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## The Law of the Territories of the United States in Puerto Rico, the Oldest Colony in the World

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# **The Law of the Territories of the United States in Puerto Rico, the Oldest Colony in the World**

Carlos Iván Gorrín Peralta\*

*The territorial law and policy of the United States changed towards the turn of the 20th century, as territorial expansion was no longer motivated by the extension of national borders, but by geopolitical, strategic and economic objectives. The new territories acquired in the Spanish American war were different from those previously annexed. The resulting constitutional doctrine of the Insular Cases differentiated the previous incorporated territories from the new unincorporated territories, which were not destined to be part of the U.S. nor to be admitted as new states. Despite purported changes in the relation with the United States in 1950-1952, Puerto Rico is still an unincorporated territory, subject to plenary territorial powers without its participation in the government of its sovereign. During the second half of the twentieth century, the international law of human rights has recognized the right to self-determination of all peoples. As a result, the constitutional law of early twentieth century is at odds with the international legal obligations of the United States arising from customary law and those assumed under the International Covenant on Civil and Political Human Rights, which entered into force for the United States three decades ago. This article presents substantive and procedural avenues for the harmonization of U.S. constitutional*

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*law with international law through the exercise of the right of self-determination by the people of Puerto Rico.*

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## I. INTRODUCTION

The peoples of the territories of the United States are restless; both legal academia and political circles have noticed. As a result of the increasing demands of territories of the United States around the globe,<sup>1</sup> the issues regarding their legal situation have surfaced in political and academic discussions over the course of the last three decades.<sup>2</sup> Outside of the academic universe, some developments have

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<sup>1</sup> For a revealing account of the global dimension of the possessions, see generally DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE, A HISTORY OF THE GREATER UNITED STATES* (Farrar, Straus and Giroux, 1st ed. 2019).

<sup>2</sup> For example, in 1994, the universities of several territories, with the collaboration of George Washington University, organized a conference to discuss the relations between the United States and its territories. See *National Conference: "A Time of Change: Relations between the United States and American Samoa,*

forced consideration of the relationship of the United States with its territories. For example, the Supreme Court of the Virgin Islands has repudiated the Restatement of the Law and claimed discretion to develop its own local law.<sup>3</sup> Some Samoans have demanded recognition of U.S. citizenship.<sup>4</sup> The people of Puerto Rico repudiated the existing territorial relation in the plebiscite of 2012.<sup>5</sup> These are some examples of recent concerns regarding the “law of the territories”.

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*Guam, the Northern Marianas, Puerto Rico and the Virgin Islands,”* THE ARCHIVAL COLLECTIONS AT THE UNIV. OF HAWAI’I SCH. OF L. LIBR., 1, 1 <http://archives.law.hawaii.edu/items/show/17246#c=0&m=0&s=0&cv=0> (last visited Apr. 21, 2023). In 1998, on the 100th anniversary of the Spanish American War, Yale Law School hosted a conference which resulted in the publication of a major contribution to the historiography of the territorial policy of the United States. See FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (Christina Duffy Burnett and Burke Marshall, eds., Duke Univ. Press 2001). In 2014, Harvard Law School organized a conference to “reconsider the Insular Cases” which resulted in another important publication by the H.L.S. Human Rights Program. See GERALD E. NEUMAN AND TOMIKO BROWN-NAGIN, RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (Harvard Law School Human Rights Program and Harvard University Press 2015). The American University George Washington School of Law has hosted panels on territorial issues pending before the Supreme Court in 2016 and 2019. The Stetson Law Review organized a symposium in 2017 to address “emerging issues of political status in the Territorial and Insular Jurisdictions of the United States.” See Kristen David Adams, *Symposium Introduction*, 46 STETSON L. REV., 227, 227 (2017). In 2022 the Yale Law Journal celebrated a “Special Issue Symposium on the Law of the Territories”; its papers were published in Volume 131 of the Journal.

<sup>3</sup> See *Banks v. Int’l Rental & Leasing Corp.*, 55 V.I. 967, 973-80 (2011) (holding that the Virgin Islands Supreme Court possesses the discretion to decline to follow the most recent restatement provision in favor of local law).

<sup>4</sup> See *Tuaua v. United States*, 788 F.3d 300, 301-02 (D.C. Cir. 2015), *cert denied*, 136 S. Ct. 2461 (2016) (“[T]he Citizenship Clause does not extend birthright citizenship to those born in American Samoa.”).

<sup>5</sup> The plebiscite ballot contained two questions. R. SAM GARRETT, PUERTO RICO’S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS, CONG. RES. SERVICE, JUNE 25, 2013, at 5-6. The first one asked the voter to vote yes or no on maintaining the current territorial relation with the United States. *Id.* at 6. According to the records of the State Elections Commission, the vote was 46 percent “yes” and 54 percent “no.” *Id.* at 8. For the first time, a majority of the people rejected the territorial status. *Id.* On the second question, the voter could select among three options: statehood, independence and *estado libre asociado soberano* (sovereign free-associated state). *Id.* at 6. Of the total ballots cast, 44 percent voted for statehood, 4 percent voted for independence, 24

These are not “emerging issues” but a constant concern in law schools and universities present within the territories for many decades, reflecting the unending discussion among local political forces. However, in the academic and political mainstream of the United States, law and policy regarding the territories have been a well-kept secret. Their history and political underpinnings are for the most part absent from the canon of constitutional law in law schools, and from the teaching of history or political science in universities across the United States.<sup>6</sup>

This article will present the historical evolution of the territorial policy of the United States and its application to Puerto Rico, which has endured a colonial status for more than five hundred years, first as a Spanish possession from 1493 to 1898, and then as a

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percent voted for *estado libre asociado soberano*, and 27 percent did not vote for any of the options. *Id.* at 13. During the campaign, the Popular Democratic Party, which supports the present relation, had urged voters to cast blank votes in the second question. Ed Morales, *Analysis: The Puerto Rico Plebiscite That Wasn't*, ABC NEWS (Nov. 8, 2012), [http://abcnews.go.com/ABC\\_\\_Univision/Opinion/puerto-rico-status-plebiscite/story?id=17674719](http://abcnews.go.com/ABC__Univision/Opinion/puerto-rico-status-plebiscite/story?id=17674719). Half of their electorate did so; the other half voted for the *estado libre asociado soberano*. *Id.* If the blank votes are factored out, statehood obtained 61 percent, independence 6 percent and *estado libre asociado soberano* 33 percent. Needless to say, the blank votes can reasonably be interpreted as not favoring statehood. *Id.*; GARRETT, *supra*, at 5.

<sup>6</sup> An illuminating explanation of this absence was Professor Sanford Levinson's “confession” over twenty years ago at the Yale conference of 1998: “I confess [that] prior to the . . . conference on Puerto Rico . . . I had never read the [insular] cases. Neither in my graduate studies at Harvard . . . nor at Stanford . . . were they ever assigned; I have also managed to teach constitutional law for almost two decades at the University of Texas (and co-edit what I immodestly believe is a first-rate casebook in the field) without filling in this blank. One factor encouraging this public confession is that conversation with other adepts in constitutional law . . . leads me to believe that my story is not in the least unusual.” Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 122 (Christina Duffy Burnett and Burke Marshall eds., Duke Univ. Press 2001). *See also* Juan R. Torruella, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 4 (Edit. Univ. de Puerto Rico 1985) (“Although at one time the *Insular Cases* were the subject of intense debate, . . . they are today hardly a flaming issue, having been relegated to the backburner of judicial concern . . . [Their] doctrine floats in the penumbra of legal priorities considerably below the rule against perpetuities.”).

unincorporated territory of the United States.<sup>7</sup> It will then examine the political, economic and social crisis in Puerto Rico currently, and the contradiction between the constitutional doctrine forged over a hundred years ago and the international obligations assumed by the United States towards the end of the twentieth century. Finally, it will consider substantive and procedural options available to solve the contradiction inherent in the colonial regime through the exercise of the right to self-determination.

## II. HISTORICAL DEVELOPMENT OF U.S. TERRITORIAL LAW AND POLICY

### *A. 18th Century Framework for Territorial Expansion*

To understand the problems facing the peoples of the territories today, their claims and the diverse solutions available for the future, it is necessary to examine the historical background of the territorial policy and its legal formulations over time.

The colonial question has been present throughout the history of the United States, even before 1776. After all, the American Revolution was the product of anti-colonialist forces and one of the first exercises of the right to self-determination in the history of humankind. The Declaration of Independence is perhaps the first formal articulation of the right when it states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.<sup>8</sup>

The American Revolution was characterized by contradictions and antagonisms which have been present throughout the constitutional history of the United States to this day. The territorial issue

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<sup>7</sup> For a general history of Puerto Rico, see FRANCISCO A. SCARANO, *PUERTO RICO: CINCO SIGLOS DE HISTORIA* (4th ed. McGraw Hill 2015).

<sup>8</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776), <https://www.archives.gov/founding-docs/declaration-transcript>.

has been no exception. In addition to early pretensions of becoming a full-fledged nation on par with its colonialist European models, the social and economic conditions of the time, especially the tension between established economic interests and the impoverished masses, made it attractive to the emerging nation to set territorial expansion among its national priorities, as a means for land acquisition by the landless.<sup>9</sup> Even before independence, Benjamin Franklin suggested to England the taking of Cuba.<sup>10</sup> Under the Articles of Confederation, George Washington spoke of an “emerging empire;”<sup>11</sup> Franklin and Samuel Adams proposed taking Canada; James Madison, Alexander Hamilton, Thomas Jefferson and John Quincy Adams repeatedly insisted on the need for an empire through territorial expansion beyond the Mississippi and even towards South America, to secure social stability, economic welfare and public liberty for the young nation.<sup>12</sup>

These purported “needs” driven by expansionist objectives posed a dilemma. How were the founding fathers to harmonize their anticolonial ideology with the plan to submit other peoples to colonial rule? The gap was bridged with the Ordinance for the Northwest Territory, originally proposed in 1784 by Jefferson<sup>13</sup> and ultimately passed in its final version in 1787.<sup>14</sup> The huge mass of land between the newly independent states and the Mississippi River was part of the United States under the terms of the Treaty of Paris of 1783 with Great Britain.<sup>15</sup> The Ordinance outlined three stages for the development of that “territory.” First, Congress would establish a temporary government and promote migration to populate the several

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<sup>9</sup> Carlos Rivera Lugo, *Los orígenes de la cláusula territorial*, 46 REV. COL. ABO. P.R. 63, 67 (1985).

<sup>10</sup> W.H. Calcott, *THE CARIBBEAN POLICY OF THE UNITED STATES, 1890-1920*, 1 (1942), cited in 1 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 135 (1980).

<sup>11</sup> RICHARD W VAN ALSTYNE, *THE RISING AMERICAN EMPIRE* 1 (1960), cited in Rivera Lugo, *supra* note 9, at 72.

<sup>12</sup> *Id.* at 92-93.

<sup>13</sup> JAY A. BARRETT, *EVOLUTION OF THE ORDINANCE OF 1787: WITH AN ACCOUNT OF THE EARLIER PLANS FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY 17-27* (New York: G. P. Putnam's Sons, 1891).

<sup>14</sup> AN ORDINANCE FOR THE GOVERNMENT OF THE UNITED STATES NORTH-WEST OF THE RIVER OHIO (July 13, 1787) [hereinafter *Northwest Ordinance*].

<sup>15</sup> Treaty of Paris, U.S.-Gr. Brit., arts. 1-2, Sept. 3, 1783, Gen. Records of the U.S. Gov't Record Grp. 11.

segmented areas of the immense territory. Then, upon reaching a specified population, Congress authorized convening a convention of delegates to draft a constitution for a permanent government. In the final stage, upon achieving a population equal to the least populous of the original states, the territories could be gradually admitted as full members of the Confederation, with equal representation in Congress.<sup>16</sup> The plan secured the expansion of the empire purportedly quieting the ideological scruples of those preoccupied with the contradiction between colonial expansion and self-determination of the peoples of the territory. Since they were destined for eventual acceptance as equal members of the federation, the colonial—or rather, “territorial”—experience would be temporary and short lived. The commitment to the principle of government by the governed espoused in the Declaration of Independence would not be compromised for too long.

Despite the “nationalization” of the territory through the Ordinance, it was still a source of friction among the several states, as they vied for control of that vast expanse of land to the west. According to Alexander Hamilton, the territorial issue was, together with the commercial competition among the states, one of the great reasons for convening the Constitutional Convention of 1787 and establishing a federal government.<sup>17</sup> James Madison also saw a need to constitutionalize the territorial issue:

We may calculate . . . that a rich and fertile country of an area equal to the inhabited extent of the United states will soon become a national stock . . . Congress have assumed the administration of this stock . . . to render it productive. Congress have undertaken to do more: they have proceeded to form new States, to erect temporary governments, to appoint officers for them, and to prescribe the conditions on which such States shall be admitted into the Confederacy. All this has been done . . . without the least color of constitutional authority.<sup>18</sup>

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<sup>16</sup> Rivera Lugo, *supra* note 9, at 83.

<sup>17</sup> See THE FEDERALIST NO. 7 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

<sup>18</sup> THE FEDERALIST NO. 38 (James Madison) (Clinton Rossiter ed. 1961).



The territorial issue gleamed briefly in the Constitutional Convention of Philadelphia. On August 18, 1787, James Madison proposed, as one of the powers of the national legislature to be submitted to the Committee of detail, the power:

“To dispose of the unappropriated lands of the U. States.”

“To institute temporary Governments for New States arising therein.”<sup>19</sup>

A few days later, on August 30, 1787, the Convention considered a new text.<sup>20</sup> With some stylistic modifications, the second proposal was finally adopted as Article IV, Section 3, clause 2 of the Constitution, known as the Territory Clause:

The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.<sup>21</sup>

The power to dispose of the territory and to rule it in the meantime is preceded by a companion clause that authorizes the admission of new states by Congress.<sup>22</sup> The federal government was thus constitutionally empowered to implement the territorial policy of the Northwest Ordinance. The territory, which was part of the United States in perpetuity,<sup>23</sup> would first be colonized governed by federal legislation, and when demographic and economic conditions ripened, the Congress would dispose of portions of that federal territory

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<sup>19</sup> 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 324 (Max Farrand ed. 1937).

<sup>20</sup> *Id.* at 459.

<sup>21</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>22</sup> U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union . . .”)

<sup>23</sup> AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTHWEST OF THE RIVER OHIO, § 14, art. IV, stated:

The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in congress assembled, conformable thereto.

to be then admitted as new states “on an equal footing with the original States.”<sup>24</sup> The legal framework had been established to carry out the territorial expansion of the frontier.

### *B. 19th Century Territorial Expansion of the National Borders*

The Northwest Territory was not enough. Expansionist pretensions beyond the original territory began to materialize early in the nineteenth century. Under Thomas Jefferson, the fledgling nation embarked on its first acquisition of more territory with the Louisiana Purchase of 1803. The event marked the first test of the Territory Clause as Congress elucidated whether the Constitution allowed territorial expansion. The expansionist position triumphed as Congress not only approved the Treaty with France,<sup>25</sup> but also passed legislation establishing a territorial government along the lines sketched in the Northwest Ordinance of 1787. A similar course was followed with the acquisition of Florida from Spain in 1819-1821.<sup>26</sup>

Having reached a new coast to the south in the first two decades of the nineteenth century, the expansionist sights began to move across the sea towards the Caribbean. The United States began to show interest in Cuba. Some authors have concluded that this interest was a major consideration behind the proclamation of the Monroe Doctrine issued on December 2, 1823.<sup>27</sup>

Two decades later, the expansion continued. In 1845 Texas was annexed by Joint Resolution of Congress,<sup>28</sup> and in 1846 the Oregon Territory was acquired from Great Britain.<sup>29</sup> Two years later, in the Treaty of Guadalupe Hidalgo,<sup>30</sup> the United States annexed about fifty percent of the Mexican national territory. In 1867 the United

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<sup>24</sup> *Id.* § 13.

<sup>25</sup> Convention Between the United States of America and the French Republic, Fr.-U.S., Apr. 24, 1803, 8 Stat. 206.

<sup>26</sup> Treaty of Amity, Settlement, and Limits, between the United States of America and his Catholic Majesty, Eng.-U.S., Feb. 22, 1819, 8 Stat. 252.

<sup>27</sup> See TRÍAS MONGE, *supra* note 10, at 135-37.

<sup>28</sup> Joint Resolution of Congress No. 8 for Annexing Texas to the United States, 5 Stat. 797.

<sup>29</sup> Treaty of Oregon, Eng-U.S., Jun. 24, 1846, 9 Stat. 869.

<sup>30</sup> Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922.

States purchased Alaska from Russia.<sup>31</sup> In 1893 the United States supported a coup against the queen of Hawaii and the creation of a Republic of Hawaii which sought annexation, finally achieved in 1898.<sup>32</sup>

The process was not free of uncertainties and controversies. The annexation of new territories posed new questions regarding the extent of constitutional power under the Territory Clause. Did the clause grant power only to govern and dispose of the original Northwest Territory? The constitutional text employs the singular, not the plural. In the alternative, did the Constitution grant Congress the power to acquire, govern and dispose of new territories at will? What was the meaning of the phrase “the territory or other property belonging to the United States”? Did it contemplate the acquisition and governance of additional “territory” in the sense of exercising sovereign political powers over the inhabitants of new lands over which the United States did not exercise property rights?

A difficult debate ensued. As with other issues of grave importance during the first half of the nineteenth century, this one was marked by the opposing judicial views of Chief Justice John Marshall and later of Chief Justice Roger B. Taney. The former adopted the expansive view of congressional power articulated in *American Insurance Co. v. 356 Bales of Cotton*.<sup>33</sup> The acquisition of Florida set the stage for the confirmation of the constitutional power to acquire territory. In this case the Supreme Court held that under the doctrine of implied powers articulated in *McCulloch v. Maryland*,<sup>34</sup> the United States had the power to acquire territory as part of its explicitly delegated powers to make war and enter into treaties with

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<sup>31</sup> Treaty Concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of All the Russias to the United States of America, Rus.-U.S., Mar. 30, 1867, 15 Stat. 539 [hereinafter Treaty on the Cession of Alaska].

<sup>32</sup> See *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (stating that with the consent of the Republic of Hawaii, the Congressional “Newlands Resolution” of July 7, 1898, annexed Hawaii as a territory. Newlands Resolution, H.R.J. Res. 55, 55th Cong. (1898).).

<sup>33</sup> *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet. 26) 511, 512 (1828).

<sup>34</sup> *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (holding that Congress has implied powers to legislate any means necessary, proper, convenient or useful, to exercise its expressly delegated powers.)

foreign nations. Chief Justice John Marshall went further. Not only did Congress have the power to acquire and “dispose of”, but also to “make all needful rules and regulations respecting the territory or other property belonging to the United States.” It also had the plenary power of the sovereign, that is, the power to govern the inhabitants who had colonized the territories. Some decades later, in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*,<sup>35</sup> the Court would once again sanction the power to acquire territory, as incidental to national sovereignty.

On the other side of the debate, Chief Justice Roger Taney espoused a restrictive anti-imperialist view of congressional power in the famous and now infamous decision of *Dred Scott v. Sanford*.<sup>36</sup>

There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure . . . [N]o power is given to acquire a territory to be held and governed permanently in that character.<sup>37</sup>

The Civil War put an end to visions that limited the powers of the national government in many aspects. Jefferson’s scheme for the Northwest Territory and Marshall’s expansive interpretation of the territory clause prevailed as the official territorial policy of the United States. All the instruments of annexation secured for the inhabitants of the territories the same rights enjoyed by American citizens in the states, and promised them that they would, sooner than later, be admitted as states into the Union. The Supreme Court recognized this policy in several decisions. In *Shively v. Bowlby*,<sup>38</sup> the Court stated the following:

[T]he territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify

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<sup>35</sup> *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1, 42 (1890).

<sup>36</sup> *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>37</sup> *Id.* at 446.

<sup>38</sup> *Shiveley v. Bowlby*, 152 U.S. 1 (1894).

it, of being admitted into the Union as States upon an equal footing with the original States in all respects . . .<sup>39</sup>

By the end of the nineteenth century the continental expansion of the United States was complete. The doctrine of Manifest Destiny, articulated early in the century to justify the imperialistic plans, had successfully run its course from coast to coast. The geography of the Republic changed as the boundaries gradually crept across the continent. Its nature, based on what Thomas Jefferson had dubbed “an empire of liberty,”<sup>40</sup> mutated into a regime that “claimed the liberty to rule an empire.”<sup>41</sup> In a sense, territorial expansion had operated as the geopolitical manifestation of Darwinism, which would also flourish as a mainstream theory over the course of the very same century.<sup>42</sup> There was nowhere else to go but across the seas.

### *C. From Territorial Expansion to a Colonial Empire in the 20th Century*

Three decades after the American Civil War, economic and social unrest resulting from unemployment, low wages, undesirable working conditions, and cries for labor reform renewed interest in further expansion during the last decade of the century. The economic motive would once again move the nation towards expansionist adventures under the old ideology of Manifest Destiny.<sup>43</sup>

The Spanish American War, Theodore Roosevelt’s “splendid little war,”<sup>44</sup> served the political objective of the reunification of the

<sup>39</sup> *Id.* at 49.

<sup>40</sup> Brook Thomas, *A Constitution Led by the Flag: The Insular Cases and the Metaphor of Incorporation*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION* 89 (Christina Dufy Burnett & Burke Marshall ed. 2001).

<sup>41</sup> Carlos Iván Gorrín Peralta, *Puerto Rico and the United States at the Crossroads*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 183, 186 (Gerald L. Neuman & Tomiko Brown-Nagin eds. 2015).

<sup>42</sup> See TRÍAS MONGE, *supra* note 10, at 137-38.

<sup>43</sup> Raúl Serrano Geys, *The Territorial Status of Puerto Rico and Its Effect on the Political Future of the Island*, XI *REV. JUR. U.I. P.R.* 385, 406-07; *see also*, TRÍAS MONGE, *supra* note 10, at 139-40.

<sup>44</sup> The phrase has been incorrectly attributed to Theodore Roosevelt, probably as a result of his personal involvement in the war. It was John Milton Hay, Secretary of State from August 1898 until his death in July 1905, who in a letter to President Theodore Roosevelt, referred to the 1898 imperial adventure as a “splendid little

nation after the Civil War. The economic need for new sources of cheap raw materials, new places for the investment of surplus capital, and the security of controlled export markets prompted a quick war to snatch the last holdings of the former Spanish empire.<sup>45</sup> There were also geopolitical and strategic objectives: the expanding economic interests in Asia (to compete with Japan) and the required presence of a growing military might in the Caribbean (where plans for an interoceanic canal were already in motion).<sup>46</sup>

Spain ceded sovereignty over the Philippines, Guam and Puerto Rico; it also “relinquished” sovereignty over Cuba, which was never formally a territory but instead was economically and politically controlled by the United States for several decades. Ironically, the United States would acquire colonies to become an imperial power through a Treaty of Peace signed in Paris,<sup>47</sup> the same city where the United States had formally ceased to be colonies of the British Empire in 1783.<sup>48</sup>

When enthusiasm over the war and the new expansionist adventure settled down, a debate ensued within political and academic circles regarding what to do with the new possessions. Their acquisition presented a golden opportunity to turn the United States into a great imperial power, to improve its military capability, to protect the national interests with bases and stations overseas, and to increase the commercial potential of illimitable markets and sources of cheap raw materials. On one side of the debate, the self-anointed “imperialists” defended the proposition that the United States should become an empire with a duty to civilize and Christianize backward areas of the world. On the other side of the debate, it was argued that the new possessions had to be relinquished; to maintain them as colonies would be tyrannical and a violation of liberty and democracy. Contrary to the prior territories, the new possessions were the product of very different history, culture, customs and traditions. They were non-contiguous and densely populated tropical areas not

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war.” See *John Milton Hay*, LIBR. OF CONGRESS, <https://www.loc.gov/rr/hispanic/1898/hay.html> (last visited Nov. 25, 2016).

<sup>45</sup> BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 64-5 (2006).

<sup>46</sup> *Id.*

<sup>47</sup> Treaty of Peace, U.S.-Spain, Dec. 10, 1898, 30 Stat.1754.

<sup>48</sup> See Treaty of Paris, *supra* note 15, art. 1.

conducive to massive immigration or colonization. Their political organization, legal system and religious inclination were markedly different.<sup>49</sup> Their “natives” were spuriously described as primitive and savage populations, lacking in civilization and “incapable of self-rule.”<sup>50</sup> A New York Times article described Puerto Ricans as “uneducated simple-minded and harmless people who are only interested in wine, women, music and dancing.”<sup>51</sup> Another publication stated that “[a]ll Puerto Ricans are totally lacking in moral values, which is why none of them seem to mind wallowing in the most abject moral degradation.”<sup>52</sup> In a shameful speech on the U.S. Senate floor, Sen. William B. Bate stated:

What is to become of the Philippines and Porto Rico? Are they to become States with representation here from those countries, from that heterogeneous mass of mongrels that make up their citizenship? . . .

Jefferson was the greatest expansionist. But neither his example nor his precedent affords any justification for expansion over territory in distant seas, over peoples incapable of self-government, over religions hostile to Christianity, and over savages addicted to head-hunting and cannibalism, as some of these islanders are.<sup>53</sup>

The alien nature of those populations required that they not be annexed as full-fledged territories, or eventually as states. The prevailing sentiment seems to have inspired Chief Justice William H. Taft when he wrote in *Balzac v. Porto Rico*<sup>54</sup>: “[A]nother consideration . . . requires us not lightly to infer . . . an intention to incorporate in the Union these distant ocean communities of a different

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<sup>49</sup> Serrano Geyls, *supra* note 43, at 390-91.

<sup>50</sup> NELSON A. DENIS, *WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY* 14-17 (Nation Books 2015).

<sup>51</sup> S.S. Harvey, “Americanizing Puerto Rico”, *New York Times*, February 22, 1899.

<sup>52</sup> Charles E. Hewitt Jr., “Welcome Paupers and Crime: Puerto Rico’s Shocking Gift to the US”, *Scribner’s Commentator* 7-8 March 1940).

<sup>53</sup> *Congressional Record*, 56th Cong., 1st Sess., April 2, 1900.

<sup>54</sup> 258 U.S. 298 (1922).

origin and language from those of our continental people.”<sup>55</sup> But to make them territories, and eventually admit them as states, would not be wise; they were considered culturally foreign and incapable of being states.<sup>56</sup>

Against the backdrop of this debate, it should not come as a surprise that the Treaty of Paris of 1898 did not reproduce the provisions contained in all prior treaties of annexation, which had reflected the scheme for the Northwest Territory. The different geopolitical, economic, and strategic motivations to acquire the new possessions explain why the instrument of annexation did not reproduce the terms of previous acquisitions. The 1898 Treaty of Paris states quite tersely that the political condition and the rights of the “native inhabitants” of the new possessions were to be determined by Congress.<sup>57</sup> The text of the treaty was vague and flexible, in order

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<sup>55</sup> *Id.* at 311.

<sup>56</sup> Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, XLIII REV. JUR. U.P.R. 259, 263 (1974). *Id.* at 289-90.

<sup>57</sup> Treaty of Peace, *supra* note 47, art. IX. 30 Stat. 1754, 1759, states:

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights . . . In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making . . . within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

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

The text of this article is similar to Article III of the Treaty on the Cession of Alaska, which also secured citizens of the ceding nation their citizenship if they so chose, but had quite a different treatment for the “uncivilized native tribes.” Treaty on the Cession of Alaska, *supra* note 31, art. III. The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their



to postpone the ultimate decision regarding the future of the possessions. It was preferable to submit it to the interplay of political forces in Congress.

The debate took a juridical turn as legal academicians of different persuasions articulated three theories regarding the power of Congress to deal with the new territories. In several articles published by the Harvard Law Review and the Yale Law Journal in 1899, some legal academics advanced an “anti-imperialist” position.<sup>58</sup> The United States could not acquire foreign lands to govern indefinitely without participation of their people in the government. The Constitution “follows the flag” and thus applies fully wherever the United States exercises sovereignty. It would be argued, however, that the new possessions were populated by inferior races incapable of true civilized government; they could not be part of the American people and had to be relinquished as soon as possible.<sup>59</sup>

Other academics reflected the “imperialist” side of the debate, arguing that the United States could validly acquire new lands through military conquest or by treaty, and govern them through the Territory Clause, with no constitutional limits. Congress had plenary constitutional power over the new possessions, unencumbered by the strictures of the Constitution, which does not apply in the new territories.<sup>60</sup>

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liberty, property, and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country.* *Id.* (emphasis added). This seems to have been the first time that the United States did not recognize constitutional protections to inhabitants of a newly acquired territory, in this case the “uncivilized native tribes” of Alaska. *Id.* Not only is it shameful that equal rights were not recognized for indigenous Alaskans, but thirty-one years later the same inequality would be perpetrated against all the “native inhabitants” of Guam, the Philippines, and Puerto Rico. *Id.*

<sup>58</sup> *E.g.*, Elmer B. Adams, *The Causes and Results of Our War with Spain from a Legal Standpoint*, 8 YALE L.J. 119, 126-27, 132 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 299-300 (1898).

<sup>59</sup> *See* Adams, *supra* note 58, at 304-05, 308-11 (discussing this concept with regard to Philippine islanders).

<sup>60</sup> Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 395, 397-99 (1899); *see* Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 164 (1899); Charles C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 372-73 (1899).

A third view emerged from the clash of the first two: the United States has the power to acquire and rule new territories, but a new territory is not automatically part of the United States, unless that is the will of Congress. This view distinguished the new acquisitions from the previously annexed territories. Prior treaties of annexation established the incorporation of the new territories into the United States, to be eventually admitted as states, but the Treaty of Paris did not. As a result, the new possessions could not be considered part of the United States. They were unincorporated territories and could be ruled by Congress, limited only by those provisions of the Constitution which are “fundamental.”<sup>61</sup> It was possible to acquire new territories to exploit their resources, use their strategic location, and govern its inhabitants under the territory clause without making them part of the United States. Since they were not part of the nation, their inhabitants were not to participate in the national government and the Constitution did not necessarily apply to them, unless that was the will of Congress, which could govern them without all the limitations imposed by the Constitution.

The first view was racist. The second one was imperialistic. The third view was both.

The time came for Congress to act. In addition to ideological and constitutional concerns, it responded to powerful economic interests of the sugar, fruit and tobacco industries as well as the labor movement concerned with the competition they might begin to face if products and persons from the possessions were to be allowed free access to the United States market, especially the Philippines.<sup>62</sup> As a result, the first organic act, proposed by Sen. Joseph Foraker and adopted in 1900<sup>63</sup> to establish a “temporary government” for Puerto Rico, responded to the ideological and protectionist concerns by establishing a special tariff on all merchandise to and from Puerto Rico.

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<sup>61</sup> Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 169-170, 172 (1899); John Kimberly Beach, *Constitutional Expansion*, 8 YALE L.J. 225, 228 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471 (1899).

<sup>62</sup> Fuster, *supra* note 56, at 275-88.

<sup>63</sup> Foraker Act, Pub. L. 56-191, 31 Stat. 77 (1900).

[A]ll merchandise coming into the United States from Porto Rico and coming into Porto Rico from the United States shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles or merchandise imported from foreign countries . . . <sup>64</sup>

The duties to be collected would not enter the U.S. Treasury, but were to go into a separate fund to finance the newly created territorial government. The provision was short-lived. The Act provided that when the local legislature certified that it had set up a system of taxation, the President could by proclamation decree that all merchandise could be free of duty. On July 25, 1901, on the third anniversary of the invasion of Puerto Rico, President William McKinley proclaimed the fully free trade between the United States and Puerto Rico.<sup>65</sup>

The real purpose of the special tariff was to establish a legislative precedent for the differential treatment given to one of the new territories, as a protectionist mechanism to be later used for imports from the Philippines. Congress wanted to make it clear that the tax uniformity imposed by article 1, Section 8, clause 1 of the Constitution would not apply to any of the new territories, thus claiming more constitutional leeway than in relation to the states or the previous territories, where the uniformity clause applied as a limitation on the taxing power of Congress. Senator Foraker made it clear during consideration of the bill that the purpose of the tariff was to elicit a Supreme Court recognition of wider congressional power over the new possessions.<sup>66</sup>

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<sup>64</sup> *Id.* §§ 3, 31 Stat. 78. Ever since the Treaty of Paris, all official references in English employed the form "Porto Rico" instead of the correct Spanish form "Puerto Rico." In 1932, Congress provided that "[a]ll laws, regulations and public documents and records of the United States in which such an island is designated or referred to under the name "Porto Rico" shall be held to refer to such island under and by the name of "Puerto Rico." Joint Resolution No. 20, ch. 190, 47 Stat. 158 (1932).

<sup>65</sup> Proclamation No. 8, 32 Stat. 1983 (1901).

<sup>66</sup> Senator Foraker's support of the bill in the Senate included the following: I want to say to Senators that this legislation not only meets the requirements of a very necessitous situation as to revenue, but raises a most important question

Only one year after the Foraker Act, the Supreme Court decided that the special tariff was constitutional. First, in *De Lima v. Bidwell*<sup>67</sup> the Court decided that since Puerto Rico was no longer a foreign country, but a territory of the United States, the tariff imposed on merchandise entering from foreign countries was no longer applicable as it had been before the Treaty of Paris.<sup>68</sup> Then, in *Downes v. Bidwell*,<sup>69</sup> decided on the same day, a sharply divided Court validated the special tariff imposed by the Foraker Act to merchandise imported from Puerto Rico. There was no majority opinion in this case. Justice Brown announced the judgment of the Court:

We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . the Foraker act is constitutional, so far as it imposes duties upon imports from such island . . .<sup>70</sup>

No one else joined Justice Brown's opinion. Justice Gray concurred with his own opinion.<sup>71</sup> Justice White's famous concurrence with the judgment of the Court was the first judicial articulation of the theory of territorial incorporation that had already been advanced in academic circles.<sup>72</sup> Under the treaty making power and the territorial powers delegated by the Constitution, Congress may distinguish between incorporated territories—those that are part of the United States and destined to be eventually admitted as new states—and unincorporated territories, those possessions acquired by the United States which are neither part of the nation nor destined

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which never will be settled until the Supreme Court settles it . . . in respect to the power of Congress to legislate for these territorial acquisitions . . . In my own mind, the fact that this bill raises that question is more important than any revenue that it provides for . . . [B]eyond Puerto Rico come the Philippines. Soon we shall be called upon to legislate with respect to those islands. I do not know what the future has in store.

33 CONG. REC. 2476, March 2, 1900, *cited in* Fuster, *supra* note 56, at 287-88.

<sup>67</sup> *De Lima v. Bidwell*, 182 U.S. 1 (1900).

<sup>68</sup> *Id.* at 200.

<sup>69</sup> *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

<sup>70</sup> *Id.* at 287.

<sup>71</sup> *Id.* at 345.

<sup>72</sup> *Id.* at 287.

by Congress to be admitted as states. A significant difference between the two types of territory lies in the applicability of the Constitution. While the Constitution applies fully in the incorporated territories, only fundamental provisions of the Constitution may limit the plenary power of Congress to discretionally govern the unincorporated territories. As a newly acquired territory by treaty, Puerto Rico was appurtenant to the United States and under its sovereign power as an unincorporated territory that was not part of the United States.

Three years later, a majority of the court adopted Justice White's theory of incorporation in *Dorr v. United States*,<sup>73</sup> holding that the right to jury trial did not extend to the Philippines, another unincorporated territory. A year later, in *Rasmussen v. United States*,<sup>74</sup> the Court reiterated the doctrine, holding that the right to trial by jury did extend to Alaska because the Treaty with Russia and subsequent legislation incorporated the territory, making the Constitution fully applicable.

Was it possible that subsequent congressional legislation might have incorporated Puerto Rico into the United States when the second organic act was passed in 1917?<sup>75</sup> Known as the Jones Act, it extended United States citizenship to the population of Puerto Rico, despite the opposition expressed by the House of Delegates, the only representative organ of the territorial government.<sup>76</sup> In *Balzac v. People of Porto Rico*,<sup>77</sup> in a unanimous decision written by the former Governor of the Philippines, former President, and then Chief Justice William Howard Taft, the Supreme Court held that the right to trial by jury does not apply to Puerto Rico. By then "the opinion

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<sup>73</sup> *Dorr v. United States*, 195 U.S. 138 (1904) (reaffirming the doctrine in the context of the Philippines in *Dowdell v. United States*, 221 U.S. 325 (1910) and in *Ocampo v. United States*, 234 U.S. 91 (1913)).

<sup>74</sup> *Rasmussen v. United States*, 197 U.S. 516, 518 (1905).

<sup>75</sup> Organic Act of Puerto Rico (Jones Act), 39 Stat. 951 (1917).

<sup>76</sup> Memorial al Presidente y al Congreso de los Estados Unidos (Memorandum to the President and the congress of the United States, approved by the House of Delegates on March 12, 1914) ("[W]e firmly and loyally maintain our opposition to be declared, against our express will or consent, citizens of any other country that is not our own beloved land . . .") (Author's translation from the original Spanish text.) in *EL DESARROLLO CONSTITUCIONAL DE PUERTO RICO: DOCUMENTOS Y CASOS*, at 72 (Carmen Ramos de Santiago, editor, 2d ed. 1979).

<sup>77</sup> *Balzac v. People of Porto Rico*, 258 U.S. 298, 305 (1922).

of Mr. Justice White of the majority in *Downes v. Bidwell* had become settled law.”<sup>78</sup> The court went even further. Justice White had suggested that territorial incorporation did not have to be express and could be implied from congressional action, such as “by bestowing the privileges of citizenship and the rights and immunities which pertained to the Northwest Territory.”<sup>79</sup> In *Balzac* Chief Justice Taft discarded the suggestion of implicit incorporation. “Incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.”<sup>80</sup> Thus, *Balzac* discarded that the grant of citizenship and the inclusion of a bill or rights in the Jones Act of 1917 were sufficient indicators of a congressional intention to incorporate Puerto Rico into the United States.

The doctrine of territorial incorporation marked the demise of the original territorial policy of the United States articulated in the scheme for the Northwest Territory and all subsequent acquisitions over the course of the nineteenth century. It also marked the triumph of the imperialist vision of territorial expansion. The new territorial policy of colonial expansion contradicts the foundational principle of government by consent of the governed espoused in the Declaration of Independence and the Constitution.<sup>81</sup> The will of the peoples of the territories had to be sacrificed to serve the strategic and economic interests of the nation, even if it meant elevating to constitutional stature a doctrine of congressional power untrammelled by constitutional limitations, except those emanating from undefined fundamental provisions. Justice Fuller criticized the doctrine in his *Downes v. Bidwell* opinion:

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitute for the present system of republican government, a system of domination over

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<sup>78</sup> *Id.*

<sup>79</sup> *Downes v. Bidwell*, 182 U.S. 244, 333 (1901).

<sup>80</sup> *Balzac*, 258 U.S. at 306.

<sup>81</sup> BARRETT, *supra* note 13.

distant provinces in the exercise of unrestricted power.<sup>82</sup>

By “virtue” of the doctrine, Congress has the power to apply its laws—or not to apply them—to Puerto Rico and the other territories, even though they do not have effective participation in the legislative process. For instance, since 1900, Congress has included Puerto Rico in its coastwise laws, which require that maritime commerce between two points of the United States must be in ships owned and operated by United States citizens.<sup>83</sup> As a result, imports into Puerto Rico—needless to say, surrounded by water—are considerably more expensive than if those laws did not apply.<sup>84</sup>

On the other hand, Congress has excluded Puerto Rico from the application of the supplemental security income legislation,<sup>85</sup> which provides assistance to the poor, blind, and handicapped. The Supreme Court validated the exclusion over forty years ago in *Califano v. Gautier Torres*,<sup>86</sup> and more recently in *United States v. Vaello Madero*.<sup>87</sup> The Court reasoned that the Constitution empowers Congress to legislate for the territories, and differential treatment does not violate the equal protection of the laws if there is a rational basis for the discrimination. Since federal income tax legislation does not apply equally, and Puerto Rico contributes less to the federal treasury, Congress may rationally exclude the poor from this program.

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<sup>82</sup> *Downes v. Bidwell*, 182 U.S. 244, 373 (1901).

<sup>83</sup> 46 U.S.C. § 55102 (2006). According to 46 U.S.C. § 55101, the cabotage laws apply to the insular territories and possessions of the United States, except American Samoa, the Northern Marianas, and the Virgin Islands. 48 U.S.C. 744 specifically makes those laws applicable to Puerto Rico.

<sup>84</sup> See Anne O. Krueger, Ranjit Teja & Andrew Wolfe, *Puerto Rico—A Way Forward*, Value Walk 1, 18 (June 29, 2015), <http://www.gdb-pur.com/documents/PuertoRicoAWayForward.pdf>

Exempting Puerto Rico from the U.S. Jones act could significantly reduce transport costs and open up new sectors for future growth. In no mainland state does the Jones Act have so profound an effect on the cost structure as in Puerto Rico. Furthermore, there are precedents for exempting islands, notably the U.S. Virgin Islands. *Id.*

<sup>85</sup> 42 U.S.C. § 1382c(e) states: “For purposes of this subchapter, the term “United States,” when used in a geographical sense, means the 50 States and the District of Columbia.” Puerto Rico is thus not included.

<sup>86</sup> See *Califano v. Gautier Torres*, 435 U.S. 1, 2 (1978).

<sup>87</sup> *United States v. Vaello Madero*, 142 S. Ct. 1539, 1541 (2022).

Another example is the 1984 congressional exclusion of Puerto Rico from the provision of the Bankruptcy Code which allows a state to authorize judicial proceedings for restructuring public debt of its municipalities.<sup>88</sup> That exclusion prompted the adoption of local legislation to provide analogous judicial remedy in the courts of Puerto Rico, to handle the unmanageable and unpayable public debt incurred by the government and its municipalities over decades. The Commonwealth government based its legislation on the premise that the exclusion opened the way for local bankruptcy legislation. However, that legislation was invalidated by the Supreme Court in *Puerto Rico v. Franklin California Tax-Free Trust*.<sup>89</sup>

By excluding Puerto Rico “for the purpose of defining who may be a debtor under chapter 9” . . . the [Bankruptcy] Code prevents Puerto Rico from authorizing its municipalities to seek Chapter 9 relief . . . But Puerto Rico remains a “State” for other purposes . . . including that chapter’s pre-emption provision . . . [which] bars Puerto Rico from enacting its own municipal bankruptcy scheme . . .<sup>90</sup>

### III. PUERTO RICO: STILL THE OLDEST COLONY IN THE WORLD

#### *A. The Mirage of Constitutional Democracy*

How can the same territorial law and policy of the early 1900’s be the basis of recent Congressional enactments and judicial decisions in the twenty-first century? Wasn’t there a significant change in the relation between the United States and Puerto Rico in mid-twentieth century?

In 1950, Congress exercised its plenary powers under the territory clause of the Constitution to authorize the adoption of a constitution for the self-government of Puerto Rico.<sup>91</sup> The new government would be called “Commonwealth of Puerto Rico” in English,

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<sup>88</sup> 11 U.S.C. § 101(52) (2012).

<sup>89</sup> See *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115 (2016).

<sup>90</sup> *Id.* at 118.

<sup>91</sup> Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, Pub. L. No. 81-600, 64 Stat. 319 (1950), 48 U.S.C. §731.



and *Estado Libre Asociado de Puerto Rico* in Spanish, which translates literally as “Free Associated State.”<sup>92</sup> According to the terms of Public Law 600, it was approved “in the nature of a compact.”<sup>93</sup> If the people approved the terms of the law by referendum, then they would be empowered to call a constitutional convention. After approval by the convention and ratification by the people, the new organic text would require the approval of the President and Congress before going into effect. When submitted to Congress for approval, several provisions were rejected, others were amended, and Congress imposed certain conditions<sup>94</sup> that the convention accepted by

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<sup>92</sup> Resolution 22 of the Constitutional Convention of Puerto Rico (4 February 1952), DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 191-92 (Marcos Ramírez Lavandero ed., 3d ed. 1988). José Trias Monge, one of the delegates to the convention, later Secretary of Justice and subsequently Chief Justice of the Puerto Rico Supreme Court, would characterize the “official translation” of “Estado Libre Asociado” as “Commonwealth” as a rigmarole (“*galimatias*”). TRIAS MONGE, *supra* note 10. According to the dictionary of the *Real Academia Española* the term means “obscure language as a result of the impropriety of the phrase or the confusion of ideas. DICCIONARIO DE LA LENGUA ESPAÑOLA 1109 (Real Academia Española 22a ed. 2001).

<sup>93</sup> Section 1 of Public Law 81-600 states: “*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that fully recognizing the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.*” Sections 4 and 5 also provided that provisions of the Jones Act of 1917 (the second organic act) would be amended “[a]t such time as the constitution of Puerto Rico becomes effective.” The amendments referred to those provisions of the Jones Act that structured the government of the territory and provided a bill of rights. Both aspects would be governed by the new constitution. All other provisions of the 1917 organic act, related to the relation between Puerto Rico and the U.S., would remain in force under the new name of “Puerto Rican Federal Relations Act.” 48 U.S.C. § 731.

<sup>94</sup> Joint Resolution approving the constitution of the Commonwealth of Puerto Rico which was adopted by the people of Puerto Rico on March 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952), (approving the Constitution of Puerto Rico, subject to acceptance of several important changes to the proposed text. Congress required the elimination of provisions which guaranteed several economic and social rights, and introduced a provision which required that any future amendment to the constitution would have to be in accordance with the Constitution of the United States, the Puerto Rican Federal Relations Act, the law which approved the constitution, and Public Law 600, which had authorized drafting the constitution.).

resolution a week later.<sup>95</sup> The new instrument came into force on July 25, 1952, the anniversary of the invasion of Puerto Rico by the United States armed forces in 1898.<sup>96</sup> Four months later, in a referendum held on the same day as the general elections, the changes imposed by Congress were formally “ratified.”<sup>97</sup>

The following year, a resolution of the United Nations General Assembly formally relieved the United States from the obligation to submit reports on steps being taken for the decolonization of Puerto Rico in accordance with the United Nations Charter.<sup>98</sup>

For decades, the governments of Puerto Rico and the United States maintained that the constitutional relationship had changed and that Puerto Rico was no longer a territory of the United States since a bilateral compact had emerged from the creation of the “Commonwealth.”<sup>99</sup>

The theory of the compact was a house of cards that collapsed. It has proven to be a hoax based on intentional ambiguities and falsehoods. The legislative history of Public Law 600 is quite clear. The purpose behind the legislation was to grant a certain degree of self-government for purely local affairs within the existing relationship,<sup>100</sup> with the acquiescence of the people to the existing territorial

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<sup>95</sup> Resolution 34 of the Constitutional Convention (10 July 1952), *Documents*, *supra* note 93, at 222-223.

<sup>96</sup> SCARANO, *supra* note 7 at 555, 733.

<sup>97</sup> I RAÚL SERRANO GEYLS, *DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO* 494 (Colegio de Abogados de P.R. 1986).

<sup>98</sup> G.A. Res. 748 (VIII), at 25-6 (Nov. 27, 1953) (adopted by a plurality of 26 votes in favor, 16 against and 19 abstentions); SERRANO GEYLS, *supra* note 97 at 563-64; I TRÍAS MONGE, *supra* note 10, at 55.

<sup>99</sup> See *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953); *Mora v. Mejías*, 206 F.2d 267 (1st Cir. 1953); *Cosentino v. I.L.A.*, 115 F. Supp. 420 (D.P.R. 1954); *R.C.A. Communications v. Gobierno de la Capital*, 91 D.P.R. 416 (1964); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Some scholars advanced the idea that the constitutional relation had changed. See: Thomas Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 Const. Comment. 15, 19, n. 16 (1995), citing from *United States v. Quiñones*, 758 F.2d 40, 42 (1st Cir. 1985) wrote that in 1952 Puerto Rico ceased to be a territory and that Congress was no longer able to alter the Constitution of Puerto Rico, and that the Puerto Rican government was no longer an agency of the federal government which exercised authority delegated by Congress.

<sup>100</sup> The White House Director of the Executive Office informed Senator Joseph C. O'Mahoney, chair of the Senate Committee of the Interior, that the President was in agreement with the bill to allow the people of Puerto Rico to draft a

relationship.<sup>101</sup> The nature of the relationship and the sovereignty of the United States over Puerto Rico were to remain intact.<sup>102</sup> As a result, the *Estado Libre Asociado* is not a state, nor is it free, nor is it associated.

Historical evidence reveals that the phrase “in the nature of a compact” was artfully drafted to argue before Congress that it was not really a bilateral pact between the United States and Puerto Rico, while in Puerto Rico the proponents of the new arrangement would be able to tell the people that a bilateral pact had indeed been achieved. Former delegate to the convention, later Secretary of Justice and Chief Justice of the Puerto Rico Supreme Court José Trías Monge so admitted in his memoirs.<sup>103</sup> The phrase was intentionally ambiguous. “In the nature of a compact” would only have the form of a compact, without the substance.

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constitution within the existing relationship between Puerto Rico and the federal government. Hearings on the Puerto Rico Constitution, at 167 (Government Printing Office, Washington, 1950).

<sup>101</sup> House Report No. 2275, 81<sup>st</sup> Congress, 2d session.

<sup>102</sup> Senate Report No. 1769, 81<sup>st</sup> Congress, second session. In his testimony before Congress, Luis Muñoz Marín, governor of Puerto Rico, indicated that “if the people of Puerto Rico should go crazy, Congress can always get around and legislate again.” Resident Commissioner Antonio Fernós Isern added: “The authority of the United States government, of Congress, to legislate in case of need, would always be there.” He later reiterated that the bill under consideration “would not change the status of the island of Puerto Rico in relation to the United States . . . It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.” On the floor of the House of Representatives, Fernós Isern said that “the present exercise of authority of the United States over all matters of a federal nature would continue undisturbed.” A report presented by Oscar Chapman, Secretary of the Interior, indicated that “the bill under consideration would not change the political, social and economic relationship with the United States.” According to another report, “the State Department believes that it is of the utmost importance that the people of Puerto Rico be authorized to frame their own constitution . . . in order that formal consent of Puerto Ricans be given to their present relationship to the United States.” The Senate committee report that recommended the approval of the measure, indicated that the project was “designed to complete the full measure of local self-government in the island, by enabling the two and a quarter million American citizens there to express their will to create their own territorial government. . . The measure would not change Puerto Rico’s fundamental political, social and economic relationship to the United States.” SERRANO GEYLS, *supra* note 97, at 488.

<sup>103</sup> JOSÉ TRÍAS MONGE, *CÓMO FUE - MEMORIAS* 144 (Ed. Univ. P.R. 2005).

Regarding the U.N. General Assembly resolution of 1953, which removed Puerto Rico from the list of non-self-governing territories and exempted the United States from submitting annual reports, the historical record reveals that it was based on misinformation provided by the U.S. delegation. The United Nations had been informed that the people had decided between three options—full integration as a state of the union, full independence, and association—and that the people had opted for association through a compact that would require bilateral consent to introduce changes in the relationship. There never was a referendum in which the people actually voted for different alternatives; the only referendum held only allowed an affirmative vote on the sole option of creating the so called *estado libre asociado*. A negative vote implied the continuation of the colonial regime under the organic acts approved by Congress in 1900 and 1917. The real options were to continue in the territorial relationship under federal law, or to continue under the territorial relationship with a “constitution” consented to by the people, but approved by Congress.

During the final decade of the twentieth century the stance of the U.S. government with regard to the status of Puerto Rico began to shift. The Cold War was over, and Puerto Rico was no longer an important piece in the geopolitical scenario, nor did it have the strategic and military usefulness of the past. In economic terms, balancing the federal budget was more important than the incentive to U.S. investments in Puerto Rico through Section 936 of the Internal Revenue Code, which granted federal tax exemption to corporations that repatriated earnings to their matrix corporations in the U.S. The section was phased out for ten years, ending in 2006. Obsolete military installations throughout Puerto Rico had already begun to close when towards the turn of the century massive protests against military exercises in the island municipality of Vieques prompted not only terminating the exercises, but closing the Roosevelt Roads Naval Station, until then the most important U.S. Navy base in the Caribbean.<sup>104</sup>

Three reports issued by the Task Force on Puerto Rico’s Status, designated by President Bill Clinton, President George W. Bush and

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<sup>104</sup> *Navy Closes last Base in Puerto Rico*, PEOPLE’S WORLD (Apr. 9, 2004, 3:09 AM), <https://peoplesworld.org/article/navy-closes-last-base-in-puerto-rico/>.

President Barack Obama have announced the latest executive policy of different administrations with regards to Puerto Rico.<sup>105</sup> The second report states that the representations made to the United Nations in 1953 had no legal significance.<sup>106</sup> The three reports of the President's Task Force are unequivocal: since Puerto Rico remains an unincorporated territory of the United States, subject to the plenary powers of Congress under the territorial clause. Congress can repeal any law authorizing the self-government of the territory, and the United States may even cede the territory of Puerto Rico to another nation, regardless of the wishes or will of the people of Puerto Rico.<sup>107</sup>

These conclusions coincide with those of a 2010 Congressional Research Service report which analyzed the options that Congress has for future relations with Puerto Rico. "Puerto Rico is subject to congressional jurisdiction under the territorial clause of the United States Constitution."<sup>108</sup> They are also in harmony with the decisions of the U.S. Supreme Court, which had ruled that Puerto Rico is constitutionally still a territory, subject to the territorial powers of Congress. The first jurisprudential indications in this direction had begun in 1966, in *Americana of Puerto Rico v. Kaplus*.<sup>109</sup> In 1976 the Supreme Court decided, in *Examining Board v. Flores de Otero*, that the 1950–52 process had not altered the jurisdiction of the federal court that operates in Puerto Rico.<sup>110</sup> Three years later, the Court fully relied on the territorial theory of the Insular Cases to decide in *Torres v. Puerto Rico*<sup>111</sup> that Congress can make applicable to

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<sup>105</sup> See generally REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 7 (2005); REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 5-6 (2007); REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 17-18 (2011).

<sup>106</sup> See REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS (2007), *supra* note 105, at 5-6.

<sup>107</sup> See REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS (2005), *supra* note 105, at 6 ("The Federal Government may relinquish United States sovereignty by granting independence or ceding the territory to another nation; or it may, as the Constitution provides, admit a territory as a state, thus making the Territory Clause inapplicable").

<sup>108</sup> KEITH BEA & R. SAM GARRETT, CONG. RSCH. SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS (2011).

<sup>109</sup> See *Americana of Puerto Rico v. Kaplus*, 368 F.2d 431, 436 (3d Cir. 1966).

<sup>110</sup> *Examining Board v. Flores de Otero*, 426 U.S. 572, 585 (1976).

<sup>111</sup> See generally *Torres v. Puerto Rico*, 442 U.S. 465, 470 (1979).

territories constitutional provisions that are not automatically controlling, because it is necessary to preserve the ability of Congress to govern such possessions. According to the Court, Congress had determined that it would be beneficial for Puerto Rico to apply the constitutional protection against unreasonable searches and seizures, not as constitutional imperative but as congressional benevolence. A year later, in *Harris v. Rosario*,<sup>112</sup> the Court explicitly stated that Congress can legislate on Puerto Rico under the territorial clause of the Constitution. More recently, in 2008, the Court reiterated the legal doctrines of the Insular Cases. In the much-discussed case of *Boumediene v. Bush*,<sup>113</sup> the Court once again relied on the doctrine of the *Insular Cases* to determine whether Guantánamo detainees had access to habeas corpus relief against their unduly prolonged detention without being prosecuted in accordance with due process of law. The Supreme Court reiterated that the U.S. government has the constitutional power to acquire, govern and dispose of territories, subject only to limits imposed by fundamental constitutional clauses, which were also applicable in places not part of the United States but which are under their control, such as Guantánamo Bay in Cuba.

The three branches of the federal government have agreed that they can constitutionally govern Puerto Rico as an unincorporated territory. When Congress approved a constitution proposed by the people, the existing relationship was not altered, but was purportedly validated by consent to the territorial regime. The theory initially advanced has been abandoned. One of the early judicial decisions by the Court of Appeals for the First Circuit, proclaimed that Puerto Rico must have ceased to be a territory of the United States when the Commonwealth of Puerto Rico was created. The court rejected the argument that the Puerto Rico Constitution was just another organic act approved by Congress. “We find no reason to impute to the Congress the perpetration of such a monumental hoax.”<sup>114</sup> History has shown that this is exactly what happened. As the three branches of the United States government demonstrate, Puerto Rico continues to be a territory, that is, a colony of the United States.

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<sup>112</sup> *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980).

<sup>113</sup> *See generally* *Boumediene v. Bush*, 553 U.S. 723, 736 (2008).

<sup>114</sup> *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

As recently as December 2015, in a case pending before the United States Supreme Court,<sup>115</sup> the Solicitor General argued that Puerto Rico is an unincorporated territory which lacks sovereignty. The same position was argued orally before the Court in January 2016.<sup>116</sup> The government of Puerto Rico had accused a person previously prosecuted in federal court for the same offense. The defendant alleged that the Constitution forbids that a person be put twice in jeopardy for the same offense. The government argued that according to established doctrine of U.S. courts and the Puerto Rico Supreme Court, the protection is only available for a second prosecution by the same government. However, the Supreme Court of Puerto Rico decided that double jeopardy had occurred.<sup>117</sup> After the U.S. Supreme Court granted certiorari, the U.S. Department of Justice argued in favor of confirming the decision of the Supreme Court of Puerto Rico because the government of the Commonwealth and the federal government operate under the same sovereignty; when a state prosecutes a person previously processed by the federal government, there is no double jeopardy because its sovereign powers are separate from those of the federal government. But Puerto Rico lacks sovereignty. Its government exercises authority only by delegation of the federal government.<sup>118</sup> In oral argument, the U.S. Attorney argued that the powers of Congress over Puerto Rico are so plenary that it may review the arrangement under Law 600 that authorized the drafting of the constitution in 1950, and even eliminate powers of the government of Puerto Rico under that constitution.<sup>119</sup>

A clear majority of the Supreme Court accepted the argument of the U.S. Department of Justice and the Supreme Court of Puerto Rico regarding the inapplicability of the doctrine of separate sovereignty whereby the state and the federal governments may prosecute a person for the same offense without violating the constitutional protection.<sup>120</sup> The states and the Indian tribes can prosecute

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<sup>115</sup> See *Commonwealth of Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 68 (2016).

<sup>116</sup> Transcript of Oral Argument at 49-51, *Commonwealth of Puerto Rico v. Sánchez Valle*, 579 U.S. 59 (2016) (No. 15-108).

<sup>117</sup> *Pueblo v. Sánchez Valle*, 192 D.P.R. 594 (2015).

<sup>118</sup> Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae*.

<sup>119</sup> Transcript of Oral Argument, *supra* note 117.

<sup>120</sup> *Sánchez Valle*, 579 U.S. at 63.

separately, but Puerto Rico cannot.<sup>121</sup> Puerto Rico is an unincorporated territory of the United States, and all authority exercised by the government of Puerto Rico, including the power to prosecute, derives from congressional authority.<sup>122</sup> The ultimate source of power is not the people but the United States Congress.<sup>123</sup>

### *B. The Economic Failure of the Colonial Hoax*

In the not too distant past, the relationship between Puerto Rico and the United States was characterized as the best of two worlds.<sup>124</sup> Puerto Rico could maintain its cultural identity while benefiting from a close economic relationship with the United States. Now it turns out to be the worst of all worlds. “[T]he . . . relationship is one of domination and undue political and economic influence.”<sup>125</sup> After a couple of decades of significant economic growth in the 1950s and 1960s, now about half of the population is below the poverty line depending on government aid.<sup>126</sup> Per capita gross domestic product has oscillated between thirty and forty percent of that of the United States<sup>127</sup> for decades, and about half the rate of the poorest state.<sup>128</sup>

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<sup>121</sup> *Id.* at 69-70.

<sup>122</sup> *Id.* at 75-76.

<sup>123</sup> *Id.*

<sup>124</sup> See generally Ediberto Román, *Empire Forgotten: The United States colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1141-42 (1997).

<sup>125</sup> *Id.* at 1210.

<sup>126</sup> According to the U.S. Census, 44% of the population was under the poverty level in 2020. UNITED STATES CENSUS BUREAU, <https://www.census.gov/quick-facts/PR> (last visited Jan. 30, 2023). For the U.S. as a whole, 11% of the population was under the poverty level and for Mississippi, the poorest state, it was 18%. Emily A. Shrider et al., *Income and Poverty in the United States: 2020*, UNITED STATES CENSUS BUREAU (Sept. 14, 2021), <https://www.census.gov/library/publications/2021/demo/p60-273.html>.

<sup>127</sup> In 2022, GDP per capita in the United States was \$76118. *GDP by State | U.S. Bureau of Economic Analysis (BEA)*. Bureau of Economic Analysis. Retrieved 10 April 2022. Per capita GDP of Puerto Rico was \$31,429. World Bank - GDP Per Capita. American Samoa / Guam / Northern Mariana Islands / Puerto Rico / Virgin Islands (U.S.) Retrieved July 3, 2022. Official data retrieved from: <https://www.puertoricoreport.com/new-census-data-on-puerto-rico/#.YuGUb-HbMJpk>.

<sup>128</sup> Mississippi is still at the bottom among the states. See U.S. Dep’t of Commerce, *Mississippi*, Bureau of Econ. Analysis, <http://bea.gov/regional/bear-facts/pdf.cfm?fips=28000&areatype=STATE&geotype=3> (accessed on May 21, 2017). Official data for 2015 shows a per capita GNP of \$34,771, almost 1.8 that



Before the 2017 hurricanes, the 2020 earthquake and the COVID-19 pandemic, official unemployment hovered around 11–14%.<sup>129</sup> During the last decade and a half, Puerto Rico has had a negative economic growth rate, the lowest in the hemisphere, and one of the lowest in the world.<sup>130</sup> Taxes have increased substantially.<sup>131</sup> Migration has caused a dramatic decline in the country's population, which has declined by 11.8% between 2010 and 2020.<sup>132</sup> The

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of Puerto Rico. See official data in <https://www.puertoricoreport.com/new-census-data-on-puerto-rico/#.YuGUbHbMJpk>.

<sup>129</sup> According to the Puerto Rico Planning Board Economic Reports to the Governor, the unemployment rate fluctuated between 13 percent and 14 percent. Commonwealth of Puerto Rico Office of the Governor Planning Board, *Statistical Appendix of the Economic Report to the Governor and to the Legislative Assembly*, Gov't Dev. Bank for Puerto Rico (2015), <http://www.gdb-pur.com/economy/documents/AppendiceEstadistico2015.pdf>. Official data for Puerto Rico retrieved from <https://jp.pr.gov/apendice-estadistico-del-informe-economico-a-la-gobernador/>, links on that page: *Apéndice Estadístico 2015*, *Apéndice Estadístico 2016*, and *Apéndice Estadístico 2017*. Even worse than that is the extremely low labor-force participation of about 40 percent, considered among the lowest in the world. *Countries with Lowest Labor Force Participation Rate-Bottom 5 world.*, IECONOMICS (2016), <http://ieconomics.com/lowest-5-labor-force-participation-rate>. (Retrieved on May 21, 2017).

<sup>130</sup> Since 2006, the economy has registered negative growth of its real GNP. Commonwealth of Puerto Rico Office of the Governor Planning Board, *supra* note 129 at A-6. It shrank almost 14 per cent between 2006 and 2016. *Id.* A very long economic depression has resulted in an extremely reduced productive capacity. *Id.*

<sup>131</sup> See official data on taxes collection in <https://jp.pr.gov/apendice-estadistico-del-informe-economico-a-la-gobernador/>, link on that page: *Apéndice Estadístico 2021*. The government has tried to reduce the budget deficit through taxes. A tax of 5% of all imports was substituted by a 7% sales tax on almost all products and services, and then increased it to 11.5%. The tax on gasoline increased from 4 to 8 cents per liter. However, despite these measures, the Department of the Treasury foresaw more budget deficits. See Robert Slavin, *Puerto Rico Senate Passes Balanced Budget*, THE BOND BUYER (June 25, 2015), <http://www.bondbuyer.com/news/regionalnews/puerto-rico-senate-passes-balanced-budget-1077399-1.html>.

<sup>132</sup> According to the U.S. Census Bureau, Puerto Rico had a population of 3,725,789 in 2010. U.S. CENSUS BUREAU, [https://www2.census.gov/geo/maps/dc10\\_thematic/2010\\_Profile/2010\\_Profile\\_Map\\_Puerto\\_Rico.pdf](https://www2.census.gov/geo/maps/dc10_thematic/2010_Profile/2010_Profile_Map_Puerto_Rico.pdf) (last visited Jan. 30, 2023). In 2020 the population decreased to 3,285,874. America Counts Staff, *Puerto Rico Population Declined 11.8% From 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html>. In a

government is bankrupt, and the credit rating agencies have classified Puerto Rico's public debt under the category of non-investment or speculative ("junk") bonds. There is no longer access to credit markets for the issuance of new debt.<sup>133</sup> Needless to say, the social problems associated with the economic crisis have multiplied in the areas of education, health, crime, drug addiction, social services, and government corruption.<sup>134</sup> The situation worsened as a result of recent natural disasters and the pandemic. The territory is on the brink of a humanitarian debacle.

The fiscal crisis resulting from an unmanageable public debt prompted various legislative proposals in Congress. The idea of reverting the 1984 exclusion of Puerto Rico from the Bankruptcy Code provision allowing access to judicial restructuring of the debt did not prosper.<sup>135</sup> As a result, the Puerto Rico Legislative Assembly

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recent report, the US Census Bureau admitted that Puerto Rico's total population was overestimated in the 2020 Census by 174,000 people. Therefore, total inhabitants are currently just over 3,100,000. *The Census Bureau Publishes the Results of the Survey of the Post-Enumeration Phase of Puerto Rico of the 2020 Census*, UNITED STATES CENSUS BUREAU (Aug. 16, 2022), <https://www.census.gov/newsroom/press-releases/2022/2020-post-enumeration-survey-results-puerto-rico/2020-post-enumeration-survey-results-puerto-rico-spanish.html>.

<sup>133</sup> See D. ANDREW AUSTIN, CONG. RSCH. SERV., R44095, PUERTO RICO'S CURRENT FISCAL CHALLENGE, (2016). At least since 1975 the Commonwealth government was aware of the gravity of the existing public debt. Guillermo Rodríguez Benítez, Letter to the Hon. Rafael Hernández Colón, Governor of Puerto Rico, June 16, 1975 (on file with the author). The letter stressed the seriousness of the public debt. His recommendation was: "I recommend that (1) no favorable consideration be given to the creation of new public corporations with a view to finance them with the emission of new debt in the United States. (2) that no projects be initiated, regardless of their merits, if they would require increasing the rhythm of our sales in the U.S. bond market, and (3) that the programs which have been already approved for agencies which emit bonds ought to be kept unchanged until the rhythm of our economic growth has been able to bring out our debt indicators to more reasonable levels . . . It is evident . . . that any policy not aimed to control the fragile position in which we are will place the financing of the programs of the Commonwealth in serious danger. In fact, it might already be too late." Since then, subsequent governments increased the public debt astronomically.

<sup>134</sup> Vann R. Newkirk II, *Will Puerto Rico's Debt Crisis Spark a Humanitarian Disaster?*, THE ATL. (June 25, 2015), <https://www.theatlantic.com/politics/archive/2016/05/puerto-rico-treasury-visit/482562/>.

<sup>135</sup> Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015-16).

passed a law to fill the gap.<sup>136</sup> Some creditors questioned the validity of the law in federal court arguing that the exclusion of Puerto Rico in 1984 pre-empted any Puerto Rican legislation; the congressional intent had been that Puerto Rico should not have access to any court. Both the U.S. District Court for the District of Puerto Rico and the Court of Appeals for the First Circuit agreed with the creditors.<sup>137</sup>

Four days after *Puerto Rico v. Sánchez Valle*, the Supreme Court decided *Puerto Rico v. Franklin California Tax-Free Trust*<sup>138</sup> affirming the lower court decisions which had invalidated the local bankruptcy statute. The Court interpreted the exclusionary legislation of 1984 as congressional pre-emption of any Puerto Rican legislation. As a result, contrary to what the states may do to restructure public debt in federal courts under the federal Bankruptcy Code,<sup>139</sup> Puerto Rico is excluded from this possibility, and from the alternative of its own territorial legislation.<sup>140</sup> As a result, the Supreme Court effectively denied the territory any access to economic strategies and financial instruments available to both states and sovereign nations.

After months of discussions, lobbying, and political negotiations, Congress finally passed legislation to address the Puerto Rican government's financial crisis. On June 30, 2016, the president signed Public Law 114-187, artfully entitled Puerto Rico Oversight, Management, and Economic Stabilization Act or 'PROMESA.'<sup>141</sup>

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<sup>136</sup> See Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71.

<sup>137</sup> See *Franklin Cal. Tax-Free Trust v. Commonwealth of Puerto Rico*, 85 F. Supp. 3d 577, 596 (D.P.R. 2015); *Commonwealth of Puerto Rico v. Franklin Cal. Tax-Free Trust*, 805 F.3d 322, 325 (1st Cir. 2015).

<sup>138</sup> *Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 118 (2016).

<sup>139</sup> 11 U.S.C. § 903(1).

<sup>140</sup> See *Franklin Cal. Tax-Free Trust*, 579 U.S. at 130 (“[The Bankruptcy Code] precludes Puerto Rico from authorizing its municipalities to seek relief under Chapter 9. But it does not remove Puerto Rico from the scope of Chapter 9’s pre-emption provision. Federal law, therefore, pre-empts the Recovery Act.”).

<sup>141</sup> Puerto Rico Oversight, Management, and Economic Stabilization Act or PROMESA, Pub. L. 114-187, Sec. 1(a), 130 Stat 550, 48 U.S.C. § 2101. The acronym PROMESA means “promise” in Spanish. It is frequently pronounced by anglophones as “promesa”, which makes no sense, perhaps unaware of its meaning or pronunciation in Spanish, or of the questionable intended pun.

It explicitly invokes the territory clause as the “Constitutional Basis” for the enactment.<sup>142</sup>

The law created a seven-member board appointed by the president.<sup>143</sup> Six of them were to be nominated by Congressional leadership. The president would appoint a member on his own initiative.<sup>144</sup> The governor of Puerto Rico, or whomever he designates, is an eighth *ex officio* member, without the right to vote.<sup>145</sup> The board is created as an instrumentality of the government of the territory, despite the fact that it was not the Legislative Assembly of the Commonwealth which created it under the territorial “constitution.”<sup>146</sup> The Puerto Rican government must finance all its expenses,<sup>147</sup> but the board does not answer to the government of the Commonwealth; quite the contrary, each dependency of the territorial government must comply with the fiscal plans approved by the board.<sup>148</sup> It has the power to examine, review, and modify any law or decision of the territorial government that it finds contrary to its fiscal plan.<sup>149</sup> The board has final authority to approve the budget of the territorial government.<sup>150</sup> It must approve the issuance of any new debt, or any modification to existing debt.<sup>151</sup> It can review and modify the terms and benefits of retired public employee retirement funds.<sup>152</sup> Its members are immune from claims to make them liable for their actions.<sup>153</sup> The law provides the stay of procedures aimed at collecting

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<sup>142</sup> PROMESA, § 101, 48 U.S.C. §2121(b)(2) (“Constitutional Basis. The Congress enacts this Act pursuant to article IV, section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.”).

<sup>143</sup> *Id.* § 2121(e)(1)(A).

<sup>144</sup> *Id.* §§ 2121(e)(2)(A)(i)-(vi).

<sup>145</sup> *Id.* § 2121(e)(3).

<sup>146</sup> *Id.* § 101(c). “An Oversight Board established under this section (1) shall be created as an entity within the territorial government for which it is established in accordance with this title; and (2) shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government.”

<sup>147</sup> *Id.* §§ 2101(c)(1)-(2), 2127(b).

<sup>148</sup> *Id.* §§ 2121(d)(1)(D)-(E).

<sup>149</sup> 48 U.S.C. §§ 2144(a)(5)-(6).

<sup>150</sup> *Id.* § 2142(a).

<sup>151</sup> *Id.* § 2147.

<sup>152</sup> *Id.* § 2145(a)(4).

<sup>153</sup> *Id.* § 2125.

public debt in the courts.<sup>154</sup> The board can negotiate with creditors to achieve voluntary debt restructuring, and if negotiations are unsuccessful, it may initiate proceedings in federal court under rules similar to those of the Federal Bankruptcy Code.<sup>155</sup>

Another characteristic of the board created by PROMESA is that the president appoints its members without the advice and consent of the Senate. The Supreme Court decided in *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*,<sup>156</sup> that the appointments clause which requires the advice and consent of the Senate for major federal appointments does not apply. The Board is an instrumentality of the territorial government, created under the plenary power of Congress to legislate for the territory, including the creation of structures within the territorial government. As a result, the members of the board are not federal officers subject to the appointments clause.

In sum, Congress has created a board to supervise and control any governmental operation in the territory of Puerto Rico by seven persons appointed by the President and Congress of the United States, without the participation of the people of Puerto Rico in its appointment and operation.<sup>157</sup> PROMESA is the culmination of colonial government. Under the guise of providing a legal mechanism to address the bankruptcy of the territory—caused by the colonial nature of the relation—its real purpose is to ensure the interests of creditors at the expense of the interests of the people of Puerto Rico.<sup>158</sup> Finally, PROMESA contains a mealy-mouthed “recognition” of Puerto Rico’s right to determine its future political status.<sup>159</sup> But in effect it denies the exercise of the people’s right to self-

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<sup>154</sup> *Id.* §§ 2194(b)-(d).

<sup>155</sup> 48 U.S.C. § 2124.

<sup>156</sup> *Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, \_\_ U.S. \_\_, 140 S. Ct. 1649 (2020).

<sup>157</sup> 48 U.S.C. § 2121 (2016).

<sup>158</sup> *Puerto Rico Political Leaders Weigh in on PROMESA*, CARIBBEAN BUS. (Mar. 26, 2016), <http://caribbeanbusiness.com/sen-rosa-rejects-draft-republican-plan-for-puerto-rico-fiscal-crisis/>.

<sup>159</sup> 48 U.S.C. § 2192 (“[n]othing in this [chapter] shall be interpreted to restrict Puerto Rico’s right to determine its future political status, including by conducting the plebiscite as authorized by Public Law 113–76.”)

determination, which by virtue of the law is subject to the designs of a board that does not respond to the people.<sup>160</sup>

Puerto Rico is the oldest colony in the world. From 1493 to 1898 it was a colony of Spain. Since 1898 it has continued to be a colony, under the seemingly less opprobrious term of “unincorporated territory” of the United States. A century and a quarter later, it remains unable to rule its destiny, subject to the exercise of plenary powers by a Congress in which the people have only a nominal participation without any effective power. This constitutes a deviation from foundational values of the American republic articulated in the Declaration of Independence, and reiterated, albeit partially, in the Constitution. The mid-twentieth century exercise in pseudo-constitutional governance, when the people were told that they could adopt their own constitution, turned out to be a hoax, an illusion, a vanishing mirage that concealed the arid sands of a colonial desert.

Yet, the people of Puerto Rico still maintain their national identity and the hope that someday they may change the regime of subordination and economic dependence. The feeling of frustration, the sense of impotence, the resignation to inevitable dependence and submission, and the fear resulting from decades of persecution of those who have in the past raised their anti-colonial voices against the regime,<sup>161</sup> are characteristics of colonized peoples. Even so, in the plebiscite held in 2012, the majority of the electorate voted against the continuation of the territorial regime.<sup>162</sup> In 2020, on the same day of the general election, voters had the opportunity to vote for or against the sole option of statehood. The result was 52 percent in favor of statehood and 48 percent against.<sup>163</sup> However, in the gubernatorial race, close to 28 percent of the voters favored candidates for governor who had explicitly voiced their preference for the independence option, 31 percent favored the candidate who favored

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<sup>160</sup> Newkirk, *supra* note 134.

<sup>161</sup> See *Noriega Rodríguez v. Hernández Colón*, 122 P.R. Dec. 650, (1988), (Negrón García, J., concurring) (For an important judicial condemnation of systematic persecution of independence advocates by government authorities).

<sup>162</sup> See sources cited *supra* note 5.

<sup>163</sup> See official chart of results of the statehood plebiscite: [https://elecciones2020.ceepur.org/Escrutinio\\_General\\_93/index.html#es/default/PLEBISCITO\\_Resumen.xml](https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#es/default/PLEBISCITO_Resumen.xml) (last visited April 12, 2023)

the territorial status quo, and only 32 percent voted for the candidate who favors admission of Puerto Rico as a state.<sup>164</sup>

Since at least 2012, the people have repudiated the territorial relationship, which lost any claim to legitimacy through consent of the people. In any case, the claim of legitimacy through collective consent in exchange for a degree of self-government for municipal affairs back in 1950 to 1952 amounts to claiming that a slave owner can validly perpetuate a regime of involuntary servitude if the slave has consented. Colonialism, like slavery, violates inalienable rights that cannot be abrogated, violated or renounced. No individual can consent to slavery; no people can consent to colonialism. International law has outlawed it through the development of the right to self-determination during the second half of the 20th century.

#### IV. THE RIGHT TO SELF-DETERMINATION

##### *A. Sources of the Right in International Law*

The conceptual origins of self-determination can be traced back to historical documents such as the U.S. Declaration of Independence<sup>165</sup> and various enactments of the *Assemblée Nationale* during the French Revolution.<sup>166</sup> The term “self-determination” is a product of the second decade of the 20th century. In 1916 Lenin

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<sup>164</sup> See official chart of results for each political party candidate for governor: [https://elecciones2020.ceepur.org/Escrutinio\\_General\\_93/index.html#es/default/GOBERNADOR\\_Resumen.xml](https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#es/default/GOBERNADOR_Resumen.xml) (last visited April 12, 2023).

<sup>165</sup> See ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 11 (Cambridge Univ. Press 1995); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 11 (Martinus Nijhoff Publishers 2000).

<sup>166</sup> In 1792, *l'Assemblée Nationale* declared its desire to support all peoples willing to fight for the cause of freedom in other countries. CASTELLINO, *supra* note 165. A year later, the National Convention considered the draft of a constitution, in which the Republic would renounce annexing any foreign territory if it did not have the consent of its population. “La République française renonce solennellement à réunir à son territoire des contrées étrangères, sinon d’après le vœu librement émis . . . .” Unfortunately, the principle was not to be consistently applied in practice, especially after the Republic evolved into the Empire. *Id.*

articulated the principle for the first time,<sup>167</sup> and in 1919 Woodrow Wilson identified self-determination as the logical corollary of popular sovereignty, synonymous with government based on the consent of the governed.<sup>168</sup>

The concept would evolve after the Second World War, with a new universal emphasis on decolonization. The United Nations Charter proclaimed the respect for the principle of self-determination and the promotion of human rights as one of the main purposes of the organization.<sup>169</sup> Article 55 of the United Nations Charter reiterates the principle of equal rights and self-determination of peoples.<sup>170</sup> Article 56 states that “[a]ll Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”<sup>171</sup> For the first time, the principle of self-determination was elevated to a multilateral treaty, conceived as an important basis for the new world community.<sup>172</sup>

The work of the U. N. Commission on Human Rights produced the historic approval of the Universal Declaration of Human Rights in 1948.<sup>173</sup> But that was only the beginning. In 1966 the General Assembly approved the International Covenant on Economic, Social and Cultural Human Rights<sup>174</sup> and the International Covenant on Civil and Political Human Rights.<sup>175</sup> Both instruments contain a common Article 1 that recognizes the right of all peoples to self-

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<sup>167</sup> CASSESE, *supra* note 165, at 15 (citing VLADIMIR ILLICH LENIN, *THESES ON THE SOCIALIST REVOLUTION AND THE RIGHT OF NATIONS TO SELF-DETERMINATION* (1916)).

<sup>168</sup> See CASTELLINO, *supra* note 165, at 18.

<sup>169</sup> U.N. Charter art. 1, ¶ 2 (“The purposes of the United Nations are: . . . (2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace . . .”).

<sup>170</sup> U.N. Charter art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . .”).

<sup>171</sup> U.N. Charter art. 56.

<sup>172</sup> CASSESE, *supra* note 165, at 41-3.

<sup>173</sup> G.A. Res. 217A (III), (Dec. 10, 1948).

<sup>174</sup> See International Covenant on Economic, Social and Cultural Human Rights, G.A. Res. 2200A (XXI), Dec. 16, 1966).

<sup>175</sup> See International Covenant on Civil and Political Human Rights, G.A. Res. 2200B (XXI), Dec. 16, 1966.



determination, as an indispensable prerequisite for the enjoyment of all other human rights:<sup>176</sup>

#### Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>177</sup>

The third paragraph of the article is especially important. Every colonial power that becomes a party to the covenant has the obligation to promote, through affirmative action, the realization of self-determination and to ultimately cede its powers to the colonized people.<sup>178</sup>

In addition to the treaty provisions that recognize the right, self-determination has evolved through customary international law

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<sup>176</sup> CASTELLINO, *supra* note 165, at 31-2.

<sup>177</sup> International Covenant on Economic, Social and Cultural Human Rights, *supra* note 174, art. 1, and International Covenant on Civil and Political Human Rights, *supra* note 175, art. 1.

<sup>178</sup> CASTELLINO, *supra* note 165, at 33; *Report of the Human Rights Committee to the General Assembly*, U.N. Doc 1/39/40, 1984, at 143, ¶ 6, *cited in* CASSESE, *supra* note 165, at 62-63.

expressed in various resolutions of the U.N. General Assembly.<sup>179</sup> Resolution 1514 (XV), of December 14, 1960,<sup>180</sup> recognizes that all peoples have the right to self-determination and that colonial powers have the obligation to take the necessary measures in territories that have not achieved self-government, to move them towards their independence.

Resolution 1541 (XV),<sup>181</sup> adopted the next day, defines what constitutes complete self-government. The decision must be made by the people by a vote in a free and fair election, in which they can decide between: (a) constituting itself as a sovereign state; (b) associate freely with an independent state; or (c) join an independent state already in existence.

Finally, Resolution 2625 (XXV)<sup>182</sup>—“Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”—approved by the General Assembly in 1970, reiterates the

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<sup>179</sup> Article 38 (1) of the Statute of the International Court of Justice is the most authoritative expression of the sources of international law. MALCOLM N. SHAW, *INTERNATIONAL LAW* 55 (4th ed., Cambridge Univ. Press 4th ed. 1997) and authorities cited there. The article provides that the sources are: (a) international conventions; (b) international custom as evidence of general practices accepted as law; (c) the general principles of law recognized by civilized nations; and (d) judicial decisions and the teachings of the most qualified authors of the various nations, as subsidiary means for determining rules of law. The resolutions of the United Nations General Assembly do not expressly appear in Article 38 (1). However, they are recognized as increasingly important to the extent that they show that a concept has ceased to be a political or moral principle to become a norm of international law. To the extent that repeated resolutions evidence a consensus of the overwhelming majority of nations, the concept becomes a norm of customary law, as a general practice that nations consider binding. The International Court of Justice has stated this repeatedly since 1986. *Id.* P. 91; I.C.J. Reports, 1986, pp. 14, 102; I.C.J. Reports, 1996, para. 70.

<sup>180</sup> G.A. Res. 1514 (XV), (Dec. 14, 1960). (“*Recognizing* the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence . . . *Declares* that: 1. The subjugation of peoples to alien subjugation and exploitation constitutes a denial of fundamental human rights, is contrary to the charter of the United Nations and is an impediment to the promotion of world peace and co-operation. 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development . . .”).

<sup>181</sup> G.A. Res. 1541 (XV), (Dec. 15, 1960).

<sup>182</sup> G.A. Res. 2625 (XXV), at 9 (Oct. 24, 1970).

principles of previous resolutions, including the right to self-determination. The states have the obligation to consult the population of the intervened people “[t]o bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.”

The international consensus on the importance of the right to self-determination is of such magnitude that the principle is considered among the norms of *jus cogens*, that is, as a peremptory norm of international law that no state can repeal for any reason, including the consent of the colonial people.<sup>183</sup> The International Court of Justice has reiterated the peremptory nature of self-determination in its pronouncements regarding Namibia in 1971, Western Sahara in 1975, East Timor in 1995 and Mauritius’ Chagos Archipelago in 2019.<sup>184</sup> There is no longer any doubt that all peoples subject to a colonial regime have the right to self-determination, to freely determine their political status and their economic, social and cultural development, as an independent sovereign state, or as a freely associated state, or through integration into another pre-existing state, in the way that the people freely decide.<sup>185</sup>

### *B. Constitutional Colonialism v. the Right to Self-Determination*

Traditional international law validated the acquisition of territory by military conquest and by transfer of a conquered territory by treaty between two states. Under the nineteenth-century vision, the European conquest of vast extensions of foreign lands in Asia, Africa and the Americas was justified. Following the prevailing

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<sup>183</sup> CASTELLINO, *supra* note 165, at 35; CASSESE, *supra* note 165, at 169-74.

<sup>184</sup> See Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Op., (Feb. 25, 2019) <https://www.icj-cij.org/en/case/169>; see also East Timor (Port. v. Austl.), 1995 I.C.J. Rep. 90, 102 (June 30, 1995) <https://www.icj-cij.org/en/case/84>; see also Western Sahara, 1975 I.C.J. Rep. 12, 31-3 (Oct. 16, 1975) <https://www.icj-cij.org/en/case/61>; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resol. 276 (1970), 1971 I.C.J. Rep. 16, 31-2 (June 21, 1971) <https://www.icj-cij.org/en/case/53>.

<sup>185</sup> CASSESE, *supra* note 165, at 72-73; ALLEN BUCHANAN, JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (Oxford Univ. Press 2004); JAUME FERRER LLORET, LA APLICACIÓN DEL PRINCIPIO DE AUTODETERMINACIÓN DE LOS PUEBLOS: SAHARA OCCIDENTAL Y TIMOR ORIENTAL 19 (Publicaciones Univ. Alicante 2002).

imperialistic vision, the Supreme Court of the United States validated the acquisition of territories and subsequent exercise of plenary powers to govern them.<sup>186</sup> That theoretical basis evolved in the early twentieth century into the colonial constitutionalism of the United States which allows Congress to indefinitely govern “unincorporated territories” not destined to be part of the United States.

The right of self-determination has not resulted in an explicit invalidation of these bases, but it has created the legal obligation of countries that still exercise sovereignty over colonial territories, to promote a process of self-determination with the ultimate objective of renouncing the title they may have held.<sup>187</sup> As a result of this development during the twentieth century, there is no justification in the twenty-first century for the constitutional doctrine forged in the Insular Cases more than one hundred years ago. A doctrine which contemplates that the United States may govern the people of a territory in perpetuity contradicts the founding values of the republic and violates the right to self-determination of peoples recognized by international law.

For over a hundred years, the United States Supreme Court has recognized that customary international law is part of federal law, and both federal and state courts are bound to apply its norms.<sup>188</sup> This principle also applies to the law of treaties, since the supremacy clause of the Constitution considers it part of the “supreme law of the land.”<sup>189</sup> Under the presidency of Jimmy Carter, the United

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<sup>186</sup> See generally *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. U.S.*, 136 U.S. 1 (1890).

<sup>187</sup> CASSESE, *supra* note 165, at 186-187.

<sup>188</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”). See generally *U.S. v. Belmont*, 301 U.S. 324 (1937).

<sup>189</sup> U.S. CONST. art. VI, cl. 2. (“This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which

States signed both International Covenants on Human Rights. On June 8, 1992, the Covenant on Civil and Political Human Rights entered into force in the United States after the Senate approved it, subject to certain declarations and reservations.<sup>190</sup>

Did the reception of the international norm of self-determination affect the constitutional law relative to the territories, and more specifically, Puerto Rico. The early twentieth century constitutional doctrine emanating from the Insular Cases empowers Congress to rule an unincorporated territory regardless of the will of the people of the territory. But article 1 of the International Covenant on Civil and Political Rights creates a legal obligation to respect and promote affirmatively the self-determination of the people of the territory, as a means to end colonial rule.<sup>191</sup>

Unfortunately, the courts of the United States are reluctant to apply international law. On one hand, the case law has recognized that norms of international law may be ignored by the government of the United States when they conflict with a statute or executive act.<sup>192</sup> On the other hand, as a general rule, the treaties signed and ratified by the United States are not “self-executing” without enabling legislation to make them effective.<sup>193</sup> The application of this rule is especially significant when the adoption of a treaty is accompanied by an explicit “declaration” of its non-self-executing character. That was the case with of the International Covenant on Civil and Political Rights.

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shall be made, under the Authority of the United States, shall be the supreme law of the land . . .”).

<sup>190</sup> See 138 CONG. REC. S4781-01 (daily ed. April 2, 1992).

<sup>191</sup> International Covenant on Economic, Social and Cultural Human Rights, art. 1, ¶ 3 (“The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”)

<sup>192</sup> See SHAW, *supra* note 179, at 115; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 (AM. L. INST. 1987).

<sup>193</sup> See *Foster v. Neilson*, 27 U.S. 253, 314 (1829); see also *Medellin v. Texas*, 552 U.S. 491, 518-19 (2008) (holding the judgment of the International Court of Justice was not enforceable in the United States because there is no congressional legislation to make it enforceable in the courts of the United States or the states).

The doctrine has been harshly criticized inside and outside the United States.<sup>194</sup> The rule was adopted in the nineteenth century, when international law was “the law of nations,” leaving relations between individuals and the states to domestic law. That conception of international law has shifted dramatically after World War II with the development of the international law of human rights, which pierced national borders to regulate relations between states and their nationals through the consensual international law of treaties.<sup>195</sup> The extension of the rule of non-self-executing treaties in the field of human rights is a violation of the general principle of *pacta sunt servanda*,<sup>196</sup> and the terms of the Vienna Convention on the Law of Treaties which codified customary norms of international law.<sup>197</sup>

The people of Puerto Rico face an unenviable legal conundrum. The three branches of the United States government agree that Congress continues to exercise sovereignty and plenary powers over Puerto Rico under the territory clause of the Federal Constitution. This, in itself, raises serious contradictions with the founding values of the United States related to the proposition that the only legitimate government is that in which the governed can actively participate. The problem is exacerbated by the development of the right to

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<sup>194</sup> For a recent critique of the rule regarding non-self-executing treaties by the United States, see generally Sarah Robles Rivera, *Time for the United States to Start Complying with Human Rights Treaties: On the Self-Executing Treaty Doctrine as to Human Rights Violations*, 54 REV. JUR. U.I.P.R. 111 (2019-20). See e.g., Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007); Myres McDougal, *Remarks at the Annual Meeting of the American Society of International Law (April 27, 1951)* in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 45 (1951); Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricken*, 89 AM. J. INT'L L. 341, 346 (1995); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 375 (Carolina Academic Press 2d. ed. 2003); David Sloss, *Schizophrenic Treaty Law*, TEXAS INTL. L. J. 43 (2007); UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, No. 24, U.N. Doc. CCPR/C/21/Rev. 1/Add. 6, at 4, 7-8 (1994).

<sup>195</sup> Robles Rivera, *supra* note 194 at 123.

<sup>196</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 321.

<sup>197</sup> See Vienna Convention on the Laws of Treaties, art. 27, May 23, 1969, 1155 U.N.T.S. 331.

self-determination during the second half of the 20th century. That right should theoretically have been incorporated into federal law, not only as a customary norm of international law—even of *jus cogens*—but because the United States signed and ratified the International Covenant on Civil and Political Rights.<sup>198</sup> Thus the right to self-determination became part of the supreme law of the land. Consequently, an obligation to take affirmative action has arisen to ensure the exercise of the right by the colonized people. However, in view of the fact that the situation in Puerto Rico is statutorily regulated and that the International Covenant is considered not self-executing, the people of Puerto Rico have a right that can hardly be enforced through legal actions in the courts of the United States or in the courts of Puerto Rico.

During the last three decades, several bills have been submitted to the United States Congress in attempts to facilitate a process of self-determination of the Puerto Rican people. Unfortunately, despite its power to “dispose of the territory” in accordance with the territory clause of the Constitution, Congress has failed to act, and continues to exercise its plenary powers over Puerto Rico in violation of its international obligations. It has repeatedly invoked the power to rule Puerto Rico under a constitutional doctrine forged in the early twentieth century. Over a hundred years later, that doctrine is in open conflict with the obligations that, at least thirty years ago, the United States assumed under international law to respect and promote the self-determination of the people of Puerto Rico.

## V. A LOOK AT ALTERNATIVE FUTURES

### A. *Substantive Options*

The time has come to resolve the contradiction. The present economic crisis is the combined result of territoriality and irresponsible governments. For almost fifty years, the territorial economy has been artificially kept afloat through federal transfers and unprecedented public debt. After 125 years under the sovereignty of the United States, the colony is bankrupt, threatening the interests of the bondholders and the stability of the bond market. The current

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<sup>198</sup> International Covenant on Civil and Political Human Rights, *supra* note 175; see 138 CONG. REC. S4781-01 (daily ed. April 2, 1992).

economic crisis not only affects Puerto Rico; it is also a shameful stain on the prestige of the United States. Colonialism not only denigrates the colonized; it also debases the colonizer.<sup>199</sup>

The people of Puerto Rico will have to decide on a non-colonial alternative to make a reality its repudiation of the territorial condition, which loses popular support every day. In order to comply with its foundational commitment to self-determination and its international treaty obligation to respect and promote the right of the people to self-determination, Congress should only consider non-territorial and non-colonial options to secure the interests of the United States.<sup>200</sup> Needless to say, the forces of immobility, both in Washington and San Juan, will probably insist on mere reforms to the territorial regime. But the territorial nature of the relationship lies at the root of the problems of political subordination, economic dependence and social decay encountered by the people of Puerto Rico. The solutions are not to be found in mere reforms premised on the continuation of the colonial model. Other forces accustomed to colonial submission or those privileged by imperial power will surely stand in the way of the people's self-determination. They will try to use or design processes that serve shortsighted partisan interests without really solving the colonial problem.

Three options are considered as alternatives to colonial rule in the territories: admission to statehood on an equal footing with the other states; independence as a separate sovereign nation; and free association with the United States which would retain specific powers agreed upon by the people of Puerto Rico and the government of the United States.<sup>201</sup>

The Constitution empowers Congress to admit new states:

New states may be admitted by the Congress into the Union, but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States without the Consent of the

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<sup>199</sup> Rubén Berríos Martínez, *Puerto Rico's Decolonization* 76 FOREIGN AFFAIRS 100, 112 (1997).

<sup>200</sup> See G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

<sup>201</sup> *Id.*



Legislature of the States concerned as well as of the Congress.<sup>202</sup>

As with all powers of Congress, the power to admit is plenary. Congress may exercise it, or it may not. “The constitutional provision concerning the admission of new states is not a mandate, but a power to be exercised with discretion.”<sup>203</sup> No territory has a “right to statehood.” Throughout the thirty-seven processes of admission of new States, from Vermont in 1791 to Hawaii in 1959, Congress has imposed a wide range of conditions and made many specific concessions to new states.<sup>204</sup> In addition to the textual limitations—no state within another, nor by the junction of two states—the main limitation to the power of Congress is that all states must be admitted “on an equal footing” with the original states. The concept appeared for the first time in the Northwest Ordinance,<sup>205</sup> and was recognized as a constitutional limitation by the Supreme Court in *Coyle v. Smith*.<sup>206</sup> Congress may impose conditions and make concessions to a new state, but only of an economic nature, and never altering the uniform political sovereignty of the states.<sup>207</sup>

Since the admission of a new state is a political question subject to congressional discretion, Congress has elaborated the political criteria which a territory must satisfy before its admission:

- (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government;
- (2) That a majority of the electorate wishes statehood;

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<sup>202</sup> U.S. CONST., art. IV, § 3, cl. 1.

<sup>203</sup> *Coyle v. Smith*, 221 U.S. 559, 568 (1911); see C. HERMAN PRITCHET, *THE AMERICAN CONSTITUTION* 55 (McGraw-Hill, 3d ed. 1977) (“Congress grants or withholds statehood for any reason it chooses.”).

<sup>204</sup> For a detailed enumeration of conditions and concessions, see Raúl Serrano Geyls & Carlos I. Gorrín Peralta, *Puerto Rico y la estadidad: Problemas constitucionales (I)*, 40 REV. COL. ABO. P.R. 521 (1979).

<sup>205</sup> See NORTHWEST ORDINANCE, § 14, art. 5 (1787).

<sup>206</sup> See *Coyle*, 221 U.S. at 566 (stating that according with the admission act Congress may not limit the power of a new state to determine which city shall be its capital because the original states, and all others admitted afterwards, had the sovereign power to do so.).

<sup>207</sup> See Raúl Raúl Serrano Geyls & Carlos I. Gorrín Peralta, *Puerto Rico y la estadidad: Problemas constitucionales (II)*, 41 REV. COL. ABO. P.R. 1, 2-12 (1980).

(3) That the proposed new State has sufficient population and resources to support the State government and at the same time carry its share of the cost of the Federal government.<sup>208</sup>

These criteria were developed and applied in the context of incorporated territories, annexed under the premise that they would be part of the United States forever, the Constitution would apply *ex proprio vigore* and they would be sooner or later admitted as states. Their inhabitants, for the most part, were to be citizens of the United States since annexation or soon thereafter. The territories had been colonized by American migrants from the states, who controlled their political, economic and social structures. The decision to admit them was just a matter of time.

The situation in Puerto Rico is different. It is a scenario never before encountered in the thirty-seven processes of admission of new states nor considered in these criteria. The admitted states had been populated by Americans who controlled the political, social, and economic life of the territory. Admission did not imply the integration of a people with clearly distinguishable cultural characteristics. When Congress admitted territories with significant populations that spoke other languages—French in the case of Louisiana (1812), Spanish in the cases of Oklahoma (1907), Arizona (1912) and New Mexico (1912)—the admission laws required that the new state use the English language in legislative and judicial processes, or in public education.<sup>209</sup>

The admission of Puerto Rico implies much more. It is a Latin American nation that would retain, even if admitted as a state, its right to self-determination, an inalienable right which cannot be renounced or extinguished.<sup>210</sup> Congress would have to consider if this principle would raise the specter of secession, which provoked the traumatic Civil War in the 19th century. Before considering the admission of Puerto Rico as a state, Congress should at least consider any number of conditions to be previously met beforehand, such as the generalized use of the English language by the government and the people in general, and the previous development of a vigorous

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<sup>208</sup> See H.R. REP. NO. 85-624, at 75 (1957).

<sup>209</sup> Serrano Geyls & Gorrín Peralta, *supra* note 204, at 524, 535.

<sup>210</sup> SHAW, *supra* note 179, at 216-17.

economy.<sup>211</sup> Congress must understand that nationalities cannot be suppressed and will always reappear when suppressed. There are several recent examples such as the former soviet republics, the former members of the Yugoslavian federation, Catalonia, Scotland and Québec. In the consideration of statehood for Puerto Rico, the Congressional Research service has recently suggested widening the traditional criteria.

Each territory's path to statehood (where applicable) has been unique, as has congressional consideration. History suggests that the following factors, among others, could inform future statehood debates for one or more U.S. territories:

- whether the status quo provides sufficient democratic representation and inclusion and, if not, which change, if any, would offer improvement;
- popular support for a status change within a territory and whether that support is sufficient for Congress;
- how a territory's status options were formulated and debated;
- whether altering political status is in the national interest and in a territory's interest, including issues of culture, defense, economics, language, and political institutions; and
- how or whether historical examples of status changes for previous territories warrant consideration.<sup>212</sup>

There is also the option of independence, the natural destiny of all peoples. Even though it was the preferred option during the first half of the 20<sup>th</sup> century, its support diminished as a result of repression and economic and psychological dependence. Sometimes certain critical events produce unexpected results. In the two years prior to the Declaration of Independence, men like George Washington and Thomas Jefferson expressed that independence was not desired

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<sup>211</sup> See generally Eric Biber, *The Price of admission: Causes, Effects and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 198 (2004).

<sup>212</sup> R. Sam Garrett, *Statehood Process and Pol. Status of U.S. Territories: Brief Policy Background*, CONGR. RSCH. SERV. (July 29, 2022), <https://crsreports.congress.gov>.

by any thinking man, and that they wanted to continue a permanent relationship with England.<sup>213</sup>

The Insular Cases were decided four decades after the Civil War.<sup>214</sup> Its doctrine of territorial non-incorporation dispelled fears that territoriality would necessarily imply permanent union with the United States, foreclosing the possibility of deannexation of new territories, if that would serve the interests of the nation. Contrary to the incorporated territories annexed as part of the nation in perpetuity, the doctrine facilitated the legal deannexation of territories.<sup>215</sup> In the case of Puerto Rico, Congress would not be exercising for the first time its constitutional powers to deannex an unincorporated territory in order to recognize its independence. Such was the case of the Philippine Islands.<sup>216</sup>

An independent Puerto Rico would have the freedom to promote its economic development without the restrictions imposed by United States federalism.<sup>217</sup> It could establish productive relationships with other nations, including the United States, which would benefit far more from a free and prosperous Puerto Rico than from

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<sup>213</sup> See WASHINGTON IRVING, *THE LIFE OF GEORGE WASHINGTON*, vol. 1 (G.P. Putnam 1860); see e.g., CHARLES A. KROMKOWSKI, *RECREATING THE AMERICAN REPUBLIC: RULES OF APPORTIONMENT, CONSTITUTIONAL CHANGE, AND AMERICAN POLITICAL DEVELOPMENT, 1700-1870*, 122 (Cambridge Univ. Press 2002); JOHN SHARP WILLIAMS, *THOMAS JEFFERSON: HIS PERMANENT INFLUENCE ON AMERICAN INSTITUTIONS* 28 (Columbia Univ. Press 1913).

<sup>214</sup> See *supra* notes 68-83 and accompanying text (discussing the *Insular* cases).

<sup>215</sup> Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 *UNIV. CHI. L. REV.* 797, 804 (2005) (“[T]he *Insular Cases* creat[ed] a category of domestic territory not bound in permanent union to the rest of the United States. These decisions made clear that the United States retained the power to deannex territory, as long as it remained unincorporated—even after it had become subject to exclusive U.S. sovereignty, . . . and even . . . after its inhabitants had been made U.S. citizens.”)

<sup>216</sup> See Tydings-Mcduffie Act of 1934, Pub. L. No. 73-124; see also Treaty of General Relations Between the United States of America and the Republic of the Philippines, July 4, 1946, 7 *U.N.T.S.* 3.

<sup>217</sup> Antonio Weiss & Brad Setser, *America’s Forgotten Colony: Ending Puerto Rico’s Perpetual Crisis*, *FOREIGN AFFAIRS* 158, 166 (July/August 2019) (“Independence would offer full policy autonomy, including, if Puerto Rico so desired, an independent central bank, a floating currency, and the ability to craft its own labor, tax, and trade policies. These would, in theory, allow Puerto Rico to set economic policies based on its own needs, rather than those of the broader United States.”).

a bankrupt colony. The road to independence will require a careful but very viable transition to convert a failed economy of dependency to one of sustainable development.<sup>218</sup>

A third decolonizing alternative would be the creation of a new relationship of genuine free association between Puerto Rico and the United States.<sup>219</sup> This option, more than a mere change of name from “Commonwealth” to “Associated Free State,” would first require Congress to recognize the sovereignty of Puerto Rico and to “dispose of the territory” by renouncing the plenary powers that it has exercised for more than a century. A true compact of association with Puerto Rico would emerge from the constitutional powers to dispose of territory and to enter into international agreements. The model developed over thirty years ago for the several components of the Trust Territory of the Pacific following World War II could serve as a starting point for a treaty of free association for a specified period of time, subject to renegotiation and extension, and to unilateral termination at any time in the future.<sup>220</sup> There are important differences, beginning with the historical fact that those island communities were never territories of the United States in the constitutional sense, and that the option has been adopted in very small island communities<sup>221</sup> which are very different from Puerto Rico.

### *B. Procedural Avenues Towards Self-Determination*

After over ninety years of colonial rule, forty of them under the guise of “*estado libre asociado*” (free associated state in English), President George H. W. Bush stated that “[w]e stand today at what I think most people would agree is a pivot point in history, at the end

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<sup>218</sup> *Id.*; see Berrios Martínez, *supra* note 199 at 108-12.

<sup>219</sup> According to U.N. resolutions, especially Resolution 1541 (XV) of 1960, the options to achieve a “full measure of self-government” are full independence, “[f]ree association with an independent [s]tate,” or “[i]ntegration with an independent [s]tate” already in existence. Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter of the United Nations, G.A. Res. 1541 (XV). See G.A. Res. 1541 (XV), at 29 (Dec. 15, 1960).

<sup>220</sup> “The option of free association is recognized if it is “done freely and on the basis of absolute equality.” Manuel Rodríguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. REV. 457, 470-71 (1987).

<sup>221</sup> *Id.*

of one era and the beginning of another.”<sup>222</sup> He was referring, of course, to the world stage after the end of the Cold War. The territories of the United States are part of that world. Four years earlier, in his first State of the Union Address to Congress, he had proposed that legislation should be considered and passed for the self-determination of Puerto Rico. His invitation was consistent with his recommendation to the Senate regarding the approval of the International Covenant on Civil and Political Rights, which included the right of all peoples to self-determination, and which finally entered into force for the U.S. in 1992 after Senate approval.<sup>223</sup>

Over the course of the last three decades Congress has considered and failed to pass many proposals for the self-determination of Puerto Rico. The most recent measures were considered by the House of Representatives of the 117th Congress (2021–2022).

A proposed House of Representatives Resolution would have rejected the *Insular Cases* and their application to future controversies because their doctrine was pure judicial invention and “relics of the racial views of an earlier era that have no place in our Nation today.”<sup>224</sup> Unquestionably, the prevailing backdrop of racism had spurred academics at Harvard, Yale, and other institutions to articulate the doctrine which Congress adopted in the Foraker Act of 1900. Just five years after the infamous *Plessy v. Ferguson*<sup>225</sup> case the similarly racist justices of the Supreme Court “constitutionalized” the doctrine of territorial non incorporation in the *Insular Cases* over a hundred years ago. But the problem with territoriality at the present time is not the abhorrent racism of those who originally contrived the doctrine. The tragedy is that over a century later the government of the United States, including the Supreme Court, still holds on to the idea that they may submit millions of people to political

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<sup>222</sup> Lance Morrow & Tom Curry, *Man of the Year: The Torch is Passed*, TIME Magazine, Jan 4, 1993, at 20, 24.

<sup>223</sup> 138 CONG. REC. S4781-01 (1992).

<sup>224</sup> H.R. Res. 279 (March 26, 2021). The title itself “[acknowledges] that the United States Supreme Court’s decisions in the *Insular Cases* and the ‘territorial incorporation doctrine’ are contrary to the text and history of the United States Constitution, rest on racial views and stereotypes from the era of *Plessy v. Ferguson* that have long been rejected, are contrary to our Nation’s most basic constitutional and democratic principles, and should be rejected as having no place in United States constitutional law.”

<sup>225</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

subordination and economic dependence, without their consent or effective participation. This compromises basic values of modern constitutionalism and denies the peoples of the territories the right to self-determination which the United States is bound to respect under international law.

The proposed House Resolution would repudiate the territorial non-incorporation but is silent as to the consequences. It begs the question whether the territories would then become incorporated territories, under the original design articulated in the Northwest Ordinance. Would the Constitution be fully applicable *ex proprio vigore* (including the tax uniformity clause)? Would they be part of the United States, destined to become states, without a clear congressional determination to that effect, and even without consulting the peoples of the territories? Would it be a legitimate exercise of judicial power to steer the political status of the territory towards a solution that has not received a clear support of the people?

The resolution would close the door to what some scholars have proposed in terms of “repurposing” the doctrine of the Insular Cases.<sup>226</sup> Instead of viewing them as a permanent power of Congress to govern foreign peoples, it has been proposed that the plenary power of Congress (with few constitutional limitations) could be an appropriate instrument for preserving the diverse cultures of the territories, without affecting the relationship with the United States.<sup>227</sup> However, this revisionist proposal validates the perpetuation of a doctrine which submits millions of people to colonial rule, under the paternalistic guise of respect towards cultural differences.

Attuned to the proposed House resolution, the critics of “repurposing” suggest the judicial revocation of the Insular Cases. But the consequences of such “revocation” are rather nebulous.

So what would change? . . . No longer would perpetual colonialism have the endorsement of the federal courts . . . [O]verruling the Insular Cases would not concretely require Congress to do anything specific

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<sup>226</sup> See generally *Developments in the Law: The U.S. Territories*, 130 HARV. L. REV. 1616 (2017).

<sup>227</sup> See generally Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022).

at any particular time . . . The reason to overrule the *Insular Cases* is not, however, to resolve the political status of the territories, which the Court cannot do . . . [But it] would have the salutary twofold effect of reining in the purely teleological and poorly reasoned jurisprudence engendered by that proposition, while withdrawing once and for all the Court's implicit imprimatur from the outrageous notion that a U.S. territory can remain a territory forever—notwithstanding the flagrant political illegitimacy and shameless hypocrisy of a representative constitutional democracy that allows itself, in perpetuity, to govern a people without representation.<sup>228</sup>

It seems that the revocation would merely have a symbolic self-congratulatory value by lifting the dark cloud over the law of the territories, while not affecting the reality of colonial rule. The peoples of the territories are not concerned with the peace of mind of the courts, Congress and the government, but with their inability to determine their future. Revocation of the *Insular Cases* while maintaining the territorial relationship—and the plenary powers of Congress under the territory clause—does not respond to the aspirations of the people, and falls miserably short of complying with their international human right to self-determination.

In any case, the most recent decisions of the Supreme Court regarding the territories reiterate the doctrine, and the clear majority of the court gives no indication of moving away from it.<sup>229</sup> Only

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<sup>228</sup> *Id.* at 2539-40.

<sup>229</sup> See generally *Boumediene v. Bush*, 553 U.S. 723 (2008) (reasoning that the doctrine of non-incorporation is determinative of whether the constitutional clause relating to suspension of habeas corpus applies to the incarceration of “enemy combatants” in Guantanamo Bay); *Puerto Rico v. Sánchez Valle*, 579 U.S. 59 (2016) (setting precedent that U.S. territories, including Puerto Rico, are not sovereigns distinct from the United States for purposes of double jeopardy); *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, 140 S. Ct. 1649 (2020) (finding that when Congress creates local offices using its power to legislate for the territories, their officers are not federal but territorial officers, whose appointments are not subject to the constitutional requirement of advice and consent); *U.S. v. Vaello Madero*, 142 S.Ct. 1539 (2022) (concluding since the territory clause affords Congress wide latitude to legislate for the



Justice Neil Gorsuch, solely concerned with the racist backdrop of the *Insular Cases*—and not their colonial significance—has recently stated in a concurrence that they “have no foundation in the Constitution and rest instead on racial stereotypes. They deserve no place in our law.”<sup>230</sup>

Another measure considered by the 117th Congress—H.R. 1522—proposed the admission of Puerto Rico as a state<sup>231</sup> after a simple majority vote in a referendum in which the electorate would vote YES or NO to the sole option of statehood. In case of an affirmative simple majority, a presidential proclamation would then declare “the date Puerto Rico is admitted as a State of the Union on an equal footing with all other States, . . . not later than 12 months . . . Upon issuance of the proclamation by the President, Puerto Rico [would] be deemed admitted into the Union as a State.”<sup>232</sup> Besides excluding independence and free association from the ballot, thus denying other self-determination options, the proposal purports to be an “admission” act by presidential proclamation and not by a final act of Congress, as has always been the case. As a result, the measure was politically unviable and questionable on constitutional and international law grounds.

Another bill considered by the House of Representatives—H.R. 2070—proposed “[t]o recognize the right of the People of Puerto Rico to call a status convention through which the people would exercise their natural right to self-determination, and to establish a mechanism for congressional consideration of such decision, and for other purposes.”<sup>233</sup> To facilitate the exercise of self-determination, which is recognized as a legal obligation of the United States, the measure would initiate a process in which the people could organize a “Puerto Rico Status Convention” to “debate and draft definitions on self-determination options for Puerto Rico, which [would] be outside the Territorial Clause of the United States Constitution.”<sup>234</sup>

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territories, it may treat Puerto Rico differently from states, and exclusion from the SSI program passes the rational basis test under equal protection).

<sup>230</sup> *Vaello Madero*, 142 S.Ct. at 1552.

<sup>231</sup> H.R. 1522, 117th Cong. (2021).

<sup>232</sup> *Id.* § 7(c).

<sup>233</sup> H.R. 2070, 117th Cong. (2021) (proposing the enactment of the “Puerto Rico Self-Determination Act of 2021”).

<sup>234</sup> *Id.* § 3(c)(1).

It would also create a “Congressional Bilateral Negotiating Commission” which, among its duties and functions, would “develop recommendations regarding self-determination options on constitutional issues and policies related to—(i) culture; (ii) language; (iii) judicial and public education systems; (iv) taxes; and (v) United States citizenship.”<sup>235</sup> The Commission would meet periodically with members of the Status Convention to negotiate agreements on the several options available both to Puerto Rico and the United States. After an educational campaign on the detailed options developed jointly, there would be a referendum in which the people could vote for their preferred non-territorial options.<sup>236</sup> That alternative would then go back to Congress, for its consent by joint resolution.<sup>237</sup>

The measure proposed a comprehensive process of self-determination, as a result of which Puerto Rico would enter into a new relationship with the United States based not on subordination and dependence but instead on mutual respect and sustainable development. The details of the proposals were to be ironed out in the legislative process. This bill was based on real and concrete historical and legal premises.<sup>238</sup> Its adoption would have represented an unprecedented milestone as it would “dispose” of the territory divesting Congress of the power delegated by the territory clause of the Constitution, and would only consider decolonizing options, excluding the territorial relation.

Both measures—H.R. 1522<sup>239</sup> and H.R. 2070<sup>240</sup>—were considered by the House Committee on Natural Resources, which has jurisdiction over matters pertaining to the territories of the United

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<sup>235</sup> *Id.* §§ 4(a),(c)(2)(C).

<sup>236</sup> *Id.* §§ 5(a)-(b).

<sup>237</sup> *Id.* § 6.

<sup>238</sup> § 2 of the bill contained “findings” regarding the history of the relationship since the annexation in 1898, the organic acts passed by Congress, the Insular Cases decided by the Supreme Court, and the creation of the “commonwealth” in 1952. It also recognizes that “[t]he United States has a legal duty to comply with Article 1 of the International Covenant on Civil and Political Rights, which establishes that all peoples have the right to self-determination and ‘by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.” *Id.* § 2(8).

<sup>239</sup> H.R. 1522, 117th Cong. (2021).

<sup>240</sup> H.R. 2070, 117th Cong. (2021).

States. Negotiations among its original proponents resulted in the elaboration of a substitute bill—H.R. 8393—“An Act To enable the people of Puerto Rico to choose a permanent, nonterritorial, fully self-governing political status . . . and to provide for a transition to and the implementation of that permanent, nonterritorial, fully self-governing political status.”<sup>241</sup> The bill was expeditiously considered by the majority in the Committee on Natural Resources only days after its presentation on July 15, 2022, and after some amendments, the House considered and passed it on December 15, 2022, too late for any Senate consideration in the very last days of the 117<sup>th</sup> Congress, coinciding with the holiday season. Yet, this bill might be a good starting point for future congressional measures.

H.R. 8393 contained characteristics of previous bills, not only H.R. 1522 and H.R. 2070, but also, going as far back as 1989, when Congress considered the first proposals for self-determination of Puerto Rico.<sup>242</sup> The new negotiated bill called for a plebiscite in which the people of Puerto Rico could have voted for the three decolonizing options of independence, free association, and statehood in November 2023.<sup>243</sup> If none of the options achieved a majority vote, a runoff vote would have been held in March of 2024 among the two options which had obtained the most votes.<sup>244</sup> The bill also contained three separate “Titles” which detailed the self-executing process of “transition and implementation” for each of the options.

This was the first time that a chamber of Congress explicitly recognized the territorial nature of the relation and its legal obligation to facilitate self-determination to end the colonial regime. Among its legislative “findings” the measure stated the following:

In recognition of the inherent limitations of Puerto Rico’s territorial status, and the responsibility of the Federal Government to enable the people of the territory to freely express their wishes regarding political status and achieve full self-government, Congress seeks to enable the eligible voters of Puerto

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<sup>241</sup> H.R. 8393, 117th Cong. (2022).

<sup>242</sup> S. 712, 101st Cong. (1989); S. 244 102nd Cong. (1992).

<sup>243</sup> H.R. 8393, 117th Cong. § 5(a)(2) (2022).

<sup>244</sup> *Id.* § 5(a)(3)

Rico to choose a permanent, non-territorial, fully self-governing political status . . .<sup>245</sup>

If Independence were to prevail, Title I provided that the Puerto Rico legislature would call for a constitutional convention to draft a constitution,<sup>246</sup> to be ratified by the people.<sup>247</sup> Meanwhile a joint commission appointed by the President of the United States and the presiding officer of the Constitutional Convention, would be responsible for structuring the orderly transfer of all functions exercised by the federal government and all agreements necessary for the future relation among the two countries.<sup>248</sup>

Title II contained analogous provisions for the “Transition and Implementation” to the status of “sovereignty in free association with the United States,” including a constitutional convention,<sup>249</sup> and a “bilateral negotiating commission” designated by the convention and the President of the United States to facilitate the transition to the new relationship and negotiate the terms of the “Articles of Free Association.”<sup>250</sup>

Title III, on statehood, reproduces the terms of the statehood bill—H.R. 1522—with its shortcomings. Had the statehood option prevailed with a simple majority in the plebiscite, the measure provided that “the president shall issue a proclamation declaring the date that Puerto Rico is admitted as a State of the Union on an equal footing with all other States, which shall be a date not later than one year after the effective date of the plebiscite results.”<sup>251</sup> In other words, without considering the political criteria articulated in its previous processes of admission of new states, Congress would invalidly delegate its constitutional power to admit new states to the will of the electorate of the territory, and the final admission would not be the result of an act of Congress, which is required by the Constitution.

In addition to this constitutional anomaly, H.R. 8393 faced strong political opposition in Congress, especially from the

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<sup>245</sup> *Id.* § 3.

<sup>246</sup> *Id.* §§ 101-02.

<sup>247</sup> *Id.* § 103.

<sup>248</sup> *Id.* § 106.

<sup>249</sup> *Id.* § 201.

<sup>250</sup> H.R. 8393, 117th Cong. § 210 (2022).

<sup>251</sup> *Id.* § 301.

Republican camp.<sup>252</sup> Even legislators who in the past have supported the admission of Puerto Rico as a state have stated that at least at the present time, that is not possible. It has even been argued that admission of Puerto Rico as a state would require a constitutional amendment or a national referendum across the United States.<sup>253</sup> The bill passed the House essentially on party lines; the final vote was predominantly democratic, with very few republicans supporting it. The expedited consideration also seems to have been prompted by electoral motivations, in the face of midterm elections in November 2022. And, of course, the bill would not even be considered by the Senate, which did not have the political status of Puerto Rico on its agenda. The new republican majority in the new 118<sup>th</sup> House of Representatives and the change of leadership in the House Committee on Natural Resources condemn any similar measure to failure in the 118th Congress.<sup>254</sup>

Once again, Congressional inaction maintains the colonial regime and prolongs the violation of the right to self-determination of the people of Puerto Rico. Hopefully, the day will come when the United States will finally solve the contradiction existing for too long between colonial rule and fully democratic government. Even Justice White, the judicial artificer of the doctrine of territorial

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<sup>252</sup> With the exception of Puerto Rico's Resident Commissioner, no other Republican member of the Committee on Natural Resources voted in favor of H.R. 8393. See José A. Delgado, *Joe Manchin rejects bill that includes statehood*, EL NUEVO DÍA, 5 February 2023 ).

<sup>253</sup> See e.g., José A. Delgado Robles, *Democratic Senator Joe Manchin Thinks that Admitting Puerto Rico as a State Requires an Amendment to the U.S. Constitution*, EL NUEVO DÍA, 2 August 2021 (“As far as I’m concerned, any statehood proposal should go through an amendment process in which the people of the United States should vote to see if they want to annex Puerto Rico or any other territory as a state,” said Manchin . . . “). Delgado Robles, *supra* note 253 (“I think I’ve been as clear as I can be on that. There should be a referendum for the American people: Do we want more states?” said Manchin, noting that this should apply to Puerto Rico as well as to Washington D.C. . . . “)

<sup>254</sup> The new leadership of the House of Representatives and of the Committee on Natural Resources have stated that the issue of Puerto Rican status is not on the agenda at this time. José A. Delgado, *El próximo presidente del Comité de Recursos Naturales no cree en adelantar la salida de la Junta y espera que no avance el proyecto de status*. EL NUEVO DÍA, 15 Noviembre 2022). José A. Delgado, *Para marzo el próximo proyecto de status en la Cámara baja federal, dice Jennifer González*, EL NUEVO DÍA, 28 Febrero 2023).

incorporation, spoke in *Downes v. Bidwell* of “obligations of honor and good faith which . . . sacredly bind the United States to terminate the dominion and control, when, in its political discretion, the situation is ripe to enable it to do so.”<sup>255</sup> Faced with the possibility that his theory could be used to hold the peoples of the territories indefinitely as unincorporated territories, he stated:

[T]he presumption necessarily must be that [the legislative] department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to its duty under the Constitution, and therefore, when the unfitness of a particular territory for incorporation is demonstrated, the occupation will terminate. I cannot conceive how . . . pledges made to an alien people can be . . . more sacred than that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.<sup>256</sup>

The political discretion of Congress which Justice White deferentially recognized in *Downes* has been exercised for way too long. For 125 years, the Congress has relied on it to effectively subject the territories indefinitely to its sovereign powers. It is time for Congress to finally find it in the best interest of the nation to send a clear signal to the Supreme Court, to the nation and to the world to the effect that Justice Harlan, the Elder, was right after all when he stated categorically in his dissent of 1901 in *Downes v. Bidwell* that “the idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces . . . is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.”<sup>257</sup>

Regardless of the option finally agreed upon, “for the United States, which has ruled Puerto Rico as a colony for over a century, giving the people of Puerto Rico the chance to decide their own

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<sup>255</sup> *Downes v. Bidwell*, 182 U.S. 244, 343 (1901) (White, J., concurring).

<sup>256</sup> *Id.* at 344.

<sup>257</sup> *Id.* at 380 (Harlan, J., dissenting).

future is not only a wise policy decision—it is, for a country that prides itself as the leader of the free world, a moral imperative.”<sup>258</sup>

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<sup>258</sup> Weiss & Setser, *supra* note 217, at 168.