Article

Puerto Rico and the Right of Accession

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INTRODUCTION

For decades, voices both on and off the island of Puerto Rico have decried its status as an "unincorporated territory"—a legal category invented by a fractured U.S. Supreme Court in the widely-reviled *Insular Cases* a century ago,[1] and technically unchanged by the adoption of a constitution and "commonwealth" status in the 1950s.[2] Broad dissatisfaction with this constitutional and political limbo—neither state nor incorporated territory, "belonging to" but not "part of" the United States,[3] "foreign . . . in a domestic

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1. *See* Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 1 YALE L. & POL'Y REV. 57 (2013); *see also infra* notes 129-1300 and sources cited therein.

2. Torruella, *supra* note 1, at 80 n.102.

3. Downes v. Bidwell, 182 U.S. 244, 287 (1901); *see also* Harry Pratt Judson, *The Constitution and the Territories*, 21 AM. MONTHLY 451 (1900).

sense"[4]—might suggest a strong case for independence. But when Puerto Rico held a plebiscite about its status in 1998, independence proved to be the *least* popular of all the available options: only 2.5 percent of voters preferred it, while 46.5 percent preferred statehood.[5]

Nearly twenty years later, Puerto Rico's relationship to the rest of the United States is again in the headlines and has again made its way to the Supreme Court. A June 2017 referendum found ninety-seven percent support for statehood; however, with just under a quarter of eligible voters participating, it can hardly be considered the final word.[6] Moreover, that vote was cast in the midst of an extraordinary debt crisis. The island has something in the range of seventy billion to one hundred billion dollars in outstanding debt (depending on whether one includes unfunded pension obligations), and, especially with the added costs of Hurricane Maria, it has no hope of being able to pay off anywhere close to that amount absent significant external assistance.[7]

Even as the significance of the debt crisis became clear in the spring and summer of 2016, the U.S. Supreme Court handed down two decisions that reaffirmed Puerto Rico's essentially colonial status.[8] In one, the Court held that Puerto Rico could not take advantage of the same municipal bankruptcy options as those available to U.S. states.[9] In the other, the Court held that Puerto Rico, unlike a state, is not a separate "sovereign" for purposes of double jeopardy.[10]

Puerto Rico's debt crisis and its treatment at the Supreme Court add new

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4. *Downes*, 182 U.S. at 341.

5. *Puerto Ricans Say "No" to Statehood*, CNN (Dec. 14, 1998), http://www.cnn.com/WORLD/americas/9812/14/puerto.rico.01.

6. Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES (June 12, 2017), https://www.nytimes.com/2017/06/12/us/trump-puerto-rico-statehood-congress.html.

7. *See* Mitu Gulati & Robert Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133 (2017); Eric Platt, *New Puerto Rico Governor Seeks Amicable Debt Crisis Resolution*, FIN. TIMES (Jan. 19, 2017), https://www.ft.com/content/d9551584-de66-11e6-86ac-f253db7791c6. On the unfunded pension obligations, see Nick Brown, *Puerto Rico's Other Crisis: Impoverished Pensions*, REUTERS (Apr. 7, 2016), https://www.reuters.com/investigates/special-report/usa-puertorico-pensions.

8. *See, e.g.*, Noah Feldman, *Supreme Court Affirms that Puerto Rico Really is a Colony*, BLOOMBERG (June 14, 2016), https://www.bloomberg.com/view/articles/2016-06-14/supreme-court-affirms-that-puerto-rico-is-really-a-u-s-colony; Mark Joseph Stern, *Second-Class Sovereignty*, SLATE (Jan. 14, 2016), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/01/the_supreme_court_considers_puerto_rico_s_sovereignty_in_sanchez_valle.html; *cf.* José A. Cabranes, *Some Common Ground*, *in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 39, 40-41 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] ("Speaking plainly and honestly about our history requires us to acknowledge, without rancor and without embarrassment, that *colonialism* is a simple and perfectly useful word to describe a relationship between a powerful metropolitan state and a poor overseas dependency that does not participate meaningfully in the formal lawmaking processes that shape the daily lives of its people."); Juan R. Torruella, *The Insular Cases: A Declaration of Their Bankruptcy and My Harvard Pronouncement*, *in* RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF AMERICAN IMPERIALISM 61, 66 (Gerald L. Neuman & Tomiko-Brown Nagin eds., 2015) [hereinafter RECONSIDERING THE INSULAR CASES] ("[T]he relationship between Puerto Rico and the United States is a colonial one and . . . the resolution of this conundrum that is Puerto Rico's colonial condition is of prime relevance to the invalidation of the Insular Cases and all that emanates from them.").

9. *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938 (2016).

10. *See* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863 (2016).

urgency to resolving its relationship to the United States.[11] It would be best, of course, if Puerto Rico and the federal government could come to a mutually acceptable agreement on its status. And just a few years ago, the President's Task Force on Puerto Rico's Status suggested that the President would follow the island's lead: "The policy of the Federal executive branch has long been that Puerto Rico's status should be decided by the people of Puerto Rico."[12] Some have suggested that such agreement is not only desirable, but necessary.[13] The same Task Force, in fact, concluded that "if a change of status is chosen by the people of... Puerto Rico, such a choice must be implemented through legislation enacted by Congress and signed by the President."[14]

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

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

12. REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 18 (2011), https://obamawhitehouse.archives.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf. The U.N. has passed resolutions to this effect at least seventeen times since 1952. In November 1953, the U.S. Representative to the U.N. General Assembly said: "I am authorized to say on behalf of the President that, if at any time the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted." Statement by Henry Cabot Lodge, Jr., U.S. Representative to the Gen. Assembly, U.S. Relationship with Puerto Rico, Nov. 27, 1953, DEP'T ST. BULL., Dec. 1953, at 841.

13. Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 1, 17 ("It is widely agreed that both Congress and a majority of the inhabitants of the territory must consent to any resolution to the current colonial situation and that the terms of a transition out of the current status must be acceptable to both sides."); Danica Coto, *Puerto Rico's New Gov Promises Immediate Push from Statehood*, MIAMI HERALD (Jan. 2, 2017), http://www.miamiherald.com/news/nation-world/world/americas/article124159919.html ("The U.S. government has final say on whether Puerto Rico can become a state.").

14. REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, *supra* note 12, at 18.

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

16. *See* Mary Wiliams Walsh & Liz Moyer, *How Puerto Rico is Grappling with a Debt Crisis*, N.Y. TIMES (July 1, 2016), https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html ("Corporate tax breaks designed to spur economic growth for Puerto Rico expired in 2006, and manufacturing and other business activity began to leave the island. When jobs started leaving, people followed or lost their jobs, reducing Puerto Rico's tax revenue. The government filled the

to support statehood,[17] and indeed, the island's new governor has made statehood his top priority.[18]

However, these same factors might lead voters on the mainland to resist Puerto Rican statehood or even to want to expel the island.[19] On the same day that the United States elected Donald Trump as President (although, of note, Puerto Ricans living on the island have no vote in the presidential election despite being U.S. citizens), Puerto Rico chose a governor for whom statehood is foremost on the agenda. If Puerto Rico's new government were to demand statehood, could the Trump Administration say no? Even if the President were in favor, might Congress block statehood for fear that giving two Senate seats and five House seats to Puerto Rico would result in a loss of Republican control? More radically, could the United States do as Britain and the Netherlands have done with some of their colonies[20] and essentially mandate independence for Puerto Rico or other U.S. territories like Guam or the Northern Marianas Islands?[21]

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gaps by borrowing even more.").

17. Approximately forty-seven percent of Puerto Ricans supported statehood in the 1998 referendum. *Puerto Ricans Say "No" to Statehood*, *supra* note 5. In the 2012 referendum, nearly two-thirds of the voters who selected a preferred alternative status selected statehood. Roque Planas, *Puerto Rico Status Vote Proposed by White House*, HUFFINGTON POST (Apr. 18, 2014), https://www.huffingtonpost.com/2013/04/10/puerto-rico-status-vote_n_3056579.html; *see also* Danica Coto, *Puerto Rico's Campaign to Become the 51st State May be About To Get a Big Boost*, L.A. TIMES (Nov. 6, 2016), http://www.latimes.com/nation/nationnow/la-na-puerto-rico-20161103-story.html; Danica Coto, *Amid Crisis, Support Grows for Puerto Rico Statehood*, ASSOCIATED PRESS (June 30, 2016), https://apnews.com/e187bf2e601f42ada69d615b0cab1f98; Cristina Silva, *52 States of America? Puerto Rico and Washington DC Voters Want Statehood*, INT'L BUS. TIMES (Nov. 10, 2016), http://www.ibtimes.com/52-states-america-puerto-rico-washington-dc-voters-want-statehood-2444748.

18. *Puerto Rico: Pro-Statehood Candidate Ricardo Rosselló Wins Governor Race*, NBC NEWS (Nov. 8, 2016), https://www.nbcnews.com/news/latino/puerto-rico-pro-statehood-candidate-ricardo-rossell-wins-governor-race-n680576. Puerto Rico's nonvoting delegate in the U.S. House of Representatives has also supported statehood. *See* Pedro R. Pierluisi, *Statehood for Puerto Rico Now*, N.Y. TIMES, July 10, 2015, at A19.

19. *See, e.g.*, Coto, *supra* note 13; Andy Uhler, *Puerto Rico's Governor Pushes Statehood To Cut Debt*, MARKETPLACE (Jan. 4, 2017), https://www.marketplace.org/2017/01/04/world/puerto-rico-s-governor-pushes-statehood-cut-debt. A recent article on the debt crisis had the following illustrative quotation:

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

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

20. GERT OOSTINDIE & INGE KLINKERS, DECOLONISING THE CARIBBEAN: DUTCH POLICIES IN A COMPARATIVE PERSPECTIVE 56 (2003) ("[U]nlike London and The Hague, Washington has never insisted that its Caribbean territories accept independence—in fact the opposite is true."); *see also* Godfrey Baldacchino, *The Micropolity Sovereignty Experience: Decolonizing But Not Disengaging*, *in* EUROPEAN INTEGRATION AND POSTCOLONIAL SOVEREIGNTY GAMES 53 (Rebecca Adler-Nissen & Ulrik Pram Gad eds., 2013).

21. One might dismiss the talk as idle, but economically motivated expulsions have been a topic of discussion in the context of other recent economic crises. *See, e.g.*, Rainer Buergin, *Schauble Tells Lew He'd Gladly Swap Greece for Puerto Rico*, BLOOMBERG (July 9, 2015), https://www.bloomberg.com/news/articles/2015-07-09/schaeuble-tells-lew-he-d-gladly-swap-greece-for-puerto-rico (quoting German politician Wolfgang Schauble at a Deutsche Bundesbank conference on July 9, 2015, saying, "I offered my friend Jack Lew . . . that we could take Puerto Rico into the euro zone [sic] if the U.S. were willing to

Some may recoil at the suggestion, but it takes work to show *why* this would be legally impermissible.[22] There is, after all, historical precedent for nations "granting" independence to colonies that have not demanded it.[23] The United States is, like most countries, a product of cessions and transfers,[24] and centuries of practice suggest that nations have near-total control over their own borders. Is there a newly developed principle of international law, or some domestic constitutional rule, that would prevent expulsion today?

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

This may sound sensible enough in light of long-standing domestic policy approving statehood and growing international support for the principle of self-determination. But establishing a firm basis for a legal *right* is not easy. Puerto Rico is not a state, and there is some reason to think that the *Insular Cases* were written in part to preserve the U.S. government's option to "de-annex" (i.e., to expel) the island.[25]

Similar issues have arisen in the context of other U.S. territories.[26] The Philippine Islands were acquired under the same treaty as Puerto Rico. Decades after its independence movement had been brutally suppressed,[27] the Philippines was made independent and the U.S. nationality of its residents was revoked.[28] By then, the distant colony had become too expensive to administer, and too

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take Greece into the dollar union," and noting that Lew, the U.S. Treasury Secretary, "thought that was a joke," according to Schauble).

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

23. *See generally* OOSTINDIE & KLINKERS, *supra* note 20 (describing treatment of Caribbean colonies). On the economics and politics of decolonization, see Erik Gartzke & Dominic Rohner, *The Political Economy of Imperialism, Decolonization and Development*, 41 BRIT. J. POL. SCI. 525, 526, 531-37 (2011) ("The appeal of colonial holdings evaporated for leading nations by the mid-twentieth century.").

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

25. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005); *see also* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."); JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 50 (1979) ("[T]he doctrine seemed to leave open the possibility that, for one reason or another, the United States might 'dispose' of its insular territories."); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 409 (1899) (making the same argument and suggesting that a "conqueror" of territory "may not be able to retrain what he receives").

26. *See* Christina Duffy Burnett, *The Edges of Empire and the Limits on Sovereignty*, 57 AM. Q. 779 (2005).

27. *E.g.*, Reynaldo C. Ileto, *The Philippine-American War: Friendship and Forgetting*, *in* VESTIGES OF WAR: THE PHILIPPINE-AMERICAN WAR AND THE AFTERMATH OF AN IMPERIAL DREAM 1899-1999, at 3, 6-7 (Angel Velasco Shaw & Luis H. Francia eds., 2002).

28. *See* Jones Act (Philippine Islands), ch. 416, 39 Stat. 545 (1916) (declaring intention of the United States to recognize the independence of the Philippine Islands in the preamble); Treaty of General Relations and Protocol ("Treaty of Manila of 1946"), 61 Stat. 1174, T.I.A.S. 1568, 7 U.N.T.S. 3 (1946).

many poor Filipinos were migrating to the U.S. mainland.[29] It is not hard to imagine the same arguments being made today about Puerto Rico.

International law can provide some guidance on these issues. After all, international law has played a role in justifying Puerto Rico's existing relationship with the rest of the United States. The initial relationship was the product of a conception of international law that allowed nations—particularly the imperial powers—to do what they wished with sovereign territory: steal from, sell, cede, or ultimately abandon such territory without the approval of the territory's residents.[30] The *Insular Cases* themselves invoked international law regarding the legitimacy of Western nations exercising authority over their less civilized colonial subjects while keeping them at arm's length.[31]

But international law changed fundamentally in the aftermath of World War II, and the United States was a leader in urging the changes.[32] In the post-1945 era, and under the United Nations Charter and associated human rights treaties, it is no longer acceptable to treat former colonies as property, subject entirely to the whims of the colonizer.[33] As part of this fundamental shift in the global order, the imperial powers were required to give independence to colonies with valid claims to it.[34] We have argued elsewhere that this political and legal transformation also included a right of colonies to *resist* unwanted "independence" and to remain part of the metropole—an alternative form of self-determination.[35]

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29. *See, e.g.*, H.W. BRANDS, BOUND TO EMPIRE: THE UNITED STATES AND THE PHILIPPINES 160 (1992).

30. Most relevant for present purposes, as a result of the United States winning the Spanish-American War, Spain ceded a number of its colonies, including Puerto Rico, to the United States in the Treaty of Paris. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

31. *See* Downes v. Bidwell, 182 U.S. 244, 300 (1901) (White, J., concurring); *see also* Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez and the Supreme Court, 1898 to 1905*, 27 J. AM. ETHNIC HIST. 5, 9-10 (2008); Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association*, *in* RECONSIDERING THE INSULAR CASES, *supra* note 8, at 77, 81 (pointing to Justice White having drawn from Henry Wagner Halleck's treatise on international law for the rights of Western nations to acquire territory and fully determine the fate of that territory); Kal Raustiala, *Empire and Extraterritoriality in 20th Century America*, 40 SW. L. REV. 605, 606-11 (2011) (similar).

32. Keitner, *supra note* 31. Eleanor Roosevelt was a key player in getting the first international bill of human rights adopted by the United Nations in 1948. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001). As most will guess, the history of this move was far more complicated than a simple articulation that the global community had decided that colonialism was bad. *See* Mark Mazover, *The Strange Triumph of Human Rights*, 47 HIST. J. 379 (2004).

33. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. EXEC. DOC. NO. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); *see also* Andrea Bianchi, *Human Rights and the Magic of* Jus Cogens, 19 EUR. J. INT'L L. 491, 491 (2008) (discussing the almost intrinsic relationship between human rights and jus cogens norms).

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

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

The United States therefore had to choose to either give up its colonies or represent to the international system—the United Nations, in particular—that the colonies were being given full rights to self-determination. In economic terms, the United States had to decide whether to "make" or to "buy" whatever value Puerto Rico was providing, since "steal" was off the table.[36] The United States could have decided to give Puerto Rico independence and entered into contracts with it for military bases (as it did with the Philippines and Cuba—the "buy" decision), but Puerto Rico was considered strategically important enough that the United States wanted full control and not just a contractual relationship. Thus, the choice was to "make" or incorporate.[37] The price of fully bringing Puerto Rico into the United States should have included granting further rights to the Puerto Rican people, both individually and collectively. As a practical matter, this was done to some degree in 1952 when the United States entered into a "compact" with Puerto Rico, allowing it to have its own domestic constitutional structure, and reported to the United Nations that the compact "expressly recognized the principle of government by consent."[38]

Whether and under what conditions the United States can expel Puerto Rico, or continue to hold it at arm's length, is partly a function of that compact's terms. Specifically, what was the implicit promise being made by the more powerful actor to the weaker partner in the bilateral relationship? That implicit deal, we believe, could not have been that Puerto Rico could be kicked out of the Union at the whim of the U.S. Congress, nor that it could perpetually be held at arm's length.

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

Part II turns to international law. However, Puerto Rico's semi-sovereign status complicates the analysis. Whether one considers Puerto Rico to be an independent sovereign in a treaty with the mainland or instead "part of" the United States, traditional readings of international law would not prohibit expulsion.[39] We argue, however, that contemporary international law requires that Puerto Rico's wishes be taken into account. Indeed, the values underlying self-determination suggest that Puerto Ricans should have the ultimate say in whether to be more closely associated with the United States.

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36. On the application of the "make or buy" conception to trades in sovereignty, see Paul B. Stephan, *Blocher, Gulati and Coase: Making or Buying Sovereignty*, 66 DUKE L.J. ONLINE 51 (2017).

37. *See, e.g.*, Ramon Grosfoguel, COLONIAL SUBJECTS: PUERTO RICANS IN A GLOBAL PERSPECTIVE 49-53 (2003).

38. For a detailed discussion, see Keitner, *supra* note 31, at 86-94.

39. Blocher & Gulati, *supra* note 22, at 230-41 (discussing traditional rules regarding expulsion from States); Joseph Blocher, Mitu Gulati & Laurence Helfer, *Can Greece be Expelled From the Eurozone? Toward a Default Rule on Expulsion from International Organizations*, *in* FILLING THE GAPS IN GOVERNANCE: THE CASE OF EUROPE 127, 138-46 (Franklin Allen et al. eds., 2016) (discussing traditional rules regarding expulsion from international organizations); *see also* Jens Dammann, *Paradise Lost: Can the European Union Expel Countries From the Eurozone?*, 49 VAND. J. TRANSNAT'L L. 693 (2016).

In Part III, we consider domestic constitutional limitations on either expelling Puerto Rico or denying it statehood. Our analysis here is more tentative. We conclude that the U.S. Constitution does not prohibit expulsion of unincorporated territories, and yet the Constitution also does not rule out the proposition that Puerto Rico has a right to demand statehood. (Whether that right is ultimately justiciable is a separate question.)[40] That, in turn, raises questions about whether, if ever, a *state* could be expelled from the Union.

I. THE LEGAL AND POLITICAL STATUS OF PUERTO RICO

On February 15, 1898, the U.S.S. *Maine* exploded in a Cuban harbor. The fire and smoke over Havana that night helped inaugurate the Spanish-American War—a "splendid little war" fought nominally to secure Cuban independence from Spain,[41] and which was over by Christmas of that year. In the Treaty of Paris, Spain ceded Cuba, Puerto Rico, Guam, and the Philippines to the United States.

In ways that are perhaps unimaginable today, the acquisition of these territories made empire a part of the American political consciousness, to the degree that "[t]he election of 1900 largely turned upon the so-called issue of Imperialism."[42] The end of the war cemented the United States' status as a world power; never before and never since has it controlled so much territory.[43] But while expansion was on the minds of many,[44] the acquisition of Spain's Caribbean and Pacific territories also raised the question of whether the United States could *dispose* of its new territories. As President McKinley put it in 1898: "While we are conducting war . . . we must keep all we can get; when the war is over we must keep what we want."[45] For a variety of reasons, Cuba and the Philippines did not remain under U.S. control.[46] Puerto Rico and Guam still are.

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40. *See infra* Part IV.

41. Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 373, 375 (noting that the war "did not arise from any great economic or military necessity pressing on any party involved. It resulted essentially from the desires of some U.S. leaders to win a war, build a larger empire, and prove to the European powers that [white] Americans, too, were one of 'the great masterful races,' as the feisty Teddy Roosevelt put it").

42. Duffy Burnett & Marshall, *supra* note 13, at 4 (quoting Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 60 AM. L. REV. 801 (1926)); *see also* CABRANES, *supra* note 25, at 4 ("The expansion of American power and influence precipitated a great national debate on imperialism, a debate that moved the nation for several years before and after the Spanish-American War and dominated the presidential election campaign of 1900."). *But see* SPARROW, *supra* note 15, at 108-09. *See generally* NOEL MAURER, THE EMPIRE TRAP: THE RISE AND FALL OF U.S. INTERVENTION TO PROTECT AMERICAN PROPERTY OVERSEAS 1893-2013 (2013).

43. SPARROW, *supra* note 15, at 216 ("[T]he United States never encompassed as large an area as it did between March 1899 and May 1902.").

44. Remarkably, Attorney General John Griggs argued to the Supreme Court that the government needed broad powers to annex territory because it might someday acquire "Egypt and the Soudan [*sic*], or a section of Central Africa, or a spot in the Antarctic Circle, or a section of the Chinese Empire." SPARROW, *supra* note 15, at 142.

45. 2 CHARLES S. OLCOTT, THE LIFE OF WILLIAM MCKINLEY 165 (1916); *see also* SPARROW, *supra* note 15, at 217 ("The lesson from Cuba was that the United States did not have to keep all the area that it acquired; the United States could also let territory go.").

46. *See* CABRANES, *supra* note 25, at 2 n.4 ("A policy of forcible annexation such as was effected in Puerto Rico, Guam, and the Philippines was not possible in the case of Cuba because of the self-denying proclamations that accompanied the American call to arms."); *id.* at 2-3 n.5 (noting that

Leading constitutional scholars addressed the question of sovereign territory not only as a thought experiment for political theorists but also as a pressing and immediate challenge for lawyers. Five remarkable articles published in the *Harvard Law Review* in 1898 and 1899 by luminaries like Abbot Lawrence Lowell, C.C. Langdell, and James Bradley Thayer helped lay the groundwork for the U.S. Supreme Court's ultimate resolution of the issue.[47] Not one of them thought that Puerto Rico's status was for Puerto Ricans to determine.

How striking, then, that the issue has so far receded from political and legal consciousness that most Americans probably cannot identify Puerto Rico's status, let alone account for the United States' other territories.[48] The past decade has seen an increase in scholarly attention to Puerto Rico,[49] but Sanford Levinson's observation is likely still accurate: most constitutional law professors are probably not familiar with the *Insular Cases*[50]—the foundational Supreme Court cases that, between 1901 and 1922, created the legal category of unincorporated territorial status and relegated Puerto Rico to it.[51] Though criticized from nearly all quarters, the cases still provide the foundation for the legal status of Puerto Rico,[52] as recent Supreme Court cases demonstrate.[53]

A. Annexation and the Creation of "Unincorporated Territory"

The annexation of Puerto Rico following the Spanish-American War raised the question of the island's status vis-à-vis the rest of the nation. Would it be a state, and its residents U.S. citizens? Would it be the property of the mainlanders? Would it, like Cuba (and, eventually, the Philippines), officially be given independence? And, if none of the above, how long could the island be held in legal and political limbo?

"[a]lthough not as well known at first, the Filipinos' aspirations for independence were no less firm than those of the Cubans" and that the U.S. conflict with the Philippines was more costly than the Spanish-American War itself (citations omitted)); SPARROW, *supra* note 15, at 70 (arguing that "important American business interests . . . together with their congressmen and senators opposed the United States' annexation of Cuba"); *id.* at 37 ("The war in the Philippines (1899-1902) cost hundreds of millions of dollars and demanded 70,000 U.S. troops at the peak . . . .").

47. Baldwin, *supra* note 25; C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899). When writing about the *Insular Cases*, it is obligatory to note that they inspired Mr. Dooley's famous aphorism, "no matter whether th' constitution follows th' flag or not, the supreme coort follows th' iliction returns." F.P. Dunne, MR. DOOLEY ON THE CHOICE OF LAW 52 (E.J. Bander ed., 1963).

48. SPARROW, *supra* note 15, at 9.

49. *See, e.g.*, RECONSIDERING THE INSULAR CASES, *supra* note 8; Samuel Issacharoff et al., *What is Puerto Rico?*, (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 18-02, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103932.

50. Sanford Levinson, *Installing the* Insular Cases *into the Canon of Constitutional Law*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 121, 123.

51. SPARROW, *supra* note 15, at 5 ("Observers at the time reported that the *Insular Cases* aroused more political passion than had any action by the Supreme Court since its decision in *Dred Scott v. Sandford* (1857)."); John W. Davis, *Edward Douglass White*, 7 AM. BAR. ASSOC. J. 377, 378 (1921) (calling the cases "the most hotly contested and long continued duel in the life of the Supreme Court").

52. *See* Bartholomew H. Sparrow, *The Centennial of* Ocampo v. United States*: Lessons from the Insular Cases*, *in* RECONSIDERING THE INSULAR CASES, *supra* note 8, at 39, 45.

53. *See infra* Section I.C.

In the immediate aftermath of annexation—which Puerto Ricans did not initially resist[54]—Puerto Rico's political leaders preferred statehood.[55] But in 1900, those hopes were dashed when Congress passed the Foraker Act,[56] whose sponsor said it was designed "to recognize that Puerto Rico *belongs to* the United States of America."[57] The Act made clear that Puerto Rico was not only *not* a state but was also disadvantaged even compared to other territories. As Christina Duffy Ponsa-Kraus notes:

> [M]ost significantly, Congress declined to extend the US Constitution by statute to Puerto Rico, as it had done in all prior territories, and instead of granting US citizenship to the island's inhabitants, it declared native-born Puerto Ricans "citizens of Porto Rico," a nebulous and undefined status that seemed to amount to little more than an embellished form of statelessness.[58]

Questions of citizenship and statehood were intertwined from the moment of annexation.[59] Article IX of the Treaty of Paris took away the Spanish citizenship of the territories' residents but did not guarantee U.S. citizenship. Instead, the terms of the Treaty simply provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[60] This was potentially a significant change, since Puerto Ricans *had* been entitled to rights in the Spanish system,[61] and it was the

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54. CABRANES, *supra* note 25, at 3 n.5 ("In marked contrast [to Cuba and the Philippines], Guam and Puerto Rico generally welcomed the occupying forces and, for a considerable time, did not resist American rule.") (citations omitted); OOSTINDIE & KLINKERS, *supra* note 20, at 45 ("A strong independence movement remained absent—in stark contrast to its culturally similar 'sister island' Cuba.").

55. Christina Duffy Ponsa, *When Statehood was Autonomy*, *in* RECONSIDERING THE INSULAR CASES, *supra* note 8, at 1, 3.

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

57. 33 CONG. REC. 2473 (1900) (statement of Sen. Foraker) (emphasis added); *see also* Ponsa, *supra* note 55, at 27-28 ("The rejection of Puerto Rican statehood by the United States led to the demise of Puerto Rico's autonomist constitutionalism as it stood at the end of the nineteenth century. . . . The effect was to strip the autonomists not only of their hopes but also of their ideas.").

58. Ponsa, *supra* note 55, at 27.

59. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 194 (2004) ("Anyone who is at all familiar with the history of territorial governance knows that anything resembling the constitutional analysis described above sank to the bottom of Manila Bay along with the Spanish fleet in 1898. After 1898, territorial inhabitants do not necessarily get the benefit of constitutional provisions that seem, by their terms, to apply to them. . . . The modern doctrine makes no sense on its face, and it makes even less sense the deeper one digs into it."); E. Robert Statham Jr., *U.S. Territorial Expansion: Extended Republicanism Versus Hyperextended Expansionism*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 167, 173 ("States are created by people and are subsequently admitted into the Union. Territory is property, and is, therefore, distinct from people and citizenship."); *id.* at 177 ("To contend that the Constitution (and the Territorial Clause in particular) gives complete power over and ownership of territorial acquisitions and their inhabitants is to treat inhabitants as property to be disposed of at the pleasure of Congress, a single branch of the national government. . . . . Whereas the United States has the right to acquire territory, it has no right whatsoever to acquire people.").

60. Treaty of Peace Between the United States of America and the Kingdom of Spain, U.S.-Spain, art. IX, Dec. 10, 1898, 30 Stat. 1754.

61. José Trías Monge, *Injustice According to Law: The* Insular Cases *and Other Oddities*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 226, 231 ("Puerto Ricans were Spanish citizens, equal in all respects to mainland Spanish citizens. The Spanish Constitution applied in Puerto Rico in the same manner as in Spain proper. Puerto Rico had as full a right to representation as any other province of Spain."); Smith, *supra* note 41, at 375 (noting that Puerto Rican home rule status was only conferred in 1897, before which "most Puerto Ricans, it seems, had long been content to be Spanish subjects, without

first time that "in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood."[62] The terms of the treaty for the Louisiana Purchase, by contrast, provided something of a guarantee of resolution: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted *as soon as possible* according to the principles of the Federal [C]onstitution."[63]

In 1916, Puerto Rico's resident commissioner, Luis Muñoz Rivera, articulated a position held by many of the island's political elites, by trying to connect citizenship and statehood: "Give us statehood and your glorious citizenship will be welcome to us and to our children. If you deny us statehood, we decline your citizenship, frankly, proudly, as befits a people who . . . will preserve their conception of honor, which none can take from them . . . ."[64]

The Jones Act of 1917 eventually conferred U.S. citizenship on Puerto Ricans (apparently because additional men were needed to fight in World War I[65]). The Act also separated the three branches of Puerto Rican government and created a locally elected bicameral legislature.[66] After the Jones Act, it was still "widely believed that it would only be a matter of time until this 'transitory phase' would end in statehood."[67] But as Judge José Cabranes notes, "[T]he citizenship that was granted was not complete," and the "very word 'citizenship' suggested equality of rights and privileges and full membership in the American political community, thereby obscuring the colonial relationship between a great metropolitan state and a poor overseas dependency."[68] Judge Cabranes concludes that "[b]y extending United States citizenship to the Puerto Ricans after promising independence to the Filipinos, Congress intended to do little

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a legally recognized, independent Puerto Rican nationality").

62. Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the* Insular Cases, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 156 (quoting J. PRATT, AMERICA'S COLONIAL EXPERIMENT 68 (1950)); CABRANES, *supra* note 25, at 20-21.

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

64. 53 CONG. REC. 7472 (1916) (statement of Resident Comm'r Rivera).

65. Bartholomew Sparrow & Jennifer Lamm, *Puerto Ricans and U.S. Citizenship in 1917: Imperatives of Security*, 29 CENTRO J. 284, 285-86 (2017). By contrast, Cabranes concludes that the extension of citizenship on the eve of war was coincidental. CABRANES, *supra* note 25, at 14-16.

66. Jones Act (Puerto Rico), ch. 145, sec. 5, 39 Stat. 951 (1917) (codified as amended at 8 U.S.C. § 1402 (1976)).

67. OOSTINDIE & KLINKERS, *supra* note 20, at 46.

68. CABRANES, *supra* note 25, at 6-7.

more than proclaim the permanence of Puerto Rico's political links with the United States."[69]

In addition to these shaky constitutional foundations,[70] the denial of full citizenship was partially a product of underlying racism.[71] Even in the language of the *Insular Cases* themselves, it is easy enough to see that the Justices regarded Puerto Ricans as a foreign population and perhaps not assimilable. In *Downes v. Bidwell*, the Justices—all but two of whom had joined the decision in *Plessy v. Ferguson*[72] a few years earlier—wrung their hands over the "grave questions [which] will arise from differences of race, habits, laws and customs of the people."[73] In *Balzac v. Porto Rico*, the Court rejected the extension of the Sixth Amendment's jury right and found that Congress had not intended to extend that right "of Anglo-Saxon origin" to "people like the Filipinos or Porto Ricans, . . . living in compact and ancient communities, with definitely formed customs and political conceptions."[74] Justice Henry Billings Brown would later conclude, "Indeed, it is doubtful if Congress would ever assent to annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States."[75]

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

> The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since *it . . . was owned by the United States*, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, *but was merely appurtenant thereto as a possession.*[76]

This odd dichotomy—"foreign . . . in a domestic sense" but not "in an international sense"—is captured by two of the decisions that make up the *Insular Cases*. In *Downes*, the Court effectively held in a splintered set of decisions that the Uniformity Clause (which requires uniform "Duties, Imposts and Excises . . . throughout the United States"[77]) does not apply to Puerto Rico. This suggested that the island is indeed "foreign." And yet, in *De Lima v. Bidwell*, the Court held that Puerto Rico did not fall within the scope of the Dingley Act, which provided for duties on goods shipped to the United States

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69. *Id.* at 15.

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

71. Perea, *supra* note 62, at 140, 156; *see, e.g.*, Baldwin, *supra* note 25, at 415 (arguing against giving "the ignorant and lawless brigands that infest Puerto Rico" the benefits of the Constitution).

72. 163 U.S. 537 (1896).

73. Downes v. Bidwell, 182 U.S. 244, 282 (1901).

74. 258 U.S. 298, 310-11 (1922). A decade prior, President William Howard Taft suggested to Congress that the Puerto Ricans had been given too much responsibility over governance "for their own good." Message from President Taft to Congress (May 10, 1909), *reprinted in* S. REP. NO. 61-10, at 5 (1909).

75. *Downes*, 182 U.S. at 280.

76. *Id.* at 341-42 (White, J., concurring) (emphasis added).

77. U.S. CONST. art. I, § 8, cl. 1.

from "foreign countries."[78] This reinforced the notion that Puerto Rico was not foreign in an international sense.[79]

With regard to territorial status itself, the Court created what is known as the doctrine of incorporation, which divides territories into two classes. "Incorporated" territories are on their way to statehood and, hence, subject to the restrictions of the Constitution. "Unincorporated" territories like Puerto Rico, however, are not—they lack a constitutional trajectory. As Chief Justice Melville Fuller wrote in his *Downes* dissent, "the contention [of the majority opinion] seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[80]

The natural question to ask is who gets to determine the end of that "ambiguous existence." Ponsa-Kraus and others have demonstrated the degree to which Puerto Rico's relationship to the mainland must be understood through the lens of the federal government's power to control that relationship.[81] Ponsa-Kraus argues that the *Insular Cases*' primary significance is that they "served the aims of empire in a different and unexpected way: not by opening the door to the annexation of American colonies, but by paving the way for their release."[82] On this reading, the cases established that territories like Puerto Rico "could be separated from the United States, or . . . 'deannexed,' as long as they remained unincorporated. Preserving the option of deannexation was the reason not to incorporate a territory in the first place."[83]

Puerto Rico is not the only example within the United States. The Northern Mariana Islands, Guam, the U.S. Virgin Islands, and American Samoa are also unincorporated territories,[84] and together they cover more such territory "than is controlled by any other country in the world."[85] As Ponsa-Kraus and Marshall

78. 182 U.S. 1 (1901).

79. At the time of *Downes*, Congress had passed the Foraker Act. In *De Lima*, the Court was responding to executive power in the aftermath of war but before the Act had taken effect. SPARROW, *supra* note 15, at 111-12.

80. *Downes*, 182 U.S. at 372 (1901) (Fuller, C.J., dissenting).

81. *See* Ponsa, *supra* note 55.

82. Duffy Burnett, *supra* note 25, at 799.

83. *Id.* at 802, 854 ("[T]he doctrine of territorial incorporation did have something to add to the Court's territorial jurisprudence—namely, it established the constitutionality of territorial deannexation."); *see also Downes*, 182 U.S. at 308 (White, J., concurring) ("Suppose at the termination of a war the hostile government had been overthrown and the entire territory or a portion thereof was occupied by the United States, and . . . it became necessary for the United States to hold the conquered country for an indefinite period, or at least until such time as Congress deemed that it should be either released or retained because it was apt for incorporation into the United States."); Paul R. Shipman, *Webster on the Territories*, 9 YALE L.J. 185, 206 (1900) (arguing that there was no moral or constitutional obligation to retain Puerto Rico); Edward B. Whitney, *The Porto Rico Tariffs of 1899 and 1900*, 9 YALE L.J. 297, 314 (1900) (arguing that annexed territory could be ceded). On the broader issues, see generally CABRANES, *supra* note 25.

84. The uninhabited atoll of Palmyra "enjoys the curious distinction of being the only American jurisdiction outside the fifty states and the District of Columbia to which the U.S. Constitution applies 'in its entirety.' This is because Palmyra possess a unique legal status within the framework of U.S. law: it is the only 'incorporated' territory of the United States." Duffy Burnett, *supra* note 26, at 779 (citations omitted).

85. SPARROW, *supra* note 15, at 215-16 ("[O]nly China, with Hong Kong and Macau, has a

note:

> Although each of the U.S. territories has a different status . . . they have several features in common: Congress governs them pursuant to its power under the Territorial Clause of the U.S. Constitution; none is a sovereign independent country or a state of the Union; people born in the territories are U.S. citizens, or, in the case of American Samoa, U.S. "nationals"; all are affected by federal legislation at the sole discretion of Congress; none has representation at the federal level.[86]

In the words of the Supreme Court: "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants."[87] They therefore can "belong to" the United States without being part of it.

An analogous series of developments took place in international law at roughly the same time that the *Insular Cases* were reshaping U.S. law. Martti Koskenniemi has noted that in the decades surrounding World War I—the last time that colonial expansion was truly prominent and open—some nations hesitated to officially extend sovereignty over territories.[88] As one critic put it, "[G]reed and the wish for exploitation without administrative and policy costs had led European countries to employ hypocritical techniques of annexation without sovereignty."[89]

Human rights lawyers in the 1920s and 1930s argued strenuously that colonies should be treated as fully subject to the sovereignty of their colonizers, not held as possessions.[90] The latter was what happened in many contexts where the imperial power wanted to expropriate from the overseas territory but did not want to take on obligations to the people there (or worse, to have those people come over to the mainland and claim rights). Koskenniemi describes the British "protectorates" in Africa as being one example, and the British "lease" of Cyprus as another.[91] Eric Posner describes Cuba in the early 1900s and later U.S. relationships with vassal states in similar terms.[92]

The natural question to ask is why. Just as people are thought to have an innate desire for acquiring property, nations are generally supposed to prefer more sovereign territory, not less; the basic rules of international law and practice have evolved largely to address that expansionist impulse. Indeed, "[v]irtually

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larger territorial population."); *see also* Monge, *supra* note 61, at 231 ("The United States, one notes with a heavy heart, has been unaccountably slow in decolonizing its wards, slower than most modern administering nations.").

86. Duffy Burnett & Marshall, *supra* note 13, at 1-2; *see also* SPARROW, *supra* note 15, at 220 (noting "the variation that exists in the governing arrangements of the several territories").

87. Murphy v. Ramsey, 114 U.S. 15, 44 (1885).

88. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 109-25 (2001).

89. *Id.* at 151.

90. *See id.* at 109-10. The terminology in vogue at the time was "protection of minorities" rather than "human rights." *See* Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 HIST. J. 379, 398 (2004).

91. KOSKENNIEMI, *supra* note 88, at 125-51.

92. Eric A. Posner, *The Limits of Limits*, NEW REPUBLIC (May 5, 2010); *see also* Bradley R. Simpson, *Self-Determination, Human Rights, and the End of Empire in the 1970s*, 4 HUMANITY 239, 251 (2013) (describing the conditions under which Australia gave independence to Nauru and Papua New Guinea).

all states and empires have treated territory as being of itself good,"[93] and "[t]he history of international law since the Peace of Westphalia is in significant measure an account of the territorial temptation."[94]

Why, then, would the United States choose to keep Puerto Rico at arm's length? One important factor is that most nations powerful enough to maintain colonies are also powerful enough to exert control more cheaply and effectively *without* claiming sovereign territory,[95] or by explicitly disclaiming it.[96] As Ponsa-Kraus notes, "We tend to associate imperialism with the acquisition of territory, the projection of power, and the imposition of sovereignty. The emphasis tends to be on expansion—more territory, plenary power, extended sovereignty. Yet American imperialism has also consisted of efforts to impose limits on expansion."[97]

An obvious cost of territorial expansion, and therefore a reason to avoid it, is the principle for which *Downes* is most commonly invoked: the extension of constitutional law. If incorporating Puerto Rico—granting statehood, for example—would mean that the island's residents could claim the full panoply of constitutional rights, including birthright citizenship,[98] and that the island itself would have more of a constitutionally guaranteed role in the constitutional structure (voting representation in Congress being one), the perceived "cost" to the rest of the United States might be high. By declining to treat Puerto Rico like a state, while also denying it a chance to affiliate with other nations,[99] the mainland extracted benefits without paying the costs.

More radically, though, keeping Puerto Rico at constitutional arm's length may have been designed to preserve the United States' exit option: the power to *expel* Puerto Rico—a prospect that would be more difficult, perhaps impossible,[100] if it were to become a state. On this interpretation, the key to the *Insular Cases* is not how much sovereign control over Puerto Rico they approved but how much they held back.

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93. Andrew F. Burghardt, *The Bases of Territorial Claims*, 63 GEOGRAPHICAL REV. 225, 225 (1973) (also quoting Niccolo Machiavelli: "[T]he wish to acquire more [territory] is admittedly a very natural and common thing; and when men succeed in this they are always praised rather than condemned." (footnote omitted)).

94. Bernard H. Oxman, *The Territorial Temptation: A Siren Song at Sea*, 100 AM. J. INT'L L. 830, 830 (2006).

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

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

97. Duffy Burnett, *supra* note 26, at 781.

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

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

100. *See infra* Section II.B.

B. Indeterminate Self-Determination

As a constitutional matter, the *Insular Cases* largely settled the status of Puerto Rico. And by the time the last of the cases was decided in 1921, the nation's attention had largely turned to other matters.

But on the island itself, the question of status remained paramount and unsettled.[101] In 1948, for the first time, Puerto Rico elected its own governor, Luis Muñoz Marín, who would remain in power for nearly two decades at the head of the Popular Democratic Party, also known as the Commonwealth Party. As the name of his party suggests, Muñoz Marín presided over Puerto Rico's transition to "commonwealth" status. This transition was approved by the residents of Puerto Rico—76.4 percent voted in favor—and inaugurated a new era.

However, both the legal significance and popularity of commonwealth status remain somewhat unsettled, even after decades' worth of plebiscites and referenda. Nearly fifty years later, in 1996, Representative Don Young introduced a bill to present the people of Puerto Rico with a range of options that Congress would be willing to accept. "Enhanced commonwealth" was not among them, however, which caused "immediate and overwhelming opposition . . . on the island."[102] The three options instead offered were statehood, commonwealth without "enhancements," and independence. The Young bill eventually died in the Senate, leaving Congress's official position on the matter unresolved.[103]

Puerto Rico's government, which favored statehood, responded by organizing a separate and nonbinding plebiscite in December 1998, which presented a slightly different list of options: independence, "free association," statehood, non-enhanced commonwealth, and "none of the above."[104] Again, enhanced commonwealth status was omitted, leading Muñoz Marín's heirs in the Popular Democratic Party to advocate "none of the above." In the end, 50.2 percent of voters made that choice, while 46.5 percent chose statehood.[105] The increasing support for statehood was notable, however, and when Puerto Rico held another plebiscite (its fifth) in 2012, statehood received a plurality of support for the first time.[106]

Support for statehood is reflected not just in referenda, but in electoral results. On November 8, 2016, the same day voters on the mainland chose

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101. Duffy Burnett & Marshall, *supra* note 13, at 17; Ute Guthunz, *Beyond Decolonization and Beyond Statehood? Puerto Rico's Political Development in Association with the United States*, 21 IBEROAMERICANA 42, 48 (1997) (noting that Puerto Rican political parties define themselves through status options).

102. Duffy Burnett & Marshall, *supra* note 13, at 21 (further stating, "It would be difficult to exaggerate the divisions the Young bill caused").

103. *Id.* at 22.

104. *See* Mireya Navarro, *Looking Beyond Vote in Puerto Rico After 'None of the Above' Is Top Choice*, N.Y. TIMES, (Dec. 15, 1998,) https://www.nytimes.com/1998/12/15/us/looking-beyond-vote-in-puerto-rico-after-none-of-the-above-is-top-choice.html.

105. *Puerto Ricans Say "No" to Statehood*, *supra* note 5.

106. R. SAM. GARRETT, CONG. RESEARCH SERV., R42765, PUERTO RICO'S POLITICAL STATUS AND THE 2012 PLEBISCITE: BACKGROUND AND KEY QUESTIONS 8 (2013).

Donald Trump as the next U.S. President, Puerto Ricans elected a new governor, Ricardo Rosselló. His New Progressive Party supports statehood (its main competitor, the Popular Democratic Party, does not). The following day, November 9, Rosselló called on President-elect Trump to facilitate the move to statehood.[107] He stated that "[t]he Republican platform is very clear" in supporting statehood if Puerto Rican voters choose it, and that "having a Republican House [of Representatives], a Republican Senate and a Republican president, there's no excuse for not carrying it out."[108]

In keeping with his campaign promises, Rosselló's party organized a referendum on June 11, 2017. Percentage-wise, the results were overwhelmingly supportive of statehood—nearly ninety-seven percent of all votes cast—but only twenty-three percent of voters turned out, leaving the implications unclear yet again.

The next day, the *New York Times* reported, "By law, the next steps toward statehood remain in Congress, where advocates for statehood face the daunting task of persuading a legislature dominated by Republicans to take on a state which would have the nation's highest poverty and unemployment rates and an unpaid $74 billion debt."[109] Whether those next steps are truly entrusted "by law" to Congress is among the questions we address.

C. The Resilience of the Insular Cases

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

In other ways, however, the cases have not lost their grip. While the U.S. Supreme Court has overruled or minimized many other constitutional doctrines rooted in racism and a national self-conception that we would not tolerate today,[110] the *Insular Cases* remain good law. The Supreme Court's 2015-16 term provided a few prominent illustrations.[111]

The first major case from the term drove home Puerto Rico's

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107. *Puerto Rican Governor-Elect Trusts Trump Will Back Change in Island's Status*, FOX NEWS LATINO (Nov. 9, 2016), http://latino.foxnews.com/latino/politics/2016/11/09/puerto-rican-governor-elect-trusts-trump-will-back-change-in-island-status/print.

108. Silva, *supra* note 17; *see also* Jorge Bonilla, *A Conservative Case for Puerto Rico Statehood*, FOX NEWS (Aug. 10, 2017), http://www.foxnews.com/opinion/2017/08/10/conservative-case-for-puerto-rico-statehood.html.

109. Robles, *supra* note 6.

110. Of the four cases Jamal Greene lists as constituting the "anticanon" of constitutional law, three fit this description: *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944). Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). The fourth case is *Lochner v. New York*, 198 U.S. 45 (1905).

111. Despite their ugly history, the cases do get cited by lawyers (including the Obama Administration's Justice Department) and judges. *See* Pema Levy, *Obama Administration Using Century-Old Racist Case Law to Block Citizenship*, MOTHER JONES (Feb. 23, 2015), https://www.motherjones.com/politics/2015/02/obama-birthright-citizenship-racist-american-samoa-tuaua (quoting Sanford Levinson as saying: "A lot of people are justifiably embarrassed by the Insular Cases because they really do capture an earlier imperial moment that is saturated in white supremacy.").

disadvantaged status. In *Puerto Rico v. Sanchez Valle*, the Court held that Puerto Rico, unlike a state, is not a "sovereign" for purposes of the Fifth Amendment's Double Jeopardy Clause, which permits successive prosecutions by separate sovereigns.[112] Writing for a six-Justice majority, Justice Elena Kagan found that the events of 1950-52 created a "new political entity," which was "republican in form," and "subordinate to the sovereignty of the people of Puerto Rico."[113] But rather than creating a new sovereign, Congress's enactment of Public Law 600—the organic law for the government of Puerto Rico— reflected Congress's "broad latitude to develop innovative approaches to territorial governance."[114] And because Congress authorized and approved Puerto Rico's Constitution, Congress was "the deepest wellspring[]" of Puerto Rico's sovereignty.[115] Therefore, Puerto Rico was not a "separate sovereign" from the United States, and successive prosecutions would violate the Double Jeopardy Clause.[116] Interestingly, the majority seemed to go out of its way to avoid directly citing the *Insular Cases*.[117]

In dissent, Justice Stephen Breyer questioned whether this was the proper inquiry and even whether it led to the conclusion that Justice Kagan had reached. After all, states are only admitted to the United States on Congress's say-so but are clearly treated as separate sovereigns for purposes of the Fifth Amendment of the U.S. Constitution.

Justice Breyer would have looked to "the broader context of Puerto Rico's history" to determine whether the island had "gained sufficient sovereign authority to become the 'source' of power behind its own criminal laws."[118] Among the most important moments in that history, of course, were the passage of Public Law 600 and the adoption of the Puerto Rico Constitution, which—along with other evidence—Justice Breyer concluded were sufficient to show separate sovereignty for purposes of double jeopardy analysis.[119]

The second case arose directly from Puerto Rico's debt crisis. In *Puerto Rico v. Franklin California Tax-Free Trust*, the Supreme Court held that the bankruptcy code provided no relief for Puerto Rico or its municipalities and yet also precluded Puerto Rico from enacting an insolvency regime of its own.[120] Following the Court's decision, attempts to voluntarily restructure certain parts

112. 136 S. Ct. 1863 (2016). The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." However, that prohibition does not apply if the prosecuting authorities are separate sovereigns—for example, the federal government and a state. *See* Michael Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 290-92 (1992).

113. Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1869 (2016) (internal quotation marks omitted).

114. *Id.* at 1876.

115. *Id.* at 1871.

116. *Id.* at 1876.

117. Bartholomew Sparrow, The Precedent Vanishes: *Puerto Rico v. Sanchez-Valle* and the *Insular Cases* 26 (Feb. 7, 2018) (unpublished manuscript) (on file with authors).

118. *Sanchez Valle*, 136 S. Ct. at 1880 (Breyer, J., dissenting).

119. *Id.* at 1884 (Breyer, J., dissenting).

120. 136 S. Ct. 1938 (2016).

of the debt, while showing initial glimmers of optimism, eventually fell apart.[121] Puerto Rico was in fiscal purgatory.

Eventually, Congress generated something of a solution—one that, whatever its effectiveness, emphasizes Puerto Rico's second-class status. Specifically, Congress passed PROMESA, which provided a bankruptcy-type option for Puerto Rico, but imposed a steep price.[122] A control board was put in place with effective control over the territory's finances and conduct of any bankruptcy-type proceedings.[123] It remains to be seen whether this last-minute action is sufficient to save the island from economic collapse, but in any event, the loss of sovereignty is a price that no state would ever be asked to pay.

Finally, although not directly involving Puerto Rico as a party, the Court denied certiorari in *Tuaua v. United States*. The parties in that case sought review of a D.C. Circuit decision upholding a 1900 law providing that people born in American Samoa are "nationals" who owe allegiance to the United States but—unlike people born in any of the fifty states, or even in territories like Guam and Puerto Rico itself—are not citizens.[124] This, the petitioners argued, violates the Fourteenth Amendment's declaration that all persons "born or naturalized in the United States" are U.S. citizens.[125] The Court declined to hear the case, but it might have another chance—a similar case has already been filed.[126]

Perhaps not since the *Insular Cases* have the constitutional implications of colonialism been so central to the Supreme Court's docket—and the Justices have essentially re-affirmed the status quo, one in which the people of territories like Puerto Rico and Guam have second class status.[127] But in other ways, things have changed. A century later, it seems plausible that Puerto Ricans might favor statehood at precisely the same time, and for the same reasons, that voters and politicians on the mainland oppose it. Indeed, some of the rhetoric surrounding the financial crisis indicates that many political leaders think of Puerto Rico as a distant, ne'er do well relation, but not really part of the family.[128]

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121. For details, see Gulati & Rasmussen, *supra* note 7, at 135.

122. For a detailed description of PROMESA, see D. ANDREW AUSTIN, CONG. RESEARCH SERV., R42765, THE PUERTO RICO OVERSIGHT, MANAGEMENT, AND ECONOMIC STABILITY ACT (PROMESA; H.R. 5278, S. 2328) (2016).

123. Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation With Its Future: A Reply to the Notion of "Territorial Federalism"*, 131 HARV. L. REV. F. 65, 93-97 (2018); Mary Williams Walsh, *Puerto Rico Debt Relief Law Stirs Colonial Resentment*, N.Y. TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/business/dealbook/puerto-rico-debt-relief-law-stirs-colonial-resentment.html ("[L]awmakers have said they had power to enact the Promesa under the Territorial Clause of the United States Constitution, and that renewed the debate here about whether Puerto Rico should be a state, a territory, a sovereign nation—or just what.").

124. *See* Petition for Writ of Certiorari, Tuaua v. United States, 136 S. Ct. 2461 (2016) (No. 15-981); Christina Duffy Ponsa, Opinion, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html.

125. Tuaua v. United States, 788 F.3d 300, 302-03 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016).

126. *See* Sophia Yan, *American Samoans Sue for Birthright Citizenship*, ASSOCIATED PRESS (Mar. 28, 2018), https://www.apnews.com/5a3daf6d1aac4f89b26afad3cdf007b4.

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

128. For discussions along these lines, see, for example, Cate Long, *Puerto Rico is America's Greece*, REUTERS MUNILAND BLOG (Mar. 8, 2012), http://blogs.reuters.com/muniland/2012/03/08/

It is not our purpose here to further criticize the *Insular Cases*; indeed, it is not clear anyone is left to defend them.[129] Judge Juan Torruella writes: "The *Insular Cases* were flawed when decided because they (i) directly clashed with our Constitution, (ii) were disobedient to controlling constitutional jurisprudence in place at the time, and (iii) contravened, without exception, every single historical precedent and practice of territorial expansion since our beginning as a nation."[130] Yet the cases remain good law, giving Congress near-limitless power over Puerto Rico.[131] Our interest lies with one particular *aspect* of that power: the power to deny statehood or even to expel the island altogether.

II. THE INTERNATIONAL LAW OF EXPULSION AND ACCESSION

The expulsion of a colony for financial reasons may seem far-fetched, but historical illustrations are not hard to find. Newfoundland in the 1930s and 1940s provides a ready example. By then, it was the British Empire's oldest colony, and had the status of a "self-governing dominion."[132] But due to a combination of fiscal mismanagement and a drop in global fish prices in the 1930s, Newfoundland found itself with an unsustainable debt stock.[133] Attempts were made to bring the situation under control—an imperial commission took control of governance for a period—but matters did not improve enough, nor did World War II help to ameliorate the situation.[134] By 1946, faced with the prospect of having to invest in Newfoundland to get the dominion on its feet, the British mainland decided that it would be better to give the territory to Canada, which agreed to take on ninety percent of the debt.[135] The end result: Newfoundland essentially got expelled by the British Empire and was transferred to the

puerto-rico-is-americas-greece; and *Puerto Rico: Greece in the Caribbean*, ECONOMIST (Oct. 26, 2013), https://www.economist.com/news/leaders/21588374-stuck-real-debt-crisis-its-back-yard-america-can-learn-europes-aegean. *See also* Gervasio Luis Garcia, *I Am the Other: Puerto Rico in the Eyes of North Americans, 1898*, 87 J. AM. HIST. 39, 44 (2000) (noting that classifying Puerto Rico as an unincorporated territory meant "relegating the island to the perpetual status of a ward who will never become part of his patron's family").

129. *Cf.* Duffy Burnett & Marshall, *supra* note 13, at 2 ("No one today defends the colonial status sanctioned by these cases, yet the idea of a relationship to the United States that is somewhere 'in between' that of statehood and independence . . . has not only survived but enjoys substantial support."). One can, of course, imagine how the subordination of territories to military bases could be useful for various public and private interests, including but not limited to those involving national defense. David Vine, *Most Countries Have Given Up Their Colonies. Why Hasn't America?*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/09/28/most-countries-have-given-up-their-colonies-why-hasnt-america ("Why, in 2017, decades after the civil rights and decolonization eras, does the United States still have colonies and citizens who lack full democratic rights by law? The answer is largely simple, but troubling: Because the desires and power of the United States military have overwhelmed the desires and rights of colonized peoples.").

130. Torruella, *supra* note 8, at 62.

131. *But see* Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22 (D.P.R. 2008) (suggesting that Puerto Rico may have transitioned over the time since the *Insular Cases* were decided from an unincorporated to an incorporated territory).

132. David Hale, *The Newfoundland Lesson*, INT'L ECON., Summer 2003, at 52-53.

133. *Id.* at 53 (noting that in 1933, Newfoundland had roughly one hundred million dollars in debt, with an annual nominal income of only around thirty million dollars); *see also* CARMEN REINHART & KENNETH ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2013) (describing Newfoundland's change in sovereign status resulting from its debt crisis in the 1930s).

134. Hale, *supra* note 132, at 53-59.

135. *Id.* at 60.

Canadian federation, with little or no say from the Newfoundlanders.

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

A. If Puerto Rico is a Separate Sovereign

Discussions of Puerto Rico's status sometimes proceed as if Puerto Rico is already something like a separate sovereign. U.S. courts, including the Supreme Court, often describe Puerto Rico as being "sovereign" in matters not governed by the U.S. Constitution[136]—a somewhat ambiguous account. The United Nations' Special Committee on Decolonization has gone farther, adopting a resolution criticizing violations of the island's "national rights."[137]

The most significant textual evidence for this view is the phrase "in the nature of a compact," which appears in Public Law 600. Supporters of the "compact theory" have long trumpeted this language as indicating that Puerto Rico and the rest of the United States entered into the agreement as something like equals or co-sovereigns.[138] In a message to Congress regarding the Puerto Rican draft constitution, President Harry S. Truman emphasized the novelty of the post-1950s relationship:

> The Commonwealth of Puerto Rico will be a government which is truly by the consent of the governed. No government can be invested with a higher dignity and greater worth than one based upon the principle of consent. The people of the United States and the people of Puerto Rico are entering into a new relationship that will serve as an inspiration to all who love freedom and hate tyranny.[139]

This articulation of a relationship of shared governance between sovereigns seems to be what convinced the U.N. General Assembly to adopt a resolution in

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136. Posadas de Puerto Rico Assoc. v. Tourism Co., 478 U.S. 328 (1986); Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982).

137. U.N. GAOR, 33rd Sess., 1133d mtg. at 32, U.N. Doc. A/AC.109/574 (Sept. 12, 1978).

138. See *infra* note 176 and sources cited therein. It is possible to see some elements of this theory in existing First Circuit jurisprudence, at least before *Sanchez Valle*. *See, e.g.*, United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985) (stating that "in 1952, Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress"); *accord* Rodriguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982) ("Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" (citations omitted)); United States v. Lopez-Andino, 831 F.2d 1164, 1968 (1st Cir. 1987) (finding Puerto Rico's status like that of a state and finding Puerto Rico and the United States separate sovereigns for double jeopardy purposes); First Fed. Sav. & Loan Ass'n of P.R. v. Ruiz De Jesus, 644 F.2d 910, 911 (1st Cir. 1981) ("Puerto Rico's territorial status ended, of course, in 1952."). There is a contrary view, which is that history shows that Public Law 600 and its language about a "compact" is, and has long been, eyewash. *See* Torruella, *supra* note 123, at 85-88, 96 (describing the compact as a "monumental hoax" perpetrated on the United Nations).

139. President Harry S. Truman, Special Message to the Congress Transmitting the Constitution of the Commonwealth of Puerto Rico (Apr. 22, 1952), http://www.presidency.ucsb.edu/ws/?pid=14089.

November 1953 recognizing that, under the compact, "the people of the Commonwealth of Puerto Rico have been vested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as an autonomous political entity."[140] Some commentators go further, arguing that the nature of the "compact" indicates permanence—that because it is essentially a treaty, it can only be changed by the consent of both Puerto Rico and the rest of the United States.[141]

As a matter of international law, however, this is not necessarily true. Treaties often make explicit provision for withdrawal or expulsion (which, in the case of a bilateral treaty, are nearly equivalent).[142] To take one prominent example, Article 6 of the U.N. Charter provides that "[a] member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council."[143] Similarly, the Articles of Agreement of the International Monetary Fund provide for a similar outcome of compulsory withdrawal: "If a member fails to fulfill any of its obligations under this Agreement, the Fund may declare the member ineligible to use the general resources of the Fund."[144]

The ability to effectively expel a state that has materially breached an international law obligation was codified in the Vienna Convention on the Law of Treaties. Under Article 60 of the Vienna Convention, a "material breach" of a multilateral treaty by one party entitles "the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either: (i) in the relations between themselves and the defaulting State, or (ii) as between all the parties."[145]

Even where those explicit provisions are absent, the best reading of background principles of international law suggests that there is an implicit right

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140. OOSTINDIE & KLINKERS, *supra* note 20, at 47 (footnote omitted).

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

142. *See generally* Laurence R. Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579 (2005).

143. U.N. Charter art. 6.

144. Articles of Agreement of the International Monetary Fund art. 26, § 2(a), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39.

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

of expulsion if one party persistently breaches material terms of the agreement.[146] Outright expulsion from international organizations is rare but not unheard of. The Soviet Union was effectively expelled from the League of Nations in 1939 after it invaded Finland;[147] Czechoslovakia was expelled from the International Monetary Fund in 1954 for refusing to provide data.[148] And, as one might expect, the threat of expulsion is sometimes invoked to get members to behave.[149]

Recently, the question of expulsion has gained salience in the context of the Greek debt crisis. Frustrated by Greece's inability to meet its obligations, and the fact that it apparently earned admission to the European Monetary Union on the basis of misleading numbers, some commentators have raised the possibility of expelling Greece from the Eurozone.[150] Others have responded that this is impossible, because the treaties do not make specific provision for such an eventuality.[151] But, as noted, such an explicit power is unnecessary.[152] That does not mean that Greece *should* be expelled. What it does mean, however, is that one cannot categorically avoid the question.

Assuming that Puerto Rico is, like Greece, a separate sovereign, the situation is analogous. The precipitating event for contemplating expulsion is, in both cases, incipient bankruptcy and a massive debt crisis. But, as with Greece, this is not an argument in favor of expelling Puerto Rico. Expulsion on the basis of material breach generally presupposes some degree of *fault*.[153] In the case of Greece, the alleged breaches were specific and severe: providing misleading numbers so as to ensure admittance to the monetary union in the first place, failing to comply with rules regarding fiscal austerity, and more.[154] Nothing like that has happened in the case of Puerto Rico. To the contrary, as the Supreme

146. *See* Blocher, Gulati & Helfer, *supra* note 39, at 144.

147. MAGLIVERAS, *supra* note 145, at 22.

148. Blocher, Gulati & Helfer, *supra* note 39, at 134.

149. *See id.* at 131-34.

150. *See, e.g.*, Jochen Bittner, *It's Time for Greece to Leave the Euro*, N.Y. TIMES (July 7, 2015), https://www.nytimes.com/2015/07/08/opinion/jochen-bittner-its-time-for-greece-to-leave-the-euro.html; Leo Cendrowicz, *Greek Debt Crisis: Alexis Tsipras Given Ultimatum—Push Through Cuts This Week Or Quit Euro*, INDEPENDENT (July 12, 2015), http://www.independent.co.uk/news/world/europe/greek-debt-crisis-alexis-tsipras-given-ultimatum-push-through-cuts-this-week-or-quit-euro-10384084.html (reporting the threat made to Greece that it either take on more austerity in July 2015 or take a "time out" from the Euro); Dalia Fahmy & Elisabeth Behrmann, *Germans Tired of Greek Demands Want Country to Exit Euro*, BLOOMBERG (Mar. 15, 2015), https://www.bloomberg.com/news/articles/2015-03-15/germans-tired-of-greek-demands-want-country-to-exit-euro (reporting that fifty-two percent of Germans polled wanted Greece to exit the Euro, with eighty percent of Germans polled taking the view that Greece "isn't behaving seriously towards its European partners"); *Germans Call For Greece to Leave the Euro, After "No" Referendum Vote*, FORTUNE (July 5, 2015), http://fortune.com/2015/07/05/germans-call-for-greece-to-leave-the-euro-zone-after-no-referendum-vote.

151. Phoebus Athanassiou, *Withdrawal and Expulsion from the EU and EMU: Some Reflections* 35 (Eur. Cent. Bank Legal Working Paper Series No. 10, 2009); Annie Lowrey, *Could Greece Get Kicked Out of the European Union? No*, FP EXPLAINER (Mar. 23, 2010), http://foreignpolicy.com/2010/03/23/could-greece-get-kicked-out-of-the-european-union.

152. *See* Blocher, Gulati & Helfer, *supra* note 39.

153. Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1400 (1964).

154. On the falsification of data to join the EU, see Anthee Carassava, *Greece Admits to Faking Data to Join Europe*, N.Y. TIMES (Sept. 23, 2004), https://www.nytimes.com/2004/09/23/world/europe/greece-admits-faking-data-to-join-europe.html. More generally, see Dammann, *supra* note 39.

Court's decision last year made clear, Puerto Rico has been denied the options to tackle its own domestic debt crisis that state governments in the United States have long been allowed. There seems to be no logical reason for this discrimination,[155] though its effect is again to highlight Puerto Rico's disadvantaged relationship with the mainland.

B. If Puerto Rico is "Part Of" the United States

The second way to see Puerto Rico is not as a separate "sovereign" akin to a foreign treaty partner, but as a part of the tighter compact that constitutes the United States. After all, Senate and House Reports both stated that Public Law 600 "would not change Puerto Rico's fundamental political, social, and economic relationship to the United States."[156] If that is the case, then the relevant question for international law is whether a nation can excise a part of itself.

Traditionally, this has not been a prominent question.[157] Though international law has long been preoccupied with borders, it has generally assumed that the pressures that must be managed are either expansionist or secessionist.[158] This has led to the emergence of two foundational but sharply divergent principles, the reconciliation of which presents a considerable challenge.

On the one hand, the traditional rules of sovereignty give States control over their own borders so long as they do not interfere with the borders of other nations. This means that nations can cede—and often have ceded—territory to others without the approval of the territory's residents. Most of the United States, including Puerto Rico, was acquired in such a fashion.[159]

On the other hand, particularly in the past century, law and practice have given increased attention to the rights and interests of "peoples" to determine their own political destinies. The ascendant principle of self-determination provides that, in certain circumstances, a sub-national group or region can choose to secede, so as to become independent, or perhaps join another nation. The circumstances under which this right can be invoked remain a subject of debate, but nearly everyone agrees that former colonies are the paradigm example.[160]

The possibility of expelling sovereign territory, especially colonies like Puerto Rico, confounds these rules in both directions. The traditional rules of sovereignty would say that the United States has a nearly unfettered power to decide for itself whether to maintain Puerto Rico as a territory, subject merely to

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155. Gulati & Rasmussen, *supra* note 7.

156. S. REP. NO. 81-1779, at 3 (1950); H.R. REP. NO. 81-2275, at 3 (1950).

157. Blocher & Gulati, *supra* note 22, at 217.

158. *Id.*

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

160. Karen Knop, *A Market for Sovereignty? The Roles of Other States in Self-Determination*, 54 OSGOODE HALL L.J. 491 (2017).

its own domestic restrictions.[161]

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

Two characteristics of Puerto Rico's situation are particularly notable. First, it is a former colony. Second, it transitioned from colonial status to self-governance status at the very time when the international order was shifting from an acceptance of imperial subjugation to a rejection of that principle in favor of the right to self-governance.

Take the general international law rules for colonies. Traditionally, international law scholars tend to think of the colonial right to self-determination as going only in one direction.[162] In the case of former colonies, that has typically meant exit from the colonial State in favor of independence—and independence was evidently the preferred outcome for the former colonies that achieved independence in the decades after World War II.

But if the former oppressor is a rich State, with valuable citizenship rights, it is not clear that the people of the colony would prefer independence—particularly now that international law and global norms prohibit the kind of discrimination that in earlier decades would have made formal citizenship less valuable in practice. And this, as we have seen through multiple votes over the past few decades, is the situation in Puerto Rico. (Alex Aleinikoff has described Puerto Rico's status as "colonialism by consent.")[163] On the flip side of the equation, the preferences of the former colonial powers might also be different, now that the former colonial subjects have to be treated as equals; granting them "independence" begins to look more attractive. Effectively, there are pressures

161. Independent doctrines of international law would prevent particular kinds of expulsion, such as one that would subject the residents of the expelled territory to persecution. *See* United Nations Convention relating to the Status of Refugees art. 33, *opened for signature* July 28, 1951, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) ("No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.").

162. This assumption is implicit in the treatment of self-determination as a deprivation of sovereign control. *See, e.g.*, A. RIGO-SUREDA, THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION: A STUDY OF UNITED NATIONS PRACTICE 353 (1973) ("[W]ithin the context of colonialism, self-determination has become a peremptory norm of International Law whereby a state's title to a territory having colonial status is void.").

163. T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT 15, 33 (1994); OOSTINDIE & KLINKERS, *supra* note 20, at 55 (noting that, on the U.S. Virgin Islands, "[i]n spite of U.N. criticism, constitutional matters seem of little importance either to the local population or to the United States," and that in a 1993 status referendum, 80.4 percent of voters voted for continued or enhanced territorial status with the United States); *id.* at 55-56 ("The explanation for the populations' [of Puerto Rico and the U.S. Virgin Islands] relative contentment with subordination to the United States lies in the inherent and substantial economic support and political stability they enjoy, as well as in the possession of American citizenship and the right of abode in the metropolis.").

favoring a perverse kind of self-determination—de-colonization upside down,[164] whereby colonies are made independent against their wishes.

We think that international law, prohibits expulsion, for almost exactly the same reasons that it gives Puerto Rico a right to independence. Put differently, the right to self-determination of a former colony should negate the former colonizer's power to expel it. If the colonizing power wants to be rid of its colonies, it should effectively have to buy them out. Otherwise, only the colonizer has a meaningful right to "self-determination," a right whose exercise will only further disadvantage the residents of its colonies. The logic of the rule points in precisely the opposite direction: giving former colonies like Puerto Rico the right to decide their alignment with the metropole, perhaps even by demanding statehood. Whatever the rules might be regarding expulsion of territories or members who *voluntarily* joined, the rules should favor coerced parties like Puerto Rico.

To say that Puerto Rico has the right to choose its status, however, is not the same as saying that it can choose whatever it wants.[165] International law provides a dizzying range of possibilities. Even within the context of the United States, the details of territorial governance are quite complex.[166] Our primary focus here is not on what choices are available, although we have our doubts that "unincorporated territory" is one of them. Rather, we focus on *who* gets to make the decision—and we believe Puerto Rico has greater rights under international law than many assume.

C. The Domestic Relevance of International Principles

At first cut, international law may seem irrelevant to, or at least not dispositive of, the domestic legal question of whether Puerto Rico can be expelled from the United States. And indeed, the United States Court of Appeals for the First Circuit, which has jurisdiction over Puerto Rico, has effectively said as much in the course of rejecting the claim that U.S. human rights treaty obligations mandate federal voting rights for the inhabitants of Puerto Rico.[167]

There is a different way to come at the issue, though, which is to ask whether some source of domestic law, perhaps influenced by international law, gives Puerto Rican citizens rights vis-à-vis the mainland.[168] In such a context, international law would not be countermanding domestic law, but rather helping

164. OOSTINDIE & KLINKERS, *supra* note 20, at 217 ("As far as Westminster was concerned, all of the former British colonies had to go. The fact that at present a handful of Caribbean 'Overseas Territories' still come under the sovereignty of the United Kingdom should not, therefore, be attributed to the ardent wishes of Westminster, but rather to the stubbornness with which these islands have refused to accept independence.").

165. *See* Blocher & Gulati, *supra* note 22.

166. *See generally* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989) (describing the varying forms of federal control over American territories, from possessions like Guam to the largely self-governing Northern Marianas).

167. *See* Igartúa v. United States 626 F.3d 592 (1st Cir. 2010); Igartúa-De La Rosa v. United States, 417 F.3d 145, 147 (1st Cir. 2005) (en banc).

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

to determine the terms of an already existing domestic agreement. There is no dispute that such an agreement exists: Public Law 600 was explicitly represented to be a "compact" that would govern the future relationship between the United States and Puerto Rico. Given that the agreement has no explicit terms about expulsion, a court would have to put in place a default provision.

As a legal matter, the move to commonwealth status was set in motion by the passage of Public Law 600, "an Act to provide for the organization of a constitutional government by the people of Puerto Rico,"[169] which provided for an insular referendum that in turn overwhelmingly approved the creation of a constitutional convention.[170] The draft constitution was ratified by a public referendum in March 1952 and by Congress soon after. The statehood movement regained steam at around the same time.[171] In the course of approving the Puerto Rico Constitution, House Majority Leader John McCormack said that Public Law 600 was "a new experiment; it is turning away from the territorial status; it is something intermediary between the territorial status and statehood."[172]

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

> Twenty-five years ago the establishment of the Commonwealth of Puerto Rico was the official U.S. response to the worldwide process of decolonization. It was the "showcase of democracy" for colonial peoples and underdeveloped countries, the U.S. model of how a country could pull itself out of poverty "by its own bootstraps" through an intimate political and economic relationship with the United States . . . . By 1977, the Commonwealth of Puerto Rico has become a source of embarrassment to the United States.[173]

By that time, the relationship was not only a source of embarrassment for the United States, but also one of aggravation for the island.[174]

Scholars and commentators have long been divided over what to make of Public Law 600, in particular the fact that it describes itself as being "in the nature of a compact."[175] Many claim this phrase as evidence that the United States and Puerto Rico are something like separate sovereigns, and that Puerto

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169. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b-731e (2006)).

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

171. CABRANES, *supra* note 25, at 11 n.28 (noting between 1952 and 1976 "a significant growth in the statehood movement, at the expense of those parties favoring independence or continued commonwealth status").

172. 98 CONG. REC. 5128 (1952).

173. Rubén Berríos Martínez, *Independence for Puerto Rico: The Only Solution*, 55 FOREIGN AFF. 561 (1977).

174. CABRANES, *supra* note 25, at 8 (noting that in 1978 "the leaders of all major Puerto Rican political parties for the first time appeared before the United Nations' Special Committee on Decolonization, which thereafter adopted a resolution critical of alleged United States violations of the Puerto Ricans' 'national rights.'").

175. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 ("Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, [t]hat, fully recognized the principle of government by consent, this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.").

Rico's colonial status has been rescinded—a view that points in the direction of the analysis in the previous Section.[176]

Perhaps the best evidence in favor of this view is the representation that the United States itself made to the United Nations at the time. Article 73 of the U.N. Charter requires nations to make regular reports about their non-self-governing areas (i.e., their colonies). Following the passage of Public Law 600, however, the United States told the United Nations that such reports would no longer be necessary, since the island was now sovereign.[177] The United States noted that Public Law 600 "expressly recognized the principle of government by consent," and was "adopted in the nature of a compact."[178] The U.N. accepted the representation.

Others conclude, often to their own dismay, that Public Law 600 is effectively nothing more than a statute—one that Congress could repeal without Puerto Rico's consent.[179] One possible implication is that Congress could not give away the federal government's territorial power even if it wanted to, short of granting the island independence, statehood, or otherwise moving it into a different constitutional category.

One way to understand this is through the lens of contract theory. It might be argued that the terms of the compact have indeed been specified for all cases in which there are no explicit terms (questions involving or demands of statehood, for example), and that the specification is that *Congress* gets to decide on all such matters.

Such a scenario is not particularly unusual. Parties often bargain to grant one side discretion in decision-making.[180] That is the essence of most employer-employee relationships, for example: the employer has bargained to be able to tell the employee what tasks to do. But this is still a bargain; one that is supposed to benefit both parties. And implicit in the bargain is that one party will not use its authority to act in ways that expropriate from or unilaterally harm the other.[181]

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176. *See, e.g.*, Keitner, *supra* note 31, at 77; Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. Rev. 1123, 1126 (2009); *see also* H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L. REV. 219 (1967); Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953); David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federacy"?*, 122 POL. SCI. Q. 115, 123 (2007); Dorian A. Shaw, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT'L L.J. 1006, 1031 (1994).

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

178. Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico, *reprinted in* PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 618 (3d ed. 1988).

179. *See, e.g.*, JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 144-200 (1985); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 459 (1992).

180. For an articulation of this insight, see Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691 (1986); and Philippe Aghion & Patrick Bolton, *An Incomplete Contracts Approach to Financial Contracting*, 59 REV. ECON. STUD. 473 (1992).

181. *E.g.*, Ronald J. Gilson, Charles Sabel & Robert E. Scott, *Braiding: The Interaction of*

In other words, what we describe is a distinction between one party being the property of the other, and the existence of a contract between the two parties. We use this distinction intentionally because when the question of Puerto Rico's relationship with the rest of the United States came up in the early 1900s, the Supreme Court ruled that constitutional rights did not necessarily extend to Puerto Rico, even though it was part of the United States. And the reason for creating an exception for the rights granted by the Constitution was that Puerto Rico was different from the states; it was not a voluntary entrant into the Union, but rather was the property of the rest of the United States. In 1952, though, as part of the new world order where colonies and imperial subjugation were supposed to be things of the past, the United States represented to the rest of the world (and to Puerto Rico) that the relationship was changing. Puerto Rico was now going to be part of the compact, with full rights of self-governance. The days of colonial oppression were supposedly over.

III. CONSTITUTIONAL PRINCIPLES OF STATEHOOD AND EXPULSION

When in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another . . .[182]

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

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

Or consider the situation if Abraham Lincoln had not been elected president in 1860. If, say, the Democratic Party had not been so riven by disagreement about slavery, and Stephen Douglas had won the Party's undivided loyalty, his support for "popular sovereignty" with regard to slavery (by which newly admitted territories would decide for themselves whether to permit slavery) might have become further entrenched, altering not only the shape of the slavery debate but of the nation. If the people are sovereign, why should they be ruled by borders? What if the North had decided that it was better to expel the South, or at least let it go, rather than sacrifice more than half a million lives to keep it?

One answer is to deny that the U.S. Constitution has anything to say about

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Formal and Informal Contracting in Theory, Practice and Doctrine, 110 COLUM. L. REV. 1377, 1416-17 (2010) (discussing how courts can and do step in to fill incompleteness at the margins of otherwise vague collaborative contracts—where one side is abusing the other's trust, in the context of a collaborative relationship).

182. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

such matters—politics alone will be the final tribunal. And on some level, it is correct that the political branches would play the leading role. Courts, after all, were not the main players in the debate over the constitutionality of the South's attempted secession.

But the limited role of courts does not mean that the questions are not constitutional, only that the judicial branch does not have final say. In *Luther v. Borden*—the case that effectively established the political question doctrine—the Supreme Court held that the "Republican Form of Government" Clause of Article IV must be enforced by the President and Congress.[183] The Court has said roughly the same thing about sovereign authority over the territories.[184] But these are simply holdings about which branches have responsibility for interpretation and enforcement, not whether the underlying rules are constitutional. In any event, the Court actually *has* weighed in on the legality of secession. In the post-Civil War case of *Texas v. White*, for example, the Court held that Texas had never left the United States, that the Constitution did not permit secession, and that the ordinances of secession and all legislative acts based on them were "absolutely null."[185]

Consider, likewise, the Supreme Court of Canada's opinion on the legality of Quebec's attempted secession.[186] The Court rejected the notion that Quebec had a right to unilateral secession under Canadian law but identified circumstances under which such secessions would be permissible.[187] Crucially, it did so as a *legal* matter, and in a way that the parties ultimately respected.

In short, we think that the U.S. Constitution can speak to the legality of expulsion, and that its rules matter.[188] What, then, are those rules? The text of the Constitution gives Congress enormous power in this area. Article IV, Section 3 says that "[n]ew States may be admitted *by the Congress* into this Union."[189] The word "may" arguably suggests that Congress could choose *not* to admit new states, and the only limits that the text directly mentions[190] are irrelevant to the admission of Puerto Rico. Moreover, the same provisions give Congress the

183. Luther v. Borden, 48 U.S. 1 (1849).

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

185. Texas v. White, 74 U.S. 700, 701 (1868), overturned in part by Morgan v. United States, 113 U.S. 476 (1885)

186. Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

187. *Id.* ¶ 138; *see id.* ¶¶ 128-35.

188. *See, e.g.*, Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1051-52 (1984); Paul Finkelman, Opinion, *How the Civil War Changed the Constitution*, N.Y. TIMES (June 2, 2015), https://opinionator.blogs.nytimes.com/2015/06/02/how-the-civil-war-changed-the-constitution; *cf.* Duffy Burnett & Marshall, *supra* note 13, at 19 ("This disagreement [over Puerto Rico's status] is not merely 'political': differing views about what is constitutionally possible shape the different views about what is desirable.").

189. U.S. CONST. art. IV, § 3 (emphasis added).

190. *Id.* ("New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

"Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"—this is the Territories Clause (or Territorial Clause) and has been read in the *Insular Cases* and elsewhere to give Congress near-plenary authority over the territories.

But even broad congressional powers—the commerce power, to take one example—are subject to constitutional restrictions, and the same would be true of particular types, methods, or motivations for expulsion. Expulsion motivated by racial animus and inflicting harm on Puerto Ricans would trigger—and perhaps fail—Equal Protection analysis, to take one obvious example.[191]

Those constraints excepted, the Constitution surely does preserve broad political discretion in managing the territories. Consider the following from Felix Frankfurter, then a clerk in the Bureau of Insular Affairs at the War Department:

> The form of the relationship between the United States and the unincorporated territory is solely a problem of statesmanship. . . . History suggests a great diversity of relationships between a central government and dependent territory. The present day shows a great variety in actual operation. One of the great demands upon inventive statesmanship is to help evolve new kinds of relationship[s] so as to combine the advantages of local self-government with those of a confederated union. Luckily, our Constitution has left this field of invention open.[192]

A similar line appeared in the *Harvard Law Review* articles described above. In one, future Harvard President Abbott Lawrence Lowell argued that it was up to the political branches to determine whether a territory should be incorporated into the United States, or merely acquired by it: "The incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or treaty-making authorities."[193] Contemporary scholars continue to invoke that basic framework to argue for a flexible approach to Puerto Rico's status—specifically, to defend the desirability of options other than independence and statehood.[194] As mentioned, our focus is less on what the options are (though we are skeptical of the continuing vitality of the *Insular Cases*), and more on who gets to choose among them. A range of options means something very different when Congress, rather than the people of Puerto Rico, gets to make the choice.

A. Domestic Self-Determination for the Territories

The hardest scenario for our argument is one where Puerto Rico demands statehood, seemingly against the wishes of Congress. In that case, the

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191. The qualifier "perhaps" is necessary here because some precedent suggests that Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions." Romeu v. Cohen, 265 F.3d 118, 124 (2d Cir. 2001) (citing Califano v. Torres, 435 U.S. 1 n.4 (1978) (per curiam) (upholding denial of Social Security benefits to U.S. citizens who relocated from Puerto Rico to the mainland)). Even so, there is a constitutionally significant difference between giving Puerto Rico dissimilar treatment because it is a territory and doing so because of racial animus.

192. Mora v. Torres, 113 F. Supp. 309, 319 (D.P.R. 1953) (quoting Frankfurter); *see also* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1876 (2016) (describing Puerto Rico's attainment of commonwealth status as a "prime example" of Congress's "broad latitude to develop inventive approaches to territorial governance").

193. Lowell, *supra* note 47, at 176.

194. *See, e.g.*, Issacharoff et al., *supra* note 49.

Constitution is not clearly in Puerto Rico's favor. But the matter is not entirely clear cut.

As a historical matter, there is precedent for statehood-on-demand—precedent that supporters of Puerto Rican statehood have invoked.[195] In 1796, Tennessee became the sixteenth state, and the first to be carved out of federally owned territory. (The thirteen colonies, Kentucky, and Vermont preceded it, but none was ever a territory.) But the path to statehood was not simple. The land that today constitutes Tennessee was originally granted to the federal government by North Carolina,[196] to be governed under the terms of the Northwest Ordinance.[197] As to statehood, Article V of the Ordinance stipulated that "[t]here shall be formed in the said territory, not less than three nor more than five states."[198] And, upon reaching "sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States in all respects whatever."[199] However, admission of states with a population of less than sixty thousand would be allowed if "consistent with the general interest of the confederacy."[200]

Congress acquiesced to the conditions of North Carolina's legislature and in 1790 passed a bill establishing the Southwest Territory.[201] The Territory elected its first legislature in 1794,[202] and, within the year, the legislature passed a bill providing for a census and referendum regarding public opinion of statehood.[203] The census indicated that the Territory had a population of 77,262 persons,[204] and the results of the referendum showed "6,504 [votes] in favor of statehood . . . and 2,562 against."[205]

The census and referendum results prompted Tennessee's governor, Willie Blount, to call for a convention to adopt a state constitution.[206] In February 1796, the convention adopted a constitution proclaiming that the people of the Territory "mutually agreed with each other to form themselves into a free and independent State by the name of the State of Tennessee," and asserted they "ha[d] the right of admission into the General Government [of the United States] as a member

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

196. *See* 1789 N.C. Sess. Law 4–6 (stipulating conditions for cession of land).

197. *See* Act of May 26, 1790, ch. 14, 1 Stat. 123 (establishing the governance structure for the Southwest Territory); *see also* NORTHWEST ORDINANCE OF 1787, *reprinted in* 1 UNITED STATES CODE, at LV (Office of the Law Revision Counsel of the House of Representatives ed., 2006).

198. *Id.* art. V.

199. *Id.*

200. *Id.*

201. Act of May 26, 1790, ch. 14, 1 Stat. 123.

202. PHILIP M. HAMER, TENNESSEE: A HISTORY, 1673-1932, at 163-64 (1933).

203. *Id.* at 165.

204. The 77,262 figure included 10,613 slaves, giving the Territory a population of 66,649 free inhabitants. 1 STANLEY J. FOLMSBEE ET AL., HISTORY OF TENNESSEE 209 (1960).

205. *Id.*

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

state thereof."[207] Following adoption of its constitution, Tennessee elected a new governor and replaced its territorial assembly with a newly elected state legislature.[208] Stanley Folmsbee writes that following the adoption of Tennessee's constitution, "government under the law creating the Southwest Territory came rapidly to an end."[209]

Opponents of immediate statehood argued that the terms of the Act of 1790 indicated an antecedent act of Congress was required to establish the borders of states.[210] Furthermore, the Act did not authorize the territorial government to undertake a census,[211] and the census conducted by the territorial government overinflated the number of inhabitants.[212]

Supporters of immediate admission argued that opponents were "spinning a finer thread than was necessary."[213] Rather than ask whether Tennessee had met all of the conditions required by the Act of 1790, the only appropriate question was whether Tennessee *should* be admitted as a state.[214] Proponents essentially argued in favor of the principle of self-determination: the people of the Southwest Territory desired to be admitted to the Union as a state, and unless admission worked to the general detriment of the Union, Congress should admit Tennessee as a state.[215] Furthermore, the people of the Southwest Territory "were at present in a degraded situation; they were deprived of a right essential to freemen—the right to be represented in Congress."[216] Should Congress admit Tennessee to the Union, prior to having the requisite number of inhabitants, "it was only a fugitive consideration."[217] Rather, "where there was doubt, Congress ought to lean towards a decision which should give equal rights to every part of the American people."[218]

After two days of debate,[219] the House passed a resolution recognizing that the "Territory, now bearing the name of the State of Tennessee, was entitled to all privileges enjoyed by the other States of the Union, and that it should be one of the sixteen States of America."[220] In the Senate, political concerns predominated. President George Washington had made public his decision not to run for a third term, and Federalists—who controlled the Senate—were worried that admission of Tennessee to the Union would tip the presidential

207. TENN. CONST. OF 1796, pmbl.

208. *Id.*

209. FOLMSBEE ET AL., *supra* note 204, at 214.

210. 5 ANNALS OF CONG. 1301-02 (1796).

211. *Id.* at 1302.

212. The territorial census measured "people within the respective counties," whereas the Act of 1790 referred to "the inhabitants within the respective districts." Furthermore, sheriffs were paid "a dollar for every 200 persons they returned," and the results of the census were "just sufficient" to entitle Tennessee, should it be admitted as a state, to two members in the House of Representatives. *Id.* at 1302-03.

213. *Id.* at 1308.

214. *Id.* at 1304.

215. *Id.* at 1305.

216. *Id.* at 1309.

217. *Id.*

218. *Id.*

219. Williams, *supra* note 206206, at 307.

220. 4 ANNALS OF CONG. 916 (1796).

election in favor of Republican candidate Thomas Jefferson.[221] (One could easily imagine a modern analog if Puerto Rico were to actively seek statehood.) To that end, the Senate adopted a bill providing for the territory to be admitted as a single state, but only following "a more satisfactory census . . . taken under the authority of Congress."[222]

The House refused to accept the terms of the Senate bill but instead proposed a compromise whereby Tennessee would be immediately admitted to the Union but would have only one Representative in the House—and consequentially only three electoral votes—until the next federal census in 1800.[223] The Senate accepted the compromise, and President Washington signed a bill admitting Tennessee into the Union on June 1, 1796.[224]

Like Tennessee, Puerto Rico's existing relationship to the United States shapes its legal claim to statehood. In particular, Puerto Rico's long colonial history makes it different from, say, Nova Scotia, which has also made noise about joining the United States.[225] As Rogers Smith puts it:

> [T]he governing authority asserted by the United States over Puerto Rico is and always has been substantially illegitimate, in violation of the U.S. Constitution and the nation's broader political principles. Where that leaves the issue of Puerto Rican nationality is in important respects unclear, but it does clearly mean that the United States is not entitled to decide the status of Puerto Rico, at least not any further than Puerto Ricans wish them to do. Puerto Ricans should be seen as legally entitled to decide their status for themselves (a power that is arguably at the heart of national identity).[226]

This would mean that, if Puerto Ricans chose statehood, Congress would be constitutionally required to go through the constitutionally-prescribed processes for admission of new states, as discussed above.[227] There are at least three reasons why this might be true.

First, one might reject the notion of "unincorporated territories" altogether and say that, constitutionally, the United States can only acquire new territory by eventually granting one of the following: (i) statehood (Hawaii and Alaska being the two most recent examples); (ii) independence (Philippines); or (iii) incorporation (Northern Marianas). Chief Justice Fuller suggested as much in the *Insular Cases*, rejecting the notion that Puerto Rico could be indefinitely treated like a "disembodied shade."[228] One can see the same basic theme in political comments at the time.[229] Even the Northwest Ordinance of 1787, as noted above,

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221. HAMER, *supra* note 202, at 179, 181.

222. FOLMSBEE ET AL., *supra* note 204, at 217.

223. *Id.*

224. An Act for the admission of the State of Tennessee into the Union, ch. XLVII, June 1, 1796, Stat. 1.

225. Storer H. Rowley, *Quebec Crisis Creates Talk About 4 Canadian Provinces Joining U.S.*, CHI. TRIB. (May 3, 1990), http://articles.chicagotribune.com/1990-05-03/news/9002050757_1_newfoundland-premier-clyde-wells-meech-lake-quebec.

226. Smith, *supra* note 41, at 385.

227. Whether Congress would actually live up to this obligation, or whether it would be justiciable, are separate questions.

228. Downes v. Bidwell, 182 U.S. 244, 272 (Fuller, C.J., dissenting).

229. 33 CONG. REC. 2067 (1900) ("I believe that we can only hold territory, as a nation, in trust for the States that are ultimately to be erected out of that territory. I believe that we can only hold the

contemplated that the acquired territory would eventually be carved into states.[230]

The passage of time alone is not enough to disregard the importance of this promise. After all, Alaska was purchased from Russia in 1867 (apparently with no promise of statehood),[231] was made a territory in 1912, and eventually achieved statehood in 1959. Bartholomew Sparrow notes that "the period between the first petition or bill for statehood and admission as a state . . . lasted an average of more than thirteen years, . . . [and] for seven states, the process took longer than twenty years."[232] But even the racially-charged *Dred Scott* case was not so cavalier as to support permanent territorial limbo: "There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure . . . . [N]o power is given to acquire a Territory to be held and governed permanently in that character."[233] Indeed, the U.S. Supreme Court has repeatedly described the *Insular Cases* as "involv[ing] the power of Congress to provide rules and regulations to govern *temporarily* territories with wholly dissimilar traditions and institutions."[234]

Gary Lawson and Guy Seidman have pursued a similar line, arguing, as a matter of enumerated powers, that the only constitutional basis for the federal government's acquisition of sovereign territory is as an incident of Congress's power to grant statehood.[235] Applying this theory, Lawson and Seidman have no specific objections to the acquisition of Puerto Rico,[236] while their "instinct" is that the acquisition of the Philippines was unconstitutional because there was never a reasonable prospect of statehood.[237] Further, they insist that "the constitutionally relevant moment is the moment of acquisition."[238] However, they observe that, "[o]nce the acquisition has been constitutionally validated . . . [t]here is nothing in the Territories Clause that requires Congress either to admit a territory as a state or to dispose of it (perhaps by granting independence) if statehood ever ceases to be an option."[239]

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territory of Puerto Rico in trust for the sovereign State that will be some day admitted into the Union.") (statement of Rep. McClellan).

230. SPARROW, *supra* note 15, at 14-15; *see also* MAX FARRAND, THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES: 1789-1895, at 53 (1896) ("That the Territories are to be regarded as inchoate States, as future members of the Union, has been and is the fundamental basis of our Territorial system.").

231. TED C. HINCKLEY, THE AMERICANIZATION OF ALASKA, 1867-1897, at 29, 36 (1972).

232. SPARROW, *supra* note 15, at 26.

233. Dred Scott v. Sandford, 60 U.S. 393, 446 (1857).

234. Reid v. Covert, 354 U.S. 1, 14 (1957) (emphasis added); *see also* Boumediene v. Bush, 553 U.S. 723, 759, (2008).

235. LAWSON & SEIDMAN, *supra* note 59, at 4 ("Whereas there is no constitutional problem with the acquisition of territory that is intended as a future state, there are serious questions about the ability of the United States to add territories that are not slated for statehood."); *id.* at 107 (noting that the likelihood of statehood would be subject to a "reasonableness" test).

236. *Id.* at 111 ("Puerto Rico and Guam were acquired as spoils of the war, and both acquisitions were clearly constitutional . . . . Puerto Rico, because of its hemispheric location, was probably an even better candidate for statehood than was Hawaii.").

237. *Id.* at 113.

238. *Id.* at 203.

239. *Id.*

We believe that the proper inquiry must take into account more than the moment and mechanism of acquisition. Indeed, a second theory as to why Puerto Rico can demand statehood now is that Congress and multiple presidents have already promised as much and are bound by that promise. Precisely when that promise was made is debatable, but there are at least three candidates. Those who reject the notion of "unincorporated territories" might say that the promise was made at the moment of acquisition in 1898, as noted above. Others might argue, as a former governor of Puerto Rico did, that an "implied pledge of statehood [was] made to Puerto Ricans when citizenship was granted."[240] A third, and we think the strongest, possibility is that legal changes such as the passage of Public Law 600 and the approval of the Puerto Rico Constitution in the 1950s not only promised but actually delivered a form of statehood, or at least a deliverance from the limbo of "unincorporated" status.[241]

Additionally, for decades now, U.S. presidents have regularly expressed willingness to accept Puerto Rican statehood. President Gerald Ford was the first to do so, albeit in the waning days of his presidency, leading President-elect Jimmy Carter to respond, "I would be perfectly willing to see Puerto Rico become a state if the people who live there prefer that."[242] President George W. Bush reiterated support for statehood in his inaugural speech,[243] and President Barack Obama said much the same a few years later.[244] Most recently, then-candidate Donald Trump said, "There are 3.7 million American citizens living in Puerto Rico. As citizens, they should be entitled to determine for themselves their political status."[245] We do not venture to guess whether such rhetoric would manifest in action, but its prevalence cannot be ignored.

That such actions could have constitutional significance has not gone unnoticed. The Supreme Court has held, as recently as its 2008 decision in *Boumediene v. Bush*, that "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance."[246] And just a few months after *Boumediene*, a federal district court in Puerto Rico followed exactly that theory in concluding that, while the *Insular Cases* remain good law and Congress has not explicitly moved Puerto Rico out of "unincorporated" status, "[a]ctions speak louder than words."[247] Thus, "[a]lthough Congress has never enacted any affirmative

240. CABRANES, *supra* note 25, at 7 n.19 (quoting Governor Carlos Romero Barceló, Address before the Los Angeles World Affairs Council (Dec. 6, 1977)).

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

242. CABRANES, *supra* note 25, at 11 & nn.30-31.

243. OOSTINDIE & KLINKERS, *supra* note 20, at 50.

244. *See* Helene Cooper, *In Visit to Puerto Rico, Obama Offers (and Seeks Out) Support*, N.Y. TIMES (June 15, 2011), http://query.nytimes.com/gst/fullpage.html?res=9801E1D8143EF936A25755C0A9679D8B63.

245. Chris Bodenner, *The State of Puerto Rican Statehood*, ATLANTIC (Mar. 7, 2016), http://www.theatlantic.com/notes/2016/03/the-state-of-puerto-rican-statehood/472599.

246. 533 U.S. 723, 758 (2008).

247. Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22, 41 (D.P.R. 2008) (emphasis omitted).

language such as 'Puerto Rico is hereby an incorporated territory,' its sequence of legislative actions from 1900 to present has in fact incorporated the territory."[248]

Even if one does not believe that ties between Puerto Rico and the United States have strengthened "in ways that are of constitutional significance," or that the federal government is constitutionally bound to make good on its promises, Puerto Rican statehood (or independence) might be required as a remedy for the longstanding wrong of its unconstitutional status.

It is hard to ignore the degree to which race and racism played a role in shaping Puerto Rico's political status, arguably raising Equal Protection concerns.[249] It is black letter constitutional law that a showing of racial animus, combined with disparate impact, can prove a violation of the Equal Protection Clause.[250] This is especially true when voting and other rights of political participation are in play, and it is not necessarily enough to say that contemporary supporters of Puerto Rico's second-class sovereignty are not themselves motivated by racial animus. As far as the Equal Protection clause is concerned, a law that was originally motivated by racial animus can remain tainted by it decades later. In the 1985 case *Hunter v. Underwood*, the Supreme Court struck down a 1901 Alabama law that disenfranchised people for committing crimes of "moral turpitude." The Court found that the "original enactment was motivated by a desire to discriminate against blacks on account of race, and the section continues to this day to have that effect. As such, it violates equal protection . . . ."[251]

Put differently, the history of the denial of the right of representation in national governance to Puerto Ricans is largely a story of racism and imperialism. The denial of those rights to Puerto Ricans should be constitutionally suspect, requiring strong evidence that the denial of rights was *not* motivated by racial animus. Best we can tell, there is no such evidence—other than perhaps the claim that at some points in time the inhabitants of Puerto Rico have not wanted national representation because they were receiving tax benefits or were seeking to maintain their culture of difference from the mainland.[252]

But the very conceptualization of national representation as something that

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248. *Id.*

249. It is also worth noting, as Judge Cabranes suggests, that matters were even worse vis-à-vis the Philippines, which helps explain why Puerto Rico was kept as a territory. With regard to the Philippines, ties with which would soon be severed, "[e]xpressions of concern about the annexation of Oriental peoples were commonplace," while "[t]he relatively tender treatment accorded to the Puerto Ricans may be partially explained by the representations made in Congress concerning the racial composition of the island." CABRANES, *supra* note 25, at 30-31. That said, there was plenty of racism to go around. In his *Harvard Law Review* article cited above, Simeon Baldwin suggests that it would be unwise "to give to the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico" the benefits of the Constitution. Baldwin, *supra* note 25, at 415.

250. Washington v. Davis, 426 US 229 (1976).

251. Hunter v. Underwood, 471 U.S. 222, 233 (1985).

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

could be traded away for tax breaks by one subset of citizens who are largely of a different (and disadvantaged) race than the majority is itself problematic. As a constitutional matter, voting is supposed to be sacrosanct. It is generally thought to be both an *individual* right (that is, the *collective* cannot trade it away in exchange for some other benefit) and an *inalienable* one (there can be no trading of this right whatsoever, especially for financial reasons).[253] Yet, for marginal regions like Puerto Rico and American Samoa, courts and policy makers seem comfortable treating the right to vote as being at the mercy of the local collective.

B. Expelling States?

Our focus here is on the legality of expelling territories—and specifically Puerto Rico—rather than states. And to the extent that expulsion has even been contemplated, a firm line has typically been drawn between expulsion of territories and of states. For example, Sparrow notes that in a brief in *Crossman v. United States* (1901), U.S. Solicitor General John Richards argued that "[t]he only indissoluble, inseparable parts of the United States" were "the States of the Union, the governing body." He did not believe there to be any power to "disintegrate the Union" but did "believe there is power to dispose of territory which simply belongs to the United States."[254]

But it is not clear that the inquiry can stop there. Is statehood a safe harbor from the kind of expulsion Ponsa-Kraus describes?[255] To consider the possibility of expelling either states or territories, one has to start with questions about the nature of the Union itself—questions that are thought to have been settled at Appomattox, where the U.S. Civil War came to a close. And we are loath to suggest disagreement with Abraham Lincoln about the permanence of the Union.[256]

Still, one might ask: *What if* the Union had blessed, or demanded, the South's exit? Would that be an attempted secession (of a majority, perhaps), and be analyzed the same way? If southern states had refused the demands of Reconstruction following the Civil War, would there have come a point at which unrepentant and widespread embrace of slavery would have been so inconsistent with the national law and ethos that it could justify expulsion?[257] Would resumption of war have been the only alternative, and would that have been preferable?

Because there is no explicit power to expel or deannex a state, any such

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

254. SPARROW, *supra* note 15, at 83-85.

255. *See supra* notes 82-83.

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

257. *See* RALPH YOUNG, DISSENT: THE HISTORY OF AN AMERICAN IDEA 11 (2015) (noting that abolitionist William Lloyd Garrison "eventually went so far as to propose that the United States abrogate the Constitution . . . and expel the southern states from the Union").

power would have to be found by implication in *other* constitutional powers. And although state and national borders are often taken for granted today, the location of those borders—and the concomitant power to shape them—were central to the Declaration of Independence, the substance of the Constitution, and the early development of the nation.[258] The Articles of Confederation's inability to resolve border disputes between states was one of its central defects.[259] But precisely because of those ongoing disputes and uncertainty, "[t]he Framers could . . . go no further than defining the basic components for future mapmakers to assemble over time."[260]

In doing so, they eliminated the Articles' provision regarding Canada's accession to the Union,[261] arguably leaving the Constitution without a specific mechanism by which the United States could acquire more sovereign territory.[262] This became particularly pressing when Thomas Jefferson was presented with the prospect of the Louisiana Purchase. As Jefferson noted, "The [C]onstitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The Executive in seizing the fugitive occurrence which so much advances the good of their country, have done an act beyond the Constitution."[263] Notably, the debate over the constitutionality of the purchase was not nearly so public as that over the status of Puerto Rico.[264]

The legality of the Louisiana Purchase is accepted now,[265] but the debate

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258. *Cf.* THE FEDERALIST NO. 7, at 28 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that states, having "discordant and undecided claims between several of them," might go to war over "vast tract[s] of unsettled territory within the boundaries of the United States"); Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 16 (2001) ("[T]he Declaration of Independence cited [the British Parliament's] transfer of land [from the colonies to Quebec], as well as other limitations that the British had placed upon alienability of land in the West, among its justifications for severing ties with Britain." (footnote omitted)). During the Constitutional Convention, Nathaniel Gorham asked, "Can it be supposed that this vast Country including the Western territory will 150 years hence remain one nation?" NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787: REPORTED BY JAMES MADISON 410 (Adrienne Koch ed., 2d ed. 1985).

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

260. Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1173 n.14 (2011).

261. ARTICLES OF CONFEDERATION OF 1781, art. XI ("Canada acceding to this confederation . . . shall be admitted into, and entitled to all the advantages of this Union . . . ."); *see also* Murray G. Lawson, *Canada and the Articles of Confederation*, 58 AM. HIST. REV. 39 (1952) (discussing the reasoning and historical context behind Article XI in the Articles of Confederation and the Founders' initial concern with Canada).

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

263. 10 THE WORKS OF THOMAS JEFFERSON 7 n.1 (Paul Leicester Ford ed., 1905).

264. Brook Thomas, *A Constitution Led by the Flag: The* Insular Cases *and the Metaphor of Incorporation*, *in* FOREIGN IN A DOMESTIC SENSE, *supra* note 8, at 82, 91 ("The constitutional debate concerning the Louisiana Purchase took place exclusively in private correspondence and within the conscience of Jefferson himself; the debate surrounding the *Insular Cases* was very public.").

265. *See* John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 528

over the constitutionality of annexation has implications for the future of constitutional authority over the nation's borders.[266] If the power to annex can be inferred from the Constitution, what about the power to de-annex or expel?

To the degree that control over borders is implied in the nature of sovereignty, this argument has a lot to recommend it. In the debate over the Louisiana Purchase, Representative Joseph Nicholson argued, echoing Justice White's logic in the *Insular Cases*, that "[t]he right must exist somewhere. It is essential to independent sovereignty." Representative John Randolph similarly noted that "[i]f the old Confederation—a mere government of States—a loosely connected league . . . could rightfully acquire territory in their allied capacity, much more is the existing Government competent to make such an acquisition."[267] As a matter of political practice and international law, cession of territory has long been regarded as part of sovereign authority.

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

> By the law of nations, recognized by all civiliezed [sic] states, dominion of new territory may be acquired by discovery and occupation as well as by cession or conquest[] . . . . This principle affords ample warrant for the legislation of congress concerning guano islands.[268]

For those with a more limited view of federal power—or who are determined to ground it in specific text—there is an argument that de-annexing a state, or ceding it to another country, would be beyond the enumerated powers of Congress. Lawson and Seidman, for example, argue that there is no explicit power of territorial acquisition, so any federal acquisition of territory can only be "as a means of carrying into effect other national powers, such as the power to admit new states or to provide and maintain a navy."[269]

IV. EXPULSION, ACCESSION, AND COLONIALISM AS LEGAL QUESTIONS

International law has focused on rules regarding expansion and secession because they, rather than expulsion, have historically been the forces that needed to be checked. But today, the former imperial powers face a different set of incentives. Physical territory is not so valuable as it once was. Simultaneously, citizens are potentially costlier, since it is legally, politically, and morally more difficult to discriminate against particular groups of them.

(1951) ("If there were doubts as to the power of the United States to acquire [lands], these have been resolved decisively in favor of the Federal government, not only by the Supreme Court but by the people through their elected representatives in the Congress and the presidency.").

266. Although the constitutionality of the Purchase is relatively well-settled, territorial annexation nonetheless raises important constitutional questions, which may have implications for broader matters of constitutional law. Along those lines, see Daniel Rice, *Territorial Annexation as a "Great Power"*, 64 DUKE L.J. 717, 722 (2015) (arguing that "the annexation of foreign territory is exactly the sort of power that is too important to be left to implication through the Necessary and Proper Clause").

267. LAWSON & SEIDMAN, *supra* note 59, at 23 (quoting these and other statements from 8 ANNALS OF CONG. 499-510 (1803), but concluding that they "are not valid arguments in the context of the federal Constitution").

268. Jones v. United States, 137 U.S. 202, 212 (1890).

269. LAWSON & SEIDMAN, *supra* note 59, at 5.

The debate about Puerto Rico's status is but one exemplar of this broader trend, and, as we have argued, presents legal as well as political questions. We have argued that international and domestic law give the people of Puerto Rico some right to control their destiny by resisting expulsion or perhaps even seeking accession. Those two possibilities—a right to resist expulsion and a right to demand statehood—might seem quite different. Some readers have suggested that the former is obviously sound (albeit unlikely to arise), while the latter has no strong legal foundation.

Logically and legally, however, the two arguments are deeply intertwined. If one accepts the former, then the latter follows almost as a matter of course. Recall that, on Ponsa-Kraus' persuasive reading of the *Insular Cases*, perhaps the fundamental difference between incorporated and unincorporated territories is that the latter are subject to "deannexation." If a territory can resist deannexation (i.e., expulsion) then, *ipso facto*, it cannot be an unincorporated territory.

If that conclusion is true, it does not follow that Puerto Rico automatically becomes a state. But if it is not an *un*incorporated territory, then it must be an incorporated territory. And *that* would put the island on course for either independence or statehood: thirty-one of the current fifty states were once incorporated territories, and we are not aware of any incorporated territory that sought statehood and did *not* eventually receive it.[270] Given that statehood has consistently and overwhelmingly outperformed independence as an option in Puerto Rico's many referenda, we have every reason to think that statehood would be the chosen option.

We do not mean to suggest that this is something like a legal "proof" of Puerto Rico's eventual statehood. There are many ways—legal, political, and economic—in which Puerto Rican statehood could be derailed. But the questions we have tried to address here are not limited to Puerto Rico alone; they go to the heart of foundational legal principles—many of them predicated on the notion that nations will seek to gain, preserve, and defend territory. This is sensible, since the history of the world has largely been a history of the expansionist impulse. The colonial powers, after all, profited handsomely by denuding their colonies of resources.

Today, the scales have tipped in the opposite direction. Tens of millions of people—one-sixth of the Caribbean's population, for example—still live in colonies directly controlled by a distant metropole.[271] But these colonies now often represent an economic burden, not a boon, for the nations that hold them, and in no existing colony is there clear support for secession. If a push for "independence" arises, then, it is more likely to come from the center than from

270. Opponents of Puerto Rican statehood sometimes suggest that there are no examples of Congress being "forced" to accept a state. The example of Tennessee, as explained above, casts some doubt on that proposition. In any event, if Puerto Rico became an incorporated territory, the burden of the presumption would flip; one searches in vain for incorporated territories to whom Congress *denied* statehood.

271. OOSTINDIE & KLINKERS, *supra* note 20, at 220 ("Of the total population of the Caribbean, an estimated 37 million people, almost fifteen per cent live in areas which still maintain constitutional ties with the mother country.").

the edges. Law, we argue, may give the colonies—including Puerto Rico—tools with which to resist.

This legal inquiry also has implications for scholars of colonialism more broadly. At the moment, scholarly arguments about colonialism's legacy are so feverish and bitter that they are making headlines in major news outlets.[272] One flashpoint of the current debate has been "The Case for Colonialism," an article in which Portland State University professor Bruce Gilley argues that colonialism was "both objectively beneficial and subjectively legitimate" in many places throughout the world.[273] The criticisms have been fierce.[274] *Third World Quarterly* eventually retracted the article,[275] setting off a subsidiary debate about academic freedom.[276]

Gilley is not alone in his views, however, and evaluations of colonialism's legacy seem increasingly prominent.[277] Oxford University has recently launched a five-year academic project called "Ethics and Empire," which will reportedly challenge the prevailing wisdom in "academic discourse" that "imperialism is wicked; and empire is therefore unethical."[278] Nor is the question of colonialism's desirability limited to faculty lounges. In one recent British poll, nearly half of respondents said that the British Empire was a good thing (forty-three percent), and something to be proud of (forty-four percent).[279] The connection to current events is palpable. As one commentator puts it: "Why has the debate erupted now? For many, the obvious answer seems to be Brexit."[280] In a world where borders and alliances are shifting, the evaluation of past

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272. *See, e.g.*, Brandon Kendhammer, *A Controversial Article Praises Colonialism. But Colonialism's Real Legacy was Ugly*, WASH. POST (Sept. 19, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/19/colonialism-left-behind-a-long-legacy-most-of-it-bad/?utm_term=.9b35be98eb7f.

273. Bruce Gilley, *The Case for Colonialism*, THIRD WORLD Q. (published online Sept. 8, 2017, and withdrawn), http://www.web.pdx.edu/~gilleyb/2_The%20case%20for%20colonialism_at2Oct2017.pdf.

274. Sahar Khan, *Libertarians Shouldn't Accept the Case for Colonialism*, CATO UNBOUND (Oct. 9, 2017) https://www.cato-unbound.org/2017/10/09/sahar-khan/libertarians-shouldnt-accept-case-colonialism; Nathan J. Robinson, *A Quick Reminder of Why Colonialism Was Bad*, CURRENT AFF. (Sept. 14, 2017), https://www.currentaffairs.org/2017/09/a-quick-reminder-of-why-colonialism-was-bad.

275. *See The Case for Colonialism: Abstract*, TAYLOR & FRANCIS ONLINE (2017), https://www.tandfonline.com/doi/abs/10.1080/01436597.2017.1369037 (presenting the withdrawal notice).

276. *See, e.g.*, Colleen Flaherty, *Is Retraction the New Rebuttal?*, INSIDE HIGHER EDUC. (Sept. 19, 2017), https://www.insidehighered.com/news/2017/09/19/controversy-over-paper-favor-colonialism-sparks-calls-retraction.

277. *See, e.g.*, Nigel Biggar, *Don't Feel Guilty About Our Colonial History*, TIMES (U.K.) (Nov. 30, 2017), https://www.thetimes.co.uk/article/don-t-feel-guilty-about-our-colonial-history; Niall Ferguson, *Why We Ruled the World*, NIALL FERGUSON (Jan. 5, 2003), http://www.niallferguson.com/journalism/history/why-we-ruled-the-world; Kenan Malik, *The Great British Empire Debate*, N.Y. REV. BOOKS (Jan. 26, 2018), http://www.nybooks.com/daily/2018/01/26/the-great-british-empire-debate.

278. *Ethics and Empire*, MCDONALD CENTRE, http://www.mcdonaldcentre.org.uk/ethics-and-empire (last visited May 15, 2018); *see also Ethics* and *Empire: An Open Letter from Oxford Scholars*, CONVERSATION (Dec. 19, 2017), https://theconversation.com/ethics-and-empire-an-open-letter-from-oxford-scholars-89333 (open letter from Oxford scholars expressing opposition to the "Ethics and Empire" project).

279. Will Dahlgreen, *Rhodes Must Not Fall*, YOUGOVUK, (Jan. 18, 2016), https://yougov.co.uk/news/2016/01/18/rhodes-must-not-fall.

280. Malik, *supra* note 278.

arrangements seems all the more pressing.

It is frustrating, then, that the debate about colonialism's past proceeds as if colonialism itself were past. It is anything but:

> Portugal did not withdraw from its oldest colony, Macao, nor from its Atlantic islands. Spain remained in two North African enclaves and the Canary Islands. Britain and France kept a scatter of possessions around the world. Denmark continued to influence Greenland and the Faeroes, and even the Netherlands held on to two groups of islands in the Caribbean. European powers were not alone; the United States retained "territories" and "commonwealths" in the Pacific and Caribbean, notably Puerto Rico and Guam . . . . These various territories—or some of them—may really be the last colonies.[281]

Millions of people live in these "former" colonies.[282] For them, the question of colonialism's benefit is not a historical counterfactual. And as Robert Aldrich and John Connell note, "In every contemporary territory, powerful reasons exist for choosing continued political ties with metropolitan powers; they range from concerns over security (from local civil or political unrest rather than external aggression), to dependence on transfer payments (in various forms) and access to migration opportunities."[283]

Contemporary discussions of colonialism should involve more than counterfactuals about roads not taken. There are still roads ahead, and the big question is who gets to choose them.

281. ROBERT ALDRICH & JOHN CONNELL, THE LAST COLONIES 2 (1998)
282. *Id.* at 9.
283. *Id.* at 164.