Ex proprio vigore application of the Constitution in unincorporated territories.

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Summary: Courts have suggested a number of theories under which provisions of the Constitution would apply to unincorporated territories. The rationale most commonly used is that even the plenary power of Congress or the right of an acquiring sovereign is limited by the "fundamental rights" of the inhabitants in the acquired territory.

The cases do not show a clear definition of "fundamental rights," and most opinions have turned to the fifth amendment due process clause as the specific provision that protects basic rights.

Consequently the courts have been able to maintain the flexibility that is a necessary part of the relationship between the U.S. and its territories.

Litigation involving certain specific issues has produced decisions concerning the applicability vel non of a number of constitutional provisions.

I. Background

The extent to which the U.S. Constitution is applicable in U.S. Territories depends initially upon whether the territory is "incorporated" or "unincorporated." This judicially created distinction was launched by Justice White in his concurring opinion in Downes v. Bidwell, 182 U.S. 244 (1901) and was adopted by the full Court in Balzac v. Porto Rico, 258 U.S. 298 (1922). The basis of Justice White's distinction is that "The United States under the Constitution is [not] stripped of those powers which are absolutely inherent in and essential to national existence," 182 U.S. at 311, viz., "that acquired territory . . . will bear such relation to the acquiring government as may be by it determined." 182 U.S. at 306. Within the framework of the Constitution Justice White found that the powers to make treaties and to carry on war implied the further power to acquire territory and the authority incident thereof to determine the status of that territory. 182 U.S. at 303-4, 306, 312. Moreover, that authority is expressly given to Congress by the territorial clause. See, 182 U.S. at 290, 318, 344. In sum, Congress has the power to determine any status, including incorporation, of an acquired territory. Once a territory is incorporated by Congress into the United States constitutional protections are extended to the inhabitants and the congressional power is thus confined.

The position of unincorporated territories, however, is not clearly established. Even Justice White refused to acknowledge that Congressional power over the territories was totally unfettered:

> Whilst . . . there is no express or implied limitation on Congress in exercising its power to create local governments for . . . the territories, . . . it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot with impunity be transcended . . . there may . . . be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution. 180 U.S. at 290-91.

Going beyond this vague formulation of fundamental, but unstated, rights both the opinion of the Court and Justice White's concurrence suggested that particular provisions of the Constitution may be applicable according to the terms of the provision. The opinions provided two means by which applicability could be found: (1) if a Constitutional prohibition is expressly extended to areas other than those incorporated into the United States; (2) if the prohibition goes "to the very root of the power of Congress to act at all, irrespective of time or place" or if it is "an absolute denial of all authority under any circumstances or conditions to do particular acts" 182 U.S. at 277, 294.

The Court found only one example of a provision that explicitly provided for extended applicability: the

Occasions of extended applicability

thirteenth amendment, which prohibits slavery "within the United States, or any place subject to their jurisdiction." 182 U.S. at 251, 336-37. Under the classification of absolute prohibitions on congressional action the Court included article I, § 9, clause 3 (no bill of attainder or ex post facto laws) and clause 9 (no titles of nobility). 182 U.S. at 277. The absolute prohibition theory is of particular interest since it would seem to provide for application of the Bill of Rights, or at least of the first amendment ("Congress shall make no law . . ."). And, in fact, the Court recognized the possibility of applying the Bill of Rights to unincorporated territories, see 182 U.S. at 277, 294-98, but expressly refrained from deciding the issue.

Despite suggestions by the Downes Court of the tests of applicability described, supra, most courts have relied on the vaguer concept of "fundamental rights" in determining what, if any, constitutional provisions apply to unincorporated territories. See, e.g., Balzac v. Porto Rico, 258 U.S. 298, 312 (1922)("guaranties of certain fundamental personal rights"); Virgin Islands v. Bode, 427 F.2d 532, 533 (3rd Cir. 1970)("fundamental rights" but not "remedial rights"); Soto v. U.S., 273 F. 628, 633 (3rd Cir. 1921)("constitutional rights of a natural or personal nature"), Virgin Islands v. Rijos, 285 F. Supp.

126, 129 (D.V.I. 1968)("basic fundamental principles inherent in the Constitution . . . apply automatically"). See also, Mormon Church v. U.S., 136 U.S. 1, 44 (1890) ("Congress . . . subject to those fundamental limitations in favor of personal rights; . . . these limitations would exist rather by inference and the general spirit of the Constitution . . . than by any express and direct application of its provisions."); Dorr v. U.S., 195 U.S. 138, 143 (1904)(Congress "subject to such constitutional restrictions . . . as are applicable to the situation").

II. Specific Constitutional Provisions Found to be Applicable in Unincorporated Territories

A. Article I, § 9, Clause 3: "No Bill of Attainder or ex post facto Law shall be passed."

As already noted the Downes Court used this provision in dictum to illustrate the Constitution's absolute prohibition on congressional action concerning a certain subject matter regardless of the circumstances or locality. In Putty v. U.S., 220 F.2d 473 (9th Cir. 1955), cert. denied 350 U.S. 821 (1955), the court of appeals specifically held that art. I, § 9, cl. 3 restrains the power of Congress to legislate for the territories and invalidated an amendment to the Organic Act of Guam as it applied to the defendant as a violation of the constitutional provision. The court quoted approvingly the Downes dicta and

appeared to rely on the "absolute prohibition" rationale. See also, Cases v. U.S. 131 F.2d 916 (1st Cir. 1942), cert. denied 319 U.S. 770 (1943)(prohibition against ex post facto laws is applicable to congressional power in the territories).

B. Article I, § 10, Clause 1: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

Despite the facts that the provision clearly relates to states and that in other contexts the word "state" in the Constitution has been construed to not include territories, see, e.g., National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949)(diversity jurisdiction); the Third Circuit held that the contracts clause "concerns constitutional rights of a natural or personal character and extends to these outlying territories . . . within the rule of the Insular Cases." Thornberg v. Jorgensen, 60 F.2d 471, 473 (1st Cir. 1932). Although not overruled the contracts clause holding of this case is not a strong authority for the following reasons: (1) the court also relied on the firmer ground of the due process clause; (2) the case has been subsequently cited only for the due process holding; (3) later cases have held that territories are not states as that term is used in the Constitution; (4) the importance of the contracts clause/ due process argument has greatly diminished since the 1930's.

C. First Amendment

As discussed supra, the Downes opinion and Justice White's concurrence therein strongly suggested, without holding, that the first amendment is a restraint upon congressional action in the territories. Only one district court has explicitly followed that suggestion. In International Longshoremen's & Ware. Union v. Ackerman, 82 F. Supp. 65 (D. Haw. 1948), rev'd on other grnds. 187 F.2d 860 (9th Cir. 1951), cert. denied 342 U.S. 859 (1951), the court stated that "the provisions of the First Amendment . . . are applicable to the Territory of Hawaii." 82 F. Supp. at 103. The court, however, based its holding in the case on the fifth amendment due process clause rather than on a violation of first amendment rights.

D. Fifth Amendment, Due Process Clause

The fifth amendment's prohibition against deprivation of "life, liberty, or property, without due process of law" is definitely applicable in unincorporated territories. The clearest statement of this fact was made in Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953): "there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution." See also, Balzac v. Porto Rico, 258 U.S. 298 (1922); Farrington v. Tokushige, 273 U.S. 284 (1927); Colon-Rosich v. Puerto Rico,

256 F.2d 393 (1st Cir. 1958); Soto v. U.S., 273 F. 628 (3rd Cir. 1921).

The ex proprio vigore application of the due process clause creates the possibility that the concept of equal protection of the law also applies. In Sims v. Rives, 84 F.2d 879 (D.C. Cir. 1936), cert. denied, 298 U.S. 682 (1936), the court of appeals stated that "The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws. But equal protection of the laws means merely that a law must deal alike with all of a given class within the jurisdiction to which the law is applicable" 84 F.2d at 878. The court did not explain why it felt that the fifth amendment implied equal protection only as applied to the District. It could be argued that in legislating for the District of Columbia the federal government is performing substantially the function of the state governments and is therefore subject to the same restraints, but the grant of plenary power to Congress over the "seat of the government" arguably broadens federal power rather than restricts it. Despite a holding after Sims that the restraints on the federal government, particularly in the District of Columbia, are less narrow than those on the states, Neild v. District of Columbia, 110 F.2d 246 (D.C. Cir. 1940), the D.C. Circuit reaffirmed the Sims holding of "implied" equal protection insofar as the due process clause is applied

to the District and indicated that the basis of the implication was that Congress was acting as the "local legislature" and therefore subject to the same restraints as the state legislature.*/ Hamilton Nat'l Bank v. District of Columbia, 176 F.2d 624 (D.C. Cir. 1949), cert. denied 338 U.S. 891 (1949).

The Sims/Hamilton reasoning was extended to unincorporated territories by the District Court of the Virgin Islands in U.S. v. Davis, 115 F. Supp. 392 (D.V.I. 1953), rev'd. on other grnds. 212 F.2d 681 (3rd Cir. 1954). After holding that the fifth amendment guarantee of due process applies to unincorporated territories, the district judge went on to hold that "at least as applied to a territory the due process clause . . . implies equal protection of the laws." 115 F. Supp. at 396. The Davis holding was followed in a reapportionment case decided by the District Court of Hawaii. Dyer v. Kazuhisha Abe,

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*/ In place of legal reasoning the court posited an "unthinkability" standard for resolving constitutional issues: "It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws." 176 F.2d at 630. Suprisingly, the "unthinkability" standard was also used by the Supreme Court in Bolling v. Sharpe, 347 U.S. 497 (1954): "In view of our decision [Brown] that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." 347 U.S. at 500.

138 F. Supp. 220, 224-25 (D. Haw. 1956), rev'd. as moot 256 F.2d 728 (9th Cir. 1958)("Implicit within [the fifth amendment] as applied to a territory is the equal protection of the laws of the Territory").

The Dyer court relied, in part, on Bolling v. Sharpe, 347 U.S. 497 (1954), the Supreme Court's firmest holding on the "due process of the law"/"equal protection of the laws" issue. There, the Court acknowledged that "the two are [not] always interchangeable phrases. But . . . discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499. See also, Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969)(waiting-period requirement for welfare eligibility in D.C. is unjustifiable discrimination and violates due process).

In the context of federal legislation concerning land holding in the Marianas the due process/equal protection concept could be a serious problem, especially if the right to purchase or hold land is based on race or ancestry. The Bolling Court emphasized that "[c]lassifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." 347 U.S. at 499. See also, Hirabayashi v. U.S., 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality").

Moreover, Buchanan v. Warley, 245 U.S. 60, 82 (1917), construed the due process clause of the fourteenth amendment as a bar to laws that prohibit the conveyance of property to a person of another race. Since land ownership restrictions in the Marianas would be based on race and since such a restriction would not be an example of Congress' "hit[ting] at a particular danger where it is seen, without providing for others which are not . . . so urgent" nor an example of congressional response to a national emergency, see Hirabayashi v. U.S., 320 U.S. at 100, the discrimination may well be found to "be so unjustifiable as to be violative of due process." Bolling v. Sharpe, 347 U.S. at 499. The due process violation could be found in prohibiting the sale of land by a Marianas "resident" or in prohibiting the purchase of land by a "resident" of the United States.

The considerations favoring the constitutionality of land restrictions in the Marianas' context are discussed in Attachment 9 of the "Study of Political Status Alternatives and Related Legal Issues."

III. Specific Constitutional Provisions Found Not to be Applicable in Unincorporated Territories

A. Article I, § 8, Clause 1: "all Duties, Imposts and Excises shall be uniform throughout the United States."

Downes v. Bidwell, 182 U.S. 244 (1901), the source of the incorporation doctrine, held that the uniformity clause is not applicable to unincorporated territories since, until a territory is incorporated it is not part of the "United States." Downes specifically upheld a provision of the Foraker Act (Puerto Rico's first, "temporary" organic act) imposing a duty on goods imported into the United States from Puerto Rico.

B. Article I, § 8, Clause 3: Commerce clause.

Two courts of appeals have held that the commerce clause does not limit the legislative powers of Congress with respect to the territories. Sayre & Co. v. Riddell, 395 F.2d 407 (9th Cir., 1968)(Guam); Cases v. U.S., 131 F.2d 916 (1st Cir., 1942), cert. denied 319 U.S. 770 (1943)(pre-commonwealth Puerto Rico).

C. Article I, § 9, Clause 5: "No Tax or Duty shall be laid on Articles exported from any State."

In Dooley v. U.S., 183 U.S. 151 (1901), plaintiff challenged a provision of the Foraker Act that imposed a duty on merchandise coming into Puerto Rico from the United States. The Court provided two theories as to why clause 5 had not been violated: (1) Even if a tax on imports from the United States could be construed as a tax on "exports" from the United States, Puerto Rico is not a foreign country and thus the movement of goods from the

mainland to the island is not an "export" within clause 5; (2) The tax was on imports into Puerto Rico not on exports from the U.S. It should be noted that Dooley and Downes together establish the peculiar position of an unincorporated territory: It is not a part of the United States (Downes) nor is it a foreign country (Dooley).

D. Article I, § 10 Clause 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . ."

Buscaglia v. Ballister, 162 F.2d 805 (1st Cir. 1947), cert. denied 332 U.S. 816 (1947), held that this provision "is inapplicable because that prohibition is laid upon the states, and Puerto Rico . . . is not a state." 162 F.2d at 807. Notwithstanding the Thornberg case, discussed in II, B, supra, it is clear from the cases that a territory is not a state and that all the art. I, § 10 prohibitions against state action (as well as prohibitions elsewhere in the Constitution) are inapplicable.

E. Article IV, § 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State."

Although this clause has not been held explicitly to be inapplicable, the conclusion of inapplicability is necessarily implied in Embry v. Palmer, 107 U.S. (17 Otto) 3 (1882); Atchison, Topeka, & Santa Fe Ry. v. Sowers, 213 U.S. 55 (1909); and Americana of Puerto Rico, Inc. v.

Kaplus, 368 F.2d 431 (3rd Cir. 1966), cert. denied 386 U.S. 943 (1966). A discussion of these cases can be found in part III of the July 19, 1973 memo on Puerto Rico and the territorial clause.

F. Article IV, § 2: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

In Haavik v. Alaska Packers Ass'n, 263 U.S. 510 (1929) the Court held that a non-resident fisherman's tax did not conflict with the privileges and immunities clause since "citizens of every State are treated alike. Only residents of the Territory are preferred." 263 U.S. at 515. The lower courts have expanded Haavik into an explicit holding that the privileges and immunities clause is not applicable to the territories. E.g. Duehay v. Acacia Mutual Life Ins. Co., 105 F.2d 768, 775 (D.C. Cir. 1939)(clause "is a limitation upon the powers of the states and in no way affects the powers of Congress over the territories and the District of Columbia"); Martinsen v. Mullarey, 85 F. Supp. 76 (D. Alaska, 1949). See also, U.S. v. Barnett, 330 F.2d 369 (5th Cir. 1963).

G. Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury."

The Supreme Court and the lower courts have consistently held that this clause of the fifth amendment

is not applicable to unincorporated territories. E.g., Dowdell v. U.S., 221 U.S. 325 (1911), Pugh v. U.S., 212 F.2d 761 (9th Cir. 1954).

H. Trial by Jury Provisions: Article III, § 2 ("The Trial of all Crimes . . . shall be by Jury"); Sixth Amendment ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury."); Seventh Amendment ("In suits at common law . . . the right of trial by jury shall be preserved").

The Supreme Court and the lower courts have consistently held that the trial by jury provisions of the Constitution are not applicable to unincorporated territories. E.g., Balzac v. Porto Rico, 258 U.S. 298 (1922); Pugh v. U.S., 212 F.2d 761 (9th Cir. 1954).

I. Fourteenth Amendment

The First Circuit has twice held that the fourteenth amendment is a limit only on the states and is thus not applicable to an unincorporated territory. Arroyo v. Puerto Rico Trns. Auth., 164 F.2d 748 (1st Cir. 1947); South Puerto Rico Sugar Co. v. Buscaglia, 154 F.2d 96 (1st Cir. 1946). Subsequent to the establishment of Commonwealth the District Court of Puerto Rico has held that the fourteenth amendment is still inapplicable, Mora v. Torres, 113 F. Supp. 309 (D.P.R. 1953), but the First Circuit has expressly refrained from deciding the issue. Mora v. Mejias, 206 F.2d 377 (1st Cir. 1953). The First Circuit's avoidance of the issue is, of course, part of the court's refusal to