of the territories acquired by the U.S.A. after the Spanish American War (1898). There is a futile contention on which cases should be considered in this category. I believe that is nonsensical. They just keep showing up. They have also been discussed *ad nauseam* elsewhere. The one I subjectively select for this essay is *Balzac* in the context of recent U.S. Supreme Court expressions on the subject. The name "insular" derives from the fact that these territories were inhabited islands. The inhabitants of Puerto Rico were already engaged in modest economic trade enterprises that came under federal jurisdiction after the Treaty of Paris, Dec. 10, 1898 [A Treaty of Peace between the United States and Spain, U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1, 5-11 (Washington: GPO, 1899)]. This created a *few* conflicting interests and legal problems. They were dealt according to American imperialistic protectionism over their tariffs, public opinion of a particular political nature, the Dollar diplomacy policy, and even racial or ethnic prejudice.

The *public* issue at stake was construed differently. It allegedly centered in the scope and extent of the U.S. Constitution to those new territories in areas such as economy, trade, and justice. That these new possessions were already inhabited by "racially mixed peoples" was construed as another legal problem. Please note that, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *was* "law of the land" back then. Through these cases, the U.S. Supreme Court established that *all* constitutional provisions *do not apply in equal manner (or in full force)* to some areas under the American flag, even if "under the American flag the Constitution follows." I will question the validity of such premise, because I need the arguments for the development of the essay.

The U.S. Supreme Court specifically construed **for the new territories acquired from Spain**, the judicial concept of *unincorporated* territories, whereas U.S. citizens, like the American residents (inhabitants) of Puerto Rico, may not enjoy certain constitutional rights while said *unincorporated* territory is under the American flag. The eventual adoption of *Organic laws* for the territory was not inferred to represent *incorporation* of these island-territories acquired from Spain. Even U.S. *citizenship*, (granted in March, 1917, just 2 months before adoption of the increase of the Military Establishment or Draft in May, 1917), was ruled out as a deciding factor towards *incorporation*. Chief Justice Taft's Court decreed that U.S. citizenship was extended to give to the inhabitants of Puerto Rico the "boon" they wanted. [For a most compelling account on U.S. citizenship of the territorial Commonwealth, *see*, José A. Cabranes, *Citizenship and the American Empire*, 127 U. Pa. L. Rev. 390 (1978)]. Citizenship was held to mean something to the *individual* not the place they called island-homeland. In *Balzac*, the Taft Court stated, that to enjoy all the privileges of citizenship, the new citizens by statute would have to move to the mainland (continental United States).

Gradually, the U.S. Supreme Court developed the doctrine that the U.S. Constitution's provisions fully extended to *incorporated* Territories and only partially to *unincorporated* territories. *Boudemiene v. Bush*, 553 U.S. 723 (2008). This premise as related to Puerto Rico must be at least questioned here to ascertain the possibility of incorporation of Second Amendment rights in the Territory, since it is a historical fact that not all constitutional provisions have applied in full force uniformly at certain times irrespective of their incorporation or federated status.

[16] *See* n. 1014.

face again the legal consequences of territorial *unincorporation*, we will not grasp the scope of the questions I present here. Therefore, we need a preamble on how the 405 year old Spanish colonial territory of Puerto Rico, became the 112 year old *unincorporated* territory under the American flag.

IV. The Territorial Commonwealth of Puerto Rico

The U.S.A. presently claims the sovereignty to exercise jurisdiction over inhabited territories *beyond* its federalized geographical borders. It was widely supported, by the routinely "legal experts," that within the constitutional framework of the Federation, the power to acquire new territories either by purchase, treaty, cession **or force**, was a necessary fact of being a "civilized nation."[17] In *Worcester v. Georgia*[18], the great Chief Justice Marshall stated, in brief,

> [. . .]It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied, or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the preexisting rights of its ancient possessors . . . But *power*, *war*, *conquest*, *give rights*, which, after possession, are *conceded by the world*, and **which can never be controverted by those on whom they descend**.[19]

Prior to the 20th century, U.S.A. acquisition of territories gradually, sometimes accidentally, followed a chartered movement to the west which eventually carved the nation's "natural" boundaries. Acquiring new territories was only a part of the *young* government's agenda. Adopting laws for the public or economic regulations for trade within those territories eventually became a great issue.

The reasoned judicial logic was construed to mean that the right to acquire territories inherently carried the power to administrate and govern them *under* the Territorial Clause of the U.S. Constitution. Those new responsibilities to organize local governments, to rule and administer them wrought fundamental changes in the judicial thinking of an era.

The wide spectrum of legal thought towards the scope of the Constitution in those new ventures has been thoroughly discussed elsewhere. It is enough to mention here that those ensuing doctrines were amply debated but decided by that principle of democracy known as the *majority rule* in the U.S. Supreme Court. *Majority rule* doesn't necessarily mean it is the best proven law, but after awhile, along with the

---

[17] *See also American Ins. Co. v. Canter*, 26 U.S. 511 (1828) (Marshall, CJ). Nevertheless, this was not construed as a universal premise; it only applied to certain civilized nations.

[18] 31 U.S. 515 (1832).

[19] *31 U.S.Id*. at 543.

Constitution, Treaties, and *Acts of Congress*, it becomes *the law of the land*.[20] That is an undisputable fact many times overlooked. A change to the accepted *law of the land* needs concerted reaction, or, maybe "38 States with *amici* supporting petitioners" and "*amicus* brief submitted by 58 Members of the Senate and 251 Members of the House of Representatives" helps a bit.[21]

Such was the nature and the *theater of affairs* of American expansionism before the turn of the 20th century when it became, apparently to some, imperialistic.[22] Under those growing experiences of expansionism, the U.S.A. voluntarily immersed itself in the legal ownership of the destinies of inhabited new possessions previously under *European yoke*, only to later become at odds with these possessions.[23] Some

---

[20] Reports and Executive Memoranda of the Executive do not constitute such, although it might influence, particularly when U.S. American citizens deem fellow U.S. American citizens as *Puerto Ricans*. After 10 years of "study", a Report by the President's Task Force on Puerto Rico's Status 18 (accessed on Mar. 11, 2011) (available at http://www.whitehouse.gov/administration/eop/iga/puerto-rico), stated: "The policy of the Federal executive branch has long been that Puerto Rico's status should be decided by the people of Puerto Rico . . . Nevertheless, if a change of status is chosen by the people of the Puerto Rico (sic), such a choice must be implemented through legislation enacted by Congress and signed (sic) by the President." That *nevertheless* is quite a contrast to the *policy*.

[21] I am tempted to respectfully question the U.S. Supreme Court's contention that it does not reverse well-established constitutional law, or holds provisions of the Bill of Rights applicable based on a "popular consensus." (*See City of Chicago*, 130 S. Ct. at 3124.) Advent of landmark constitutional law cases generally do not show up in the void of such influences. The historical correspondence between the acting Justices at the time, Presidents McKinley, Roosevelt and Taft, as well as such correspondence available from H. Cabot Lodge, E. Root and other Congressmen from the "turn of the century" do not sustain such articulated premise, at least in the case of Puerto Rico back then (1898-1900).

[22] There might be many *considerations* to affirm that American expansionism ended with the end of the military occupation of the Philippines, thus denying that American foreign policy has ever been imperialistic. If a possible definition of *Empire* is, "supreme command over conquered or confederated peoples, or supreme or sovereign dominion", Black's Law Dictionary 1990 (6th ed. 1991), often, under the rule of one individual, oligarchy, or sovereign state, then that former premise is far from the truth. I respectfully conjecture, that terms like: "possession of the U.S.A.", "unincorporated territory under the sovereignty of the U.S.A.", "indisputably part of the sovereign territory of the United States" and under "rational basis" of the U.S.A. to discriminate against that possession, do not proclaim "informal territorial control" to be outside the scope of imperialism.

[23] On April 15, 1899, writing for the Indianapolis News, African-American leader Booker T. Washington wrote unabashedly the following criticism:

> My general feeling is that Cubans ought to be left to govern themselves. In bringing Cuba into our American life we must bear in mind that, notwithstanding the fact that the Cubans have certain elements of weakness, they seem to have surpassed the United States in solving the race problem, in that they seem to have no race problem in Cuba. I wonder if it is quite fair to the white people and the colored people in Cuba to bring them into our American conditions and revive the race antagonism so that they will have to work out anew the race problem that we are now trying to solve in this country.

It could be mentioned here that Cuba officially solved their "race problem" approximately in 1886; Puerto Rico had done it bloodlessly in 1873. Puerto Rico's first abolitionist society was founded in Mayagüez in c.1858-1859. Yet, at that time, Puerto Rico was still an outlying island colony of the Spanish Crown, with limited access to its own destiny.

of them came to be known as the *outlying island possessions* of the America's New Empire.[24] This presented a *whole new* different set of legal problems for the U.S.A.[25] These new possessions were inhabited by what was deemed "native homogeneous people" with language and written laws allegedly "foreign" or unsuitable to the American way.[26] *Among* the new possessions were Cuba (held just in temporary protectorate), Guam, the Philippines, and Puerto Rico. The Philippines immediately represented a troublesome rebellious possession. Guam and Puerto Rico presented a different *type* of problem.

Puerto Rico became a possession of the U.S.A. after cessation of hostilities during the Spanish-American War (1898), "the little splendid war." Prior to that, Puerto Rico was an outlying colonial-province *property* of the Spanish

---

[24] Today, Puerto Rico is not deemed statutorily an "outlying possession." For purposes of nationality, the term "State" includes the District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands. *See* for example 8 U.S.C. 1101 (a) (38). The McCarran-Walter Act of 1952, already amended, 1 U.S.C. 101 (38), defined the term "United States" in a similar way: "[. . .]except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States."

[25] Those were eventually dispatched by the majority rule of the U.S. Supreme Court. The cases became the *arena* of legalistic discussion to justify annexation or not. For a case in this sort of *legalese*, *see*: *Worcester v. Georgia*, 31 U.S. 515 (1832). In the case of Puerto Rico with the notable exceptions of the opinions of Chief Justice Fuller, and Justice Harlan I, joined by Justices Brewer and Peckham, Puerto Rico, in 1901, was deemed inside and outside of the U.S.A. on different cases decided *the same day*. *See De Lima v. Bidwell*, 182 U.S. 1 (1901) and *Downes v. Bidwell*, 182 U.S. 244 (1901), both decided on May 27, 1901.

[26] There are hundreds of English books and pamphlets on the subject from the first 50 years of the twentieth century, which use these peculiar racially charged "terms." I am lucky enough to have access to such, without need of a public Library. They should be commonly accessible and hard to list them all here, but, *see*, Antonio S. Pedreira, *Bibliografía Puertorriqueña (1493-1930)* (1932). This one source lists most books for the years 1898-1930.

In Puerto Rico's defense, I should point out that neither Spanish **nor** the "civil law system" was entirely foreign *within* the U.S.A., yet it was not deemed so at the time. Puerto Rico can claim a similar language heritage with the States of Texas, New Mexico, Arizona, Nevada, Colorado and California. These were territories "acquired" from (*Hispanic*) Mexico. Today, there are as many American citizens of Puerto Rico in the territorial Commonwealth as there are in: New York, New Jersey, Florida, Illinois, Pennsylvania, Hawaii, and Connecticut. And *their allegedly* "foreign" system of law is fairly similar to that in the illustrious State of Louisiana. Louisiana was the home-State where one Justice Edward A. White trained as a lawyer. He was, by the way, the historically identified force behind the *incorporation-unincorporation* panacea. This was candidly repeated in The Report, *supra*, n. 20. Although history handpicked Justice White for such honors, mainly because of his concurrence in *Downes*, the territorial *incorporation-unincorporation* theories were proposed elsewhere and in the ***Insular Cases*** Court it was Justice McKenna who first advocated it in the first ***Insular Case***: *De Lima v. Bidwell*, 182 U.S. 1 (1901). I need not go into details of this story now. Justice White's family owned a large plantation near the town of Thibodeauxville in Lafourche Parish of south Louisiana and cultivated (and refined) sugar on it. Nevertheless, for a *phenomenal example* on Justice White's *mastery* of intranational comparative law and **civil law**, *see*, *Romeu v. Todd*, 206 U.S. 358 (1907). Reading such references as "foreign law", "race", "natives", "unfit", "uneducated peasants", and "untrained in centuries old tradition of common law", comes with its own measure of irony.

crown.[27] Puerto Rico was not rebellious, it was welcoming, it represented a trade opportunity, the small antagonistic Spanish community was given the opportunity to leave for their *mother-land* (many didn't), and, at that time, its geographical locality proved essential to American interests. Thus, Puerto Rico's history with and within the Union began.

Notwithstanding the well-documented propaganda of liberation from the "Spanish *yoke*," that was publicly circulated by the U.S. military during the Spanish-American War among the inhabitants of Puerto Rico, the original administration after the War was a military occupational government, since it was granted at the time that the island was "invaded." In his classic satirical style Mark Twain wrote: "[t]here must be two Americas: one that sets the captive free, and one that takes a once-captive's new freedom away from him . . . "[28] All the expectations of "liberty through annexation or liberty *after* military occupation" were suspended at a judicially created **twilight** at that time (and it has been like that ever since). Even so, the chattel (the "U.S. nationals" or "Porto Rico" citizens) of the territorial real estate of the sovereign U.S.A. had its evolution in republicanism. The territory was eventually organized in the "American way" and a new government experiment followed.

The first organic Congressional Act to provide a civil government for Puerto Rico was adopted in 1900 (commonly known as the Foraker Act for Puerto Rico). It was *this* Act with its peculiar tariffs which prompted the first ***Insular Cases***.[29] The second organic Congressional Act (the Jones-Shafroth Act) was a new different

---

[27] Puerto Rico was a colony for *almost all* its 405 years of history "under the Spanish *yoke*." Then, it became an overseas island-province of Spain when hostilities with the U.S.A. became apparent and imminent. As a way to deal with the Cuban rebellion issue, the island was granted an autonomist provincial status that lasted ***less*** *than a year*. Such was its importance to the *Mother-Land* Spain, that the Island, and *its* inhabitants, was neither utterly sold, like the Philippines (for twenty million dollars) nor temporarily transferred like Cuba. They were unceremoniously *ceded*.

[28] Twain, s*upra* n. 2. Major General Nelson Miles, Commanding United States Army, declaration to the inhabitants of Puerto Rico on July, 1898, is recorded in *Ochoa v. Hernandez y Morales*, 230 U.S. 139, 158 (1913).

[29] The wonders of the new civilization wrought upon through these cases exist because at that time Puerto Rico had modest merchandise for trade, but Puerto Rico, like its rebellious cousin the Philippines was a "Person sitting in Darkness." Justice White's separate opinion (with Justices McKenna and Shiras joining in the judgment of affirmance), clearly states that recovery sought "is" *the amount of duty paid on merchandise which came into the United States from Puerto Rico after July 1, 1900, and that no duty on goods going from the United States to Puerto Rico* were concerned. *Downes*, 182 U.S. at 287.

Irrespective of the year controversy between the impositions, it was sort of a tariff for goods outgoing, but not for goods incoming. *Plus*: shipping only through American vessels (new cabotage law requirement a few years later), with their peculiar tariffs or through the "nationalized" vessels, like the "Ponce." With the new vassalage status, the dollar became the territory's new currency, Spanish currency in circulation was declared foreign and in the necessary exchange for the new currency (the dollar), the Spanish *peso* was devaluated 40% --although it is said that the silver in it, outweighed the American dollar then. A very good trade indeed! "**And at no cost. Rich winnings to be gathered in, too, rich and permanent, indestructible, a fortune transmissible forever to the children of the flag.**" *See* Twain, *supra* n. 2.

"experiment." It was adopted in 1917 and it pursued the road of territorial self-government in a republican way. It provided for a Legislature, a Bill of Rights and other territorial-republican institutions, one of which was the mass naturalization that granted U.S. American citizenship to the nationals' residents of the territorial archipelago. Finally, the U.S.A. adopted amendments to that Act that allowed popular suffrage to elect the Governor of the territory and later prompted the *jus sanguinis* U.S. citizens to draft their own Constitution.

It might be worth to point out at this time that the Commonwealth of Puerto Rico's Constitution of 1952 is as *organic law* to the Territory, as the U.S. Constitution can be. It is true that an Act of Congress was necessary to set in motion its adoption; it could not have been done in any other legal way. Yet, such Congressional Act was adopted to *authorize* it; it was not ordered. Congress had already in place a comprehensive organic charter (the Jones-Shafroth Act of 1917).

Congress allowed that exercise of power by the U.S. citizens in the territory, but, **as in any other instance of articles of incorporation of territories**, requested that such constitution be modeled to a republican form of government with a Bill of Rights and *subjection* in a nature of a compact. The "nature of a compact" was an initiative by the *metropolis*, an Act of Congress, not an invention of the territorial chattel or the U.S. Supreme Court. This was due to the acknowledgement by Congress that Puerto Rico had already achieved a large measure of "self-government." Because of this recognition, Congress promoted Puerto Rico to the next step in republicanism, the principle of government by consent, "in the nature of a compact." Thus, the U.S.A. prompted the residents of Puerto Rico to "organize a government pursuant to a constitution of their own adoption."

When the U.S. American citizens residents of Puerto Rico stepped up to the challenge to draft *a Constitution* **of their own making**, they organized themselves, under Congressional approval, in a *constitutional convention* of representative delegates of all *the U.S. citizens*, residents of the archipelago. The Commonwealth's Constitution was drafted by such *constitutional convention* of the organized territory. They subjected their Constitution to the rigors of a democratic process of ratification by the People of the territory. The Territorial Constitution proposed a republican government with a Bill of Rights incorporated. Such Constitution was not drafted by Congress, yet they approved it, with only two amendments.[30]

---

[30] Pub. L. 82-447, 66 Stat. 327, July 3, 1952. The first amendment by Congress required the elimination of section 20 of Article II (the Bill of Rights). That section created a list of *human rights*. Through this first amendment Congress required a rewording of section 5 of said Article II (to read as follows: "Compulsory attendance at elementary public schools to the extent permitted by the facilities of the state as herein provided shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices.") The second amendment required inclusion of a second paragraph into section 3 of Article VII (seldom included in the Spanish versions of the Constitution or at the most in a footnote). Said paragraph was to read as follows: "Any amendment or revision of this constitution shall be consistent with the resolution enacted by Congress of the United

Upon final ratification by the competent legalities, the constitutional charter became the official Constitution of the territorial Commonwealth. Thereafter, U.S. citizenship has been recognized *at birth* on Puerto Rico soil.[31]

States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact."

Too much importance was given to the concept of "self government" *vis a vis* "autonomy" in regards to Puerto Rico. The predicate of "the nature of the compact" was to further the republican experience of government by the consent, thus the drafting of its own "magna carta." A State of the Union will always have *more* **independence**, *more* **autonomy** and *more* **self government** than the Commonwealth of Puerto Rico has ever enjoyed while it is still a Territory. A State, for one, is *not* subject to the Territorial Clause, it also enjoys the privileged responsibility of providing full voting representatives of their respective communities to the seat of the Federal Government; the State is **sovereign** and also self governed, though it renounced part of its sovereignty to a Central entity called the Federal Government. According to law, the States are autonomous entities, with their own drafted republican Constitutions. The Tenth Amendment states: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The enigmatic Ninth Amendment follows a similar path.

Nevertheless, the territorial Constitution allows a framework of legal stability. This principle of stability of the "law of the land" (and I don't mean immobility of current law) has been intentionally engrained in the culture of the territorial Commonwealth. I was raised in the *stare decisis* of the democratic institutions that were sold to the territorial Commonwealth and swore allegiance to those two Constitutions with full belief in them. I am trained in intranational constitutional law, in the "law of the case", the law of the precedents, and the "finality" of a judgment. After all has been said and done, I have to believe the Territorial-State Constitution represents a certain measure of stability, because these facts help my analysis of a Second Amendment right.

[31] A Congressional Act that amends the Jones-Shafroth Act of 1917 declared all persons born in Puerto Rico after 1899, U.S. citizens (Pub. L. 73-447 of June 27, 1934). Nevertheless, Pub. L. 82-414 of June 27, 1952, established that "[a]ll persons born in Puerto Rico on or after January 13, 1941, and subject to the jurisdiction of the United States, **are citizens of the United States at birth**." Thus, everyone born *in Puerto Rico* after those facts is a *jus soli* U.S. citizen. Generally, the only States that claim citizenship other than statutory are the ones that were not territories prior to being States. There are also arguments against the ongoing inference of "statutory citizenship" after citizenship was recognized *by birth* on Puerto Rico soil. Statutory *citizenship* (or naturalization) is granted to the individual and transmitted *jus sanguinis* outside the jurisdiction of the U.S.A. and do not extend to the territory. But when the citizenship bond is extended or recognized by way of "birth" into the Territory, then that Territory is integrated to the U.S.A. for that purpose. Those Acts of Congress, *supra*, integrated the Territory of Puerto Rico to the U.S.A. for the constitutional citizenship provision ("subject to the jurisdiction thereof"). Once constitutional rights are recognized under *jus soli* citizenship legal notions of irrevocability 'come into play'; neither Court nor Congress can abridge those rights, else they are above of the Constitution. I do believe the Fourteenth Amendment of the U.S. Constitution § 1 is clear on the two types of citizenship. This citizenship provision bears importance in my essay due to § 737 of the P.R.F.R.A..

A contrario sensu, I am aware of the arguments of the so called "second class citizenship", but there is nothing of the sort in the U.S. Constitution, differential treatment will be discussed later (*see also* n. 51), since it bears relevance with my Second Amendment issue. Nevertheless, and this has been covered in detail elsewhere, in *more than one* instance Puerto Rico stands *side by side* as any of its blood brothers States and Territories according to population number. For example, as more countries became involved in what became known as World War I, the U.S. Congress *finally*

The act of *subjection* to the supremacy of the U.S. Constitution by the constituents is embodied in the Preamble of the Commonwealth Constitution, but also in section 3 of Article VII, the second amendment introduced by Congress.[32] Such amendment was an act of incorporation of the U.S. Constitution into the Territory.[33] Whatever was

---

approved the Jones-Shafroth Act, which granted the citizens of Puerto Rico, U.S. citizenship. As a result, the new citizens became eligible for the National military *draft*, approved by Congress *two* months *later*. Ever from that date on, the Territory has provided its blood tax for the defense of the Union. In, *A Memoranda of the President of U.S.A.*, Nov. 30, 1992, 57 F.R. 57093, 48 U.S.C. § 734 (Memorandum for the Heads of Executive Departments and Agencies), the President published, that those U.S. citizens' residents of Puerto Rico have, "*fought valorously in five wars in the defense of our Nation and the liberty of others*."

It should be pointed out that, even *before* 1917, the territory provided servicemen. Both my maternal and paternal grandfathers served in the "Porto Rico" Regiment of Infantry, U.S. Army before 1917. My father is a U.S. Army Colonel Ret. He served in World War II-Pacific and the Korean War. The Union bestowed him, along with other Service Medals: the **Army Infantry Badge** (*twice* awarded as a combat veteran of *two* wars), a **Purple Heart**, a Bronze Star, a Korean Service (nine combats), and a **POW Honorable Service Medal** (three years confinement in communist Korea, and after release remained in service until retirement). Both, my brother and I were subject to the draft. I served in the State Militia attached for duty to the National Guard with rank of 1st Lieutenant. Many U.S. American citizens born and residents of the Territory have been KIA-MIA in *every* instance U.S. service has called upon them. Many served *and serve* the federal government both abroad or in the Territory. Many know what it is to pay federal taxes in the Territory without congressional representation.

[32] Pub. L. 82-447, *supra* n. 30.

[33] There could be strong arguments that would interpret that the subjection clause is the renouncement-recognition of the Supremacy of the Federal Government, where the U.S. citizens governed under Rules for the Territory under the sovereignty of the U.S.A., consented to renounce certain supremacy rights to the Federal Government of the Union as the *quid pro quo* to draft their own constitution with the foremost measure of self-government possible *in lieu* of another organic charter and, that was the nature of the *compact*, between an organized territory of U.S citizens, not yet *sovereign* (as all States are after admission), with its sovereign Nation. To some territories the Union requested a change of its Capital, to others it requested the change of the recall statutes, and to others it requested the uniformity of language. To the island territory it was requested that its form of government be Republican, and a Bill of Rights be adopted. The loyalty and renouncement are always requirements to incorporation of any territory. It was required, it was offered, and the Nation accepted the offering. *See Examining Bd. v Flores de Otero*, 426 U.S. 572, 594 (1976), *" . . . the purpose of the Congress in the 1950 and 1952 legislation was to accord Puerto Rico the degree of autonomy and independence normally associated with the States of the Union*"; and *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), " . . . [. . .]pressures for greater autonomy led to *congressional* enactment of Pub. L. 600(*sic*), 64 Stat. 319, which *offered the people of Puerto Rico a compact* whereby they might establish a government under their own constitution. *Puerto Rico accepted the compact*, and on July 3, 1952, Congress approved, with minor amendments, a constitution adopted by the Puerto Rican populace, 66 Stat. 327 . . . [. . .]", and later, quoting from **Mora v. Mejías,** 206 F.2d 377, 416 (1st Cir. 1953), *if the constitution of the Commonwealth of Puerto Rico is really a 'constitution'—as the Congress says it is, 66 Stat. 327— and not just another Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution' of the United States, and thus a 'state' within the policy of 28 U.S.C. § 2281*, afterwards the U.S. Supreme Court stated, " . . . we believe that the established federal judicial practice of treating enactments of the Commonwealth of Puerto Rico as "State statute[s]" for purposes of the

"inapplicable" dealt with the fact that Puerto Rico is still not a Federated State and, for that reason it was deemed *outside* of the Interstate Commerce Act and the Federal tax provisions; those provisions remained inapplicable in 1952. It is also worth to remember that at such time of the subjection to the supremacy of the Federation's institutions (to the U.S. citizenship, U.S. Constitution, U.S. Laws and U.S. Supreme Court decisions), the U.S. American citizens of a territory, constituted as the People of Puerto Rico, were already organized under the sovereignty of the U.S.A. and under an Act of Congress.[34] In other words, whenever the "commonwealth of Puerto Rico" or the "people of Puerto Rico" is mentioned, it is a fact that the legal meaning of that phrase is: the U.S. American citizens' residents of Puerto Rico, and also, through the pertinent U.S. constitutional provisions of the dual citizenship, it also means the territorial or state citizenship.

Concurrent with the adoption of the aforementioned Territorial Constitution, Congress amended and repealed many of the provisions of the Jones-Shafroth Act, but kept important ones. The resulting and still binding statutes of the Organic Law of 1917 were renamed by Congressional Pub. L. 81-600 of July 3, 1950, the P.R.F.R.A.. Eventually, the *jus soli* citizenship provision was replaced to (federal civil law): 8 U.S.C. The relevant provisions pertinent to my question in Part III, were kept in 48 U.S.C., along with the other prevailing provisions. It was Congress who established the Federal tax provisions existent in the territorial Commonwealth (not meaning the state's income tax provisions), and kept the cabotage tariffs.

This is a forced synopsis of the territorial history of Puerto Rico. We must keep in mind that the subject matter at issue (a Second Amendment right of the U.S. Constitution), is currently a non essential right of the Constitution of the Commonwealth of Puerto Rico. That is, it was not enumerated or recognized in the original Bill of Rights of such Constitution.

There were two important Congressional statutes kept "in force and effect" by Pub. L. 81-600 of July 3, 1950 that constitute important legal provisions for the

---

Three-Judge Court Act, serves and does not expand, the purposes of § 2281 [. . .]." Then, it seems logical, that selective integration of a fundamental right (like incorporation into a State) must follow in the case of a Second Amendment right. At least, these facts should pave the way for an answer to the question presented in Part III of this analysis. Notwithstanding, I have to deal with the ***Insular Cases*** before any conclusion on the issue.

[34] Historical records might point out that the want for allowing the people of Puerto Rico more self-government guided the sovereign Nation to prompt the drafting of the territorial Commonwealth's Constitution. Yet, were those "*People*" already U.S. American citizens? **What were the nature and the purpose of a "compact" for *greater* autonomy, "independence" or self-government given to *jus soli U.S. American citizens* for in 1950**? Even if the political answer to that question should be discussed elsewhere, the legal nature of that *compact* bear's importance to the question at hand (Part III here). To me the answer is obvious. Both *uniformity* provisions in 1917 and 1947, the "compact" of 1950, the issues dealt in the Preamble of the territorial constitution, even the reinvented Territorial Clause (by the ***Insular Cases***), they all relate to the provisions of Article IV of the U.S. Constitution. Thus the citizens of the United States *can* claim fundamental rights in the Territory of Puerto Rico. As I evidence in n. 104, *infra*, territoriality, is not incompatible with State in such matter.

territorial Commonwealth and our analysis. For purposes of this essay I will call them the *uniformity provisions*.

The *uniformity provisions* of 48 U.S.C. §§ 734 and 737 (previously § 9 ¶1 and ¶2, of the Jones-Shafroth Act of 1917; § 737 *was* originally kept in the P.R.F.R.A., while § 734 was replaced directly to 48 U.S.C.), create an incorporation framework, that paves a way for the *selective integration* of a Second Amendment right into a Territory. They constitute an *Act* of Congress, and the scope of such requirements is very important here.[35] There is at least one instance where these *uniformity provisions* were clearly misconstrued by the U.S. Supreme Court.[36] This misconstruction was probably due to those ***Insular Cases*** which will be discussed briefly. We need to specifically address these *uniformity provisions* because they relate to our questions of a Second Amendment right. These Congressional statutes (*since 1917*) state that:

> *The statutory laws of the United States not locally inapplicable*, except as hereinbefore or hereinafter otherwise provided, *shall have the* ***same force and effect in Puerto Rico as in the United States***.
>
> The rights, privileges, and immunities of citizens of the United States shall be respected in Puerto Rico ***to the same extent as though Puerto Rico were a State of the Union*** *and subject to the provisions of paragraph 1 of section 2 of article IV of the Constitution of the United States.*[37]

It is clearly evident that the provisions of § 734 follow the language of similar requirements to the *incorporated* territories prior to 1950. According to *some* that base their premise on the ***Insular Cases***, the *only* difference between *unincorporated* and *incorporated* territories, was that in the case of the *incorporated* territories, their charter of *incorporation* stated that the U.S. Constitution followed in force to

---

[35] *See Mullaney v. Anderson*, 342 U.S. 415 (1952). In *Boumediene*, the U.S. Supreme Court stated that after 1898, Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute. But these statutes ***are*** from *1917*, and *1947*. They clearly extended constitutional rights into the Territory by Congressional statute. Even if the 1917 statute is considered an exercise of power, according to Art. IV, § 3 ¶ 2 of the U.S. Constitution, the 1947 statute clearly extends constitutional rights and limitations into the Territory. The constant contradictions that are levied upon the U.S citizens residents of the territorial Commonwealth because of the ***Insular Cases***, are very taxing considering the *significance* to the lives and property of millions of human beings, that have lived and died under such *considerations* of the U.S. Supreme Court. To say the least, it's troublesome if that is the reasoning for *unincorporation*. Notwithstanding, these Congressional statutes have much to say in the complex nature of *selective integration* of the Second Amendment right into the Territory.

[36] *See*, *Torres v. Puerto Rico*, 442 U.S. 465 (1979), In *Torres*, the Court held that: "Congress has provided by statute that Puerto Rico must accord to all citizens of the United States the privileges and immunities of its own residents." 442 U.S. at 473. I respectfully think that is not the *mandate* of Congress's statute. *See* 48 U.S.C. § 737 again.

[37] 48 U.S.C. §§ 734 and 737.

the territory, thus *all* the constitutional provisions were applicable to them. I will respectfully challenge this alleged difference in Part V, in order to state my claim that the probable answer to the question in Part III is in the "affirmative," though I must leave unattended such premise until Part V.

The general propositions in the aforementioned Congressional statute at 48 U.S.C. § 734 provide *both* a guarantee that all "made applicable" laws of Congress shall have the same force and effect as if Puerto Rico was a State, *and* that all local laws not inconsistent or in conflict with the statutory laws of the U.S.A. shall remain in force until altered, amended, or repealed by Act of Congress (or repealed by the U.S. Supreme Court). This dual premise was explained in § 57 of the Jones-Shafroth Act of 1917, and although § 57 was repealed in 1950 by Pub. L. 81-600, its legal principle continued in force under the new government pursuant to the Commonwealth's Constitution. The subjection provision in the territorial Commonwealth (the loyalty Clause of the territorial Constitution's **Preamble**) *is* the double guarantee for such requirement. Hence, *almost all* Federal laws or statutes apply to Puerto Rico as if the Territory was a Federated State (except some in the nature of beneficial treatment). As a matter of fact, after 1917, Congress had stopped acting as the territorial legislature instead of the ward of an inchoate Territory. The significant part of the statutory provisions of § 734 is the *uniformity* clause: "*the same force and effect*" clause. *See also* Article IV and the Tenth Amendment of the U.S. Constitution.

Since I have proposed that *Torres v. Puerto Rico*[38], misconstrued § 737, this Statute warrants a discussion of merit. This is a territorial Fourteenth Amendment, because even when the *U.S. Supreme Court* gradually incorporated the Due Process Clause and the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Territory of Puerto Rico (*see* n. 104), in § 737 *Congress* directly incorporated the rights,[39] privileges and immunities *of the citizens of the United States*, into the "shall be respected" zone. Such rights cannot be abridged in Puerto Rico ***to the same extent as though Puerto Rico were a State of the Union***.[40] This limitation upon the territorial Commonwealth extends to *any* of the U.S. citizens, in spite of residency in the U.S. archipelago.

Congress did not order Puerto Rico to accord *the citizens of the United States* the same privileges and immunities *of its own citizens*. The reciprocity clause was mandated in *the* second part of the statute and it relates to the dual citizenship and

---

[38] *Torres*, 442 U.S. at 470.

[39] With full expression of what "privileges and/or immunities" mean, whereas in other instances it has to be explained, like it was in *City of Chicago*. *See also* n. 34, *supra*. In the Bill of Rights of the Jones-Shafroth Act of 1917, both the Due Process Clause and the Equal Protection Clause were already incorporated to Puerto Rico.

[40] It is questionable if these are not violated every day, as long as differential and discriminatory treatment on the Territory is allowed under the judicially constructed "rational basis" doctrine. *See*, n. 51, *infra*.

reciprocity of the U.S. Constitution. Well debated legal doctrine has identified the basic differences between both constitutional limitations.

What this statute established in the first part, is that the rights, privileges and immunities of *the citizens of the United States* (this is the National U.S. citizenship clause), will not be abridged ("shall be respected") in Puerto Rico, as it is (respected) in any of the States (*then* only 48) "***to the same extent as though Puerto Rico were a State of the Union***." Clearly, *the U.S. Constitution* ***mandates*** *Congress to enforce such provision*.

In *Torres*, the Court held that *Congress has provided by statute that Puerto Rico must accord to all citizens of the United States the privileges and immunities of its own citizens*.[41] *Torres* misconstrues the meaning of the statute by merging both limitations and both references to citizenship (both the State and National citizenship). It misconstrues the meaning because it implies that the citizens *of the United States* (the national citizenship rights) are subjected to the reciprocity that the Territory of Puerto Rico can accord.

This could be held to represent that if in Puerto Rico a Second Amendment right is not recognized to *its* citizens (be that the Territorial citizenship), then there would be no need to respect such claim while residing in the Territory, while in fact, there *is* a difference between rights, privileges and immunities of State citizenship (limited to the dual citizenship of the State) and the fundamental rights, privileges and immunities of a U.S. citizen in his Nation. This would allow the U.S.A. to distinguish or differentiate the territorial Commonwealth in terms of a Second Amendment right, just because it still maintains that Puerto Rico is *unincorporated* territory. I do not think this reasoning would be correct.

It is also very relevant that *Congress* included a second part in § 737. This second part is doubly important. Foremost, it equates the dual citizenship in Puerto Rico (the territorial and the National), as if Puerto Rico's were a State.[42] Thus, *Congress* subjected the territorial government of Puerto Rico to Article IV, § 2, ¶1 of the U.S. Constitution. *Second*, this statute was adopted in ***1947***, and in *Boumediene v. Bush,*[43] the U.S. Supreme Court completely missed this chronological fact.

Even if the history of republicanism of the archipelago of Puerto Rico has been stated in brief, and before we can continue with our task anticipated in Part III, I stated previously that it was necessary to ascertain *how the 405 year old Spanish colonial territory of Puerto Rico, became the 112 year old unincorporated territory under the American flag*. In fact, it is most disturbing, *to some that were led to trust differently*, that the Commonwealth of Puerto Rico, has never been declared to be outside of the Territorial Clause. "**Congress, which is empowered under the**

---

[41] 442 U.S. at 473.

[42] The Federally sanctioned dual citizenship, not of the U.S. nationals but the one recognized to the States.

[43] 553 U.S. 723, 758 (2008) (Kennedy, J).

Territory Clause of the Constitution . . . may treat Puerto Rico differently from States so long as there is a rational basis for its actions."[44] That "history" of political twilight[45] started with the ***Insular Cases*** in 1901.

Those ***Insular Cases***, created the important constitutional scenario for both the present status of the territorial Commonwealth and the framework that will allow me to confront the proposed questions in Part III. To understand the scope of the territorial condition of Puerto Rico *vis a vis* the incorporation of a Second Amendment right, at least, another brief summary on the ***Insular Cases*** is needed. Indeed, *the U.S. Supreme Court*'s ***Insular Cases*** bear great responsibility, *if not all*, in the ingeniously way the territorial reality became ***encrypted*** for ages.

V. *Balzac* through *Boumediene*, Unincorporation and More Questions

A. *Boumediene*

Obviously, there is no need to explore in this essay if the fundamental right of a U.S. American citizen to **keep and bear** arms follows him to a foreign nation. Nevertheless, if the *locality* is an *unincorporated* territory under U.S.A. sovereignty, then an answer would be rendered tentative unless given by the U.S. Supreme Court, the final arbiter of such matters.

---

[44] *Harris v. Rosario*, 446 U.S. 651, 651-652 (1980) (*per curiam*).

[45] The Report by the President's Task Force, *supra* n. 20, essentially "reports" that the "U.S. Congress declared Puerto Rico an 'organized but unincorporated' territory through the Jones Act" (the Jones-Shafroth Act of 1917). First, the Jones-Shafroth Act of Congress bears no responsibility on that doctrine. In fact, *there is no such mention in the Act*. Nevertheless, it is written in that Report that Puerto Rico is an *unincorporated* territory of the U.S.A. since *Downes*. There is no need to go here into the historical or legal correctness of the Report or the so-called laid foundations of territorial *incorporation*, or the discussion of citizenship issues (stripping?) or the multiple "transitions" discussion.

After 112 years of that "economically viable, mutually beneficial relationship" (*Supra* note 19 at 21), where Puerto Rico, after a brief period under military occupational government has endured its *unincorporated* territorial status for 110 years, I now embrace 'doubts' of a constitutional law nature, because under a couple of the solutions presented in that Report, *supra*, the issue of a Second Amendment right might be rendered moot. Without a wish to be skeptical, to the strengthened "ties of constitutional significance" (*Boumediene*, 553 U.S. at 758), what is the scope of the U.S. American citizenship to this endowed Presidential Task Force? If *U.S. American jus soli citizens'* residents in a territory acquired by the U.S.A. and, "**indisputably part of the sovereign territory of the United States**", (*Boumediene*, 553 U.S. at 839) (Scalia, dissenting), can *secede* that "**unincorporated Territory**" (*Boumediene*, 553 U.S. at 765) (Kennedy, J), proclaim independence from the sovereign U.S.A., or any other independent sovereign formula and modify the terms of their U.S. citizenship in a treaty with the sovereign U.S.A., then there is no need to discuss Second Amendment issues or any other whatsoever. Now, would be a good time, *for those who proposed such scheme to the President*, to review Article VII § 3 ¶ 2 of the territorial Constitution. And, *that* is not publicized in the *nevertheless* "clause" of the Report, it is not even mentioned. I would have thought, that should have been, the first step. Since I have questions on the validity of such theories, I will not dwell on them *vis a vis* the question at issue (Part III).

Usually, the orderly way of discussing the ***Insular Cases*** would be to enumerate the "list" (of them) and start with the first case.[46] I will not do such thing; I will regress the subject in the context of the most recent expressions by the constitutional lion, the final arbiter, the almost current U.S. Supreme Court.

After all has been said and done for the last 112 years, the U.S. Supreme Court still went back the same way to *Balzac v. Porto Rico*[47], to reiterate that:

> [a]s the Court later made clear, "*the real issue in the Insular Cases was not whether the Constitution extended to* the Philippines *or Porto Rico* when we went there, *but which of its provisions were applicable by way of limitation* upon the exercise of executive and legislative power in dealing with new conditions and requirements.*»"*[48]

Our Second Amendment issue *is* a "constitutional provision"; hence the question of its incorporation or integration in the Territory is pertinent.

In *Boumediene*, the U.S. Supreme Court tried to place in mutual relationship certain historical facts[49] since these ***Insular Cases*** continually force the exercise of extra care not to offend the established precedents necessary for the constitutional harmony between the territorial-extraterritorial doctrines. But, I think that *Boumediene* missed and only served to underscore the legal importance of the ***Insular Cases***.

The recurrent problems and discriminatory treatment[50] that the judicially

---

[46] *See* n. 15.

[47] 258 U.S. 298 (1922).

[48] *Boumediene*, 553 U.S. at 758 citing *Balzac*, 258 U.S. at 312.

[49] *Boumediene* allows a digression to discuss a different approach to some historical facts on the new possessions. The U.S. Supreme Court stated (*nobody questioned this "fact"*) in *Boumediene*'s constitutional decision that: "[a]t least with regard to the Philippines, a complete transformation of the prevailing legal culture would have been not only disruptive but also unnecessary, ***as the United States intended to grant independence to that Territory.***" 553 U.S. at 757. Notwithstanding how the Philippines were already fighting the Spaniards for independence *before* "we went there", or the real reason of the Philippine "insurrection" against the U.S.A., or the atrocities of that "incident", or the tariff-Dollar diplomacy, and yes, of the year that "independence" was finally "given", *why*, would the U.S.A. pay $20,000,000 to an utterly defeated European Nation for a territory that they "intended" to grant independence?

Commenting on *Boumediene*, Professor Gerald L. Neuman declares that the Court (U.S. Supreme Court) also gave a ***sanitized account*** of the motivations for the *Insular Cases* doctrine, **underplaying the racial element in U.S. colonialism, and overemphasizing the usefulness of the doctrine of temporary governance of a territory that would later be granted independence** (namely, the Philippines). **But such a simplification is hardly atypical in tracing a line of precedent**." *See*, Gerald L. Neuman, *The Extraterritorial Constitution after Boumediene v. Bush,* 82 S. Cal. L. Rev. 259, 270 (2008-2009). I should add, again, because the wisdom of the ***Insular Cases*** is still "a very good trade" (*i.e.* "good law"). ***And at no cost. Rich winnings to be gathered in, too, rich and permanent, indestructible, a fortune transmissible forever to the children of the flag***." Twain, *supra* n. 2.

[50] I would like to stress that I am not referring to racial or ethnic discrimination here. I am specifically referring to differential treatment of applicable laws concerning rights, privileges and immunities between citizens of the same Nation.

constructed concept of *unincorporation* allows, might be minimized by some, but they warrant a constant reminder that *maybe* something was not done right. That bulwark of strict constitutionalism, the *lone dissenter*, Justice Harlan, once said that, "*no question can be settled_until settled right*."[51] *Boumediene* represents a wasted opportunity of revision to the separation and inequalities doctrine of and concerning the Territories of the U.S.A. *vis a vis* those last vestiges of imperialistic twentieth century America. Instead, the ***Insular Cases golem*** was rebooted.

In the "*habeas*" case *Boumediene*, the Court reiterates that "[*i*]*n a series of opinions later known as the Insular Cases, the Court addressed whether the Constitution, by its own force, applies in any territory that is not a State*."[52] (Cases omitted.) Our U.S. Supreme Court then develops a *fresh new explanation* to the ***Insular Cases*** as it states that:

> The Court held (in the ***Insular Cases***) that the Constitution has independent force in these territories, a force not contingent upon facts of legislative grace. Yet it took note of the difficulties inherent in that position. Prior to their cession to the United States, the former Spanish colonies operated under a civil-law system. . . .The Court was reluctant to risk the uncertainty and instability that could result from a rule that displaced altogether the existing legal systems in these newly acquired Territories. [. . .. . .]These **considerations** resulted in the doctrine of territorial incorporation, under which the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories.[53]

Too many vexing questions arise from this entire premise in *Boumediene*. Surely our Court must sincerely conclude that granting *unincorporated* status to the territorial-real estate of the U.S.A. was a *consideration*. But they should realize that these *considerations* came with a price tag *for each and every* U.S. citizen that has lived and died under the rules of those *considerations*. History shows, that these *considerations* created differential treatment and discriminatory applicability of certain statutory provisions to **U.S. citizens "under the flag."** That other *lone dissenter*, Justice Marshall, reiterated the residual inequity of that Court sanctioned scheme known as the ***Insular Cases***:

> [d]espite these precedents, the Court suggests today, without benefit of briefing or argument, that Congress needs only a *rational basis* to support less beneficial treatment for *Puerto Rico*, and the citizens residing there, than is provided to the States and citizens residing in the States. . . .Such

---

[51] Coudert, *supra* n. 4 at 842.

[52] 553 U.S. at 756.

[53] 553 U.S. at 756-757.

> a proposition surely warrants the full attention of this Court before it is made part of our constitutional jurisprudence.[54]

If the Constitution was in force (like *Balzac* clearly expounded), we must know: *which* were those constitutional provisions that warranted not incorporating, yet, in the territorial archipelago of Puerto Rico. Was the Court referring to the procedural-substantive rights guaranteed in the Bill of Rights? There can be *no* doubt that the U.S. Supreme Court was referring to *them* in particular, since it is clear that both *Dorr v. United States,*[55] —the first case where a clear majority adopts the *incorporation* "law of the territory-land" —and *Balzac*, were Sixth Amendment cases.

If the real issue in those cases was the *consideration* of *not disrupting the civil institutions* of natives with "wholly dissimilar traditions and institutions," why would the Court presume the territories "acquired" from **Mexico** were on different grounds than "*the territories acquired from Spain*"? Apropos, were those territories "acquired" from Mexico; anglo-saxon, *common law* acquainted Protestants? Why should a Justice native of the illustrious State of Louisiana ever think that a "civil-law system" was so ill prepared for "centuries old common-law" or for that purpose much different than federal law?

More relevant, perhaps, why would the Court in 1922 presume *the States* were on different grounds than "*the territories acquired from Spain*"? These questions are relevant because even when the U.S. Constitution was in FULL FORCE both in Federated States and chartered *incorporated* Territories, at the time, **not all constitutional provisions had been equally extended to the citizens in them**. Save portions of the due process and equal protection clauses, the nationalization of the fundamental rights within the States had not historically begun yet! The U.S. Supreme Court decided that all constitutional provisions applied to fully chartered-incorporated-organized Territories [[*see* also, *Rasmussen v. United States*, 197 U.S. 516 (1905)], nevertheless, not all constitutional provisions (*i.e.* the fundamental rights) were generally applied or enforced against State infringement on the U.S. citizens.

Were the First, or the Second, or the Third, or the Fourth, or the Sixth, or the Seventh, or the Eight Amendment constitutional provisions incorporated to the States in 1922? No. Furthermore, was, or is, even today, Fifth Amendment fully "incorporated" to the States? *Quaere* if even the "takings" due process clause under the Fifth Amendment was held applicable to Puerto Rico in *Ochoa v. Hernandez y Morales*, 230 U.S. 139 (1913). The U.S. Supreme Court held that they found "unnecessary to consider whether the authority of General Henry was subject to the same constitutional limitations as that of Congress; for we have reached a like result, so far as the present case is concerned, upon different reasoning." It seems that the U.S. Supreme

---

[54] *Harris v. Rosario*, 446 U.S. 651, 654 (1980) (Marshall, J., dissenting).

[55] 195 U.S. 138 (1904).

Court always has an easier way of explaining these *considerations* because, after all, Puerto Rico was a territory acquired from Spain only 113 years ago.

There is something contemptuous about the ***Insular Cases*** longevity because the U.S. Supreme Court stated in *Boumediene*, that *Dorr*, in 1904, stands for the premise that "[u]ntil Congress shall see fit to incorporate territory ceded into the United States… the territory is to be governed under"[56] the Territorial Clause,[57] and still in 2008, the *considerations* **of this same Court** resulted in the ratification of such doctrine of territorial *incorporation*. But, does this proposition mean that *incorporated* Territories are outside the Territorial Clause?

All these troublesome questions were never addressed by the U.S. Supreme Court, and it is surprising they didn't when they breathed new life on the ***Insular Cases***. It certainly doesn't allow much freedom to answer the question still upon me.

Nonetheless, the *unincorporated* territory must decipher now the U.S. Supreme Court belief 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***."[58] In this new encrypted code of the Court must clearly be the resolution of that mystery of constitutional law questioned many years ago by the *lone dissenter*, when he expressed: "**I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel**."[59] Would it be reasonable to question again if the reason for this "mystery" is because the concept: *incorporation-unincorporation* was ***nowhere*** to be found in the U.S. Constitution?[60] I shall not give up my *challenge* though, since incorporating a Second Amendment right might well be one of those "ties" mentioned in *Boumediene*.

The story of the ***Insular Cases*** in *Boumediene* is so controversial that to portray a history that would eventually sustain their, potentially dangerous main issue of the *habeas corpus* in extraterritorial grounds, the U.S. Supreme Court affirmed that "this century-old doctrine informs":

---

[56] *Boumediene*, 553 U.S. at 757-758.

[57] *See also Downes v. Bidwell* 182 U.S. 244 (1901).

[58] *Boumediene*, 553 U.S. at 758.

[59] *Downes v. Bidwell*, 182 U.S. 244, 391 (1901) (Harlan, J, dissenting).

[60] Justice Harlan was *accused* of strict constructivism because his theory expounded in the ***Insular Cases*** was simple, the Constitution only speaks of Territories, for one purpose, *inchoate States*, or else there was no moral reason to acquire *and retain* such lands, much less grant them citizenship. *See also District of Columbia v. Carter*, 409 U.S. 418 (1973). It is either Territory within the U.S.A., or *disposed* property like Cuba or the Philippines (and I already expressed my doubts about the given history of the Philippines independence). It is also interesting that, in the first *Insular Case*, strict constructivism *was* the majority of Justices, although it was not the Court's majority for the decision. Both, *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *De Lima v. Bidwell*, 182 U.S. 1 (1901), were delivered by the same (Reporting) Justice.

> Fundamental questions regarding the Constitution's geographic scope first arose at the dawn of the 20th century when the Nation acquired noncontiguous Territories: Puerto Rico, Guam, and the Philippines—ceded to the United States by Spain at the conclusion of the Spanish-American War —and Hawaii— annexed by the United States in 1898. ***At this point Congress chose to discontinue its previous practice of extending constitutional rights to the territories by statute***.[61]

But, I respectfully take exception of this expression as a whole. There might be some pertinent controversy on some of the facts.[62] It is very taxing to logic to accept the judicial passion for that historical panacea called the ***Insular Cases***. Surely, not everybody in the *unincorporated* territories is confused with the *considerations* of their existence. In a way, the Court's catharsis was revealed when *they* accepted the fact that "*the Court* ***devised*** in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed."[63] It was not *devised* by Congress, it was not *devised* by the President, for such responsibility was accepted by *the* U.S. Supreme Court.

It is fairly obvious what this "devising" is; in fact the possible encoded expression (*devising*) in English law is extremely accurate for all the importance of the encrypted meaning of the reference as a whole. It is not entirely original though. It began with the "elasticity" Coudert expressed in his 1926 article.[64] This "devising" is nothing less than the rule of: "whatever the Constitution and laws may say, the list of protected rights will be whatever courts wish it to be . . .."[65] I fear that Twain well prophesized the end result of this "elasticity" doctrine with the analogy of the *sucked orange*.[66]

---

[61] 553 U.S. at 756. There are a few controversial issues to this statement, besides P.R.F.R.A. and 48 U.S.C. § 734. *First*, the Philippines were not "ceded", their history is different. *Second*, the U.S.A. apparently made a conspicuous exception to that "century-old constructed constitutional doctrine" **attributed**, by the Court, **to Congress**, *vis a vis* actions that had ***significance*** over the lives of their fellow Hispanic-American U.S. citizens in those territories. The *unoccupied* Palmyra Atoll (12km²), in the Pacific bears the *honor* of being a **T**erritory *incorporated* by the U.S.A. Government in ***1959***, after Hawaii's Statehood. **T**erritory, with capital **T**. To allow myself a (non-serious) digression, maybe it was considered *of paramount National importance to extend* ***constitutional rights*** *to the coconuts, the boobie-birds, the oysters, and lobsters at the coral reefs of the Atoll*. I fail to see the "single, neutral principle" that the new law of the land conveyed to incorporate an unoccupied territory that gives little back to the Union, *in lieu* of one with four million U.S. Americans in it.

To say the least and regress, those *considerations* do not allow a simple answer to the question if a Second Amendment right will follow into the territorial Commonwealth after the *Heller-City of Chicago* precedents.

[62] *See* n. 35 and n. 62.

[63] 553 U.S. at 759.

[64] *Supra,* n. 5.

[65] *City of Chicago*, 130 S. Ct. at 3058. (Scalia, J., concurring)

[66] Twain, *supra,* n. 2 and n. 105.

At least, in *Boumediene*, Justice Scalia (dissenting) and other *three* Justices convey a couple of premises that I can *use* for my challenge on the integration of a Second Amendment right in the *unincorporated* archipelago of Puerto Rico:

> [b]ut the Court conveniently omits Balzac's predicate to that statement: "The Constitution of the United States is in force in Porto Rico as it is wherever and whenever the sovereign power of that government is exerted."[67]
>
> [. . .] The Insular Cases all concerned territories acquired by Congress under its Article IV authority and indisputably part of the sovereign territory of the United States.[68]

B. *Balzac*

There are many books, theories, and opinions about the ***Insular Cases***. I see no need to reconsider more theories after *Boumediene*'s magisterial delivery. Nonetheless, since their doctrines bear on the question of my essay, I must review their "important" dispositions. I find that they are well summarized in *Balzac v. Porto Rico*.[69] Even if *Balzac* is no longer good law in regard to Sixth Amendment under the (territorial) selective integration doctrine, it still stands as the *U.S. Supreme Court's* constitutional law of territorial *incorporation*. *Boumediene* reiterated this fact. Without being exhaustive in this limited space I will try to condense *Balzac*'s significance for my analysis.

i. On the U.S. Constitution

The Constitution of the United States is in force in Porto Rico.[70] Thus, since a Second Amendment right has been incorporated to the States, there can be a valid claim of such right in a Territory of the U.S.A..

ii. On Citizenship

The "boon,"[71] and it shall be noted that then, it was statutory citizenship, just like it was with many of the territories that later became States. Yet, the statement:

---

[67] *Boumediene*, 553 U.S. at 839, citing *Balzac*, 258 U.S. at 312.

[68] *Id*.

[69] 258 U.S. 298 (1922). I have read the original *Affidavit* by appellant, and *he* always signed himself "Balsac." History recorded him otherwise. A little twist of irony is accorded also to his namesake case. The scope of the notorious case warrants review.

[70] *Id*. at 312.

[71] *Id*. at 308.

"to secure them more certain protection against the world…" should be well taken. It's the other side of the coin, and it was a time of war. *Balzac* holds this premise:

> We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by 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.[72]

The Court reiterated that the granted citizenship meant*: **to enjoy every right of any other citizen of the United States, civil, social and political,***[73] save maybe, although the Court did not mention it, be eligible *then* to the office of the Presidency. This would be because in 1922, citizenship was statutory granted (mass naturalization citizenship), thus, *jus sanguinis*, though not after 1941.

As I affirm here, the constitutional limitations adhered to the *unincorporated* territorial-immovable property and were restricted to that territorial condition of the real property of the U.S.A., until such time the territory became *incorporated*. Those constitutional limitations did not adhere to the individual citizenship. Indeed, the explanation was given clearly in *Balzac*'s constitutional law: "[***i]t is locality that is determinative of the application of the Constitution****, in such matters as judicial procedure, and* ***not the status of the people who live in it***."[74]

Thus, a U.S. citizen who claims a Second Amendment right in the territory is, hypothetically, on the same legal standing as a fellow citizen resident of a State in terms of "*citizenship*." Then, has a Second Amendment right to **keep and bear arms** (already incorporated as a fundamental right to the citizens of the U.S.A. by the *Heller-City of Chicago* precedents), been fully incorporated in Puerto Rico? Even if this seems an easy question, the fact that the Due Process Clause of the Fourteenth Amendment (against the States) was used for selective incorporation of a Second Amendment right, leaves my challenge with the *some* difficulty. Why? Because the stated difference of Puerto Rico in *Balzac* was "the locality," therefore the question of the selective incorporation of a Second Amendment right in the *unincorporated* Territory relates to *the locality*, not the individual citizenship, and Puerto Rico is not a State.

---

[72] *Id*. at 311.

[73] *Id*. at 308.

[74] *Id*. at 309.

iii. On Unincorporation

Puerto Rico was not incorporated in 1917. It is emphasized throughout the decision especially because Puerto Rico was *a territory acquired from Spain* in 1899.[75]

iv. On Incorporation ("The Promise" . . .)

Balzac clearly elucidates the constitutional law requirements that need no more explanation. At least, I count them as the approved constitutional principles because the U.S. Supreme Court recently accepted that the ***Insular Cases*** stand as source for strengthened "constitutional significance." The Court in *Balzac* held: "before that, ("that" was the Spanish-American War that provided the "territory acquired from Spain") the purpose of Congress might well be a matter of mere inference from various legislative acts; but in the latter days, **incorporation is not to be assumed:**

1. without express declaration, or

2. an implication so strong as to exclude any other view. "[76]

v. On the *Unincorporation* "Limitations"

These are the most relevant for my analysis and *Boumediene* tried to explain them. *Balzac* reiterates that the constitutional provisions limited were those of the **Bill of Rights** nature.[77] In *Balzac* the U.S. Supreme Court stated that:

---

[75] This seems to be a recurring concern to the U.S. Supreme Court and the public opinion. In *Balzac*'s time it was portrayed as a handicap of racial overtones. Notwithstanding, the territories "acquired" from Mexico had the same original institutions acquired from Spain.

[76] *Balzac,* 258 U.S. at 306. It is obviously clear *who* had to expressly declare premise "a", and what that would have been. And it is clear that both the express declaration *or* the, "*an implication* so strong" would come from Congress. The first would be a clear Act of Congress, thus, "express declaration." But, the second *can* be through "implication", and that should be an indirect Act(s) or indirect act(s). Both requirements (premises: "a" *or* "b") can be considered exclusive.

It is also very clear *who* can decide what "an implication so strong…" (premise "b") is; the rule of inevitability points *to whom the second prong belongs*. Thus the interpretation of when the "*implication*" is enough, rests on the same ones who included it in *Balzac*, that is: *the U.S. Supreme Court*, the "constitutional lion", the same ones who perpetuated it in *Boumediene*. To them belongs the ultimate measure of justice. If the precedent was good to discriminate for a "*rational basis*", Justices should not consummate a double wrongdoing by negating that the discrimination was held in accordance to a certain fact *then*, unaccomplished. Finally, I do not see anywhere in *Balzac* that the People who afterwards entered the "compact" with Congress in the 1950's bear any additional responsibility to decide this issue, but this is just an opinion.

[77] It would be absurd otherwise, since even under the Court's doctrine, either type of territorial entity–*incorporated* or *unincorporated*–cannot be precluded to fall under the Territorial Clause which

> If it was intended to incorporate Porto Rico into the Union by this act, (the 1917 Congressional Jones-Shafroth Act) *which would ex propio vigore make applicable the whole Bill of Rights of the Constitution to the Island*, why was it thought necessary to create for it a Bill of Rights and carefully exclude trial by jury? In the very forefront of the act is this substitute for incorporation and application of the Bill of Rights of the Constitution.[78]

Balzac then is good evidence that the constitutional provisions of essence not extended to the territory, or were limited as *considerations*, were what is now known as the ***fundamental rights***.

This brings our discussion back to the questions I asked the reader in the *Boumediene* analysis. Which *fundamental right* was nationalized at the time of *Balzac*? History confirms that it was only the Due Process Clause through the Fourteenth Amendment,[79] and they *were* already applicable in Puerto Rico by statute. Both the Due Process and the Equal Protections Clause had been incorporated by Pub. L. 65-368 of March 2, 1917, and they have been ever since, part of the Bill of Rights of Puerto Rico. The Court in *Balzac* itself ratifies that the Federal Due Process Clause was applicable in Puerto Rico like in any other State or Territory. Nevertheless, it is worth to remember that at the time of *Balzac* not even the *selective incorporation* approach was used to nationalize substantive rights into the States.[80]

Then, it was immaterial if there were or not jury trials in Puerto Rico under the Sixth Amendment or if they were allegedly applicable in all *incorporated* territories, because those fundamental rights were not even (uniformly) incorporated in the States until the U.S. Supreme Court nationalized this Sixth Amendment right into the States in *1968*.[81] *Balzac* involved this Sixth Amendment issue, and in 1922 there was no such thing as a fundamental right of the Sixth Amendment incorporated to the States. Nonetheless, the surprising fact *is* that the institution of jury trials for

---

allows or empowers Congress to adopt Rules and Regulations over them. Being under the Territorial clause, it warrants whatever rules, regulations, legal impositions or limitations Congress adopts over its territories, unless, it abridges incorporated constitutional provisions.

Indeed, it was *Congress* who did not include the institution of jury trials in its organic Acts for the Territory. Nevertheless, and even if it was eventually challenged, *Puerto Rico Legislature* did adopt this "common law" institution of jury trials by territorial statute, since 1901. Ever since that year, the Territory worked out its system of justice within that constitutional provision. The arguments in *Balzac* that, Congress adopted a Bill of Rights for the territory because the Constitution was not incorporated fully there, warrants no merit for me today in 2011. In the essay I try to evidence that the arguments were legally insufficient, but *let bygones be bygones*.

[78] *Balzac*, 258 U.S. at 306-307.

[79] *258 U.S.Id*. at 312-313.

[80] I will not dwell into this interesting constitutional history here because of space constraints. But *see*, *infra* note 104. Early version of the future incorporation doctrine, through the Due Process Clause analysis, might be traced back to: *Twining v. New Jersey*, 211 U.S. 78 (1908).

[81] *See Duncan v. Louisiana*, 391 U.S. 145 (1968).

felonies *was* already law in Puerto Rico since 1901, and *Balzac* uncovered this at the beginning. By analogy with the States, the constitutional provisions of trial by jury of Article III, Section 2, and of the Sixth Amendment of the U.S. Constitution were in place in Puerto Rico at that time, just like in any other organized fully chartered incorporated Territory under the flag. The U.S. Supreme Court reasoning for their disparity rested only in their Court-made doctrine of (territorial) *unincorporation*.

But, I will not stop my critical analysis here since *Balzac* involved a challenge under the Sixth Amendment because the accused was tried for a misdemeanor-petty criminal charge and was not granted a jury trial in the territory. Thus, the additional reasoning in *Balzac* was, that since trial by jury was not a traditional "civil law" institution (not inferring that Louisiana was an exception), a *disruption* on that tradition might have caused havoc on the natives of Puerto Rico. This reasoning was inexplicable. In *Balzac*'s time, *no trial by jury* was warranted for misdemeanors charges in the Federated States or the *incorporated* Territories and this was *common law* knowledge at that time.[82]

vi. Summation

Originally, the limitations under *Balzac* and the related *Insular Cases* were allegedly levied on the exercise of *fundamental rights* of the U.S. citizens of the

---

[82] *Callan v. Wilson*, 127 U.S. 540, 557 (1888); *Natal v. Louisiana*, 139 U.S. 621 (1891); *Lawton v. Steele,* 152 U.S. 133, 142 (1894):

> So, the summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in question in this case was intended to interfere with the established principles in that regard;

Schick v. United States, 195 U.S. 65, 69-70 (1904)

> [*G]eneral definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms, though in common usage the word 'crimes' is made to denote such offenses as are of a deeper and more atrocious dye; while smaller faults and omissions of less consequence are comprised under the gentler name of 'misdemeanors' only*." *Schick* even includes for the Taft Court that, "***it is a well known fact that, in many territories organized by act of Congress, the legislature has authorized the prosecution of petty offenses in the police courts of cities without a jury***. 195 U.S. at 71.

What is far from logical is that *one* of the same Justices in *Balzac* ruled for the Court in *District of Columbia v. Colts*, 282 U.S. 63, 72-73 (1930), and argued that, "[t]his provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury." **See Callan v. Wilson,** *that there may be many offenses called "petty offenses" which do not rise to the degree of crimes within the meaning of Article III, and in respect of which Congress may dispense with a jury trial, is settled.* (Citing **Schick v. United States***;* **Natal v. Louisiana**; **Lawton v. Steele**).

Yet the U.S. Supreme Court in 1922, did not deem necessary to distinguish those cases from *Balzac*, nor to explain why the "established principle" was not applicable in justice to the case at hand, from Puerto Rico.

territories due to their recent change of sovereignty and the *considerations*. That seemed logical to the Justices then. Today, 112 years later, the ***Insular Cases*** doctrine has oddly developed to signify something else, the merging of the rights of the U.S. American citizens' residents of the archipelago with the limitations of the territorial condition of the Commonwealth, something that I do not think even the Court in *Balzac* anticipated. In *Harris v. Rosario*, Justice Marshall (dissenting) expressed in no hesitant way his rebuttal of the evolving doctrine: "**It is important to remember at the outset that Puerto Ricans are United States citizens, see 8 U.S.C. § 1402, and that different treatment to Puerto Rico under AFDC may well affect the benefits paid to these citizens . . .**"[83] That was the reasoning of the *last lone dissenter for* Puerto Rico.[84]

The U.S. Supreme Court has ruled, that discriminatory or differential treatment to U.S. American citizens does not offend the U.S. Constitution as long as they are residents in the territorial Commonwealth under the sovereignty of the U.S.A. and deemed "people of Puerto Rico." Therefore, if a particular right is not granted first by applicable or enforceable statute, then whatever that right is, and, even the scope of it, will come under scrutiny of that Court.

This finally, is the dogmatic legacy of the ***Insular Cases***.[85] A *fact* clearly manifested by consistent U.S. Supreme Court decisions:

---

[83] 446 U.S. at 653.

[84] U.S. Supreme Court Associate Justice Thurgood Marshall. And who are these people? Puerto Rico is the U.S.A. Territory; its *residents* are U.S. American citizens, hence *Puerto Ricans*. A Memoranda of the President of U.S.A., Nov. 30, 1992, 57 F.R. 57093, 48 U.S.C. § 734 (Memorandum for the Heads of Executive Departments and Agencies), *supra* note 31, stated that: "***Puerto Rico is*** *a self-governing* ***territory of the United States*** *whose residents have been United States citizens since 1917, and have fought valorously in five wars in the defense of our Nation and the liberty of others*." Whilst a good number of them respond to their so called shared duty of blood tax, the whole have to conform to: "***less beneficial treatment… than is provided to the States and citizens residing in the States***." [*Harris*, 446 U.S. at 654. (Marshall, J, dissenting)]. As such, the territorial Commonwealth appears to be *separate and unequal*. [Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1988)] The *unincorporation* plot has proven a very good trade. "**And at no cost. Rich winnings to be gathered in, too, rich and permanent, indestructible, a fortune transmissible forever to the children of the flag.**" Twain, *supra* n. 2.

[85] For this essay, I cannot add much more to the discussion that more *learned jurists* have done on the ***Insular Cases***. They are the constitutional law that binds the Nation. All the same, they stand for *caution* whenever we deal with fundamental rights under the flag "painted black" (*Supra* n. 2) for the territories. (A last few words on *Balsac* «I don't use the "nationalized" case-namesake here», for all who have quoted from it and have never seen the original file: Balsac, a newspaper editor, claimed a *First Amendment right* (in 1918!), thus he specifically alleged, *absence of malice* and *fair comment* (criticism) against a *public official*, the continental governor of the time. Balsac was tried by the District Attorney who had been appointed by the aggrieved, in a Court that had a continental Justice, *alumni* of the same University of the aggrieved, and a majority of the Judges had been appointed by the Chief Justice of the U.S. Supreme Court, when he had been the President of U.S.A. with a "history" towards Puerto Rico).

> [t]hus, Congress appears to have left the question of the personal rights to be accorded to the inhabitants of Puerto Rico to orderly development by this Court and to whatever further provision *Congress* itself *might make for them*.[86]
>
> *Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico* [. . .] However, because the limitation on the application of the Constitution in *unincorporated territories* is based on the need to preserve Congress' ability to govern such *possessions*, and *may be overruled by Congress* [. . . .][87]

In *Torres*, the U.S. Supreme Court didn't even bother with the territorial Commonwealth's "special relationship with the U.S.A." or its "uniqueness" or its "unparalleled relationship." It was all, "cut the chase and go to the point" approach. I do not particularly mind that directness, *that is the way it is* and, since that premise bears importance later in my answer to the question of Part III, it is the point I tried to leave settled early on. The final arbiter that decides what part of the U.S. Constitution extends to Puerto Rico or how it will extend *is* the U.S. Supreme Court.

Do We must remember that the issue at hand is whether a Second Amendment right of U.S. citizens can be abridged in the territorial realty of the U.S.A. However, after *Boumediene*'s ratification of *Balzac* the answer to this issue was transformed into an unclear thing, even when such right has been recognized as a fundamental right of the U.S. citizen. Nevertheless, the one thing that can still give hope for the Territory is the majority vote at any given time. At present, at least to me, the U.S. Supreme Court is at a height of membership talent. The *Heller-City of Chicago* precedents are examples of important individual rights decisions, and the majority in both is still in the bench.

VI. The Territorial Gun Laws

Prior to further advance answers to the issue at hand, a brief review of the territorial gun law is required. After the initial military occupation government (1898-1900), Congress adopted the first organic charter for the island. On April 2, 1900, the 56th Congress approved the first organic law to provide a civil government to the territory (31 Stat. 77, the Foraker Act).

Such Act *did not* include a Second Amendment-type right. On March 9, 1905, an Act to prohibit the carrying of arms was adopted. Through this Act, weapons of

---

[86] *Examining Bd. v. Otero*, 426 U.S. 572, 590 (1976).

[87] *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979).

offense and defense were prohibited in the new territory. Section 9 stated that: "[a]ll laws authorizing the keeping or carrying of arms under license, and all laws, orders and decrees in conflict with this Act are hereby repealed."

On March 12, 1908, an important amendment to the Act of 1905 was adopted to authorize *keeping and carrying* (operable) *weapons in private properties* (dwellings) and homesteads. This could be authorized after request and approval of the local municipal court. Thus, a right to **keep and carry** weapons in one's dwelling was recognized, "in modern times," as early as 1908, although the law did not recognize either, any restriction to the requirement of an "authorization."

In 1917 (two months *before* Pub. L. 65-12 of May 18, 1917, H.R. 3545 was adopted by Congress), through its second more expansive charter for the territory, the commonly referred Jones-Shafroth Act of 1917, Congress granted Statutory U.S. citizenship to all U.S. nationals residents of Puerto Rico.[88] That was also ratified by subsequent Public Laws of Congress, until the adoption of the Commonwealth's Constitution. After that, in 1952, as approved by Act of Congress, U.S.A. has *rendered unnecessary to ratify that fact*.[89]

The Act included a *Bill of Rights*, but none established a right similar to the Second Amendment.[90] At this time, § 9 of the same statute (now 48 U.S.C. § 734) provided, *"[t]hat the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws*." Nevertheless, this same statute (Act of 1917) also provided that:

> [T]he laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided for Porto Rico or by Act of Congress of the United States.

No Federal law at this time or later has been approved to limit, restrict or provide a Second Amendment right for the territory.

After these events, Act No. 14 of June 25, 1924, was adopted by the territorial Legislature to "Amend an Act . . . . Approved March 9, 1905, and Amended March 12, 1908." This Act basically expanded the provisions and regulations of weapons in the territory. The Act provided in Article 5, § 5 that the provisions of the Act would "*not be applicable to the carrying of arms within one's dwelling or estate.*"

---

[88] "[A]ll citizens of Porto Rico at the time and all natives of Porto Rico are hereby declared, and shall be deemed and held to be, citizens of the United States." This was a mass naturalization Act of Congress.

[89] I find it unnecessary to discuss and respond to the scope or value of cases like *United States v. Sanchez*, 992 F. 2d 1143 (11th Cir. 1993); and, *Harris v. Rosario*, 446 U.S. 651 (1980), a *per curiam* decision, questioned here on different grounds, has no significance to the citizenship issue.

[90] H.R. 9533, 65th Cong. (March 2, 1917) Pub. L. No. 368 § 2.

Also, § 7 stated:

> [I. . .]n addition to the licenses mentioned in paragraph 11 of the preceding section ("conductor of private funds" needed license to carry), *license to carry arms may be issued by the district court* of the applicant's residence *upon hearing by the fiscal* (district attorney), *if danger of death or of serious personal injury to the petitioner is shown in the opinion of the court and the circumstances in the case, established by affidavits of the applicant and witnesses, warrant the need of the license*.

The Act enumerates under this section, the needed requirements for the license ***to carry***. In my opinion, this is the genesis of the requirement I will redress later on this essay.

Three historical propositions should be considered:

1. It might be understandable why, during the military occupation government and the first organic law civil government, weapons were prohibited in the territory. Even the "country peasant's" traditional implement of labor, the *machete* (and indeed, a potential weapon in the hands of an insular), was prohibited unless proof of profession warranted authorization ***to carry***. But, authorization to **keep and carry**—and it is also my opinion, from the reading, that it meant an *operable* weapon—in one's dwelling or homestead was recognized in Puerto Rico, ever since 1908.

2. Our first Bill of Rights, under the 1917 Organic Act, did not establish a Second Amendment-type right. This is also understandable. First, because Congress had not repealed the first territorial gun laws at the time, and second, because it is unlikely that Congress itself would arm the inhabitants of an *unincorporated* territory, even if at such time U.S.A. was granting (U.S.) citizenship, was also conscripting part of the male population. I have already proposed that after 1917, Congress sort of stopped acting as the territorial Legislature on insular affairs.

3. The new 1924 statute *kept* the "right" to ***keep and carry*** weapons in one's dwelling or property. It was also *recognized or established* a *privilege* to ***keep and carry*** under other conditions.

In *People v. Díaz*,[91] which should be noted as argued in 1926 and decided in 1927, the accused attempted a challenge to this gun law. Díaz was accused (later convicted) of the offense of carrying a revolver.

---

[91] 36 P.R.R. 514 (1927).

Díaz challenged the 1924 gun law based, among other issues, on conflict with the ***Second Amendment*** to the U.S. Constitution, under which "**Congress cannot restrict the right of citizens to bear arms**, and consequently, **that Congress has not legislated and could not legislate so as to limit or restrict the right of carrying arms in Porto Rico."**[92]

The C.S.C., held that the Constitution of the United States as such, *had been held not to be in force in Porto Rico* and instead the territory was under an Organic Act wherein *no* provisions disallowed a local law prohibiting the carrying of dangerous weapons.[93] It was also understood, that Porto Rico had been conferred full legislative powers and within this grant, all imaginable reasonable police powers were allowed including the right to prohibit the carrying of dangerous weapons. The C.S.C. relied on *City of Salina v. Blaksley*,[94] a Kansas decision, and *United States v. Cruikshank*.[95]

The C.S.C. went also to case law from other U.S. Supreme Court decisions and also from courts of Arkansas, Missouri, Texas, Alabama, and, West Virginia, among others. On the constitutionality issue the C.S.C. held, under proper *stare decisis* approach, that the Second Amendment was a restriction upon the powers of the national government only and not upon state legislation.

The Court deduced that Congress occupies a double position for its territories: one as Congress of the United States, limited in its powers by the Constitution and the other as a local legislature (within the Territorial Clause, Article IV section 3, with powers to make all necessary rules and regulations for the territories belonging to the U.S.A.) to which many such limitations are not applicable. The decision reiterated that under Act of Congress, the territory had been given broad legislative powers without establishing a restriction whatsoever on the regulation or prohibition of the carrying of deadly or dangerous weapons.

It is not necessary to discuss further evolution of the gun laws at this time. I already mentioned that the Constitution of the Commonwealth of Puerto Rico did not include keeping and carrying weapons as one of their civil rights. Yet, Article 2.05(a) of the current Puerto Rico Weapons Law,[96] established a legal requirement that no gun license will be issued unless, evidence (with cause) or showing, that petitioner has specific *fear for his* life or *security*. And this must be assessed in a judicial process. Want for "self defense" is, at this time, not an established right under the Commonwealth's Weapons Law.

---

[92] *36 P.R.R.Id*. at 517.

[93] What the context of the opinion stands for is the affirmation that those fundamental rights of the Bill of Rights had not been nationalized at that time, and that Puerto Rico was under Article IV, section 3 of the U.S. Constitution.

[94] 72 Kan. 230, 115 Am. St. Rep. 196 (1905).

[95] 92 U.S. 542 (1875).

[96] Pub. L. 404, 25 L.P.R.A. § 456d (a).

VII. Final Analysis

If the territorial issue is not considered a deterrent for incorporation of the fundamental right in question, then it will mean something to the U.S. American citizens' residents in the territory. It is foreseeable that a Second Amendment right will be ultimately enforced over the territorial Commonwealth through the already applicable Due Process Clause of the Fourteenth Amendment or through the territorial "rights, privileges and immunities" clause of the "territorial Fourteenth,"[97] as it applies **to citizens.** [98] That this is merely tentative is obvious, but I find it most interesting.

The ***Insular Cases*** themselves cause havoc because of the possibilities and diverse results they represent in the reasoning of the "constitutional lion." If the wrong approach is used, the future of Puerto Rico's territorial coded encryption will continue a path of constitutional vagueness. Thus, *my opinion* to questions in Part III would be: *affirmative* to *selective integration* might seem obvious, but since the territorial entity cannot foresee what other *considerations* awaits them in the constitutional territorial horizon, then, who knows?[99]

Different scenarios can play a part in the incorporation or integration of a Second Amendment right in the territorial Commonwealth. Of course, there is no need to address here an obvious 'way out' through local statutory amendment to the territorial gun law in harmony with the *Heller-City of Chicago* precedents.

If a judicial decision comes from the C.S.C. and they decide the recognized fundamental right in question applies through § 737, the Fourteenth Amendment and the precedents, which to me at least is plausible, then the scope of the integration is limited, since only a pronouncement of the U.S. Supreme Court can decide permanently an issue concerning the Territory. This would leave many questions presented here unresolved as usual. Nonetheless, the local decision would be important in terms of the analogies concerning the *self defense* argument and the "uniformity" claim.

In another scenario, the Federal Courts system could apply the precedents of the nationalized Second Amendment over the Territory's Weapons Law and that would also be important because they would have to address the uniformity doctrine as it is justified in a Territory. It would be most welcoming if we could anticipate both the arguments and the precedents to be used and applied in Puerto Rico, but we cannot do more here. *A contrario sensu*, a denial of the right would be extremely interesting if it goes all the way to the seat of the ***Insular Cases*** custodians.

---

[97] 48 U.S.C. § 737 (discussed elsewhere).

[98] *See City of Chicago*, 130 S. Ct. 3020 (2010).

[99] At this time, there is a plurality decision of the territorial Commonwealth's Court of Appeals, case number KLAN201000562 that held, tentatively, in the direction of a Second Amendment right conflict with local Weapons Law. Such decision only resolved the case under revision and is not *stare decisis* in Puerto Rico.

The U.S. Supreme Court would have a complete legal arsenal at their disposal even if they persist in the predominant "hear no evil" approach with the territorial Commonwealth. They have 48 U.S.C. § 737 and § 734. They already have incorporated the Due Process of the Fourteenth Amendment and even of the Fifth Amendment. At the very end of the spectrum they can rely in the *Heller-City of Chicago* precedents without ever discussing the ***Insular Cases***. And, they can always step up and give the U.S. citizens of the territorial Commonwealth at last, the next "boon."

If, in a complete change of *stare decisis* over the life, immunities and privileges of U.S. American citizens, the U.S. Supreme Court decides to treat the territorial Commonwealth as *foreign* for purposes of a Second Amendment right, then without good apparent reason, they would do away with much and established constitutional law (U.S. Supreme Court made law), that has *already* affected the lives of millions of U.S. American citizens for more than 100 years. It is also tantamount to "usurpation" of a fundamental right to U.S. citizens while residing in a U.S.A. possession.

There is nothing constitutional about subduing a declared fundamental right of U.S. American citizens to a rule or regulation, even under the Territorial Clause since "once a fundamental right"; *it is irrevocable* by Court or Congress, save an amendment. It follows the *citizens* under the flag and Puerto Rico U.S.A. is not a foreign sovereign. These Second Amendment issues concern the very nature of the constitutional law of territorial *incorporation* and the ramifications to the Territory of Puerto Rico are wholly beyond the whims of mere judicial procedure.

Finally, if the Court recognizes that such non essential fundamental right to keep and bear arms, [100] is fully applicable to the Commonwealth through its *Heller-City of Chicago* precedents, notwithstanding the ***Insular Cases***, the apparent result will be a further integration to the Union through one of the fundamental rights that was deemed "most" paramount to the life, liberty and property *of U.S. citizens of the Nation* since the beginning of the Republic and through desegregation. It would be extremely trifle to impose such a particular non-essential fundamental right upon a Territory "not part of" if the path of *separate and unequal*[101] is going to continue further.

VIII. Conclusion

I consider it very troubling that a whole generation of scholars and judges has seen selective fairness, rational basis, and logical justice in the "law of the territory-land" (the ***Insular Cases***). I am convinced that the validity or usefulness of the ***Insular Cases*** should be utterly challenged in many respects and my neutrality as an Appellate Judge does not extend to silence my opinion over discrimination. It

---

[100] I deem it *non essential* only in relation to the Constitution of the *territory*.

[101] Juan R. Torruella, The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal (1988).

is evident that not everybody is contented with their "*Glass Beads and Theology, and Maxim Guns and Hymn Books, and Trade Gin and Torches of Progress and Enlightenment*."[102]

Boumediene left no doubt that these cases are still the law of the land. Yet, that these cases do not reflect any needed *considerations* for a People that have stepped up to all the challenges, and differential treatment, and discriminations placed upon them as a perpetual yoke for more than 518 long years is, at least to me, obvious. Even judges should know when enough is enough and "parole" from a yoke should be granted.

In this essay, without *trespassing* the boundaries of the neutrality that binds me, I tried to identify several loopholes to the basic premise of *unincorporation* as they relate to the issue of a Second Amendment nature. I conclude that the necessary legal instruments to integrate the fundamental right to **keep and bear arms** in the *Territory* of Puerto Rico *are in place*. [103] Judicial precedents from the U.S. Supreme Court, from the C.S.C. of the ***territory***, and of Congressional statutes, through the

---

[102] Twain, *supra* n. 2.

[103] Again, in a nutshell, through *selective incorporation*, after 1925, the U.S. Supreme Court has nationalized the following Amendments into the States: the First, Second, Fourth, and Sixth Amendments are fully incorporated to the States. The Third, Fifth (grand jury indictments is not fully incorporated) and Eighth Amendments, are *partially* incorporated. The Seventh Amendment is not incorporated. The Ninth or Tenth do not warrant incorporation, at least at present.

The *scorecard* of the unincorporated Territory is this: the First and Fourth Amendment are also applied in full force to the Territory of Puerto Rico. The Sixth Amendment was applied *via*: *Duncan v. Louisiana,* 391 U.S. 145 (1968), but the Territory *already* had in place provisions, as those provisions related in *Duncan*, established by law since the beginning of the 20th century and later in the Bill of Rights of the territorial constitution. The institution of *probable cause* for presentation or indictment in two levels of judicial evaluation prior to trial operates *in lieu* of the expense of a grand jury institution, and this local arrangement has passed, as of yet, the scrutiny of the U.S. Supreme Court. The Territory has a procedure not much different as the one held in *Hurtado v. California*, 110 U.S. 516 (1884). Also, it is worth to remember that in Puerto Rico, judges are *not* elected in their communities, and do not serve the same terms as the ones who appoint them. *Both* constitutional provisions of the Sixth and the Eighth Amendments are so *fully* incorporated in the territorial Bill of Rights and territorial *case law* that it is utterly moot for the Territory. Thus, the First, Fourth, Sixth and Eight are fully integrated. Note that the Eight Amendment is not fully incorporated into the States, while it is in the Territory.

Both, the Due Process and the Equal Protection Clauses of the Fifth and the Fourteenth Amendments apply in Puerto Rico since 1900, and *Balzac* is proof of this. Nevertheless, *Torres v. Puerto Rico*, 442 U.S. 465 (1979), confirms it. With § 737, which is *Congressional incorporation*, this completes all the Clauses of the Fourteenth Amendment into the Territory, and equally applies Article IV § 2 as if Puerto Rico was a State. § 734 complete applicability of all Federal laws. U.S. citizenship by birth has been recognized *jus soli* (the Fourteenth Amendment contemplates two sources of citizenship, one of which means that birth is within American Territory (8 U.S.C. § 1402), where the U.S. Constitution and laws are specifically extended, thus, the Treaty of Paris, *supra* note 15 provision has been accomplished: "*the civil rights and political status of the native inhabitants*" has been "*determined by Congress*"). All in all, except for the Second Amendment, since it was not expressly incorporated yet, all that has been incorporated to the States follows into the *provincial real estate island* of the Union. *What additional implication is expected by our constitutional lion*? The Territorial Commonwealth is waiting for a Second Amendment right.

territorial incorporation of fundamental rights doctrine, do not anticipate a possibility of exclusion of a fundamental right of the Second Amendment nature. Nevertheless, although I consider its applicability inevitable because of its "fundamental nature," by force of the ***Insular Cases***, we addressed the issue tentatively.

All the scenarios mentioned in the "final analysis" part present more interesting constitutional questions. I believe the words of the territorial Weapons Law create a 'dilemma' *vis a vis* the *right* to **keep and bear arms** under the flag, but it is not my place to answer that here.

It might be that, our culturally approved language of gun restriction that warrants that a gun permit be issued *only* upon proof of necessity no longer "holds water" under a constitutional scrutiny based on the new fundamental right of *self-defense*. If that be the case, it could very well mean something for "the person sitting in Darkness." And, in the beginning *that* was my inspiration for this essay, to question what will be said to *him*, which is still *the Person Sitting in Darkness* after 112 years under the flag?

> Having now laid all the historical facts before the Person Sitting in Darkness, we should bring him to again and explain them to him. We should say to him: They (*the historical judicial facts*) look doubtful, but in reality they are not. There have been lies, yes, but they were told in a good cause. We have been treacherous, but that was in order that real good might come out of apparent evil. . . . each detail was for the best. We . . . petted them, lied to them—officially proclaiming that our land and naval forces came to give them their freedom and displace the bad Spanish Government—fooled them, used them until we needed them no longer, then derided the *sucked orange* and threw it away. [104]

---

[104] Twain, *supra* n. 2. The *elasticity* of the ***Insular Cases*** could have been nothing more useful than a perennial *easy way out reserve* of a judicial excuse for any future need if Congress, " ***. . . used* (the Territory) *until . . . needed them no longer, then derided the sucked orange and threw it away***." Twain, *supra* n. 2. But to this, I will return soon with a question: once the territory is under ***jus soli***, how *returneth thou* from *thou* folly?