

## **PUERTO RICO AND THE RIGHT OF ACCESSION**

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### **Abstract**

On June 11, 2017, Puerto Rico held a referendum on its legal status. Although turnout was low, 97% of ballots favored statehood, rather than independence or the status quo. The federal government, however, has financial and political reasons to resist this preference: Puerto Rico would bring with it a massive, unpayable debt, and the potential to swing the current balance of power in Congress. That then raises the two questions of whether Congress could decide expel Puerto Rico (give it “independence”) or is legally required to give it statehood (“accession”).

The answers are not obvious. International law, we argue, suggests that the people of Puerto Rico have a legal right to determine their own status vis-à-vis the mainland. Whether domestic law protects the same right of self determination is a more difficult question.

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In 1998, Puerto Rico held a plebiscite about its status vis-à-vis the rest of the United States. For decades, voices both on and off the island had decried its status as an “unincorporated territory”—a legal category invented by a fractured Supreme Court in the widely-reviled *Insular Cases* a century ago,<sup>1</sup> and not entirely clarified by the adoption of a constitution and “commonwealth” status in the 1950s.<sup>2</sup> Broad dissatisfaction with this constitutional and political limbo—neither state nor territory; “belonging to” but not “part of” the United States;<sup>3</sup> “foreign ... in a domestic sense”<sup>4</sup>—might suggest that Puerto Ricans would want to resolve their colonial status by voting for independence. But of all the available options, independence proved to be the *least* popular: only 2.5% of voters preferred it, while 46.6% preferred statehood.<sup>5</sup>

Nearly twenty years later, Puerto Rico’s relationship to the rest of the United States is again in the headlines, and has again made its way to the Supreme Court. A June 2017 referendum found 97% support for statehood, but with only a quarter of eligible voters participating, it cannot be considered the final word.<sup>6</sup> Moreover, that vote was cast in the midst of an extraordinary debt crisis. The island has something in the range of \$70bn to \$100bn in outstanding debt (depending on whether one includes unfunded pension obligations) and it is showing no signs of being able to pay off anywhere close to that amount absent external assistance.<sup>7</sup>

Even as the significance of the debt crisis became clear throughout the spring and summer of 2016, the US Supreme Court handed down two decisions that effectively reaffirmed Puerto Rico’s colonial status.<sup>8</sup> In one, the Court held that Puerto Rico could not take advantage of the same municipal bankruptcy options as

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<sup>1</sup> See Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 1 YALE L. & POL’Y REV. 58 (2013).

<sup>2</sup> *Id.* at 80.

<sup>3</sup> *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); Harry Pratt Judson, *The Constitution and the Territories*, THE AMERICAN MONTHLY 451 (April 1900).

<sup>4</sup> *Downes*, 182 U.S. at 341–342.

<sup>5</sup> *Puerto Ricans Say ‘No’ to Statehood*, CNN, Dec. 14, 1998, at <http://www.cnn.com/WORLD/americas/9812/14/puerto.rico.01/>.

<sup>6</sup> Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES, June 12, 2017.

<sup>7</sup> See Mitu Gulati & Robert Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring* S.Cal. L. Rev. (forthcoming, 2017); Eric Platt, *New Puerto Rico Governor Seeks Amicable Debt Crisis Resolution*, FIN. TIMES, Jan. 19, 2017. On the unfunded pension obligations, see Nick Brown, *Puerto Rico’s Other Crisis: Impoverished Pensions*, REUTERS, April 7, 2016.

<sup>8</sup> *E.g.*, Noah Feldman, *Supreme Court Affirms that Puerto Rico Really is a Colony*, BLOOMBERG, June 14, 2016; Mark Joseph Stern, *Second-Class Sovereignty*, SLATE, Jan 14, 2016. See also José A. Cabranes, *Some Common Ground*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 39, 40–41 (Christina Duffy Burnett & Burke Marshall eds. 2001) (“Speaking plainly and honestly about our history requires us to acknowledge, without rancor and without embarrassment, that *colonialism* is a simple and perfectly useful word to describe a relationship between a powerful metropolitan state and a poor overseas dependency that does not participate meaningfully in the formal lawmaking processes that shape the daily lives of its people.”); Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF AMERICAN IMPERIALISM 65–66 (Gerald L. Neuman & Tomiko-Brown Nagin eds. 2015).

are available to US states.<sup>9</sup> In the other, the Court held that Puerto Rico, unlike a state, is not a separate “sovereign” for purposes of Double Jeopardy.<sup>10</sup>

Puerto Rico’s debt crisis and its treatment at the Supreme Court add new urgency to resolving its relationship to the United States.<sup>11</sup> It would be best, of course, for Puerto Rico and the federal government to agree on a new status. And just a few years ago, the President’s Task Force on Puerto Rico’s Status suggested that the President would follow the island’s lead: “The policy of the Federal executive branch has long been that Puerto Rico’s status should be decided by the people of Puerto Rico.”<sup>12</sup> Some have suggested that such agreement is not only desirable, but necessary.<sup>13</sup> The same Task Force, in fact, concluded that “if a change of status is chosen by the people of the [sic] Puerto Rico, such a choice must be implemented through legislation enacted by Congress and signed by the President.”<sup>14</sup>

But what if agreement continues to prove impossible<sup>15</sup> or, perhaps in response to recent developments, the situation deteriorates? In the wake of the debt crisis and the loss of the special federal tax status for corporations located in Puerto Rico,<sup>16</sup> it seems plausible that Puerto Ricans have even more reasons to support

<sup>9</sup> See *Commonwealth of Puerto Rico et al. v. Franklin California Tax-Free Trust et al.*, 136 S. Ct. 1938 (2016).

<sup>10</sup> See *Commonwealth of Puerto Rico v. Sanchez Valle et al.*, 136 S. Ct. 1863 (2016).

<sup>11</sup> Richard Thornburgh, *Puerto Rican Separatism and United States Federalism*, in Burnett & Marshall, *FOREIGN IN A DOMESTIC SENSE*, *supra* note 8, at 349, 350 (“The attempt to create a new category of state in union with the United States but with separate nationality under the American flag has failed and cannot succeed under the constitution and government structure of the United States.”); Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century*, in RECONSIDERING, *supra* note 8, at 241, 241 (“[T]he current commonwealth status is necessarily and unavoidably modifiable at the will of Congress, and ... commonwealth status therefore is not and cannot become a permanent solution to the status dilemma.”); Torruella, *Bankruptcy*, in RECONSIDERING, *supra* note 8, at 74 (“It is now an unassailable fact that what we have in the United States-Puerto Rico relationship is government without the consent or participation of the governed. I cannot imagine a more egregious civil rights violation, particularly in a country that touts itself as the bastion of democracy throughout the world. This is a situation that cannot, and should not, be further tolerated.”).

<sup>12</sup> PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS, REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS 18 (2011). The U.N. has passed resolutions to this effect at least seventeen times since 1952. In 1954, the American representative said: “I am authorized to say on behalf of the President that if any time the legislative assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted.” GERT OOSTINDIE & INGE KLINKERS, *DECOLONIZING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE* 248-49, nns. 24 & 25 (2003).

<sup>13</sup> Burnett & Marshall, *supra* note 8, at 17 (“It is widely agreed that both Congress and a majority of the inhabitants of the territory must consent to any resolution to the current colonial situation and that the terms of a transition out of the current status must be acceptable to both sides.”); Danica Coto, *Puerto Rico’s New Gov Promises Immediate Push from Statehood*, MIAMI HERALD, Jan. 2, 2017 (“The U.S. government has final say on whether Puerto Rico can become a state.”).

<sup>14</sup> PRESIDENT’S TASK FORCE, *supra* note 12, at 18.

<sup>15</sup> BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 248 (2006) (“[W]e can imagine Congress and the Court coming to a new understanding with respect to the United States’ island territories and the difficult ambiguous position that they (and Washington, D.C.) occupy in the political system and the U.S. Constitution. Harder to imagine is how the constitutionally unique arrangements in the different territories, just like those on American Indian reservations and in the District of Columbia, can be improved upon to the satisfaction of both territorial inhabitants and the interests of members of Congress and the executive branch.”).

<sup>16</sup> See Mary Williams Walsh & Liz Moyer, *How Puerto Rico is Grappling with a Debt Crisis*, N.Y. TIMES, July 1, 2016 (“Corporate tax breaks designed to spur economic growth for Puerto Rico expired in 2006, and manufacturing

statehood,<sup>17</sup> and indeed the island's new governor has made statehood his top priority.<sup>18</sup>

And yet the same factors might lead voters on the mainland to resist statehood, or even to push for independence as a way to avoid costly obligations.<sup>19</sup> On the same day that the United States elected Donald Trump as President—a man who has, to put it mildly, been willing to question the existing legal order—Puerto Rico chose a governor for whom statehood is first and foremost on the agenda. If Puerto Rico's new government were to demand statehood, could the Trump Administration say no? Or could Congress do the blocking, if, for example, the Republicans in power fear that giving two Senate seats and five House seats to Puerto Rico will result in a loss of control? More radically, could the United States do as Britain and the Netherlands have done with some of their colonies,<sup>20</sup> and essentially mandate independence?<sup>21</sup>

Some may recoil at the suggestion, but it is surprisingly difficult to identify *why* this would be legally impermissible.<sup>22</sup> There is, after all, ample historical precedent for nations “granting” independence to colonies that have not demanded

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and other business activity began to leave the island. When jobs started leaving, people followed or lost their jobs, reducing Puerto Rico's tax revenue. The government filled the gaps by borrowing even more.”)

<sup>17</sup> Forty-seven percent of Puerto Ricans supported statehood in the 1998 referendum. CNN, *supra* note 5. In the 2012 referendum, nearly two thirds of the voters who selected a preferred alternative status selected statehood. Roque Planas, *Puerto Rico Status Vote Proposed by White House*, HUFFINGTON POST, April 18, 2014. See also Danica Coto, *Puerto Rico's Campaign to Become the 51<sup>st</sup> State May be About to Get a Big Boost*, L.A. TIMES, Nov. 6, 2016; Danica Coto, *Amid Crisis, Support Grows for Puerto Rican Statehood*, U.S. NEWS, June 30, 2016; Silva, *supra* note 112.

<sup>18</sup> *Puerto Rico: Pro-Statehood Candidate Ricardo Rosselló Wins Governor Race*, NBC News, Nov. 8, 2016; Puerto Rico's nonvoting delegate in the United States House of Representatives has also supported statehood. See Pedro R. Pierluisi, *Statehood for Puerto Rico Now*, N.Y. TIMES, July 10, 2015, A19.

<sup>19</sup> See, e.g., Andy Uhler, *Puerto Rico's Governor Pushes Statehood to Cut Debt*, NPR's Marketplace, Jan 4, 2017; Coto, *supra* note 13. A recent article on the debt crisis had the following illustrative quotes:

To many residents of the mainland United States, separation between the USA and Puerto Rico seems like a natural solution to the island's financial woes as well as the most logical resolution of an anomalous constitutional situation. After all, the empire-building and thirst for military bases that led the United States to take Puerto Rico away from Spain in 1898 are long since obsolete . . .

and

[S]ecuring a reputation for the island as a deadbeat is unlikely to inspire the mainland United States to become excited about statehood

Matthew Yglesias, *The Puerto Rico Crisis, Explained*, Vox, May 2, 2016, <http://www.vox.com/2015/7/1/8872553/puerto-rico-crisis>.

<sup>20</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 56 (“[U]nlike London and The Hague, Washington has never insisted that its Caribbean territories accept independence—in fact the opposite is true.”); see also Godfrey Baldacchino, *The Micropolity Sovereignty Experience: Decolonizing but not Disengaging*, in EUROPEAN INTEGRATION AND POSTCOLONIAL SOVEREIGNTY GAMES 53 (Rebecca Adler-Nissen & Ulrik Pram Gad eds. 2013).

<sup>21</sup> One might dismiss the talk as idle, but economically motivated expulsions have been a topic of discussion in the context of recent economic crises. See, e.g., Rainer Buergin, *Schauble Tells Lew He'd Gladly Swap Greece for Puerto Rico*, BLOOMBERG BUSINESS, July 9, 2015 (“I offered my friend Jack Lew... that we could take Puerto Rico into the euro zone if the U.S. were willing to take Greece into the dollar union,” said Wolfgang Schauble at a Deutsche Bundesbank conference on July 9, 2015. Lew, the U.S. Treasury Secretary, “thought that was a joke,” according to Schauble.”).

<sup>22</sup> Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP PROB. 215(2017) (arguing for limits on the historical power to cede territory, while noting that traditional readings of international law would generally permit it).

it.<sup>23</sup> The United States is, like most countries, a product of cessions and transfers,<sup>24</sup> and centuries of practice suggest that nations have total control over their own borders. Is there a newly developed principle of international law, or some domestic constitutional rule, that would prevent it today?

The answers to these questions suggest something deeper about the law of sovereignty. We argue that colonies in general, and the people of Puerto Rico in particular, have a legal right to determine their own futures vis-à-vis their colonial powers—whether that means pulling away *or* pulling closer.

This may sound sensible enough in light of long-standing domestic policy approving statehood and growing international support for the principle of self-determination. But identifying a firm basis for these conclusions in constitutional or international law requires more work than one might expect. Puerto Rico is not a state, and as Christina Duffy Ponsa has demonstrated, there is reason to think that the *Insular Cases* were written in part to preserve the government's option to “de-annex” (i.e., expel) the island.<sup>25</sup> The same, it turns out, is true of other American territories.<sup>26</sup> The Philippines were acquired under the same treaty as Puerto Rico—decades later they were made independent, and the US nationality status of their residents revoked.<sup>27</sup> What prevents the same from being done to Puerto Rico?

We begin from a different starting point, by asking whether international law has to say on the matter. International law has played a role in justifying Puerto Rico's existing relationship with the rest of the United States. The initial relationship was the product of a conception of international law that allowed nations (particularly the imperial powers) to do what they wished with sovereign territory—steal from, sell, cede, or ultimately abandon—without the approval of the territory's residents.<sup>28</sup> The *Insular Cases* themselves invoked international law

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<sup>23</sup> See generally OOSTINDIE & KLINKERS, *supra* note 12. On the economics and politics of decolonization, see Erik Gartzke & Dominic Rohner, *The Political Economy of Empire, Decolonization and Development*, 41 BRIT. J. POL. SCI. 1, 2, 7-13 (2011) (“[T]he appeal of colonial holdings evaporated for leading nations by the mid twentieth century”).

<sup>24</sup> Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 245-46 (2014).

<sup>25</sup> Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 73 U. CHI. L. REV. 797 (2005). See also Cabranes, *supra* note 8, at 50 (“[T]he doctrine seemed to leave open the possibility that, for one reason or another, the United States might ‘dispose’ of its insular territories.”); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899) (making the same argument, and suggesting that a “conqueror” of territory “may not be able to retain what he receives”); U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States ....”).

<sup>26</sup> See Christina Duffy Ponsa, *The Edges of Empire and the Limits on Sovereignty*, 57:3 AMERICAN QUARTERLY 779 (2005).

<sup>27</sup> See Jones Act (Philippine Islands), ch. 416, 39 Stat. 545 (1916) (preamble declares intention of United States to recognize the independence of the Philippine Islands); Treaty of General Relations and Protocol, 61 Stat. 1174, TIAS 1568, 7 UNTS 3 (1946) (“Treaty of Manila of 1946”).

<sup>28</sup> As a result of the U.S. winning to Spanish-American war, Spain ceded a number of its colonies, including Puerto Rico, to the U.S. in the Treaty of Paris. See Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

regarding the legitimacy of western nations exercising authority over their less civilized colonial subjects while keeping them at arm's length.<sup>29</sup>

But international law changed fundamentally in the aftermath of World War II, and the United States was a leader in urging the changes.<sup>30</sup> In the post-1945 era, and under the United Nations charter and associated human rights treaties, it is no longer acceptable to treat former colonies as property. As part of this fundamental shift in the global order, the imperial powers were required to either let go of their colonies<sup>31</sup> or, if those colonies wished, bring them closer. The latter option is less recognized, but is at the core of the right of self-determination that all peoples (and particularly former colonies) are supposed to have.<sup>32</sup>

The United States, therefore, had to choose to either give up its colonies or represent to the international system (the United Nations in particular), that the former colony was being given full rights of self determination. In economic terms, the U.S. had to decide whether to “make” or “buy” whatever value Puerto Rico was providing since “steal” was off the table.<sup>33</sup> The U.S. could have decided to give Puerto Rico independence and entered into contracts with it for military bases (as it did with the Philippines and Cuba – the “buy” decision), but Puerto Rico was considered strategically important enough that the United States wanted full control and not just a contractual relationship (the choice was to “make” or incorporate).<sup>34</sup> And the price of bringing Puerto Rico into the United States should have involved granting rights to the Puerto Rican people, both individually and collectively. Theoretically, this was done in 1952 when the United States entered into a “compact” with Puerto Rico, allowing it to have its own domestic constitutional structure, and simultaneously reporting to the United Nations that the law “expressly recognized the principle of government by consent.”<sup>35</sup>

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<sup>29</sup> See *Downes v. Bidwell*, 182 U.S. 244, 300 (1901) (White, J., concurring); see also Chimene I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association*, in RECONSIDERING, *supra* note 8, at 77, 81 (pointing to Justice White having drawn from Halleck's treatise on international law for the rights of western nations to acquire territory and fully determine the fate of that territory); Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez and the Supreme Court, 1898 to 1905*, 27 J. AMER. ETHNIC HIST. 5, 9-10 (2008) (similar); Kal Raustiala, *Empire and Extraterritoriality in 20th Century America*, 40 SOUTHWESTERN L. REV. 605, 606-611 (2011) (similar).

<sup>30</sup> Keitner, *supra* note 29. Eleanor Roosevelt was a key player in getting the first international bill of human rights adopted by the United Nations in 1948. See MARY ANN GLENDON, *ELEANOR ROOSEVELT, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001). As most will guess, the history of this move was far more complicated than a simple articulation that the global community decided, after World War II, that colonialism was bad. See Mark Mazover, *The Strange Triumph of Human Rights*, 47 HISTORICAL J. 379 (2004).

<sup>31</sup> An example is the pressure that was put on the Franco regime in Spain in the 1960s to give up its colonial holdings in Africa, such as the Western Sahara. See Jennifer Labella, *The Western Sahara Conflict: A Case Study of U.N. Peacekeeping in the Post Cold War World*, 29 UFAMU: J. OF AFRICAN STUD. 67, 69 (2003).

<sup>32</sup> Blocher & Gulati, *Forced Secessions*, *supra* note 22. For more detailed accounts, see Erez Manela, *THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISM* (2007); Jan Eckel, *Human Rights and Decolonization: New Perspectives and Open Questions*, 1 HUMANITY 124 (2010).

<sup>33</sup> On the application of the “make or buy” conception to trades in sovereignty, see Paul B. Stephan, *Blocher, Gulati and Coase: Making or Buying Sovereignty*, DUKE L. J. (forthcoming 2017).

<sup>34</sup> See, e.g., Ramon Grosfoguel, *COLONIAL SUBJECTS: PUERTO RICANS IN A GLOBAL PERSPECTIVE*, 49-53 (2003).

<sup>35</sup> For a detailed discussion, see Keitner, *supra* note 29, at 86-94.

Whether and under what conditions the United States can expel Puerto Rico, or continue to hold it at arm's length, is partly a function of the compact's terms. Specifically, what was the implicit promise being made by the more powerful actor in the bilateral relationship to the weaker partner and to the international system? That implicit deal could not be that Puerto Rico could be kicked out of the Union at any point at the whim of the United States Congress, nor that it could perpetually be held at arm's length. To the contrary, we argue, Puerto Rico has the right to *demand* that it be brought closer into the Union, and specifically that it be given statehood.

Part I provides a legal and historical overview of Puerto Rico's status vis-à-vis the rest of the United States. Our focus is on the degree to which legal and political developments, including the *Insular Cases*, have arguably emphasized and preserved the United States' authority to keep Puerto Rico at arm's length, and even to expel it.

Part II turns to international law. Puerto Rico's semi-sovereign status complicates the analysis. Whether one considers Puerto Rico to be an independent sovereign in a treaty with the mainland or something more like the property of the United States, traditional readings of international law would not prohibit expulsion.<sup>36</sup> We argue, however, that contemporary international law requires that Puerto Rico's wishes be taken into account. Indeed, the values underlying self-determination suggest that Puerto Ricans should have the ultimate say in whether to be more closely associated with the United States.

In Part III, we consider domestic constitutional limitations on either expelling Puerto Rico or denying it statehood. We conclude, as others such as Christina Duffy Ponsa have done,<sup>37</sup> that the constitution does not clearly prohibit expulsion of unincorporated territories. And yet the constitution does not rule out the proposition that Puerto Rico has a right to demand statehood. That, in turn, raises questions about whether, if ever, a *state* could be expelled from the union.

The legality of expulsion is one of the central questions for the legacy of colonialism—of which Puerto Rico is one prominent part. Today, most colonies that have sought independence have received it.<sup>38</sup> Conquest is no longer the central threat to self-determination and self-governance—international law and practice forbid it. What, then, of “reverse conquest”—the expulsion of a territory against its

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<sup>36</sup> Blocher & Gulati, *Forced Secessions*, *supra* note 22 (discussing traditional rules regarding expulsion from states); Joseph Blocher, Laurence Helfer & Mitu Gulati, *Can Greece be Expelled From the Eurozone? Toward a Default Rule on Expulsion From International Organizations*, in *FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE* (Franklin Allen et al., eds. 2016) (discussing traditional rules regarding expulsion from international organizations).

<sup>37</sup> Burnett, *Untied States*, *supra* note 25.

<sup>38</sup> *E.g.*, Godfrey Baldaccino & Eve Hepburn, *A Different Appetite for Sovereignty: Independence Movements in Subnational Island Jurisdictions*, 50 *COMMONWEALTH & COMP. POL.* 555 (2012) (detailing the relative lack of appetite for independent sovereignty in recent decades among the former island colonies); Peter Clegg, *Independence Movements in the Caribbean: Withering on the Vine?* 50 *COMMONWEALTH & COMP. POL.* 422 (2012) (similar).



will? The harms might be similarly serious, especially for the millions of people living in former colonies who now *benefit* (comparatively speaking) from maintaining a relationship to the metropole. Do the constitutional principles against secession also prohibit expulsion? Can international law principles like self-determination be invoked against independence? In a world where sovereign territory no longer has the obvious value it once did, these are central questions for the law of sovereignty. The answer, we think, might be the right of accession.

## I. The Legal and Political Status of Puerto Rico

On February 15, 1898, the U.S.S. *Maine* exploded in a Cuban harbor. The fire and smoke over Havana that night helped inaugurate the Spanish-American War—a “splendid little war” fought nominally to secure Cuban independence from Spain,<sup>39</sup> and which was over by Christmas of that year. In the Treaty of Paris, Spain ceded Cuba, Puerto Rico, Guam, and the Philippines to the United States.

In ways that are perhaps unimaginable today, the acquisition of these territories made empire a part of the American political consciousness, to the degree that “[t]he election of 1900 largely turned upon the so-called issue of Imperialism.”<sup>40</sup> The end of the war cemented the United States’ status as a world power—never before and never since has it controlled so much territory.<sup>41</sup> But while expansion was on the minds of many,<sup>42</sup> the acquisition of Spain’s Caribbean and Pacific territories also raised the question of whether the United States could *dispose* of its new territories. As President McKinley put it in 1898: “While we are conducting war we must keep all we can get; when the war is over we must keep what we want.”<sup>43</sup> For a variety of reasons, Cuba and the Philippines did not remain under American control.<sup>44</sup> Puerto Rico and Guam still are.

<sup>39</sup> Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in RECONSIDERING *supra* note 8, at 375 (noting that the war “did not arise from any great economic or military necessity pressing on any party involved. It resulted essentially from the desires of some U.S. leaders to win a war, build a larger empire, and prove to the European powers that [white] Americans, too, were one of ‘the great masterful races,’ as the feisty Teddy Roosevelt put it”).

<sup>40</sup> Burnett & Marshall, FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 4 (quoting Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AMER. L. REV. 801 (1926)); Cabranes, *supra* note 8, at 4 (“The expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American war and dominated the presidential election campaign of 1900.”). See generally, Noel Maurer, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS 1893-2013 (2013).

<sup>41</sup> SPARROW, *supra* note 15, at 216 (“[T]he United States never encompassed as large an area as it did between March 1899 and May 1902.”).

<sup>42</sup> Remarkably, Attorney General John Griggs argued to the Supreme Court that the government needed broad powers to annex territory because it might someday acquire “Egypt and the Soudan, or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire.” (quoted in SPARROW, *supra* note 15, at 142).

<sup>43</sup> SPARROW, *supra* note 15, at 217 (“The lesson from Cuba was that the United States did not have to keep all the area that it acquired; the United States could also let territory go.”).

<sup>44</sup> JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 2 (1979) (“A policy of forcible annexation such as was effected in Puerto Rico, Guam, and the Philippines was not possible in the case of Cuba because of the self-denying proclamations that

Leading constitutional scholars addressed the question of sovereign territory not only as a political theory thought experiment, but as a pressing and immediate legal matter. Five remarkable articles published in the *Harvard Law Review* in 1898 and 1899 by luminaries like Abbot Lawrence Lowell, C.C. Langdell, and James Bradley Thayer<sup>45</sup> helped lay the groundwork for the Supreme Court's ultimate resolution of the issue.<sup>46</sup> (None, of course, concluded that Puerto Rico's status was for Puerto Ricans to determine.)

How striking, then, that the issue has so far receded from political and legal consciousness that most Americans probably cannot identify Puerto Rico's status, let alone account for the United States' other territories.<sup>47</sup> The past decade has seen an increase in scholarly attention to Puerto Rico,<sup>48</sup> but Sanford Levinson's observation is likely still accurate: Most constitutional law professors are probably not familiar with the *Insular Cases*<sup>49</sup>—the foundational Supreme Court cases that, between 1901 and 1922, created the notion of unincorporated territorial status and relegated Puerto Rico to it.<sup>50</sup> Though criticized from nearly all quarters, the cases still provide the foundation for the legal status of Puerto Rico,<sup>51</sup> as last term's Supreme Court cases demonstrate.<sup>52</sup>

#### A. Annexation and the *Insular Cases*

The annexation of Puerto Rico following the Spanish-American War raised the question of the island's status vis-à-vis the rest of the nation. Would it be a state, and its residents American citizens? Or would it be the property of the mainlanders? Would it, like Cuba (and, eventually, the Philippines), officially be given

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accompanied the American call to arms.”); *id.* at 3 n.5 (noting that “the Filipinos’ aspirations for independence were no less firm than those of the Cubans,” that the US conflict with the Philippines cost more lives than the war with Spain, and that in 1916 Congress declared its intention to give the islands independence, which it accomplished in 1946); SPARROW, *supra* note 15, at 70 (arguing that “important American business interests ... together with their congressmen and senators” opposed the annexation of Cuba); *id.* at 37 (“The war in the Philippines (1899-1902) cost hundreds of millions of dollars and demanded 70,000 U.S. troops at the peak ....”).

<sup>45</sup> Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

<sup>46</sup> When writing about the *Insular Cases*, it is obligatory to note that they inspired Mr. Dooley's famous aphorism, “no matter whether th' constitution follows th' flag or not, the supreme court follows th' iliction returns.” F.P. Dunne, MR. DOOLEY ON THE CHOICE OF LAW 52 (E.J. Bander ed. 1963).

<sup>47</sup> SPARROW, *supra* note 15, at 9.

<sup>48</sup> *E.g.*, RECONSIDERING, *supra* note 8.

<sup>49</sup> Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, in Burnett & Marshall, FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 123.

<sup>50</sup> John W. Davis, *Edward Douglass White*, 7 A.B.A. J. 377, 378 (1921) (calling the cases “the most hotly contested and long continued duel in the life of the Supreme Court”) (quoted in CABRANES, *supra* note 44, at 45); SPARROW, *supra* note 15, at 5 (“Observers at the time reported that the *Insular Cases* aroused more political passion than had any action by the Supreme Court since its decision in *Dred Scott v. Sandford* (1857).”).

<sup>51</sup> Bartholomew H. Sparrow, *The Centennial of Ocampo v. United States*, in RECONSIDERING, *supra* note 8, at 39, 45.

<sup>52</sup> See *infra* Section I.C.

independence? And, if none of the above, how long could the island be held in legal and political limbo?

In the immediate aftermath of annexation—which Puerto Ricans did not initially resist<sup>53</sup>—Puerto Rico’s political leaders preferred statehood.<sup>54</sup> But in 1900, those hopes were dashed when Congress passed the Foraker Act,<sup>55</sup> whose sponsor said it was designed “to recognize that Puerto Rico *belongs to* the United States of America.”<sup>56</sup> The Act made clear that Puerto Rico was not only not a state, but was disadvantaged even vis-à-vis other territories. As Ponsa notes, “most significantly, Congress had declined to extend the US Constitution by statute to Puerto Rico, as it had done in all prior territories, and instead of granting US citizenship to the island’s inhabitants, it declared native-born Puerto Ricans ‘citizens of Porto Rico,’ a nebulous and undefined status that seemed to amount to little more than an embellished form of statelessness.”<sup>57</sup>

Questions of citizenship and statehood were intertwined from the moment of annexation.<sup>58</sup> Article IX of the Treaty of Paris took away the Spanish citizenship of the territories’ residents, but did not guarantee U.S. citizenship. Instead, the terms of the Treaty simply provided that “[t]he 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>59</sup> This was potentially a significant change, since Puerto Ricans *had* been entitled to rights in the Spanish system,<sup>60</sup> and it was the first time that “in

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<sup>53</sup> CABRANES, *supra* note 44, at 3 (“In marked contrast [to Cuba and the Philippines], Guam and Puerto Rico generally welcomed the occupying forces and, for a considerable time, did not resist American rule.”); OOSTINDIE & KLINKERS, *supra* note 12, at 45 (“A strong independence movement remained absent—in stark contrast to its culturally similar ‘sister island’ Cuba.”).

<sup>54</sup> See Christina Duffy Ponsa, *When Statehood was Autonomy*, in RECONSIDERING, *supra* note 8, at 1, 3.

<sup>55</sup> Organic Act of 1900 (Foraker Act), ch. 191, 31 Stat. 77 (1900) (codified as amended in scattered sections of 48 U.S.C. (2013)).

<sup>56</sup> 33 Cong. Rec. 2473 (1900) (remarks of Sen. Foraker) (emphasis added). Ponsa, *When Statehood was Autonomy*, *supra* note 54, at 27-28 (“The rejection of Puerto Rican statehood by the United States led to the demise of Puerto Rico’s autonomist constitutionalism as it stood at the end of the nineteenth century. ... The effect was to strip the autonomists not only of their hopes but also of their ideas.”).

<sup>57</sup> Ponsa, *When Statehood was Autonomy*, *supra* note 54, at 27.

<sup>58</sup> LAWSON & SEIDMAN, *supra* note 227, at 194 (“Anyone who is at all familiar with the history of territorial governance knows that anything resembling the constitutional analysis described above sank to the bottom of Manila Bay along with the Spanish fleet in 1898. After 1898, territorial inhabitants do not necessarily get the benefit of constitutional provisions that seem, by their terms, to apply to them. ... The modern doctrine makes no sense on its face, and it makes even less sense the deeper one digs into it.”); E. Robert Statham Jr., *U.S. Territorial Expansion: Extended Republicanism versus Hyperextended Expansionism*, in RECONSIDERING, *supra* note 8, at 167, 173 (“States are created by people and are subsequently admitted into the Union. Territory is property, and is, therefore, distinct from people and citizenship.”); *id.* at 177 (“To contend that the Constitution (and the Territorial Clause in particular) gives complete power over and ownership of territorial acquisitions and their inhabitants is to treat inhabitants as property to be disposed of at the pleasure of Congress, a single branch of the national government. ... Whereas the United States has the right to acquire territory, it has no right whatsoever to acquire people.”).

<sup>59</sup> Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

<sup>60</sup> Monge, *supra* note 86, at 231 (“Puerto Ricans were Spanish citizens, equal in all respects to mainland Spanish citizens. The Spanish Constitution applied in Puerto Rico in the same manner as in Spain proper. Puerto Rico had as full a right to representation as any other province of Spain.”); Smith, *Bitter Roots*, in RECONSIDERING, *supra* note 8, at 373, 375 (noting that Puerto Rican home rule status was only conferred in 1897, before which “most Puerto

a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood.”<sup>61</sup> The terms of the treaty for the Louisiana Purchase, by contrast, provided something of a guarantee of resolution: “The inhabitants of the ceded territory shall be incorporated into the Union of the United States *as soon as possible* according to the principles of the federal Constitution.”<sup>62</sup>

In 1916, Puerto Rico’s resident commissioner, Luis Muñoz Rivera, articulated a position held by many of the island’s political elites, by trying to connect citizenship and statehood: “Give us statehood and your glorious citizenship will be welcome to us and to our children. If you deny us statehood, we decline your citizenship, frankly, proudly, as befits a people who ... will preserve their conception of honor, which none can take from them ....”<sup>63</sup>

The Jones Act of 1917 did eventually confer American citizenship on Puerto Ricans,<sup>64</sup> and it was still “widely believed that it would only be a matter of time until this ‘transitory phase’ would end in statehood.”<sup>65</sup> (Notably, a year before, the Jones Act of 1916 pledged eventual independence to the Philippines<sup>66</sup>—a promise that was fulfilled in 1946<sup>67</sup>). But as Judge José Cabranes notes, “the citizenship that was granted was not complete,” and the “very word ‘citizenship’ suggested equality of rights and privileges and full membership in the American political community, thereby obscuring the colonial relationship between a great metropolitan state and a poor overseas dependency.”<sup>68</sup> Cabranes concludes that “[b]y extending United States citizenship to the Puerto Ricans after promising independence to the

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Ricans, it seems, had long been content to be Spanish subjects, without a legally recognized, independent Puerto Rican nationality”).

<sup>61</sup> J. PRATT, AMERICA’S COLONIAL EXPERIMENT 68 (1950) (quoted in Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in RECONSIDERING, *supra* note 8, at 156.); Cabranes, *supra* note 8, at 20-21.

<sup>62</sup> Treaty of Purchase Between the United States and the French Republic, art. III. U.S.-Fr., Apr. 30, 1803, 8 Stat. 200, 202; *see also* Treaty of Amity, Settlement, and Limits Between the United States of America and His Catholic Majesty, U.S.-Spain, art. VI, Feb. 22, 1819, 18 Stat. 712, 714 (“The Inhabitants of the Territories which his Catholic Majesty cedes to the United States by this Treat, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities of the citizens of the United States.”); Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. IX, Feb. 2, 1848, 9 Stat. 922, 930 (“The Mexicans ... shall be incorporated in the Union of the United States and be admitted, at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.”). Even *Johnson v. M’Intosh*, in which Chief Justice Marshall gave imprimatur to the conquest of Native Americans, noted that while “[t]he conqueror prescribes [the] limits” of its title, “[h]umanity ... has established, as a general rule” that the condition of the conquered “shall remain as eligible as is compatible with the objects of the conquest.” 21 U.S. 543, 589 (1823). Specifically, “[m]ost usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected.” *Id.*

<sup>63</sup> 53 Cong. Rec. 7472 (1916) (remarks of Resident Commissioner Rivera) (quoted in CABRANES, *supra* note 44, at 89).

<sup>64</sup> Jones Act (Puerto Rico), ch. 145, S5, 39 Stat. 951 (1917) (current version at 8 U.S.C. S 1402 (1976)).

<sup>65</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 46.

<sup>66</sup> Jones Act (Philippines Islands), ch. 416, 39 Stat. 545 (1916) (preamble).

<sup>67</sup> 22 U.S.C. 1394 (1976).

<sup>68</sup> CABRANES, *supra* note 44, at 6-7.

Filipinos, Congress intended to do little more than proclaim the permanence of Puerto Rico's political links with the United States."<sup>69</sup>

In addition to these shaky constitutional foundations,<sup>70</sup> one must also note the degree to which the denial of full citizenship was a product of underlying racism.<sup>71</sup> Justice Brown would later conclude: "Indeed, it is doubtful if Congress would ever assent to 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>72</sup>

What is clear, however, is that Puerto Ricans' citizenship has not been treated as equal to that of other Americans. In *Balzac v. Porto Rico*,<sup>73</sup> for example, the Supreme Court held that the 1917 grant of citizenship to the island's inhabitants did not change their *constitutional* rights, so long as they remained residents of the island. Chief Justice Taft concluded that the locality, and not their individual status as citizens, was what mattered.<sup>74</sup> Taft's views of Puerto Ricans and their rights seem to have been tinged with much the same kind of racism that would later infect the opinions in the *Insular Cases*.<sup>75</sup>

The Foraker Act also "dispensed with the free trade that had been the norm between US territories and states."<sup>76</sup> Trade restrictions inspired a legal challenge, which eventually worked its way up to the Supreme Court as *Downes v. Bidwell*, the first and most famous of the *Insular Cases*.

The central underlying legal issue in the *Insular Cases* is the one addressed in the five *Harvard Law Review* articles noted above. Four of those articles divided on the question whether territories were part of the "United States."<sup>77</sup> But the fifth, by future Harvard President Abbott Lawrence Lowell, took an approach that Ponsa and

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<sup>69</sup> *Id.* at 15. Cabranes also concludes that it was purely coincidental that citizenship was extended a month before the United States entered World War I, as there is no evidence that Puerto Ricans were to be used as troops, and would have been subject to the draft in any event. *Id.* 14-16. Note, however, that the territories provide far more than their proportionate share of service members. See Landess Kearns, *Military Veterans Living in US Territories Sue for Right to Vote*, HUFFINGTON POST, Nov. 19, 2015.

<sup>70</sup> Torruella, *Bankruptcy*, in RECONSIDERING, *supra* note 8, at 69 ("This is clearly in direct contravention to the Constitution—the source from which civil and political rights and status emanate, *not* Congress ....").

<sup>71</sup> Perea, *supra* note 61, at 140, 156. See, e.g., Baldwin, *supra* note 45 at 415 (arguing against giving "the ignorant and lawless brigands that infest Puerto Rico . . . the benefit[s] of" the Constitution).

<sup>72</sup> 182 U.S. 244, 280 (1901).

<sup>73</sup> 258 U.S. 298 (1922)

<sup>74</sup> *Id.* at 309.

<sup>75</sup> *Id.* at 310-11 ("Congress has thought that a people like the Filipinos or like the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when."). A decade prior, while president, Taft suggested to Congress that the Puerto Ricans had been given too much responsibility over governance "for their own good." Message from President Taft to Congress (May 10, 1909), *reprinted in* S. Rep. No. 10, 61st Cong. 1st Sess. 1, at 5.

<sup>76</sup> *Id.*

<sup>77</sup> Sparrow summarizes Langdell and Thayer as subscribing to the view "that the United States consisted of the states *alone*," Baldwin and Randolph that "the United States consisted of *both* the states and the territories," and

Burke Marshall describe as falling “somewhere in between.”<sup>78</sup> Lowell argued that it was up to the political branches to determine whether a territory should be incorporated into the United States, or merely acquired by it: “The incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or treaty-making authorities.”<sup>79</sup> Lowell’s description of something like a purgatory of sovereign status is close to what the Supreme Court ended up endorsing.

There is no straightforward way to state the doctrinal result of the *Insular Cases*. An oft-quoted summary comes from Justice White’s opinion:

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since *it was owned by the United States*, it was foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, *but was merely appurtenant thereto as a possession*.<sup>80</sup>

This odd dichotomy—not foreign “in an international sense,” and yet “foreign ... in a domestic sense”—is captured by two of the decisions that made up the *Insular Cases*. In *Downes*, the Court effectively held in a splintered set of decisions that the Uniformity Clause (which requires uniform “duties, imposts, and excises ... throughout the United States”<sup>81</sup>) does not apply to Puerto Rico. This suggested that the island is indeed “foreign.” And yet in *De Lima v. Bidwell*, the Court held that Puerto Rico did not fall within the scope of the Dingley Act, which provided for duties on goods shipped to the United States from “foreign countries.”<sup>82</sup> This reinforced the notion that Puerto Rico was not foreign in an international sense.

There is much more to the *Insular Cases* than this, and—beginning with the Justices in *Downes*—people continue to disagree about whether, for example, the Supreme Court held that the federal government can exercise power extraterritorially without being subject to constitutional restrictions. (To take one example, the Court is currently considering *Hernandez v. Mesa*, regarding the application of the Fourth Amendment to a cross-border shooting.<sup>83</sup>) The cases are often said to stand for the proposition that the Constitution does not “follow the flag”—basically true as far as it goes, but also misleading. A better statement might be that *Downes* says the constitution does not *entirely* or *necessarily* follow the flag.<sup>84</sup>

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Lowell that “the United States was neither exclusively the states nor necessarily inclusive of the states and the territories.” SPARROW, *supra* note 15, at 40-41.

<sup>78</sup> Burnett & Marshall, FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 5.

<sup>79</sup> Lowell, *supra* note 45, at 176.

<sup>80</sup> *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring).

<sup>81</sup> *Id.* at 249 (requiring that “all duties, imposts and excises ... be uniform throughout the United States”).

<sup>82</sup> *De Lima v. Bidwell*, 182 U.S. 1 (1901).

<sup>83</sup> *Hernández v. Mesa*, 757 F.3d 249 (5th Cir. 2014), *aff’d en banc* 785 F.3d 117 (2015), *cert granted* 137 S.Ct. 291 (2016).

<sup>84</sup> Contrast Justice Brown’s suggestion that certain “prohibitions as go to the very root of the power of Congress to act at all” *Downes*, 182 U.S. at 277 (Brown, J.), with Justice White’s conclusion that “the question which arises

With regard to territorial status itself, one initial question is whether that status can be maintained indefinitely, or whether it must ultimately be resolved one way or the other—into statehood or independence, for example. In the *Insular Cases*, the Supreme Court suggested two answers to that question, depending on the kind of territory at issue. “Incorporated” territories are on their way to statehood and, hence, subject to the restrictions of the Constitution. “Unincorporated” territories like Puerto Rico, however, are not—they lack many basic constitutional protections, but also a constitutional trajectory. As Chief Justice Fuller put it in his dissent, “the contention [of the majority opinion] seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period.”<sup>85</sup>

Puerto Rico is not the only example within in the United States. The Northern Mariana Islands, Guam, the U.S. Virgin Islands, and American Samoa are also unincorporated territories,<sup>86</sup> and together they cover more such territory “than is controlled by any other country in the world.”<sup>87</sup> As Ponsa and Marshall note:

Although each of the U.S. territories has a different status ... they have several features in common: Congress governs them pursuant to its power under the Territorial Clause of the U.S. Constitution; none is a sovereign independent country or a state of the Union; people born in the territories are U.S. citizens, or, in the case of American Samoa, U.S. “nationals”; all are affected by federal legislation at the sole discretion of Congress; none has representation at the federal level.<sup>88</sup>

In the words of the Supreme Court: “The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their

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is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.” *Downes*, 182 U.S. at 292 (White, J., concurring).

<sup>85</sup> 182 U.S. at 272 (Fuller, C.J., dissenting).

<sup>86</sup> See Smith, *Bitter Roots*, in RECONSIDERING, *supra* note 8, at 108-11 for an account of acquisition of other territories; see also José Trias Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in RECONSIDERING, *supra* note 8, at 226, 231 (“The United States, one notes with a heavy heart, has been unaccountably slow in decolonizing its wards, slower than most modern administering nations.”). The uninhabited atoll of Palmyra “enjoys the curious distinction of being the only American jurisdiction outside the fifty states and the District of Columbia to which the U.S. Constitution applies ‘in its entirety.’ This is because Palmyra possess a unique legal status within the framework of U.S. law: it is the only ‘incorporated’ territory of the United States.” Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty*, in LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp, eds. 2006) (internal citations omitted).

<sup>87</sup> SPARROW, *supra* note 15, at 215; *Id.* 215-16 (“[O]nly China, with Hong Kong and Macau, has a larger territorial population.”).

<sup>88</sup> Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 1, 1-2; SPARROW, *supra* note 15, at 220 (noting “the variation that exists in the governing arrangements of the several territories”).

inhabitants.”<sup>89</sup> They therefore can “belong to” the United States without being part of it.

An analogous series of developments took place in international law at roughly the same time as the *Insular Cases* were reshaping US law. Martti Koskenniemi has noted that in the decades surrounding World War I—the last time that colonial expansion was truly prominent and open—some nations hesitated to officially extend sovereignty over territories.<sup>90</sup> As one critic put it, “greed and the wish for exploitation without administrative and policy costs had led European countries to employ hypocritical techniques of annexation without sovereignty.”<sup>91</sup>

The natural question to ask is why. Just as people are thought to have an innate desire for acquiring property, nations are generally supposed to prefer more sovereign territory, not less—the basic rules of international law and practice have evolved largely to address that expansionist impulse. Indeed, “[v]irtually all states and empires have treated territory as being of itself good,”<sup>92</sup> and “[t]he history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation.”<sup>93</sup>

Why, then, would the United States choose to keep Puerto Rico at arm’s length? One important factor is that most nations powerful enough to maintain colonies are also powerful enough to exert control more cheaply and effectively *without* claiming sovereign territory,<sup>94</sup> or even by explicitly disclaiming it.<sup>95</sup> As Ponsa notes, “We tend to associate imperialism with the acquisition of territory, the projection of power, and the imposition of sovereignty. The emphasis tends to be on expansion—more territory, plenary power, extended sovereignty. Yet American imperialism has also consisted of efforts to impose limits on expansion.”<sup>96</sup>

An obvious cost of territorial expansion, and therefore a reason to avoid it, is the principle for which *Downes* is most commonly invoked: the extension of constitutional law. If incorporating Puerto Rico—granting statehood, for example—would mean that the island’s residents could claim the full panoply of constitutional

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<sup>89</sup> *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).

<sup>90</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 109-125 (2001).

<sup>91</sup> *Id.* at 104.

<sup>92</sup> Andrew Burghardt, *The Bases of Territorial Claims*, 63(2) *GEOGRAPHICAL REV.* 225, 225 (1973); *see also id.* (quoting Niccolo Machiavelli: “[T]he wish to acquire more [territory] is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned.”).

<sup>93</sup> Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 *AM. J. INT’L L.* 830, 830 (2006).

<sup>94</sup> SPARROW, *supra* note 15, at 12 (“Crucial in the establishment of this nonterritorial, informal empire was the ability of the United States to divest itself of territories.”); *id.* at 246 (“President Roosevelt, his advisers, and other policymakers began to realize soon after the turn of the twentieth century that they could get the benefits of U.S. sovereignty without the costs of military occupation or territorial annexation.”)

<sup>95</sup> The Guano Islands Act is exemplary: “[N]othing in this chapter contained shall be construed as obliging the United States to retain possession of the islands, rocks, or keys after the guano shall have been removed from the same.” 48 U.S.C. §1419.

<sup>96</sup> Ponsa, *Edges of Empire*, *supra* note 26, at 189.



rights (including birthright citizenship<sup>97</sup>), and that the island itself would have more of a constitutionally-guaranteed role in the constitutional structure (senators and the like), the perceived “cost” to the rest of the United States might be high. By declining to treat Puerto Rico like a state, while also denying it a chance to affiliate with other nations,<sup>98</sup> the mainland got to eat its cake without the calories.

Somewhat more radically, though, keeping Puerto Rico at constitutional arm’s length may have been designed to preserve the United States’ exit option—retaining the power to *expel* Puerto Rico; a prospect that would be much more difficult (and perhaps impossible<sup>99</sup>) if it were to become a state. On this interpretation, the significant thing about the *Insular Cases* is not how much sovereign control over Puerto Rico they approved, but how much they held back.

Ponsa’s pathbreaking work has demonstrated the degree to which Puerto Rico’s relationship to the mainland must be understood through the lens of the federal government’s power to control that relationship.<sup>100</sup> Ponsa argues that it is wrong to understand the *Insular Cases* as holding that the Constitution does not “follow the flag.” Instead, the cases’ primary significance is that they “served the aims of empire in a different and unexpected way: not by opening the door to the annexation of American colonies, but by paving the way for their release.”<sup>101</sup> Ponsa argues that the cases established that territories like Puerto Rico “could be separated from the United States, or . . . ‘deannexed,’ as long as they remained unincorporated. Preserving the option of deannexation was precisely the reason not to incorporate a territory in the first place.”<sup>102</sup>

This is much the same phenomenon that Koskenniemi observed in international law. Human rights lawyers in the 1920s and 1930s argued strenuously that colonies should be treated as fully subject to the sovereignty of their colonizers—not held as possessions.<sup>103</sup> The latter was what happened in many contexts where the imperial power wanted to expropriate from the overseas

<sup>97</sup> Lisa Maria Perez, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008).

<sup>98</sup> On the benefits of opening up the competition for affiliation, see Joseph Blocher & Mitu Gulati, *A Market for Sovereign Control*, 66 DUKE L. J. 797 (2017).

<sup>99</sup> See *infra* Section II.B.2.

<sup>100</sup> See especially Ponsa, *supra* note 5.

<sup>101</sup> *Id.* at 799.

<sup>102</sup> *Id.* at 802; *id.* at 854 (“[T]he doctrine of territorial incorporation did have something to add to the Court’s territorial jurisprudence—namely, it established the constitutionality of territorial deannexation.”); see also *Downes*, 182 U.S. at 307-08 (White, J., concurring) (“Suppose at the termination of a war the hostile government had been overthrown and the entire territory or a portion thereof was occupied by the United States, and . . . it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States.”); Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 206 (1900) (arguing that there was no moral or constitutional obligation to retain Puerto Rico); Edward B. Whitney, *The Porto Rico Tariffs of 1899 and 1900*, 9 YALE L.J. 297, 314 (1900) (arguing that annexed territory could be ceded). On the broader issues, see generally CABRANES, *supra* note 44.

<sup>103</sup> See KOSKENNIEMI, *supra* note 90, at 109-110. The terminology in vogue at the time was “protection of minorities” rather than “human rights.” See Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 HIST. J. 379, 398 (2004).

territory but did not want to take on obligations to the people there (or worse, have those people come over to the mainland and claim rights). Koskenniemi describes the British “protectorates” in Africa as being one example, and the British “lease” of Cyprus as another.<sup>104</sup> Eric Posner describes Cuba in the early 1900s and later U.S. relationships with vassal states in similar terms.<sup>105</sup>

## B. Indeterminate Self-Determination

As a constitutional matter, the *Insular Cases* largely settled the status of Puerto Rico. And by the time the last of the cases was decided in 1921, the nation’s attention had largely turned away from the island.

But on the island itself, the question of status remains paramount and unsettled.<sup>106</sup> In 1948, for the first time, Puerto Rico elected its own governor—Luis Munoz Marín, who would remain in power for nearly two decades at the head of the Commonwealth Party. As the name of his party suggests, Marín presided over Puerto Rico’s transition to “commonwealth” status. This transition was overwhelmingly approved by the residents of Puerto Rico—76.4% voted in favor—and surely inaugurated a new era. But its precise legal significance remains unsettled, leading to a series of plebiscites and referenda in the decades since.

In 1996, Representative Don Young (R-AK) introduced a bill to present the people of Puerto Rico with a range of options that Congress would be willing to accept. “Enhanced commonwealth” was not among them, however, which caused “immediate and overwhelming opposition on the island.”<sup>107</sup> (The three options offered were statehood, commonwealth without “enhancements,” and independence.) The Young bill eventually died in the Senate, leaving Congress’s official position on the matter unresolved.<sup>108</sup>

Puerto Rico’s government (which favored statehood) responded by organizing a separate and nonbinding plebiscite in December 1998, which presented a slightly different list of options: independence, “free association,” statehood, non-enhanced commonwealth, and “none of the above.” Again, enhanced commonwealth status was omitted, leading Marín’s heirs in the Popular Democratic Party to advocate “none of the above.” In the end, 50.3% of voters did so, while 46.6% chose statehood and .06% supported the unenhanced commonwealth

<sup>104</sup> KOSKENNIEMI, *supra* note 90, at 125-151.

<sup>105</sup> Eric A. Posner, *The Limits of Limits*, THE NEW REPUBLIC (May 5, 2010); see also Bradley Simpson, *Self Determination, Human Rights and the End of Empire in the 1970s*, HUMANITY 239, 251 (Summer 2013) (describing the conditions under which Australia gave independence to Nauru and Papua New Guinea).

<sup>106</sup> Burnett & Marshall, *Between the Foreign and the Domestic*, in RECONSIDERING, *supra* note 8, at 17; Ute Guthunz, *Beyond Decolonization and Statehood? Puerto Rico’s Political Association with the United States*, 21 IBEROAMERICANA 42, 48 (1997) (noting that Puerto Rican political parties define themselves through status options).

<sup>107</sup> Burnett & Marshall, *Between the Foreign and the Domestic*, in RECONSIDERING, *supra* note 8, at 21; *id.* (“It would be difficult to exaggerate the divisions the Young bill caused.”).

<sup>108</sup> *Id.* at 22.

option.<sup>109</sup> The increasing support for statehood, however, was notable, and when Puerto Rico held another status quo plebiscite (its fifth) in 2012, received a plurality of support for the first time.<sup>110</sup>

On November 8, 2016, voters on the mainland chose Donald Trump as the next US President. (Puerto Ricans living on the island, although citizens, have no vote in the presidential election.) That same day, Puerto Ricans elected a new governor, Ricardo Rosselló. His New Progressive Party supports statehood (its main competitor, the Popular Democratic Party, does not), and on November 9 he called on President-Elect Trump to facilitate the move to statehood.<sup>111</sup> Rosselló said that “[t]he Republican platform is very clear” in supporting statehood if Puerto Rican voters choose it, and that “having a Republican House (of Representatives), a Republican Senate and a Republican president, there’s no excuse for not carrying it out.”<sup>112</sup>

In keeping with his campaign promises, Rosselló’s party organized a nonbinding referendum to be held on June 11, 2017. Percentage-wise, the results were overwhelmingly supportive of statehood—nearly 97% of all votes cast. But only 23% of voters turned out to cast those votes, leaving the implications unclear yet again. The next day, the *New York Times* reported, “By law, the next steps toward statehood remain in Congress, where advocates for statehood face the daunting task of persuading a legislature dominated by Republicans to take on a state which would have the nation’s highest poverty and unemployment rates and an unpaid \$74 billion debt.”<sup>113</sup> Whether those next steps are truly entrusted “by law” to Congress is among the central questions we address here.

### C. The Remarkable Resilience of the *Insular Cases*

In some respects, the turnaround with regard to Puerto Rico’s status has been remarkable. A century ago, the *Harvard Law Review* published five articles that, in different ways, defended the idea of American empire. Today one searches in vain for defenders of the *Insular Cases*.

But in other ways, the cases have not lost their grip. While the Court has overruled or minimized many other constitutional doctrines rooted in racism and a national self-conception that we would not tolerate today,<sup>114</sup> the *Insular Cases*

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<sup>109</sup> CNN, *supra* note 5.

<sup>110</sup> R. SAM. GARRETT, CONG. RESEARCH SERV., R42765, PUERTO RICO’S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 8 (2013).

<sup>111</sup> *Puerto Rican Governor-Elect Trusts Trump will Back Change in Island’s Status*, FOX NEWS, Nov. 9, 2016, <http://latino.foxnews.com/latino/politics/2016/11/09/puerto-rican-governor-elect-trusts-trump-will-back-change-in-island-status/>

<sup>112</sup> Cristina Silva, *52 States of America? Puerto Rico and Washington DC Voters Want Statehood*, INT’L BUS. TIMES, Nov. 10, 2016.

<sup>113</sup> Robles, *supra* note 6.

<sup>114</sup> Of the four cases Jamal Greene lists as constituting the “anticanon” of constitutional law, three fit this description: *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and

remain good law. The Supreme Court's 2015-16 term provided a few prominent illustrations.<sup>115</sup>

The first arose directly from Puerto Rico's debt crisis. In *Puerto Rico v. Franklin California Tax-Free Trust*,<sup>116</sup> the Supreme Court held that the bankruptcy code provided no relief for Puerto Rico or its municipalities and yet also precluded Puerto Rico from enacting an insolvency regime of its own.<sup>117</sup> Attempts to voluntarily restructure certain parts of the debt, while often showing initial glimmers of optimism, eventually fell apart.<sup>118</sup> Puerto Rico was in fiscal purgatory.

Eventually, Congress generated something of a solution—one that, whatever its effectiveness, emphasizes Puerto Rico's second class status. Specifically, Congress passed PROMESA, which opened the door to Chapter 9 of the Bankruptcy Code but with a steep price for Puerto Rico.<sup>119</sup> A control board was put in place that effectively had control over the territory's finances and conduct of any Chapter 9 type proceedings.<sup>120</sup> It remains to be seen whether this last minute action is sufficient to save the island from economic collapse, but in any event the loss of sovereignty was a price that no state would ever be asked to pay.

The second major case from the term drove home Puerto Rico's disadvantaged status. In *Puerto Rico v. Sanchez Valle*, the Court held that Puerto Rico, unlike a state, is not a "sovereign" for purposes of the Fifth Amendment's Double Jeopardy Clause (which permits successive prosecutions by separate sovereigns).<sup>121</sup> Writing for a six-Justice majority, Justice Kagan found that the events of 1950-52 created a "new political entity," which was "republican in form," and "subordinate to the sovereignty of the people of Puerto Rico."<sup>122</sup> But rather than creating a new sovereign, Congress' enactment of Public Law 600 reflected Congress' "broad latitude to develop innovative approaches to territorial governance."<sup>123</sup> And because Congress authorized and approved Puerto Rico's Constitution, Congress was "the deepest wellspring[]" of Puerto Rico's

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*Korematsu v. United States*, 323 U.S. 214 (1944). See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). The fourth case is *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>115</sup> Despite their ugly history, the cases do get cited by lawyers (including the Obama Administration's Justice Department) and judges. See Pema Levy, *Obama Administration Using Century-Old Racist Case Law to Block Citizenship*, MOTHER JONES, Feb. 23, 2015 (quoting Sanford Levison as saying: "A lot of people are justifiably embarrassed by the Insular Cases because they really do capture an earlier imperial moment that is saturated in white supremacy").

<sup>116</sup> 136 S. Ct. 1938 (2016).

<sup>117</sup> For details, see Gulati & Rasmussen, *supra* note 7.

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

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Mary Williams Walsh, *Puerto Rico Debt Relief Law Stirs Colonial Resentment*, N.Y. TIMES, June 30, 2016 ("[L]awmakers have said they had power to enact the Promesa under the Territorial Clause of the United States Constitution, and that renewed the debate here about whether Puerto Rico should be a state, a territory, a sovereign nation — or just what.").

<sup>121</sup> 136 S.Ct. 1863 (2016).

<sup>122</sup> *Id.* at 1869.

<sup>123</sup> *Id.* at 1876.

sovereignty.<sup>124</sup> Therefore, Puerto Rico was not a “separate sovereign” from the United States, and successive prosecutions would violate the Double Jeopardy Clause.<sup>125</sup>

Justice Breyer, in dissent, questioned whether this was the proper inquiry, and even whether it leads to the conclusion that Justice Kagan reached. After all, states are only admitted to the United States on Congress’s say-so, but are clearly treated as separate sovereigns for purposes of the Fifth Amendment. Breyer would have looked to “the broader context of Puerto Rico’s history” to determine whether the island had “gained sufficient sovereign authority to become the ‘source’ of power behind its own criminal laws.”<sup>126</sup> Among the most important moments in that history, of course, were the passage of Public Law 600 and the adoption of the Puerto Rican constitution, which—along with other evidence—Breyer concluded were sufficient to show separate sovereignty for purposes of double jeopardy analysis.<sup>127</sup>

Finally, although not directly involving Puerto Rico as a party, the Court denied certiorari in *Tuaua v. United States*. The parties in that case sought review of a D.C. Circuit decision upholding a 1900 law to the effect that people born in American Samoa are “nationals” who owe allegiance to the United States but—unlike people born in any of the 50 states, or even in territories like Guam and Puerto Rico itself—are not birthright citizens.<sup>128</sup> This, the petitioners argued, violates the Fourteenth Amendment’s declaration that all persons “born or naturalized in the United States” are U.S. citizens.<sup>129</sup>

Perhaps not since the *Insular Cases* have the constitutional implications of colonialism been so central to the Supreme Court’s docket. And in last Term’s cases, the Justices essentially re-affirmed the status quo—one in which the people of territories like Puerto Rico and Guam have what can only be described as second class status. This Term, the Court will again grapple with the *Insular Cases’* legacy, when it decides whether the Fourth Amendment applies to a cross-border shooting of an unarmed Mexican citizen in an enclosed area controlled by the United States.<sup>130</sup>

Most commentators on these developments see them as a continuation of Puerto Rico’s long-running subjugation,<sup>131</sup> and with good reason. But in other ways,

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<sup>124</sup> *Id.* at 1871.

<sup>125</sup> *Id.* at 1874.

<sup>126</sup> *Id.* at 1880 (Breyer, J., dissenting).

<sup>127</sup> *Id.* at 1884 (Breyer, J., dissenting).

<sup>128</sup> See Christina Duffy Ponsa, *Are American Samoans American?* N.Y. TIMES, June 8, 2016.

<sup>129</sup> *Tuaua v. United States*, 788 F.3d 300, 302–03 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461, 195 L. Ed. 2d 800 (2016).

<sup>130</sup> *Hernández v. Mesa*, 757 F.3d 249 (5th Cir. 2014), *affirmed en banc* 785 F.3d 117 (2015), *cert granted* 137 S.Ct. 291 (2016).

<sup>131</sup> See Andres G. Berdecia, *Puerto Rico Before the Supreme Court of the United States: Constitutional Colonialism in Action*, 7 COLUM. J. RACE & L. 80, 149 (2016); Feldman, *supra* note 8.

things have changed. A century later, it seems plausible that Puerto Ricans might favor statehood at precisely the same time, and for the same reasons, that voters and politicians on the mainland oppose it. Puerto Rico is not treated as a “part of” the United States; perhaps the United States no longer wants it to be even that. The Supreme Court cases demonstrate the former; the political response suggests the latter. Indeed, some of the rhetoric surrounding the crisis indicates that many political leaders think of Puerto Rico as a distant, ne’er do well relation—but not as family.<sup>132</sup>

It is not our purpose here to further criticize the *Insular Cases*—it is not clear anyone is left to defend them.<sup>133</sup> Judge Juan Torruella writes: “The *Insular Cases* were flawed when decided because they (i) directly clashed with our Constitution, (ii) were disobedient to controlling constitutional jurisprudence in place at the time, and (iii) contravened without exception every single historical precedent and practice of territorial expansion since our beginning as a nation.”<sup>134</sup> Yet the cases remain good law, giving Congress near-limitless power over Puerto Rico. Our interest lies with one particular *aspect* of that power—the power to deny statehood or even expel the island entirely.

## II. The International Law of Expulsion

The expulsion of a colony for financial reasons may seem far-fetched, but history tells us that this movie has played before. Imperial powers have given up territories—especially far flung ones—when economic conditions on the mainland were tough and the territory was expensive.

Newfoundland in 1930s and 1940s provides a ready example. By then it was the British Empire’s oldest colony, and had the status of a “self governing” dominion.<sup>135</sup> But thanks to a combination of fiscal mismanagement and a drop in global fish prices in the 1930s, it found itself with an unsustainable debt stock.<sup>136</sup> There were attempts to bring the situation under control—an imperial commission took control of governance for a period—but matters did not improve enough, and

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<sup>132</sup> For discussions along these lines, see, e.g., Cate Long, *Puerto Rico is America’s Greece*, REUTERS, March 8, 2012; *Greece in the Caribbean*, THE ECONOMIST, Oct 2012; Gervasio Luis Garcia, *I Am The Other: Puerto Rico in the Eyes of North Americans, 1898*, 87 J. AM. HIST. 44 (June 2000) (noting that classifying Puerto Rico as an unincorporated territory meant “relegating the island to the perpetual status of a ward who will never become part of his patron’s family”).

<sup>133</sup> Burnett & Marshall, *Between the Foreign and the Domestic*, in RECONSIDERING, *supra* note 8, at 2 (“No one today defends the colonial status sanctioned by these cases, yet the idea of a relationship to the United States that is somewhere ‘in between’ that of statehood and independence ... has not only survived but enjoys substantial support.”).

<sup>134</sup> Torruella, *Bankruptcy*, in RECONSIDERING, *supra* note 8, at 61, 62.

<sup>135</sup> David Hale, *The Newfoundland Lesson*, INT’L ECONOMY 51 (Summer 2003).

<sup>136</sup> *Id.* at 52 (noting that in 1933, Newfoundland had roughly \$100 million in debt, with an annual nominal income of only around \$30 million); see also KENNETH ROGOFF & CARMEN REINHARDT, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2013) (describing Newfoundland’s change in sovereign status resulting from its debt crisis in the 1930s).

World War II did not help.<sup>137</sup> By 1946, faced with the prospect of having to invest in Newfoundland to get it on its feet, the British mainland decided that it would be better to give up Newfoundland to Canada, which was willing to take on 90% of the debt.<sup>138</sup> The end result: Newfoundland essentially got expelled by the empire into the Canadian federation, with little or no say from the Newfoundlanders.

Finding guidance in international law is complicated as a threshold matter precisely because Puerto Rico's current status is, as a matter of international law, debatable. If the compact between Puerto Rico and the rest of the United States is akin to a treaty between separate sovereigns, one set of international rules applies; if Puerto Rico is "part of" the United States, a separate set applies. We analyze each in turn, recognizing that these are not the only options, and that the island's current status probably lies somewhere in between. The answers are not straightforward, but they suggest that the mainland does not have the exclusive and final word on Puerto Rico's future.

#### A. If Puerto Rico is a Separate Sovereign

Discussions of Puerto Rico's status sometimes proceed as if it is already something like an independent nation—indeed, the United Nations' Special Committee on Decolonization adopted a resolution criticizing violations of the island's "national rights."<sup>139</sup>

The piece of textual evidence typically used to suggest that Puerto Rico is sovereign is the phrase "in the nature of a compact," which appears in Public Law 600. Supporters of the "compact theory" have long trumpeted this language as indicating that Puerto Rico and the rest of the United States entered into the agreement as something like equals, or at least co-sovereigns.<sup>140</sup> This seems to be what convinced the United Nations General Assembly, which in November 1953 adopted a resolution recognizing that, under the compact, "the people of the Commonwealth of Puerto Rico have been vested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as an autonomous political entity."<sup>141</sup>

<sup>137</sup> Hale, *supra* note 135, at 53-59.

<sup>138</sup> *Id.* at 60.

<sup>139</sup> 33 U.N. GAOR, Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (1133d mtg.), U.N. Doc A/AC.109/574 (1978) (hereinafter "Decolonization Committee").

<sup>140</sup> It is possible to see this theory in existing First Circuit jurisprudence, at least before *Sanchez Valle*. See, e.g., *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (stating that "in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress"); *accord* *First Fed. Sav. & Loan Ass'n of P.R. v. Ruiz De Jesus*, 644 F.2d 910 (1st Cir. 1981) ("Puerto Rico's territorial status ended, of course, in 1952"); *United States v. Lopez-Andino*, 831 F.2d 1164, 1968 (1st Cir. 1987) (finding Puerto Rico's status like that of a state, and Puerto Rico and the United States separate sovereigns for Double Jeopardy Purposes); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'").

<sup>141</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 47 (internal citation omitted).

U.S. Courts, including the Supreme Court, have written that Puerto Rico is “sovereign” in matters not governed by the U.S. constitution<sup>142</sup>—an admittedly ambiguous account. Some supporters of the constitution go farther, arguing that the nature of the “compact” suggested permanence—specifically, because it is essentially a treaty it can only be changed by the consent of both Puerto Rico and the rest of the United States.<sup>143</sup>

As a matter of international law, however, this is not true. Treaties often make explicit provision for withdrawal or expulsion (which, in the case of a bilateral treaty like P.L. 600 is alleged to be, are functionally equivalent). But even when they do not, the power to withdraw under certain circumstances is well established. The ability to effectively expel a state that has materially breached an international law obligation was codified in the Vienna Convention on the Law of Treaties. Under Article 60 of the Vienna Convention, a “material breach” of a multilateral treaty by one party entitles “the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties.”<sup>144</sup>

Are the rules different if one conceptualizes the exit from a treaty as an expulsion rather than a withdrawal? Not really. As with withdrawal, many treaties explicitly provide for suspension or even expulsion of members.<sup>145</sup>

Even where those explicit provisions are absent, the best reading of background principles of international law suggests that there is an implicit right of expulsion if one party persistently breaches material terms of the agreement.<sup>146</sup> Outright expulsion from international organizations is rare, but not unheard of. The Soviet Union was effectively expelled from the League of Nations in 1939 after it

<sup>142</sup> *Posadas de Puerto Rico Assoc. v. Tourism Co*, 478 U.S. 328 (1986); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982).

<sup>143</sup> Jason A. Otano, *Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum*, 27 *FORDHAM INT'L L.J.* 1806, 1810 (2004) (“To some, Puerto Rico has created a unique relationship with the United States, bound by a compact, which cannot be denounced by either party unless it has the permission of the other party. . .”); cf. *Quinones*, 758 F.2d at 42 (“Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally. . .”); but see *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (“ . . . Puerto Rico is still constitutionally a territory, and not a separate sovereign.”).

<sup>144</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, Article 60(2)(a). Magliveras notes that if an international organization’s “constitutive instrument contains suspension or expulsion clauses, the organization has been delegated the power to proceed accordingly; if not, Article 60 of the Vienna Convention could be applied.” KONSTANTINOS D. MAGLIVERAS, *EXCLUSION FROM PARTICIPATION IN INTERNATIONAL ORGANISATIONS: THE THEORY AND PRACTICE BEHIND MEMBER STATES’ EXPULSION AND SUSPENSION OF MEMBERSHIP* 232-33 (1999); see also *id.* at 3 (“Since it is the minority of constitutive instruments which contain express suspension and/or expulsion clauses, this lacuna is addressed by arguing that the Vienna Convention on the Law of Treaties and the rules on permitted countermeasures could be invoked and applied by analogy in appropriate cases.”); Chi Carmody, *On Expelling Nigeria from the Commonwealth*, 34 *CANADIAN Y.B. INT’L L.* 273, 284 (1996) (“The Vienna Convention has never been invoked to resolve a disputed expulsion, but a number of the convention’s articles apply to such a situation.”).

<sup>145</sup> See generally Laurence R. Helfer, *Exiting Treaties*, 91 *VA. L. REV.* 157 (2005).

<sup>146</sup> See Blocher, Gulati, & Helfer, *supra* note 36.



invaded Finland<sup>147</sup>; Czechoslovakia was expelled from the International Monetary Fund in 1954 for refusing to provide data.<sup>148</sup> And, as one might expect, the threat of expulsion is sometimes invoked to get members to behave.<sup>149</sup>

Recently, the question of expulsion has gained salience in the context of the Greek debt crisis. Frustrated by Greece's inability to meet its obligations, and the fact that it apparently earned admission to the European Monetary Union on the basis of misleading numbers, the possibility of expelling Greece entirely from the Eurozone was raised.<sup>150</sup>

Some commentators have asserted that this is impossible, because the treaties do not make specific provision for such an eventuality. But, as we have shown, such an explicit power is not necessary. That does not mean that Greece *should* be expelled, nor even that its malfeasance rises to the level that would legally justify an expulsion. What it does mean, however, is that one cannot avoid those hard questions by simply concluding that expulsion is off the table.

Assuming that Puerto Rico is, like Greece, a separate sovereign, the situation is analogous in many ways. The precipitating event for contemplating expulsion is, in both cases, incipient bankruptcy and a massive debt crisis.

But as with Greece, this is not an argument in favor of expelling Puerto Rico. Expulsion on the basis of material breach seems to presuppose some degree of *fault*. And no one is claiming that the fault for the debt crisis lies all with Puerto Rico—or whether a debt crisis is the sort of fault that could justify expulsion. Indeed, as the Supreme Court's decision last year made clear, Puerto Rico has been denied the options to tackle its own domestic debt crisis that state governments in the US have been long allowed (and there seems to be no logical reason for this<sup>151</sup>). In the case of Greece, the alleged breach being discussed was very specific: Providing misleading numbers so as to ensure admittance to the monetary union in the first place. Nothing like that has happened in the case of Puerto Rico. Indeed, one might argue that its current dire straits are precisely the kind of unfortunate and unpredictable eventuality that leads to the creation of treaties, international organizations, and even nations in the first place. The obligation of the United States, whether as a treaty partner or the ultimate sovereign, is to provide the aid necessary to manage the crisis.

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<sup>147</sup> MAGLIVERAS, *supra* note 144, at 22.

<sup>148</sup> Blocher & Gulati, *supra* note 36.

<sup>149</sup> See Blocher, Gulati, & Helfer, *supra* note 36.

<sup>150</sup> E.g., Leo Cendrowicz, *Greek Debt Crisis: Alexis Tsipras Given Ultimatum – Push Through Cuts This Week Or Leave Euro*, THE INDEPENDENT, July 12, 2015 (reporting the threat made to Greece that either it take on more austerity in July 2015 or take a “time out” from the Euro); Dalia Fahmy & Elisabeth Behrmann, *Germans Tired of Greek Demands Want Country to Exit Euro*, BLOOMBERG, March 15, 2015 (reporting that 52% of Germans polled wanted Greece to exit the Euro; with 80% of Germans polled taking the view that Greece “isn’t behaving seriously towards its European partners”); *Germans Call For Greece to Leave the Euro, After “No” Referendum Vote*, FORTUNE, July 5, 2015; Jochen Bittner, *It’s Time for Greece to Leave the Euro*, N.Y. TIMES, July 7, 2015.

<sup>151</sup> Gulati & Rasmussen, *supra* note 7.

Finally, the very fact that Puerto Rico has been treated as a colony for so long should give it *more*, not less, control over its destiny. In that sense, the United States is the one in breach. That, we think, should give the island a different option: Not just to pull away from the mainland, but to push closer.

## B. If Puerto Rico is “Part Of” of the United States

The second way to see Puerto Rico is not as a separate “sovereign” akin to a foreign treaty partner, but as a part of the tighter compact that constitutes the United States. After all, Senate and House Reports both stated that “[Public Law 600] would not change Puerto Rico’s fundamental political, social, and economic relationship to the United States.”<sup>152</sup> If that is the case, then the relevant question is whether a nation can excise a part of itself.

The question of whether a region can be expelled from a nation has not traditionally been asked.<sup>153</sup> International law has long been obsessed with the sanctity and movement of borders, but it has generally assumed that the pressures that must be managed are either expansionist or secessionist.<sup>154</sup> This has led to the emergence of two foundational but sharply divergent principles, the reconciliation of which presents a considerable challenge.

On the one hand, the traditional rules of sovereignty give states control over their own borders so long as they do not interfere with the borders of other nations. This means that nations can—and often have—ceded territory to others without the approval of the territory’s residents. Most of the United States, including Puerto Rico, was acquired in such a fashion.<sup>155</sup>

On the other hand, particularly in the past century, law and practice have given increased attention to the rights and interests of “peoples” to determine their own political destinies. The ascendant principle of self-determination provides that, in certain circumstances, a sub-national group or region can choose to secede, or to become a part of another nation. The circumstances under which this right can be invoked remain a subject of debate, but nearly everyone agrees that former colonies are the paradigm example.<sup>156</sup>

The possibility of expulsion of sovereign territory, and especially of colonies like Puerto Rico, confounds these rules in both directions. The traditional rules of

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<sup>152</sup> S. Rep. No. 81-1779, at 3 (1950); H.R. Rep. No. 81-2275, at 3 (1950).

<sup>153</sup> Blocher & Gulati, *Forced Secessions*, *supra* note 22.

<sup>154</sup> *Id.*

<sup>155</sup> Blocher, *supra* note 24, at 245-46 (“The United States as we know it was shaped by land sales: the Louisiana Purchase, Alaska Purchase, and Treaty of Guadalupe Hidalgo together account for more than half of the nation’s landmass, and they are not the only territory whose sovereign control has been bought and sold.”).

<sup>156</sup> Karen Knop, *A Market for Sovereignty? The Roles of Other States in Self-Determination*, OSGOODE HALL L. REV. (forthcoming 2017).

sovereignty would say that the United States has a nearly unfettered<sup>157</sup> power to decide for itself whether to maintain Puerto Rico as a territory (subject to its own domestic restrictions, which are restrictive but not prohibitive).

But it is implausible to think that this traditional rule from the days of imperial power and conquest holds force today. International law no longer gives countries total authority to control their borders—even to cede territory voluntarily with another nation. If the right of self determination has any force, it cannot be the case that nations can buy, sell and abandon territory which has people on it without some strong showing of consent from those people. If those are the contours of the general rule, then what is the specific rule that would apply in the case of Puerto Rico?

Two characteristics of Puerto Rico's situation are particularly notable. First, it is a former colony. Second, it transitioned from colonial status into self governance status specifically in the context of the shift in the international order from accepting imperial subjugation to rejecting that in favor of the right of self governance.

Take the general international law rules for colonies first. Traditionally, international law scholars tend to think of the colonial right to self determination as going only in one direction. In the cases of former colonies, that typically means exit from the colonial state in favor of independence. And in a context in which independence is clearly the preferred outcome for all of the citizens of the former colony, that makes sense—as was typically the case for many of the colonies who achieved independence in the mid 1900s.

But if the former oppressor is a rich state, with valuable citizenship rights, it is not clear that the people of the colony would prefer independence—particularly at the point in history when international law and global norms no longer countenance colonial oppression. And this, as we have seen through multiple votes over the past few decades in Puerto Rico, is the situation there. (Alex Aleinikoff has described Puerto Rico's status as “colonialism by consent.”<sup>158</sup>) On the flip side of the equation, the preferences of the former colonial masters might also be different, now that the former colonial subjects have to be treated as equals. Now, granting them “independence” begins to look more attractive. Effectively, what we have is a

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<sup>157</sup> Independent doctrines of international law would prevent particular kinds of expulsion – one that would endanger the residents of the expelled territory, for example.

<sup>158</sup> T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT 15, 33 (1994); OOSTINDIE & KLINKERS, *supra* note 12, at 55 (noting that, on the U.S. Virgin Islands, “[i]n spite of U.N. criticism, constitutional matters seem of little importance either to the local population or to the United States,” and that in a 1993 status referendum, 80.4 percent of voters voted for continued or enhanced territorial status with the United States); *id.* (“The explanation for the populations’ [of Puerto Rico and the U.S. Virgin Islands] relative contentment with subordination to the United States lies in the inherent and substantial economic support and political stability they enjoy, as well as in the possession of American citizenship and the right of abode in the metropolis.”).

perverse kind of self-determination—de-colonization upside down.<sup>159</sup> Instead of a right of secession from the mainland (the former imperial overlords), the question is whether there is now a right of accession to the mainland.

We think that international law, if forced to answer, would prohibit such an expulsion, for almost exactly the same reasons that it gives Puerto Rico a right to independence. Puerto Rico, a former colony, should have a right to decide to be more closely aligned with the mainland. And perhaps that right should accrue to every individual citizen. Put differently, the right to self-determination of a former colony should (perhaps) negate the right to expel of the former oppressor (unless it pays to buy it out), but give the former colony all the rights of being an integral part of the parent/oppressor state. Whatever the deal regarding expulsion is with respect to those members of the union that *voluntarily* entered into it, surely the deal with the members who were *coerced* into joining should be interpreted in favor of the party coerced—then the rule on expulsion for states serves as something of a lower bound.

Although this conclusion is precisely contrary to the “direction” of most self-determination claims, it is nonetheless symmetric. International law has typically focused on expansion and secession, not expulsion, because those have historically been the forces that needed to be checked. But today, the former imperial powers face a different set of incentives. Physical territory is not so valuable as it once was, since natural resources are not so prominent as a source of national wealth. Simultaneously, citizens are potentially more costly, since it is legally, politically, and morally more difficult to discriminate against particular groups of them, and the social safety nets provided by the former imperial powers are expensive to maintain.

What status should Puerto Rico be entitled to? Statehood? “Enhanced commonwealth” status? The menu is more complicated than one might suppose, even within the United States. Internationally, the range of possibilities is dizzying.<sup>160</sup> We do not have answers to all of these questions. Our focus here is on *who* gets to make the decision, not what options are available. And as to the former question, we believe Puerto Rico has greater rights under international law than might currently be understood.

### C. The Domestic Relevance of International Principles

At first cut, international law may seem to be irrelevant to the question of whether Puerto Rico can be expelled from the United States. Surely no domestic court would think that it could counter a Congressional decision on such a matter by

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<sup>159</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 217 (“As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean ‘Overseas Territories’ still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.”).

<sup>160</sup> See Blocher & Gulati, *Forced Secessions*, *supra* note 22.

looking to international law to trump domestic legislative action. And indeed, the United States Court of Appeals for the First Circuit (which has jurisdiction over Puerto Rico) has said so in rejecting, on multiple occasions, the claim that human rights treaty obligations of the United States should mandate the grant of voting rights in national elections to inhabitants of Puerto Rico.<sup>161</sup>

There is a different way to come at the issue, though, which is to ask whether there is a different *source* of domestic law, one that may be informed by international law, that gives Puerto Rican citizens rights vis-à-vis the mainland.<sup>162</sup> If there is, and the question is one of giving that source content, international law can be relevant. For example, the Constitution says that the citizens of the states have the right to vote for the President and for representatives in Congress. However, it does not prohibit citizens who do not reside in a state from being given the right to vote. So, the argument goes, if there was a treaty or equivalent legal source (a public law, for example) that the U.S. had entered into that granted that right, there would be no Constitutional bar on recognizing it.<sup>163</sup>

In such a context, a domestic court would not be drawing on international law to countermand domestic law, but rather determining the terms of an *already existing* domestic agreement. There is no dispute that such an agreement exists: Public Law 600 was explicitly represented to be a “compact” that would govern the future relationship between the United States and Puerto Rico. Given that the agreement has no explicit terms about expulsion, a court would have to put in place a default provision.

As a legal matter, the move to commonwealth status was set in motion by the passage of Public Law 600, “an Act to provide for the organization of a constitutional government by the people of Puerto Rico,”<sup>164</sup> which provided for an insular referendum, which in turn overwhelmingly approved the creation of a constitutional convention.<sup>165</sup> The draft constitution was approved by a public referendum in March 1952, and by Congress soon after. The statehood movement regained steam at around the same time.<sup>166</sup>

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<sup>161</sup> See *Igartúa–De La Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc); *Igartúa v. United States* 626 F.3d 592 (1st Cir. 2010).

<sup>162</sup> See *Igartúa*, 626 F.3d. at 609 (Lipez, J., concurring) (“If Puerto Rico residents’ right to vote originates from a source of United States law other than the Constitution, however, it is possible that declaratory relief could properly involve individual government officials rather than Congress.”).

<sup>163</sup> *Igartúa*, 626 F.3d. at 608 (Lipez, J., concurring); see also José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L. J. 1389, 1394 (2007) (“Absent a clear constitutional intent to deny Congress the power to treat Puerto Rico as a state for purposes of representation in the House, the broad language of the Territorial Clause seems at least to provide a clearer source of power to enfranchise nonstate citizens than does the Seat of Government Clause [for D.C. residents.]”); but see Ponsa.

<sup>164</sup> Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b to 731e (2006)).

<sup>165</sup> Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico’s Political Process Failure*, 110 COLUM. L. REV. 797, 811 n.81 (2010)

<sup>166</sup> CABRANES, *supra* note 44, at 11 n.11 (noting, between 1952 and 1976, “a significant growth in the statehood movement, at the expense of those parties favoring independence or continued commonwealth status”).

A quarter century later, Rubén Berríos Martínez, Puerto Rican senator, law professor and leader of the independence party, summarized the compact and its aftermath:

Twenty-five years ago the establishment of the Commonwealth of Puerto Rico was the official U.S. response to the worldwide process of decolonization. It was the “showcase of democracy” for colonial peoples and underdeveloped countries, the U.S. model of how a country could pull itself out of poverty “by its own bootstraps” through an intimate political and economic relationship with the United States. . . . By 1977, the Commonwealth of Puerto Rico has become a source of embarrassment to the United States.<sup>167</sup>

By that time, the relationship was not only a source of embarrassment for the United States, but of aggravation for the island.<sup>168</sup>

Scholars and commentators have long been divided over what to make of Public Law 600, and in particular the fact that it describes itself as being “in the nature of a compact.”<sup>169</sup> Many point to this phrase as evidence that the United States and Puerto Rico entered into the agreement as something like separate sovereigns, and that Puerto Rico’s colonial status has been rescinded.<sup>170</sup>

Perhaps the best evidence in favor of this view is the representation that the United States itself made to the United Nations at the time. Article 73 of the United Nations Charter requires nations to make regular reports about their non-self-governing areas (i.e., colonies). Following the passage of Public Law 600, however, the United States told the United Nations that such reports would no longer be necessary, since the island was now sovereign.<sup>171</sup> The United States noted that Public Law 600 “expressly recognized the principle of government by consent,” and was “adopted in the nature of a compact.”<sup>172</sup> The U.N. accepted the representation.

<sup>167</sup> Rubén Berríos Martínez, *Independence For Puerto Rico: The Only Solution*, 55 FOREIGN AFFAIRS 561 (1977).

<sup>168</sup> CABRANES, *supra* note 44, at 8 (noting that in 1978, “the leaders of all major Puerto Rican political parties for the first time appeared before the United Nations’ Special Committee on Decolonization, which thereafter adopted a resolution critical of alleged United States violations of the Puerto Ricans’ ‘national rights.’”).

<sup>169</sup> H-Rep-No. 1832 Congress 2d Session, April 30, 1952 (“Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that, fully recognized the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”).

<sup>170</sup> See, e.g., Keitner, *supra* note 29 at 77; Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1126 (2009); see David A. Rezvani, *The Basis of Puerto Rico’s Constitutional Status: Colony, Compact, or “Federacy”?*, 122 POL. SCI. Q. 115, 123 (2007); Doriane A. Shaw, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT’L L. J. 1006, 1031 (1994); H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L. REV. 219 (1967); Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1958).

<sup>171</sup> See generally Letter from Puerto Rico Governor Alejandro J. García-Padilla to His Excellency Ban Ki-Moon, Secretary-General of the United Nations, Dec. 26, 2015, <http://www.scotusblog.com/wp-content/uploads/2016/06/PRico-governor-letter-to-UN-12-26-15.pdf>.

<sup>172</sup> Memorandum of the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico, *reprinted in*

Others argue, often to their own dismay, that Public Law 600 is nothing more than a statute—one that Congress could repeal without Puerto Rico's consent.<sup>173</sup> One possible implication is that Congress could not give away its power even if it wanted to, short of granting the island independence, statehood, or otherwise moving it into a different constitutional category.

In part because Public Law 600 does not provide clear answers, other attempts have been made to move Puerto Rico from commonwealth status to something more constitutionally recognizable—independence and statehood being the two most obvious options. Independence has never commanded majority support, but statehood parties have often dominated political office on the island.<sup>174</sup>

A threshold objection must be addressed, before getting to what the implicit terms of the compact may be. It might be argued that the terms of this compact have indeed been specified for all cases in which there is no explicit term, and that the specification is that *Congress* gets to decide on all such matters.

We are willing to concede that Congress bargained for what one might call the residual right of control. Parties often bargain to grant one side discretion in decision making.<sup>175</sup> That, for example, is the very essence of most employer-employee relationships: the employer has bargained to be able to tell the employee what tasks to do. But this is still a bargain; one that is supposed to benefit both sides. And implicit in the bargain is that one side will not use its authority to act in ways that expropriate from or unilaterally harm the other.<sup>176</sup>

Put differently, what we describe is the distinction between one side being the property of the other and there being a contract between the two. We use this distinction intentionally because when the question of Puerto Rico's relationship with the rest of the United States came up in the early 1900s, the Supreme Court ruled that constitutional rights did not necessarily extend to Puerto Rico, even though it was part of the U.S. And the reason for creating an exception for the rights granted by the Constitution was that Puerto Rico was different from the states; it was not a voluntary entrant into the Union, but rather was the property of the rest of the United States. In 1952, though, as part of the new world order where colonies

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PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 618 (3d ed 1988).

<sup>173</sup> See, e.g., JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 144-200 (1985); 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, 459 (1992).

<sup>174</sup> CABRANES, *supra* note 168, at 7.

<sup>175</sup> For an articulation of this insight, see Sandy Grossman & Oliver Hart, *The Cost and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986) and Philippe Aghion & Patrick Bolton, *An "Incomplete Contracts" Approach to Financial Contracting*, 59 REV. ECON. STUD. 473 (1992).

<sup>176</sup> E.g., Ronald J. Gilson, Charles Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice and Doctrine*, 110 COLUM. L. REV. 1377, 1416-17 (2010) (discussing how courts can (and do) step in to fill incompleteness at the margins of otherwise vague collaborative contracts – where one side is abusing the trust that the other has place in it in the context of a collaborative relationship).

and imperial subjugation were supposed to be things of the past, the U.S represented to the rest of the world (and to Puerto Rico) that the relationship was changing. Now, Puerto Rico was going to be part of the compact, with full rights of self governance; the days of colonial oppression were supposedly over.

Assuming that what we have is indeed a compact that is silent on the question of expulsion, what are the implicit terms that international law or practice provide? As explored elsewhere, the question of expulsion is latent in international law, and the rules, such as they are, must be found by integrating the traditional rules of state sovereignty (which gave nations total control over their borders, including the power to cede territory without the approval of its residents) and the modern principle of self-determination (which would give ultimate control to the territory's residents instead).<sup>177</sup>

### III. Constitutional Principles of Statehood and Expulsion

*When in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another . . .*<sup>178</sup>

The US Constitution was forged in the wake of a secession, and, decades later, secession was its greatest test. The Revolutionary War resulted in an involuntary transfer of sovereign territory away from England; the Civil War was an attempt to do the same to the United States themselves. In both cases, the force for change came from the periphery, and was opposed from the center.

But what if it were otherwise? What if England had decided to quit its fractious and expensive American colonies, against the colonists' wishes? Practically speaking, the outcome surely would have been similar—American “independence”—though the process would have differed, and likely would not have involved war. (It is hard to imagine the colonists taking up arms and sailing to England to force the crown to keep them.)

Or consider the situation if Lincoln had not been elected in 1860. If, say, the Democratic Party had not been so riven by disagreement about slavery, and Stephen Douglas had won its undivided loyalty, the doctrine of “popular sovereignty” might have become the official government position. And although Douglas himself opposed secession in 1861, the logic of popular sovereignty might seem to support it. If the people are sovereign, why should they be ruled by borders? What if the North had decided that it was better to expel the South—or at least let it go—rather than to sacrifice more than half a million lives to keep it?

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<sup>177</sup> See Blocher, Gulati, & Helfer, *supra* note 36.

<sup>178</sup> THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).



Evaluating the legality of expulsion, or of any changes to sovereign territory, tests the very boundaries of law itself. One might well believe that the issue is important, and yet deny that the constitution has anything to say about it—politics alone will likely be the final tribunal.

This is especially true of Puerto Rico and the other territories of the United States. Consider the following from Felix Frankfurter, then a clerk in the Bureau of Insular Affairs at the War Department:

*The form of the relationships between the United States and the unincorporated territory is solely a problem of statesmanship.* History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open.<sup>179</sup>

We agree that politics would play a leading role in any attempted expulsion. Courts would be unlikely to resolve the issue, just as they were not the main players in the debate over the constitutionality of the South's attempt to secede. If asked to decide the constitutionality of an expulsion, whether of a state or a territory, the Court might well invoke the political question doctrine and stay on the sidelines.

But the broad reach of politics and limited role of courts does not mean that the questions are not constitutional. In *Luther v. Borden*—the case that effectively established the political question doctrine—the Court did not hold that the “republican form of government” clause of Article Four is a nullity, but rather that it must be enforced by the President and Congress.<sup>180</sup> It has said roughly the same thing about sovereign authority over the territories.<sup>181</sup> And in some ways, the Court has weighed in on the legality of secession. In the post-war case of *Texas v. White*, for example, the Court held that Texas had never left the United States, that the Constitution did not permit secession, and that the ordinances of secession and all legislative acts based on them were “absolutely null.”<sup>182</sup>

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<sup>179</sup> Monge, *supra* note 86, at 235 (quoting *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953) (quoting Frankfurter)) (emphasis added); see also Sanchez-Valle, 136 S. Ct. at 1875 (describing Puerto Rico's attainment of commonwealth status as a “prime example” of Congress's “broad latitude to develop inventive approaches to territorial governance”).

<sup>180</sup> *Luther v. Borden*, 48 U.S. 1 (1849).

<sup>181</sup> *Jones v. United States*, 137 U.S. 202, 212 (1890) (“Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.”).

<sup>182</sup> *Texas v. White*, 74 U.S. 700, 701 (1868), overturned in part by *Morgan v. United States*, 113 U.S. 476 (1885)

Consider, likewise, the Supreme Court of Canada's opinion on the legality of Quebec's attempted secession.<sup>183</sup> The Court rejected the notion that Quebec had a right to unilateral secession under Canadian law, but also identified circumstances under which such secessions would be legally permissible.<sup>184</sup> Crucially for our purposes, it did so as a *legal* matter, and in a way that the parties ultimately respected.

In short, we think that the Constitution can speak to the legality of expulsion, and that its rules matter. Whether or not litigated, the very *idea* of the constitution is hugely important.<sup>185</sup> Unfortunately, the constitutional rules are not entirely clear and, to the extent that they are, leave something to be desired.

Undoubtedly there are constitutional prohibitions on particular types, methods, or motivations for expulsion. Expulsion motivated by racial animus and inflicting harm on Puerto Ricans would presumably be forbidden by the Equal Protection clause, to take one obvious example. Such claims could be evaluated by familiar doctrines, and subject to analysis like any other government action.

It must be emphasized, of course, that the text of the Constitution gives Congress enormous power in this area. Article V, Section 3 says that "New States may be admitted *by the Congress* into this Union."<sup>186</sup> The only limits that section mentions (forbidding the creation of states within existing states, or by "Junction of two or more States," without the consent of the states concerned) are irrelevant to the admission of Puerto Rico. Moreover, the same provisions give Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"—this is the Territories Clause, and has been read (in the *Insular Cases* and elsewhere) to give Congress basically plenary authority over the territories.

These provisions seriously complicate any constitutional claims Puerto Rico might make for statehood. The matter is not clearly in the island's favor. But it is not clearly a loser, either.

## A. Domestic Self-Determination for the Territories

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<sup>183</sup> Reference Re Secession of Quebec [1998] 2 SCR 217.

<sup>184</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 218, ¶ 138 (Can.); see *id.* at ¶ ¶ 128–35.

<sup>185</sup> See, e.g., Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051–52 (1984); Paul Finkelman, *How the Civil War Changed the Constitution*, N.Y. TIMES, June 2, 2015; cf. Burnett & Marshall, *Foreign in a Domestic Sense*, in RECONSIDERING, *supra* note 8, at 19 ("This disagreement [over Puerto Rico's status] is not merely 'political': differing views about what is constitutionally possible shape the different views about what is desirable.").

<sup>186</sup> U.S. Const., Art IV, sec. 3.

There is precedent for statehood-on-demand—precedent that supporters of Puerto Rican statehood have invoked.<sup>187</sup> In 1796, Tennessee became the 16<sup>th</sup> state—and the first to be carved out of federally owned territory. (The thirteen colonies, Kentucky, and Vermont preceded it, but none was ever a territory). But the path to statehood was not simple. The land that today constitutes Tennessee was originally granted to the federal government by North Carolina,<sup>188</sup> to be governed under the terms of the Northwest Ordinance.<sup>189</sup> As to statehood, Article V of the Ordinance stipulated that “[t]here shall be formed in the said territory not less than three nor more than five states.”<sup>190</sup> And, upon reaching “sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever.”<sup>191</sup> However, admission of States with a population of less than sixty thousand would be allowed if “consistent with the general interest of the confederacy.”<sup>192</sup>

Congress acquiesced to the conditions of North Carolina’s legislature, and in 1790 passed a bill establishing the Southwest Territory.<sup>193</sup> The Territory elected its first legislature in 1794,<sup>194</sup> and, within the year, the legislature passed a bill providing for a census and polling regarding public opinion of Statehood.<sup>195</sup> The census indicated that the Territory had a population of 77,262 persons,<sup>196</sup> and the results of the referendum showed “6,504 votes in favor of Statehood. . . and 2,562 against.”<sup>197</sup>

The census and referendum results prompted Governor Blount to call for a convention to adopt a state constitution.<sup>198</sup> And, in February 1796, the convention adopted a constitution proclaiming that the people of the Territory “mutually agreed with each other to form themselves into a free and independent State by the name of the State of Tennessee,” and asserted they “ha[d] the right of admission into the General Government [of the United States] as a member state thereof.”<sup>199</sup> Following adoption of their constitution, Tennessee elected a new Governor and

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<sup>187</sup> Coto, *supra* note 13 (reporting that the new Governor of Puerto Rico “said he would soon hold elections to choose two senators and five representatives to Congress and send them to Washington to demand statehood, a strategy used by Tennessee to join the union in the 18th century”).

<sup>188</sup> See 1789 N.C. Sess. Law 4–6 (stipulating conditions for cession of land).

<sup>189</sup> See Act of May 26, 1790, ch. 14, 1 Stat. 123 (establishing governance structure for Southwest Territory); see also U.S.C.A. Northwest Ordinance.

<sup>190</sup> U.S.C.A. Northwest Ordinance, Art. V.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Act of May 26, 1790, ch. 14, 1 Stat. 123.

<sup>194</sup> PHILIP M. HAMER, TENNESSEE—A HISTORY, 1673–1932 164 (1953).

<sup>195</sup> *Id.* at 165.

<sup>196</sup> The 77,262 figure included 10,613 slaves, giving the Territory a population of 66,649 free inhabitants.

STANLEY J. FOLMSBEE ET AL., HISTORY OF TENNESSEE 209 (1960).

<sup>197</sup> *Id.*

<sup>198</sup> Cf. Charlotte Williams, *Congressional Action on the Admission of Tennessee into the Union*, 2 TENN. HIST. Q. 291, 295 (1943) (linking the results of the census with Governor Blount’s calls for a constitutional convention).

<sup>199</sup> Tenn. Const., pmb1.

replaced its territorial assembly with a newly elected state legislature.<sup>200</sup> Stanley Folmsbee writes that following the adoption of Tennessee's constitution "government under the law creating the Southwest Territory came rapidly to an end."<sup>201</sup>

In April, President Washington presented Tennessee's constitution, the results of the territorial census, and Tennessee's request for admission to Congress.<sup>202</sup> Opponents of immediate admission argued that the terms of the Act of 1790 indicated an antecedent act of Congress was required to establish the borders of States.<sup>203</sup> Furthermore, the Act did not authorize the territorial government to undertake a census,<sup>204</sup> and the census conducted by the territorial government overinflated the number of inhabitants.<sup>205</sup>

Proponents of immediate admission argued that opponents of immediate admission were "spinning a finer thread than was necessary."<sup>206</sup> Rather than ask whether Tennessee had met all of the conditions required by the Act of 1790, the only appropriate question was whether Tennessee *should* be admitted as a State.<sup>207</sup> Proponents argued in favor of the principle of self-determination—the people of the Southwest Territory desired to be admitted to the Union as a State, and unless admission worked to the general detriment of the Union, Congress should admit Tennessee as a State.<sup>208</sup> Furthermore, the people of the Southwest Territory "were at present in a degraded situation; they were deprived of a right essential to freedom—the right to be represented in Congress."<sup>209</sup> Should Congress admit Tennessee to the Union, prior to having the requisite number of inhabitants, "it was only a fugitive consideration."<sup>210</sup> Rather, "where there was doubt, Congress ought to lean towards a decision which should give equal rights to every part of the American people."<sup>211</sup>

After two days of debate,<sup>212</sup> the House passed a resolution recognizing that the "Territory, now bearing the name of the State of Tennessee was entitled to all privileges enjoyed by the other States of the Union, and that it should be one of the sixteen States of America."<sup>213</sup> In the Senate, political concerns predominated.

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

<sup>201</sup> FOLMSBEE ET AL, *supra* note 196, at 214.

<sup>202</sup> Annals of Congress, 1 Cong., 2 Sess., 1143.

<sup>203</sup> Annals of Congress, 4 Cong., 1 Sess. 1301.

<sup>204</sup> *Id.*

<sup>205</sup> The Territory's census measured "people within the respective counties," whereas the Act of 1790 referred to "the inhabitants within the respective districts." Furthermore, Sheriffs were paid "a dollar for every 200 persons they returned," and the results of the census were "just sufficient" to entitle Tennessee, should it be admitted as a State, to two members in the House of Representatives. *Id.*

<sup>206</sup> Annals of Congress, 4 Cong., 1 Sess. 1308.

<sup>207</sup> *Id.* at 1304.

<sup>208</sup> *Id.* at 1305

<sup>209</sup> *Id.* at 1309

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Williams, *supra* note 198, at 307.

<sup>213</sup> Annals of Congress, 4 Cong., Sess. 1. 916.

President Washington had made public his decision to not run for a third term, and Federalists—who controlled the Senate—were worried that admission of Tennessee to the Union would tip the Presidential election in favor of Republican candidate Thomas Jefferson.<sup>214</sup> (It is not hard to see the modern analogue if Puerto Rico were to actively seek statehood.) To that end, the Senate adopted a bill providing for the Territory to be admitted as a single State, but only following “a more satisfactory census had been taken under the authority of Congress.”<sup>215</sup> The House refused to accept the terms of the Senate bill, but instead proposed a compromise whereby Tennessee would be immediately admitted to the Union, but would have only one Representative in the House—and consequentially only three electoral votes—until the next federal census in 1800.<sup>216</sup> The Senate accepted the compromise, and President Washington signed a bill admitting Tennessee into the Union on June 1, 1796.<sup>217</sup>

If Puerto Rico were to attempt a similar move, it would not necessarily be simple brinkmanship, but potentially a claim of right. Its long colonial history makes Puerto Rico different from, say, Nova Scotia (which has also made noise about joining the U.S.<sup>218</sup>). As Rogers Smith puts it:

[T]he governing authority asserted by the United States over Puerto Rico is and always has been substantially illegitimate, in violation of the U.S. Constitution and the nation’s broader political principles. Where that leaves the issue of Puerto Rican nationality is in important respects unclear, but it does clearly mean that the United States is not entitled to decide the status of Puerto Rico, at least not any further than Puerto Ricans wish them to do. Puerto Ricans should be seen as legally entitled to decide their status for themselves (a power that is arguably at the heart of national identity).<sup>219</sup>

What this would mean if Puerto Ricans chose statehood is that Congress would be constitutionally required to go through the constitutionally-prescribed processes for admission of new states, as discussed above.<sup>220</sup> There are at least three reasons why this might be true.

First, one might reject the notion of “unincorporated territories” entirely, and say that the only constitutional way in which the United States can acquire new territory is with a promise of statehood (Hawaii and Alaska being the two most recent examples), independence (Philippines), or incorporation (Northern Marianas). Chief Justice Fuller suggested as much in the *Insular Cases*, rejecting the

<sup>214</sup> HAMER, *supra* note 194, at 179, 181.

<sup>215</sup> FOLMSBEE ET AL, *supra* note 196, at 217.

<sup>216</sup> *Id.*

<sup>217</sup> An Act for the admission of the State of Tennessee into the Union, ch. XLVII, June 1, 1796, Stat. 1.

<sup>218</sup> Storer H. Rowley, *Quebec Crisis Creates Talk About 4 Canadian Provinces Joining U.S.*, CHI. TRIB., May 3, 1990.

<sup>219</sup> Rogers Smith, *Bitter Roots*, in RECONSIDERING, *supra* note 8, at 385.

<sup>220</sup> Whether Congress would actually live up to this obligation, or whether it would be justiciable, are separate questions.

notion that Puerto Rico could be indefinitely treated like a “disembodied shade.”<sup>221</sup> One can see the same basic theme in political comments at the time.<sup>222</sup> Even the Northwest Ordinance of 1787 contemplated that the acquired territory would eventually be carved into states.<sup>223</sup>

The passage of time alone is not enough to disregard the importance of this promise. After all, Alaska was purchased from Russia in 1867 (apparently with no promise of statehood),<sup>224</sup> was made a territory in 1912, and eventually achieved statehood in 1959. Sparrow notes that “the period between the first petition or bill for statehood and admission as a state ... lasted an average of more than thirteen years, ... for seven states, the process took longer than twenty years.”<sup>225</sup> But even *Dred Scott* was not so racist or cavalier as to support permanent territorial limbo: “There is certainly no power given by the Constitution to the Federal government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; .... [N]o power is given to acquire a territory to be held and governed permanently in that character.”<sup>226</sup>

Gary Lawson and Guy Seidman have pursued a similar line, arguing, as a matter of enumerated powers, that the only constitutional basis for the federal government’s acquisition of sovereign territory is as an incident of Congress’s power to grant statehood.<sup>227</sup> Applying this theory, Lawson and Seidman have no specific objections to the acquisition of Puerto Rico;<sup>228</sup> while their “instinct” is that the acquisition of Philippines was unconstitutional because there was never a reasonable prospect of statehood.<sup>229</sup> Further, they insist that “the constitutionally relevant moment is the moment of acquisition. Once the acquisition has been constitutionally validated, .... There is nothing in the Territories Clause that requires Congress either to admit a territory as a state or to dispose of it (perhaps by granting independence) if statehood ever ceases to be an option.”<sup>230</sup>

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<sup>221</sup> *Downes*, 182 U.S. at 272 (Fuller, C.J., dissenting).

<sup>222</sup> 33 Cong. Rec. 2067 (remarks of Rep. McClellan) (“I believe that we can only hold territory, as a nation, in trust for the States that are ultimately to be erected out of that territory. I believe that we can only hold the territory of Puerto Rico in trust for the sovereign State that will be some day admitted into the Union.”) (quoted in CABRANES, *supra* note 168, at 33).

<sup>223</sup> SPARROW, *supra* note 15, at 14-15. In 1900, just after Puerto Rico’s acquisition, Max Farrand wrote of the Ordinance: “That the Territories are to be regarded as inchoate States as future members of the Union has been and is the fundamental basis of our Territorial system.” *Id.* at 15.

<sup>224</sup> TED C. HINCKLEY, *THE AMERICANIZATION OF ALASKA, 1867-1897*, at 35-36 (1972).

<sup>225</sup> SPARROW, *supra* note 15, at 26.

<sup>226</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 446 (1868)

<sup>227</sup> GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 4* (2004) (“Whereas there is no constitutional problem with the acquisition of territory that is intended as a future state, there are serious questions about the ability of the United States to add territories that are not slated for statehood.”); *id.* at 107 (noting that the likelihood of statehood would be subject to a “reasonableness” test).

<sup>228</sup> LAWSON & SEIDMAN, *supra* note 227, at 111 (“Puerto Rico and Guam were acquired as spoils of the war, and both acquisitions were clearly constitutional. ... Puerto Rico, because of its hemispheric location, was probably an even better candidate for statehood than was Hawaii.”).

<sup>229</sup> *Id.* at 113.

<sup>230</sup> *Id.* at 203.

We believe that the proper inquiry must take into account more than the moment and mechanism of acquisition. Indeed, a second theory as to why Puerto Rico can demand statehood now is that Congress has already promised as much and is bound by that promise, even if it would not have otherwise been so obligated. Precisely when that promise was made is debatable, but there are three candidates. Those who reject the notion of “unincorporated territories” might say that the promise was made at the moment of acquisition in 1898, as noted above. Others might argue, as a former governor of Puerto Rico did, that an “implied pledge of statehood [was] made to Puerto Ricans when citizenship was granted.”<sup>231</sup> A third, and we think the strongest, possibility is that Public Law 600 and the approval of Puerto Rico’s constitution in the 1950s not only promised but actually (or at least partially) delivered a form of statehood.<sup>232</sup>

Additionally,—at least since the 1970s—American presidents have regularly expressed support for Puerto Rican statehood. Gerald Ford was apparently the first to do so, albeit in the waning days of his presidency, leading president-elect Jimmy Carter to respond, “I would be perfectly willing to see Puerto Rico become a state if the people who live there prefer that.”<sup>233</sup> President George Bush reiterated support for statehood in his inaugural speech,<sup>234</sup> and Barack Obama said much the same thing a few years later.<sup>235</sup> Most recently, Donald Trump said, “There are 3.7 million American citizens living in Puerto Rico. As citizens, they should be entitled to determine for themselves their political status.”<sup>236</sup>

Third, even if one does not believe that the federal government is constitutionally bound to make good on its promises, Puerto Rican statehood (or independence) might be required as a remedy for the longstanding wrong of its unconstitutional status.

It is hard to ignore the degree to which race and racism played a role in shaping Puerto Rico’s political status—to a degree that raises questions for Equal Protection.<sup>237</sup> It is blackletter constitutional law that racial animus, combined with

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<sup>231</sup> CABRANES, *supra* note 168, at n. 19 (quoting Address by Governor Carlos Romero Barcelo, before Los Angeles World Affairs Council).

<sup>232</sup> *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (“Thus, in 1952, Puerto Rico ceased being a territory of the United States . . . .”); *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953) (“Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word.”).

<sup>233</sup> Cabranes, *supra* note 8, at 11 & nns. 30-31.

<sup>234</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 50.

<sup>235</sup> See Helene Cooper, *In Visit to Puerto Rico, Obama Offers (and Seeks Out) Support*, N.Y. TIMES, June 14, 2011.

<sup>236</sup> Chris Bodenner, *The State of Puerto Rican Statehood*, THE ATLANTIC, March 7, 2016, <http://www.theatlantic.com/notes/2016/03/the-state-of-puerto-rican-statehood/472599/>.

<sup>237</sup> It is also worth noting, as Cabranes suggests, that matters were even worse vis-à-vis the Philippines, which helps explain why Puerto Rico was kept as a territory. With regard to the Philippines, ties with which would soon be severed, “[e]xpressions of concern about the annexation of Oriental peoples were commonplace,” while “[t]he relatively tender treatment accorded to the Puerto Ricans may be partially explained by the representations made in Congress concerning the racial composition of the island.” CABRANES, *supra* note 168, at 30-31.

disparate impact, can prove a violation of the Equal Protection clause.<sup>238</sup> This is especially true when voting and other rights of political participation are in play. Put differently, the history of the denial of the right of representation in national governance to Puerto Ricans is largely a story of racism and imperialism. The denial of those rights to Puerto Ricans should be constitutionally suspect; requiring strong evidence that the denial of rights was *not* motivated by racial animus. Best we can tell, there is no such evidence—other than perhaps the claim that at some points in time the inhabitants of Puerto Rico have not wanted national representation because they were receiving tax benefits or were seeking to maintain their culture of difference from the mainland.<sup>239</sup>

But the very conceptualization of national representation as something that could be traded away for tax breaks by one subset of citizens who are largely of a different (and disadvantaged) race than the majority is itself problematic. As a constitutional matter, voting is supposed to be sacrosanct. It is generally thought to be both an *individual* right (that is, the collective cannot trade it away in exchange for some benefits that the local government sees) and an *inalienable* one (no trading of the right, especially for financial reasons).<sup>240</sup> Yet, for marginal regions like Puerto Rico and American Samoa, courts and policy makers seem comfortable treating the right to vote as being at the mercy of the local collective.

## B. Expelling States?

Our focus here is on the legality of expelling territories—and specifically Puerto Rico—not states. And to the extent that expulsion has even been contemplated, a firm line has typically been drawn between expulsion of territories and of states. For example, Bartholomew Sparrow notes that in a brief in *Crossman v. United States* (1901), U.S. Solicitor General John Richards argued that “[t]he only indissoluble, inseparable parts of the United States” were “the States of the Union, the governing body.” He did not believe there to be any power to “disintegrate the Union” but did “believe there is power to dispose of territory which simply belongs to the United States.”<sup>241</sup>

But it is not clear that the inquiry can stop there. Is statehood a safe harbor from the kind of expulsion Ponsa describes? To consider the possibility of expelling either states or territories, one has to start with questions about the nature of the union itself—questions that are thought to have been settled at Appomattox. And

<sup>238</sup> *Washington v. Davis*, 426 US 229 (1976).

<sup>239</sup> *E.g.*, Luis Gallardo Rivera, *Why Statehood is Bad for Puerto Rico*, LA RESPUESTA MEDIA, Oct 7, 2014, <http://larespuestamedia.com/statehood-is-bad-for-pr/>. This cultural preservation argument has apparently received consideration from the D.C. Circuit. *See Tuaua v. United States*, 788 F.3d 300, 310-11 (D.C. Cir. 2015).

<sup>240</sup> *See, e.g.*, Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1324 (2000) (describing the general illegality and opprobrium attached to vote buying in the United States).

<sup>241</sup> Quoted in SPARROW, *supra* note 15, at 23.



we are loath to suggest disagreement with Abraham Lincoln about the permanence of the union.<sup>242</sup>

Still, one might ask: *What if* the union had blessed, or demanded, the South's exit? Would that be an attempted secession (of a majority, perhaps), and be analyzed the same way? If Southern states had refused the demands of Reconstruction, would there have come a point at which unrepentant and widespread embrace of slavery would be so inconsistent with the national law and ethos that it could justify expulsion?<sup>243</sup> Would resumption of war have been the only alternative, and is that preferable?

Because there is no explicit power to expel or deannex a state, any such power would have to be found by implication in *other* constitutional powers. And although state and national borders are often taken for granted today, the location of those borders—and the concomitant power to shape them—were central to the Declaration of Independence, the substance of the Constitution, and the early development of the nation.<sup>244</sup> The Articles of Confederation's inability to resolve border disputes between states was one of its central defects.<sup>245</sup> But precisely because of those ongoing disputes and uncertainty, "[t]he Framers could ... go no further than defining the basic components for future mapmakers to assemble over time."<sup>246</sup>

In doing so, they eliminated the Articles' provision regarding Canada's accession to the Union,<sup>247</sup> arguably leaving the Constitution without a specific

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<sup>242</sup> 5 Abraham Lincoln, To Horace Greeley, in *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 388, 388 (Roy P. Basler ed., 1953) ("My paramount object in this struggle is to save the Union, and is not either to save or to destroy slavery. If I could save the Union without freeing *any* slave I would do it, and if I could save it by freeing *all* the slaves I would do it; and if I could save it by freeing some and leaving others alone I would also do that.").

<sup>243</sup> RALPH YOUNG, *DISSENT: THE HISTORY OF AN AMERICAN IDEA* 11 (1998) (noting that abolitionist William Lloyd Garrison "eventually went so far as to propose that the United States abrogate the Constitution [...] and expel the Southern states from the Union").

<sup>244</sup> *Cf.* THE FEDERALIST No. 7, at 60-61 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that states, having "discordant and undecided claims between several of them," might go to war over "vast tract[s] of unsettled territory within the boundaries of the United States"); Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 16 (2001) ("[T]he Declaration of Independence cited this transfer of land [[from the colonies to Quebec], as well as other limitations that the British had placed upon alienability of land in the West, among its justifications for severing ties with Britain."] During the Constitutional Convention, Nathaniel Gorham asked, "Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?" James Madison, *Notes of Debates in the Federal Convention of 1787*, at 410 (Adrienne Koch ed., 1966) (quoted in LAWSON & SEIDMAN, *supra* note 227, at 2).

<sup>245</sup> See Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 297 (2003) ("These arrangements ... proved inadequate to prevent disruptive controversies over ill-defined boundaries, discrimination by some states against sister states, and infringements on the United States through state treaties and agreements ....").

<sup>246</sup> Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1173 n.14 (2011).

<sup>247</sup> Articles of Confederation of 1777, art. XI ("Canada acceding to this Confederation ... shall be admitted into, and entitled to all the advantages of this union ...."); see also Murray G. Lawson, *Canada and the Articles of Confederation*, 58 AM. HIST. REV. 39 (1952) (discussing the reasoning and historical context behind Article XI in the Articles of Confederation and the founders' initial concern with Canada).

mechanism by which the nation could acquire more sovereign territory.<sup>248</sup> This became particularly pressing when Jefferson was presented with the prospect of the Louisiana Purchase. As Jefferson noted, “The Constitution ... has made no provision for our holding foreign territory, still less for our incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of the country have done an act beyond the Constitution.”<sup>249</sup> (Notably, the debate over the constitutionality of the purchase was not nearly so public as that over the status of Puerto Rico.<sup>250</sup>)

The legality of the Louisiana Purchase is accepted now,<sup>251</sup> but the debate over the constitutionality of annexation has implications for the future of constitutional authority over the nation’s borders.<sup>252</sup> If the power to annex can be inferred from the Constitution, what about the power to de-annex or expel?

To the degree that control over borders is implied in the nature of sovereignty, this argument has a lot to recommend it. In the debate over the Louisiana Purchase, Representative Joseph Nicholson argued, echoing Justice White’s logic in the *Insular Cases*, that “the right must exist somewhere. It is essential to independent sovereignty.” Representative Randolph similarly noted that, “If the old Confederation—a mere government of States—a loosely connected league . . . could rightfully acquire territory in their allied capacity, much more is the existing Government competent to make such an acquisition.”<sup>253</sup> As a matter of political practice and international law, cession of territory has long been regarded as part of sovereign authority.

In the 1890’s *Jones v. United States* (a case involving the status of the guano islands), the Supreme Court said as much, while invoking its own case law, first principles, and international law:

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<sup>248</sup> See, e.g., SPARROW, *supra* note 15, at 1 (“[T]he U.S. Constitution has almost nothing on the territorial expansion of the United States.”); John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Breaking Upon Constitutional Law*, 13 HARV. L. REV. 371, 373 (1900) (arguing that it is not likely that the later Constitution was meant to be less expansive than the Articles in this regard).

<sup>249</sup> Palfrey, *supra* note 248, at 379.

<sup>250</sup> Brook Thomas, *A Constitution Led by the Flag*, in RECONSIDERING, *supra* note 8, at 91 (“The constitutional debate concerning the Louisiana Purchase took place exclusively in private correspondence and within the conscience of Jefferson himself; the debate surrounding the *Insular Cases* was very public.”).

<sup>251</sup> See John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 528 (1951) (“If there were doubts as to the power of the United States to acquire [lands], these have been resolved decisively in favor of the Federal government, not only by the Supreme Court but by the people through their elected representatives in the Congress and the presidency.”).

<sup>252</sup> Although the constitutionality of the Purchase is relatively well-settled, territorial annexation nonetheless raises important constitutional questions, which may have implications for broader matters of constitutional law. Along those lines, see Daniel Rice, *Territorial Annexation as a “Great Power”*, 64 DUKE L.J. 717 (2015) (arguing that “the annexation of foreign territory is exactly the sort of power that is too important to be left to implication through the Necessary and Proper Clause”).

<sup>253</sup> LAWSON & SEIDMAN, *supra* note 227, at 23 (collecting these and other statements, but concluding that they “are not valid arguments in the context of the federal Constitution”).

By the law of nations, recognized by all civiliezed [sic] states, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest; .... This principle affords ample warrant for the legislation of congress concerning guano islands.<sup>254</sup>

For those with a more limited view of federal power—or who are determined to ground it in specific text—there is an argument that de-annexing a state, or ceding it to another country, would be beyond the enumerated powers of Congress. Lawson and Seidman, for example, argue that there is no explicit power of territorial acquisition, and so any federal acquisition of territory can only be “as a means of carrying into effect other national powers, such as the power to admit new states or to provide and maintain a navy.”<sup>255</sup>

Finding an *authorization* for expulsion is only part of the story, however. Federal powers are subject to independent restrictions. If the United States were to attempt to expel a state, a range of constitutional prohibitions would be implicated. The first clause of Article IV, Section 3 provides: “New states may be admitted by the Congress into this union; but no new states shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.”<sup>256</sup> The Constitution forbids the alteration of a state’s borders without its consent, and changing *federal* borders so as to exclude a state might be considered a “change” of the state’s borders as well.

Further, could Congress’s Fourteenth Amendment enforcement power override the supposed sanctity of state borders—if, for example, expelling a state were necessary to guarantee Equal Protection to those threatened by an oppressive state government?<sup>257</sup> Likewise, what of the federal government’s textually mandated *obligation* to guarantee a republican form of government in the states?<sup>258</sup>

Our intention is not to argue whether expulsion of an American state would or would not be constitutional, and it is unlikely that the question would be answered in court. But there is still a “constitutional” question worth asking.

## IV. Law and Expulsion

The case of Puerto Rico illustrates a broader legal question: How can domestic and international law provide for unwinding of sovereignty? Historically, nations have sought to expand, or to maintain their size by preventing secessions,

<sup>254</sup> Jones v. United States, 137 U.S. 202, 212 (1890).

<sup>255</sup> LAWSON & SEIDMAN, *supra* note 227, at 5.

<sup>256</sup> U.S. CONST. art. IV, § 3.

<sup>257</sup> U.S. CONST. amend XIV § 5.

<sup>258</sup> U.S. CONST. art. IV, § 4 (providing in relevant part that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”).

and so the background principles of international and constitutional law are designed to respond to those outward pressures. The *rights* of former colonies and their peoples to accession, however, are generally ignored. The U.S. constitution provides explicitly for the creation of new states, for example, but not the dissolution of existing ones; it has been interpreted to permit the acquisition of territory, but says nothing about how it can be disposed of.

The same is true outside of the United States. Foundational principles of international law are predicated on the notion that nations will seek to gain, preserve, and defend territory. This is sensible, since the history of the world has largely been a history of the expansionist impulse. The colonial powers, after all, profited handsomely by denuding their colonies of resources.

Today, the scales have tipped in the opposite direction. Tens of millions of people—one-sixth of the Caribbean's population, for example—still live in colonies directly controlled by a distant metropole.<sup>259</sup> But these colonies now often represent an economic burden, not a boon, for the nations that hold them, and in no existing colony is there clear support for secession. If a push for "independence" arises, then, it is more likely to come from the center than from the edges. Law, we argue, may give the colonies—including Puerto Rico—tools with which to resist.

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<sup>259</sup> OOSTINDIE & KLINKERS, *supra* note 12, at 220 ("Of the total population of the Caribbean, an estimated 37 million people, almost fifteen per cent live in areas which still maintain constitutional ties with the mother country.").