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The Rise and Fall of Puerto Rico: How Politico-Legal Failures Led to an Experiment's Demise

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THE RISE & FALL OF PUERTO RICO: HOW POLITICO-
LEGAL FAILURES LED TO AN EXPERIMENT'S DEMISE

by

SEBASTIÁN J. DELGADO SUÁREZ
B.A., UNIVERSITY OF CENTRAL FLORIDA, 2023

A thesis submitted in partial fulfillment of the requirements
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ABSTRACT

Puerto Rico has been a United States territory since 1898. Since then, the island has remained in an ill-defined relationship with the United States, lacking autonomy and sovereignty. The Supreme Court and Congress have been the primary agents dealing with Puerto Rico's territorial trajectory. While the island has faced many setbacks throughout the years, this thesis asserts that the zenith in autonomy and sovereignty was reached in the 1950s, after two key legislative developments. This set forth an experiment in territorial administration. But the experiment was abandoned and closed in 2016, after two Supreme Court decisions and an Act of Congress sent Puerto Rico—the experiment—in retrograde motion. This thesis explores Puerto Rico's politico-legal developments, with a focus on the 1950s and 2016.

To my family and loved ones.
Their tenacity is unmatched.
They are my guides and inspiration; the ones who fuel me to be the best
version of myself and do what is right and just.
To my friends, who have supported me throughout this
rewarding undertaking.
To the People of Puerto Rico, whose collective story inspired me to do this.

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I. Introduction

I love America more than any other country in the world, and, exactly for this reason, I insist on the right to criticize her perpetually.

-James Baldwin, *Notes of a Native Son*.

In 1950, the United States began its foray into an experimental territorial administration it had never utilized. Puerto Rico was that experiment. That year marked the beginning of the constitution-making process that no other territory had experienced. In essence, this degree of autonomy provided the island a glimpse into what could come with greater autonomy and self-government, akin to those of a State. But the project was left incomplete. Instead of expanding on those new self-governing measures, the United States precluded Puerto Rico from advancing. These restrictions on self-government were evident and most powerful in 2016 when a combination of judicial and legislative decisions sent Puerto Rico back to a time where the 1950s self-government victories did not exist.

This thesis will explore Puerto Rico's significant politic-legal events that either contributed or derailed the aims of the experiment in autonomy. First, a glimpse into Puerto Rico's early days in the polity, with a focus on Congress' and the Supreme Court's actions. These first administrative actions dealt with Puerto Rico differently, and rather than placing the island on the traditional territorial path—statehood—Congress left it in an amorphous

condition sanctioned by the Court. Additionally, the island was bereft of full constitutional protections, because of the Court's interpretation of Congress's powers over the territory.

Next, the events that precipitated the 1950s constitution-making process. These include the granting of United States citizenship to Puerto Ricans as well as other court decisions shaping the relations between Washington, D.C., and the island. While significant, these developments did not amount to a substantial change in the power dynamic between the mainland and Puerto Rico.

Then come the 1950s and Puerto Rico's sudden rise in autonomy. While the constitution-making process was not a perfect experiment, it was meant to be the beginning of something novel, grand, and a giant leap for Puerto Rico's advancement within the polity. This thesis will show that this point was the zenith in Puerto Rico's autonomy, but it was not the end. However, Congress seemed to have turned away from that experiment and eventually shut down the benevolent creation, leaving it without further sustenance. The lack of punctiliousness and sustenance turned into autonomous starvation in 2016. While the island was in a condition of financial tumult, Congress and the Court took steps that severed Puerto Rico's self-governing peduncle. This set the island in a celeritous retrograde

motion, almost equaling the measures under Spanish rule. Puerto Rico has been left in this position since 2016.

The last chapters are concerned with both the occurrences of 2016 and the specific effects inflicted on Puerto Rico's autonomy and sovereignty. Lastly, this thesis embodies the philosophical adage of finding a solution embedded in the problem, as the only authority that can do anything concerning Puerto Rico's fate is the body that began the different treatment: Congress.

II. Pre-Spanish-American War Puerto Rico

Before the Spanish-American War, Puerto Rico had chiefly been a Spanish colony since the island's discovery in 1493.¹ Puerto Rico was governed by a distant sovereign with no control over its local affairs—its citizenry enjoyed no representation at Las Cortes de Cádiz (Las Cortes), Spain's parliament.² Granted, Puerto Rico experienced some mild improvements in sovereignty, underscored by the 1812 Cádiz Constitution.³ This Constitution granted Puerto Rico and the other Spanish colonies unparalleled freedoms, including representation in the central government.⁴ In any event, this constitutional anomaly was quickly eradicated after the Spanish conservatives “overthrew [the government] by force and restored absolute power to the king” in 1814.⁵ Puerto Rico's body politic has never enjoyed representation comparable to that set in the Cádiz Constitution, even when under the authority of the world's chief democracy.

Post-1814, Puerto Rico continued its struggles over local self-rule. For the most part, the Spanish dismissed their pleas. For instance, in 1869, the

¹ JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 7 (1997).

² *Id.* at 9.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

“most liberal” Spanish Constitution was adopted by Las Cortes.⁶ In this iteration, Puerto Rico gained some key rights, specifically the right to elect representatives to Las Cortes.⁷ Also, the 1869 Constitution enabled Puerto Ricans to organize themselves into political parties.⁸ This development would ultimately allow Puerto Rico to abolish slavery in 1873:⁹ another key victory for Puerto Rico’s self-rule. A year later, after the monarchy struck back and replaced the Spanish Republic, those concessions were quickly eradicated.¹⁰ Puerto Rico attempted many bargains with Spain regarding the island’s political status in the interim period before the onset of the Spanish-American War; this would also be a recurring theme in Puerto Rico’s politico-legal relations with the United States. These negotiations, or pleas, led to Spain granting “charters of autonomy and greater constitutional and electoral rights” to Puerto Rico (as well as Cuba) in 1897.¹¹ Puerto Rico was not to enjoy these newfound freedoms, as the United States and Spain were on an irreversible collision course over Cuba.

⁶ *Id.* at 10. Deemed the most liberal of constitution due to Puerto Rico’s civil rights gains from it.

⁷ SAM ERMAN, *ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE* 17 (2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 18. The abolition of slavery on the island survived the toppling of the Spanish Republic.

¹¹ *Id.*

Puerto Rico had enjoyed little to no involvement in the decisions controlling it since the island's early days. When the Spanish-American War erupted, Puerto Ricans thought that once under the United States' control, the lack of self-government would be rebuffed by the world's leading democracy.¹² However, to the island's dismay, the United States would not be the emissary of those pure freedoms. Puerto Rico would have to wait until after the United States' arrival on the island to face this reality.

A. The United States and Puerto Rico Before 1898

While Cuba fueled the hostilities between the United States and Spain, it must be said that Puerto Rico and the United States were aware of each other before the conflict's onset. As Efrén Rivera Ramos informs, there was a "commercial agent" from the United States in Puerto Rico since 1815.¹³ This agent became the United States Consul fourteen years later.¹⁴ This officer was tasked with "promoti[ng] [the] American economic relations with Puerto Rico."¹⁵ Further, Puerto Rico and the United States had developed a relationship based on commerce, with Puerto Rico consuming a "considerable

¹² *Id.* at 27 ("As U.S. troops overran Puerto Rico, islanders and conquerors alike hailed what they saw as a benevolent constitutional revolution. It was easy to imagine that annexation would bring Puerto Ricans U.S. citizenship, rights, and eventual statehood").

¹³ EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 53 (2001) (inner citation omitted).

¹⁴ *Id.*

¹⁵ *Id.*

number of American goods” and the United States importing a “substantial amount” of Puerto Rican sugar.¹⁶

United States officials had expressed a desire to occupy the island before 1898. For example, in 1891 Secretary of State James G. Blaine responded to President Benjamin Harrison’s need for more overseas military bases by recommending the invaluable acquisition of Puerto Rico, along with that of Hawaii and Cuba.¹⁷ Similarly, in 1894 the Naval War College prepared a contingency plan in case of a war with Spain that involved “blocking and occupying Puerto Rico.”¹⁸ Moreover, when the shadow of war seemed to consume the island, the United States military command suggested that Puerto Rico should be the focus of the conquest, instead of Cuba, and the United States Consul in Puerto Rico had urged the acquisition of Puerto Rico.¹⁹

Amid the conflict, Theodore Roosevelt, then the Lieutenant Colonel of the Rough Riders stationed in Cuba,²⁰ wrote to Senator Henry Cabot Lodge: “Do not make peace until we get Porto Rico [*sic*] (...).”²¹

¹⁶ *Id.*

¹⁷ *Id.* (inner citation omitted).

¹⁸ *Id.* (inner citation omitted).

¹⁹ *Id.* (inner citations omitted).

²⁰ THEODORE ROOSEVELT, *THE ROUGH RIDERS*, 7 (1899). The Rough Riders were the volunteer cavalry regiment in Cuba during the Spanish-American War.

²¹ Rivera Ramos, *supra* note 11, at 53-54.

III. The Origins and End of the Splendid Little War: How Puerto Rico Became a United States Territory

In one shape or another, the United States had been pursuing the annexation of Cuba since 1822.²² These efforts came to naught, as the Cuban independence movement kept the United States' annexation interests at bay.²³ But the United States and Cuba were irrevocably tangled as their commercial relationship—based on sugar—evolved.²⁴ The United States consumed “87% of Cuba’s exports.”²⁵ Before 1898, economic interests alone were insufficient to justify the United States’ intervention in Cuba, but the Cuban insurrection, along with the press coverage and the election of William McKinley in 1896, started planting the permanent and propagative seeds of intervention.²⁶ The *casus belli* was soon to come.

Tensions among the United States and Spain over Cuba were determined to boil over, but Congress’s ultimate impetus had not yet arrived. Then came the incident with the *Maine*. The U.S.S. *Maine* had been deployed to Cuba to protect American commerce as the Cuban rebellion intensified.²⁷ This seemingly ordinary procedure would help persuade the United States to

²² JUAN R. TORRUELLA, GLOBAL INTRIGUES: THE ERA OF THE SPANISH-AMERICAN WAR AND THE RISE OF THE UNITED STATES TO WORLD POWER 53 (2007).

²³ *Id.*

²⁴ *Id.* at 54.

²⁵ *Id.*

²⁶ *Id.* at 56.

²⁷ *The USS Maine explodes in Cuba’s Havana Harbor*, HISTORY.COM <https://www.history.com/this-day-in-history/the-maine-explodes> (last visited Aug. 29, 2021).

declare war on Spain when the *Maine* exploded off the coast of Cuba on February 15, 1898.²⁸ The expansionists and press embodied *carpe diem* and accused Spain of being the belligerents. For instance, Theodore Roosevelt, then the Assistant Secretary of the Navy, wrote: “The Maine was sunk by an act of dirty treachery on the part of the Spaniards.”²⁹ Similarly, media giants like Joseph Pulitzer and William Randolph Hearst, from the *New York World* and *New York Journal* accordingly, circulated stories fueling the calls for a declaration of war.³⁰ For example, when corresponding with artist Frederic Remington, who was in Cuba, William Randolph Hearst cabled the following: “You furnish the pictures and I’ll furnish the war.”³¹ These compelling agents eagerly exercised their influences on the Government, ultimately paving the way for the declaration of war.

A. The Influence of Sea Power and the Rough Riders Upon the Spanish-American War: A Quick End to the War

In April 1898, President William McKinley requested Congress send a final notice to Spain over the Cuban situation which specified the following: (1) Spain needed to recognize Cuba’s independence and; (2) Spain’s forces

²⁸ *Id.*

²⁹ Louis A. Pérez, Jr., *The Meaning of the Maine: Causation and the Historiography of the Spanish-American War*, 58 PAC. HIST. REV. 293, 294 (1989).

³⁰ *Id.*

³¹ *The Press: I’ll Furnish the War*, TIME MAG. (Oct. 27, 1947), <http://content.time.com/time/subscriber/article/0,33009,854840,00.html>.

were to evacuate the island with great celerity.³² President McKinley's message argued that intervention was justified for "the cause of humanity and to put an end to the barbarities, bloodshed, starvation, and horrible miseries,"³³ an argument that would become ironic once the United States acquired Puerto Rico and the other former Spanish colonies post-war.

President McKinley also rested on the report filed by the "naval court of inquiry," which concluded that the *Maine* had exploded because of a mine.³⁴

While the inquiry did not determine an aggressor, the President urged Congress that the *Maine*'s demise was a prime example of the state of affairs, making an intervention on behalf of the Cuban people necessary.³⁵ Congress was sympathetic to the President's arguments, relaying the ultimatum to Spain on April 21, 1898.³⁶ In response, Spain jilted the proposal and opted to terminate all relations with the United States instead.³⁷ Four days later, the United States declared war on Spain.³⁸ And with this declaration, the United States launched its foray into vast empire-building.

³² Torruella, *supra* note 22, at 103.

³³ William McKinley, Message to Congress Requesting a Declaration of War with Spain (Apr. 11, 1898), available at <https://www.presidency.ucsb.edu/node/304972>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Torruella, *supra* note 22, at 103.

³⁷ *Id.*

³⁸ *Id.*

The war lasted around 120 days.³⁹ The conflict's brevity was because of the United States' herculean Navy.⁴⁰ Moreover, the United States conducted a bifurcated war, with a special focus being devoted to Cuba and the Philippines.⁴¹ The naval forces around Cuba and the Philippines swiftly defeated the Spanish forces, while Theodore Roosevelt and his Rough Riders easily disposed of the defenses in Cuba.⁴² The *coup de grâce* was delivered to Spain at Santiago Harbor in Cuba.⁴³ There, the United States Navy prevailed on the eve of the Fourth of July.⁴⁴ Twenty-one days later, the United States landed in Puerto Rico. The United States forces rapidly defeated the light resistance they encountered. Puerto Rico received these troops with pomp and circumstance. And with that, Puerto Rico began its history as a United States territory.

B. The Emergence of the American Empire: An Overview of the Exclusive Treaty of Paris

Negotiations ensued between the United States and Spain after hostilities ceased on August 14.⁴⁵ The United States delegation was representative of the McKinley Administration, with its majority composed of

³⁹ *Id.*

⁴⁰ Torruella, *supra* note 22, at 104.

⁴¹ *Id.* at 104.

⁴² *Id.* at 106.

⁴³ *Id.*

⁴⁴ *Id.* at 107.

⁴⁵ *Id.* at 108.

expansionists.⁴⁶ The negotiations were prolonged, in part, because of Spain's hesitation in relinquishing the Philippines to the United States.⁴⁷ Ironically, Puerto Rico, as well as the other former Spanish possessions, was not privy to the events occurring behind closed doors in Paris.⁴⁸ In a tone echoed through the annals of Puerto Rican history, the negotiations were considered impertinent to the island.

In a more granular analysis, the treaty was not unique. It contained seventeen articles. These articles detailed several aspects of the agreement, including lands to be ceded to the United States (Arts. II, III, VIII), religious liberty (Art. X), as well as other miscellaneous matters.⁴⁹ Article II ceded Puerto Rico to the United States but said nothing else of import.⁵⁰ Article IX unlocked Pandora's box of Congress's power over territorial administration: "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."⁵¹ As Puerto Rico would come to realize, it was this article that would be used to justify its subservient place in the American polity.

⁴⁶ *Id.* at 157.

⁴⁷ *Id.* at 158-59.

⁴⁸ *Id.*

⁴⁹ Treaty of Peace Between the United States and Spain, Dec. 10, 1898, available at https://avalon.law.yale.edu/19th_century/sp1898.asp#art2 (hereinafter Treaty of Paris of 1898).

⁵⁰ *Id.*

⁵¹ *Id.* art. IX.

After nearly a year since the declaration of war, and after much debate among politicians in the United States, the Treaty of Paris of 1898 became law on April 11, 1899.⁵² With the ratification, the United States acquired Puerto Rico, Guam, and the Philippines.⁵³ Manifest Destiny was on full display, but the Government had no idea how to administer the new territories.

⁵² Trías Monge, *supra* note 1, at 161.

⁵³ *Id.*

IV. A “New” American Territory: Of Different Rules and Regulations

When United States forces landed, many in Puerto Rico believed a “constitutional revolution” was afoot.⁵⁴ The island’s political leaders thought that “citizenship, rights, and statehood” were on the horizon.⁵⁵ Almost every move taken by the United States or its agents about Puerto Rico seemed to confirm those hopes. For instance, the Department of State had assessed that naturalization for Puerto Rico was near, which in turn led to the United States military officials requiring that some officeholders in the island take the naturalization oath.⁵⁶ This involved devoting all allegiance to the United States, promising to defend the Constitution, and renouncing the Spanish Crown and government.⁵⁷ Similarly, United States officials began treating Puerto Rico as part of the United States, given the application of several United States statutes on the island.⁵⁸ On top of this, some of the island’s influential political leaders, like Federico Degetau, promoted the idea that Puerto Ricans and the People of the United States were connected because “Latins and Anglo-Saxons were coauthors of democracy.”⁵⁹ Even Degetau’s worst-case

⁵⁴ Erman, *supra* note 7, at 27.

⁵⁵ *Id.*

⁵⁶ *Id.* at 28.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 37.

scenario, that of Puerto Ricans and “mainlanders” being considered unequal, would not be worrisome, since the United States forces had promised those liberties compatible with the United States’ ideals.⁶⁰ If the United States defaulted on those promises, Degetau thought, it would paint the Nation in the most unkind manner.⁶¹ While there was much debate between the island’s political parties over status, one thing united them during this period: whether granted autonomy over its internal affairs comparable to that of States or some other egalitarian relationship, the relationship had to be one under the United States’ principles of liberty.⁶²

Political leaders within the United States, such as military governor-general George Davis, did not think Puerto Ricans deserved said equal status or the full application of self-governing principles. As he assessed, “[Puerto Ricans were] no more fit to take part in self-government than are our reservation Indians, from whom the suffrage is withheld”⁶³ Davis’s rhetoric on Puerto Rico, combined with his influence in Washington, D.C., played a key role in the island’s subsequent subjugation.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

Stateside, there was much palavering on Capitol Hill and at 1600 Pennsylvania Avenue over the new acquisitions' destinies. President McKinley wanted to establish a firm holding over Puerto Rico and the Philippines, and consequently urged his Secretary of War, Elihu Root, to set the framework for the new territories' administration.⁶⁴ In his writings, Root framed three queries which were to guide his recommendations for Puerto Rico:

(1) What form of government shall be established, and what participation in that government shall the people of the island have? (2) What shall be the treatment of the municipal law of the island, and how far shall the laws which now regulate the rights and conduct of the people be changed to conform to the ideas prevalent among the people of the United States? (3) What economic relations shall be established between the island and the United States?⁶⁵

In response to the first question, Root asserted that Puerto Ricans were not "educated in the art of self-government, or any really honest government."⁶⁶ Based on this flawed assessment, since the United States did not allow for Puerto Rico to bask in the practice of self-government,⁶⁷ Root determined the island should have a governor appointed by the President and confirmed by the Senate, and that other government officials be appointed in

⁶⁴ *Id.*

⁶⁵ ELIHU ROOT, *The Principles of Colonial Policy: Porto Rico, Cuba, and the Philippines*, in *THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS BY ELIHU ROOT* 163, 163 (Robert Bacon & James Brown Scott eds., 1916).

⁶⁶ *Id.*

⁶⁷ Truman R. Clark, "Educating the Natives in Self-Government": Puerto Rico and the United States, 1900-1933, 42 *PAC. HIST. REV.* 220, 223 (1973).

the same fashion.⁶⁸ He also proposed a “legislative council” to be made from the appointed government officials and a “minority” from “the people of the island,” but these were also subject to the President’s appointment powers.⁶⁹ Worse yet, Root recommended that legislation passed by the council be subject to vetoes by Congress and the President.⁷⁰ The Puerto Rican people were only to exercise their civic duty in municipal elections, and those were to be restricted to men who could “read and write, or who hold property”⁷¹ Root, a Reconstruction Republican, was now in favor of truncating enfranchisement in the same fashion as Southern officials before the Reconstruction Amendments.⁷²

In terms of the second question, Root contended that the civil law of Puerto Rico, instituted by Spain, should not be replaced, or altered, since “a system of laws based on the experience and characteristics of a New England community would be both oppressive and futile” to Puerto Rico.⁷³ The basis for this was Louisiana, a former Spanish territory that also had a civil code and it remained untouched after the former territory’s invitation into the

⁶⁸ Root, *supra* note 65, at 166.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 167.

⁷² The Reconstruction Amendments are the Thirteenth, Fourteenth, and Fifteenth Amendments. These granted freedom from involuntary servitude, the equal protection of the laws, and the right to vote regardless of race, accordingly.

⁷³ *Id.* at 169.

Union.⁷⁴ However, unlike Louisiana, the Supreme Court would rely on this different system of government to justify the inapplicability of the United States Constitution.

As for the third prong, Root maintained that free trade was crucial for Puerto Rico's advancement.⁷⁵ He discouraged economic isolation and thus requested the repeal of tariffs that had erected an economic wall around Puerto Rico.⁷⁶

Root's analysis did not stop here: He further thought that Puerto Rico should be made a different type of territory and that it never be made a state.⁷⁷ He later partnered with Charles Magoon, an officer for the Division of Customs and Insular Affairs, to offer more options for the unequal treatment of Puerto Rico.⁷⁸ The duo declared the *Dred Scott* precedent that "the Constitution extended broad rights to the territories and demanded that they one day become [S]tates" to have been of a pre-Civil War era, thus having been eradicated by the War.⁷⁹ Then, the duo proposed that

⁷⁴ *Id.*

⁷⁵ *Id.* at 170.

⁷⁶ *Id.*

⁷⁷ Erman, *supra* note 7, at 39.

⁷⁸ *Id.* at 40.

⁷⁹ *Id.* at 40-41. In *Dred Scott v. Sandford*, 60 U.S. 393, 446 (1857), the Supreme Court postulated the following regarding the application of the Constitution to the territories: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure" This decision, while obtuse for other reasons, properly assessed the power of the Federal Government under the Constitution regarding the administration of territories.

traditional Fourteenth Amendment citizenship be sidestepped on the island, replacing the doctrine of *jus soli*—that "birth within the lands over which U.S. sovereignty extended automatically conferred citizenship."⁸⁰ This eroded years of custom and tradition.⁸¹ Senator Joseph Foraker went into action with this ammunition at his disposal. Puerto Rico was bound to move in a retrograde motion.

⁸⁰ *Id.*

⁸¹ *Id.*

V. All Needful Rules and Regulations: Congress's Organization of Puerto Rico

With Root's recommendations in mind, Senator Joseph Foraker of Ohio and Congressman Sereno Payne of New York drafted a law that would incorporate most of Root's theories—the Organic Act for Puerto Rico. The goal of the Act was to test the waters for the administration of the larger, more unfurled acquisition: the Philippines.⁸² Both the White House and the Act's architects anticipated the emanation of sundry constitutional issues from the legislation, as it would be the first of its kind.⁸³

The Foraker Act was enacted on April 12, 1900, when President McKinley officially approved the colonial experiment.⁸⁴ The Act moved to address the questions of tariffs, citizenship, and the system of civil government.⁸⁵ Puerto Rico would face losses in all three policy domains.

For purposes of tariffs, the Foraker Act imposed a fifteen percent tariff on goods imported from Puerto Rico.⁸⁶ This quickly erected the economic

⁸² José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 415 (1978) (“[The] legislation for Puerto Rico would be a precedent for the larger and more menacing problem of the Philippines”).

⁸³ *Id.* (“It was also feared that the Puerto Rico legislation would be the subject of portentous constitutional litigation challenging congressional power to regulate trade with and migration from the insular territories, as well as the capacity of the legislative branch to determine whether Puerto Ricans (...) would become United States citizens”). This constitutional litigation would become the infamous Insular Cases.

⁸⁴ See Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391, 435.

⁸⁵ Root, *supra* note 65.

⁸⁶ An Act Temporarily to provide revenues and a civil government for Porto Rico, and for other purposes, Pub. L. No. 56-191, § 3, 31 Stat. 77 (1900) (hereinafter Foraker Act).

wall around Puerto Rico Root had cautioned against.⁸⁷ This step had no precedent and significantly differed from other contemporary Organic Acts, such as Hawaii's.⁸⁸ The distinction stemmed from lobbies from the tobacco, sugar, and whisky trusts in a move to protect the stateside markets.⁸⁹ In effect, the Act treated Puerto Rico as a foreign country, imposing tariffs on goods, rather than allowing the free trade customary to the United States and lands appurtenant to it. With that began the period of economic isolation for the island that has plagued it to this day.

Puerto Ricans and their posterity, contrary to the principles of *jus soli*, were not named American citizens. They were instead labeled “citizens of Porto Rico [*sic*]” who were to enjoy “the protection of the United States” consistent with the civil rights provision set in the Treaty of Paris—that they be determined by Congress.⁹⁰ In effect, the Foraker Act created second-class citizenship within the American polity,⁹¹ one that did not rise to the level of actual U.S. citizenship. The Foraker Act removed the “blessings of liberty”⁹² from the Constitution and placed them in Congress's hands. This would become the subject of the Supreme Court's debate over Puerto Rico in 1901.

⁸⁷ Root, *supra* note 65.

⁸⁸ Trías Monge, *supra* note 1, at 50.

⁸⁹ Cabranes, *supra* note 82, at 415, n.75.

⁹⁰ Treaty of Paris of 1898, *supra* note 49, art. IX.

⁹¹ Cabranes, *supra* note 82, at 398.

⁹² U.S. CONST. Premb.

On the question of civil government, the Foraker Act provided for a Governor, his Executive Council, and a House of Delegates.⁹³ The Governor was to be appointed by the President of the United States if he had the Senate's approval.⁹⁴ The Governor was also granted veto power over legislation passed by the House of Delegates.⁹⁵ Lastly, the Governor was to be supported by an Executive Council comprised of "a secretary, attorney-general, a treasurer, auditor, a commissioner of the interior, and a commissioner of education," along with "five other persons" all subject to the President's appointment powers.⁹⁶ Out of the eleven-member Executive Council, only five had to be Puerto Ricans.⁹⁷ Out of the five, none were to be chosen by the populace. After the Act went into effect, all the members leading the departments were from the mainland, and the required minimum number of Puerto Ricans occupied the other five seats.⁹⁸ The Foraker Act was an enfeebled version of representative government.

After the institution of an unelected Governor and his Executive Council, the Foraker Act set up a bicameral legislature composed of the

⁹³ Foraker Act, *supra* note 86, § 17.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at § 18.

⁹⁷ *Id.*

⁹⁸ Trías Monge, *supra* note 1, at 53.

Executive Council and the House of Delegates.⁹⁹ The House of Delegates was to be made of thirty-five members elected by the people.¹⁰⁰ But the people referred to here were those who met the “qualifications of voters under the laws and military orders in force.”¹⁰¹ The stringent voting provision meant that not even universal male suffrage would be in effect on the island without the legislature’s permission.¹⁰² This meant that such provision would be at the mercy of the Governor and his veto powers.¹⁰³ And even if the bill (or any bill for that matter) survived the Governor’s veto, it would be subject to Congress’s, with the branch reserving the power to “annul the [laws]” of the island.¹⁰⁴

To keep diluting the power of the Puerto Rican populace, and to appease the charges of colonialism, the Act provided for an amorphous representative in Congress—the Resident Commissioner.¹⁰⁵ The Resident Commissioner was and is powerless, since the delegate enjoys no voting power in Congress, and for the first few years, the delegate could not access the halls of Congress.¹⁰⁶ The idea of government by consent celeritously evaporated with a single Act of Congress.

⁹⁹ Foraker Act, *supra* note 86, § 27.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 29.

¹⁰² Trías Monge, *supra* note 1, at 42-3.

¹⁰³ *Id.*

¹⁰⁴ Foraker Act, *supra* note 86, § 31.

¹⁰⁵ *Id.* § 39.

¹⁰⁶ Trías Monge, *supra* note 1, at 42-3.

The Foraker Act was followed in 1917 by Puerto Rico’s second organic law—the Jones-Shafroth Act.¹⁰⁷ This Act addressed the issue of citizenship for Puerto Ricans. One of the Act’s architects, Congressman William A. Jones (Democratic Party)—Chairman of the House Committee on Insular Affairs—was preoccupied with the notion that if Puerto Rico were to become a State in the Union, the balance of power in Congress would be in Puerto Ricans’ hands.¹⁰⁸ Yet the former Confederate steadfastly believed that Puerto Rico needed to be under the Constitution’s full protection and that its populace was to be American citizens.¹⁰⁹ Further, Congressman Jones and his party argued that the United States should not perpetually hold the people of Puerto Rico in the ranks of “subjects and not citizens.”¹¹⁰ Additionally, granting citizenship to Puerto Rico would commit the United States to a more everlasting relationship with Puerto Rico, allaying the calls for independence from some on the island.¹¹¹ The then legal officer for the Bureau of Insular Affairs, Felix Frankfurter, proposed a solution.¹¹² Future Justice Frankfurter’s proposition relied on the Supreme Court’s ambiguous

¹⁰⁷ An Act to Provide a Civil Government for Porto Rico, and for other Purposes, Pub. L. 64-368, 39 Stat. 951 (1917) (hereinafter Jones-Shafroth Act).

¹⁰⁸ Erman, *supra* note 7, at 131.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 132.

¹¹¹ *Id.*

¹¹² *Id.*

territorial doctrines and the fact that “constitutional rights, citizenship, [United States] sovereignty, and self-government in dependent locales were entirely within congressional control.”¹¹³ In other words, Puerto Rico’s fate was subject to Congress’s plenary powers.

The Jones-Shafroth Act provided for the collective naturalization of Puerto Ricans, making them United States citizens.¹¹⁴ As Congressman Towner stated: “[w]e are conferring on [Puerto Ricans] what they ought to have had years ago and what they earnestly desire—the privilege of being American citizens and being placed under the protection of our flag.”¹¹⁵ The Act also made several alterations to the existing organic act (the Foraker Act), but most importantly, the Jones-Shafroth Act provided a bill of rights for the island.¹¹⁶ The only thing the Act imparted was that “no law shall deprive any person of life, liberty, or property without due process of law, or deny to any person the equal protection of the laws.”¹¹⁷ There was also a provision against double jeopardy,¹¹⁸ but at the same time, there was the significant omission of the sacred right to a jury trial. In a way, the Jones-Shafroth Act propelled Puerto Rico forward even if

¹¹³ *Id.* In the memo, Frankfurter also mentioned the idea of “inventive statesmanship,” an idea which will be expounded later in a discussion of possible solutions to the Puerto Rican situation.

¹¹⁴ Jones-Shafroth Act, *supra* note 107, § 5.

¹¹⁵ Cabranes, *supra* note 82, at 485 (internal quotation marks omitted).

¹¹⁶ Jones-Shafroth Act, *supra* note 107, § 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

antidemocratic restraints, like voting restrictions, were present.¹¹⁹ But the Act failed to bring about the full protection of the Constitution to Puerto Rico in continuance of the Treaty of Paris and the Foraker Act. As summarized by Circuit Judge Cabranes, the Jones-Shafroth Act “liberalized the structure of colonial government in Puerto Rico and granted substantially more governmental autonomy to the island” when compared to the shoddy Foraker Act.¹²⁰ But even with these quasi-autonomous victories present, the Jones-Shafroth Act “reaffirmed the indefinite status of the island by conferring a type of citizenship on its inhabitants that strengthened Puerto Rico’s ties to the United States but gave its people few of the civil and political rights normally associated with American citizenship.”¹²¹ In all, the American citizenship bestowed upon Puerto Ricans was effectively a diluted version of that inherent in traditional citizenship.

¹¹⁹ Erman, *supra* note 7, at 123-42.

¹²⁰ Cabranes, *supra* note 82, at 486.

¹²¹ *Id.*

VI. Justice Thou Shalt Not Have: The *Insular Cases* & Puerto Rico

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.

-*Marbury v. Madison*, 5 U.S. 137, 176 (1803)

The Supreme Court and Puerto Rico have been inextricably connected since the implementation of the Foraker Act. Moreover, the Court has played a crucial role in eradicating or undermining Puerto Rico's claims to sovereignty, or at least sovereignty compatible with Puerto Rico's status as a territory. Leading scholars' and lawyers' prevalent opinions at the time of Puerto Rico's acquisition, such as that enounced by Michigan Supreme Court Justice Thomas Cooley, described the Constitution as one "made for the States, not for Territories."¹²² The Court would adopt these assertions in a series of decisions known as the *Insular Cases*, ranging from 1900 to 1922. The decisions covered in this section will be paramount to the Court's role in severing the tenets of constitutional protections for Puerto Rico.

Downes v. Bidwell, the first prominent case of the *Insular Cases* occurred in response to the Foraker Act's imposition of tariffs on Puerto Rico. Samuel

¹²² THOMAS COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 36 (Fred B. Rothman & Co. 1981) (1880).

Downes, a merchant who worked for S.B. Downes & Co., and imported oranges from Puerto Rico to New York, disputed the constitutionality of over \$600 in tariffs being levied on the oranges.¹²³ Downes claimed that these tariffs violated the United States Constitution's Taxing and Spending Clause: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."¹²⁴ In sum, Downes argued that since Puerto Rico was part of the United States, Congress acted in an extra-constitutional manner when it implemented tariffs on Puerto Rico.

In *Downes v. Bidwell*, the Court had to decide whether the tariffs were constitutional.¹²⁵ The Court elaborated that in a broader sense, the question presented required the Justices to investigate whether "the revenue clauses of the Constitution extend [*ex proprio vigore*] to our newly acquired territories."¹²⁶ Justice Brown, writing for the Court, held that a historical inquiry into territorial administration yielded that territories, in general, were *never* considered part of the United States.¹²⁷ Instead, the territories

¹²³ BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 80 (2006).

¹²⁴ U.S. CONST. art I, § 8, cl. 1.

¹²⁵ 182 U.S. 244 (1901). Under *ex proprio vigore*, the Constitution would apply of its own force, without activation from Congress.

¹²⁶ *Id.* at 249.

¹²⁷ *Id.* at 251.

were subject to Congress’s plenary powers under the Territory Clause,¹²⁸ thus making Congress the principal actor tasked with determining whether provisions of the Constitution applied. The Court observed that “[i]n all these (...) Territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy [constitutional provisions].”¹²⁹ Further, the majority wrote that Congress’s power to administer territories and determine exactly what applied to them was deducible from Congress’s power to acquire said territories.¹³⁰ The Court elaborated that while there are aspects of the Constitution about the admittance of new States into the Union, “nothing is said regarding the acquisition of new territories or the extension of the Constitution over them.”¹³¹ The Court concluded by saying that “those possessions inhabited by *alien races*”¹³² were in “a territory appurtenant and

¹²⁸ 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”).

¹²⁹ *Downes*, 182 U.S. at 279.

¹³⁰ *Id.* (“We are also of opinion that the power to acquire territory by treaty implies not only the power to govern such territory, but to prescribe upon what the United States will receive its inhabitants, and what their status shall be ...”).

¹³¹ *Id.* at 286.

¹³² *Id.* at 287 (emphasis added). It is evident that the Insular Cases are progeny of cases such as *Dred Scott v. Sandford*, 60 U.S. 393, (1857) (holding that freed African Americans were not citizens under the Constitution); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate accommodations for races are constitutional); *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the Government may restrict the civil rights of a single racial group were subject to heightened scrutiny, but all were not unconstitutional).

belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution,”¹³³ making the Foraker Act’s tariffs constitutional.

While the majority opinion was dispositive of the tariffs question, Justice Edward Douglass White’s concurrence planted the seeds for Puerto Rico’s continued unequal treatment. Justice White’s concurrence would be adopted by the Government and Court for decades to come.

At the heart of Justice White’s concurrence was the doctrine of incorporated and unincorporated territories: “[I]t seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United State without the express or implied approval of Congress.”¹³⁴ Justice White employed an alarmist tone asserting that if those residing in Puerto Rico were “immediately and irrevocably incorporated into the United States,” the underpinnings of the Republic would be “overthrown.”¹³⁵ According to Justice White, the unprecedented theory of incorporated and unincorporated territory was evinced by some sort of incorporating language in prior acquisitions, and that the treaty power was not determinative of a territory’s incorporation status.¹³⁶

¹³³ *Id.*

¹³⁴ *Id.* at 312.

¹³⁵ *Id.* at 313.

¹³⁶ *Id.* at 319 (“[I]t becomes to my mind [clear] that the treaty-making power was always deemed devoid of authority to incorporate (...) without the assent, express or implied, of Congress, and that no question to the contrary has ever been mooted”).

Justice White fortified his theory with phraseological arguments regarding the meaning of the United States at the time of the Constitution's adoption.¹³⁷ Still, what is problematic in Justice White's concurrence is the incongruity of just how dispositive a treaty is of a territory's status. As stated above, the Justice did not subscribe to a treaty's power of incorporation, but later claims Article IX of the Treaty of Paris left Puerto Rico's destiny in Congress's hands: "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."¹³⁸ Furthermore, Justice White believed that said provision in the treaty confirmed the absence of (ill-defined) incorporative language:

I cannot doubt that the express purpose of the [Treaty of Paris] was not only to leave the *status* of the territory to be determined by Congress but to prevent the treaty from operating to the contrary And, in addition, the provisions of the act by which the duty here (...) was imposed, taken as a whole, seem to me plainly at least Porto Rico [*sic*] is not to be incorporated into the United States.¹³⁹

¹³⁷ *Id.*

To appreciate this it is essential to bear in mind what the words 'United States' signified at the time of the adoption of the Constitution. When by the treaty of peace with Great Britain the independence of the United States was acknowledged, it is unquestioned that all the territory within the boundaries defined in that treaty, whatever may have been the disputes as to title, substantially belonged to particular states.

¹³⁸ Treaty of Paris, art. IX.

¹³⁹ *Downes*, 182 U.S. at 340 (White, J., concurring).

Justice White’s tower of incongruities was capped by declaring Puerto Rico to be “foreign to the United States in a domestic sense.”¹⁴⁰ The meaning of this perplexes scholars and jurists to this day,¹⁴¹ and the Court has failed to issue a clarification in 120 years, though that may soon change.¹⁴²

The opinions also “quietly” overruled Chief Justice Marshall’s opinion in *Loughborough v. Blake*, which deemed that the term the United States applied to States and territories.¹⁴³ Moreover, in *Loughborough*, Chief Justice Marshall explicated that “it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in [States, and not in territories].”¹⁴⁴ Clearly, under *Loughborough*, the Foraker imposts would not have survived constitutional muster given the Uniformity Clause. By upholding the tariffs in *Downes*, the Court overruled those early Marshall Court pronouncements.

Justices Peckham, Brewer, Harlan, and Chief Justice Fuller dissented. Yet the most enlightening dissent in *Downes* belonged to the Justice deemed

¹⁴⁰ *Id.* at 341.

¹⁴¹ See generally, GERALD L. NEUMAN & TOMIKO BROWN-NAGIN, RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE (2015); SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE (2019); EFREN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001); Juan R. Torruella, *The Insular Cases: The Establishment of Political Apartheid*, 29 U. PA. J. INT’L L. 284 (2007).

¹⁴² *United States v. Vaello Madero, post*, at 72, n.284.

¹⁴³ 18 U.S. 317, 319 (1820) (“Does [the United States] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories”).

¹⁴⁴ *Id.*

“The Great Dissenter”: Justice John Marshall Harlan. In his dissent, Justice Harlan admonished the Court’s opinion and concurrences and pointed out their contradictions and flaws, as explained more fully below.

Justice Harlan noted that the concurrences’ assertions of a Constitution for and by States only were flagrantly flawed and incorrect: “The Constitution speaks not simply to the States in their organized capacities, but to all peoples, whether of States or territories, who are subject to the authority of the United States.”¹⁴⁵ What is more, Justice Harlan argued that if the views expressed by some of the concurrences—the ideas that Congress could plenary administer the territories—were espoused by a majority of the Court in the future, “[w]e will, in that event, pass from the era of constitutional liberty guarded and protected by a written constitution into an era of legislative absolutism.”¹⁴⁶ In other words, Justice Harlan condemned the view that Congress could administer new territories with authority derived from other sources, with a special focus on the way the British Empire administered its holdings.¹⁴⁷ If Congress were to employ that approach and if the Court were to bless it, “[the conduct would] engraft upon our republican institutions a *colonial system* such as exists under

¹⁴⁵ *Downes*, 182 U.S. at 378 (Harlan, J., dissenting; citation omitted)

¹⁴⁶ *Id.* at 379.

¹⁴⁷ *Id.* at 379-80 (“[W]e are now informed that Congress possesses powers *outside of the Constitution*, and may deal with new territory, acquired by treaty or conquest, in the same manner *as other nations have been accustomed to act with respect to territories acquired to them*”) (emphasis in original).

monarchical governments ... such a result was never contemplated by the fathers of the Constitution.”¹⁴⁸ Justice Harlan continued by stating that if the Court adopted those views of an absolutist Congress, the Court would be uprooting the foundations of the Republic, an affront to its struggle against a tyrannical government overseas.¹⁴⁹ Justice Harlan’s dissent concluded with an analogy comparing Congress to a creature of the Constitution. In his view, Congress (the creature) could not possibly restrict the Constitution (the creator) from the territories because Congress only managed to acquire those possessions via the Constitution.¹⁵⁰

Justice Harlan’s predictions became realities. Ruling after ruling, the Court eroded the aspirational liberties Puerto Ricans hoped for post-Spanish-American War. Justice Harlan knew it from the *Insular Cases*’ inception:

What [Justice Harlan] saw in the *Insular Cases*, and no other justice even alluded to, was the potential for exactly the kind of divisions and hypocrisy that had fanned the flames of civil war: the injustice of keeping some people in subservient conditions, coupled with economic structures that grow up around such

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Id.* at 380-81.

The glory of our American system of government is that it was created by a written constitution which protects the people against the exercise of arbitrary, unlimited power and the limits of which instrument may not be passed by the government it created, or by any branch of it, or even by the people who ordained it, except by amendment or change of its provisions. (Harlan, J., dissenting).

¹⁵⁰ *Id.* at 382. (“I confess that I cannot grasp the thought that Congress which lives and moves and has its being in the Constitution, and is consequently the mere creature of that instrument, can, at its pleasure, legislate or exclude its creator from territories which were acquired only by authority of the Constitution”).

deprivations, and the simple tension of two systems existing under one flag, adding up to a threat to the future of the nation.¹⁵¹

Twenty-two years after the Court's decision in *Downes*, Puerto Rico had one final appearance before the Court preceding a gradual period of advancement in autonomy from the 1930s to the 1950s. The case, *Balzac v. Porto Rico*, would be the straw that broke the camel's back as a matter of constitutional protection.¹⁵² The decision in *Balzac* was issued five years after Puerto Ricans were granted United States citizenship by the Jones-Shafroth Act. With citizenship, the hurdles imposed by the Court and Congress should have evaporated, as citizenship meant that they were entitled to the *same* constitutional protections as their mainland counterparts.¹⁵³ But as the *Balzac* Court asserted, the claim that citizenship yielded constitutional protections was chaffy; locality is what mattered.

Balzac v. Porto Rico began as a case of criminal libel against Jesús M. Balzac of Puerto Rico.¹⁵⁴ Puerto Rico's criminal procedure code allocated a jury trial in felony cases, but it reserved the right in misdemeanor cases.¹⁵⁵ Mr. Balzac argued that, regardless of Puerto Rico's code, the United States Constitution's Sixth Amendment's jury trial guarantee superseded Puerto

¹⁵¹ PETER S. CANELLOS, *THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO* 386 (2021).

¹⁵² 258 U.S. 298 (1922).

¹⁵³ Juan R. Torruella, *The Insular Cases: A Regime of Political Apartheid*, 29 U. PA. J. INT'L. L. 283, 326 (2014).

¹⁵⁴ *Balzac*, 258 U.S. 298 (1922).

¹⁵⁵ *Id.* at 300.

Rico's code, thus affording him the right to a jury trial.¹⁵⁶ Additionally, Mr. Balzac alleged that the libel charges against him were frivolous under the First Amendment to the United States Constitution.¹⁵⁷ After the arguments were rejected by both the trial court and the Supreme Court of Puerto Rico, Mr. Balzac appealed to the United States Supreme Court.¹⁵⁸

The Court considered whether the Sixth Amendment applied to Puerto Rico.¹⁵⁹ The Court relied on the *Downes* era jurisprudence apropos of the applicability of the Constitution to the territories, which was surprising in Puerto Rico's situation, given that its inhabitants had been made American citizens. Instead, according to the Court, the full application of the Constitution depended on whether Puerto Rico had been incorporated by Congress since it acquired the island in 1900.¹⁶⁰ The Court examined the Jones-Shafroth Act. Had Puerto Rico been incorporated? Had Congress intended to incorporate it? The Court answered both in the negative and did so by relying on the Act's ambiguities regarding Puerto Rico's status.¹⁶¹ Yet the Court's most vexing test was the locality doctrine: "It is locality that is

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 304.

¹⁶⁰ *Id.* at 305.

¹⁶¹ *Id.* at 306 ("Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union (...) it would have done so by the plain declaration, and would not have left it to mere inference").

determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.”¹⁶²

Overall, the Insular Cases caused Puerto Rico’s devolution to a time reminiscent of Spanish rule. What can be distilled from the Insular Cases are the following propositions: (1) Puerto Ricans are second-class citizens when compared to those residing on the mainland; (2) The Constitution is inapplicable in territories simply because they are unincorporated.

¹⁶² *Id.* at 309.

VII. Puerto Rico's Chance at a *New Deal*: Advancement in the Polity and Public Law 600

Beginning in the 1930s, Puerto Rico started gaining more autonomy. This was amidst a time of tumult, suffering, violence, and economic despair.¹⁶³ On top of the social issues consuming the island, Puerto Rican political parties were undergoing rudimentary changes, such as the rise of the *Partido Popular Democrático* (PPD) under the future Governor and the Free Associated State's founding father, Luis Muñoz Marín.¹⁶⁴ While the Great Depression ravaged the mainland, Puerto Rico was being consumed by a mixture of violence and economic perils—a microcosm of the mainland.¹⁶⁵ Unlike his predecessors, President Franklin D. Roosevelt sought to rescue the island from financial pressures and put an end to the characteristic indifference of years past. President Roosevelt addressed his “fellow friends and citizens of Puerto Rico” from the island's capital and identified the “social and economic problems” in the island that would be met with “the same methods that we use to solve them in other parts of the country.”¹⁶⁶ A year after President Roosevelt's San Juan remarks, a prominent piece of New Deal

¹⁶³ Trías Monge, *supra* note 1, at 88 (“The 1930s are of seminal importance in Puerto Rican history. The squalid economic conditions of the island worsened, and as it began to falter, the old colonial policy became even more rigid”).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 93.

¹⁶⁶ Franklin D. Roosevelt, Remarks in San Juan, Puerto Rico (Jul. 7, 1934), available at <https://www.presidency.ucsb.edu/documents/remarks-san-juan-puerto-rico>.

legislation arrived on the island: the Puerto Rico Reconstruction Administration (hereinafter PRRA).¹⁶⁷ Through the PRRA, Puerto Rico saw multiple recovery measures extended to it. These included a cooperative in charge of a sugar mill's operations (Central Lafayette) and the construction of public works, including medical buildings, funds for education, and other social and economic policies.¹⁶⁸ While a prima facie examination of the PRRA yields an air of New Deal success, the program was not free of criticism. As proof, Connecticut Senator Chester Bowles's assessment of the program in 1955:

For all that [the PRRA] accomplished as the local adjunct of the New Deal in the nineteen thirties, [the PRRA] early demonstrated the ineffectiveness of a rigid planning, which was benevolently prepared and supervised by a government outside the immediate context of local needs. Thus a decade ago Puerto Ricans learned a lesson which should now be a truism: that is a people are to be saved from whatever danger threatens them, whether it be the militant aggression of communism or the social scourge of poverty and disease, they will in the last analysis save themselves through their own indigenous power, pride and responsibility. If outsiders are to be helpful, their help must take the form of friendly and unobtrusive support.¹⁶⁹

Similarly, the island's last appointed Governor from the mainland and President Roosevelt's appointee, Rexford G. Tugwell, evaluated Puerto Rico's situation as the vestiges of colonialism, which "made beggars of honest men,

¹⁶⁷ Geoff F. Burrows, *The New Deal in Puerto Rico: Public Works, Public Health, and the Puerto Rico Reconstruction Administration, 1935-1955*, CUNY Academic Works (2014).

¹⁶⁸ See generally Burrows, *The New Deal in Puerto Rico: Public Works, Public Health, and the Puerto Rico Reconstruction Administration, 1935-1955*, CUNY Academic Works.

¹⁶⁹ Trías Monge, *supra* note 1, at 97 (quoting statement from Senator Chester Bowles) (citation omitted).

sycophants of cynics, American-haters of those who ought to have been working beside us for world-betterment.”¹⁷⁰ Governor Tugwell further described that “[e]conomically it consisted in setting up things so that the colony sold its raw products in a cheap market (in the mother country) and bought its food and other finished goods in a dear market (also the mother country).”¹⁷¹

While the vestiges of colonialism remained, wholly subscribing to these criticisms of the New Deal programs would be foolish. As noted by Geoffrey Burrows, “[the] PRRA public works projects made concrete contributions to the physical security of millions of Puerto Ricans through the construction of hurricane-proof houses, schools, hospitals, roads, sewers, waterworks, and rural electrification networks.”¹⁷² Moving away from infrastructural accomplishments, the PRRA had a deeper effect on Puerto Rico’s relationship with Washington, D.C., since it placed the island, and its status, back on Washington, D.C.’s radar and allowed for progress in the island’s status, opening the doors for what was to follow in the 1940s and 1950s. As Geoffrey Burrows wrote, “[the PRRA] not only made lasting contributions to local social and economic life, [it] also had a transformative effect on Puerto Rican politics during the 1940s and the meaning of U.S. citizenship for Puerto

¹⁷⁰ *Id.* (citation omitted).

¹⁷¹ *Id.* (citation omitted).

¹⁷² Burrows, *supra* note 167, at 6.

Ricans in the twentieth century and beyond.”¹⁷³ Admittedly, the PRRA did precipitously reduce the funds available to Puerto Rico, which culminated in Congress *ordering* the Secretary of the Interior to cease the PRRA in 1955.¹⁷⁴

The 1940s were transformative for Puerto Rico and its role within the polity. For instance, Governor Tugwell had ambitious goals for the island, which were followed with swift actions, including the reduction of the bureaucracy within the bureaucracy that had become the offices of the island’s Auditor and Attorney General, as well as removing powers which they had unjustly seized.¹⁷⁵ Tugwell also laid the groundwork for what was to be the election of Puerto Rico’s Governor by Puerto Ricans. However, at first, Tugwell’s goals remained ashore as President Roosevelt grappled with the ongoing war in Europe and the Pacific.¹⁷⁶ Moreover, Puerto Rico wanted a definitive statement as to what its status would be postwar, especially considering the Atlantic Charter, which included provisions for the colonies’ self-determination.¹⁷⁷ As Puerto Rico’s status agitated the island more and

¹⁷³ *Id.*

¹⁷⁴ The Living New Deal, *Puerto Rico Reconstruction Administration*, WWW.LIVINGNEWDEAL.ORG, <https://livingnewdeal.org/glossary/puerto-rico-reconstruction-administration-prra-1935-1955/>.

¹⁷⁵ Trías Monge, *supra* note 1, at 102.

¹⁷⁶ MARÍA DEL PILAR ARGÜELLES, *MORALITY AND POWER: THE U.S. COLONIAL EXPERIENCE IN PUERTO RICO FROM 1898 TO 1948* 126 (1996).

¹⁷⁷ *Id.* at 123. *See also* Franklin D. Roosevelt & Winston S. Churchill, Atlantic Charter (Aug. 14, 1941), <https://avalon.law.yale.edu/wwii/atlantic.asp> (“[R]espect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self government [*sic*] restored to those who have been forcibly deprived of them ...”).

more, Governor Tugwell wrote the Secretary of Interior, Harold Ickes, the following desperate plea:

I have not been able to understand the prolonged delay in making any statement about Puerto Rico's status after the war. It is a more and more embarrassing question. And if it is not handled pretty soon, it is going to get mixed up in the political mess here. I should like to urge that Interior send its recommendations for changes in the [Jones Act] immediately on convening of the new Congress. This will clarify the situation so far as I am concerned. And it will challenge the opposition in Congress to do something besides snipe.¹⁷⁸

Tugwell's pleas alongside his influence on President Roosevelt culminated in the creation of a commission that would explore the feasibility of a governor elected by the island's electorate;¹⁷⁹ advancement in the island's sovereignty. Along with the creation of the exploratory commission came a communique from President Roosevelt to Congress, urging Congress to "amend [the Jones Act] so as to permit the people of Puerto Rico to elect their own governor and to redefine the functions and power" of Puerto Rico.¹⁸⁰

In 1943, the commission submitted a report with its findings. The report recommended that Puerto Rico's political status be addressed with no further delay.¹⁸¹ Senator Tydings subsequently introduced a bill in the United States Senate reflecting the commission's report.¹⁸² The bill, alongside the zeitgeist in the Senate regarding the island, reflected the

¹⁷⁸ *Id.* at 126 (citation omitted).

¹⁷⁹ *Id.* at 128.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 130.

¹⁸² Trías Monge, *supra* note 1, at 104.

change in rhetoric about Puerto Rico in Washington, D.C.¹⁸³ However, the bill with the commission's recommendations faced a grim fate in the House.¹⁸⁴ But in 1947 a simpler bill gained approval; nearly fifty years after the United States took control of the island, Puerto Rico could finally choose its Governor.¹⁸⁵ Congress, especially the House, wanted Puerto Ricans to remain clear on one thing:

The changes which would be made by the enactment of H.R. 3309 would not alter Puerto Rico's political or fiscal relationship to the United States. Congress does not surrender any of its constitutional authority to legislate for Puerto Rico or to review insular laws. Neither would this legislation prove an obstacle to a subsequent determination by the Congress of the permanent political questions.¹⁸⁶

Congress's reprimand aside, the elective governor provision altered the dynamic between the United States and Puerto Rico and did away with the restrictive appointment provisions set by the Foraker and Jones-Shafroth Acts. As Luis Muñoz Marín explained: "From now on, when the humble Puerto Rican voter deposits his vote in the ballot box, that vote will have at least three times more power than before."¹⁸⁷ Yet the climax of Puerto Rican progress would occur later in the Truman presidency.

¹⁸³ *Id.* at 104-05.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 106 (citation omitted) (original quotation marks omitted).

¹⁸⁷ Argüelles, *supra* note 165, at 178 (citation omitted). Luis Muñoz Marín would become the island's first popularly elected governor.

Under President Truman's turn at the helm, Puerto Rico was able to gain new tracts of sovereignty, especially after the denunciation of colonial holdings worldwide had intensified post-World War II. After signing the elective governor bill into law, President Truman embarked on a more radical gambit: redefining Puerto Rico's status. Shortly after coming to the presidency, President Truman delivered a special message to Congress:

It is the settled policy of this Government to promote the political, social and economic development of people who have not yet attained full self-government, and eventually to make it possible for them to determine their own form of government.

It is our pride that this policy was faithfully pursued in the case of the Philippines. The people of the Philippines determined that they desired political independence, and the Government of the United States made provision to this effect.

It is now time, in my opinion, to ascertain from the people of Puerto Rico their wishes as to the ultimate status which they prefer, and, within such limits as may be determined by the Congress, to grant to them the kind of government which they desire.

The present form of government in the Island appears to be unsatisfactory to many its inhabitants. Different groups of people in Puerto Rico are advocating various changes in the present form of government.

These advocated changes include different possibilities: (1) the right of the Puerto Ricans to elect their own Governor with a wider measure of local self-government; (2) Statehood for Puerto Rico; (3) complete independence; and (4) a Dominion form of government.¹⁸⁸

The cornerstone for this constitutional revolution began when Senator Tydings and Resident Commissioner Piñero joined forces and introduced a

¹⁸⁸ Harry S. Truman, Special Message to the Congress on Puerto Rico (Oct. 16, 1945), available at <https://www.presidency.ucsb.edu/node/230220>.

referendum that would check the pulse of Puerto Rico’s status preference.¹⁸⁹ The three status options on the bill were statehood, independence, and an “Associated State or a dominion.”¹⁹⁰ The Tydings-Piñero comprehensive bill with status options met its demise without seeing the light of day out of committee.¹⁹¹ But the ill-fated bill provided three parts that would inspire Public Law 600—the law that would bring Puerto Rico’s control over its internal affairs to its apex. The components were the following: (1) it tried to affirm Puerto Rican’s right to self-government via a constitution of their drafting;¹⁹² (2) it leveled the power dynamics between the United States and Puerto Rico;¹⁹³ (3) it was designed to implement the alterations necessary to achieve the second part.¹⁹⁴

With the debacle of the Tydings-Piñero bill aside, and after securing a hefty victory in the 1948 elections, Luis Muñoz Marín and the PPD went to work to create the stem cells for Public Law 600.¹⁹⁵ After many internal debates and deliberations, the Resident Commissioner submitted the legislation to Congress.¹⁹⁶ In the grand scheme of things, the proposed legislation called for the “establishment of a constitutional government for

¹⁸⁹ Trías Monge, *supra* note 1, at 108.

¹⁹⁰ *Id.* at 108-09.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 110.

¹⁹⁶ *Id.* at 111.

the island.”¹⁹⁷ Simply put, the legislation pressed for Puerto Rico to have more control of its internal affairs, similar to that control possessed by a State, but subject to larger restrictions.¹⁹⁸ This move aimed to reallocate part of Congress’s mammoth power over the island to Puerto Rico itself, specifically the control over its internal affairs. Congress and President Truman approved the measure and entered into a “compact” with Puerto Rico “so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”¹⁹⁹ However, the compact was not free from Congress’s reservations, such as the ability to circumvent the Puerto Rican Constitution or annul laws ratified by the island’s legislature and signed by its Governor.²⁰⁰ In other words, despite Puerto Rico’s advancements, Congress retained its plenary powers *in full*. Finally, in 1952, the law was enshrined in the annals of American political and legal history. When delivered to President Truman’s desk, the President signed the measure approving the constitution and delivered the following remarks:

The constitution approved by the constitutional convention was submitted to the people of Puerto Rico in a referendum on March 3, 1952, and was approved by an overwhelming majority. On April 22, 1952, I transmitted the constitution to the Congress for approval in accordance with the provisions of the act of July 3, 1950. The

¹⁹⁷ Martin J. Collo, *The Legislative History of Colonialism: Puerto Rico and the United States Congress, 1950 to 1990*, 13 J. THIRD WORLD STUD. 215, 217 (1996).

¹⁹⁸ *Id.*

¹⁹⁹ Puerto Rico Federal Relations Act, Pub. L. No. 81-600 (1950).

²⁰⁰ Collo, *supra* note 185, at 218-19. See LUIS FUENTES-ROHWER, *THE LAND THAT DEMOCRATIC THEORY FORGOT*, 83 IND. L.J. 1525 (2008).

constitution will now become effective upon the acceptance by the constitutional convention of the conditions of approval and the issuance of a proclamation by the Governor of Puerto Rico.

[The Puerto Rican Constitution] is the culmination of a consistent policy of the United States to confer an ever-increasing measure of local self-government upon the people of Puerto Rico. It provides additional evidence of this Nation's adherence to the principle of self-determination and to the ideals of freedom and democracy.

We take special pride in the fact that this constitution is the product of the people of Puerto Rico. When the Constitution of the Commonwealth of Puerto Rico is proclaimed by the Governor, Puerto Rico will have a government fashioned by the people of Puerto Rico to meet their own needs, requirements, and aspirations.

With the approval of [the Commonwealth's Constitution] the people of the United States and the people of Puerto Rico are about to enter into a relationship based on mutual consent and esteem. The Constitution of the Commonwealth of Puerto Rico and the procedures by which it has come into being are matters of which every American can be justly proud. They are in accordance with principles we proclaim as the right of free peoples everywhere. July 3, 1952, should be a proud and happy day for all who have been associated in a great task.²⁰¹

With that, the Commonwealth of Puerto Rico was born. Some consider the constitution to be nothing more than a mirage, others deem it insufficient,²⁰² but it must be said that since 1952 and the Truman Presidency, Puerto Rico has been left in a state of neglect and indifference.

²⁰¹ Harry S. Truman, Statement by the President Upon Signing Bill Approving the Constitution of the Commonwealth of Puerto Rico (Jul. 3, 1952), available at <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-approving-the-constitution-the-commonwealth>.

²⁰² See Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in Aurelius*, 130 YALE L.J. FORUM 101 (2021) (discussing that Commonwealth status, that is, the post-1950 compact and full equality with States cannot coexist without statehood).

Moreover, the ebb and flow that is Puerto Rico's progress in sovereignty reached its apogee when the Commonwealth's Constitution was adopted.

Could the measures pushing for self-government have done more?

Absolutely. As will be explored in a later section, the United States has several options regarding Puerto Rico that should be adopted, especially after key developments in 2016 that dealt heavy blows to Puerto Rico's sovereignty and subverted its standing in the polity. However, at the same time, it must be conceded that the grant of the constitution toppled those restraints Puerto Rico endured during Spanish times as well as the harsher measures it incurred during its early days under Congress's auspices. In other words, President Truman's grandiose aims regarding Puerto Rico's self-governing powers were, for the most part, fallacious.

What is more, after the ratification of Public Law 600 and the enactment of the Puerto Rico Constitution, the United Nations removed Puerto Rico from the category of "non-self-governing" territories, underscoring those ambitious, self-governing goals at the center of Public Law 600.²⁰³ But this international autonomous recognition, as well as domestic approaches to Public Law 600, obfuscated rather than clarified the nascent Commonwealth's standing. Even years after the ratification of the

²⁰³ Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1126 (2009).

Puerto Rico Constitution and commonwealth designation, those in Government were befuddled over what exactly was meant by the new status. For example, Attorney General Richard Thornburgh stated that “[the] Constitution knows only the mutually exclusive categories of ‘State’ and ‘Territory.’”²⁰⁴ Some even argue that the term Commonwealth “remains, domestically, just another territory subject to Congress's plenary power under the Territor[y] Clause.”²⁰⁵ As will be further evinced by court decisions and commentary on the Puerto Rico Constitution at the time of its enactment, there were several ambiguities with the island’s new label, proving the authors’ claims right to an extent.

However, before further explicating Public Law 600’s deficiencies, the constitution-making process, a first of its kind, an experiment, was the apex of Puerto Rico’s sovereignty and autonomy. Even though the experiment was not finished, even though it had its downfalls, its primordial benevolent and lofty intentions were meant to forge a consensual bond between the Federal Government and Puerto Rico. Dr. Antonio Fernós-Isern, the island’s Resident Commissioner from 1946 to 1965, wrote that Public Law 600 and the Constitution that ensued replaced Puerto Rico’s belonging “within [the Spanish] monarchical system whose political institutions could not escape the

²⁰⁴ *Id.* at 1127 (internal quotation marks omitted).

²⁰⁵ *Id.* (citation omitted).

effect of the decay and ruin into which the old realm had fallen” with a relationship endowed with “equality, dignity, and security within the great republican system of freedom, democracy, opportunity, and security of the United States of America.”²⁰⁶ Further, Governor Luis Muñoz Marín lauded the experiment as one that superseded the “divisive and futile debate on status” and instead disenthralled the “long-repressed political energy of [Puerto Ricans].”²⁰⁷ In turn, “a new form of status, a new form of political relationship in the American Union and in all America, a new form of political freedom in harmony with the economic freedom of [Puerto Ricans] was born.”²⁰⁸ Even so, Governor Luis Muñoz Marín’s Nostradamic prognostications were tainted with doubt: “It should be made clear that what we have done has been to initiate a process of political creation in Puerto Rico (...) Precisely because it needs to grow in so many phases (...) [Puerto Rico] must use its energy in [its] development and continuous growth.”²⁰⁹ The doubts became realities, especially in 2016.

Like Mary Shelley’s Victor Frankenstein, the Federal Government abandoned its experiment and did not provide methods for further

²⁰⁶ Antonio Fernós-Isern, *From Colony to Commonwealth*, 285 ANNALS AM. ACAD. POL. & SOC. SCI. 16, 21 (1953).

²⁰⁷ Luis Muñoz Marín, *Development Through Democracy*, 285 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 6 (1953).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

advancement.²¹⁰ As will be explained in detail in sections regarding 2016 and its aftershocks, Public Law 600's and the Puerto Rico Constitution's goals were left in the lab and its doors closed.

Yet these 1950 to 1952 constitutional experimentations provided a glimpse into what could have been but never was: a window into utilizing the Territory Clause for effecting self-governing change.

²¹⁰ MARY W. SHELLEY, *FRANKENSTEIN; OR, THE MODERN PROMETHEUS* 47 (Sever, Francis, & Co., ed. 1869).

VIII. *In Re* Insular Cases

For all purposes, the Insular Cases are still good law and remain an impediment to Puerto Rico's sovereignty and equal participation in the United States' political process. Moreover, Congress's untrammelled authority over Puerto Rico is predicated on the holdings of the Insular Cases. The Insular Cases remain stranded on their own island, or stomping an island, rather. With that, this chapter will discuss how the Court *has* implicitly overruled these cases, even if the judiciary has, for inexplicable reasons, found a way to avoid confrontation with the Insular Cases.

The revisitation of the Insular Cases will proceed with three key cases succeeding the early 1900s jurisprudence. These three cases will help address the following concerns: First, the question of the extraterritorial application of the Constitution, that is, whether the Supreme Court has indicated that the Constitution now applies beyond its borders more robustly than that set by the Insular Cases. This principle has been addressed by two cases: *Reid v. Covert* and *Boumediene v. Bush*. Second, the question of Puerto Rico's incorporation into the polity, or whether the legislative or judicial findings evince the removal of Puerto Rico from the unincorporated territory category. For this analysis, the focus will be on *Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero*. The goal of this

reinspection of the Insular Cases is to eradicate one of the largest roadblocks to Puerto Rico’s sovereignty within the United States.

A. The Constitution Goes Abroad

The Supreme Court sealed Puerto Rico’s chance at the full applicability of the Constitution on the island in 1922. Chief Justice Taft, speaking for the Court, made the pronouncement that the only determinative factor regarding the Constitution’s application is the location of the citizens.²¹¹ But thirty-five years after that fateful decision, the Court abrogated the locality doctrine. Instead, the Court focused on more practical considerations as related to the applicability question. In short, the query will turn to both the locality and citizenship status of the affected individuals.

1. *Reid v. Covert*

Colloquially reduced to the epithet of the “murdering wives” case, *Reid v. Covert* “raise[d] basic constitutional issues of the utmost concern.”²¹²

The concern was whether civilians—the wives of servicemembers—could be tried by courts-martial outside the United States for the murder of their husbands, thus “depriving them of trial in civilian courts, under

²¹¹ *Balzac*, 258 U.S. at 309 (“It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it”).

²¹² 354 U.S. 1, 3 (1957) (plurality opinion).

civilian laws and procedures and with all the safeguards of the Bill of Rights.”²¹³

Clarice Covert, one of the parties, had killed her husband, an Air Force non-commissioned officer.²¹⁴ Although she was not a servicemember, she had been residing with her husband on a United States military base in Britain at the time of the murder.²¹⁵ Mrs. Covert was brought before and tried by a court-martial composed of servicemembers.²¹⁶ She was found guilty and sentenced to spend life in prison.²¹⁷

Dorothy Smith, a co-party to Mrs. Covert, also killed her husband, a United States Army colonel, on a United States Army base in Japan.²¹⁸ Like Mrs. Covert, Mrs. Smith was tried and sentenced by a court-martial, which found her guilty and set her to face a life sentence.²¹⁹

After the two cases were consolidated, the Court initially held that the use of courts-martial as the fora for the trial of the two civilians was constitutional, since “the provisions of Article III and the Fifth and Sixth Amendments which require that crimes be tried by a jury after indictment

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 4.

²¹⁸ *Id.*

²¹⁹ *Id.*

(...) did not protect an American citizen when he was tried by the [Government] in foreign lands for offenses committed there.”²²⁰ Further, the Court included that “Congress could provide for the trial of such offenses in any manner it saw fit so long as the procedures established were reasonable and consonant with due process.”²²¹ Ultimately, the Court relied on Article I which vested the power “[t]o make Rules for the Government and Regulation of the land and naval Forces”²²² in Congress. Of course, this once again was related to Congress’s plenary authority over certain policymaking and regulatory areas such as the administration of territories. The Court authorized rehearing and, remarkably, changed its mind.

From the start, the Court made it clear that it repudiated “the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights.”²²³ Most damningly, the Court indicted the United States of overstepping the bounds imposed by the Constitution, as the “United States is *entirely* a creature of the Constitution.”²²⁴ And to bulldoze the holding of *Balzac*, the Court did not mince words when it stated that “the shield which the Bill of Rights and other parts of the

²²⁰ *Id.* at 5.

²²¹ *Id.*

²²² U.S. CONST., art. I, § 8.

²²³ *Reid*, 354 U.S. at 5.

²²⁴ *Id.* at 6 (emphasis added).

Constitution provide to protect his life and liberty should not be stripped away just because [individuals] happen[] to be in another land.”²²⁵ As to the doctrine of selective incorporation of only fundamental rights established by the Insular Cases, the Court asserted that It “f[ou]nd no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.”²²⁶ Yet the Court did not go as far as to *explicitly* overrule the holdings of the Insular Cases but rather distinguished them from *Reid* because “[the Insular Cases] involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship.”²²⁷ But the Court simultaneously refused to extend the principles of the Insular Cases and cautioned that a “blending of executive, legislative, and judicial powers in one person or even in one branch of the Government”²²⁸ as well as bypassing the Constitution merely because it is inconvenient to apply

²²⁵ *Id.*

²²⁶ *Id.* at 9.

²²⁷ *Id.* at 14.

²²⁸ *Id.* at 11.

it, is antithetical to the basic framework of the Constitution and the ideals of limited Government.²²⁹

Similarly, the Court described that when confronted with a treaty, the Constitution's supremacy prevails.²³⁰ This is reminiscent of the Treaty of Paris's provision allocating the power to determine Puerto Ricans' political and civil rights to Congress.²³¹ To top the indictment against an omnipotent Government with aspirations to selectively apply the Constitution to United States citizens abroad, the Court announced that "[t]he mere fact that these women had gone overseas (...) should not reduce the protection the Constitution gives them."²³² The wives' convictions were overturned.

Parallels to the Puerto Rican situation are scattered throughout this case. For example, Congress effectively behaves, for the most part, as the sole organ with jurisdiction over Puerto Rico, for it is granted the most power to deal with territories by not just the Territory Clause, but by the Court and the Executive. Likewise, Congress possesses plenary powers

²²⁹ *Id.* at 14 ("The Concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government").

²³⁰ *Id.* at 17-18 ("The prohibitions of the Constitution were designed to apply to all branches of the National Government (...). This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty") (citation omitted).

²³¹ Treaty of Paris of 1898, *supra* note 49, art. IX.

²³² *Reid*, 354 U.S. at 33.

over the regulation of the Armed Forces. In *Reid*, like *Balzac* before it, the Petitioners were being refused their constitutional rights based on locality, and yet the *Reid* Court refused to apply the *Balzac* doctrine, extending constitutional protections to United States citizens located across the globe. Congress has relied on the Insular Cases and the Treaty of Paris to justify the indifference, disparate treatment, and near abandonment of its citizens in Puerto Rico. But Congress would run into the halt placed by the *Reid* Court if the Court so desired: “It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that *must conform* to that instrument.”²³³ In short, although the Court may have not explicitly overruled the Insular Cases in *Reid*, it merely needed to add a few words to do so. It then follows that *Reid* significantly eroded the foundations of the anachronistic decisions, but as the Roberts Court would confirm in *Boumediene*, the Insular Cases are nothing if not an obsolete reliquial series of cases.

2. *Boumediene v. Bush*

Fifty-one years after the monumental decision in *Reid*, the Court again faced the extraterritorial application question. However, this time it did

²³³ *Id.* at 18 (emphases added).

not deal with American citizens abroad but with enemy combatants detained in Cuba, seven years into the so-called “War on Terror” following the September 11, 2001, attacks on the United States. The central question was whether the detainees in Guantanamo Bay qualified to receive judicial relief through the Writ of Habeas Corpus.²³⁴

Congress’s enactment of the Detainee Treatment Act of 2005 provided that “no court, justice, or judge shall have jurisdiction to hear or consider (...) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba.”²³⁵ The Government’s arguments advanced with the claim that enemy combatants who were not citizens and were detained in Guantanamo Bay—which was outside the United States’ borders—were not subject to constitutional privileges or habeas relief.²³⁶

After a historical review of the Great Writ’s existence and development in England and the United States, the Court proceeded by, again, distinguishing between the Insular Cases and *Boumediene*. According to the Court, the Constitution’s application in the Insular Cases was

²³⁴ *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008) (“[W]hether [Petitioners] have the constitutional privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, § 9, cl. 2”).

²³⁵ *Id.* at 2241 (original quotation marks omitted; alteration in original.).

²³⁶ *Id.* at 2244.

predicated on practical concerns given Puerto Rico’s unfamiliarity with Anglo-Saxon legal traditions and practices, as well as the use of civil law over the common law: “Yet noting the inherent practical difficulties of enforcing all constitutional provisions ‘always and everywhere,’ the Court devised in the Insular Cases a doctrine that allowed it to use its power sparingly and where it would be most needed.”²³⁷ This test is characterized as the “impracticable and anomalous” test.²³⁸ But this sweeping characterization of the Insular Cases is misguided, as the Court a few pages afterward went on to say that although the Constitution may permit territorial acquisition, it does not follow that political branches get to decide where and when the instrument applies.²³⁹ This is a manifest contradiction by the Court. What is more, the Court followed the charges against the political branches with the *Boumediene* principle: “To hold the political branches have the power to switch the Constitution on or off at will is another.”²⁴⁰ Because of this, the enemy combatants could seek habeas relief in federal courts. This stupefied the Government, as it had relied on the Court’s precedent set by *Eisentrager v. United States*,

²³⁷ *Id.* at 2255.

²³⁸ Christina D. Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973 (2009).

²³⁹ *Boumediene*, 128 S. Ct. at 2259 (“The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply”).

²⁴⁰ *Id.*

wherein the Court refused to grant German prisoners access to the Great Writ given their designation of non-nationals.²⁴¹ Further, the *Eisentrager* Court made the crucial distinction between a citizen and a non-citizen, particularly enemy combatants: “Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.”²⁴² Also, the *Eisentrager* Court simultaneously destroyed the *Balzac* locality doctrine and exalted the meaning of citizenship vis-à-vis constitutional protections: “If a person's claim to United States citizenship is denied by any official, Congress has directed our courts to entertain his action to declare him to be a citizen ‘*regardless of whether he is within the United States or abroad.*’”²⁴³

But why is the Court hesitant to hold that Puerto Rico—a United States Territory populated by 3 million American citizens²⁴⁴—is endowed with the *full* protections of the Constitution? Rather, why is the Court so blasé about relegating millions of American citizens in Puerto Rico to a

²⁴¹ 339 U.S. 763, 769 (1950).

²⁴² *Id.*

²⁴³ *Id.* (emphasis added).

²⁴⁴ U.S. Census Bureau, “Puerto Rico: 2020 Census,” (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/puerto-rico-population-change-between-census-decade.html>.

status inferior to enemy combatants and abandoning the views espoused by the *Eisentrager* Court? This is not to dispute the decision in *Boumediene*, for it is proper that the political branches be reined in when operating in an extraconstitutional state. But as will be explored next, it is a dangerous approach to constitutional applicability and Puerto Rico has suffered because of it.

3. *Reid*, *Boumediene*, and Their Shortcomings

As earlier stated, in *Reid*, Justice Black's plurality opinion sought to repudiate the Insular Cases. Yet the Court stopped short of declaring that these cases were obsolete, as Justice Black's opinion did not garner enough support. One of the concurrences—Justice John Marshall Harlan II's—has outlasted Justice Black's constitutional application ideas.²⁴⁵ Justice Harlan II's outlook rested on the following teachings from the Insular Cases:

The proposition is, of course, not that the Constitution “does not apply” overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of (...) the Insular Cases is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a specific guarantee altogether impracticable and anomalous ... In other words, what (...) the Insular Cases hold is that the particular local

²⁴⁵ Burnett, *supra* note 238, at 998.

setting, the practical necessities, and the possible alternatives are relevant²⁴⁶

Dr. Burnett argues that Justice Harlan's approach balked in making the distinction "between applicability and enforceability of constitutional guarantees," and in so doing "subjected the question of applicability to an analysis driven entirely by consequentialist concerns" as the Court would later employ in *Boumediene*.²⁴⁷

Launching off Justice Harlan II's concurrence in *Reid*, the *Boumediene* Court utilized his approach to determine whether the enemy combatants detained in Guantanamo were eligible for habeas relief. The Court considered a multi-factor test consisting of citizenship and status, the degree of control the United States exercised over the domain (sovereignty), and whether there were any "practical obstacles" that would prevent the application of relief, that is, the constitutional protection.²⁴⁸ To rebuff this open-ended, hazy method of the Constitution's applicability, Dr. Burnett proposes a solution rooted in the Fourteenth Amendment and specific case law gleaned from the Amendment's provisions.²⁴⁹ More precisely, this counter to the Court's balancing test outlook deals with the

²⁴⁶ *Reid*, 354 U.S. at 74-75 (Harlan, J., concurring in judgment).

²⁴⁷ Burnett, *supra* note 238, at 1002.

²⁴⁸ *Id.* at 1033 (inner citations omitted).

²⁴⁹ *Id.* at 1026.

incorporation of the Bill of Rights against the States.²⁵⁰ Moreover, the proposed test boils down to whether a specific constitutional provision applies and if so, how.²⁵¹ Instead of *Boumediene*'s "anomalous and practical test," the Court *would have* inquired on the United States' sovereignty over Guantanamo, the historical application of the Great Writ's Suspension Clause, and other important constitutional provisions.²⁵² When examined, the *Boumediene* Court would have arrived at the same holding, because the United States exerts *de facto* sovereignty over Guantanamo. Consequently, the Suspension Clause is not limited by geographical boundaries, and there is proof that the Great Writ had been applied abroad before the *Boumediene* decision.²⁵³ This new method would have curbed the flaw in the Court's balancing test: its reliance on "abstract and hypothetical concerns."²⁵⁴ And to answer the dissent's

²⁵⁰ *Id.* Dr. Burnett names the following cases as being guides for this new view: *E.g.*, *Mapp v. Ohio*, 367 U.S. 463 (1961) (holding that the Fourteenth Amendment incorporates the Fourth Amendment's protection against unreasonable searches and seizures by the States); *Malloy v. Hogan*, 378 U.S. 1 (1964) (holding that the Fourteenth Amendment incorporated the Fifth Amendment's privilege against self-incrimination in the States); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that Sixth Amendment's right to a jury trial was incorporated into the States via the Fourteenth Amendment); *Benton v. Maryland*, 395 U.S. 784 (1969) (holding that the Eighth Amendment's protection against double jeopardy was incorporated into the States by virtue of the Fourteenth Amendment).

²⁵¹ *Id.* at 1032 ("[T]he whether stage [consists] of a determination of what constitutional provisions authorize the power being exercised, and what constitutional provisions limit it. [Then], when the whether question has been answered affirmatively and the relevant constitutional provisions identified, a court should determine how a provision [held applicable] (...) shall be vindicated ...").

²⁵² *Id.* at 1032-33.

²⁵³ *Id.*

²⁵⁴ *Boumediene*, 128 S. Ct. at 2293 (Roberts, C.J., dissenting).

question of who won in the Court's decision²⁵⁵ would have included not just Petitioners in the case but American citizens in the territories as well.

B. To Be Incorporated, or Not to Be, That Is the Over Century-Old Question

In tandem with the question of the Constitution's application comes the question of whether Puerto Rico remains as a "disembodied shade, in an intermediate state of ambiguous existence"²⁵⁶ in the manner of an unincorporated territory. The issue of incorporation is imperative to the Puerto Rican sovereignty question for the Court has held that what inhibits Puerto Rico's access to all the blessings of liberty lies in Congress's refusal to incorporate the territory.²⁵⁷ The analysis in this next section will focus on whether Puerto Rico's incorporation (either implicit or explicit) is evinced by an Act of Congress or by any of the Court's rulings. Under consideration comes *Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero*. This narrow investigation will focus on any language, indication, or development emanating from these two authorities that speak, either in affirmance or denial, of Puerto Rico's territorial status. While one might be tempted to foreclose the argument based on *Balzac's* statement that even citizenship was not

²⁵⁵ *Id.* ("So who has won? Not the detainees (...) Not Congress (...) Not the Great Writ (...) And certainly not the American people ...").

²⁵⁶ *Downes*, 182 U.S. at 372 (Fuller, C.J., dissenting).

²⁵⁷ *E.g., Id.*; *Dorr v. United States*, 195 U.S. 138 (1904); *Balzac*, 258 U.S. 298 (1922).

enough to consider Puerto Rico an incorporated territory, it would be irresponsible to eschew examination of developments in the law since 1922.

1. *Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero*

In *Examining Bd. of Engineers, Architects, and Surveyors v. Flores de Otero*, the Court considered two issues: whether the United States District Court for the District of Puerto Rico had jurisdiction—granted under the United States Code provision dealing with the process required when civil rights are violated²⁵⁸—to hear 1983 civil rights cases,²⁵⁹ and whether a Puerto Rico statute limiting civil engineering licenses to United States citizens was constitutional.²⁶⁰ After Maria C. Flores de Otero had applied for said license, she was denied said license by Puerto Rico’s Examining Board of Engineers, Architects, and Surveyors.²⁶¹ Along with Ms. Flores de Otero was Sergio Perez Nogueiro, who was also a noncitizen.²⁶² In Mr. Perez Nogueiro’s complaint, he alleged that the denial of licensure infringed the Due Process Clause of either the Fifth or Fourteenth Amendments.²⁶³ The United States District Court for the

²⁵⁸ 28 U.S.C.A. § 1343 (West).

²⁵⁹ 42 U.S.C.A. § 1983 (West).

²⁶⁰ *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976).

²⁶¹ *Id.* at 575-77.

²⁶² *Id.* at 579.

²⁶³ *Id.*

District of Puerto Rico granted relief and instructed the Board to license the individuals.²⁶⁴ The Board appealed.²⁶⁵ The Supreme Court granted certiorari.²⁶⁶

The Court examined the statutes and their histories, specifically Congress's 1874 addition of the phrase "or Territory" to their statute of origin: the Ku Klux Klan Act of 1871.²⁶⁷ On the jurisdiction question, the Court answered that the district court had jurisdiction.²⁶⁸ As to the question related to §1983, the Court also answered that the district court had jurisdiction to hear complaints and grant relief since the purpose of commonwealth status for Puerto Rico was to "accord [the island] the degree of autonomy and independence normally associated with States of the Union."²⁶⁹ The Court also noted that Puerto Rico's relationship with the United States is *sui generis*, with "no parallel in our history."²⁷⁰ As to the overall question regarding Puerto Rico's ban on "aliens" being licensed as engineers, the Court found that "[i]t [was] clear (...) that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the

²⁶⁴ *Id.* at 580.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 581 (citation omitted).

²⁶⁸ *Id.* at 583-84.

²⁶⁹ *Id.* at 594.

²⁷⁰ *Id.* at 596.

Fourteenth Amendment appl[ied] to Puerto Rico.”²⁷¹ But the Court did not know whether the applicable clauses came from the Fifth or Fourteenth Amendments.²⁷² Lacking an answer to which Amendment applied, the Court went on to employ strict scrutiny in examining the Puerto Rico statute and annulled the same.²⁷³

Two logical implications arise from the Court’s decision. First, either Puerto Rico is equal to a State when speaking of constitutional provisions that apply on the island, or it is something else. Second, if the first proposition is veridic, then Puerto Rico has been incorporated into the United States. From this, it follows that the lack of equal representation in Congress, the denial of suffrage rights for the island, and the lack of full constitutional protections are incoherent with the Court’s pronouncements. But this has not been the situation.

As will be evinced by the Court’s decisions in 2016, the Court has abstained from expounding on that degree of autonomy afforded to Puerto Rico by the commonwealth status: “[B]oth decisions treated Puerto Rico’s fundamental constitutional transformation after 1950 as nothing more than a data point—and sometimes an irrelevant one—in the interpretive task at hand.”²⁷⁴ In a later section, the effects these decisions have had on

²⁷¹ *Id.* at 600.

²⁷² *Id.* at 601.

²⁷³ *Id.* at 602-06.

²⁷⁴ Samuel Issacharoff et. al., *What Is Puerto Rico?*, 94 *IND. L.J.* 1, 19 (2019).

Puerto Rico's alleged State-like sovereignty will be further explored and explained.

IX. Prelude to 2016: A Tumultuous Time

It would be impractical to relate the entirety of events leading up to the actions by the Court, the Executive, and Congress in 2016. Instead, it is apt to focus on the happenings that precipitated governmental actions. Most of these developments dealt with Puerto Rico's precarious financial situation, but they also include key legal and political occurrences. Overall, the two main actors will continue to be Congress and the Court, while the Executive will play a supporting role. Moreover, one will take notice of Puerto Rico's devolution in autonomy and sovereignty.

A. The Economic Front

This detective work begins with § 936 of the Internal Revenue Code of 1976. This law provided a tax exemption for companies in the mainland to invest in Puerto Rico.²⁷⁵ Major companies, like Johnson & Johnson, took advantage of the tax haven, as § 936 provided heightened incentives for companies who “could show the vast majority of their income was derived from sources in a ‘possession.’”²⁷⁶ Companies were enthralled by the incentives, and through corporate inventiveness or avarice, they managed to move practically everything to the tax shelter Puerto Rico had

²⁷⁵ Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship*, 100 MINN. L. REV. Headnotes 79, 94 (2016).

²⁷⁶ *Id.*

become, including “production, patents, and trademarks.”²⁷⁷ Congress lost over \$3 billion in taxes because of the corporations’ gambit.²⁷⁸ The corporations’ actions were devastating to the intended goal of § 936, which was to develop Puerto Rico’s economy through job creation.²⁷⁹ Congress wanted to put a stoppage to the lost revenue and thus decided to *entirely* repeal § 936 in 1996 without first testing intermediary steps.²⁸⁰ The companies retaliated and left Puerto Rico, creating an economic vacuum that sent thousands to unemployment while simultaneously punting the economy into its demise.²⁸¹

Contributing to Puerto Rico’s economic downturn is the dangerous trade dependency Puerto Rico has on the mainland. For instance, close to 90% of Puerto Rico’s exports are destined for the mainland’s markets, making Puerto Rico the Nation’s largest contributor of wealth as well as the chief “captive market” of mainland goods.²⁸² In turn, the Government is eager to subsidize industries, but the subsidies are equivalent to giving money to one’s sibling so they can purchase lemonade from one’s lemonade stand, as the subsidies are “repatriated when Puerto Ricans buy

²⁷⁷ *Id.* at 95.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 94.

²⁸⁰ *Id.* at 95.

²⁸¹ *Id.*

²⁸² Torruella, *supra* note 261, at 95-6.

Mainland-made products” with the subsidies.²⁸³ To offset these economic debilities, Puerto Rico engaged in an addictive bond-issuing practice. Indeed, the island started issuing triple-tax exempt bonds to become the sultriest investment location.²⁸⁴ Investors flocked the island. Puerto Rico needed to keep its projects and itself afloat, hence the continued issuing of debt.²⁸⁵ But Puerto Rico “took out long-term debt to cover short-term financial needs.”²⁸⁶ With the repeal of § 936, the island’s economy was set for a cataclysmic meltdown. To make matters worse, Puerto Rico was “experiencing steady population loss and very low productivity.”²⁸⁷ The island’s mass exodus—a “brain drain”—as well as its economy’s volatility, combined to make a gargantuan recipe for disaster.

Then came the disparity in federal benefits. Puerto Rico receives a minuscule share of Medicaid and Supplemental Security Income (SSI) benefits.²⁸⁸ More specifically, when speaking of Medicaid, Puerto Rico received a smaller share of the funding compared to States that have

²⁸³ *Id.*

²⁸⁴ Francesca Trianni & Ellie Ismailidou, *The Next Financial Crisis You Haven’t Heard About Yet: Puerto Rico*, TIME MAG. (Mar. 12, 2014, 9:24 AM), <https://time.com/20416/the-next-financial-catastrophe-you-havent-heard-about-yet-puerto-rico/>.

²⁸⁵ *Id.*

²⁸⁶ *Id.* (original quotation marks omitted).

²⁸⁷ *Id.*

²⁸⁸ Dareh Gregorian, *DOJ to defend law barring benefits to Puerto Rico, which Biden calls ‘inconsistent’ with his values*, NBC NEWS (June 7, 2021, 3:09 PM), <https://www.nbcnews.com/politics/joe-biden/doj-defend-law-barring-benefits-puerto-rico-which-biden-calls-n1269878>. This case is that of *United States v. Vaello Madero* (2021).

equal or smaller populations.²⁸⁹ There is no good reason for Puerto Rico’s exclusion other than the Insular Cases’ deference to Congress, even if the island’s residents would be eligible on the mainland.²⁹⁰ Puerto Rico’s already handicapped local government is then burdened with covering the rest.

What is more, the Supreme Court has greenlit this difference in treatment. As explained in *Califano v. Torres*, “[c]ertain benefits under the Social Security Act, as amended in 1972, are payable only to residents of the United States, defined as the 50 States and the District of Columbia.”²⁹¹ The Court refused to further scrutinize the exclusion and subjected it to rational basis review.²⁹² Then came *Harris v. Rosario*, wherein the Court upheld different funding for federal programs on the island, holding that the Territory Clause empowered Congress to treat Puerto Rico differently, yet again: “Congress...may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”²⁹³ Next, the Court examined Congress’s reasons for doing so: (1) “Puerto Rican residents do not contribute to the federal treasury;” (2) “the cost of treating Puerto Rico as a State under the statute would be high;”

²⁸⁹ Torruella, *supra* note 261, at 97.

²⁹⁰ See note 137.

²⁹¹ 435 U.S. 1 (1978) (*per curiam*).

²⁹² *Id.* at 5 (“Such a statute ‘is entitled to a strong presumption of constitutionality.’ ‘So long as its judgments are rational, and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket’”) (citations omitted).

²⁹³ 446 U.S. 651, 652 (1980) (*per curiam*).

(3) “greater benefits could disrupt the Puerto Rican economy.”²⁹⁴ This was a setback for the Commonwealth. In dissent, Justice Thurgood Marshall sought to point out the majority’s reasoning flaws. First, the majority had no reason for claiming that the Territory Clause provided Congress a free license to discriminate against Puerto Rico.²⁹⁵ Next, Justice Marshall took issue with the Insular Cases. Justice Marshall believed that those decisions were “questionable,” especially since the Court had held that the Due Process and Equal Protection Clauses applied on the island.²⁹⁶ Lastly, Justice Marshall confronted the majority’s logic about the benefits disturbing the economy: “This rationale has troubling overtones. It suggests that programs designed to help the poor should be less fully applied in those areas where the need may be greatest, simply because otherwise the relative poverty of recipients compared to other persons in the same geographic area will somehow be upset.”²⁹⁷ Significant economic disparities aside, the Court’s *per curiam* opinion in *Rosario* unlocked the door for what was to become the decline of Puerto Rico’s sovereignty. It also let Congress take back the reins over Puerto Rico’s internal affairs, inconsistent with Public Law 600’s goal of enhancing Puerto Rico’s autonomy, for nothing is more internal than a people’s economy.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 652-53 (Marshall, J., dissenting).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 655-56.

Making matters worse was a 1984 amendment to House Resolution 5174, aimed at overhauling the United States bankruptcy courts.²⁹⁸ This amendment prevented Puerto Rico from declaring Chapter 9 bankruptcy. Chapter 9 bankruptcy is the “part of the bankruptcy code for insolvent local governments.”²⁹⁹ There is no rhyme or reason for this exemption.³⁰⁰ What came from this exception was that Puerto Rico’s \$70-plus billion debt had nowhere to go.³⁰¹ Instead, Puerto Rico and the American citizens therein were left to fare for themselves. This is like an individual’s house being on fire but preventing them from calling on those able to extinguish it.

The struggle for debt restructuring would end up at the Supreme Court. It is one of the two 2016 Court decisions, detailed below, that would deal heavy, repetitive blows to Puerto Rico’s sovereignty and standing within the polity.

²⁹⁸ Jon Greenberg, *Mystery: Strom Thurmond, Puerto Rico and bankruptcy protection*, PolitiFact (Apr. 27, 2016), <https://www.politifact.com/factchecks/2016/apr/27/john-oliver/mystery-strom-thurmond-puerto-rico-and-bankruptcy-/>.

²⁹⁹ Mary Williams Walsh, *Puerto Rico Fights for Chapter 9 Bankruptcy in Supreme Court*, N.Y. TIMES (Mar. 22, 2016), <https://www.nytimes.com/2016/03/23/business/dealbook/puerto-rico-fights-for-chapter-9-bankruptcy-in-supreme-court.html>.

³⁰⁰ See Williams Walsh, *Puerto Rico Fights for Chapter 9 Bankruptcy in Supreme Court*, and note 266.

³⁰¹ *Id.*

B. Shortcomings of the Politico-Legal Processes

After Puerto Rico enacted its constitution in 1952, it was thought that the procedure would enter Puerto Rico on a path set for a “different” status. The arrangement was deemed an “achievement in the politico-legal relations between Puerto Rico and the mainland.”³⁰² This point has some merit since legislation regarding Puerto Rico before Public Law 600, including the Foraker and Jones-Shafroth Acts, were *imposed* on the island rather than letting the island decide. However, Public Law 600 was subject to the island’s electorate in the form of a plebiscite vote.³⁰³ But unfortunately, the apex for sovereignty quickly subsided, as the “compact” entered by both the mainland and Puerto Rico can be altered by future Congresses.³⁰⁴ Precisely, as has been described in the above sections, the vicissitudes in policies toward Puerto Rico have made that compact subject to the whims of different Congresses. It then follows that the compact is more of an arrangement rather than a true, fixed compact. Not just this, but even in 1952, the question of whether Congress could unilaterally repeal Puerto Rico’s constitution was up in the ether.³⁰⁵

³⁰² Peter J. Fliess, *Puerto Rico’s Political Status Under Its New Constitution*, 5 THE WESTERN POL.Q. 635, 636 (1952).

³⁰³ *Id.* at 640.

³⁰⁴ *Id.* at 641.

³⁰⁵ *Id.* at 647, n.55 (“If, as the debates seem to indicate, Public Law 600 in no way impairs the authority of Congress over Puerto Rico, there is nothing to prevent its repeal in form or substance through unilateral act of Congress”).

Besides Public Law 600's obfuscations regarding the equilibrium between Congress and Puerto Rico, it is also very important to mention the obvious: Although it was a law made to enhance Puerto Rico's control over internal affairs, it *refused* to grant Puerto Rico representation in Congress or federal voting rights *ipso facto* leaving Puerto Rico's standing in the general polity untouched and unenhanced. In effect, the ambiguities surrounding Public Law 600 and the commonwealth label are some of the major obstacles for Puerto Rico.

1. What is the Commonwealth's Constitution?

Some claim that Congress cannot repeal Puerto Rico's Constitution bestowed upon the island by Public Law 600 while also claiming that the law provided Puerto Rico with "state-like sovereignty."³⁰⁶ However, this would be reaching a premature conclusion, as Congress's plenary powers—set by the Territory Clause—remained intact after Public Law 600. On top of that, Puerto Rico's Constitution did not wholly receive its powers from the Government.³⁰⁷ Again, this is antithetical to Congress's full power over Puerto Rico's fate within the polity. To answer the repeal question, Congress does have the power to repeal, making Public Law 600

³⁰⁶ Adam W. McCall, *Why Congress Cannot Unilaterally Repeal Puerto Rico's Constitution*, 102 CORNELL L. REV. 1367, 1376 (2017).

³⁰⁷ *Id.* at 1379 ("The Puerto Rican Constitution obtains its authority indirectly and only in part from the federal government").

a measure to increase the island's management over its local affairs while offering no recompense to Puerto Rico's standing comparable to that of the States. The most light shed on this new status came via an opinion issued by the United States District Court for the District of Puerto Rico merely a year after the adoption of the constitution as well as commonwealth status. In *Mora v. Torres*, the district court acknowledged the time-old tale that a "new type of relationship" had been born out of the commonwealth and constitution.³⁰⁸ Aside from that, the district court explicated that "[Puerto Rico] is no longer an agency of the Government of the United States nor does it exercise any longer its powers by way of delegation of the Federal Government. It is not now a dependency, possession nor territory of the United States."³⁰⁹ The district court also said that the Puerto Rican Constitution could not be unilaterally repealed by either side, as it was anathema to the *pactum* Public Law 600 was meant to be.³¹⁰ Adding to the premature premonitions, the district court stated that "Puerto Rico enjoy[ed] the total substance of self government [*sic*] and there is a plentitude of government by consent, which realities

³⁰⁸ *Mora v. Torres*, 113 F. Supp. 309, 313 (D.P.R.), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

³⁰⁹ *Id.*

³¹⁰ *Id.* ("As a necessary legal consequence of said compact, neither the Congress of the United States nor the people of Puerto Rico can unilaterally amend Public Law 600 nor the Puerto Rican Federal Relations Act without the consent and approval of the other party to the compact").

are incompatible with the previous status of Puerto Rico as a possession, dependency or territory.”³¹¹ And though the First Circuit Court of Appeals may have reaffirmed the lower court’s ruling,³¹² the Court failed to substantially elaborate on these asseverations until 2016.³¹³

2. On Voting Rights

The courts have foreclosed the arguments made for voting rights and meaningful representation rather quickly. In *Igartúa-De la Rosa v. United States*, the First Circuit Court of Appeals rejected arguments made in favor of Puerto Ricans’ right to vote in the federal election.³¹⁴ The arguments in favor were grounded in the Constitution, international treaties entered by the United States advocating for human rights, and customary international law.³¹⁵ The First Circuit rejected all three. To answer the first argument, the First Circuit held that the constitutional clause governing participation in the General Election deals with electors, not citizens and that Puerto Rico has not been granted any electors, unlike the District of Columbia.³¹⁶ Then the First Circuit repudiated the treaty argument, as the Constitution remained the supreme law of the

³¹¹ *Id.* at 313-14.

³¹² See *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

³¹³ See *ante Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *Harris v. Rosario*, 446 U.S. 651 (1980).

³¹⁴ 417 F.3d 145 (1st Cir. 2005) (en banc).

³¹⁵ *Id.*

³¹⁶ *Id.* at 147 (citation omitted).

land: “The case for giving Puerto Ricans the right to vote in presidential elections is fundamentally a political one and must be made through political means. But the right claimed cannot be implemented by courts unless Puerto Rico becomes a state or until the Constitution is changed.”³¹⁷ And to bless the notion that treaties could not supersede the Constitution, the First Circuit said that the right to vote ought not “‘be declared’ by a federal court on the basis of treaties none of which was designed to alter domestic law—and none of which could override the Constitution.”³¹⁸ In terms of the last argument, whether customary international law exerted upon the United States an obligation to enfranchise American citizens in Puerto Rico, the First Circuit said that though “some enthusiasts [deem customary law] to be law like other law,” it was an “uncertain body of norms” with a varying degree of “enforceability...even in the international sphere.”³¹⁹ In sum, the customary law claim did not hold water.³²⁰ The Supreme Court declined to grant certiorari to resolve such an important question.³²¹

³¹⁷ *Id.* at 151 (citations omitted).

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.* (“No serious argument exists that customary international law, independent of the treaties now invoked, requires a particular form of representative government”).

³²¹ *de la Rosa v. United States*, 547 U.S. 1035, 126 S. Ct. 1569, 164 L. Ed. 2d 326 (2006).

The question of purposeful representation for the island’s American citizens was resolved in *Igartúa v. United States*.³²² There, the central argument in favor of congressional representation was Puerto Ricans’ status as United States citizens. But the Court distinguished this as not being a form of traditional citizenship (that bestowed by the Fourteenth Amendment), but it instead was one granted by Congress according to its Territory Clause powers.³²³ On top of that, the Constitution only speaks of enfranchising “residents of the States,” not citizens.³²⁴ The Supreme Court again refused to confront such an important question.³²⁵

3. Status Update

To define its relationship with the Government, or to try to augment participation in the Government, Puerto Rico has engaged in the practice of holding plebiscite after plebiscite to send a dim flare to Washington, D.C. This ultimately boils down to the two major parties’—the PPD and the *Partido Nuevo Progresista* (PNP)—efforts to sustain a “permanent domestic relationship with the [mainland].”³²⁶

³²² 626 F.3d 592 (1st Cir. 2010).

³²³ *Id.* at 601.

³²⁴ *Id.* (“Under other provisions of the Constitution, however, the right to vote is given to residents of the States, not to citizens. Hence, citizenship alone does not trigger the right to vote”).

³²⁵ *Igartua v. United States*, 566 U.S. 986, 132 S. Ct. 2376, 182 L. Ed. 2d 1017 (2012).

³²⁶ Ángel R. Oquendo, *Puerto Rican National Identity and United States Pluralism*, in *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPRESSION, AND THE CONSTITUTION* 315, 318 (Christina Duffy Burnett & Burke Marshall eds., 2001).

As evidenced by congressional and White House records, more serious efforts to improve the Commonwealth's footing within the polity can be traced back to as early as 1964. President Lyndon B. Johnson, at the first meeting of the United States-Puerto Rico Commission on Puerto Rico, mentioned that the "United States has a traditional and deep-seated national commitment to the principle of self-determination."³²⁷ Two years later, the Commission issued a 2,000+ page report with three options: maintenance of commonwealth status, statehood, or independence.³²⁸ Again, President Johnson issued a statement reaffirming that any choice should be rooted in the "principles of mutual consent and self-determination."³²⁹ Further, President Johnson asserted that any change in status would be made with the "improvement and growth for the [C]ommonwealth" in mind.³³⁰ In 1967, the Puerto Rican people spoke. The Commonwealth option won a significant portion of the vote.³³¹ The status quo persevered.

³²⁷ Lyndon B. Johnson, Remarks at the First Meeting of the United States-Puerto Rico Commission on the Status of Puerto Rico (June 9, 1964), available at <https://www.presidency.ucsb.edu/node/239457>.

³²⁸ Lyndon B. Johnson, Statement by the President in Response to the Report of the United States-Puerto Rico Commission on the Status of Puerto Rico (Aug. 5, 1966), available at <https://www.presidency.ucsb.edu/node/239238>.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ See Edgardo Meléndez, *The Politics of Puerto Rico's Plebiscite*, 24 CARIBBEAN STUD. 117, (1991).

The plebiscite-as-social thermometer approach took the back seat until 1991 when there was a referendum meant to address the status question yet again. That year, Governor Rafael Hernández Colón introduced a referendum to amend the Commonwealth's Constitution to 'guarantee democratic rights,' which were the right to freely determine Puerto Rico's political status; right to opt for a status that was full of "political dignity without colonial, territorial subordination to Congress's plenary powers;" the right to vote for the above-mentioned status alternatives; the right to obtain an answer to the status question with over 50% of the vote; the right to be guaranteed Puerto Rico's culture, language, and identity, including international athletic representation; the right to obtain the full citizenship protections afforded to their counterparts in the mainland.³³² The proposal was an abysmal failure, with the "No" option mustering over 50% of the vote.³³³

The pulse-through-plebiscite practice reached its cusp in the 1992 to 1993 period. After the defeat of the PPD in the polls, the PNP set out to

³³² CELESTE BENÍTEZ, *EL DÍA EN QUE PUERTO RICO HABLÓ: EL PLEBISCITO DE 1993* 24 (1998) (citation omitted). As to the international athletic representation, although Puerto Rico is under the United States' authority, the International Olympic Committee considers Puerto Rico to be its own country. The fear that Puerto Ricans faced (and still do) when navigating their political status options was that a more formal union with the mainland—statehood—would inhibit Puerto Rico's participatory ability in the Olympics. For further reading: Michael McCann, *Why the IOC considers Puerto Rico as its own country in the Olympics*, *SPORTS ILLUSTRATED* (Aug. 6, 2016), <https://www.si.com/olympics/2016/08/06/olympics-puerto-rico-united-states-ioc>.

³³³ *Id.* at 38.

explore its own plebiscite.³³⁴ The PNP launched campaigns to galvanize the electorate in support of statehood.³³⁵ This plebiscite was unlike the others, as it enthralled the millions of citizens on the island to act on their preferred status options.³³⁶ Opposite the PNP, the PPD conjured the “*Lo Mejor de Dos Mundos*” approach, aimed at preserving the commonwealth (Estado Libre Asociado) status.³³⁷ To add to the plebiscite’s uniqueness, this was the first time that the mainland took an active interest in Puerto Rico’s decision.³³⁸ Moreover, the political process was developing in bifurcated venues: in the mainland and throughout Puerto Rico’s streets, residences, businesses, even in *la tiendita en la esquina* (which roughly translates as “the store on the street corner”). The voters hit the polls and returned a narrow indictment on the statehood option: The commonwealth option gained 48% compared to 46% obtained by the statehood option.³³⁹ This was known as the Day Puerto Rico spoke.³⁴⁰ In a rare step, and to its credit, Congress followed up on the plebiscite’s results by introducing House Resolution 3715.³⁴¹ This was orchestrated

³³⁴ *Id.* at 49.

³³⁵ *Id.* at 59-64.

³³⁶ *See Id.* at 65-85.

³³⁷ *Id.* at 87.

³³⁸ *Id.* at 121.

³³⁹ *Id.* at 161.

³⁴⁰ *Id.* at 171.

³⁴¹ *Id.* at 175.

as a means to incorporate Puerto Rico into the polity.³⁴² In her book, Senator Benítez claimed that this move was a thumb on the nose to Puerto Ricans' electoral choices, claiming that such a move would undoubtedly include statehood.³⁴³ But such aspersion is unfounded. Although incorporation traditionally meant being placed on a train to statehood, it did not necessarily mean that statehood would come tomorrow. What is more, incorporation would have included being entirely subject to the protections of the United States Constitution, instead of just those rights deemed fundamental. Several other plebiscites followed in 1998 and 2012, but they bear no weight on this thesis's focus. Rather, what must be noted is that Puerto Ricans' status option opinions remained, for the most part, the same.

³⁴² *Id.*

³⁴³ *Id.*

X. A Year to Remember: PROMESA, *Franklin*, & *Sánchez Valle*

Then came the year that shall live in infamy in the annals of Puerto Rican history: 2016. Puerto Rico had been riding the wave of its financial woes as best it could, but it was about to be consumed by it. In 2016, the island had accrued over \$70 billion in debt. However, it could not enact any measure along the lines of fiscal austerity, given that Congress debarred the island from pursuing any Chapter 9-related relief for nebulous reasons in 1984. Two years before its showdown with creditors at the Supreme Court, Puerto Rico had enacted a policy made to circumvent this “No Man’s Land” situation. This measure was Puerto Rico’s “version of a bankruptcy law, designed for its big public utilities, which account[ed] for about \$26 billion of the total debt.”³⁴⁴ But this was also contrary to Chapter 9’s provision that “only Congress can enact bankruptcy laws.”³⁴⁵ The Supreme Court would settle this as part of the trifecta infringing upon Puerto Rico’s self-government victories via Public Law 600. Likewise, as Puerto Rico’s debt spiraled, Congress attempted to

³⁴⁴ Williams Walsh, *supra* note 299.

³⁴⁵ *Id.*

address the situation through several pieces of legislation. Out of these, the most restrictive piece of legislation was born.

Elsewhere on the island, at around the same period, the violations of the commonwealth and federal laws by two individuals (as well as the ensuing prosecutions) would create a situation that proved to be more than just about aspects of criminal law. These violations were used by the Court to further circumscribe the Commonwealth's self-governing powers, eroding Public Law 600's main goal.

This next section discusses the three, focused on how these rulings and Act of Congress worked not to build on those 1950 promises and grants but served instead to sever them.

A. Puerto Rico v. Franklin California Tax-Free Trust

This case arrived at the Court because of Puerto Rico's financial woes. As a recap, Puerto Rico could not pay its gargantuan debt and was unable to seek relief under Chapter 9 bankruptcy for no good reason other than being exempt from a 1984 amendment to restructure bankruptcy courts.³⁴⁶

"The Federal Bankruptcy Code," the Court said in *Puerto Rico v. Franklin California Tax-Free Trust*, "pre-empts state bankruptcy laws that enable insolvent municipalities to restructure their debts over the

³⁴⁶ See Williams Walsh, *supra* note 299.

objections of creditors and instead requires municipalities to restructure debt under Chapter 9 of the Code.”³⁴⁷ In 1984, Congress excluded Puerto Rico from falling under the ambit of Chapter 9’s definition of a debtor.³⁴⁸ But incongruity struck again, as the Court held that Congress’s omission “prevent[ed] Puerto Rico from authorizing its municipalities to seek Chapter 9 relief,” whilst at the same time concluding that Puerto Rico “remain[ed] a State for other purposes related to Chapter 9 (...) including its pre-emption provision.”³⁴⁹ The Court then explained that Puerto Rico “is not a State for purposes of the gateway provision, so it cannot perform the single function of the State[s] under that provision: to specifically authoriz[e] municipalities to seek Chapter 9 relief.”³⁵⁰ The decision belonged to Congress.

Ultimately, this meant that Puerto Rico could not act to prevent itself from drowning under the weight of its debt. Again, nothing is more local in scope than an entity’s finances. The Court’s decision in *Franklin California Tax-Free Trust* removed any chance of Puerto Rico restructuring or surviving its oppressive debt, effectively “shutting [Puerto Rico] out of a right to restructure the huge financial obligations

³⁴⁷ 136 S. Ct. 1938, 1942 (2016) (citation omitted).

³⁴⁸ *Id.* (“The Bankruptcy Code has long included Puerto Rico as a State, but in 1984 Congress amended the definition of State to exclude Puerto Rico for the purpose of defining who may be a debtor under chapter 9”) (internal quotation marks omitted; citation omitted).

³⁴⁹ *Id.* (internal quotation marks omitted).

³⁵⁰ *Id.* at 1946 (alterations in original; inner quotation marks omitted; citation omitted).

run up by its three public utilities.”³⁵¹ Across First Street, Congress was compiling a bill meant to address the debt situation; a bill that to this day remains a thorn in Puerto Rico’s side.

B. *Puerto Rico v. Sánchez Valle* & the Ultimate Source Doctrine

What started as a criminal case over violating the Puerto Rico Arms Act of 2000,³⁵² proved to be destructive to Puerto Rico’s sovereignty. The issue began when Luis Sánchez Valle and Jaime Gómez Vázquez sold guns without permits to undercover police officers on separate occasions.³⁵³ The Respondents were indicted under the Puerto Rico Arms Act.³⁵⁴ After the Commonwealth’s indictments, federal grand juries indicted the Respondents for violating like provisions of the United States’ gun trafficking laws.³⁵⁵ After pleading guilty to the federal violations, Respondents filed a motion to dismiss the Commonwealth charges on grounds that they violated the Fifth Amendment’s Double Jeopardy Clause.³⁵⁶ Petitioners, among them the Federal Government, alleged that Puerto Rico and the United States qualified as distinct sovereigns, similar

³⁵¹ Lyle Denniston, *Opinion analysis: Puerto Rico’s debt woes left to Congress*, SCOTUSBLOG (Jun. 13, 2016, 2:03 PM), <https://www.scotusblog.com/2016/06/opinion-analysis-puerto-ricos-debt-woes-left-to-congress/>.

³⁵² See 25 Laws P.R. Ann. §458 (2008).

³⁵³ *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1869 (2016).

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ *Id.*

to a State and the Federal Government, for Double Jeopardy purposes.³⁵⁷ This meant that subsequent prosecutions could be raised against the Respondents.³⁵⁸ However, the Supreme Court of Puerto Rico ruled in favor of the Respondents, claiming that the subsequent proceedings ran afoul of the Double Jeopardy Clause.³⁵⁹ The United States Supreme Court agreed to take the case.

The Supreme Court reasoned that the question of whether Puerto Rico and the United States counted as separate sovereigns for double jeopardy purposes should not focus on the “extent of control one prosecuting authority [wields] over the other,”³⁶⁰ but is based on “the ‘ultimate source’ of the power undergirding the respective prosecutions.”³⁶¹ For this, the Court said the “inquiry was historical, not functional,” with a focus on the oldest roots of the power.³⁶² After the Court used a line analogy to illustrate the ultimate source doctrine,³⁶³ it went on to compare States with Puerto Rico. Moreover, the States do not derive their prosecutorial

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 1870 (alteration in original).

³⁶¹ *Id.* at 1871 (citation omitted; original quotation marks omitted).

³⁶² *Id.* This is interesting because the Court had employed the functional approach in *Boumediene* when deciding whether constitutional provisions applied. But that is not the subject of this thesis.

³⁶³ *Id.*

If two entities derive their power to punish from wholly independent sources (imagine here a pair of parallel lines), then they may bring successive prosecutions. Conversely, if those entities draw their power from the same ultimate source (imagine now two lines emerging from a common point, even if later diverging), then they may not.

powers from the Government. They are instead based on the “authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment.”³⁶⁴ According to the Court, the logical consequence of this was that States’ prosecutorial powers antedated Congress.³⁶⁵ To follow the State example, the Court discussed Indian tribes and their ‘primeval’ sovereignty, though also subject to Congress’s plenary powers.³⁶⁶ Like a State, the Court described an Indian tribe’s powers disconnected from any Federal Government delegation.³⁶⁷

What is the ultimate source of Puerto Rico’s powers? The Court held that even though Puerto Rico had become somewhat detached from Congress after the rise to commonwealth via the constitution-making process, one could not help but find Congress at the beginning of the line.³⁶⁸ Puerto Rico’s Constitution—meant to “accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union”³⁶⁹—was rendered worthless as a measure of autonomy: “The

³⁶⁴ *Id.* (alterations in original; original quotation marks omitted; citations omitted).

³⁶⁵ *Id.* (“State prosecutions therefore have their most ancient roots in an ‘inherent sovereignty’ unconnected to, and indeed pre-existing, the U.S. Congress”) (citation omitted).

³⁶⁶ *Id.* at 1872 (“But unless and until Congress withdraws a tribal power—including the power to prosecute—the Indian community retains that authority in its earliest form”) (citation omitted).

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 1874 (“Puerto Rico today has a distinctive, indeed exceptional, status as a self-governing Commonwealth. But our approach is historical. And if we go back as far as our doctrine demands—to the “ultimate source” of Puerto Rico’s prosecutorial power—we once again discover the U.S. Congress”) (inner citation omitted).

³⁶⁹ *Flores de Otero*, 426 U.S. at 597.

island's Constitution, significant though it is, does not break the chain [of the Federal Government as the ultimate source].”³⁷⁰ The Court relegated that compact based on mutual consent to a mere ceremonial document. However, the Court did acknowledge that Congress had the prerogative to “develop innovative approaches to territorial governance,”³⁷¹ which will be used as support for alternative options to enhance the island’s sovereignty. Still, the Court was flawed when it held that Puerto Rico’s Constitution made the island a candidate to “avail itself of a wide variety of futures,”³⁷² for this assertion is incongruent with the pronouncement that Congress is the island’s ultimate source of power vis-à-vis Congress is the one with that authority; ultimate source necessitates ultimate power.

In the same way, the Court’s ultimate source doctrine poses another flaw: If the ultimate source is adopted, thirty-seven out of the fifty States would be violating the Double Jeopardy Clause *ipso facto* they were also territories deriving their powers from Congress. Granted, the Court seemed to foreclose that argument by alleging the States’ ultimate authority came from the Tenth Amendment, while at the same time saying that they preserved the sovereignty predating Congress’s

³⁷⁰ *Id.* at 1876.

³⁷¹ *Id.*

³⁷² *Id.*

existence. Thus, only thirteen of the fifty derive their authority from somewhere other than Congress.

C. A PROMESA for Puerto Rico

To culminate a month of reduction to Puerto Rico's self-governing powers, Congress enacted the Puerto Rico Oversight, Management, and Economic Stability Act (hereinafter PROMESA). Ironically, the acronym spelled "promise" in Spanish, but such a thing it was not. Under its vast Territory Clause powers, Congress imposed the Financial Oversight and Management Board (hereinafter FOMB) over Puerto Rico and its finances.³⁷³ Among its many provisions, the FOMB had the final say in determining and approving what Puerto Rico's budget would be: "[T]he [FOMB] shall determine in its sole discretion whether each proposed Budget is compliant with the applicable Fiscal Plan."³⁷⁴ As such, the provision stripped Puerto Rico's say over its budget, relegating the island's political branches to mere bystanders in the island's governance. On top of that, Puerto Rico's proposed acts, executive orders, regulations, etc., were all subject to FOMB approval.³⁷⁵

To make matters worse, the FOMB is composed of *unelected* members, making them subject to appointment by the President and Congress.

³⁷³ 48 U.S.C.A. § 2121 (West).

³⁷⁴ See 48 U.S.C.A. § 2142 (c) (d) (West).

³⁷⁵ See 48 U.S.C.A. § 2144 (a) (b) (c) (West).

Consequently, the island's already federally disenfranchised electorate is once again victim to the whims of leaders whom they do not get to choose. Additionally, if the FOMB does not agree with the proposals, it can choose to bypass Puerto Rico's electorate and its political branches, and enact its fiscal plans.³⁷⁶ Moreover, the FOMB stands as an omnipotent being overseeing Puerto Rico's local affairs. Like Spain in colonial times, like Congress before 1950, the FOMB casts a heavy, sprawling shadow over the island. Its all-reaching control desecrates the lofty goals of Public Law 600, that is, the greater measures for the island's self-government. In short, the institution of FOMB was the definitive strike to Puerto Rico's sovereignty and continues to be detrimental to the island's self-government; measures of austerity usurped the small degree of self-government earned from 1950 to 1952.

It is difficult to find any positives to the FOMB, as even the now-Chairman, David Skeel, points out the fatalities in the FOMB's structure and powers: "We were not democratically elected and the authority we have been given *temporarily* reduces the authority of Puerto Rico's elected officials."³⁷⁷ It is hard to say the FOMB has reduced Puerto Rico's authority temporarily, given that it has been five years since the FOMB's

³⁷⁶ David Skeel, *Reflections on Two Years of P.R.O.M.E.S.A.*, 87 REV. JUR. U.P.R. 862 at 871 (2018).

³⁷⁷ *Id.* at 880 (emphasis added).

institution and there is no end in sight. Additionally, Mr. Skeel propounded a similar complaint that the FOMB's policies would "prove too stringent," but as he wrote, those policies would not "prove harmful."³⁷⁸ But this is wrong, as the measures have usurped virtually every ounce of control Puerto Rico had over its budget and its policies; nothing is more local and powerful than the power of the purse. On top of that, the Biden Administration stated that "Puerto Rico, and the more than 3 million American citizens who call it home, deserve to be treated with dignity and respect."³⁷⁹ But if the Administration is willing, it could push Congress to augment the Commonwealth's say over its local affairs, including the disparity in federal benefits,³⁸⁰ and other myriad options such as reinstating the President's Task Force in the island, and a relief package for the island.³⁸¹ Yet this remains to be seen, as the Administration has focused on defending Puerto Rico's exclusion from access to equal federal benefits.³⁸² The dispute has arrived at the Supreme Court's marbled halls

³⁷⁸ *Id.*

³⁷⁹ *The Biden-Harris Plan for Recovery, Renewal and Respect for Puerto Rico*, WWW.JOEBIDEN.COM, <https://joebiden.com/the-biden-harris-plan-for-recovery-renewal-and-respect-for-puerto-rico/> (last visited Nov. 1, 2021).

³⁸⁰ See nn. 263-69.

³⁸¹ Federico de Jesús & Laura Rodriguez, *An Urgent Rescue Plan for Puerto Rico*, Center for American Progress (Apr. 28, 2021), <https://www.americanprogress.org/issues/green/reports/2021/04/28/498841/urgent-rescue-plan-puerto-rico/>.

³⁸² Dánica Soto, *US fights ruling to extend SSI benefits to Puerto Rico*, U.S.NEWS (June 7, 2021, 10:12 PM), <https://www.usnews.com/news/us/articles/2021-06-07/us-fights-ruling-to-extend-ssi-benefits-to-puerto-rico>.

and it was just argued before the Justices.³⁸³ Just like a game of six degrees, the Court is once again roped into resolving important questions about the island's standing within the polity, and if the historical inquiry proceeds, the island's future appears grim. Consequently, Public Law 600's promise—that of self-government—has been broken.

The next task, then, lies in finding solutions to the island's problems.

³⁸³ See James Romoser, *Justices suggest that Congress has leeway to exclude Puerto Rico from federal disability benefits*, SCOTUSBLOG (Nov. 9, 2021, 4:23 PM), <https://www.scotusblog.com/2021/11/justices-suggest-that-congress-has-leeway-to-exclude-puerto-rico-from-federal-disability-benefits/>.

XI. Reaching Greatness and Building Upon It

*Greatness is not in where we stand but in what direction we are moving.
We must sail sometimes with the wind and sometimes against it—but sail
we must and not drift, nor lie at anchor*

-Justice Oliver Wendell Holmes, Jr.

Doubtless, Puerto Rico has been exercising a very truncated, enfeebled version of those once-great self-governing powers. How best to address Puerto Rico's situation has been plaguing the minds of both the island's prime politico-legal minds, as well as those in the mainland, and even some elected officials in Washington, D.C. But the reality is that *nothing* inhibits Congress from pursuing solutions that then legal officer Felix Frankfurter framed around the phrase "inventive statesmanship."³⁸⁴ Congress needs to honor the basis of that compact it once consensually entered with Puerto Rico. Moreover, it is Congress that must and needs to address the situation, for the courts have either refused to answer the important questions or they have abstained from fundamentally altering the imbalance of power. As proven, the courts have effectively pretended they are not in town, and instead drawn signs pointing the island to where Congress sits. To illustrate, reference to the Supreme Court's latest ruling regarding Puerto Rico's sovereignty is necessary. In the October Term 2019, the Court considered a

³⁸⁴ Rafael Hernández Colón, *The Evolution of Democratic Governance Under the Territorial Clause of the U.S. Constitution*, 50 SUFFOLK U. L. REV. 587 (2017).

challenge to the composition of the organ known as the Financial Oversight and Management Board (FOMB)—as described in the above section.³⁸⁵ The complaint was not one aimed at its member but instead aimed at the method of selecting those members. Given that the President need not obtain Senate confirmation for the appointments,³⁸⁶ the challenge alleged that the Appointments Clause of the Constitution was being violated.³⁸⁷ The Supreme Court held that even though the Appointments Clause restricts the unconfirmed appointment of officials, members of the FOMB were not officers under the Clause’s definition, since they were primarily charged with local duties.³⁸⁸ The undemocratically chosen FOMB was upheld. Thus, it is logical and just that Congress be the body that crafts a solution through its broad territorial legislative powers. In this section, the focus will be on discussing those options under the “inventive statesmanship” umbrella and those measures which Congress has embarked upon recently.

In a 1914 memo, future Justice Felix Frankfurter wrote down the phrase inventive statesmanship, and its definition was not found. But Chief Justice Earl Warren shone a light on the obscure phrase while delivering a commemorative address in Puerto Rico:

³⁸⁵ *Fin. Oversight and Mgt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020).

³⁸⁶ *Id.* at 1654.

³⁸⁷ U.S. CONST., art. II, § 2, cl. 3 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States ...”).

³⁸⁸ *Aurelius*, 140 S. Ct. at 1661.

[O]ur American system is not static, in the sense that it is not an end but the means to an end; in the sense that it is an organism intended to grow and expand to meet varying conditions and items in a large country; in the sense that every governmental effort of ours is an experiment—so the new institutions of the Commonwealth of Puerto Rico represent an experiment—the newest experiment and perhaps the most notable of American governmental experiments in our lifetimes.³⁸⁹

This brings us back to those noble and novel roots behind Public Law 600, roots that were lost across time, courts, Congresses, and public servants. But Chief Justice Warren’s statement goes deeper, as it leads back to the question: What can Congress do? The solution lies in the problem. Congress possesses awesome powers under the Territory Clause, and it has been empowered by the courts, particularly the Supreme Court during the Insular Cases, to enact “all Needful Rules and Regulations respecting the Territor[ies].”³⁹⁰ The only thing prohibiting Congress from enacting any measures to diffuse self-government throughout its territorial holdings is Congress itself. For the most part, the courts do not restrict Congress’s power concerning the territories, and the Executive is a rather passive agent. It then follows that Congress needs to put those awesome powers to good use. What does “inventive statesmanship” look like? It is up to Congress, with Puerto Rico’s consent, to define it. However, this should not be misguided by the status questions plaguing the island’s three major political parties, for

³⁸⁹ Hernández Colón, *supra* note 370, at 618 (alteration in original).

³⁹⁰ U.S. CONST. art. IV, §3, cl. 2.

those party-line quarrels are irrelevant. Moreover, Puerto Rico needs to embody that experimental nature that Chief Justice Warren spoke of without any specific reference to the status question's disposition. Even a ruling as harmful to Puerto Rico's self-government as *Sánchez Valle* explicates that Congress holds "broad latitude to develop innovative approaches to territorial governance" under the Territory Clause.³⁹¹ Similarly, in *Aurelius*, Justice Sotomayor's concurrence hearkens to the benevolent aims of Public Law 600 and the Constitution it bred. Indeed, Justice Sotomayor noted that "[w]ith the passage of Public Law 600 and the adoption and recognition of the Puerto Rico Constitution, the United States and Puerto Rico ... forged a unique political relationship, built on the island's evolution into a constitutional democracy exercising local self-rule."³⁹² These pronouncements confirm the notion that all roads lead to Congress. For Congress to honor the compact's promises and to use those formidable Territory Clause powers, it must adopt the inventive statesmanship approach.

As to what Congress has recently done with this great power, we turn to the competing bills that have been introduced. One bill, the "Self-Determination Act," allows Puerto Ricans to consider "the implications of

³⁹¹ *Sánchez Valle*, *supra* note 325, at 1876 (citation omitted).

³⁹² *Aurelius*, 140 S. Ct. at 1672 (Sotomayor, J., concurring) (alteration in original) (internal quotation marks omitted; citation omitted).

each of the status option and what transitional plans would look like.”³⁹³

Parallel to this is the statehood bill.³⁹⁴ These are reflective of the island’s divided opinions: whether Puerto Rico should become a State or something else. But these are trivial matters, for the problems do not lie in the island’s status, but instead in Congress’s administration of it. We reach Congress’s doorsteps yet again; the problem ends where the problem began.

³⁹³ Nicole Acevedo, *Statehood or self-determination? Tensions over Puerto Rico status rise amid opposing bills*, CBS NEWS (Apr. 15, 2021, 11:14 AM), <https://www.nbcnews.com/news/latino/statehood-or-self-determination-tensions-over-puerto-rico-status-rise-n1264184>.

³⁹⁴ Russell Contreras, *Sen. Martin Heinrich to introduce plan for Puerto Rico statehood*, (Mar. 2, 2021), https://www.axios.com/sen-heinrich-puerto-rico-statehood-plan-49d07d8c-77d3-4e87-bf71-e88404d4d35c.html?utm_campaign=organic&utm_medium=socialshare&utm_source=twitter

XII. Conclusion

Puerto Rico's trajectory is somewhat irregular. It went from a colony to a colonial territory to Commonwealth to the amalgamated, weakened condition it finds itself in today. This is because of Congress's and the Court's encroachments on Puerto Rico's self-government. While the climax of the encroachments came in 2016, the phenomena have been part of Puerto Rico's history as a United States territory since its acquisition by the United States after the Spanish-American War. After being ceded to the United States by the Treaty of Paris of 1898, Congress took the reins and ran Puerto Rico differently—without the full protection of the Constitution. Congress justified this under its plenary powers to administer territories as granted by the Territory Clause. The Supreme Court justified this anomalous interpretation in a series of decisions coined the Insular Cases in the Early Twentieth Century. However, those decisions stand on thin soil, as the Court's decisions in the ensuing years slowly eroded the weight of the Insular Cases. Alongside these judicial decisions stands the monumental change Puerto Rico embarked on in the 1950s through its constitution-making process and the commonwealth status. Both the constitution-making process and the rise to commonwealth were meant to accord Puerto Rico State-like sovereignty. What is more, those processes were the first of their kind, but they did not pan out quite like that. The erstwhile gains were instead

relegated to mere plot points in Puerto Rico's territorial history, rather than the defining moments they were. The pinnacle of these trespasses on Puerto Rico's self-government came in 2016 with two Supreme Court decisions and an Act of Congress. Rather than reversing Puerto Rico's sovereign decline, the Court and Congress accelerated it to its maximum potential.

Puerto Rico v. Franklin California Tax-Free Trust provided no benefit for the island as it struggled for aid in the face of a financial apocalypse. But it was *Puerto Rico v. Sánchez Valle* that proved to be most consequential, as it uprooted those gains advanced by Public Law 600 and elevation to the Commonwealth of Puerto Rico. The Court stated that Puerto Rico derives its powers solely from the Federal Government, not the island's Constitution or its people. Across the street, Congress instituted a measure designed to rescue Puerto Rico from its elephantine debt crisis. Instead of assisting, the measure supplanted Puerto Rico's control over its internal affairs, as it stripped Puerto Rico's political branches from having a final say over the island's budgets, policies that contained spending, and attempts to sever the line between the crushing debt and the island. This came in the form of the preeminent Financial Oversight and Management Board and its stupendous powers. Yet the issue cannot stop here.

Because Puerto Rico's sovereignty has been curtailed, the most pressing concern is how to solve these issues. The reality is that Congress holds great

powers under the Territory Clause to administer Puerto Rico in the way it so desires. That means that it could abstain from the dogma that makes Puerto Rico and its citizens unequal. Instead, it should focus on realizing this self-government experiment and provide the Commonwealth with the blessings of liberty, including participation in determining its fate.

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