# PAST, PRESENT, AND FUTURE OF U.S. TERRITORIES: EXPANSION, COLONIALISM, AND SELF-DETERMINATION*

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## *I. INTRODUCTION*

The central theme of this Symposium—The Repudiation of the Restatements in the Virgin Islands and Emerging Issues of Political Status in the Territorial and Insular Jurisdictions of the United States—requires an overview of the historical background and the legal framework of the territorial policy of the United States. Attorneys and law students of the territories might be familiar with that historical and legal backdrop; but the legal profession in the states is mostly unaware of the history and the legal underpinnings of the current relations between the United States and the territories. It is simply a well-kept secret: the power of Congress over the territories[1] is absent from the canon of study of constitutional law in American legal education.[2]

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* This Article is a revision of the Author's presentation at the Symposium on *Effective Advocacy in a Developing Jurisdiction: The Repudiation of the Restatements in the Virgin Islands and Emerging Issues of Political Status in the Territorial and Insular Jurisdictions of the United States*, at Stetson University College of Law, Gulfport, Florida, March 18, 2016.

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1. "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 . . . ." U.S. CONST. art. IV, § 3, cl. 2.

2. Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 122 (2001). *See also* JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 4 (Edit. Univ. de Puerto Rico 1985) ("Although at one time the *Insular Cases* were the subject of intense debate, . . . they are today hardly a flaming issue, having been relegated to the backburner of judicial

Some rhetorical questions might help illustrate the current relations. How would you feel about living in a place in which you might be able to vote for the governor, the local legislators, and your mayor, but were unable to vote for a president who might send your sons off to war or for any voting member of Congress, despite the fact that the laws enacted by that Congress apply fully in that place, and where there is a federal court with judges designated by a president you may not elect and confirmed by a senate in which you have absolutely no say? That seems to contradict the fundamental principle that "[g]overnments are instituted among Men, deriving their just powers from the consent of the governed."[3]

That is the scenario endured by the inhabitants of the territories of the United States, including "Puerto Rico the oldest, largest, and most populous" territory[4] —which was invaded 118 years ago during the Spanish American War of 1898.[5] For more than half of its constitutional history, the United States has submitted the people of Puerto Rico, a Latin American nation, to colonial rule, in a subversion of the original values of the American Republic.

The title of this Symposium refers to "emerging issues of political status in the territories." Historically speaking, the issues are quite old. Perhaps what emerges at this time is the realization of their existence in some circles of the United States, as well as the territories' increasing dissatisfaction with the existing regime. The Virgin Islands repudiated the Restatement.[6] Some Samoans demanded recognition of U.S. citizenship.[7] The

concern . . . . [Their] doctrine floats in the penumbra of legal priorities considerably below the rule against perpetuities.").

3. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

4. United States-Puerto Rico Political Status Act, H.R. 4228, 104th Cong. § 2(14) (1996).

5. *The World of 1898: The Spanish-American War*, LIBRARY OF CONGRESS, https://www.loc.gov/rr/hispanic/1898/intro.html (last visited Feb. 28, 2017).

6. *See* Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 973–80 (V.I. 2011) (holding that the Virgin Islands Supreme Court possesses "the discretion to decline to follow the most recent Restatement provision in favor of local law").

7. *See* Tuaua v. United States, 788 F.3d 300, 301–02 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016) (stating that "the Citizenship Clause does not extend birthright citizenship to those born in American Samoa" despite the Appellants'—persons born in the American Samoas—assertion that it does).

people of Puerto Rico repudiated the existing territorial relation in the plebiscite of 2012.[8]

It seems that the natives are restless. The increased awareness in the United States might have something to do with the seventy-two billion dollars of Puerto Rico's public debt, which simply cannot be paid and threatens the stability of the U.S. bond market, especially because Puerto Rico is denied legal instruments to address a financial crisis that will soon become a humanitarian disaster.[9] The territorial policy has failed, and the colony is broke.

This Article will first present a historical overview of territorial expansion of the United States during the eighteenth and the nineteenth centuries. It will then examine how the territorial policy changed at the turn of the twentieth century, focusing specifically on the territories annexed during the Spanish-American War. That resulted in a new constitutional doctrine, which has served as a legal framework for the current U.S. policy. The Article will then assess the situation that evolved in Puerto Rico between 1950 to 1952, when Congress authorized the adoption of a "constitution" by the people of the territory. The Article will argue that half a century later, it turns out the constitutional relation between the United States and all its territories—including Puerto Rico—is the same as before and that Congress continues to exercise plenary powers over peoples

8. The plebiscite ballot contained two questions. R. Sam Garrett, *Puerto Rico's Political Status and the 2012 Plebiscite: Background and Key Questions*, CONG. RES. SERVICE, June 25, 2013, at 5–6. The first one asked the voter to vote yes or no on maintaining the current territorial relation with the United States. *Id.* at 6. According to the records of the State Elections Commission, the vote was 46 percent "yes" and 54 percent "no." *Id.* at 8. For the first time, a majority of the people rejected the territorial status. *Id.* On the second question, the voter could select among three options: statehood, independence and *estado libre asociado soberano*. *Id.* at 6. Of the total ballots cast, 44 percent voted for statehood, 4 percent voted for independence, 24 percent voted for *estado libre asociado soberano* (sovereign free associated state) and 27 percent did not vote for any of the options. *Id.* at 13. During the campaign, the Popular Democratic Party, which supports the present relation, had asked voters to cast blank votes in the second question. Ed Morales, *Analysis: The Puerto Rico Plebiscite That Wasn't*, ABC NEWS (Nov. 8, 2012), http://abcnews.go.com/ABC_Univision/Opinion/puerto-rico-status-plebiscite/story?id=17674719. Half of their electorate did so; the other half voted for the *estado libre asociado soberano*. *Id.* If the blank votes are factored out, statehood obtained 61 percent, independence 6 percent and *estado libre asociado soberano* 33 percent. Needless to say, the blank votes can reasonably be interpreted as not favoring statehood. *Id.*; Garret, *supra* note 8.

9. Jeff Spross, *Why Puerto Rico Needs its Own Currency*, THE WEEK (Mar. 28, 2016), http://theweek.com/articles/614699/why-puerto-rico-needs-currency.

absolutely deprived of sovereignty. Finally, the Article will examine how the territorial nature of the relation contradicts not only the foundational values on which the American republic was erected, but also the binding norms of international law, which recognize to all peoples the collective human right to self-determination.

## *II. A HISTORICAL VIEW ON TERRITORIAL EXPANSION*

### A. Territorial Expansion in the Eighteenth and Nineteenth Centuries

What are the legal foundations of the territorial policy? We must go as far back as the Treaty of Paris of 1783, in which Great Britain recognized the independence and geographical boundaries of the new nation.[10] Back then, it included the original thirteen states and a stretch of land from the western border of those states to the Mississippi River.[11] State disputes over that stretch of land were finally resolved four years later with the congressional adoption of the Ordinance of the Northwest Territory, which nationalized the title over most of those lands.[12] They were to be inhabited by colonists who would continue to enjoy the same rights they enjoyed in the states of origin.[13] The ordinance provided that new states were to be created from those lands, which would forever remain a part of the United States.[14]

The Ordinance of the Northwest Territory was adopted by Congress while the Constitutional Convention was in session. The plan laid out in the ordinance was incorporated into the new constitutional text. "New States may be admitted by the Congress into this Union. . . . 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."[15] From the very onset, the Constitution would apply to all parts of

10. Treaty of Paris, U.S.-Gr. Brit., arts. 1–2, Sept. 3, 1783, Gen. Records of the U.S. Gov't Record Grp. 11.

11. *Id.*

12. AN ORDINANCE FOR THE GOVERNMENT OF THE TERRITORY OF THE UNITED STATES NORTH-WEST OF THE RIVER OHIO (July 13, 1787).

13. *Id.*

14. *Id.*

15. U.S. CONST. art. IV, § 3.

the United States, including the territory.[16] Congress would have the power to break it down, carve specific portions, and "dispose" of them by admitting them as new states.[17] Meanwhile, Congress would hold title over those lands with the power to adopt any rules it considered appropriate to execute the plan.[18] Under this original design, the Territory Clause was simply a property clause that granted the federal government title over the territory that existed at the time.

Over the course of the nineteenth century, the United States extended its territory dramatically, beginning with the Louisiana Purchase of 1803 from France, which practically doubled the geographical extent of the young nation,[19] and the acquisition of Florida from Spain in 1819–1820.[20] Those developments prompted the Supreme Court's reinterpretation, in 1828, of the Territory Clause of the Constitution.[21] According to the opinion, drafted by Chief Justice John Marshall, the clause not only granted Congress a property right over the territories—all of them—but also the right of sovereignty, to govern their inhabitants and everything within their borders.[22]

That was the legal framework that served the construct of manifest destiny, the ideological justification for territorial expansion to the confines of the continent and beyond: Oregon territory from Great Britain in 1846;[23] half of Mexico in 1848;[24] Alaska from Russia in 1867;[25] and the coup d'état in the Kingdom

16. *See* U.S. GEN. ACCOUNTING OFFICE, REP. TO THE CHAIRMAN, COMM. ON RES., H.R., U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONST. 9–24, 26 (Nov. 1997) (explaining that the insular areas enjoy the fundamental rights provided by the Constitution, but that other rights are only extended to citizens within the states, such as the right to vote in national elections, unless law allows for insular inhabitants to be included).

17. U.S. CONST. art. IV, § 3.

18. *The Territorial Clause: Who Cares?*, PUERTO RICO 51ST, http://www.pr51st.com/territorial-clause-cares/ (last visited Feb. 28, 2017).

19. Library of Congress, *Westward Expansion: Encounters at a Cultural Crossroads*, LIBR. OF CONGRESS, http://www.loc.gov/teachers/classroommaterials/primarysourcesets/westward/pdf/teacher_guide.pdf (last visited Feb. 28, 2017); Convention Between the United States of American and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 206.

20. Treaty of Amity, Settlement and Limits between the United States of America, and His Catholic Majesty, U.S.-Spain, art. 2, Feb. 22, 1819, Oct. 29, 1820, 8 Stat. 252.

21. Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 541–44 (1828).

22. *Id. See also* Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (explaining the vast scope of power that Congress has over the U.S. territories).

23. Oregon Treaty, U.S.-Gr. Brit., pmbl., June 15, 1846, 9 Stat. 869.

24. Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), U.S.-Mex., pmbl., Feb. 2, 1848, 9 Stat. 922.

25. Treaty on the Cession of Alaska, U.S.-Russ., art. 1, Mar. 30, 1867, 15 Stat. 539.

of Hawai'i in 1893 that created a so-called "republic," followed by annexation in 1898.[26]

Each of these acquisitions followed the scheme of the Northwest Territory. In order to extend the boundaries of the nation, all the new territories were acquired with the purpose of being eventually admitted as one or more states, and their inhabitants were to enjoy the same rights as citizens of the several states during their territorial transition.[27] They would be colonized and temporarily governed by Congress, where they had no representation, until admission to statehood could be justified with sufficient population, economic resources, and the adoption of the core values embodied in the American form of government.[28]

Over the course of the nineteenth century, the nature of the Republic changed as the boundaries gradually crept across the continent. By the end of the nineteenth century, what Thomas Jefferson had dubbed "an empire of liberty"[29] mutated into a regime that "claimed the liberty to rule an empire."[30] The

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26. *See* Territory of Hawaii v. Mankichi, 190 U.S. 197, 209 (1903) (internal citation omitted) (stating "[b]y a joint resolution adopted by Congress, July 7, 1898, known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in . . . its Constitution, the Hawaiian islands and their dependencies were annexed 'as a part of the territory of the United States'").

27. *See* Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 48, 64–65 (2001) (explaining how territorial expansion before 1898 followed the same "pattern of territorial development" outlined in the Northwest Ordinance, leading to admission to statehood, and how that pattern was "definitely broken" in 1898).

28. Congress has repeatedly employed three criteria to admit new states:

> (1) That the inhabitants of the proposed new State are imbued with and are sympathetic toward the principles of democracy as exemplified in the American form of government.
> (2) That a majority of the electorate wish statehood.
> (3) That the proposed new State has sufficient population and resources to support State government and at the same time carry its share of the cost of the Federal Government.

COMM. ON INTERIOR AND INSULAR AFF., ENABLING THE PEOPLE OF ALASKA AND HAWAII EACH TO FORM A CONSTITUTION, H.R. REP. NO. 84–88 TO ACCOMPANY H.R. 2535, 84th Cong., 39 (1955).

29. Carlos Iván Gorrín Peralta, *Puerto Rico and the United States at the Crossroads*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 183, 186 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015). *See also* Weiner, *supra* note 27, at 89 (providing the vision of Thomas Jefferson's idea of an empire and its connection to the Manifest Destiny).

30. Gorrín Peralta, *supra* note 29, at 186.

transformation culminated in 1898, as the United States acquired three new territories by conquest and treaty that were markedly different from those that motivated previous annexations.

### B. A New Territorial Policy: The Rise of Empire for the Twentieth Century

The Spanish American War, Theodore Roosevelt's "splendid little war,"[31] served the political objective of reunification of the nation after the Civil War. The economic needs of new sources of cheap raw materials, new places for the investment of surplus capital, and the security of controlled export markets prompted a quick war to snatch the last holdings of the former Spanish empire.[32] There were also geopolitical and strategic objectives: the expanding economic interests in Asia (to compete with Japan) and the required presence of a growing military might in the Caribbean (where plans for an interoceanic canal were already in motion).[33]

Spain ceded sovereignty over the Philippines, Guam, and Puerto Rico; it also "relinquished" sovereignty over Cuba, which was never formally a territory but instead—for many decades—was economically and politically controlled by the United States.[34] Ironically, the Treaty of Peace was signed in Paris,[35] the same city where the United States formally ceased to be a colony of Great Britain in 1783,[36] and where now, in 1898, the United States would acquire colonies to become an imperial power.

The different geopolitical, economic, and strategic motivations explain why the instrument of annexation did not reproduce the terms of previous acquisitions. The 1898 Treaty of

31. The phrase has been incorrectly attributed to Theodore Roosevelt, probably as a result of his personal involvement in the war. It was John Milton Hay, Secretary of State from August 1898 until his death in July 1905, who in a letter to President Theodore Roosevelt, referred to the 1898 imperial adventure as a "splendid little war." *John Milton Hay*, LIBR. OF CONGRESS, https://www.loc.gov/rr/hispanic/1898/hay.html (last visited Feb. 28, 2017).

32. BARTHOLOMEW H. SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE 65 (2006).

33. *Id.*

34. Treaty of Peace, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

35. *Id.*

36. *See* Treaty of Paris, *supra* note 10, at art. 1 (memorializing the formal independence of the United States from Great Britain).

Paris states quite tersely that the political condition and the rights of the "native inhabitants" of the new possessions were to be determined by Congress.[37] There would not be equal rights for the population, nor any promise of future admission of the new territories as states of the union.[38]

A debate ensued within political and academic circles regarding what to do with the new possessions. In several articles published by the Harvard Law Review and the Yale Law Journal in 1899, some legal academics advanced an "anti-imperialistic" position.[39] The United States could not acquire foreign lands to govern indefinitely without participation of their people in the government. It would be argued, however, that the new

37. Treaty of Peace, *supra* note 34, at art. IX.

38. *Id.* Article IX of the treaty states:

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

*Id.* (emphasis added) (footnote omitted). The text of this article is similar to Article III of the Treaty on the Cession of Alaska, which also secured citizens of the ceding nation their citizenship if they so chose, but had quite a different treatment for the "uncivilized native tribes." Treaty on the Cession of Alaska, *supra* note 25.

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may from time to time adopt in regard to aboriginal tribes of that country*.

*Id.* (emphasis added). This seems to have been the first time that the United States did not recognize constitutional protections to inhabitants of a newly acquired territory, in this case the "uncivilized native tribes" of Alaska. *Id.* Not only is it shameful that equal rights were not recognized for indigenous Alaskans, but thirty-one years later the same inequality would be perpetrated against all the native inhabitants of Guam, the Philippines, and Puerto Rico. *Id*.

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

possessions were populated by inferior races incapable of true civilized government; they could not be part of the American people and had to be relinquished as soon as possible.[40] On the "imperialistic" side of the debate, other academics argued that the United States could acquire new lands through military conquest or treaty and govern them through the Territory Clause, with no constitutional limits.[41]

A third view emerged from the clash of the first two: the United States has the power to acquire and rule new territories, but a new territory is not part of the United States unless that is the will of the Congress.[42] The new "unincorporated" territories belong to, but are not part of, the United States and can be ruled by Congress with minimal limitations.[43]

This "third view"—the theory of territorial non-incorporation—was elevated to the rank of constitutional doctrine by the Supreme Court in the so-called *Insular Cases* decided between 1901 and 1922.[44] In a seminal concurring opinion in

40. *See* Randolph, *supra* note 39, at 304–05, 308–11 (discussing this concept with regard to Philippine islanders).

41. *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, 395, 397–99 (1899); Simeon E. Baldwin, *The People of the United States*, 8 YALE L.J. 159, 164 (1899); Charles C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 372–73 (1899).

42. *E.g.*, Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 172 (1899).

43. *Id.* at 169–70; John Kimberly Beach, *Constitutional Expansion*, 8 YALE L.J. 225, 228 (1899); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471 (1899).

44. Some authorities employ the term to refer to the original string of cases decided by the Supreme Court in 1901, which mark the origin of the doctrine. For the most significant or pertinent to Puerto Rico, see Downes v. Bidwell, 182 U.S. 244 (1901); and De Lima v. Bidwell, 182 U.S. 1 (1901). Other cases decided between 1902 and 1922, which actually developed the doctrine of territorial incorporation and gave it unanimous acceptance by the Court are also frequently included in the term. For the most significant, see Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dowdell v. United States, 221 U.S. 325 (1911); Rassmussen v. United States, 197 U.S. 516 (1905); Dorr v. United States, 195 U.S. 138 (1904); and Hawaii v. Mankichi, 190 U.S. 197 (1903). Thorough expositions of the cases can be found in: Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 REV. JUR. U.P.R. 259, 290–91 (1974); Raúl Serrano Geyls, *The Territorial Status of Puerto Rico and Its Effect on the Political Future of the Island*, 39 REV. JUR. U.I.P.R. 13, 14–15 (2004); JOSÉ TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 235–72 (1980); Carlos I. Gorrín Peralta, *Historical Analysis of the Insular Cases: Colonial Constitutionalism Revisited*, 56 REV. COL. ABO. P.R. 31 (1995); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 74–75 (2001); TORRUELLA, *supra* note 2, at 43–45.

*Downes v. Bidwell*,[45] Justice Edward E. White articulated the first judicial formulation of the doctrine in a case originating in Puerto Rico:

> [W]hile in an international sense [Puerto] Rico [is] not a foreign country, since it [is] subject to the sovereignty of and [is] owned by the United States, it [is] foreign to the United States in a domestic sense, because the island [has] not been incorporated into the United States, but [is] merely appurtenant thereto as a possession.[46]

The consequence of being an unincorporated territory, which is not part of the United States, is that the Constitution does not necessarily apply; but according to the terms of the Treaty of Paris, Congress could determine if a provision of the Constitution applies in a non-incorporated territory.[47]

Similarly, Congress may decide that a federal law will apply or will not apply in the territory. For example, the cabotage laws require that maritime commerce be conducted between points of the United States in ships owned by U.S. citizens navigating under the U.S. flag.[48] Those laws have been made applicable to Puerto Rico.[49] As a result, all of Puerto Rico's imports are considerably more expensive than if they could be imported in

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45. 182 U.S. 244 (1901).

46. *Id.* at 341–42 (White, J., concurring).

47. *Id.* at 279–80. Justice Henry B. Brown, announcing the conclusion and judgment of the court stated that "the Constitution is applicable to territories acquired by purchase or conquest, only when and so far as Congress shall so direct." *Id.* The Court later reiterated the theory of congressional extension of constitutional provisions, stating that:

> Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling. . . . [B]ecause the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.

Torres v. Puerto Rico, 442 U.S. 465, 470 (1979). Fortunately, the Court decided in *Torres* that Congress had seen it beneficial to extend to Puerto Rico the Fourth Amendment's protection from unreasonable searches and seizures, not because it must apply, but out of the goodness of the Congressional heart. *Id.* at 470–71.

48. 46 U.S.C. § 55102 (2006).

49. *See* 46 U.S.C. § 55101 (declaring that the coastwise laws apply "to the United States, including the island territories and possessions of the United States" except American Samoa, the Northern Mariana Islands, and the Virgin Islands). *See also* 48 U.S.C. § 744 (making the coastwise laws applicable specifically to Puerto Rico).

other ships.[50] On the other hand, the supplemental security income, designed to ease the burden of the poor, which is close to half of the population,[51] does not apply in Puerto Rico.[52] Also, Puerto Rico municipalities and public corporations do not have access to bankruptcy proceedings under federal law because in 1984 Congress decided to exclude Puerto Rico from the application of that aspect of the Bankruptcy Code.[53]

## *III. THE RISE AND FALL OF A CONSTITUTIONAL MIRAGE*

In 1950, Congress adopted legislation in the exercise of its plenary powers under the Territory Clause to allow for the creation of the so-called "Commonwealth of Puerto Rico," in Spanish "Estado Libre Asociado," which translates literally as "Free Associated State."[54] After half a century under the sovereignty of the United States, Public Law 600 authorized the people of Puerto Rico to adopt a constitution for their local government.[55] The law was adopted "in the nature of a compact" since the people were asked to vote for or against the terms of the

50. *See* Anne O. Krueger, Ranjit Teja & Andrew Wolfe, *Puerto Rico—A Way Forward*, VALUE WALK 18 (June 29, 2015), http://www.valuewalk.com/wp-content/uploads/2015/06/269934143-Krueger-et-al-Report-IMF-former-Economists-on-Puerto-Rico.pdf.

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

*Id.*

51. According to the U.S. Census Bureau Puerto Rico Community Survey 45 percent of the population was under the poverty level in 2013. Alemayehu Bishaw & Kayla Fontenot, *American Community Survey Briefs*, U.S. CENSUS BUREAU (Sept. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-01.pdf.

52. The exclusion of Puerto Rico from the application of SSI, 42 U.S.C. § 1382c(e) (1988), was validated by the Supreme Court in Califano v. Gautier Torres, 435 U.S. 1, 2 (1978).

53. 11 U.S.C. § 1101(52) (2012).

54. Resolution 22 of the Constitutional Convention of Puerto Rico (Feb. 4, 1952), *reprinted in* DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 191–92 (Marcos Ramirez Lavandero ed., 3d ed. 1988) (stating the name shall be "Estado Libre Asociado" in Spanish and "Commonwealth" in English). The "translation" adopted by the Convention has been characterized as convoluted and confused (*galimatías*) by the late José Trías Monge, former delegate to the Convention, former Secretary of Justice of the Commonwealth government, and former Chief Justice of the Puerto Rico Supreme Court. TRÍAS MONGE, *supra* note 44, at 266.

55. 48 U.S.C. § 731 (2015) (enacted under Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950)).

law before it could become effective.[56] After the constitution was drafted and ratified by special referendum, it had to be approved by the president and by Congress, which conditioned the approval on the modification of several provisions of the proposed text.[57] A week later, on July 10, 1952, the Constitutional Convention reconvened to adopt Resolution 34, which accepted the conditions imposed by Congress.[58] The new constitution entered into force on July 25, 1952, on the anniversary of the invasion of Puerto Rico by U.S. forces in 1898.[59] The same government elected under the Organic Act of 1917 continued in place. On November 4, 1952, more than three months after the Proclamation, the first general election was held under the new constitution.[60] Simultaneously, the modifications required by Congress to the constitution already in force were submitted to the electorate, which formally accepted what was, by then, a *fait accompli*.

The legislative history of the 1950 law shows that it sought the consent of the people to the existing territorial regime.[61] The

56. *Id.*

57. Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952).

58. Resolution 34 of the Puerto Rico Constitutional Convention (July 10, 1952), *reprinted in* DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES, *supra* note 54, at 222–23. "To accept, in [sic] behalf of the people of Puerto Rico, the conditions of approval of the Constitution of the Commonwealth of Puerto Rico proposed by the Eighty-second Congress of the United States through Public Law 447 approved July 3, 1952." *Id*; *see also* TORRUELLA, *supra* note 2, at 158.

59. *The 1952 Puerto Rico Constitution: A New "Commonwealth" in Name Only*, PUERTO RICO REPORT (Jan. 16, 2013), http://www.puertoricoreport.com/the-1952-puerto-rico-constitution-a-new-commonwealth-in-name-only/#.V9Lrl5grLIU.

60. Jesús G. Román, Comment, *Does International Law Govern Puerto Rico's 1993 Plebiscite?*, 8 BERKELEY LA RAZA L.J. 98, 110 (1995).

61. RAUL SERRANO GEYLS, DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 488 (Colegio de Abogados de Puerto Rico 1986). In his testimony before Congress, then-governor of Puerto Rico Luis Muñoz Marín said, "[I]f the people of Puerto Rico should go crazy, Congress can always get around and legislate again." *Id.* Then Resident Commissioner Antonio Fernós Isern added: "[T]he authority of the Government of the United States, of the Congress, to legislate in case of need, would always be there." *Id.* Later on, he reiterated that the bill "would not change the status of the island of Puerto Rico relative to the United States. . . . It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris." *Id.* On the House floor, during the debate of the measure, Fernós stated, "[T]he present exercise of United States authority over all matters of a Federal nature, would continue undisturbed." *Id.* A report submitted by Oscar Chapman, Secretary of the Interior, stated that "[t]he bill under consideration would not change Puerto Rico's political, social and economic relationship to the United States." *Id.* According to the State Department report submitted to Congress on this legislation, "[T]he Department of State believes it to be of the greatest importance that the Puerto Rican people be authorized to frame their own constitution . . . in order that formal consent of Puerto Ricans may be given to their present relationship to the United States." *Id.* The Senate report that recommended

United States had to respond to international pressure at the United Nations, which required annual reports on steps taken to decolonize, under the obligations imposed by the U.N. Charter.[62] In 1953, the United States obtained a General Assembly Resolution exempting compliance with the obligation to report annually.[63]

During the couple of decades after 1952, both the Puerto Rican and U.S. governments propounded the idea that the constitutional relation had changed and Puerto Rico had ceased to be a territory of the United States.[64] Some judicial decisions followed suit, using terms such as "a unique relationship"[65] "that has no parallel in our history"[66] and that "Puerto Rico is to be deemed 'sovereign.'"[67] However, between 1975 and 1980, the specter of territoriality reemerged in several decisions of the Supreme Court. Despite the changes resulting from the adoption of the Constitution of the Commonwealth of Puerto Rico, the relation itself seemed to have minimally changed. Jurisdiction of federal courts in Puerto Rico was not in any way altered in 1952 and laws which were previously applicable to the territory were to be applied just as before.[68] The Constitution of the United States does not apply *ex proprio vigore* in Puerto Rico, just as it had not previously applied since the *Insular Cases*. For instance, the protection from unreasonable searches and seizures must be respected in Puerto Rico not because it is mandated by the Constitution, but because Congress thought it would be

approval stated that the bill was "designed to complete the full measure of local self-government in the island by enabling the 2 1/4 million American citizens there to express their will and to create their own territorial government. . . . The measure would not change Puerto Rico's fundamental political, social and economic relationship to the United States." *Id.*

62. Resolutions Adopted on the Reports of the Fourth Committee, GA Res. 748 (VIII) (1953), U.S. GAOR, 8th Sess., Supp. No. 17, at 25, U.N. Doc. A/2630 (Nov. 27, 1953).

63. *Id.*

64. *See* T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 19, n.16 (1995) (citing United States v. Quiñones, 758 F.2d 40, 42 (1st Cir. 1985) (stating that "in 1952, Puerto Rico ceased being a territory of the United States[,] . . . Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power").

65. Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 573 (1976).

66. *Id.* at 596.

67. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 673 (1974) (citation omitted).

68. *Flores de Otero*, 426 U.S. at 572.

"beneficial" to extend the protection to the unincorporated territory.[69] Finally, the Supreme Court decided,

> Congress, which is empowered under the Territory Clause of the Constitution, U.S. Const. Art. IV, § 3, cl. 2, to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," may treat Puerto Rico differently from States so long as there is a rational basis for its actions.[70]

The idea that the relation had changed constitutionally through a "compact" between the people of Puerto Rico and the U.S. Congress was a house of cards that had been blown away, especially in the past decade. Several generations were brought up with the idea that there was a bilateral compact that could not be modified unilaterally; after all, Law 600 was "adopted in the nature of a compact."[71] In his posthumously published memoirs, the late José Trías Monge—one of the legal artificers of the process, member of the Constitutional Convention, former Secretary of Justice, and former Chief Justice of the Puerto Rico Supreme Court—explains that the phrase was an intentionally ambiguous text.[72] While it would be possible to convince the people of Puerto Rico of an imaginary compact, it could also be argued before Congress that the legislation did not really entail a mutually binding agreement that limited the exercise of plenary powers of future congresses over Puerto Rico. It had a form similar to a compact, but without the substance.[73]

More importantly, three reports issued by a "White House Task Force on Puerto Rico's Status" have indicated that the

69. Torres v. Puerto Rico, 442 U.S. 465, 470 (1979).
70. Harris v. Rosario, 446 U.S. 651, 651–52 (1980).
71. 48 U.S.C. § 731(b) (2012).
72. JOSÉ TRÍAS MONGE, CÓMO FUE: MEMORIAS ch. 7 (2005).
73. *Id.* at 144.

> With regard to the compact, [then Resident Commissioner Antonio] Fernós had been one of the most vocal defenders of the idea in 1947 and 1948, but then tenaciously opposed any explicit reference to the idea in the bill to be introduced in Congress. *Id.* In his judgment, the existence of a compact could be deduced from the process to be followed; its express mention would endanger the legislation. *Id.* This brought about a meeting in Washington between Fernós, [Abe] Fortas and the author [Trías Monge]. *Id.* It was there that, at the suggestion of Fortas, it was agreed in compromise, to say only, in ambiguous form, that the law would be adopted "in the nature of a compact."

*Id.* (author's translation).

statements made before the United Nations in 1953 had no legal import.[74] Puerto Rico is an unincorporated territory; the plenary powers of Congress are such that it may repeal any law granting powers of self-government to the territory, and even cede Puerto Rico to another nation.[75]

As recently as December 2015, in the case of *Puerto Rico v. Sánchez Valle*,[76] the Solicitor General of the United States argued, in an amicus curiae brief presented to the Supreme Court, that Puerto Rico is an unincorporated territory and lacks any sovereignty whatsoever.[77] An assistant solicitor general reiterated this in oral argument before the Court.[78] The Puerto Rico Supreme Court had determined that the protection against double jeopardy may be invoked in Puerto Rico courts by a defendant who has been previously processed by the federal authorities for the same crime.[79] If the same criminal prosecution is initiated in a state court—or in an Indian court—double jeopardy cannot be invoked because it applies only to a second prosecution by the same sovereign government.[80] Since Puerto Rico is still an unincorporated territory, it lacks sovereignty and thus may not prosecute the defendant for the same offense.[81] The United States argued that the Supreme Court of Puerto Rico was correct; Puerto Rico has no sovereignty whatsoever.[82] On questions posed by the justices, the attorney for the United States

74. President's Task Force on Puerto Rico's Status, *Reports by the President's Task Force on Puerto Rico's Status*, 17–18 (White House, 2011); President's Task Force on Puerto Rico's Status, *Reports by the President's Task Force on Puerto Rico's Status*, 5–6 (White House, 2007); President's Task Force on Puerto Rico's Status, *Reports by the President's Task Force on Puerto Rico's Status*, 7 (White House, 2005).

75. President's Task Force on Puerto Rico's Status, *Reports by the President's Task Force on Puerto Rico's Status*, 6 (White House, 2005, 2007, 2011).

76. 136 S. Ct. 1863 (2016).

77. Brief for the United States as Amicus Curiae Supporting Respondents at 34, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

78. Transcript of Oral Argument at 44–58, Commonwealth of Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

79. Puerto Rico v. Sánchez Valle, 192 D.P.R. 594, 598 (2015).

80. *E.g.*, Abbate v. United States, 359 U.S. 187, 195–96 (1959); Bartkus v. Illinois, 359 U.S. 121, 138–39 (1959); United States v. Lanza, 260 U.S. 377, 377 (1922). The same principle applies to subsequent prosecutions in the context of an Indian nation. *E.g.*, United States v. Wheeler, 435 U.S. 313, 332 (1978). However, because territories have no separate sovereignty, a territorial government may not prosecute if the federal government already has, and vice versa. *E.g.*, Puerto Rico v. Shell Co., 302 U.S. 253, 271 (1937); Grafton v. United States, 206 U.S. 333, 355 (1907).

81. Sánchez Valle, 192 D.P.R. at 598.

82. Brief for the United States as Amicus Curiae Supporting Respondents, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

went as far as to say that Congress may revise the present arrangement under Public Law 600, and do away with the powers under the Commonwealth Constitution.[83]

On June 9, 2016, the U.S. Supreme Court decided the *Sánchez Valle* case, affirming the decision of the Puerto Rico Supreme Court in a 6–2 vote.[84] It adopted the theory advanced by the Justice Department. Puerto Rico is an unincorporated territory of the United States, and all authority exercised by the Commonwealth government, including the prosecution of criminal offenses, derives from congressional authority as the ultimate source of power.[85] Puerto Rico cannot prosecute a person previously prosecuted by the federal government, and vice versa.[86] State governments and Indian tribes may do so because they are empowered by a sovereign people endowed with a separate source of power; however, the government of the territory of Puerto Rico is not.[87] Its ultimate source of power, according to the Supreme Court, is not the people but the Congress of the United States.[88]

In the not-so-distant past, the current relation was touted as the best of two worlds.[89] It was argued that Puerto Rico could maintain its cultural identity while benefitting from a close economic relationship with the United States.[90] Now, it turns out that it is the worst of all worlds.[91] After a couple of decades of important economic growth in the 1950s and 1960s, close to one-half of the Puerto Rican population is now under the poverty level and dependent on government aid.[92] For seven decades, the per

83. Transcript of Oral Argument at 49–51, Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

84. Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863 (2016).

85. *Id.* at 15.

86. *Id.* at 17–18.

87. *Id.* at 8–9.

88. *Id.* at 17.

89. *See generally* Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1139–42 (1997) (detailing the history of the relationship between Puerto Rico and the United States).

90. *See generally id.* at 1176 (attributing the longevity of the colonial relationship to "Puerto Rico's social, political and economic dependence on the United States").

91. *See id.* at 1210 (asserting, "[T]he United States-Puerto Rico relationship is one of domination and undue foreign political and economic influence").

92. *See* Brian Chappatta, *Puerto Rico Economy Worsens with Crisis, Most Anywhere You Look*, BLOOMBERG POLITICS (April 25, 2016, 9:22 AM EDT), http://www.bloomberg.com/politics/articles/2016-04-25/puerto-rico-economy-worsens-with-crisis-most-anywhere-you-look (noting that "[a]bout 46.2 percent of Puerto Ricans live below the poverty line, compared with 14.8 percent in the U.S.").

capita income has been one-third of the U.S. per capita income[93] and approximately one-half of the poorest state.[94] Official unemployment hovers between 11 and 14 percent.[95] During the past decade, Puerto Rico has had a negative annual rate of economic growth, the lowest in the whole hemisphere, and one of the lowest in the world.[96] Taxes have soared.[97] The government is bankrupt, government obligations have been degraded to junk, and there is no longer any access to credit markets.[98] As a result,

93. By the end of fiscal year 2013, GNP per capita in the United States was $53,720, while per capita GNP of Puerto Rico was $19,310. World Bank, *GNI Per Capita*, UNDATA, http://data.un.org/Data.aspx?q=gni+per+capita+datamart%5bWDI%5d&d=WDI&f=Indicator_Code%3aNY.GNP.PCAP.CD%3bCountry_Code%3aPRI%2cUSA%E2%80%A6 (last visited Feb. 28, 2017). These figures suggest that per capita GNP in the United States is still almost three times that of Puerto Rico (2.8), a gap that has prevailed since the 1960s. *Id.*

94. Mississippi still ranks at the bottom among the states. *See* U.S. Dep't of Commerce, *Mississippi*, BUREAU OF ECON. ANALYSIS (Sept. 28, 2016), http://bea.gov/regional/bearfacts/pdf.cfm?fips=28000&areatype=STATE&geotype=3. However, official data for 2015 raised its per capita GNP to $34,771, almost 1.8 times that of Puerto Rico. *Id.* (noting that Mississippi's 2015 per capita personal income ranked fiftieth among the states).

95. According to the Puerto Rico Planning Board Economic Reports to the Governor during the past few years, the unemployment rate in Puerto Rico has fluctuated between 13 percent and 14 percent. Commonwealth of Puerto Rico Office of the Governor Planning Board, *Statistical Appendix of the Economic Report to the Governor and to the Legislative Assembly*, GOV'T DEV. BANK FOR PUERTO RICO (2015), http://www.gdb-pur.com/economy/documents/ApendiceEstadistico2015.pdf (showing that the Puerto Rico unemployment rate ranging from 14 percent in 2013 to 13 percent in 2015). Even worse is the extremely low labor-force participation of about 40 percent, considered among the lowest in the world. *Countries with Lowest Labor Force Participation Rate–Bottom 5 World*, IECONOMICS (2016), http://ieconomics.com/lowest-5-labor-force-participation-rate.

96. Since fiscal year 2006, the economy of Puerto Rico has registered negative growth of its real GNP. Commonwealth of Puerto Rico Office of the Governor Planning Board, *supra* note 95, at A-6. It has shrunk almost 14 percent at an average annual rate of decrease of 1.6 percent. *Id.* In other words, a ten-year long recession has resulted in a current productive capacity, which is barely 86 percent of what it was ten years ago. *Id.*

97. Since November 2006, the government has tried to reduce its budget deficit with taxes. *See* Commonwealth of Puerto Rico, *General Concepts of the Sales and Use Tax*, DEP'T OF THE TREASURY (Nov. 10, 2006), http://www.hacienda.gobierno.pr/downloads/pdf/publicaciones/ publicacion/PUBLICATION%2006-05-1.pdf (explaining how the new tax scheme will operate). A duty of 5 percent on all merchandise imported into Puerto Rico became a sales tax of 7 percent on most consumer products and services rendered, which recently increased to an 11.5 percent sales tax. *See* Chappatta, *supra* note 92 (describing the recent tax hike as a way for Puerto Rico to "help pay its bills"). Despite these impositions, the Puerto Rico Department of the Treasury forecasted another budget deficit by the end of fiscal year 2016. Robert Slavin, *Puerto Rico Senate Passes Balanced Budget*, BOND BUYER (June 25, 2015), http://www.bondbuyer.com/news/regionalnews/ puerto-rico-senate-passes-balanced-budget-1077399-1.html.

98. *See* D. Andrew Austin, *Puerto Rico's Current Fiscal Challenges*, CONG. RES. SERVICE 4 (June 3, 2016), https://www.fas.org/sgp/crs/row/R44095.pdf (attributing the loss of credit market access to weakened investor confidence).

the government has announced that it cannot pay the public debt.[99] Needless to say, the social problems associated with the economic crisis have multiplied in the areas of education, health, crime, drug addiction, social services, and government corruption.[100] The territory is on the brink of a humanitarian debacle.

The current fiscal crisis regarding the public debt of Puerto Rico prompted several legislative proposals. A bill was introduced in Congress to amend the Bankruptcy Code so that Chapter 9 would once against apply to Puerto Rico in order to facilitate access by municipalities and public corporations to reorganization proceedings to restructure their debts.[101] Since the bill did not gather support, the Puerto Rico legislature passed a law to fill the gap left in 1984 by the exclusion of Puerto Rico from the application of chapter 9.[102] As soon as the law was adopted, potentially affected creditors challenged it in the U.S. District Court for the District of Puerto Rico.[103] Both the District Court

99. *Id.* at 6. At the beginning of 2013, the main investors' services within the U.S. bond market anticipated an inevitable downgrading of local government obligations and public corporation bonds. Since 2014, a dramatic collapse has occurred in the market value of all Puerto Rican bonds. *Id.* at 4. This "junk bond" situation has shrunk the possibilities for external financing, not only now but in the foreseeable future. *See* John Waggoner, *Puerto Rico's Debt Downgraded to Junk*, USA TODAY (Feb. 5, 2014, 1:06 PM EST), http://www.usatoday.com/story/money/markets/2014/02/05/puerto-rico-downgraded-to-junk/5222499/ (noting that "Standard and Poor's lowered the debt of Puerto Rico to junk status Tuesday, making it more difficult for the cash-strapped island to raise money"). For the first time in Puerto Rico's history, in January 2016, the central government announced a default on its current debt obligations; almost four-hundred million dollars were not paid in May of 2016. *See* Michelle Kaske, Jonathan Levin & Brian Chappatta, *Puerto Rico Warns of More Defaults After Missing May Payment*, BLOOMBERG (May 2, 2016, 2:18 PM CDT), http://www.bloomberg.com/news/articles/2016-05-01/puerto-rico-will-default-on-government-development-bank-debt (evaluating the country's worsening financial position). An additional default on around half of Puerto Rico's two billion dollar debt obligation occurred in July of 2016. Heather Gillers & Nick Timiraos, *Puerto Rico Defaults on Constitutionally Guaranteed Debt*, WALL ST. J. (July 1, 2016, 6:42 PM EST), http://www.wsj.com/articles/puerto-rico-to-default-on-constitutionally-guaranteed-debt-1467378242.

100. *See* Vann R. Newkirk II, *Will Puerto Rico's Debt Crisis Spark a Humanitarian Disaster?*, ATLANTIC (May 13, 2016), http://www.theatlantic.com/politics/archive/2016/05/puerto-rico-treasury-visit/482562/ (detailing the dire state of schools and hospitals in Puerto Rico).

101. Puerto Rico Chapter 9 Uniformity Act of 2015, H.R. 870, 114th Cong. (2015).

102. Puerto Rico Public Corporation Debt Enforcement and Recovery Act, P.R. 71 (2014).

103. Franklin Cal. Tax-Free Trust v. Commonwealth of Puerto Rico, 85 F. Supp. 3d 577 (D.P.R. 2015).

and the Appeals Court for the First Circuit agreed that the law was preempted by a provision in the Federal Bankruptcy Code.[104]

Five days after the *Sánchez Valle* decision, the Supreme Court affirmed the lower courts' decisions in *Puerto Rico v. Franklin California Tax-Free Trust*.[105] States may have recourse to reorganization proceedings under the Bankruptcy Code in order to restructure their municipal debts,[106] but the 1984 exclusion of Puerto Rico from the restructuring provisions of the Code preempts any legislation by the Puerto Rico Legislative Assembly.[107] As a result, Puerto Rico has been left out in the cold. Congress exercised its plenary territorial powers to the detriment of Puerto Rico. The decision of the Supreme Court in 2016, which invalidates the exercise of legislative power of the territorial government, effectively strips Puerto Rico of any legal authority to face its economic crisis through partial restructuring of its public debt.

After months of discussions, lobbying, and political negotiations, Congress finally passed legislation to handle Puerto Rico's debt crisis.[108] On June 30, 2016, the President signed Public Law 114–187,[109] to be known by the artful title of "'Puerto Rico Oversight, Management, and Economic Stabilization Act' or 'PROMESA.'"[110] The law explicitly states that it was enacted pursuant to Article IV, Section 3 of the Constitution of the United States, which provides Congress the "power to dispose of and make all needful rules and regulations" for territories.[111]

104. *Id.*; Commonwealth of Puerto Rico v. Franklin Cal. Tax-Free Trust, 805 F.3d 322 (1st Cir. 2015).

105. 136 S. Ct. 1938 (2016).

106. 11 U.S.C. § 903(1).

107. *See* 11 U.S.C. § 101(52) (2012) (providing that Puerto Rico does not qualify as a "state" for purposes of qualifying as a debtor in the Bankruptcy Code).

108. *See* Government Affairs, *Puerto Rico Rescue Bill Approved by Congress, Heads to Obama*, NALC (June 30, 2016), https://www.nalc.org/government-affairs/legislative-updates/puerto-rico-rescue-bill-approved-by-congress-heads-to-obama (describing political concerns with the PROMESA bill); Mary Williams Walsh, *Puerto Rico's Debt Crisis Addressed in Bipartisan Bill*, N.Y. TIMES (May 19, 2016), http://www.nytimes.com/2016/05/20/business/puerto-rico-debt-bankruptcy.html?_r=0 (stating that negotiations were ongoing since May).

109. 48 U.S.C. § 2101 (2016) *et seq.*

110. *Id.* Needless to say "PROMESA" means "promise" in Spanish. However, no one has still deciphered what it is that PROMESA promises.

111. 48 U.S.C. § 2121(b)(2).

The Act created a seven-member board, which has been designated by the President.[112] Six of the members were proposed by the congressional leadership (four republicans and two democrats), and the President designated one member on his own initiative.[113] An eighth *ex officio* member is the governor of Puerto Rico, or whomever he designates, but without voting rights.[114] According to the law, the Oversight Board is an instrumentality of the Commonwealth of Puerto Rico, which will cover all its expenses, but it will not report to the government of the Commonwealth.[115] Quite the contrary, according to the Act, the Board may require any instrumentality or dependency of the territorial government to abide by the fiscal plans which the Board will approve.[116] It has the power to review, revise, and modify any law or decision of the territorial government, which is not in accordance with its fiscal plans.[117] The Board has the authority to approve the annual budget of the territorial government.[118] It must approve any issuance of new debt, or any modifications to the existing debt.[119] It may revise retirement funds for public employees.[120] Its members are immune to claims of liability for their actions.[121] The Act provides a six-month stay of proceedings aimed at collecting public debt.[122] The Board may negotiate with creditors to achieve voluntary restructuring of debt, and if negotiations fail, it may initiate proceedings before a federal court under rules similar to those of the Bankruptcy Code.[123]

As a byproduct of political negotiations during the congressional discussion of the proposed bills, PROMESA provides nominally for the creation of a congressional task force to look for avenues for "economic growth in Puerto Rico."[124] Its

112. *Id.* § 2121(e)(1)(A).
113. *Id.* § 2121(e)(2)(A)(i)–(vi).
114. *Id.* § 2121(e)(3).
115. *Id.* §§ 2101(c)(1)–(2), 2127(b).
116. *Id.* § 2121(d)(1)(D)–(E).
117. *See id.* § 2144(a)(5)–(6) (enabling the Board to take necessary actions to ensure the law will not adversely affect compliance with the Fiscal Plan).
118. *Id.* § 2142(a).
119. *Id.* § 2147.
120. *Id.* § 2145(a)(4).
121. *Id.* § 2125.
122. *Id.* § 2194(b)–(d).
123. *Id.* § 2124.
124. *Id.* § 2196.

members are four congresspersons and four senators, but the task force will operate independently of the board, which has no assigned purpose to promote economic growth.[125] In fact, PROMESA creates a board, comprised of seven people designated by the president and Congress, to oversee and control absolutely all government operations in the territory of Puerto Rico without the participation of the people of Puerto Rico.[126] PROMESA seems to be the culmination of colonial government, to secure the interests of creditors.[127]

Finally, PROMESA contains a mealy-mouthed recognition of Puerto Rico's right to determine its future political status.[128] But it effectively denies the exercise of self-determination by the people of Puerto Rico.[129]

## *IV. INTERNATIONAL LAW OF HUMAN RIGHTS: SELF-DETERMINATION*

While all of this is happening, a growing consensus has emerged in the international community over the course of the last seven decades regarding the right to self-determination of all peoples.[130] The United Nations Charter recognizes this right.[131] The Universal Declaration of Human Rights[132] and several other resolutions of the General Assembly are evidence of the recognition of the right as a norm of international customary law.[133] The two most important multilateral treaties on human

125. *Id.* § 2196(b).

126. *See id.* § 2121 (establishing the Financial Oversight and Management Board).

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

128. *See* 48 U.S.C. § 2192 (stating "[n]othing in this chapter shall be interpreted to restrict Puerto Rico's right to determine its future political status, including by conducting the plebiscite as authorized by Public Law 113–76").

129. Vann R. Newkirk II, *Puerto Rico's Dream, Denied*, ATLANTIC (June 14, 2016), http://www.theatlantic.com/politics/archive/2016/06/puerto-rico-guam-supreme-court-status/486887/.

130. *See generally* Román, *supra* note 89, at 1127–31 (outlining the twentieth century development of the right to self-determination in the United States).

131. U.N. Charter art. 1(2), June 26, 1945, 1 U.N.T.S. XVI (entered into force Oct. 24, 1945).

132. Universal Declaration of Human Rights art. 15, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

133. *See* Declaration on the Granting of Independence to Colonial Countries and Peoples, Dec. 14, 1960, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (recognizing the right of all peoples to self-determination and independence); Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the

rights, both civil and political as well as economic, social and cultural rights, have recognized the right to self-determination of all peoples and the affirmative obligation of state parties to promote the realization of the right.[134] The International Court of Justice has recognized the right as a binding legal norm.[135]

The United States is bound by the right to self-determination. It is a party to the U.N. Charter[136] and subject to customary international law, according to decisions of the Supreme Court.[137] The United States signed and ratified the International Covenant on Civil and Political Rights.[138]

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Information Called for Under Article 73e of the Charter, Dec. 15, 1960, G.A. Res. 1541 (XV), U.N. Doc. A/4684 (identifying substantive non colonial options acceptable under international law); Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, Oct. 24, 1970, G.A. Res. 2625 (XXV), annex, U.N. Doc. A/8028 (reiterating principles previously recognized, including self-determination).

134. International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 UNTS 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 UNTS 3 (entered into force Jan. 3, 1976) [hereinafter ICESC].

135. *Case Concerning East Timor (Portugal v. Australia)*, 1995 I.C.J. Reports 90, 102 (June 30, 1995); *Western Sahara*, 1975 I.C.J. Reports 12, 31–33 (Oct. 16, 1975); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), 1971 I.C.J. Reports 16, 31–32 (June 21, 1971).

136. *See* U.N. Charter, *supra* note 131, at 6, art. 23 (designating the United States as a permanent member of the United Nations Security Council).

137. In *The Paquete Habana*, 175 U.S. 677 (1900), the Supreme Court stated as follows:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

*Id.* at 700.

138. ICCPR, *supra* note 134. The Covenant was signed by President Jimmy Carter, and the Senate approved its ratification in 1992. *Id.* It entered into force for the United States on September 8, 1992. *Id.* Senate approval was accompanied by a "declaration" to the effect that the substantive provisions of the Covenant are not self-executing without implementing legislation. *See International Covenant on Civil and Political Rights*, 138 CONG. REC. S4781, 4784 (daily ed. April 2, 1992). For a discussion of whether the Covenant has the force of law and whether it may or may not be invoked in a court of law of the United States in view of the doctrine of non-self-executing treaties, see Gorrín Peralta, *supra* note 29, at 202–05.

Therefore, the right to self-determination is part of the "Law of the Land" according to the Supremacy Clause of the Constitution, which ordains "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[139]

And yet, the United States still maintains several territories under the plenary powers of Congress under the Territory Clause, even though the people of the territories have not been allowed to exercise their right to self-determination, and in the case of Puerto Rico, the people have rejected the territorial relation through the ballot.[140] The constitutional law that evolved during the first half of the twentieth century is now in conflict with the international obligations that the United States has assumed during the second half of the century.

The time has come for the contradiction to be resolved. The constitutional construct of territorial non-incorporation—which constitutes the legal standard for the territorial policy of the United States—was born in legal academia, namely Harvard and Yale. Those two institutions have decided, over the course of the last two decades, to contribute to the resolution of the contradiction, and both Yale Law School in 1998 and Harvard Law School in 2014 have held conferences and published books that have indicted the doctrine of territorial non-incorporation.[141] All other universities and law schools ought to follow suit.

What should be done? First, Congress should "dispose of" the territories as contemplated in the Territory Clause itself.[142] Second, it should adopt legislation to comply with its international obligation to facilitate the process of self-determination of all the territories. Third, Congress must decide which substantive alternatives—that are both non-territorial and non-colonial—shall be compatible with the interests of the United States.

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139. U.S. CONST. art. VI, cl. 2.

140. *See* Morales, *supra* note 8 (analyzing the results of a 2012 plebiscite ballot that indicated 54 percent of voters were unsatisfied with Puerto Rico's current territorial status).

141. FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 121, 122 (Christina Duffy Burnett & Burke Marshall eds., 2001); RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 183, 186 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

142. U.S. CONST. art. IV, § 3.

The options cannot include the territorial regime, which is the cause of the problems faced by the territories. One of the options could be admission of territories as new states. Congress must decide if it is willing to offer that option to any of the territories, under the terms and conditions employed in the past for the admission of thirty-seven new states.[143] Another option could be a treaty of free association, similar to those already existing to regulate relations between the United States and several island communities of the Pacific.[144] The third option, of course, is the recognition of full independence and the establishment of a new relation based on a treaty of friendship and cooperation. That was the route taken by the United States and the Philippines forty-eight years after acquisition of the islands in 1898.[145] At least in the case of Puerto Rico, independence would open the way for economic development and productive relations with other nations including the United States, which would benefit much more from a free Puerto Rico than from a bankrupt colony.[146]

Legal academia has much to contribute to the development of these options and processes, to facilitate transition to new relations of respect and dignity. It has been said that

143. In making that decision, Congress would necessarily address important issues. In the case of Puerto Rico, the most fundamental question would be whether American federalism, forged by civil war around the principle of indivisibility, is compatible with incorporating a sociologically distinct people, a Latin American nation, which under international law would retain, as part of its right to self-determination, the right to legitimate secession. *See generally* Rubén Berríos Martínez, *Self-Determination and Independence: The Case of Puerto Rico*, 67 AM. SOC'Y INT'L L. PROC. 11, 15–16 (1973) (concluding that independence is the only alternative); MALCOLM N. SHAW, INTERNATIONAL LAW 215–18 (Cambridge Univ. Press 1997) (discussing general principles of self-determination and the criteria of statehood, as that term is used in international law, not in U.S. constitutional law).

144. According to U.N. resolutions, especially Resolution 1541 (XV) of 1960, the options to achieve a "full measure of self-government" are full independence, "[f]ree association with an independent [s]tate," or "[i]ntegration with an independent [s]tate" already in existence. Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for Under Article 73e of the Charter of the United Nations, *supra* note 133. The second option of free association is recognized if it is "done freely and on the basis of absolute equality." Manuel Rodríguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. REV. 457, 470–71 (1987).

145. Treaty of General Relations Between the United States of America and the Republic of the Philippines, U.S.-Phil., July 4, 1946, 7 U.N.T.S. 3.

146. For a synthesis of the advantages of independence for Puerto Rico, see Rubén Berríos Martínez, *Puerto Rico's Decolonization*, 76 FOREIGN AFF. 100, 108–12 (1997).

"[c]olonialism denigrates the colonized, but it also demeans the colonizer."[147] The time has come to turn the page of history.

147. *Id.* at 112.