

WHAT DOES PUERTO RICAN CITIZENSHIP MEAN FOR PUERTO RICO'S LEGAL STATUS?

JOSEPH BLOCHER & MITU GULATI†

“There are 3.7 million American citizens living in Puerto Rico. As *citizens*, they should be entitled to determine for themselves their political status.”¹

– President Donald Trump

In *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, Guy-Uriel Charles and Luis Fuentes-Rohwer explore the Voting Rights Act in a novel way.² They focus on the aspects of the Act that, from the beginning, made it vulnerable to “exit,” and eventually led to the “judicially enforced exit” that manifested in *Shelby County v. Holder*.³ This theme of cross-branch exit appears in many of the other contributions to this symposium, from Curt Bradley’s focus on executive-led exit from treaties⁴ to Jim Salzman and J.B. Ruhl’s exploration of “presidential exit” not only from prior presidential actions, but from statutory commitments.⁵

We approach the theme of exit from the other direction: *limitations* on exit, especially those that are tied to voting and

† Lanty L. Smith '67 Professor of Law, Duke Law School; Professor of Law, Duke Law School.

1. Chris Bodenner, *The State of Puerto Rican Statehood*, THE ATLANTIC, Mar. 7, 2016, <http://www.theatlantic.com/notes/2016/03/the-state-of-puerto-rican-statehood/472599> (emphasis added) [<https://perma.cc/A6W6-XC8E>].

2. Guy-Uriel Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559 (2018).

3. 570 U.S. 529 (2013).

4. Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615 (2018).

5. Jim Salzman & J. B. Ruhl, *Presidential Exit*, 67 DUKE L.J. 1687 (2018).

citizenship. What of “judicially forbidden exit”? What bonds can the government *not* break?

To us, a fascinating test case is Puerto Rico—what Fuentes-Rohwer has called “the land that democratic theory forgot.”⁶ The evils that the VRA was designed to address seem mild in comparison to the situation on the island, where people cannot vote at all in Presidential elections.⁷ Perhaps to the surprise of many Americans on the mainland, though, Puerto Ricans are American citizens, and have been for more than a century. The precise incidents of that citizenship are still, even a century later, murky.⁸ But it is undeniable that Puerto Ricans have *some* kind of status in the American legal system that they did not have when the island was originally acquired in the 1800s.

As for the island itself, its legal status is also dubious. Indeed, many scholars have noted the ways in which the island’s second-class status lays a foundation for the second-class citizenship of its residents.⁹ Puerto Rico is not a state, but it is not a foreign country. It is, in the words of the Supreme Court, “foreign in a domestic sense”¹⁰—a so-called “unincorporated territory.” That classification has implications not only for the past and present treatment of the island, but also for its future.

Perhaps most ominously, prominent scholars have suggested that Puerto Rico’s status leaves open the possibility that the island might be “de-annexed”—expelled—from the remainder of the United States.¹¹

6. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1526 (2008).

7. José D. Román, *Trying to Fit an Oval Shaped Island into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URBAN L. J. 1681, 1682 (2002).

8. JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 5 n.12 (1979) (“The content of the concept of national citizenship under American law had been, and continues to be, less than definite or clear.”).

9. See, e.g., Gustavo A. Gelpi, *Comment on Blocher & Gulati, “Puerto Rico and the Right of Accession”*, 43 YALE J. INT’L L. ONLINE (2018), <https://www.yjil.yale.edu/comment-on-blocher-gulatis-puerto-rico-and-the-right-of-accession> [<https://perma.cc/35FA-8F4E>]; Lisa Maria Perez, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008).

10. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring) (“The result of what has been said is that whilst 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*.”) (emphasis added). See generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 39, 40–41 (Christina Duffy Burnett & Burke Marshall eds. 2001) (hereinafter FOREIGN IN A DOMESTIC SENSE).

11. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 798–99 (2005); see also CABRANES, *supra* note 8, at 50.

We have written elsewhere about the question of what international and domestic law have to say about the expulsion of former colonies generally¹² and Puerto Rico in particular.¹³

The question motivating this paper is different, but builds on the expulsion possibility, considering it in light of the connection between citizenship and the island's status. We ask: What happens to citizenship rights if Congress decides it is time to give Puerto Rico "independence" against its will? More broadly, we are probing the tension between a strong individual right (citizenship) and a potentially weak collective right (the right of Puerto Rico to remain part of the United States, which is arguably revocable by Congress on a whim).¹⁴ We argue that the strong citizenship rights enjoyed by Puerto Ricans today—granted by statute, and solidified by nearly a century of historical practice—are not compatible with an unrestrained power of Congress to expel the island.

The next natural question is which of the two propositions must give way: Do Puerto Ricans lose whatever citizenship rights they have, or does Congress lose whatever expulsion power it has? We argue that Puerto Rican citizenship effectively trumps, in legal and practical terms, any congressional power of expulsion.

If we are right, there could be significant implications, in particular for the continuing viability of the *Insular Cases*—the Supreme Court decisions that created the category of "unincorporated territory" and relegated Puerto Rico to it. In effect, Puerto Rican citizenship provides strong evidence that, to quote language from later Supreme Court cases, "over time the ties between the United States and any of its unincorporated territories" have "strengthen[ed] in ways that are of constitutional significance."¹⁵

I. PUERTO RICAN CITIZENSHIP AND PUERTO RICO'S STATUS HAVE ALWAYS BEEN LINKED

To determine how the US citizenship of Puerto Ricans and Puerto Rico's political status within the US might interact to change Puerto

12. Joseph Blocher & Mitu Gulati, *Forced Secessions*, 80 L. & CONTEMP. PROBS. 215 (2017).

13. Joseph Blocher & Mitu Gulati, *Expulsion, Statehood, and the Future of Puerto Rico*, 43 YALE J. INT'L L. 229 (2018).

14. This tension between individual and collective rights has, of course, been recognized and explored elsewhere. *E.g.*, WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996).

15. *Boumediene v. Bush*, 553 U.S. 723, 758 (2008).

Rico's current status, it is helpful to know how the two features began, and how they are related.

Puerto Rican citizenship has been disadvantaged ever since the island was acquired by the United States following the Spanish-American War. The United States had acquired inhabited territories by treaty in the past—the Louisiana Purchase being the most obvious example—and had always made provision for the citizenship of the people and the eventual statehood of the area.¹⁶ That was not the case for Puerto Rico. Although Puerto Ricans had been entitled to some citizenship rights under the Spanish,¹⁷ Article IX of the Treaty of Paris took away those rights *without* correspondingly guaranteeing U.S. citizenship. Instead, Congress was given power to “determine[]” their “civil rights and political status.”¹⁸ From the outset, then, the legal status of the island and its inhabitants was unclear. That limbo, and a political moment that focused attention on the question of American empire, generated an incredible outpouring of public discussion¹⁹ and legal scholarship.²⁰

It also generated legislation. In 1900, Congress passed the Foraker Act,²¹ whose sponsor said it was designed “to recognize that Puerto Rico belongs to the United States of America.”²² The Act not only denied statehood to Puerto Rico, but disadvantaged it even vis-à-vis other territories. As Christina Duffy Ponsa-Kraus notes:

[M]ost significantly, Congress had declined to extend the US Constitution by statute to Puerto Rico, as it had

16. Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF AMERICAN IMPERIALISM 156 (Gerald L. Neuman & Tomiko-Brown Nagin eds. 2015) [hereinafter RECONSIDERING] (calling this the first time that “in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood”).

17. Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in FOREIGN IN A DOMESTIC SENSE *supra* note 10, at 373, 375 (noting that Puerto Rican home rule status was only conferred in 1897, before which “most Puerto Ricans, it seems, had long been content to be Spanish subjects, without a legally recognized, independent Puerto Rican nationality”).

18. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

19. CABRANES, *supra* note 8, at 4.

20. See, e.g., 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); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

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

22. 33 Cong. Rec. 2473 (1900) (statement of Sen. Foraker).

done in all prior territories. Moreover, 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 amounted to little more than an embellished form of statelessness.²³

The citizenship limbo permitted by the Treaty of Paris and established by the Foraker Act would later be echoed by the Supreme Court in the *Insular Cases*, which confronted the question of the island's legal status vis-à-vis the United States. That question has been addressed elsewhere, and—despite general neglect in the legal academy—fortunately has attracted increasing attention in recent years.²⁴ The Court's answer was, to put it mildly, not entirely satisfactory. In brief, the Justices concluded that Puerto Rico was an "unincorporated territory"—a novel category with an odd relationship to the mainland. U.S. territories, of course, had existed before, and all of them had eventually been made into states. But unincorporated territories lacked that constitutional trajectory, leaving serious questions about what they can demand or reject.

Most relevantly for this symposium's theme of "exit," eminent jurists have found evidence suggesting that the *Insular Cases* were written to preserve the United States' option to expel Puerto Rico.²⁵ Judge José Cabranes writes, "the doctrine seemed to leave open the possibility that, for one reason or another, the United States might 'dispose' of its insular territories."²⁶ Legal historian Christina Duffy Ponsa-Kraus documents the evidence supporting this argument at length in her article, "*Untied States: American Expansion and Territorial Deannexation.*"²⁷

These statutes and Supreme Court decisions put the island, as a political entity, and its people, as political actors, in limbo. Individual citizenship and territorial status were both sorted into novel and, within our legal system, unique categories. But they were also linked in law and practice, even though, technically speaking, they need not be

23. Christina Duffy Ponsa, *When Statehood was Autonomy*, in RECONSIDERING, *supra* note 16, at 27.

24. See, e.g., FOREIGN IN A DOMESTIC SENSE, *supra* note 10; RECONSIDERING *supra* note 16.

25. Baldwin, *supra* note 20 (suggesting that a "conqueror" of territory "may not be able to retrain what he receives"); U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . .").

26. CABRANES, *supra* note 8, at 50.

27. Burnett, *supra* note 11.

completely coincidental. There is no conceptual need for citizenship and territorial status to rise or fall together. It is easy enough to imagine American citizens living on non-state or even non-American soil. That's what expatriates do. Nor is it inconceivable to imagine the creation of a new state whose residents would not immediately and automatically become citizens. But as a practical matter, there is something bizarre about the notion that something as strong, integral, and constitutionally significant as citizenship is revocable by Congress with no consent of the individual. More concretely, it would be laughable to think that Congress could strip the hypothetical John Paulson, who resides somewhere between Aspen and New York, of this citizenship for no reason (indeed, it might not be possible to do so for most, and maybe all, reasons).²⁸ Yet, if John is a Puerto Rican living in Puerto Rico, which is also US soil, he can be stripped of his citizenship on a whim of Congress? Surely not. If that is the case: What follows?

As a matter of US law and practice, citizenship and territorial status are deeply intertwined, as political leaders in Puerto Rico have long recognized. Even in 1916, Puerto Rico's resident commissioner, Luis Muñoz Rivera, spoke for many when he said: "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 . . ." ²⁹

Notably, that same year, the Jones Act of 1916 pledged eventual independence to the Philippines³⁰—a promise that was fulfilled in 1946.³¹ That independence can be explained in part by the fact that the Filipinos fought hard for it.³² But it might also have to do with the fact that the territory had become expensive for the mainland, especially as more and more relatively poor Filipinos migrated to the US mainland.³³ And that, in turn, may help explain why, in addition to

28. *Afroyim v. Rusk*, 387 U.S. 253 (1967).

29. 53 Cong. Rec. 7472 (1916) (statement of Resident Commissioner Rivera) (quoted in CABRANES, *supra* note 8, at 89).

30. Jones Act (Philippine Islands), ch. 416, 39 Stat. 545 (1916) (preamble).

31. 22 U.S.C. 1394 (1976).

32. *E.g.*, Reynaldo C. Ileto, *The Philippine-American War: Friendship and Forgetting* in VESTIGES OF WAR: THE PHILIPPINE-AMERICAN WAR AND THE AFTERMATH OF AN IMPERIAL DREAM 1899-1999, at 3, 7 (Angel Velasco Shaw & Luis H. Francia eds. 2002).

33. *E.g.*, H.W. BRANDS, BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES 160 (1992). More generally, on the tension between the desire for expanding empire and the desire to keep out the racial "others", see NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS 1893-2013 (2013).

independence for the Philippines, the relevant treaty also stripped Filipinos of their nationality.³⁴ Back then, we imagine no one blinked an eyelid at the fact that the hypothetical John Paulsons from New York, who happened to be living in Manila at the time, would get to retain their US citizenship.

As for Puerto Rico, the deal proposed by Rivera and other political leaders—citizenship only with statehood to accompany it—was effectively declined. In 1917, another Jones Act conferred American citizenship on Puerto Ricans.³⁵ But as 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.”³⁶ Cabranes concludes that “[b]y extending United States citizenship to the Puerto Ricans after promising independence to the Filipinos, Congress intended to do little more than proclaim the permanence of Puerto Rico’s political links with the United States.”³⁷

Some, however, interpreted the signals differently, and thought that statehood would follow citizenship. As a former governor of Puerto Rico put it, an “implied pledge of statehood [was] made to Puerto Ricans when citizenship was granted.”³⁸ He was not alone. It was “widely believed that it would only be a matter of time until this ‘transitory phase’ would end in statehood.”³⁹

34. 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”).

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

36. CABRANES, *supra* note 8, at 6–7.

37. *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. More recently uncovered evidence suggests otherwise. See Bartholomew Sparrow & Jennifer Lamm, *Puerto Ricans and U.S. Citizenship in 1917: Imperatives of Security*, 29 *CENTRO J.* 284, 285–86 (2017). In any event, 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, https://www.huffingtonpost.com/entry/veterans-us-territories-sue-for-right-to-vote_us_564d1acce4b031745cefcf2a [<https://perma.cc/VW3P-HN3J>].

38. CABRANES, *supra* note 8, at 7 n.19 (quoting Address by Governor Carlos Romero Barceló, before Los Angeles World Affairs Council (Dec. 6, 1977)) (alteration in original).

39. GERT OOSTINDIE & INGE KLINKERS, *DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE* 46 (2003).

Has that time finally come?

II. IS PUERTO RICAN CITIZENSHIP CONSISTENT WITH A CONGRESSIONAL POWER OF EXPULSION?

The Territories Clause undoubtedly gives Congress great power over the territories. When it comes to uninhabited territories, that power might well include the power to cede or transfer. But that does not necessarily mean that Puerto Rico—inhabited by millions of US citizens—is subject to the same plenary power.⁴⁰ When an enumerated congressional power runs into a rights-based limitation, it must yield.⁴¹ And it follows that if Puerto Rican citizenship (a right) is inconsistent with the power to expel (a power), then the latter gives way.

To take one example, we think it clear that the Equal Protection Clause would prevent Congress from expelling Puerto Rico from the United States because of racially discriminatory animus and with the goal of harming the overwhelmingly Hispanic citizens of the island. Racial animus directed at American citizens is the *bête noir* of Equal Protection, after all.⁴² The same would of course be true of any effort to strip them of citizenship on that basis. (For that reason, among others, we suspect that the US treatment of the Filipinos' nationality in the wake of the Philippines independence would not pass constitutional muster today.)

One might take the fallback position that Puerto Rican citizenship is simply a matter of statutory grace (if it is a constitutional imperative then the answers are even more clear⁴³), but that would not necessarily avoid an Equal Protection challenge. If anything, it would compound

40. Similar points could be made about acquisition of territories. E. Robert Statham Jr., *U.S. Territorial Expansion: Extended Republicanism versus Hyperextended Expansionism*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 167, 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.”); *id.* at 173 (“States are created by people and are subsequently admitted into the Union. Territory is property, and is, therefore, distinct from people and citizenship.”).

41. For an illuminating discussion of the point, see H. Jefferson Powell, *Targeting Americans: The Constitutionality of the U.S. Drone War* 38–42 (2016).

42. See generally WILLIAM D. ARAIZA, *ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW* (2017).

43. Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, in RECONSIDERING, *supra* note 16, at 69 (“This is clearly in direct contravention to the Constitution—the source from which civil and political rights and status emanate, *not* Congress. . . .”).

the problem, since the citizenship statutes themselves were infected with racial bias.⁴⁴ The Supreme Court in *Downes v. Bidwell* suggested as much: “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.”⁴⁵

Of course, *Downes* says “at once,” and the argument is not that Puerto Ricans became citizens at the moment the island was annexed. The argument, instead, is that the citizenship that has been given may not so simply be taken away. Perhaps for this very reason, discussions of Puerto Rican citizenship in the wake of severance typically consider the possibility that Puerto Ricans would have the option to retain their US citizenship—to become, in effect, an island of ex-patriates. Contemplating the end of US sovereignty and citizenship in Puerto Rico, Dick Thornburgh—the former Attorney General and Republican politician who has consistently supported self-determination for the island⁴⁶—concludes:

History and U.S. law show that U.S. citizenship will end in one of two ways. When the independent nation of the Philippines succeeded the Philippines commonwealth, U.S. nationality and territorial citizenship for persons who acquired it based on birth in the territory ended and all persons so situated became aliens under U.S. law. Those residing in the United States were repatriated to their homeland in the new republic of the Philippines, except for those who met residency requirements in the states of the Union and thereby were permitted by Congress to become candidates for naturalization. The other option, exemplified by in the case of the succession from Spanish to U.S. sovereignty, provides for an election of allegiance to be allowed, requiring a choice of nationalities but not allowing dual nationality to be created by U.S. law or as part of the succession process.⁴⁷

44. Perea, *supra* note 16, at 140, 156. See, e.g., Baldwin, *supra* note 20, at 415 (arguing against giving “the ignorant and lawless brigands that infest Puerto Rico . . . the benefit[s] of” the Constitution).

45. 182 U.S. 244, 279–80 (1901).

46. See generally DICK THORNBURGH, PUERTO RICO’S FUTURE: A TIME TO Decide (2007).

47. Richard Thornburgh, *Puerto Rican Separatism and United States Federalism*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 10, at 349, 350.

Would the second of these options—which seems to be the overwhelming preference—solve all of the problems described here? As far as citizenship is concerned, it would. But that simply reinforces the conclusion that citizenship is non-negotiable.

In *Balzac v. Porto Rico*, the Court effectively tried to draw a distinction between territory and citizenship, holding 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.⁴⁸ Chief Justice Taft concluded that the locality, and not their individual status as citizens, was what mattered.⁴⁹ And he suggested that moving Puerto Rico out of unincorporated territory status would take something like an explicit act of Congress. But is that still true?

III. DE FACTO INCORPORATION

There is reason to think that the latter point from *Balzac* is no longer good law. After all, the Supreme Court has held “[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance.”⁵⁰ One federal district court has even held that Puerto Rico has now become an incorporated territory.⁵¹ We believe that Puerto Rican citizenship, and the corresponding limitation on Congress's power to expel the island, is part of that story.

Recall that, on one predominant reading, the category of “unincorporated territories” was created precisely so as to preserve Congress's power to expel those territories. What differentiates them from incorporated territories, then, is that they are subject to such a power. If Puerto Rico is an unincorporated territory because it can be expelled, then if it *cannot* be expelled it is not an unincorporated territory. As we have shown, Puerto Rican citizenship means that the island cannot be expelled. It follows that Puerto Rico cannot be an unincorporated territory.

This would not mean that Puerto Rico should immediately become a state. Instead, it would become an *incorporated* territory—a step out of limbo, and toward either statehood or independence.

48. 258 U.S. 298, 309 (1922).

49. *Id.* at 309.

50. *Boumediene v. Bush*, 533 U.S. 723, 758 (2008).

51. *Consejo de Salud Playa de Ponce v. Rullan*, 586 F. Supp. 2d 22, 41 (D.P.R. 2008), *as corrected* (Nov. 10, 2008) (“Although Congress has never enacted any affirmative language such as ‘Puerto Rico is hereby an incorporated territory,’ its sequence of legislative actions from 1900 to present has in fact incorporated the territory.”).

CONCLUSION

The elephant in the room is race, just as it is for Charles and Fuentes Rohwer in their discussion of the Voting Rights Act. In the early 1900s, we suspect that the grant of citizenship of individual Puerto Ricans while keeping the option to expel their territory (and them) was seen as acceptable because it was perfectly conceivable to judges and politicians that, when the time came, those who were “Puerto Ricans” and those who were “Americans” could be identified and separated on the basis of race. In the event of expulsion, the latter presumably would be given the option to retain their US citizenship; whereas the former would not.

This seems to be what happened around the world when the imperial powers retreated from their colonies. And the political and economic arguments for it are easy enough to perceive. Given that the colonies were invariably significantly poorer than the ruling metropolis, too many from the colonies – on pure economic grounds – would have taken the option to keep that extra passport.

But things have changed (we hope), at least as a matter of US constitutional law. Congress could not say to our hypothetical John Paulson, living in his mansion on the Puerto Rican mainland, “You get to keep your US passport, and vote in Connecticut elections at our local embassy in San Juan in the future,” while telling his neighbor, Daniel Morales, “You finally get the right of independence that we know you always wanted. Bye bye and good luck.”