

# The Land that Democratic Theory Forgot

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*The island of Puerto Rico is officially designated as an unincorporated United States territory. Acquired by the United States in the aftermath of the Spanish-American war, the status of the island offers innumerable lessons and puzzles for students of the law of democracy and constitutional law. Begin with the fact that citizens of Puerto Rico—U.S. citizens at birth—cannot vote in federal elections but are subject to the plenary powers of Congress. How do we justify this condition under American constitutional values and basic tenets of democratic theory? Looking to the moment of acquisition, how may we reconcile the acquisition of the island in the aftermath of the war? This question morphs into the larger question of political obligation and asks, why should citizens of Puerto Rico obey the commands of U.S. law? Finally, how can we understand the grant of American citizenship to island residents a generation later? This Article offers tentative answers to these questions, and in so doing, wishes to open new lines of inquiry about the present status of Puerto Rico. This Article concludes that the status of Puerto Rico is illegitimate and in direct tension with core democratic values. Whether statehood, enhanced commonwealth, or independence emerges as the status of choice for the island, it is undisputable that the present condition of American citizens on Puerto Rican soil must come to an end.*

*The cause of America is, in a great measure, the cause of all mankind. Many circumstances hath, and will arise, which are not local, but universal, and through which the principles of all Lovers of Mankind are affected, and in the Event of which, their Affections are interested. The laying a Country desolate with Fire and Sword, declaring War against the natural rights of all Mankind, and extirpating the Defenders thereof from the Face of the Earth, is the concern of every Man to whom Nature hath given the Power of feeling.<sup>1</sup>*

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1. THOMAS PAINE, COMMON SENSE 4 (Penguin Books 2005) (1776).

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#### INTRODUCTION

The island of Puerto Rico sits on the Caribbean basin, 1000 miles southeast of the coast of Florida, a short plane trip to American soil. Yet the two countries could not be any farther apart in social, cultural, or economic terms.<sup>2</sup> So far apart, in fact, that Puerto Rico may be considered “the land that democratic theory forgot.” To study the history of U.S. involvement in Puerto Rico and the present status of the island as an unincorporated American territory is to be transported to a place that until now only existed in our imaginations. Or, as Nobel-prize winning novelist Gabriel García Márquez remarked, “If I told the truth about Puerto Rico . . . everyone would say I was making it up.”<sup>3</sup>

This truth has considerable payoff for scholars of the law of democracy and constitutional law, as it offers an inimitable window into some of the most important constitutional questions of our time. Consider, for example, the case of Shafiq Rasul, a British national captured in Pakistan and transferred to U.S. control in early December 2001.<sup>4</sup> Within a month of his capture, Mr. Rasul was transferred to the Guantanamo Bay U.S. naval base, in Guantanamo Bay, Cuba.<sup>5</sup> While in Guantanamo, he brought various claims against the U.S. government. At the core of his complaint was a petition for a writ of habeas corpus under 28 U.S.C. §§ 2241 and 2242 seeking release from his imprisonment.<sup>6</sup> The court framed the question as “whether aliens held outside the sovereign territory of the United States can use the courts of the United States to pursue claims brought under the United States Constitution.”<sup>7</sup> It answered this question in the negative and concluded that it lacked jurisdiction to hear the case.<sup>8</sup>

But the question cannot be dismissed that easily. Consider first the status of Guantanamo under U.S. law. After having exclusive jurisdiction over the base for over a century, could the naval base be anything but a “sovereign territory of the United States”? It is easy to define this question away and conclude that, under the terms of this perpetual lease, Cuban sovereignty never ceased over the territory. Far more interesting is the normative question of whether the United States may legitimately acquire this territory. This is the question of territoriality—how to justify and

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2. See PEDRO A. MALAVET, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2004).

3. Àngel R. Oquendo, *Liking to Be in America: Puerto Rico’s Quest For Difference in the United States*, 14 DUKE J. COMP. & INT’L L. 249, 249 (2004) (citing Elea Carey, *Spark’s Novel Was Worth the Wait*, COM. APPEAL, Jan. 22, 1995, at G3).

4. Rasul v. Bush, 215 F. Supp. 2d 55, 59 (D.D.C. 2002).

5. *Id.* at 57.

6. *Id.* at 62.

7. *Id.* at 56.

8. *Id.* at 72–73.

legitimize territorial acquisitions of what we would otherwise think of as sovereign, or at the very least semi-sovereign, peoples by a more powerful, conquering sovereign?

The question of territoriality is closely followed by the question of constitutionalism. For context, think about the United States and its “war on terror.” Could a nation apprehend an individual suspected of aiding the enemy during times of war, place them in confinement in a territory this nation clearly controls, yet ultimately deny these individuals mere access to the courts or contact with an attorney on the view that the confinement is “outside [its] sovereign territory”?<sup>9</sup> Put more generally, does the Constitution follow the flag wherever the United States acquires foreign lands?

These questions alone make the example of Puerto Rico an important case study, worthy of careful scholarly attention.<sup>10</sup> But as this Article argues, the case of Puerto Rico offers much more. Consider the facts: Puerto Rico is an American territory and its citizens are American citizens at birth dating back to the Jones Act of 1917.<sup>11</sup> And yet American citizens residing on the island may not participate in federal elections, while the island itself is subject to the plenary powers of Congress.<sup>12</sup> A worse example: American citizens residing on the mainland may relocate to a foreign country and continue to vote via absentee ballot—courtesy of the Uniformed and Overseas Citizens Absentee Voting Act (the “Voting Act”)—but lose their statutory right if they relocate to Puerto Rico.<sup>13</sup>

The logic of this last example is maddening in its simplicity. The Voting Act applies only to persons “who reside[] outside the United States,” and the statutory language clearly defines “United States . . . where used in the territorial sense, [to] mean[] the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.”<sup>14</sup> Puerto Rico is thus not a state for purposes of electoral representation, but is part of the United States for absentee voting purposes. On either account, residents of Puerto Rico are disenfranchised under a political regime that holds plenary power over them. Heads I win, tails you lose.

On these facts, the questions of territoriality and constitutionalism identified earlier in the Article acquire greater nuance and urgency. For example, and looking only to the aftermath of the Spanish-American war, how can one defend the acquisition of the

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9. *Rasul v. Bush*, 215 F. Supp. 2d 55, 65 (D.D.C. 2002) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950)).

10. I am not alone in this sentiment. *See, e.g.*, FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); 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*, 43 REV. JUR. U.P.R. 259 (1974); Marcos A. Ramirez, *Los Casos Insulares: Un Estudio Sobre el Proceso Judicial*, 16 REV. JUR. U.P.R. 121 (1946); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996); Ediberto Román, *Empire Forgotten: The United States Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

11. Ch. 145, § 5, 39 Stat. 951 (1917). The Act has been frequently amended and is presently codified as 48 U.S.C. § 737 (2000).

12. *See Igartua-De La Rosa v. U.S.*, 417 F.3d 145, 168 (1st Cir. 2005).

13. Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 42 U.S.C. § 1973ff (Supp. IV 2000)).

14. 42 U.S.C. §§ 1973ff-6(8).

island by the United States on grounds of constitutional law? More crucially, why should citizens of Puerto Rico obey the commands of U.S. law? And relatedly, how does one understand the grant of American citizenship to island residents?

These questions tell a peculiar and ultimately troubling story about the relationship between Puerto Rico and the United States. This is a story where race plays a prominent role, a story of distrust for territorial residents and of arbitrary rule by an overseas empire. Indeed, it is difficult to square many strands of this story with American constitutional values. Courts and commentators often attempt to do so,<sup>15</sup> but it is hard to be impressed—much less persuaded—by their efforts. This Article concludes that the status of Puerto Rico is illegitimate on many fronts. Whether statehood, enhanced commonwealth, or independence emerges as the status of choice for the island,<sup>16</sup> the present condition of American citizens on Puerto Rican soil—as disenfranchised second class citizens—must come to an end. This Article explores and defends this claim over the course of four Parts.

Part I discusses the two central questions a nation must face while setting on the course of empire building. These are the questions of territoriality and constitutionalism. This Part concludes that territorial acquisitions must be analyzed with much suspicion, as they involve notions of self-determination and political free will. At the heart of this Part lies the question of whether a liberal representative democracy has the power to foster colonial status.

To ask the question is to answer it. Parts II and III bring this conclusion to bear on the historical and constitutional canvass provided by the island of Puerto Rico. Part II examines the three leading themes at the heart of the colonial relationship between the United States and Puerto Rico: race, mistrust and arbitrary rule through plenary powers.

Part III discusses three basic questions of democratic theory as applied to the island. First, under what theory of political obligation should residents of Puerto Rico obey the commands of U.S. law? Second, what is the meaning of citizenship and what role has it played for Puerto Ricans post-1917? And third, how can one explain, much less justify, the mass disenfranchisement of millions of citizens living on U.S. soil? This Part concludes that the relationship between Puerto Rico and the United States fails to meet these basic standards of democratic theory. Finally, Part IV discusses and ultimately rebuts one common justification of the status quo: the notion that citizens of Puerto Rico do not pay U.S. income taxes.

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15. See, e.g., *Igartúa de la Rosa v. United States (Igartúa IV)*, 417 F.3d 145 (1st Cir. 2005) (en banc); *Igartúa de la Rosa v. United States (Igartúa I)*, 842 F. Supp. 607 (D.P.R. 1994), *aff'd*, 32 F.3d 8 (1st Cir.1994); John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J. POCKET PART 403 (2007), <http://thepocketpart.org/2007/05/19/fortier.html>.

16. See JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 3 (1997).

## I. ON THE POWER TO ACQUIRE TERRITORIES: TWO BASIC QUESTIONS

*Small islands not capable of protecting themselves, are the proper objects for kingdoms to take under their care.*<sup>17</sup>

Put yourself in the position of a benevolent conqueror, living at 1600 Pennsylvania Avenue at the turn of the twentieth century and wishing to expand the reach of your empire across the globe. Before moving forward, you must confront three separate yet interrelated questions. First, does the Constitution grant you—and Congress—a general power to acquire new territories? Students of American law will immediately recognize that this inquiry should pose challenging questions under a constitutional regime of enumerated powers. Assuming this question is answered affirmatively, the real question at the heart of your project of empire rises to the forefront: does the aforementioned Constitution apply to the newly acquired territory *ex proprio vigore*? This question is directly related to a third, for assuming that the full constitutional structure does not apply to the territories upon acquisition, are its citizens devoid of fundamental protections “recognized as indispensable by civilized peoples”?<sup>18</sup>

These questions should be familiar to modern ears, courtesy of the “war on terror” and the role played by the U.S. Naval base in Guantanamo Bay, Cuba as a detention center for the war’s enemy combatants.<sup>19</sup> But they are not new questions. This Part examines them in turn, and in so doing, places the status of Puerto Rico in historical context.

## A. Power and Legitimacy

The first question is perhaps the easiest one to answer. As a matter of sovereignty, or the inherent powers of states *qua* states, a nation possesses the right to acquire territories incident to its status as an independent state.<sup>20</sup> While this might be true in theory, it is not so as a question of U.S. constitutional law. In that context, the question is whether the power to acquire territories is among those powers catalogued under Article I. Unsurprisingly, the question dates back to the early years of the Republic.

While defending the constitutionality of the proposed national bank, for example, Alexander Hamilton wrote, “[i]t is not denied, that there are *implied*, as well as *express* powers, and that the former are as effectually delegated as the latter.”<sup>21</sup> To Hamilton,

17. PAINE, *supra* note 1, at 35.

18. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *see* Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2795–98 (2006).

19. *See, e.g.*, Baher Azmy, *Rasul v. Bush and the Intraterritorial Constitution*, 62 N.Y.U. ANN. SURVEY AM. L. 369 (2007); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073 (2005); Kermit Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005); Elizabeth A. Wilson, *The War on Terrorism and “The Water’s Edge”: Sovereignty, “Territorial Jurisdiction,” and the Reach of the U.S. Constitution in the Guantanamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006).

20. *See generally* EMMERICH DE Vattel, *THE LAW OF NATIONS* (Charles G. Fenwick trans., 1758), *reprinted in* 3 *THE CLASSICS OF INTERNATIONAL LAW* (James Brown Scott ed., 1964).

21. Alexander Hamilton, *Final Version of an Opinion on the Constitutionality of an Act to*

the power to acquire territories was neither express in the language of the Constitution nor implied from the same grant of power. Yet almost in passing, Hamilton offered “another class of powers,” which he labeled “*resulting powers*.”<sup>22</sup> He explained, and in so doing offered an example that bears directly on my inquiry: “It will not be doubted that if the United States should make a conquest on any of the territories of its neighbours, they would possess sovereign jurisdiction over the conquered territory.”<sup>23</sup> Recall that this was neither an express nor an implied power, but rather, a power inherent in sovereignty; or, in Hamilton’s words, “This would rather be a result from the whole mass of the powers of the government & from the nature of political society, than a consequence of either of the powers especially enumerated.”<sup>24</sup>

This position was not universally accepted at the time. In fact, President Jefferson argued against such a power the first time it came into question, during the process that led to the Louisiana Purchase.<sup>25</sup> In fairness, Jefferson was only being faithful to his constitutional principles of limited government and enumerated powers, for the Constitution clearly did not expressly grant Congress the power to acquire territories. Thus, he wrote to Wilson Cary Nicholas: “Our peculiar security is in possession of a written Constitution. Let us not make it a blank paper by construction.”<sup>26</sup> To his credit, he drafted an amendment intended to overcome this constitutional obstacle. In the end, he yielded to the demands of political expediency. Because an amendment would take considerable time, some feared that Napoleon would take back his offer to sell the territory,<sup>27</sup> so Jefferson relented. Jefferson explained in the same letter where he expressed his constitutional doubts: “If, however, our friends shall think differently, certainly I acquiesce with satisfaction; confiding, that the good sense of our country will correct the evil of construction when it shall produce ill effects.”<sup>28</sup> In the end, public opinion won out; as Gouverneur Morris explained when asked about this very

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*Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97, 100 (Harold C. Syrett ed., 1965) (emphasis in original).

22. *Id.*

23. *Id.*

24. *Id.*

25. 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON 356 (Earl N. Harbert ed., Library of America 1986) (1889–91). In fact, Adams argues that the constitutional question arose as soon as Jefferson sent Monroe to France to buy New Orleans and Florida. *Id.* at 354.

26. Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in THOMAS JEFFERSON: WRITINGS 1139, 1140 (Merrill D. Peterson ed., 1984) [hereinafter Letter to Nicholas]. He continues:

I say the same as to the opinion of those who consider the grant of the treaty making power as boundless. If it is, then we have no Constitution. . . . If it has bounds, they can be no others than the definitions of the powers which that instrument gives. . . . Let us go on then perfecting it, by adding, by way of amendment to the Constitution, those powers which time & trial show are still wanting.

*Id.*

27. See EVERETT SOMERVILLE BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE 1803–1812, at 25 (1920).

28. Letter to Nicholas, *supra* note 26. John Quincy Adams accused Jefferson of hypocrisy, for taking this stance immediately upon assuming office yet campaigning under a states’ rights banner. BROWN, *supra* note 27, at 30–31.

same topic, “It would, therefore, have been perfectly Utopian to oppose a paper restriction to the violence of popular sentiment in a popular government.”<sup>29</sup>

A generation later, the U.S. Supreme Court legitimated what politics had made expedient, in *American Insurance Co. v. Canter*.<sup>30</sup> At issue in *Canter* was the power of Congress to establish a territorial law for the territory of Florida prior to its admission as a state. In order to answer this question, the Court first had to determine “the relation in which Florida stands to the national government.”<sup>31</sup> This issue, which looked back to the Louisiana Purchase, is whether the U.S. government has the constitutional power to acquire territories. The Court answered this question affirmatively.

Speaking through the Chief Justice, the Court concluded that the treaty and war powers included an implicit power to acquire territories from other nations.<sup>32</sup> Yet when looking through Chief Justice Marshall’s opinion, and keeping in mind the larger question of constitutional authority, one is struck by the way in which the Chief Justice disposed of such an important question with so few words. The reasoning was nothing short of *ipse dixit*, for not once did he wrestle with the difficult question of constitutional authority to acquire foreign territories. The Chief Justice only addressed the status of the territories once acquired and the condition of those persons now subject to the authority of their new sovereign.<sup>33</sup>

The conclusion that the political branches of the United States have the power to acquire territories is unquestioned. Far more interesting and difficult is the subsequent question; for, once a new territory is acquired, the question of power immediately turns into what I call a question of constitutionalism. Does the Constitution apply to the new territory as soon as it becomes a part of the United States? What duties and protections flow to the inhabitants of these territories? That is to say, does the Constitution “follow the flag”?

### *B. Constitutionalism, Fundamental Rights and the Territories*

Questions about the reach of constitutional proscriptions and protections stand at the core of a larger debate about a country’s imperial aspirations. Such was the case at the turn of the twentieth century, when the United States annexed Puerto Rico, Guam, and the Philippines in the aftermath of the Spanish-American War.<sup>34</sup> To this point, the

29. BROWN, *supra* note 27, at 31 (quoting 3 JARED SPARKS, LIFE OF GOUVERNEUR MORRIS 185 (1832)).

30. 26 U.S. 511 (1828).

31. *Id.* at 516 n.\*.

32. *Id.* at 542 (“The Constitution confers absolutely on the government of the Union the powers of making war, and of making treaties; consequently, that Government possesses the power of acquiring territory, either by conquest or by treaty.”). In so answering this question, the Court concluded that the acquired territories remain at the whim of Congress under its general power “to make all needful rules and regulations respecting the territory or other property belonging to the United States.” *Id.* In this way, the Court upheld the Circuit Court’s ruling; it concluded that the Florida act is not in violation of the Constitution, for the court in question is not a constitutional but a legislative court, subject to congressional authority.

33. *Id.* at 542 (arguing that the treaty is not the sole source for the terms of the annexation, since these may also be modified at will “on such [terms] as its new master shall impose”).

34. For a wonderful, brief history, see Sylvia R. Lazos Vargas, *History, Legal Scholarship,*

Supreme Court had offered two related positions. In *Canter*, Chief Justice Marshall contended that the terms of the treaty of cession controlled the terms of the new relationship between the acquired territory and the sovereign.<sup>35</sup> Yet Chief Justice Marshall argued that the treaty was not the sole source for the terms of the annexation, since these may also be modified at will “on such [terms] as its new master shall impose.”<sup>36</sup> This was another way of saying that the territories remained at the will and grace of the sovereign.

Chief Justice Taney offered a contrasting position in *Dred Scott v. Sandford*.<sup>37</sup> For Taney, the power to acquire new territories resided within the power to admit new states into the union.<sup>38</sup> If this position is correct, then the power to acquire territories was only a grant of authority for the particular purpose of expanding the membership of the nation. In Taney’s words, “in the construction of this power by all the departments of the Government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission.”<sup>39</sup> Territories were acquired for the sole purpose of becoming states, “and not to be held as a colony and governed by Congress with absolute authority.”<sup>40</sup>

In a collection of cases commonly known as the *Insular Cases*, the U.S. Supreme Court followed neither position.<sup>41</sup> In light of the particular history of the annexation of Puerto Rico, the Court faced three separate questions. First, what was the constitutional status of the island from the time of American occupation, on 25 July 1898, to the signing of the Treaty of Paris on 10 December of that same year? Second, what was the island’s status between the times of the signing of the Treaty to the passage of the Foraker Act, which established a civilian government for the island? Finally, how did the Foraker Act affect the constitutional status of the island and its inhabitants? This final question had two related components. One, did Congress have unfettered powers over the territories? And two, what rights must be accorded to territorial residents?

The first two questions can be answered summarily. From the time of occupation until the signing of the Treaty of Paris, the island had remained a foreign nation,<sup>42</sup> that is, “one exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States.”<sup>43</sup> To the Court, this meant that tariffs collected during this period were in fact constitutional, imposed in accordance to “the law of arms and the right of conquest,” as well as the “general principles in respect to war and

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and *LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896–1900*, 78 DENV. U. L. REV. 921 (2001).

35. *Canter*, 26 U.S. at 542.

36. *Id.*

37. 60 U.S. (19 How.) 393 (1857).

38. *Id.* at 446–47.

39. *Id.* at 447.

40. *Id.*

41. Scholars largely limit the label of *Insular Cases* to nine cases decided during the Court’s 1901 Term. Five of these cases dealt particularly with questions concerning the status of Puerto Rico. See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901).

42. *Dooley*, 182 U.S. at 233–34; see also *Armstrong*, 182 U.S. at 243.

43. *De Lima*, 182 U.S. at 180.



peace between nations.”<sup>44</sup> Once the occupation led to formal acquisition through the Treaty of Paris, Puerto Rico ceased to be a foreign country and became a territory of the United States, “although not an organized territory in the technical sense.”<sup>45</sup>

These questions lost their relevance once Congress enacted the Foraker Act and established a civilian government for the island. All future questions hinged on the status of Puerto Rico from that point forward. This is the place where the imperialist debate carried on. The question was of utmost importance because the imperial project demanded colonial subjects; that is, could the political branches acquire foreign territories on less than a promise of full membership into the American polity? More specifically, could Congress set some territories on the path to statehood while placing others under perpetual colonial rule? And with the passage of time, could Congress change its collective mind and release some of the acquired territories from its authority?<sup>46</sup>

In the case of *Downes v. Bidwell*,<sup>47</sup> the question for the Court was whether the status of the island of Puerto Rico had changed after passage of the Foraker Act. Put more pointedly: would the Court side with Marshall or Taney? The question was indeed a difficult one; at least the Court thought so and splintered accordingly.<sup>48</sup>

Writing for himself, Justice Brown set out a position now commonly known as the “extension theory.” As he wrote, the issue in *Downes* was “whether the revenue clauses of the Constitution extend of their own force to our newly acquired territories.”<sup>49</sup> The answer was perhaps too obvious—Congress has plenary authority over any and all acquired territories, and the Constitution applies to them at the discretion of Congress. This view comes with a ready exception: the Constitution does extend to the territories, even against congressional wishes, when dealing with “those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments.”<sup>50</sup> Interestingly, the Court never followed this position.<sup>51</sup>

In concurrence, Justice White developed the “incorporation theory,” which soon became the leading view in this area.<sup>52</sup> To Justice White, the initial concern was over

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44. *Dooley*, 182 U.S. at 232.

45. *De Lima*, 182 U.S. at 196; see *Goetze*, 182 U.S. at 221; *Huus v. New York & P.R. Steamship Co.*, 182 U.S. 392 (1901).

46. See Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

47. 182 U.S. 244 (1901).

48. See *id.* at 244 n.1; 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 431 (1922) (“The division of opinion on the Court was sharp and pronounced.”).

49. *Downes*, 182 U.S. at 249.

50. *Id.* at 268.

51. JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 53 (1985); see David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889–1910*, 52 U. CHI. L. REV. 867, 874 (1985) (calling Brown’s opinion in *Downes* “distressing”).

52. *Downes*, 182 U.S. at 288 (White, J., concurring); see *Dorr v. United States*, 195 U.S. 138 (1904); Frederick R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926). For a recent critique, see Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55, 56–57 (1997).

the congressional disposition over the territory at issue. This question had a simple answer: the Constitution generally applies to incorporated territories.<sup>53</sup> The second question, and the one that occupied most of Justice White's attention, was more difficult. Referring specifically to the facts in *Downes*, this was whether Congress had "power to locally govern at discretion."<sup>54</sup> He answered this question affirmatively, under either Article IV, section 3, which grants Congress the power "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," or as an implicit corollary to the right to acquire such territories.<sup>55</sup>

Having determined that Congress had the power to act, the question was then: which constitutional provisions apply to a given territory? Justice White concluded that the answer depended on the status of the territory in question. In the case of Puerto Rico, an unincorporated territory, only those fundamental principles "which are the basis of all free governments" would affect congressional actions.<sup>56</sup> In other words, Congress would be asked to proffer a compelling state interest whenever its legislation over the territories implicated fundamental principles. According to Justice White, the constitutional requirement of uniformity in taxation and matters of customs was not one such principle, and as a result, Congress was free to regulate it at will. This understanding remained unaffected after the Jones Act of 1917, when citizens of Puerto Rico were granted U.S. citizenship.<sup>57</sup>

In dissent, Justice Harlan developed a view he would echo in all subsequent territorial cases.<sup>58</sup> As he argued in *Downes*, the Constitution "speaks . . . to all peoples, whether of States or territories, who are subject to the authority of the United States."<sup>59</sup> He explained:

The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as were colonies or provinces--the people inhabiting them to enjoy only such rights as Congress chooses to accord to them--is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.<sup>60</sup>

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53. See *Rasmussen v. United States*, 197 U.S. 516 (1905); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (concluding that Newlands Resolution does not require full application of the Constitution to Hawaii, since it is only an annexed territory, not yet incorporated, and the rights at issue are not fundamental but procedural). *Balzac v. Porto Rico*, 258 U.S. 298 (1922), finalized the establishment of the incorporation doctrine.

54. *Downes*, 182 U.S. at 290 (White, J., concurring).

55. *Id.*

56. *Id.* at 291. This position was first developed in a famous exchange in the pages of the *Harvard Law Review*. See Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

57. Ch. 145, § 5, 39 Stat. 951 (1917); see, e.g., *Balzac v. Porto Rico*, 258 U.S. 298, 307 (1922).

58. *Downes*, 182 U.S. at 376 (Harlan, J. dissenting); see *Trono v. United States*, 199 U.S. 521, 535 (1905) (Harlan, J., dissenting); *Rasmussen*, 197 U.S. at 528 (Harlan, J., concurring); *Dorr v. United States*, 195 U.S. 138, 154 (1904) (Harlan, J., dissenting); *Mankichi*, 190 U.S. at 226 (Harlan, J., dissenting).

59. *Downes*, 182 U.S. at 378 (Harlan J., dissenting) (citing *Martin v. Hunter*, 1 Wheat. 304, 327 (1816)).

60. *Id.* at 380.

His point was a simple one: no distinctions may be made between the acquired territories and the applicability of constitutional guarantees. Instead, it was all or nothing; either the Constitution applies in full or not at all.<sup>61</sup> As with Justice Brown's position, Justice Harlan's view has received scant support through the years.

## II. THE UNITED STATES COMES TO "PORTO" RICO: THEMES

*Is it, perhaps, possible that there are two kinds of Civilization--one for home consumption and one for the heathen market?*<sup>62</sup>

The *Insular Cases* did not begin the formal relationship between the United States and Puerto Rico; rather, these cases sanctioned the imperial experiment raging at the turn of the century in two ways. First, they allowed for the establishment of territorial rule at the bequest of Congress at a level far less than that of statehood. The Constitution only followed the flag if Congress decided that it do so. And second, these cases allowed for congressional mistakes and changes of heart. That is, to acquire a territory need no longer mean—if it ever did—that the new acquisition must remain a permanent possession of the United States. What Congress acquired, the *Insular Cases* taught us, Congress can always set free.<sup>63</sup>

Before examining the particular implications of the insular cases to the island, this Part places the acquisition of Puerto Rico in context. It bears repeating: the Spanish-American war officially began on April 25 with a declaration from Congress. Three months later, on July 25, General Nelson A. Miles directly led the U.S. invasion of Puerto Rico, landing in Guánica—a southwestern city located 98 miles from San Juan—and finding little resistance. The U.S. Army secured the island within a month, and on December 10 of that year Spain and the United States agreed to the Treaty of Paris, ending hostilities between the two nations. As a spoil of victory, Spain ceded both "Porto" Rico and Guam to the United States.<sup>64</sup> It is now a little over a hundred years of American rule over the island.<sup>65</sup>

Three related themes mark this period in the history of Puerto Rico and its relationship with the United States. This Part examines them in turn.

### A. Race and Manifest Destiny

According to Juan Perea, "[r]ace and racism have always played central roles in the ideology of United States conquest and United States citizenship."<sup>66</sup> This view is

61. Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

62. Mark Twain, *To the Person Sitting in Darkness*, 172 N. AM. REV. 161, 167 (Feb. 1901).

63. See Burnett, *supra* note 46, at 802.

64. Under Article III, Spain also ceded "the archipelago known as the Philippine Islands," for a payment of \$20 million. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

65. For a wonderful brief account of this moment in American history, see TRÍAS MONGE, *supra* note 16.

66. Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race and the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 10 at 140; see Gabriel A. Terrasa, *The United States, Puerto Rico, and the Territorial Incorporation Doctrine: Reaching a Century of Constitutional Authoritarianism*, 31 J. MARSHALL L. REV. 55 (1997). For a specific application of this

undeniably true of the case of Puerto Rico. Debates in the early part of the twentieth century were rife with talk of Anglo-Saxon superiority and the need for those inferior beings within the acquired territories to become acculturated in the ways and mores of the United States. Congressmen would speak freely about people who “can neither comprehend nor support representative government constructed on the Anglo-Saxon plan”<sup>67</sup> and how God “has made us adepts in government that we may administer government among savage and senile peoples”;<sup>68</sup> political scientists of great influence would write that only after “centuries of discipline” did the “Anglo-Saxon race” become fit for self-government;<sup>69</sup> and the Supreme Court would offer dictum explaining how “it is doubtful if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States.”<sup>70</sup>

These views about racial superiority and democratic literacy played a crucial role in the development of policies with respect to the newly acquired territories. Take, for example, the *Insular Cases*, where the Court ultimately drew a sharp distinction between incorporated territories firmly on the road toward statehood, such as Hawaii and Alaska, and unincorporated territories, such as Puerto Rico and the Philippines, in constitutional limbo and on the road to nowhere.<sup>71</sup> These cases have nary a friend in the world. Commentators brand the language of the opinions as “undeniably racist,”<sup>72</sup> and

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argument to the history of Puerto Rico, see RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* 13 (1992).

67. 62 CONG. REC. 2798 (1912) (remarks of Rep. Slayton).

68. Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 10, at 373, 378 (citing 56 CONG. REC. 711 (1900) (remarks of Sen. Albert Beveridge)). This is not to suggest that matters have improved. For a recent example, see 137 CONG. REC. 3962 (1991) (statement of Senator Moynihan) (asserting that statements by other Senators during a debate over the status of Puerto Rico were “the most shameful display of nativism I have yet to encounter in 15 years in the Senate”); see also Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 32 (“Congress’ nativist and xenophobic fears continue to threaten the process that may lead to freedom and full acceptance for the people of Puerto Rico.”).

69. Smith, *supra* note 68, at 377 (citing Abbot Lawrence Lowell, *The Colonial Expansion of the United States*, 83 ATLANTIC MONTHLY 145, 149–54 (1899)); see Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

70. *Downes v. Bidwell*, 182 U.S. 244, 280 (1901); see RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 162–63 (1972) (“The actions of the federal government during the imperial period and the relation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.”).

71. The Court’s analysis on this point leaves a lot to be desired, as the intent of Congress is not as unambiguous as the Court intimates. *Compare* *People v. Balzac*, 258 U.S. 298 (1922), *with* *Rasmussen v. United States*, 197 U.S. 516 (1905), *and* *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

72. Efrén Rivera Ramos, *Deconstructing Colonialism: The “Unincorporated Territory” as a Category of Domination*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 10, at 113; see Deborah D. Herrera, *Unincorporated and Exploited: Deferential Treatment for Trust Territory Claimant—Why Doesn’t the Constitution Follow the Flag*, 2 SETON HALL CONST. L.J. 593, 609–

their constitutional principle as “distressing”<sup>73</sup> and “morally illegitimate,”<sup>74</sup> “designed for the convenience of the conqueror,”<sup>75</sup> and on the same plane with its contemporary *Plessy v. Ferguson*.<sup>76</sup> A leading critical voice, Judge Juan Torruella of the First Circuit Court of Appeals, contends that the *Insular Cases* “are anchored on theories of dubious legal or historical validity, contrived by academics interested in promoting an expansionist agenda.”<sup>77</sup>

For a more innocuous example, take the creation of a “citizenship of Puerto Rico” under the Foraker Act.<sup>78</sup> Under Section 7 of the Act, those residing in Puerto Rico after April 11, 1899—and their children born after this date—“shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States.”<sup>79</sup> On its face, this language simply appears to recognize the status of those who live in Puerto Rico as citizens of that territory. But there is more to the story.

The process whereby Congress created a “citizenship of Puerto Rico” was also tinged with strong racial overtones. As Rogers Smith argues, “this peculiar ‘citizenship’ was spawned by American turn-of-the-century racism.”<sup>80</sup> A “citizenship of Puerto Rico” was defined by what it clearly was not—American citizenship. Professor Smith explains: “Congress created that category expressly as another subordinate status, inferior to U.S. citizenship, and inferior explicitly because America’s political and intellectual leaders regarded Puerto Rico as not just a separate but as yet another unequal race, incapable of full self-governance.”<sup>81</sup>

For a final example, look no further than the Treaty of Paris, whereby Spain ceded, *inter alia*, Puerto Rico.<sup>82</sup> Under Article IX, Spanish subjects could choose to stay within the relinquished lands or return to Spain; and if they chose to stay, Article IX made clear that they would retain their property rights as well as “the right to carry on their industry, commerce and professions.”<sup>83</sup> For those who chose to remain in the relinquished lands, these subjects could retain their allegiance to the Spanish Crown, or else they could renounce such allegiance and accept the nationality of the territory where they live.<sup>84</sup>

As for the mixed-race creoles (*criollos*) who also inhabited these lands, Article IX was not quite as accommodating. The relevant language was brief and direct: “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.”<sup>85</sup> Or, more bluntly: these

10 (1992).

73. David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889–1910*, 52 U. CHI. L. REV. 867, 874 (1985).

74. Román, *supra* note 68, at 23.

75. Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 964 (1991).

76. 163 U.S. 527 (1896).

77. *Igartúa de la Rosa v. United States (Igartúa IV)*, 417 F.3d 145, 163 (1st Cir. 2005) (Torruella, J., dissenting).

78. 31 Stat 77 (1900) (codified as amended at 48 USC § 731 et seq (2000)).

79. 31 Stat. 77, 79 (1900). So long, of course, as they did not elect to preserve their allegiance to Spain under provisions of the Treaty of Paris. *Id.*

80. Smith, *supra* note 68, at 375.

81. *Id.* at 380.

82. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

83. *Id.* at 1759.

84. *Id.*

85. *Id.*

subjects lost their Spanish citizenship and were given no assurances about their civil and political rights. Their fate now rested in Congress' hands, yet that body was not pre-committing to anything; it would determine at a later date what the rights of those inhabiting the newly acquired territories would be. Imperialism takes practice, after all, and the United States was still new at it.

It bears noting that this was the first time in its history that the United States acquired territories without the concomitant promise of citizenship or eventual statehood.<sup>86</sup> The island's mixture of Black, Indian, and Spanish blood proved too much for the United States, and it "rendered the island incapable of independent self-government."<sup>87</sup>

### *B. Distrust and Safeguards*

The second theme is one of distrust of island affairs and the need for structural safeguards. This theme remains to this day and flows directly from the perceptions of racial superiority and unfitness for self-government discussed in the previous section. Under the Foraker Act, for example, the United States established a civil government for the island and called for a governor appointed by the President with the advice and consent of the Senate; an eleven-member executive council appointed by the President also with the advice and consent of the Senate; and a thirty-five-member legislature.<sup>88</sup> Further, the Act created a Supreme Court of Puerto Rico and provided for a nonvoting Resident Commissioner to represent the island.<sup>89</sup>

Notably, the Act did not grant American citizenship upon the inhabitants of Puerto Rico, instead choosing to create the new status of "citizens of Puerto Rico."<sup>90</sup> The Act also did not stipulate a Bill of Rights for the island, nor did it explicitly settle the question of the right to travel to and from the mainland. As for the precautions, and to name the most prominent ones: the President and the Senate appointed most political functionaries, including the governor and judges, and the President retained the right to remove the governor at will; only five of the eleven members of the executive council must be born in Puerto Rico; Congress reserved the right to annul any law enacted by the Puerto Rican legislature at any time, and could legislate for the island even for affairs considered local in nature; and losing parties could appeal decisions by the Supreme Court of Puerto Rico to the U.S. Supreme Court.<sup>91</sup> The island also held no effective representation in the U.S. Congress.<sup>92</sup>

Seventeen years later, the United States enacted a second Organic Act for the island, also known as the Jones Act of 1917.<sup>93</sup> According to the noted historian José Trias Monge, the Jones Act "represented a modest step forward on the long road

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86. See WESTON, *supra* note 70, at 184.

87. *Id.*

88. 31 Stat. 77, 79–86 (1900).

89. *Id.*

90. *Id.*

91. *Id.*

92. See TORRUELLA, *supra* note 51, at 118.

93. Jones Act (Puerto Rico), ch. 145, § 5, 39 Stat. 951 (1917) (current version at 8 U.S.C. § 1402 (1976)).

toward self-government.”<sup>94</sup> Above all, the Act replaced the executive council established under the Foraker Act for an elective Senate.<sup>95</sup> Yet distrust for the politics of the island remained high, as seen in a number of important provisions. For example, legislative actions were subject to a gubernatorial veto, and in the event of a legislative override, the President held final authority. Congress also retained the right to annul local laws any time it wished, and could go as far as to legislate for the island.<sup>96</sup> The resulting regime, wrote Judge Torruella, subjected the people of Puerto Rico “to almost absolute central discretion.”<sup>97</sup>

This level of distrust for the politics of the island survived future congressional efforts. But this should not suggest that the United States did not make any concessions, and it would be unfair to suggest otherwise. For example, President Truman designated then Commissioner Resident Jesús T. Piñero as the first Puerto Rican to serve as island governor in 1946, and the following year, the Elective Governor Act allowed the people of Puerto Rico to elect their own governor.<sup>98</sup>

As a general matter, however, Congress retained much control over island affairs. Of particular interest is Pub. L. 600, signed into law by President Truman in 1950 and approved by a referendum on the island with 76.5% of the vote.<sup>99</sup> Under this law, Puerto Rico could draft its own constitution, which it did in 1952. More importantly, the law had the potential to transform the relationship between Puerto Rico and the United States as one grounded on consensual norms. According to Governor Luis Muñoz Marín, for example, “the principle that the relationship is from now on one of consent through free agreement, wipes out all trace of colonialism.”<sup>100</sup>

Yet Congress clearly felt otherwise. Time and again, members of Congress expressed the view that Pub. L. 600 and the enactment of a Puerto Rican Constitution did not alter the prior relationship between Puerto Rico and the United States.<sup>101</sup> Further, Congress must ultimately approve the Constitution itself, and reserved the right to object and ultimately eliminate any provisions it disapproved.<sup>102</sup> Most damningly, Congress could even revoke the Constitution of Puerto Rico unilaterally;<sup>103</sup> as Muñoz Marín himself conceded during a congressional hearing in 1950, “if the

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94. TRÍAS MONGE, *supra* note 16, at 75.

95. *See* TRÍAS MONGE, *supra* note 16, at 75.

96. *See id.*

97. TORRUELLA, *supra* note 51, at 118.

98. Elective Governor Act of 1947 § 7, 48 U.S.C. § 737 (2000).

99. Act of July 3, 1950, Pub. L. No. 600, ch. 446, 64 Stat. 319.

100. TRÍAS MONGE, *supra* note 16, at 115 (“According to Governor Luis Muñoz Marín, for example, passage of the new constitution established ‘the principle that the relationship is from now on one of consent through free agreement, wipes out all trace of colonialism’”); *see* ALFREDO MONTALVO–BARBOT, *POLITICAL CONFLICT AND CONSTITUTIONAL CHANGE IN PUERTO RICO, 1989–1952*, at 143 (1997) (contending that “in general, the presentation of the Puerto Rican people as passive agents in the constitutional transformation of the island, an argument advanced by gradualists and traditional colonialist studies, is analytically and empirically simplistic and questionable”).

101. *See* TRÍAS MONGE, *supra* note 16, at 149–58.

102. *Id.* at 114–15.

103. *See id.*

people of Puerto Rico should go crazy, Congress can always get around and legislate again.”<sup>104</sup>

*C. Plenary Powers and Arbitrary Rule*

The third theme flows directly from the *Insular Cases* and the doctrine of incorporation. To this day, the Supreme Court maintains that Puerto Rico has not been incorporated into the United States through an act of Congress.<sup>105</sup> This conclusion has meant not only that Congress holds plenary powers over the island until it decides otherwise, but that residents of Puerto Rico enjoy only those guarantees of the Bill of Rights deemed by the Court as fundamental. The consequences for the island have been abysmal.<sup>106</sup>

Two *per curiam* opinions stand out in my mind, though the field is not lacking for worthy candidates. The first is *Califano v. Torres*.<sup>107</sup> The plaintiff in *Califano* was a former resident of Connecticut who had qualified for benefits under the Supplemental Security Income (SSI) program while residing there.<sup>108</sup> Upon moving to Puerto Rico, his benefits were discontinued.<sup>109</sup> This case was not a difficult application of the law; under the relevant language, beneficiaries could not apply for support under the program for any month they resided outside the “United States,” and the statute defined “United States” as “the 50 states and the District of Columbia.”<sup>110</sup> A three-judge district court declared the law unconstitutional,<sup>111</sup> but the U.S. Supreme Court reversed.<sup>112</sup> To hold otherwise, the Court offered, would grant those who just arrived in Puerto Rico “benefits superior to those enjoyed by other residents of Puerto Rico.”<sup>113</sup>

More puzzling were three further reasons offered by the Court in support of the law: “First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great—an estimated \$300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy.”<sup>114</sup> These are puzzling reasons because they are not factors traditionally used by the Court when deciding questions of constitutional law on the merits.<sup>115</sup> Whether citizens of Puerto Rico pay federal taxes, or whether the cost of the benefits to those living in Puerto Rico would be too costly or disruptive, are questions for Congress to consider, not the Court. These considerations

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104. *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the H. Comm. on Public Lands*, 81st Cong. 33 (1950).

105. *See Balzac v. Porto Rico*, 258 U.S. 298 (1922).

106. *See TORRUELLA, supra* note 51, at ch. 5.

107. 435 U.S. 1 (1978).

108. *Id.* at 2–3.

109. *Id.* at 3.

110. *Id.* at 2.

111. *Id.* at 3.

112. *Id.* at 5.

113. *Id.* at 4.

114. *Id.* at 5 n.7.

115. *See TORRUELLA, supra* note 51, at 111.



do not help decide whether the classification in question violates the equality principle under the Fourteenth Amendment.

The second notable opinion is *Harris v. Rosario*.<sup>116</sup> The statute at issue in *Harris* was the Aid for Families with Dependant Children Act (AFDC). Unlike the SSI program, the AFDC program included island residents among its beneficiaries, with the caveat that territorial residents were assisted at lower levels than those on the mainland.<sup>117</sup> As in *Califano*, the district court in *Harris* struck down the law under the 5th Amendment's equal protection clause.<sup>118</sup> And once again, the Supreme Court tersely reversed.<sup>119</sup> In addition to the economic reasons offered in *Califano*, the Court added in a telling footnote that leveling the benefits for residents of Puerto Rico would cost around \$30 million dollars a year, and if the argument were applied to other programs under the Social Security Act, the cost could balloon to \$240 million dollars.<sup>120</sup>

As with *Califano*, it is not clear why these reasons should play any role when deciding a question of *constitutional* law. What *is* clear, unfortunately, is that these cases are not outlying points on an otherwise traditional constitutional terrain, with questions over the status of Puerto Rico receiving the same thoughtful reflection as all others. Rather, they are routine examples of the Court's unwillingness to engage these difficult questions. Or, as Alex Aleinikoff explained, "*Harris* is a startling and troubling example of the Court's unwillingness to give any serious scrutiny—indeed, any serious thought—to congressional exercises of power over the territories."<sup>121</sup>

In sum, the relationship between the United States and Puerto Rico has been grounded on distrust due to the almost unlimited discretion of the mainland to rule over island affairs. The burgeoning American empire demanded nothing less. As might be expected, the implications for the island and its residents have been appalling. These implications are the subject of the next Part.

### III. A CLOSER LOOK AT THE COMMONWEALTH: ON THE FAILINGS OF AMERICAN DEMOCRACY

*The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.*<sup>122</sup>

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116. 446 U.S. 651 (1980).

117. *Id.* at 651.

118. *Id.*

119. *Id.* at 651–52.

120. *Id.* at 652 n.\*.

121. T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 22 (1994).

122. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901).

This brief account of the leading themes in the history of Puerto Rico under United States rule tells a familiar story. To talk about territorial acquisitions in U.S. history is inevitably to invoke themes of racial superiority, imperial aspirations, and colonial struggles. The examples are many, from western expansion and the Louisiana Purchase, to the Mexican War and the conquest of Hawaii.<sup>123</sup> At the heart of these struggles are questions about self-determination and the rights of native inhabitants to their lands.<sup>124</sup> The example of Puerto Rico—and the Spanish-American War in general—is no exception.

This Part examines the troubling implications of this history through the lens of democratic theory. Three questions ground this discussion. First, how does the United States justify exercising authority over Puerto Rico? This is a basic question of political theory yet seldom asked—at least explicitly—in debates over the status of the island. Second, what is the meaning of United States citizenship as extended to the people of Puerto Rico? The first two discussions converge on the third, which questions the mass disenfranchisement of American citizens residing on Puerto Rican soil.

*A. Obligation, Consent, and Why Puerto Ricans Obey American Law*

This section measures Puerto Rico's colonial reality against a basic pre-condition of democratic theory. This is the question of constitutional authority and obligation. Why should anyone, whether a state, an institution, or citizens in general, obey constitutional commands? As applied to the island, under what theory of constitutional obligation are Puerto Ricans living on the island bound to follow constitutional prescriptions? What is needed is an argument for the proposition that citizens of the island of Puerto Rico are bound to obey the United States Constitution, a document they neither know very well nor have accepted as their supreme law. This Part examines three leading candidates and offers tentative answers to this important question.<sup>125</sup>

First, one may develop an argument on teleological grounds regarding the purposes of our obligations or their likely consequences.<sup>126</sup> On this argument, we obey because of prospective rewards, gains that will result from the original obligation. It is the end in question, or *telos*, that forms the basis for the existing obligation. Utilitarianism may

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123. See, e.g., RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY FROM POLYNESIAN KINGDOM TO AMERICAN COMMONWEALTH (1948); LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN (1964); GLENN W. PRICE, ORIGINS OF THE WAR WITH MEXICO: THE POLK-STOCKTON INTRIGUE (1967); OTIS A. SINGLETARY, THE MEXICAN WAR (1960).

124. See, e.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279–82 (1955) (asserting that the Indian tribes have been conquered through warfare or forced treaties); *id.* at 289–90 (concluding that an Indian tribe's right to live on land must first be recognized by Congress); Johnson v. M'Intosh, 21 U.S. 543, 587 (1823) (holding that a discoverer may extinguish the rights of Indian tribes to land by either conquest or purchase). See Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

125. As you read, treat the discussion as exploratory in nature. I examine this issue in much greater detail elsewhere. See Luis Fuentes-Rohwer, *On the Making of Happy Slaves* (unpublished manuscript, on file with the *Indiana Law Journal*).

126. See generally R.M. Hare, *Political Obligation*, in SOCIAL ENDS AND POLITICAL MEANS 1 (Ted Honderich ed., 1976).

be catalogued under this rubric,<sup>127</sup> as well as theories of political obligation grounded on the common good of either a particular community or the larger whole.<sup>128</sup>

The teleological argument is terribly unsatisfying in the context of territorial acquisitions and the concept of self-determination. At first glance, teleological arguments appear promising; after all, Puerto Rico has benefited considerably from its relationship with the United States, particularly in terms of internal improvements and social welfare programs.<sup>129</sup> But this position ultimately fails to justify the status of Puerto Rico. In particular, this argument fails when measured in terms of political self-determination. As Judge Cabranes intimates, Puerto Rico has paid a steep price for its relationship to the United States: “political subordination and a deep, abiding sense of dependency and powerlessness.”<sup>130</sup> This situation is not what one could sensibly consider self-determination.<sup>131</sup>

The second argument looks instead to deontological theories, the types that ground obligations on moral principles and duties outside the origin of the obligation.<sup>132</sup> In other words, we obey because we must, on the strength of an existing moral code outside of the obligation itself, for the same reasons that we must not lie or steal. Deontology argues that consequences are irrelevant to the obligation itself and one’s duty to acquiesce. In the words of John Rawls, “we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves.”<sup>133</sup>

Deontological theories also fall short in response to the relationship between the United States and Puerto Rico. According to these theories, we are only required to obey *just* institutions and must only follow those rules and obey those institutions that are just, good, and fair. The example of Puerto Rico does not meet this test. What we need is an argument for justifying colonialism. Subjection to a sovereign’s plenary powers and its arbitrary will,<sup>134</sup> coupled with mass disenfranchisement, does not meet this test.

The third argument tracks our commitment to obeying a sovereign’s commands to a prior voluntary agreement. This is consent theory, a leading account of political

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127. See generally JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (R. Harrison ed., 1988) (explaining the Utilitarian view of government).

128. See T.H. GREEN, LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATIONS AND OTHER WRITINGS (Paul Harris & John Morrow eds., 1986).

129. See José A. Cabranes, *Puerto Rico and the Constitution*, 110 F.R.D. 475 (1986).

130. *Id.* at 479.

131. See José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 27 (1999) (“The subjection of a people to the arbitrary will of another, the exercise of plenary power over dependent territory, is not permissible.”); *id.* at 28 (“Under the principles of liberty and equality no plenary powers can be exercised by one people over another, even with their general consent.”).

132. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 351 (1971).

133. *Id.*

134. See *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (stating that Congress could treat Puerto Rico differently from states so long as there was a rational basis for its actions); *Califano v. Torres*, 435 U.S. 1, 5 (1978) (stating that unequal treatment of citizens in Puerto Rico is acceptable so long as the reasoning behind the treatment is rational and not invidious).

obligation.<sup>135</sup> This consent may come in a variety of forms, from an explicit ratification of the terms of an agreement—as in the colonial ratification debates of 1787-88—to an implicit acceptance reflected in one’s decision to live under a particular political regime. The case of Puerto Rico appears to fall within this well-accepted model on both explicit and implicit grounds.

The first ground offers only modest resistance. The people of Puerto Rico first enacted their existing constitution in 1952 under congressional authority vested by Pub. L. 600.<sup>136</sup> At this time, President Truman described the relationship between Puerto Rico and the United States as “based on mutual consent and esteem.”<sup>137</sup> In addition, both the language of Law 600, which authorized the creation of a constitution for the people of Puerto Rico, and the resulting Constitution of Puerto Rico refer to the relationship between the United States and Puerto Rico as a “compact.”<sup>138</sup> Finally, courts and commentators alike,<sup>139</sup> including the U.S. Supreme Court,<sup>140</sup> have used the “compact” language.

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135. See CAROLE PATEMAN, *THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM, AND POLITICAL THEORY* 58, 60 (1989) (“Given the initial postulate of individual freedom and equality, there is only *one* rational and acceptable justification for political obligation and political authority. Individuals must themselves consent, contract, agree, choose or promise to enter such a relationship.”); Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL’Y 753 (2000); Trías Monge, *supra* note 131, at 27 (“[O]nly consent can supply an adequate basis for the institution of government.”). For criticisms, see, e.g., ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1971); Lea Brilmayer, *Consent, Contract, and Theory*, 74 MINN. L. REV. 1 (1989); Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 MICH. L. REV. 1 (1997).

136. Act of July 3, 1950, ch. 446, § 2, 64 Stat. 319.

137. TORRUELLA, *supra* note 51, at 158 (quoting Statement of President Truman, July 3, 1952).

138. Public Law 600 states: “[T]his Act is now adopted in the nature of a compact . . .” Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950) (providing for the organization of a constitutional government by the people of Puerto Rico). Article I of the Constitution of Puerto Rico states that the political power of the Commonwealth of Puerto Rico “shall be exercised . . . within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.” P.R. CONST. art. I.

139. *United States v. Quinonez*, 758 F.2d 40, 42–43 (1st Cir. 1985); RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 77–78 (1984) (arguing that the relationship between the United States and Puerto Rico is based on a compact as a result of the 1952 referendum and adoption of the Puerto Rican Constitution); Rafael Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COL. ABOG. P.R. 207 (1959); Hon. Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 5, 9–16 (1953).

140. Both *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671 (1974), and *Examining Board v. Flores de Otero*, 426 U.S. 572, 594–96 (1976), for example, used language of “compact.” For a description of this compact, see *Calero*, 416 U.S. at 672 (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953)). See Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 REV. JUR. U.I.P.R. 1 (1982) (contending that the Supreme Court has accepted the “compact” reading).

But this argument ultimately fails.<sup>141</sup> Puerto Rico has been a colony since 1898, a fact that remained unaltered after 1952 when island residents voted for and adopted their own Constitution.<sup>142</sup> At best, their condition must be described as “colonialism with the consent of the governed.”<sup>143</sup> The fact that Congress retains plenary power over the island and its affairs is determinative of this view.<sup>144</sup> True, Congress has never acted to annul a law passed by Puerto Rican legislature.<sup>145</sup> One may also concede that the relationship may be described as “dialectical,” not as one-sided as the reference to colonial status might imply.<sup>146</sup> All the same, this power of Congress exists, and it may be exercised as needed. This situation is one of political subservience, not self-determination.

The second ground is more difficult to dismiss. Since 1952, island residents have renewed their commitment to their status as disenfranchised members of the American political community in three subsequent plebiscites. These plebiscites mark three independent moments in the history of Puerto Rico when voting pluralities on the island consented to U.S. rule and the commonwealth experiment,<sup>147</sup> and they are consistent with the great traditions of American democracy, such as the concept of popular consent. According to John Fortier, for example, “Puerto Rico’s referenda, in

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141. See *United States v. Lopez Andino*, 831 F.2d 1164, 1172 (1st Cir. 1987) (Torruella J., concurring); Cabranes, *supra* note 129, at 481; David Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 31 REV. JUR. U.P.R. 255, 307 (1952) (“Though the formal title has been changed, in constitutional theory Puerto Rico remains, a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico.”).

142. See TORRUELLA, *supra* note 51; Cabranes, *supra* note 129 (referring to status as colonialism); see also JAMES E. KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 119 (1982) (“The establishment of commonwealth status perpetrated the myth that Puerto Ricans had exercised the right to self-determination. But that was not the case. With the acceptance of the new status, Puerto Rico was not offered statehood, yet it was no longer a colony in the sense that it had been.”); Jon M. Van Dyke, *The Evolving Legal Relationships Between The United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445 (1992) (agreeing with Judge Cabranes about Puerto Rico’s colonial status). But see David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452 (1985) (“In my opinion there is a compact, in the nature of an understanding based on considerations of political morality, limited to the Constitution of Puerto Rico and the provisions of Acts 600 and 447 which relate to the internal affairs of the island.”).

143. Cabranes, *supra* note 129, at n.26 (“[T]he phrase ‘colonialism with the consent of the governed’ is a familiar one in Puerto Rico’s politics.”); see Trías Monge, *supra* note 131, at 162.

144. TORRUELLA, *supra* note 51, at 194; Aleinikoff, *supra* note 121, at 33 (positing that the argument that establishment of commonwealth ended Congress’ plenary power “seems a loser.”).

145. See Helfeld, *supra* note 142, at 458.

146. MONTALVO-BARBOT, *supra* note 100, at 143. He explains: “[I]n general, the presentation of the Puerto Rican people as passive agents in the constitutional transformation of the island, an argument advanced by gradualists and traditional colonialist studies, is analytically and empirically simplistic and questionable.” *Id.*; see Leibowitz, *supra* note 140 (discussing the many issues involved in the status of Puerto Rico and its relationship to the United States, especially statutory issues).

147. Román, *supra* note 68, at 39.

which the island's citizens have voted against statehood and in favor of commonwealth status, suggest that the values of democracy may be best served by honoring that outcome and retaining commonwealth status."<sup>148</sup> This argument is striking in its simplicity: all we need to know is that the people of Puerto Rico consented to their present status. This is American democracy at its best and in accordance with the foundational values of the republic. Case closed.

But consent arguments can be pushed too far at times, and the example of Puerto Rico is one of those times. How can one explain, much less justify, subjecting oneself to political powerlessness? A cursory look at the earlier plebiscites in Puerto Rico does not end the argument; it merely begins it, both descriptively and normatively. The descriptive point is hard to dismiss: did the people of Puerto Rico in fact consent, explicitly and decidedly, to the terms of their present condition? It is hard to look at the process that led to the enactment of the Puerto Rican constitution in 1952 and conclude otherwise. If they agreed to anything then, it was their condition as it exists today.

But the debate over to exactly what citizens of Puerto Rico have consented is far less interesting than the normative question of whether the people of Puerto Rico consented at all. This line of argument follows a long and influential tradition. Off hand, the facts preclude support from the giants of the American liberal tradition. The best argument looks to an unusual source—Hobbes's *Leviathan*. It goes something like this:

Dominion acquired by Conquest, or Victory in war, is that which some writers call DESPOTICAL . . . as is the dominion of the Master over his Servant. And this Dominion is then acquired to the Victor, and the Vanquished, to avoyd the present stroke of death, covenanteth either in expresse words, or by other sufficient signes of the Will, that so long as his life, and the liberty of his body is allowed him, the Victor shall have the use thereof, at his pleasure. And after such Covenant made, the vanquished is a SERVANT, and not before: for by the word *Servant* . . . is not meant a Captive, which is kept in prison, or bonds, till the owner of him that took him, or bought him off one that did, shall consider what to do with him: but one, that being taken, hath corporall liberty allowed him; and upon promise not to run away, nor to do violence to his Master, is trusted by him.<sup>149</sup>

These are unpalatable words. On this view, one may conquer another and subject them to their rule, yet remain within the requirements of consent theory. As Hobbes explains, "It is not therefore the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant."<sup>150</sup> Like the prototypical gunman hypothetical, where one's compliance to the aggressor's demand is predictably given, Hobbes' theoretical model labels a great deal of behavior that we would commonly label coercive as consensual. His point is clear: whoever the sovereign may be, subjects must obey their sovereign; his acts are their acts. Specifics about how the requisite consent is secured are not important.

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148. John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J. POCKET PART 403 (2007), <http://thepocketpart.org/2007/05/19/fortier.html>.

149. THOMAS HOBBS, *LEVIATHAN* 255 (C.B. Macpherson ed., Penguin Classics 1985) (1651).

150. *Id.* at 255–56.

In this vein, the only consent one finds in the relationship between the territories and the United States is one of the Hobbesian sort, where conquered peoples must either consent or remain in a state of nature vis-à-vis their captors. Fittingly, historian R.W. Van Alstyne has called the period between 1789 and 1823 the “Birth of the American Leviathan.”<sup>151</sup> Thus, to say that the people of Puerto Rico consented to their present political status may be descriptively accurate. Whether it is normatively attractive—or as attractive as it might seem—is a more difficult and interesting question. But this is a different debate altogether.

### *B. Balzac and the Follies of Citizenship*

The question of citizenship as applied to residents of Puerto Rico raises a second puzzle. This question looks back to the Foraker Act, under which Congress referred to the inhabitants of Puerto Rico as “citizens of Puerto Rico.”<sup>152</sup> From this time forward, the status of the people of Puerto Rico remained an open and heavily debated question.<sup>153</sup> From 1901 to 1917, twenty-one bills were introduced in Congress to confer American citizenship to citizens of Puerto Rico.<sup>154</sup> Presidents Roosevelt and Taft endorsed many of these proposals, as well as the idea itself. President Wilson went further when, in his first message to Congress, he proposed “giving [Puerto Ricans] the ample and familiar rights and privileges accorded our own citizens in our territories.”<sup>155</sup> Finally, on March 2, 1917, President Wilson signed into law the Organic Act of 1917, also known as the Jones Act.<sup>156</sup>

The Jones Act is best known for conferring U.S. citizenship upon citizens of Puerto Rico. In light of all we know about the rhetoric of the times and the debates in the United States over territorial expansion, this grant of citizenship raises a host of important questions. For example, why did Congress choose to declare citizens of Puerto Rico U.S. citizens? Further, did this seemingly drastic change in the status of the Puerto Rican citizenry affect the status of the island under U.S. rule? And would the U.S. citizenship extended to Puerto Ricans under the Jones Act be qualitatively different from the concept of U.S. citizenship that existed elsewhere?

These questions, while undoubtedly of great importance for the island, do not appear terribly difficult to answer. A plausible understanding of the Jones Act is that Congress chose to extend U.S. citizenship to the inhabitants of Puerto Rico in order to signal its willingness to incorporate the island into the fold as a full voting member of the United States, essentially a precursor to statehood.<sup>157</sup> And why do this in 1917? No

151. R.W. VAN ALSTYNE, *THE RISING AMERICAN EMPIRE* 78–99 (1960).

152. 31 Stat. 77 (1900) (codified as amended at 48 USC § 731 et seq (2000)).

153. For the leading account of this period in particular reference to the question of citizenship, see José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391 (1978).

154. See TORRUELLA, *supra* note 51, at 85.

155. *Id.* at 89 (citing 51 CONG. REC. 74, 75 (1913)).

156. Ch. 145, § 5, 39 Stat. 951 (1917).

157. *Cf.* *Rasmussen v. United States*, 197 U.S. 516, 522–23 (1905) (discussing the pre-statehood status of Alaska and the United State’s plan to incorporate it into the union); *Hawaii v. Mankichi*, 190 U.S. 197, 200 (1903) (discussing the pre-statehood status of Hawaii).

better reason than the fact that the United States had failed to do so in the prior sixteen years.

This reading of the legislative materials found much support in Puerto Rico. However, it failed to garner much support with the U.S. Supreme Court. In fairness, the congressional reasoning behind the enactment of the Jones Act is still shrouded in much debate. An influential account posits that the United States finally extended its citizenship to Puerto Rico for strategic military purposes. It argues that, with World War I looming in the distance, the United States simply wished to enlist those Puerto Ricans of age into the armed forces.<sup>158</sup> This account appears decidedly wrong.<sup>159</sup> A second account contends that Puerto Ricans yearned for American citizenship, and the U.S. Congress was simply acquiescing to that desire.<sup>160</sup> A third account appears closer to the mark: in extending citizenship to Puerto Rico, Congress was only strengthening its relationship with Puerto Rico and signaling its commitment towards a long-term future together.<sup>161</sup>

Whatever the reasons, it soon became clear that the Jones Act did not accomplish as much as one would think a grant of citizenship should. A scant five years after passage of the Act, the U.S. Supreme Court in *Balzac v. Porto Rico*<sup>162</sup> explained that in conferring U.S. citizenship to the inhabitants of Puerto Rico, Congress in fact sought to accomplish very little. According to Chief Justice Taft, the language of the statute was vague and unclear on the question of incorporation, and Congress would not have intended to take the “important step” of incorporating Puerto Rico into the United States by “mere inference.”<sup>163</sup> How then to explain the Jones Act and its citizenship provision? The Court answered, “When Porto Ricans passed from under the government of Spain . . . [t]hey had a right to expect, in passing under the dominion of the United States, a status entitling them to the protection of their new sovereign.”<sup>164</sup> Congress was only extending the protection to which Puerto Rico had grown accustomed while under Spanish rule. This is the least a colonial power should do. Chief Justice Taft knew his Hobbes.

In taking this view, two further questions immediately surface. First, how should one distinguish the Court’s conclusion about Puerto Rico’s non-incorporation from the Court’s prior conclusion on Alaska’s incorporation?<sup>165</sup> This question is important for how it informs the meaning and scope of the incorporation doctrine. It also underscores the treatment of Puerto Rico at the hands of the Supreme Court. Second, what model of citizenship is the Court implicitly adopting with respect to citizens of Puerto Rico? That is, how should we understand the meaning of citizenship that undergirds the Court’s analysis?

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158. See MANUEL MALDONADO-DENIS, *PUERTO RICO: A SOCIO-HISTORIC INTERPRETATION* 108 (Elena Vialo trans., Random House 1972) (1972).

159. See Cabranes, *supra* note 153, at 404–05.

160. See *id.* at 403–06.

161. See *id.* at 406–07.

162. 258 U.S. 298 (1922).

163. *Id.* at 306.

164. *Id.* at 308.

165. Cf. *Rasmussen v. United States*, 197 U.S. 516 (1905) (discussing Alaska’s incorporation).



The first question looks with care to the concept of incorporation introduced by Justice White's opinion in *Downes*.<sup>166</sup> What did Justice White mean by "incorporation," and how did it apply to the acquisition of territories other than Puerto Rico? Justice Brown criticized the doctrine precisely on these grounds in his concurring opinion in *Rassmussen v. United States*:

What is an organized as distinguished from an incorporated Territory? Does not the acceptance of a cession of territory and the appointment of a civil governor work an incorporation of the territory as territory of the United States? If the acceptance of territory as territory of the United States be not an incorporation, what language is necessary to effect that result?<sup>167</sup>

In other words, what made Puerto Rico an unincorporated territory, yet Alaska an incorporated territory?

In *Rassmussen*, the Court offered three facts in support of its conclusion that Alaska had been incorporated by Congress: the text of the treaty of acquisition; subsequent congressional actions; and the Court's own decisions.<sup>168</sup> The text of the treaty was a key to the Court's analysis; it read as follows: "The inhabitants of the ceded territory . . . 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 liberty, property, and religion."<sup>169</sup> In contrast, the Treaty of Paris following the Spanish-American War read quite differently: "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."<sup>170</sup> If one of the consequences of incorporation is to extend the full protections of the Constitution to the territory in question, the Court's conclusion appears sensible. That is, by extending "all the rights, advantages, and immunities of citizens of the United States,"<sup>171</sup> the treaty of acquisition with Russia treats the territorial residents of Alaska as incorporated. Yet, by leaving the civil and political rights of territorial residents undecided, to be determined by Congress at a future date, those territories are actually unincorporated until Congress determines what these rights will be.

But if this conclusion is accurate, wouldn't the extension of citizenship to residents of Puerto Rico—and all concomitant rights and privileges that any such extension of citizenship must provide—affect the conclusion? In a word, no. In *Balzac*, the Court concluded that the grant of U.S. citizenship to citizens of Puerto Rico did not signal the intent of Congress on the question of incorporation.<sup>172</sup> The Court reached this conclusion fully cognizant of the "incorporation" of Alaska, and distinguished it on three grounds.

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166. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (White, J., concurring).

167. *Rassmussen*, 197 U.S. at 533 (Brown, J., concurring).

168. *Id.* at 516–25.

169. Treaty Concerning the Cession of the Russian Possessions in North America, U.S.-Russ., Mar. 30, 1867, 15 Stat. 542.

170. Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

171. Treaty of Cession, March 30, 1867, U.S.-Russ., 15 Stat. 542.

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

First, Alaska was “an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens.”<sup>173</sup> But this argument is odd and misplaced. Unquestionably, Puerto Rico *is* relatively small—3435 square miles, compared to Alaska’s 586,412 square miles—and, with close to 4 million inhabitants, it clearly has more inhabitants than it needs.<sup>174</sup> Implicit in the Court’s argument is the idea that territorial expansion is nothing more than a means to provide citizens with new and exciting places to migrate. What other reason could there be to add territories as full-fledged members of the United States? The Court apparently could not think of any.

In a second and related argument, the Court noted that Alaska was on the same contiguous land mass, and “within easy reach of the then United States”<sup>175</sup> (it is a scant 1842 miles from Seattle to Juneau), whereas Americans wishing to go to Puerto Rico would need to navigate the 1038 miles—or 902 nautical miles—between San Juan and Miami. The same citizens who would wish to migrate to the enormous and sparsely settled Alaskan land could do so easily and effortlessly, yet the same could not be said of Puerto Rico. To the Court, traveling the distance between the United States and Puerto Rico by water in 1905 posed grave obstacles.

Finally, incorporating Alaska “involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury.”<sup>176</sup> To the Court, the people of Puerto Rico were unfamiliar with the institution of trial by jury in ways that the Alaska territory was not, and “Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities . . . should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when.”<sup>177</sup>

This argument is non-responsive—or just plain wrong—in two ways. The first problem is the Court’s use of history; for, while it was true that the institution of trial by jury was not used under the Spanish regime, it was also true that jury trials had been established in district court since 1899 and “[b]y 1922 . . . were a common thing in Puerto Rico.”<sup>178</sup> The second problem is that of doctrinal consistency. The question for the Court was whether Congress had incorporated Puerto Rico through the grant of citizenship, not whether Congress had wished for Puerto Ricans to decide whether to adopt trial by jury. If the leading evidence the Court needed in *Rasmussen* was “the enjoyment of all the rights, advantages, and immunities of citizens of the United States”<sup>179</sup> for its conclusion that Alaska had been incorporated by Congress, then it must be the case that the actual grant of citizenship would accord these inhabitants the same “rights, advantages, and immunities of citizens of the United States.”<sup>180</sup> It must also mean that the grant of citizenship signaled Congress’ intent to incorporate the

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173. *Id.* at 309.

174. *See* Welcome to Puerto Rico, <http://welcome.topuertorico.org/index.shtml>.

175. *Id.* at 309.

176. *Id.*

177. *Id.* at 310.

178. TORRUELLA, *supra* note 51, at 100.

179. *Rasmussen v. United States*, 197 U.S. 516, 522 (1905).

180. *Id.*

island. If this argument is inaccurate, we must then examine the model of citizenship implicitly adopted by the Court in *Balzac*.

Turning to the second question flagged earlier, about the meaning of citizenship adopted by the Court with respect to Puerto Rico and the Jones Act of 1917. This question is another way of asking, “[w]hat does it mean to be an American?”<sup>181</sup> Three answers come to mind.

One answer understands citizenship as identity. For a description, listen to Nicias during the Sicilian campaign of 413, as he reminds his troops that “if you now escape from the enemy, you may all see again what your hearts desire, while those of you who are Athenians will raise up again the great power of the state, fallen though it be.”<sup>182</sup> He continued, “Men make the city, and not walls or ships without men in them.”<sup>183</sup> On this view, the citizen and the city are one and the same. More importantly, citizens understand themselves as part of the city. That is, Athenian citizens are not simply the recipients of rights and privileges by virtue of their standing as citizens. Instead, the citizens *are* Athens. They feel it. They know it. Or, in the words of Rogers Brubaker, “citizenship is not a mere reflex of residence; it is an enduring personal status that is not generated by passing or extended residence alone and does not lapse with temporary or prolonged absence.”<sup>184</sup>

A second answer equates citizenship to membership.<sup>185</sup> This is the leading model of citizenship.<sup>186</sup> T.H. Marshall’s classic argument takes root in this understanding. According to Marshall, citizenship is “a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed.”<sup>187</sup> On this view, rights and privileges flow from one’s status as citizen of a political community.

181. Peter J. Spiro, *The Citizenship Dilemma*, 51 STAN. L. REV. 597, 598 (1999) (reviewing ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997)); see Ronald Takaki, *Race at the End of History*, in *THE GOOD CITIZEN* 81, 82 (David Batstone & Eduardo Mendieta eds., 1999).

182. THUCYDIDES, *THE PELOPONNESIAN WAR* 474 (Richard Crawley trans., Modern Library 1982).

183. *Id.*

184. ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992).

185. See T. Alexander Aleinikoff, *Citizens, Aliens, Membership, and the Constitution*, 7 CONST. COMMENT. 9, 12 (1990). For critiques of this model, see *id.* at 20–27; Paul Tiao, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171, 215–217 (1993).

186. In the leading casebook in the immigration law field, for example, the authors define citizenship as “a term generally understood to mean full members of the state, entitled to the basic rights and opportunities afforded by the state.” T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1 (4th ed., 1998). Similarly, Peter Schuck and Rogers Smith define citizenship rules under one of two principles, either ascription or consensual. On either account, as they understand them, the relevant question is one of political community. See PETER H. SCHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ALIENS IN THE AMERICAN POLITY* 4 (1985).

187. T.H. Marshall, *Citizenship and Social Class*, in *CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT: ESSAYS* 65, 84 (1964).

Closely related to the first two answers is a third model of citizenship, defended by Judith Shklar in her Tanner Lectures, which she labeled “citizenship-as-standing.”<sup>188</sup> This model is “a genuinely historical and politically informed understanding of what citizenship has been and now is in America.”<sup>189</sup> Shklar focuses on two social and political practices that symbolize one’s status in the community: earning and voting. Of note, both of these practices must be understood against the background of chattel slavery; that is, it is central to her model that slaves could neither vote nor work, and that many groups have often equated their social and political condition with the institution of slavery. As she writes, “[f]rom the first [Americans] defined their standing as citizens very negatively, by distinguishing themselves from their inferiors, especially from slaves and occasionally from women.”<sup>190</sup>

Put thusly, the struggle for the franchise and for the status of free agent in the marketplace have been struggles for inclusion and recognition of one’s status as a republican citizen. Her point here is significant. To Shklar, the value of the franchise hinges on the prior question of standing. That is to say, Blacks and women fought for the franchise as part of their fight for inclusion and recognition within the political community. Young people did not undergo a similar process, and as such, the 26th Amendment has a much different significance for them, if any at all. “[T]he vote,” she writes, “gains its value from the standing that it confers.”<sup>191</sup>

All three models fail in reference to citizens of Puerto Rico. The identity model demands a close connection between citizen and country, an identification between nation and self. But citizens of Puerto Rico are Puerto Rican first, *estadounidenses* in name only.<sup>192</sup> To be sure, the United States attempted to “Americanize” Puerto Rico in myriad ways, such as the imposition of English as the official language and the open encouragement of American forms of patriotism.<sup>193</sup> These efforts ultimately failed, as “Puerto Rican identity and culture proved resilient enough to survive ‘Americanization.’”<sup>194</sup>

The membership model fails as well. Citizens of Puerto Rico are not members of the larger U.S. polity, with membership defined as a status of equality in rights and duties. If members at all, they are so in name only, as dual citizens of Puerto Rico and the United States. But their membership is one unquestionably grounded in inequality.

The standing model is important for what it tells us about the condition of Puerto Rican citizens. If voting symbolizes one’s status in the larger community, the disenfranchisement of the people of Puerto Rico sends a very clear signal about their standing in the U.S. polity. Women and slaves fought for the right to vote, and

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188. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2 (1991); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1448 (1993) (arguing that without the franchise, one “lack[s] the crucial form of social recognition”).

189. SHKLAR, *supra* note 188, at 9.

190. *Id.* at 15.

191. *Id.* at 18–19.

192. See Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000).

193. See *id.* at 67–69.

194. *Id.* at 70.

ultimately achieved it, thus securing their inclusion within the political community. The people of Puerto Rico cannot vote. Their fight for inclusion is still to come.

And so, after *Balzac*, the purpose of extending American citizenship to the territories remains an open question. This is second-class citizenship at best,<sup>195</sup> and “yet another transmutation of the meaning of citizenship in the American political system.”<sup>196</sup> More tellingly, the grant of American citizenship has meant only that territorial residents have the right to travel to the United States and back to their territories of origin.<sup>197</sup> As Judge Torruella complained, “In this 211th year of the United States Constitution, and 102nd year of United States presence in Puerto Rico, United States citizenship must mean more than merely the freedom to travel to and from the United States.”<sup>198</sup> Surely citizenship must mean much more than that.

### *C. Voting and the Territories: On the Virtues of Statehood*

The *Insular Cases* and *Balzac* converge on what is perhaps the most appalling aspect of the status of Puerto Rico: its lack of representation in Congress and the Electoral College. This disenfranchisement places citizens of Puerto Rico in an unenviable and indefensible position, as they have no power to affect the very institution that holds full and complete discretionary powers over them. Neither democratic theory nor the modern voting rights revolution provides *any* support for this lack of representation. But as anyone familiar with the history of women’s suffrage can attest,<sup>199</sup> this position receives support in the only place that counts: the federal courts and the constitutional text.

In *Sanchez v. United States*,<sup>200</sup> the district court concluded that a constitutional challenge to the disenfranchisement of citizens of Puerto Rico under the Electoral College was “insubstantial”<sup>201</sup> and “plainly without merit.”<sup>202</sup> Looking to the text of the Constitution and sprinkling in a bit of its history, the court explained that the Constitution does not confer the right to vote on anyone, but leaves the issue entirely to the discretion of the states.<sup>203</sup> Puerto Rico is not a state, and thus Puerto Ricans are fully disenfranchised for federal office. In closing, the court underscored that it “is of the opinion that it is inexcusable that there still exists a substantial number of U.S. citizens who cannot legally vote for the President and Vice president of the United States.”<sup>204</sup> Yet absent a constitutional amendment or statehood for the island, according to the court, the facts did not raise a substantial constitutional question.

This conclusion is difficult to defend. How can one justify the disenfranchisement of millions of U.S. citizens on U.S. soil? To be sure, none of the models of citizenship

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195. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 430 (1999); Rivera Ramos, *supra* note 72, at 108; Román, *supra* note 68.

196. Rivera Ramos, *supra* note 72, at 107.

197. See *Balzac v. Porto Rico*, 258 U.S. 298, 308 (1922).

198. *Igartúa de la Rosa v. United States (Igartúa II)*, 229 F.3d 80, 89 (1st Cir. 2000).

199. See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165–66 (1874).

200. 376 F.Supp. 239 (D.P.R. 1974).

201. *Id.* at 240.

202. *Id.* at 241.

203. *Id.*

204. *Id.* at 242.

discussed previously offer much support. Neither the standing model nor the membership model justifies the decoupling of voting from citizenship—in fact, these models posit the right to vote as the dividing line between citizens and non-citizens—while the identity model does not speak to the grant of the franchise at all. But to say that theoretical justifications are lacking is only half the story. After all, citizens of Puerto Rico are not alone in their disenfranchisement; felons are also among this group, as are children. And in both of those cases, the constitutional text and/or its history did most of the heavy lifting as well.<sup>205</sup>

And so the citizens of Puerto Rico are grouped alongside felons and children in the voting rights hierarchy. The states can do as they wish, and non-states cannot do anything at all.<sup>206</sup> This situation is mildly surprising, for as Pam Karlan writes, “there is widespread doctrinal and popular commitment to the general principle of universal adult citizen suffrage.”<sup>207</sup> Refusing to extend this commitment to citizens of Puerto Rico did not require fancy rhetoric or an agile legal mind. On the contrary, it only required the ability to read a text and apply its plain meaning thoughtlessly. It is not surprising that the argument has survived the test of time.<sup>208</sup> So long as Puerto Rico remains a territory, its citizens—U.S. citizens at birth—will remain disenfranchised for federal elections. This disenfranchisement is one of the black holes of U.S.-style democracy.

#### IV. BACK TO THE REVOLUTION: PAYING TAXES

*Commonwealth has been the clear preference because it's been a good deal. Puerto Ricans are American citizens — but with a few exceptions. They get no vote for president and have no voting representation in Congress, yet pay no federal income taxes. Given that deal, many of us stateside might seek commonwealth status.*<sup>209</sup>

To this point, defenders of the status quo are likely to shrug their shoulders, unimpressed and unpersuaded. They offer two rejoinders. The first argument, discussed previously, contends that Puerto Ricans have consented to their present condition, first in 1952 with the forming of their existing constitution, and later through the various plebiscites that demonstrate complacency with the status quo. This Part briefly discusses the second argument, which is a variant of the popular revolutionary

205. See U.S. CONST. amend. XXVI, § 1; *Richardson v. Ramirez*, 418 U.S. 24 (1974).

206. See Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174 (2007).

207. Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121, 122 (Mark E. Rush ed., 1998).

208. See *Igartúa de la Rosa (Igartúa IV)*, 417 F.3d 145 (1st Cir. 2005) (en banc); *Igartúa de la Rosa v. United States (Igartúa III)*, 386 F.3d 313 (1st Cir. 2005), *vac and reh'g*, 404 F.3d 1 (1st Cir. 2005), *rev'd*, 407 F.3d 30 (1st Cir. 2005) (en banc); *Igartúa de la Rosa v. United States (Igartúa II)*, 107 F.Supp.2d 140 (D.P.R. 2000), *rev'd*, 229 F.3d 80 (1st Cir. 2000); *Igartúa de la Rosa v. United States (Igartúa I)*, 842 F.Supp. 607 (D.P.R.1994), *aff'd*, 32 F.3d 8 (1st Cir.1994), *cert. denied*, 514 U.S. 1049 (1995).

209. Jeane J. Kirkpatrick & Kenneth L. Adelman, Op-Ed., *Stirring Up Trouble In Puerto Rico*, N.Y. TIMES, Feb. 26, 2006, at WK13.

slogan “no taxation without representation.” This answer attempts to legitimize the disenfranchisement of citizens of Puerto Rico on the basis that they do not pay federal taxes.

This argument is probably *too* simple, akin to a “sound bite:”<sup>210</sup> citizens of Puerto Rico do not vote, but they also do not pay federal taxes. On its face, this feels like a losing argument, particularly because it does not respond to the original claim. If Congress were to decide today that citizens of Puerto Rico must pay federal taxes, such a decision would not transform the island into an incorporated territory. This lack of taxation is only an exemption from the U.S. Tax code,<sup>211</sup> an exemption that Congress can readily take away. Indeed, the argument is a non sequitur. Furthermore, residents of Puerto Rico are not exempt from all taxes; they pay the same social security taxes and receive the same benefits as residents of the fifty states.<sup>212</sup> Finally, if the argument over the disenfranchisement of Puerto Rico comes down to dollars and cents, it might be useful to remember that Puerto Rico receives reduced federal benefits. The government of Puerto Rico offsets this reduction with higher local taxes.<sup>213</sup>

As a question of policy, this argument thus has a straightforward escape hatch: If Congress would only eliminate the tax exemption while increasing the benefits its sends to the island, the local government could lower its own taxes. In the end, citizens of Puerto Rico would pay the same amount in taxes while, if those who defend the status quo are correct, gaining the right to vote in federal elections.

As a question of constitutional law, however, the argument is even simpler. Judge Pieras explained in his opinion in *Igartúa II*:

Although the United States gives the residents of Puerto Rico billions of dollars in aid each year, it is implausible to argue that receiving such aid results in the waiving of the constitutional right to freedoms materialized by the right to vote. Nor does it hold water to state that such trade-off is economically worthwhile. Freedom is priceless and cannot be bought at the expense of a slap in the face with a \$5.00 bill.<sup>214</sup>

The right to vote cannot be contingent on the payment of a tax. In fact, the mere suggestion that U.S. citizens may be disenfranchised due to their exemption from federal taxes runs against the spirit, if not the letter, of the prohibition against poll taxes.<sup>215</sup> The argument is never phrased in this way, yet the suggestion is clear—the payment of taxes must precede the grant of the right to vote. This requirement would be plainly unconstitutional.<sup>216</sup>

210. See Christina Duffy Burnett, *Two Puerto Rican Senators Stay Home*, 116 YALE L.J. POCKET PART 408 (2007), <http://thepocketpart.org/2007/05/19/burnett.html>.

211. See David C. Indiano, *The Top 10 Myths About Puerto Rico Statehood*, 52 FED. LAW. 8, 10 (2005) (“Puerto Ricans pay all the federal taxes that Congress requires them to pay.”).

212. *Igartúa III*, 386 F.3d at 315 (Torruella, dissenting) (“It should be noted that Puerto Rico residents pay the *same* Social Security tax as the citizens who reside in the states and receive the same benefits.” (emphasis in original)).

213. Burnett, *supra* note 210.

214. *Igartúa de la Rosa v. United States (Igartúa II)*, 107 F.Supp. 140, 147 (D.P.R. 2000).

215. See Amber L. Cottle, Comment, *Silent Citizens: United States Territorial Residents and the Right to Vote in Presidential Elections*, 1995 U. CHI. LEGAL F. 315, 327–30 (1995).

216. U.S. CONST. amend. XXIV; *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966)

To be clear, I do not take a view on the question of whether citizens of Puerto Rico must be granted the right to vote in federal elections while retaining their tax exemptions. Some commentators decry the idea because “[t]his makes voting rights yet another federal handout—another big fat favor handed down from on high by Congress to its lowly colonial subjects.”<sup>217</sup> This is an argument that couples the right to vote with the responsibility of paying taxes. It is fine as far as arguments go. But make no mistake: this is a policy argument, not democratic theory or constitutional law.

#### CONCLUSION

The status of Puerto Rico under U.S. law raises innumerable questions of democratic theory and constitutional law. The answers are neither encouraging nor surprising. Citizens of Puerto Rico are American citizens at birth who cannot vote for either Electoral College delegates or congressional representation. This circumstance is an embarrassment for American democracy. It is unseemly to hold onto territories in perpetuity, grant their inhabitants American citizenship, yet subject them to the full discretionary powers of congressional majorities. It is also inconsistent with American constitutional values. According to Judge Pieras, “The United States Constitution forever changed the history of humanity when it did away with human bondage. It did away with slavery and, in doing so, vindicated the principle that all men are created equal. The inability to vote represents a form of slavery as it subordinates the will of the people.”<sup>218</sup>

Yet Puerto Ricans appear unconcerned by this, as polling data and plebiscite results amply reflect.<sup>219</sup> But acquiescence in the face of a tragic choice does not place the relationship between the United States and Puerto Rico on the road to democratic legitimacy. At best, the condition of the island of Puerto Rico under American rule is “colonialism by consent.”<sup>220</sup> How else can one explain support for a condition that subjects your country to discretionary rule by another with no existing recourse to exact political change?

The solution to this present condition is simple. Puerto Rico must either gain its independence or be granted the right to vote in federal elections. Congress must also cease to hold plenary powers over the island. Colonialism is a state of affairs inconsistent with our constitutional order.<sup>221</sup>

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(“To introduce wealth or payment of a fee as a measure of a voter’s qualifications is to introduce a capricious or irrelevant factor.”).

217. Burnett, *supra* note 210.

218. *Ignartúa II*, 107 F.Supp. at 148.

219. See Luis Fuentes-Rohwer, *Bringing Democracy to Puerto Rico: A Rejoinder*, 11 HARV. LATINO L. REV. 157, 164–65 (2008).

220. Aleinikoff, *supra* note 121, at 33.

221. See *Igartua de la Rosa v. United States*, 229 F.3d 80 (1st Cir. 2000) (Torruella, J., concurring) (condemning the present political status of Puerto Rico as “colonial treatment by the United States”); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 160 (1998); Román, *supra* note 68, at 6 (illustrating “the incompatibility of equality under colonialism”).