Puerto Rico 1898-1998: The Institutionalization of Second Class Citizenship?
Puerto Rico 1898-1998: The Institutionalization of Second Class Citizenship?

Nelson D. Hermilla*

In a world experiencing an explosion of self-determination, where permanently dependent territoriality is called colonialism, one may be surprised that the world's oldest democracy would refuse . . . a [binding] vote [for self-determination] to a community of [3.8 million United States citizens].

* I want to express my thanks to William B. Fisch, the R. B. Price and Isidor Loeb Professor of Law, at the University of Missouri-Columbia School of Law. But for Professor Fisch's encouragement and comments this article would not have been written. I would also like to thank my colleagues for their valuable insights and suggestions. I assure all involved, including my friends requesting anonymity, that the views expressed and any remaining shortcomings in the paper are solely my own.

Nelson D. Hermilla practices administrative law in Washington, D.C.

1. Don Devine, Disproving the Stereotypes, WASH. TIMES, Apr. 29, 1991, § G, at 4. At the time he authored this article, Don Devine was a political consultant and the former Director of the Office of Personnel Management in the Reagan Administration. Id. Puerto Rico Referendum Killed, WASH. POST, Feb. 28, 1991, at A6. At the time of publication, the outcome of Congress' latest effort had not yet been determined; however, it appears unlikely that H.R. 856 would pass the Senate and result in any meaningful clarification of Puerto Rico's status. As an historic first, the House of Representatives passed H.R. 856 on March 4, 1998 (by a one vote margin), providing a means to clarify the status of Puerto Rico by including all status options on the ballot: independence, commonwealth and statehood for selection by the 3.8 million residents of Puerto Rico. House Passes Puerto Rico Bill, WASH. POST, Mar. 5, 1998, at A1. The bill's ultimate passage is
I. Defining Puerto Rico

In August of 1984, José Rivera\(^2\) arrived on the University of Maryland campus thinking that the only obstacle that remained between his academic ambitions and beginning his University studies would be registration for classes.

José had completed high school with a 3.6 grade point average and had scored exceptionally well on all his entrance exams. He applied to the University of Maryland, which accepted his application. During registration, however, José discovered that he would not be allowed to register for classes unless he presented a student visa or evidence that he was a resident alien.

Mr. Rivera confidently presented information that he thought would clinch his registration and supersede any visa or “green card” requirement. He informed the registration workers that he had been born in Santurce, Puerto Rico. Instead of an enrollment schedule, however, José Rivera received a very patient explanation that while this information was acknowledged and appreciated, that fact alone would not fulfill his registration status requirement because he “had not been born in the United States.” José Rivera could not find anyone at registration that day who would remove the “foreign” cloud over his birthplace. Consequently, he missed registration and the initial two weeks of classes.

José ultimately enrolled and completed his degree at the University of Maryland only after the matter came to the attention of José Luis Gonzalez, the former President of the Washington, D.C. chapter of “El Círculo de Puerto Rico.” Mr. Gonzalez’ letter to the President of the University of Maryland resolved the matter in time for José Rivera to begin classes with only a minimal interruption. Although the delay in José’s registration occurred because of a lack of knowledge on the part of individuals rather than because of University policy, Mr. Gonzalez took time in his letter to the University President to educate the University

---


2. Name changed to preserve anonymity. The following account is based on the 1991 recollections of José Luis Gonzalez, (former) President of the Washington, D.C. Chapter of “El Círculo de Puerto Rico,” and Captain, United States Marine Corp (U.S.M.C.) (Ret.) Galo I. Leguillou, an activist in Washington, D.C. community affairs. See infra note 4.
concerning the 1917 action\(^3\) by the United States Congress that made a "green card" or student visa unnecessary for José Rivera.\(^4\)

For most mainland United States citizens, whether Puerto Ricans are also United States citizens may not rank high as conversational curiosity. However, for Puerto Ricans, the issue constantly intrudes into what "mainstream" United States citizens accept as routine endeavors, such as seeking employment, obtaining services from state and local institutions or other daily pursuits. A widespread uncertainty exists regarding the status of Puerto Ricans, as demonstrated by members of Congress who themselves have expressed surprise that residents of Puerto Rico serve in the United States military.\(^5\) Former Resident Commissioner Jaime B. Fúster found, in his role as Puerto Rico's non-voting representative, that he spent a great deal of time explaining what Puerto Rico is and just what United States citizenship in Puerto Rico entails.\(^6\) Unfortunate occurrences such as these may simply reflect the general public's inadequate level of historical and geographical

---


4. Telephone interview with José Luis Gonzalez, (former) President of the Washington, D.C. Chapter of "El Círculo de Puerto Rico," (January 7, 1991). "El Círculo" is a social organization dedicated to the preservation and celebration of Puerto Rican culture. *Id.* Mr. Gonzalez states that State agencies such as the Motor Vehicles Administration are the most problematic in requesting that Puerto Ricans show evidence that they are resident aliens. *Id.*

Galo I. Leguillou experienced the same insistence upon a "green card" when he applied to the Washington, D.C. government for a license to be a special police officer. Telephone interview with Capt., USMC (Ret.) Galo I. Leguillou (January 4, 1991) (who also assisted student José Rivera). Decorated with medals in Vietnam, Mr. Leguillou's displayed DD-214 discharge papers were not sufficient to dispel the Office Manager's presumption that Mr. Leguillou, as a Puerto Rican, was an alien. *Id.* Mr. Leguillou is active in the D.C. metropolitan area community affairs as a member of LULAC Council No. 11041. *Id.* Mr. Leguillou has also served two terms as an appointed Commissioner from Ward 8 in the D.C. Commission on Latino Community Development. *Id.*

5. *Working Profile: Jaime B. Fúster*, N.Y. TIMES, May 8, 1986, at 22. Mainland United States stamp and coin collectors regularly request samples from Puerto Rico not realizing that the United States' postal and monetary systems and those of Puerto Rico are the same. McDougall, *Puerto Rico—The Facts*, N.Y. TIMES, Nov. 23, 1983, at 23. A personnel officer of the Export-Import Bank rejected the application of a University of Pennsylvania, Wharton School applicant that listed Puerto Rico as her birthplace because "as an agency of the United States government," the personnel officer wrote, "the Export-Import Bank is restricted by law to making appointments only to United States citizens." *Id.* A federal credit union employee in South Carolina refused to accept a money order written on a bank in Puerto Rico unless the money order was converted to United States dollars. *Id.*

knowledge, but the adverse impact on individuals from Puerto Rico amounts to a great deal more than mere inconvenience.

Confusion about Puerto Rico’s political relationship with the United States, however, is not unique to the mainland. Although there is no doubt among residents of Puerto Rico that they are citizens of the United States, the exact nature of the political and legal relationship of Puerto Rico with the United States, and what that status is or should be, has dominated the debates of Puerto Rican scholars, jurists, and politicians. Puerto Rico’s affiliation with the United States also figures prominently in the discussions of residents of the island of Puerto Rico, all of whom are born as United States citizens since passage of the Jones Act by the Congress of the United States.

Defining Puerto Rico—what it is and what it should be—becomes a very personalized endeavor depending on the political and cultural alignment and identification of the individual considering the question. No matter what position the individual ultimately takes in his or her conclusion of what Puerto Rico is or should be, the longstanding and current legacy of Puerto Rico’s connection to the United States is clearly that island inhabitants are second class citizens that do not have a voting representative in the United States and cannot vote for the President.

Whether in legislative reports, statements by members of the Executive Branch, judicial opinions or the ambivalent and variable application of federal laws and privileges to residents of Puerto


9. Jones Act, ch. 145, 39 Stat. 951 (1917) (current version at 48 U.S.C. §§ 731-916 (1988)). This Act secured United States citizenship for all Puerto Ricans. However, the Act did not contain any procedural presumption that either statehood could follow the imposition of citizenship or that some arrangement would allow for ultimate independence in spite of the impassioned pleas of Puerto Rico’s Resident Commissioner Luis Muñoz Rivera. A Civil Government for Porto Rico: Hearings on H.R. 13818 Before the House Comm. on Insular Affairs, 63rd Cong., 2d Sess. 5 (1914).

Puerto Rico's role in dominating Puerto Rico, just as it controls other United States territories, requires that Congress take the lead in striking a resolution of Puerto Rico's status agreeable to Puerto Rico's United States citizens. Congress' exercise of its plenary power, a power that is not limited in the manner that the Constitution limits federal power over the states, indeed defines the existing political and legal relationship with Puerto Rico. Since the United States Constitution grants Congress plenary power over territory and property of the United States, thus rendering Puerto Rico's power subordinate, Congress must therefore assume its responsibility to correct the omissions of the past ballots on Puerto Rican status and design a binding plebiscite. Any proposed resolution, however, must recognize and allow a vote or binding plebiscite on three traditional options: statehood, commonwealth, or independence. Nevertheless, true commonwealth status, as one of the options that will meet both international and United States constitutional criteria, cannot exist without both federal taxation and a voting representation for Puerto Rico.

The roots of the present second class citizenship of the residents of the island of Puerto Rico stem from the United States Supreme Court, emanating from the same Justice, Henry B. Brown, who led the majority in the infamous "separate, but equal" doctrine of *Plessy v. Ferguson*.

It is an incontrovertible fact that both mainland United States citizens and residents of the island of Puerto Rico have accepted second class citizenship, as evidenced by its continued existence. This unacceptable institutional racism, manifested by Puerto Rico's current political status, springs from the apartheid premises of the *Plessy* Court. Such an enduring legacy of the *Plessy* Court remains unacknowledged and unappreciated in spite of its repugnance to

---

12. U.S. CONST. art. IV, § 3. Congress has the power "to dispose of and make all needful rules and regulations respecting the territory or property belonging to the United States ..." See DeLima v. Bidwell, 182 U.S. 1, 27, 196 (1901) and Downes v. Bidwell, 182 U.S. 244, 268 (1901).
13. An analysis of whether a "Free Association" commonwealth-type government can potentially be designed that meets both the United Nations criteria for representation for free associated states and also meets United States constitutional standards is beyond the scope of this article. Once the United States Constitution is extended to the citizens of Puerto Rico, then a quasi-status such as a commonwealth may be problematic where the Ordinance of 1787 regarding "new" territories would then apply.
current societal and international values. Having determined at least one deplorable ingredient of the present political status, the continuation of such an anomaly in an American political system that proclaims only the very highest standards of enfranchisement as the key to democracy is difficult to comprehend.

Yet beyond simply the *Plessy* factor, why does the status question continue unresolved? Is Puerto Rico a political entity that simply never matured to the ultimate evolution of independence like its sister Spanish colony Cuba? Or, on the other hand, if the United States had decided to force a dominant political structure on Cuba in order to maintain its military base at Guantanamo in the same way as has occurred with Puerto Rico, would Cuba have fared any better? Did the United States make a calculated consideration that the costs of resistance by local residents would be greater on one island versus the other? Is Puerto Rico a hapless victim, where the resolution and development of its status is continually and indefinitely postponed, because of "imperial" policies that were merely transferred from Spain to the United States?

Or is Puerto Rico a frustrated territory, in the same sense that "New Mexico" languished (for less time), that has been excluded from full participation in Congress and from full citizenship benefits because a largely Protestant mainland population irrationally perceives and fears Puerto Rico's population to be Catholic and non-white? Or is the mainland wisely protecting itself from the angst of a full integration of Puerto Rico, resulting in a discovery of incompatibility that could lead to a political divorce, such as Canada continues to confront in its relationship with Quebec? Or, quite magnanimously, has the United States simply stood back in recognition of the unique law, language and culture of Puerto Rico, setting up a benign protectorate with the knowledge that greater integration might destroy the island's rich cultural heritage? If the majority of the colony's population opts to continue in second class status, why should anyone in the mainland or in the international organizations concern themselves? Certainly Puerto Rico had a long history of struggle for independence that the Hawaii and Alaska territories did not have.\textsuperscript{15} Did this lengthy struggle by

\textsuperscript{15} Compare OLGA JIMÉNEZ DE WAGENHEIM, PUERTO RICO'S REVOLT FOR INDEPENDENCE: EL GRITO DE LARES (1993) (discussing the extent and duration of Puerto Rico's independence movement beginning under Spain) with CLAUS M. NASKE, ALASKA: A HISTORY OF THE 49TH STATE 133-55 (1979) (reviewing the lack of any significant independence movement among Alaskans) and SYLVESTER
Puerto Rico provide an unacknowledged basis for the Plessy court’s creative “judicial legislation” that, in effect, invented an entirely new theory that would thwart the constitutional assumptions that routinely apply to the citizens of other territories?

This article certainly is not so ambitious to pretend to define the degree of impact any of these questions and their underlying premises have had on Puerto Rico. However, the author poses, for consideration, two aspects: first, how Puerto Rico and its citizens have proceeded in territorial status compared to other United States territories that later became states (which may enlighten the general query with regard to at least some of these longstanding questions); and second, how Puerto Rico and its citizens measure their relationship with the United States as compared to the United Nations criteria applied to territories belonging to foreign governments.

In understanding the development of the present situation and the pertinence of these two points, the limited nature of United States citizenship for island Puerto Ricans may best be illustrated by the votes in 1991 and 1993 allowing island residents to express their desires concerning Puerto Rico’s status. The subsequent impact of the December 8, 1991, referendum that enabled island residents to vote on the island’s political status demonstrates the lack of power inherent in this non-binding vote. After years of effort on the part of Puerto Rican leaders, the United States Congress rejected the opportunity to allow Puerto Rico to determine its status in a binding vote.\(^6\) In 1991, the United States Congress left Puerto Rico to conduct its own non-binding vote that amounted to no more than a locally and unscientifically administered opinion poll.\(^7\) The so-called November 14, 1993, “plebiscite,” in which Congress played a more substantial role than it did in designing the 1991 vote, still lacked any potential for making a difference.\(^8\) Concededly, the status quo option on Puerto Rico’s status received forty-eight percent of the vote in this glorified “poll,” with forty-six percent for statehood, four percent for

---


independence, and a voter turnout of seventy-three percent of the population.\textsuperscript{19} The vote spared both Puerto Rico and Congress from being confronted with a decision that might have brought an end to nearly 100 years of colonialism.

The outcome of these votes is less important than the fact that the vote was non-binding, illustrating that the 3.8 million United States citizens in Puerto Rico continue to have only limited ability to effect change and have little say in the development of federal laws that impact the island in nearly all aspects of island life. As merely an illustration of the United States-Puerto Rican relationship in action, the non-binding votes on status themselves reduce the 3.8 million United States citizens of Puerto Rico to the level of somewhat ineffective lobbyists in the attempted development of an island government that would ideally meet either United States constitutional standards of full citizenship or the United Nations mandated standards for member nations owning territories.\textsuperscript{20}

Puerto Rico remains one of an ever-dwindling number of non-self-governing territories in the world.\textsuperscript{21} As determined by the criteria for self-governing territories set forth by the United Nations, Puerto Rico’s misleading label as a “commonwealth” does not, in itself, elevate the island’s political status to a level that can be considered self-governing by any artful description of the island’s political dynamics with the mainland.\textsuperscript{22} In practice and in effect, Puerto Rico is no less a colony than were the North African colonies that France unpersuasively pronounced “autonomous” just prior to the time that the French colonial citizens began their successful efforts for independence.\textsuperscript{23}

Puerto Rico’s current status is inadequate and substandard as a matter of law. Claims that the United States citizens of Puerto Rico have had ample opportunities to vote on status disregard the fact that, to date, every attempt to define or affirm Puerto Rico’s status by a vote has been procedurally deficient. More specifically,

\begin{itemize}
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} See U.N. CHARTER arts. 1, 55 (regarding the right of self-determination as a firmly established international legal principle).
  \item \textsuperscript{22} See the criteria for self-governing status in G.A. Res. 742, U.N. GAOR, 8th Sess, Annexes, Agenda Item no. 32, at 13, U.N. Doc. A/2556 (1953), as the author has applied it in this article.
  \item \textsuperscript{23} French Chief Wins on African Policy, N.Y. TIMES, Dec. 11, 1954, at 1.
\end{itemize}
every vote fails as either non-binding upon the United States Congress or because viable and appropriate status options have been excluded from the ballot.\textsuperscript{24}

Puerto Rico’s current political status situation exists, in part, because the island’s status rests on the misguided premise that United States citizens of Puerto Rico are not subject to the Revenue Clause of the United States Constitution. Early in this century, the United States Supreme Court erroneously reasoned, in effect, that the United States treaty that acquired Puerto Rico from Spain superseded the United States Constitution.\textsuperscript{25} As a result, the island residents have not been fully subjected to federal taxation nor conferred with the benefits of the Constitution that might allow more say in changing the island’s political status.

There has been no credible reason put forth, in spite of the Supreme Court’s decision, to make Puerto Rico an exception to the well-established rule that no treaty can supersede the United States Constitution. What initiated this major break in the Court’s reasoning? Would the existence, in Puerto Rico, of a movement for independence be sufficient reason for the Supreme Court to suspend the application of the United States Constitution to a United States territory? That seems unlikely. The lack of full federal taxation, combined with the extension of some, but not all, benefits and entitlements to the island citizens, has partially resulted in an entrenched advantage to a sufficient number of island residents that a political impasse has been reached.\textsuperscript{26} This result has furthered the mainland’s interests by effectively defusing (but not completely extinguishing) efforts by island residents to resolve the nebulous nature of their political existence. This impasse, however, does not appear to satisfy the residents of Puerto Rico as a whole, since all political parties within Puerto Rico have

\textsuperscript{24} See copy of ballot for residents of Puerto Rico to vote on the Constitution (omitting all other options). 1 \textit{LAWS OF PUERTO RICO} 137.

\textsuperscript{25} \textit{Downes}, 182 U.S. at 280. \textit{But see} reasoning argued in dissent by Chief Justice Fuller. “A treaty cannot change the Constitution or be held valid if it be in violation of [the Constitution] . . . The Constitution itself never yields to treaty or enactments . . .” \textit{Id.} at 370 (quoting The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1870)).

\textsuperscript{26} While the lack of full federal taxation is a necessary circumstance (with roots that extend to the Boston Tea Party) where there is no voting representation as in Puerto Rico's situation, these twin aspects of the political status of Puerto Rico are not the cause or reason for each other. The basis for the lack of taxation lies in the United States Supreme Court’s mistaken line of reasoning and is developed in this article.
agreed that the political status should be altered. Congress, though, appears content with the impasse, effectively postponing any decision on Puerto Rico's permanent status.

Both mainland Republican and Democratic political parties agreed in their platforms, as long ago as 1980, that Puerto Rico's status should change in at least some manner. And although the political parties in Puerto Rico disagree on the exact nature of any change of status, they all agree that the present political and legal relationship of Puerto Rico with the United States is unsatisfactory.

Since all political party platforms, island and mainland, express an interest in making changes in the United States-Puerto Rico relationship, particularly in view of the procedural deficiencies that have characterized and dominated since 1898, the United States can no longer rely on or claim that the 1953 United Nations General Assembly Resolution No. 748 reflects either current international law or international public opinion concerning Puerto Rico's status. Even though a binding plebiscite could result in only a slight modification of Puerto Rico's status through some sort of enhanced "commonwealth" status, Congress must no longer delay making a full and complete effort to procedurally satisfy United States law and to fulfill the expressed will of the primary political factions within Puerto Rico after full consultation. Since the

27. See Puerto Rico, USA: A Special Report Prepared by the Washington Times Advertising Department, WASH. TIMES, Mar. 4, 1998, at 3. Although the Popular Democratic Party (PDP) or the "Commonwealth" party is generally characterized as supporting the status quo, the PDP has urged for a more expansive definition of commonwealth that goes way beyond the status quo, including greater autonomy in domestic and external affairs, a demand for veto power over the United States laws applicable to the island and the full funding of federal programs, similar to the states, but without the corresponding obligation to pay federal income taxes. Id. The New Progressive Party (PNP) advocates statehood and wants to achieve its objectives for Puerto Rico within the Constitution by full integration into the United states as the 51st state with all rights and obligations, including the payment of federal taxes. Id. The Puerto Rico Independence Party (PIP) believes that independence is the only option. Id.


30. See supra note 27.

United States Congress has not had the political incentive to take corrective steps on its own, party platforms notwithstanding, and given the historical evolution of the impasse, a plebiscite may satisfactorily resolve the status issue only if Congress takes an additional step. Accordingly, Congress should voluntarily submit to the procedural norms and standards of the United Nations for territories.\textsuperscript{32} The United States can utilize the United Nations procedures in a manner that will support its own procedures without having to publicize a recantation of any prior United States position regarding Puerto Rico's political and legal status, and move forward in resolving the current status stalemate.

II. The Evolution of Puerto Rico's Relationship With the United States

In 1901, the Supreme Court created a new concept for Puerto Rico's status that allowed the United States to possess the territory without giving Puerto Rico (or Cuba or the Philippines) any of the traditional guarantees that the new possessions would be incorporated into the United States as states.\textsuperscript{33} Unlike the territories acquired under the Louisiana Purchase and those won by conquest in the War with Mexico, the Court held that the Constitution, particularly the Revenue Clause, did not apply to Puerto Rico in its status as an unincorporated territory.\textsuperscript{34} At first glance the Court may have wished to allow Congress time to decide whether


\textsuperscript{33} U.S. CONST. art. IV, § 3. Congress has the power "to dispose of and make all needful rules and regulations respecting the territory or property belonging to the United States . . . ." \textit{See generally DeLima}, 182 U.S. at 27, 196; \textit{Downes}, 182 U.S. at 268. \textit{See also NORTHWEST ORDINANCE: THE N.W. TERR. GOV'T.}, art. V (1787):

And whenever any of the [States of the Northwest Territory] shall have sixty thousand free inhabitants therein, such State shall be admitted . . . . into the Congress . . . . on an equal footing with the original States, . . . . and shall be at liberty to form a permanent constitution and State government: \textit{Provided}, The constitution and government, . . . . shall be republican, and in conformity to the principles contained in these articles, . . . .

\textsuperscript{34} \textit{Downes}, 182 U.S. at 287.
the incorporation of Puerto Rico was desirable, given that Puerto Rico was "inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, [such that] the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible."35

The Court justified withholding the application of the Constitution to Puerto Rico, contrary to the mandated extension of the Constitution to other United States territories, by arguing that in previous situations the treaties expressly stated that the new territories should or "shall be incorporated,"36 but that the Treaty of Paris ceding Puerto Rico stated simply "that the civil rights and political status of the native inhabitants . . . shall be determined by Congress."37

Unlike any other territorial acquisition of the United States, the Court created a doctrine that brought to a full stop the previous procedural expectation of progression from territorial status toward statehood, in accordance with the criteria set forth in the Northwest Ordinance of 1787 concerning the Northwest Territory.38 Although unexpressed, perhaps the Court had anticipated that the circumstances and factors surrounding these particular possessions combined to make a much greater likelihood that Puerto Rico would attain the independence that ultimately did occur with Cuba and the Philippines, the other acquisitions of the Spanish American War.39

35. Id.
36. Id. at 280.
37. Id. But see id. at 370 (Fuller, C.J., dissenting) ("A treaty cannot change the Constitution or be held valid if it be in violation of [the Constitution] . . . The Constitution itself never yields to treaty or enactments . . ").
38. See supra note 33 and accompanying text.
39. Although a closer study of the briefs submitted in Downes, 182 U.S. 244 (1901) and the corresponding 1901 decisions related to the status of Puerto Rico (including Delima v. Bidwell, 182 U.S. 1 (1901); Dooley v. U.S., 182 U.S. 222 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Armstrong v. U.S., 182 U.S. 243 (1901); and Huus v. New York and Porto Rico Steamship Co., 182 U.S. 392 (1901)) might reveal evidence otherwise, neither the parties nor the Court appeared to have the benefit of access to the initial drafts of the Report of the Report of the Porto Rican Law Commission distributed on December 18, 1900. The Supreme Court heard the arguments on the cases related to Puerto Rico's status on January 8-11, 1901, and decided the cases on May 27, 1901. Delima, 182 U.S. at 1; Dooley, 182 U.S. at 222; Downes, 182 U.S. at 244; Armstrong, 182 U.S. at 243; Huus, 182 U.S. at 392. The President's Commission studying the Puerto Rican legal structure issued its final report on April 12, 1901. See H.R. REP. No. 57-52, pt. 1, at 1 (1901). The Commission acknowledged that the question of whether the Constitution's first ten amendments and the Constitution itself applied to Puerto Rico had not been resolved but went on to state that "forcing upon the island trial by
If the decision hinged entirely upon the language of the various treaties, then the new doctrine contained at least a superficial logical appeal. However, the additional discourse concerning due consideration for alien races and systems of laws made little sense in the context of the historical application of the United States Constitution to unorganized territories with native populations and variant legal systems such as Alaska and Mexico or even Louisiana, with its civil code.\(^4\) Perhaps the reasoning may be better understood in the historical context of the same Supreme Court that had decided in favor of the validity of the United States’ version of the apartheid doctrine, second class citizenship, and the cornerstone support of the Jim Crow laws for African Americans only five years earlier.\(^4\)

From all indications, Puerto Rico began its relationship with the United States with the same potential for independence as did Cuba and the Philippines, the other Spanish American War acquisitions. The Supreme Court’s interpretation of the Treaty of Paris\(^4\) and its deference to Congress’ discretion, rather than the incorporation of the residents of Cuba and the Philippines as citizens, had likewise resulted in decisions that the United States jury . . . would work a sudden revolution in the legal systems and traditions of Puerto Rico.” \(\text{Id.}\) at 36. The Commission stated that in organizing the local institutions, “...this fact is of paramount importance . . . . The experience of the first year of civil government has proved conclusively that without some form of central control, local services are neglected or inadequately performed.” \(\text{Id.}\) at 22. The Commission spoke highly of the civil code system of laws that Spain had developed for Puerto Rico. \(\text{Id.}\) at 24. However, without fully stating its reasoning, the Commission did not believe that the United States’ approach to a differing legal system in California and New Mexico (where the Constitution had been applied in spite of the “alien” legal system) sufficed as a model for Puerto Rico. \(\text{Id.}\) at 24, 26. Both the majority and the minority expressed their concerns that Puerto Rico’s political education had been systematically neglected and that Puerto Ricans were “untrained to the traditions of local self-government.” \(\text{Id.}\) at 60. The minority report expressed further concern that existing property qualifications for voting in elections should be strengthened. \(\text{Id.}\) at 62, 64. Although the conclusions of this Report do not explain the development of the “unincorporated territory” doctrine, the report does reflect the opinion contemporary to the \textit{Downes} decision and the significance of the report may be enhanced by the realization that after U.S. citizenship in 1917 and even to this day, the Court has not applied the Bill of Rights wholesale to Puerto Rico’s residents. \(\text{Accord, Torruella, supra}\) note 7, at 353.

40. \textit{See generally DeLima, 182 U.S. at 185-194; Downes, 182 U.S. at 253-258. See also Hawaii v. Mankichi, 190 U.S. 197 (1903); Rassmussen v. U.S., 197 U.S. 516 (1905).}

41. \textit{See Plessy v. Ferguson, 163 U.S. 537 (1896).}

42. \textit{Downes, 182 U.S. at 280.}
Constitution did not apply to these colonies. The Court specifically held that the right to trial by jury did not apply to the Philippines because the islands constituted an “unincorporated territory.” Congress had the power to determine the status of the Philippines, and clearly Congress ultimately did steer the Philippines toward independence. Puerto Rico’s importance to the United States, however, destined the island for a different course.

Soon after the Spanish American War, the United States constructed the Panama Canal. Puerto Rico’s initial value as a strategic sea lane to protect the Panama canal became increasingly significant with each World War. Although the United States may have had other substantial interests, the prevailing United States interest consisted of making Puerto Rico the final part of a protective triangle, with the United States bases in Guantanamo, Cuba and Panama as the other two points, controlling shipping lanes (or “sea lanes of communication”) for vital United States’ resources coming into the Gulf of Mexico.

Although Congress had the same political options for arrangements with Puerto Rico for establishing a military base as with governments throughout the world, Congress chose to establish stronger and more abundant links with the island, yet maintain an “arm’s length” relationship that avoided statehood.

Congress arguably established the strongest and most enduring tie with the island by granting United States citizenship to the residents of Puerto Rico in 1917. Island leaders had urged, without success, that Congress allow a plebiscite on the citizenship

44. Id.
45. OFFICE OF PUBLICITY AND PROMOTION OF TOURISM, SAN JUAN BUREAU OF SUPPLIES, PUERTO RICO: THE STORY OF A WAR BASE (Act No. 165, 1943): Puerto Rico is the peak of one of the highest mountains in the world. All but the top of it lies under the sea. So its steep 27,000 foot valleys are the strategic passes through which enemy submarines must pass to enter the Caribbean Sea and strike at the economic heart of the New World—the Panama Canal . . . It is a crossroads of air defense between North and South America and an important stop on air war transport routes to Africa and the Middle East.
question. Leaders such as the (non-voting representative) Resident Commissioner Luis Muñoz Rivera and Manuel Rodriguez Serra of the Puerto Rican Bar Association testified before Congress against the citizenship proposal, viewing the measure's consequence as precluding the island's future options for self-government.

Upon passage of the citizenship law by Congress, Representative Cooper articulated the primary benefit to the mainland by saying:

We are never to give up Puerto Rico for, now that we have completed the Panama Canal, the retention of the island becomes very important to the safety of the canal, and in that way to the safety of the nation itself. It helps to make the Gulf

---


48. On March 2, 1914, Resident Commissioner Luis Muñoz Rivera stated: If you wish to make us citizens of an inferior class, our country not being allowed to become a state of the Union or to become an independent State because the American citizenship would be incompatible with any other national citizenship; if we cannot be one of your States, if we cannot constitute a country of our own, then we will have to be perpetually a colony, a dependency of the United States. Is that the kind of citizenship you offer us? Then that is the citizenship we refuse. Civil Government for Porto Rico: Hearings on S. 4604 Before the Senate Comm. on Pacific Islands and Porto Rico, 63rd Cong., 2d Sess. 8 (1914). Mr. Muñoz Rivera stated further: The majority of Puerto Ricans think that the conferring of American citizenship in any form whatever would interfere with the future declaration of the status of the island and I pray Congress to postpone any legislation on this point for a period of a few years so we may demonstrate our capacity for self-government . . .

Id. See also Government for Porto Rico: Hearings on S. 1217 Before the Senate Comm. on Pacific Islands and Porto Rico, 64th Cong., 1st Sess. 35 (1916) (statement of Mr. M. Rodriguez Serra), quoted in Cabranes, supra note 47, at 477 ("We consider that the declaration of United States citizenship means the incorporation forever of Puerto Rico into the United States, and therefore the destruction of our hopes of becoming at some future day an independent nation . . . the highest aspirations of Puerto Ricans are statehood or independence"). See also the signed statement of a group of Puerto Ricans identifying themselves as workers that protested the citizenship bill on the basis that more property qualifications would be imposed as a condition for Puerto Rican residents to vote or hold office. The workers believed that a large majority of working Puerto Ricans would be effectively disenfranchised. 54 Cong. Rec. 1522 (Jan. 17, 1917).
of Mexico an American lake. I again express my pleasure that this bill grants these people citizenship...⁴⁹

Viewing the Supreme Court's 1901 reasoning in *Downes v. Bidwell*⁵⁰ in the best possible light, the Court correctly deferred the status issue to Congress, permitting that deliberative body to exercise its "plenary" power to study the status issue of Puerto Rico. At the end of a seventeen-year study period, Congress granted citizenship through passage of the Jones Act.⁵¹ An independent observer at that time might have understandably concluded that Congress had decided the *Bidwell* Court's open question on whether the "incorporation" of Puerto Rico was "desirable" and had incorporated the island fully into the United States Constitution, given Congress' grant of United States citizenship. However, the status question that the Supreme Court had claimed naturally arose out of the superseding language of the Treaty of Paris remained unresolved.

The initial impression that Congress had made a definitive decision that precluded the "non-incorporation" assumption on the Puerto Rican territory found support in a 1904 decision involving the Alaskan Territory. In that case, the Supreme Court held that Congress could not deprive the right to a trial by jury to an Alaskan United States citizen.⁵² Although the majority opinion heavily emphasized whether the United States treaty with Russia reserved the question of status of the Alaskans for "ulterior action by Congress,"⁵³ the Court also looked to other factors in making the determination. The Court reasoned that the incorporation of Alaska into the Supreme Court's judicial circuit and the undisputed United States citizenship of its territorial inhabitants could only lead to a conclusion that, indeed, the Constitution did apply to the United States citizens of Alaska.⁵⁴

Later, the United States District Court in Puerto Rico relied on these same factors in holding that the Fifth Amendment applied to Puerto Rico. Specifically, the court held that Congress had taken action to actually amend the judicial code to include Puerto

---

⁴⁹. ⁵⁴ Cong. Rec. 4170 (February 24, 1917) (remarks of Representative Cooper).
⁵⁰. ⁵⁰ See *Downes*, 182 U.S. 244.
⁵². ⁵² See *Rasmussen*, 197 U.S. 516.
⁵³. ⁵³ *Id.*
⁵⁴. ⁵⁴ *Id.* at 522.
Rico in the First Circuit in 1915 and that Congress had granted United States citizenship to the residents of Puerto Rico in 1917. The Court reasoned that there could not be different grades or separate classes of citizenship but that citizenship implied "incorporation," as well as the full application of the Constitution. "It cannot be true that American citizens under the Jones Act can only enjoy full American rights by leaving their home in Porto [Puerto] Rico and going over to the states."

The Supreme Court, however, disagreed and reversed the lower court. The Supreme Court held that, in spite of the United States citizenship granted under the Jones Act, Puerto Rico had not been "incorporated" into the protections or presumptions of the Constitution, and thus the Fifth Amendment of the Constitution did not apply to the United States citizens in Puerto Rico.

In the 1904 decision involving the Alaskan Territory, Justice Harlan registered his dismay with the "incorporation" doctrine on which the majority had premised its reasoning in Rasmussen. Justice Harlan's concurring opinion stated,

Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States . . . The proposition that a people subject to the full authority of the United States for purposes of government may, under any circumstances, or for any period of time, long or short, be governed, as Congress pleases to ordain, without regard to the Constitution is, in my judgment, inconsistent with the whole theory of our institutions.

If the Constitution does not become the supreme law in a Territory acquired by treaty . . . [then] Congress, under the theory of "incorporation," . . . could forever withhold from the inhabitants of such Territory the benefit of . . . the Constitution. I cannot assent to any such doctrine. I cannot agree that the Supremacy of the Constitution depends upon the will of Congress.

---

56. Id. at 454.
57. Id.
59. See Rasmussen, 197 U.S. 516.
60. Id.
61. Id. at 529-30.
Clearly, if the Jones Act granting citizenship did not "imply" that Congress had made its decision on determining the civil rights and political status of the inhabitants of Puerto Rico, then statehood would not and can not become an option for Puerto Rico, without the expressly granted authority of Congress or a Supreme Court decision overruling the concept of "unincorporated" territory (where there is no extension of the Constitution to the United States territory).62

During the years prior to the 1917 enactment of United States citizenship for Puerto Ricans, Resident Commissioner Luis Muñoz Rivera testified before Congress against the imposition of United States citizenship and in favor of autonomy for Puerto Rico. However, his son, Luis Muñoz Marin, took a more forthright position in favor of independence.63 In spite of the apparent momentum towards stronger ties between the island and the mainland spurred by the grant of United States citizenship, Congress itself actually took the step of holding hearings on the question of granting independence.64 Coinciding with these hearings, Senator Millard Tydings of Maryland introduced a bill that would grant the "complete, unconditional, and absolute independence of Puerto Rico."65 At some point between Senator Tydings' 1943 introduction of this bill (that included a strong arm provision for full and extensive tariffs on Puerto Rico's export trade)66 and Luis Muñoz Marin's 1948 debut as the island's first
elected governor, Luis Muñoz Marin changed his political direction. That is, Muñoz Marin abandoned his nationalist rhetoric for independence and became the leading advocate for the economic relationship with the mainland, resulting in a marked development of Puerto Rico’s economy.

Luis Muñoz Marin succeeded in leading the island’s population to approve a “home rule” constitution that also included a vote in favor of the status quo in the island’s relationship to the mainland. Muñoz’s accomplishment in leading Puerto Ricans to approve “home rule” as a limited, but acceptable form of autonomy did not occur without some significant and violently expressed disappointment among those still favoring independence.

---


70. The United States Congress approved the measure to allow Puerto Rico to draft its own constitution in July 1950 and Muñoz Marin campaigned for its approval. In October and November of that same year, violence erupted in eight Puerto Rican towns as nationalists seized Jayuya and Utuado. *Assassins Indicted on Murder Charge*, N.Y. TIMES, Nov. 11, 1950, at 9; *Nationalists Try Arson*, N.Y. TIMES, Nov. 15, 1950, at 15.

Nationalists fired on the Governor’s palace and bombed the police station in San Juan. *Revolt Flares in Puerto Rico: Soon Quelled With 23 Dead*, N.Y. TIMES, Oct. 31, 1950, at 1. United States Secretary of the Interior Oscar L. Chapman went on the radio in Washington, D.C. and explained that in spite of the revolt the great majority of islanders preferred gradual development under democracy. *Puerto Rico Blasts Remaining Rebels*, N.Y. TIMES, Nov. 1, 1950, at 26. Police and demonstrating groups clashed in Mayaguez, Ponce and San Juan. During the same five days of rioting, the Nationalist violence reached the mainland in an assassination attempt on President Truman that resulted in the killing of one White House guard and in the killing of one of the attempted assassins. *Assassination of Truman Foiled in Gun Fight Outside Blair House*, N.Y. TIMES, Nov. 2, 1950, at 1. Even four years later, four Puerto Rican Nationalists (from New York City) fired 20-25 pistol shots at random on the floor of the United States House of Representatives from the spectators’ gallery to bring national attention to the Puerto Rican status issue. The Nationalists wounded five members of Congress. *Five Congressmen Shot in House by 3 Puerto Rican Nationalists*, N.Y. TIMES, Mar. 2, 1954, at 1.
Widespread protests erupted throughout the island. By the
time of the election, however, the protests had subsided and the
Puerto Rican voters approved the “home rule” constitution by a
substantial majority.

Puerto Rico and the United States jointly approached the
United Nations to inform the international body that the United
States could discontinue reporting on Puerto Rico as a “non-self-
governing territory.” The exchange between United States
government officials and Governor Muñoz Marin in developing
that notification, however, underscored Muñoz Marin’s diametri-
cally differing interpretation of the degree of autonomy achieved
under the new arrangement.

Muñoz Marin submitted a draft of the notification letter that
stated that Puerto Rico ceased to be a territory of the United
States. The draft further stated that laws made by the Puerto
Rican legislature could not be repealed or modified by external
authority, and that the terms of the association with the United

In the 1950 riots in Puerto Rico, there were hundreds of demonstrators

71. Id.

72. 1 LAWS OF PUERTO RICO 136 (1982). The “commonwealth” concept was
accepted by a vote of 387,016 for and 119,169 against. See also Puerto Rico Lists
Vote Tally, N.Y. TIMES, June 27, 1951, at 10.

73. By joining the United Nations, the United States agreed to the organiza-
tion’s Charter, stating that:

Members of the United Nations which have or assume responsibilities for
the administration of territories whose peoples have not yet attained a
full measure of self-government recognize the principle that the interests
of the inhabitants of these territories are paramount, . . . to this end a)
to ensure with due respect for the culture of the peoples concerned. b)
to develop self-government . . . according to the particular circumstances
of each territory. c) to transmit to the Secretary-General for information
purposes . . . statistical and other information of a technical nature
relating to economic, social, and educational conditions in the territories

U.N. CHARTER, art. 73.

74. Muñoz Marin termed the island’s status a “new type of statehood, a state-
hood which [was] related by citizenship and law to the other of the Union.” But
like independent nations, Puerto Rico had the right to proclaim its own
constitution. The Puerto Rican people alone had the right of electing their
officials, and these officials were “in no way responsible to any authority of the
United States . . . Our autonomy is further vividly demonstrated by the fact that
no official of the United States - not even the President - has authority over the
Governor.” Luis Muñoz Marin, A New Idea of Statehood, UNITED NATIONS
WORLD 57 (Feb. 1951), quoted in BHANA, supra note 68, at 139-40.

75. Letter from Director James P. Davis, Office of Territorial and Insular
Affairs, Department of Interior, to Governor Luis Muñoz Marin (Sept. 25, 1952),
quoted in BHANA, supra note 68, at 169.
States could not be altered without the island’s full consent. The United States Department of Interior’s Director of Territorial and Insular Affairs, James P. Davis, responded that Muñoz should delete the provision stating that Puerto Rico ceased to be a territory on the basis that the statement was a conclusion of law that was probably not correct and might cause controversy. Director Davis also suggested that Muñoz’s statement on the effect of laws from the Puerto Rican assembly could remain in the letter if Muñoz made it clear that his view of the terms of the “association” were Muñoz’s own opinions. The United States asked Muñoz to drop any reference to colonialism since the phrase contained “certain psychological disadvantages.”

Governor Muñoz did change this letter as recommended. The United States ultimately drafted its own notification letter to the exclusion of Muñoz’s. The United States letter stressed its “willingness” to grant the Puerto Ricans complete self-government.

From 1950-1965, Muñoz made repeated attempts through conferences with the United States government to define the relationship. To date, the status has not been resolved to the satisfaction of the Puerto Rican leaders. Looking no further than the legislative reports on the Commonwealth arrangement, Congress expressly retained its plenary power to unilaterally alter Puerto Rico’s status. In spite of some official public statements

76. Id.
77. Id.
78. Id.
79. Letter from Dan Wheeler, Assistant Director of Territorial and Insular Affairs, Department of Interior, to Governor Luis Muñoz Marin (Sept. 26, 1952), quoted in Bhana, supra note 68, at 169.
that the relationship was a "compact," implying "equality" in the relationship to the extent that Congress could not impose its laws on Puerto Rico, the House Report in fact made no statement that would be inconsistent with the constitutional doctrine that Congress' plenary power cannot be compacted, contracted or in any way affected by agreements with an unincorporated territory such as Puerto Rico.

III. The United Nations Resolution 748 Regarding Puerto Rico Did Not Meet the United Nations Own Criteria for Establishing Self-Governing Territories

The procedural inadequacies of the United Nations own Resolution 748 undermine the value of that resolution for any current application. Even though the United States, Puerto Rico and the United Nations in 1953 accepted the 1951-1952 island votes for continued colonial status as a sufficient expression of the political will of the Puerto Rican voters, the current status of Puerto Rico does not meet the United Nations criteria for determining that a colony has achieved self-governing status.

The two 1951-1952 elections that constituted "home rule" referenda gave Puerto Rico no representation in the United States Congress. The arrangement allowed Puerto Rico to write a constitution subject to approval by Congress. The United States was to conduct all foreign affairs. The status referendum gave no option to vote for independence or statehood but limited the island residents' choices to voting for or against the "commonwealth" ("home rule") status.

The criteria for establishing a free association, such as the United States claimed occurred in its memo that resulted in the

83. This resolution made the rather dubious declaration that Puerto Rico is a "self-governing" territory in accordance with the terms of the U. N. Charter.
84. See supra note 72.
85. "Home rule" for Puerto Rico is essentially the right to elect Puerto Rico's governor and pass legislation that applies to Puerto Rico so long as Congress doesn't choose to override the locally initiated laws.
86. Congress' arrangement was for residents of Puerto Rico to vote for or against the option to have a constitution on June 4, 1951. The second referendum to approve or reject the actual draft of the constitution occurred on March 3, 1952. 1 Laws of Puerto Rico 136-137 (1982). For a copy of the ballot, see id at 137.
87. Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information under Article 73(e) of the
United Nation's Resolution 748 in 1952, but which fell short of achieving accordance with United Nations Resolution 742, should include the following:

a) Legislative Representation. Representation without discrimination in the central legislative organs, on the same basis as other inhabitants and regions [within the governing nation].

b) Participation of the Population. Effective participation of population in the government of the territory.

1) Is there an adequate and appropriate electoral and representation system?
2) Is this electoral system conducted without direct or indirect interference from a foreign government?

c) Citizenship. Citizenship without discrimination on the same basis as other inhabitants.

d) Government Officials. Eligibility of officials from the territory for all public offices of the central authority, by appointment or election, on the same basis as those from other parts of the country.\(^8\)

Since 1898, Puerto Rico has had no voting representation in Congress, which can override and has imposed its modifications on Puerto Rican legal efforts.\(^9\) Residents of Puerto Rico do not vote for the President. The United States Supreme Court has stated that citizenship for the residents of Puerto Rico entails fewer constitutional rights and privileges than is afforded to mainland citizens.\(^9\)

The objective of the United Nation's trusteeship system for territories emphasized the promotion of self-government or

---


89. After the people of Puerto Rico voted and approved the law granting a constitution, delegates were elected to draft a constitution for Puerto Rico. The United States Congress approved the draft of the Puerto Rican Constitutional Convention on the condition that there be three changes to the constitution: the deletion of a provision patterned after the United Nations' Declaration of Human Rights recognizing the right to work, obtain an adequate standard of living, and enjoy social protection in old age or sickness; the addition of a provision assuring continuance of private elementary schools; and the addition of a provision requiring that amendments to the Puerto Rican Constitution must be consistent with the United States Constitution, the Puerto Rican Federal Relations Act, and Public Law 600. ESCUELA DE ADMINISTRACIÓN PÚBLICA, LA NUE A CONSTITUCIÓN DE PUERTO RICO (1954), referenced in LEIBOWITZ, supra note 40, at 47.

90. Accord, Torruella, supra note 7.
independence.91 The 1951-1952 referenda, which omitted independence as an option,92 clearly made the elections inadequate to sustain United Nations Resolution 748, even from an entirely procedural perspective.93

The lack of United Nations observers in the elections94 and the unilateral declaration by the United States to the United Nations that Puerto Rico was self-governing,95 without the benefit of a reason-based United Nations review of criteria96 for determining whether Puerto Rico became self-governing, tainted what otherwise might have been a reasonable representation of the Puerto Rican electorate, in spite of the contrary message implied by the extensive Nationalist riots in Puerto Rico that occurred during this time.97

The United States succeeded in pronouncing Puerto Rico "self-governing" prior to the full development of the process in which the United Nations itself would have most likely declared that Puerto Rico constituted a trusteeship no different than the territories belonging to governments such as France and England.98 Therefore, the United States averted what would have been a much stricter scrutiny of the maneuver by the United Nations. The early United States action avoided the established principles within the United Nations Charter and the resolution derived standard that presumed that a declared Trusteeship would

---

91. See supra note 73 and accompanying text.
92. See supra note 72 and accompanying text.
94. Director James P. Davis of the Division of Territorial and Insular Affairs persuaded Governor Muñoz Marin not to pursue his requests for United Nations observers for the election as this would only dignify the criticism of the election by Communists. Letter from Director Davis to Governor Luis Muñoz Marin (Aug. 22, 1950), quoted in BHANA, supra note 68, at 136.
97. See supra note 63 and accompanying text.
become self-governing or independent.\textsuperscript{99} The United States’ success in obtaining the 1953 United Nations approval of the arrangement brought to a full stop any United Nations expectation of greater autonomy or independence for Puerto Rico. Congress clearly hoped that the Commonwealth arrangement would win United Nations approval, a fact suggested by the House Report:

[B]y permitting the people of Puerto Rico to formulate and by their own initiative and choice adopt a constitution, [this bill] would further implement the self-government principle established by the Congress as the cornerstone and fundamental policy governing the relationship of the United States toward territories over which it has jurisdiction.

It would, moreover, fulfill in a most exemplary fashion our obligations with respect to Puerto Rico under Chapter XI of the Charter of the United Nations, relating to the administration of non-self-governing territories . . . [E]nactment of S. 3336 would stand forth as a concrete demonstration to nations of Latin America and the world, and especially the people of Puerto Rico, that the United States translates its principles of democracy and self-determination into action.\textsuperscript{100}

The United Nations “approval” of the commonwealth arrangement consisted of a somewhat equivocal affirmation of the United States’ “home rule” arrangement with Puerto Rico. Although a majority of the General Assembly maintained that the United States could not terminate Puerto Rico’s “non-self-governing” status by the United States’ mere unilateral notice without United Nations review, twenty-two nations voted to sustain the United States’ notification as a final statement on Puerto Rico’s status. The twenty-two nation plurality prevailed against the eighteen “no” votes and the nineteen abstentions.\textsuperscript{101}

The problem that endures beyond merely a close but otherwise valid vote in the United Nations process remains because the General Assembly did not in any substantive way attempt to apply its list of criteria to Puerto Rico for determining whether or not

\textsuperscript{100} H.R. REP. no. 2275, 81st Cong., 2d Sess., pt. 2, at 2682 (1950).
self-governing status had been achieved. Thus, the lack of any developed reasoning by the United Nations made the consequent Resolution 748, affirming the United States action, a rather empty holding that greatly reduced any significance that the Resolution might carry in support of the present United States approach to Puerto Rico’s status.

In 1967, Congress again tested the political interests of the Puerto Rican people by passing a “Plebiscite Act,” that allowed a vote on the status of Puerto Rico. Unlike the 1951-1952 votes that omitted independence from the ballot, the 1967 vote allowed Puerto Ricans to vote on an independence option.

However, the 1967 vote occurred under very different circumstances. The 1967 plebiscite did not occur in the wake of Nationalist riots. Puerto Rico’s economy had advanced remarkably under the Commonwealth arrangement, and the independence movement had diminished in votes and participation in the election. Again, the majority of voters confirmed the status


104. Id.

105. Although high unemployment has always plagued Puerto Rico, the personal income of the island residents rose from $280.00 per capita in 1950 to $1,500.00 in 1970, as announced by Manuel Casiano, the Director of Puerto Rico’s Economic Development Administration. Brendan Jones, Puerto Rico: After Operation Bootstrap, N.Y. TIMES, Apr. 8, 1971, at 57. In 1995, the figure rose to $7,417.00. UNITED STATES DEP’T. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS: USDOC/BEA/REMD, Sept. 1996.

Compare this figure with the lowest per capita income state on the mainland—Mississippi. Mississippi’s per capita personal income rose from $755.00 in 1950 to $2,192.00 in 1970 and to $15,838.00 by 1994. BUREAU OF THE CENSUS, U.S. DEP’T. OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S.: 1970, at 320; 1995, at 461. See also Jon Nordheimer, Gaining Self-Reliance, A Key for Puerto Rico, N.Y. TIMES, Nov. 18, 1984, at 28. This article cites the unemployment rate in 1984 of island residents to be twenty-one percent. One third of Puerto Rico’s Gross Domestic Product is federal funds as compared to an average of eleven percent for the states. In 1984, sixty percent of the island population qualified for poverty aid. Id.

106. Department of State of Puerto Rico, supra note 103, at 5. This constituted the first plebiscite granted by Congress for a choice on three status options after lobbying by Puerto Rican leaders for an opportunity to vote on the island’s status in 1898, 1912, 1914, 1919, 1923, 1929, 1932, 1939, 1943, 1944, 1948, 1956, and 1960.
quo. Although the plebiscite represented the first and best opportunity for Puerto Rico to express its political will on its relationship with the United States, Congress had no obligation to abide by the results of the vote.\textsuperscript{107} Even though Congress may have avoided a binding plebiscite because of a remote and possibly specious concern that such a commitment would be an inappropriate or unconstitutional limitation on Congress' plenary power, the lack of a commitment to act upon the results of such a plebiscite could not help but undermine the procedural legitimacy of the plebiscite in the context of the international community.

With no change in status occurring after the 1967 plebiscite, Puerto Rico remains short of the criteria characterizing a "self-governing entity" as established in United Nations Resolution 742.\textsuperscript{108} With the apparent rejection of independence by Puerto Rican voters as an option, Puerto Rico must, at the very least, gain in equal representational status on the mainland. Accordingly, the United States Constitution must be applied to Puerto Rican residents before the guidelines for a free association consistent with United Nations standards may begin to be fulfilled.

\textit{Id.} Although the statehood and independence parties officially boycotted the election ("waive[d] their right to participate,"), sixty percent of the votes cast were in favor of the Commonwealth, thirty-nine percent for statehood and six tenths of one percent for independence. \textit{Id.} at 7. \textit{See also Puerto Rico at the United Nations}, Memorandum submitted to the Decolonization Committee of the United Nations by the Puerto Rican Independence and Socialist parties (Aug. 16, 1972). This paper estimates that thirty-seven percent of the voters joined in the boycott. The figure remains an estimate of the party with the most significant loss in the election and should be weighed accordingly. \textit{See also} Letter by Steven C. Munson, Counselor for Press and Public Affairs, U.S. Mission to the United Nations (Aug. 18, 1981) \textit{Loud and Clear Signals From Puerto Rico}, N.Y. TIMES, Aug. 26, 1981, at 22. The voters for Commonwealth were voting for an arrangement that would purportedly give more autonomy to Puerto Rico within the same Commonwealth framework; however, Congress had not committed itself to be bound by the plebiscite results and the added autonomy did not materialize. \textit{See Puerto Rico Governor Seeking Vote on Status}, N.Y. TIMES, Jan. 4, 1989, at 11.

\textit{107.} \textit{Id.}

IV. The Renewal of the Puerto Rican Status Issue Before the United Nations

The United Nations has acknowledged the continuing issue of Puerto Rico's status, reopening the question during the 1970's.\textsuperscript{109} Although the United Nations General Assembly rejected a request by Cuba to debate the Puerto Rican status question, the Committee on Decolonization agreed to hear testimony on the continuing status issue, despite strenuous lobbying against the move by the United States.\textsuperscript{110}

The United States has vigorously opposed efforts within the United Nations to have Puerto Rico declared to be a "non-self-governing territory,"\textsuperscript{111} a designation carrying the presumption of United Nations supervision of Puerto Rico's progress towards self-determination. The United States has asserted that the United Nations has no jurisdiction over the Puerto Rican status question, and that any action or resolution involving Puerto Rico constitutes inappropriate United Nations meddling in United States internal affairs.\textsuperscript{112} The issue of self-determination and the lack of an

\textsuperscript{110} Id.
\textsuperscript{111} Id. The United States implied a threat of retaliation by telling members of the Decolonization Committee that a vote backing a resolution related to Puerto Rican status would be considered an "unfriendly act." While the United States' assertion itself belied the United States' claim that Puerto Rico was "self-governing," the United States' protest becomes more understandable in the context of the Committee's initial proposal to recognize the independence party as representing the only legitimate aspirations of the Puerto Rican electorate even though the party has fared poorly in the plebiscite as well as local elections. Paul Hoffman, U.N. Action Asked on Puerto Rico, N.Y. TIMES, Aug. 16, 1975, at 22; Paul Hoffman, U.S. Wins a U.N. Victory on Puerto Rico, N.Y. TIMES, Aug. 21, 1975, at 1; U.S. Gets Tough and U.N. Victory, N.Y. TIMES, Aug. 24, 1975, at 2; Tom Wicker, An American Colony?, N.Y. TIMES, Aug. 14, 1981, at 23. The United States position presented by the Deputy United States delegate was that the United Nations General Assembly "clearly recognized that the people of Puerto Rico had exercised their right to self-determination" and took Puerto Rico off the list of "non-self-governing territories." The United States has consistently set forth the position that any move to require the United States to submit a yearly report on Puerto Rico is "interference in United States internal affairs." U.N. Committee Debates Puerto Rico's Status, N.Y. TIMES, Aug. 18, 1981, at 5.
\textsuperscript{112} The United States first asserted this position with regard to Puerto Rico and the United Nations prior to Puerto Rico's 1951-1952 votes for "home rule" when a United Nations delegate urged that the United Nations probe the circumstances surrounding the revolt by Puerto Rican Nationalists. Island Rebels Ask U.N. to Investigate, N.Y. TIMES, Nov. 3, 1950, at 21. France likewise protested the United Nations interference in France's "internal affairs" in interestingly similar circumstances. Schuman Cautions U.N. on Tunisia: French...
agreement with the United States' position among United Nations members on whether Puerto Rico is "self-governing," however, may alone be sufficient to invoke United Nations jurisdiction to assist in resolving the Puerto Rican status question.\footnote{113}

As a result of the testimony, the Committee voted to keep the Puerto Rican question under continuous review, thereby implying that Puerto Rico's government had been categorized as non-self-governing or colonial.\footnote{114} The United States Ambassador John A. Group Will Boycott Debate, \textit{N.Y. TIMES}, Nov. 11, 1952, at 1. The French Assembly voted to grant its North African colonies "autonomy" but not independence. \cite{Ginger} French Chief Wins on African Policy, \textit{N.Y. TIMES}, Dec. 11, 1954, at 1. The colonies voted substantially in favor of this limited autonomy prior to the outbreak of guerrilla warfare that ultimately resulted in independence some years later for, in particular, Algeria and Tunisia. United Nations members sought to probe the colonial relationship and the internal outbreaks of violence. France consistently asserted that the United Nations was interfering in its internal affairs; however, France did not have a dubious United Nations affirmation of its colonial relationship with Algeria and Tunisia (such as the United States has with the United Nations Resolution No. 748 for Puerto Rico) declaring France's colonies to be self-governing. In the Tunisian situation, however, it was the United States that advocated the United Nations' involvement and inquiry into the French-Tunisian status question much to the shock and dismay of the French government. Thomas J. Hamilton, \textit{U.N. Korean Issue Put First on List of Chief Tribunal: French Items to be Next}, \textit{N.Y. TIMES}, Oct. 23, 1952, at 1. Although voter disenfranchisement should be studied further in Puerto Rico's case, the disenfranchisement of Tunisians and Algerians appeared to have existed in far greater proportions than Puerto Rico may have ever experienced. This disenfranchisement in the North African colonies exacerbated the French situation considerably and consequently does not make for an analogous situation as to a similar future for any independence movement in Puerto Rico.

In the interest of consistency with the 1953 United States declaration that Puerto Rico was "self-governing," the United States might better assert that the United Nations would be interfering in "Puerto Rico's" internal affairs rather than the "United States" internal affairs. The contradiction is augmented by the United States' claim that Puerto Rico is "internal United States" yet in no uncertain terms the United States also declares to Puerto Rico through Congress and the Courts that Puerto Rico is "unincorporated" into the United States. The juxtaposition of these three variant assertions—self-governing, internal United States, but unincorporated into United States' territory—is less than illuminating on the actual status of Puerto Rico.

\footnote{113} See The Permanent Court in the Nationality Decrees in Tunisia and Morocco 1923 P.C.I.J., (Ser.B), No. 4; the Aaland Island Case, 1923 L.N.O.J., No. 3 (October 20) ("A matter is removed from the domain of domestic jurisdiction when it becomes the subject of agreement with other states. Matters dealt with in the Charter include non-self-governing territories, fundamental human rights, and self-determination, all of which . . . are removed from the exclusive preserve of domestic jurisdiction").

\footnote{114} See 1978 U.N.Y.B. 820-23, U.N. Sales No. E.80.I.1. The primary jurisdiction of the General Assembly's Special Committee on the Situation with regard to Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples is to review issues related to "colonial" countries.
Scali correctly observed that the Committee's decision contradicted the United Nation's 1953 General Assembly determination to drop Puerto Rico from the list of non-self-governing territories.\textsuperscript{115}

Cuba and other supporters of the reopening of the Puerto Rican status question initially demanded independence as the only legitimate option for Puerto Rico's self-determination, but the Cuban position later softened to a view that would allow a commonwealth arrangement (but not statehood) as a suitable option.\textsuperscript{116} Cuba's shift may have been influenced by the large majority of the Puerto Rican electorate's continued votes in favor of some form of continued association with the United States.\textsuperscript{117}

V. Determining Puerto Rico's International Legal Status as a Starting Point for Discussing a Resolution

The historical evolution of the relationship between the United States and Puerto Rico should suffice to demonstrate that Puerto Rico cannot fairly be classified as "self-governing." It has not been sufficient, however, as exemplified by the acrimonious debate within Puerto Rico and by the statements made in the United Nations by the United States protesting that Puerto Rico is self-governing. The debate over whether Puerto Rico is self-governing becomes particularly puzzling in view of Congress' unequivocal statements\textsuperscript{118} regarding its intention in designing and granting the commonwealth arrangement to Puerto Rico. To simply state that Puerto Rico constitutes an "unincorporated territory" and to develop a non-binding plebiscite on its status is insufficient by itself, without official recognition that there has been no significant change in the power relationship between Puerto Rico and the United States since Spain possessed Puerto Rico.

\begin{flushright}
\end{flushright}
Many legal writers may prefer to approach a discussion of Puerto Rico's status with the exclusive use of the term "unincorporated territory" or simply "territory." One might speculate that use of the term "colony," in the context of present international norms, carries a pejorative and highly emotional connotation. Although a great deal of literature will use the term "colony" as an assumed term, very little literature exists that analyzes the specifics of whether the relationship is colonial in practice.

In the context of the United Nations structure and its Committee on Decolonization, however, the term territory or colony remains a concept of international use, significance, and custom. From an international perspective, the question of whether or not Puerto Rico is a "colony" must be addressed in order for Congress and the leaders of Puerto Rico to fully recognize that basic changes must occur in order to resolve the status question. Creative advocacy claiming that the United States-Puerto Rico relationship is anything but colonial in nature is an exercise in denial that postpones needed confrontation of the issue by everyone concerned.

There is very little or no debate that Spain possessed Puerto Rico as a colony. Spain controlled the relationship in a power arrangement characteristic of other contemporary world powers such as England or France. Puerto Ricans were subjected to the Spanish monarchy and governed by the Spanish Civil Code. Although short-lived, Puerto Rico as a Spanish colony exercised, in some ways, greater control over its relationship with Spain, through

---

121. See generally, supra note 47.
122. The United Nations declaration that the 1990's be the International Decade for the Eradication of Colonialism is but one example of the United Nation's use of the term "colony" in its daily business, including resolutions and related reports. See, e.g., 1988 U.N.Y.B. 719, U.N. Sales No. E. 93.I.100.
voting representatives in the Spanish Parliament\textsuperscript{124} and in its ability to propose commercial agreements, \textsuperscript{125} than Puerto Rico has ever achieved in the nearly one hundred years since becoming a United States possession. Spain proudly claimed that Puerto Rico's voting representation in the Parliament (Cortes) was the envy and unachieved objective of the rest of the world, where representation is "a privilege solicited . . . by the autonomous English colonies, which desire to share . . . in the high functions of legislators and rulers of the great British Empire."\textsuperscript{126}

Puerto Rico, as it does now, had a local assembly.\textsuperscript{127} However, Spain continued to appoint Puerto Rico's governor.\textsuperscript{128} Moreover, in Spain's grant of Puerto Rico's "Constitution Establishing Self-Government,"\textsuperscript{129} the 1897 Royal Decree clearly stated, "in no degree is the authority of the central power [of the King or the Governor-General, as representative of the King] diminished."\textsuperscript{130}

Likewise, there is little or no debate that when the United States acquired Puerto Rico, the island's relationship with the United States was essentially a colonial one. The United States clearly administered the island as a colony from 1898 through 1948 and the administration of Governor Rexford G. Tugwell, when President Franklin D. Roosevelt appointed the last non-elected (full term) governor for Puerto Rico.\textsuperscript{131} The United States closely controlled the relationship and all of the significant political appointments within the government of Puerto Rico from the perspective of the mainland.\textsuperscript{132}

The question that began and continues to plague the debate on Puerto Rico's status developed in 1948 when the United States Congress granted Puerto Rico permission to elect its own governor

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{124} \textit{Id.}, Title I, art. 2.; \textit{Accord LEIBOWITZ, supra} note 40, at 38-39.
\item \textsuperscript{125} \textit{Constitution Establishing Self-Government in the Islands of Cuba and Porto Rico}, Title VI, art. 37, Title IX, art. 3, \textit{supra}, note 123, at 17.
\item \textsuperscript{126} \textit{Id.}, preamble, at 7.
\item \textsuperscript{127} \textit{Id.}, Title I, art. 2, at 11.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} See \textit{supra} note 123.
\item \textsuperscript{130} \textit{Id.}, preamble, at 5.
\item \textsuperscript{131} See \textit{supra} note 67 (concerning President Truman's actions which represented a break in the pattern of the first 50 years of appointments by United States Presidents).
\item \textsuperscript{132} See \textit{supra} note 67.
\end{enumerate}
\end{footnotesize}
and appoint more Puerto Ricans to offices, and subsequently created the "commonwealth" concept.133

The colonial arrangement with Spain did not allow for an elected governor.134 Where Spain had "decreed" a Constitution for "Self-Government," the United States Congress allowed Puerto Rico to vote on its constitution even though Congress ultimately amended the Puerto Rican draft.135 The final draft that Congress authorized and which the island residents approved essentially permitted "home rule" and the local administration that had already begun to some extent with the election of Luis Muñoz Marin in 1948, prior to the United States grant of the local constitution. Did the commonwealth arrangement allowing for "home rule" extinguish Puerto Rico's colonial relationship to the mainland United States? If so, did congressional intent alone set colonialism aside? Did this meet the international standards set by the United Nations?

Stated in no uncertain terms, the House of Representatives' report adopted by the Senate characterized the impact of the Commonwealth arrangement on the relationship of Puerto Rico with the mainland by reporting:

It is important that the nature and general scope of S. 3336 be made absolutely clear. The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States. Those sections of the Organic Act pertaining to the political, social, and economic relationship of the United States and Puerto Rico concerning such matters as the applicability of U.S. laws, customs, internal revenue, Federal Judicial jurisdiction in Puerto Rico, Puerto Rican representation by a Resident Commissioner, etc. would remain in force and effect and upon enactment of S. 3336 would be referred to as the Puerto Rican Federal Relations Act which section 5 of the bill would repeal are the provisions of the Act concerned primarily with the organization of the local executive, legislative, and judicial branches of the government of Puerto Rico and other matters of purely local concern . . . . This bill does not commit the Congress, either expressly or by implication, to enactment of statehood legislation for Puerto Rico.

135. See LEIBOWITZ, supra note 40, at 47.
...nor preclude a future determination... of Puerto Rico's ultimate political status...

...Puerto Rico is "unincorporated territory." The Constitution has never been extended to Puerto Rico. Puerto Rico does not, therefore have the claim of statehood which the mainland territories in Alaska and Hawaii have.\textsuperscript{136}

The congressional report stating that the commonwealth arrangement did not change the island's relationship with the mainland confirmed that if the relationship had been colonial with Spain and continued to be colonial at the time that Congress gave Puerto Rico a new constitution, then the relationship remains colonial to this day.\textsuperscript{137} Voting on a constitution merely brought Puerto Rico back some degree of what the island had attained under Spain with its "Constitution Establishing Self-Government" but had lost with the beginning of the United States occupation in 1898. Accordingly, the actual practice of the United States relationship with Puerto Rico after the vote for a constitution and "home rule" conclusively demonstrates that the Commonwealth arrangement in no way altered the plenary power of Congress to determine what occurred in the United States territory of Puerto Rico.

In spite of the clear congressional language, advocates continue to urge that the relationship at one time constituted a "compact" characterized by mutual consent and reciprocity with an equal say by Puerto Rico.\textsuperscript{138} At the very least, the commonwealth advocates believe that the relationship represents a voluntary \textit{quid pro quo}, where any deprivation of political autonomy is compensated by the economic benefits of the commonwealth arrangement and the exception of Puerto Rico to many tax laws.\textsuperscript{139}

The impact of United States political actions belie any substance to the compact theory. Congress unilaterally acted in the


\textsuperscript{137} \textit{See} Letter from Thomas Kleppe, United States Secretary of the Interior to the Committee on Interior and Insular Affairs, House of Representatives (Jan. 20, 1976) ("Congress could not and did not abdicate its Constitutional authority and Puerto Rico remains a territory of the United States in a new form of political relationship—not as an independent state—but linked to a broader political system in a Federal association without an independent separate existence").

\textsuperscript{138} \textit{See} Del Valle, \textit{ supra } note 7, at 405-406. \textit{See also} comments of (former) Resident Commissioner Jaime Fúster, \textit{Gaining Self-Reliance, A Key for Puerto Rico}, N.Y. TIMES, Nov. 18, 1984, at 28. ("many have lost sight of the fact that it is a partnership of reciprocity").

\textsuperscript{139} \textit{Id.}
1980's, cutting food stamp allocations by twenty-five percent in a manner not applied to the states, eliminating C.E.T.A. jobs having a greater impact on Puerto Rico than on the states and freezing over thirteen million dollars in loans to Puerto Rican firms. While these steps constituted legal and appropriate actions, there is little evidence of any consultation with Puerto Rico.

On another level, the State Department overruled efforts by the Governor of Puerto Rico to arrange tax-exempt investments by Japan in Puerto Rico. As an affirmation of Congress' retention of legislative authority over Puerto Rico, the United States Department of Justice has previously testified that federal law clearly pre-empts local (Puerto Rican) law. For that reason, the United States would not agree that a new enhanced Commonwealth of Puerto Rico could ever certify that a federal law or regulation would be inapplicable to Puerto Rico. Nor has the United States ever agreed to allow a recognition of even a semblance of Puerto Rican sovereignty in the past.

Although this premise has yet to be agreed on by the leaders that will be key to the status resolution process, clearly the international legal status of Puerto Rico falls short of "self-governing" status. And, as sub-entities of the United States, the United States citizens of Puerto Rico fall short of having the full rights and benefits of the United States Constitution.

VI. Toward a Framework for Action

With repeated votes in favor of internal political parties that currently campaign for some form of continued association with the United States, Puerto Rico's close relationship with the mainland will probably continue after the next plebiscite, should Congress agree to allow one. While the past referenda have been generally accepted as expressions of the free political will of island Puerto Ricans, Congress can learn from prior referenda and use the next plebiscite as an opportunity to defuse criticism of past procedures. Congress can design a plebiscite that will withstand international scrutiny of the Puerto Rican status question.

143. Id.
A plebiscite in Puerto Rico must be designed and administered with a focus on the standards of self-government that constitute the basic tenets of the United Nations Charter, its Covenants, and its principles of international law. It is in the United States' best interests to seek out and utilize the resources of the United Nations. Although the primary objective of a plebiscite may be to officially gauge the will and desires of the residents of Puerto Rico, Congress must equally concern itself with attaining a high degree of legitimacy for the plebiscite, so that any momentum generated by the referendum may sustain subsequent changes in the United States-Puerto Rican relationship. The greater the plebiscite’s legitimacy with the residents of Puerto Rico, the greater assurance of the continued participation of the post-election factions that may be disappointed in what could be a very close vote.

There are two major problems with the current relationship between Puerto Rico and the mainland of the United States that a plebiscite alone will not remedy. First, United States citizens of Puerto Rico do not have the full benefit of the United States Constitution or the standard privileges expected of United States citizenship. Second, Puerto Rico’s legal-political status has not substantively shifted in the direction of self-government and, in some respects, its status has worsened since Puerto Rico was a Spanish colony.

The United States must examine the premises of its own position on Puerto Rico’s status. There can be no question that Justice Fuller’s dissent in Downes and Justice Harlan’s concurring opinion in Rassmussen are the correct legal views. Under no circumstances can a treaty supersede the Constitution.

Since the assertion that the Treaty of Paris did supersede the

---

144. Downes, 182 U.S. at 370 (Fuller, J., dissenting).
145. Rassmussen, 197 U.S. at 516.
146. Kinsella v. United States ex. rel. Singleton, 361 U.S. 234, 248 (1960); Reid v. Covert, 354 U.S. 1, 16-17 (1957). Once the false premise that a treaty can supersede the United States Constitution has been properly discredited, the court might then apply an equal protection analysis to the rights of United States citizens of Puerto Rico, even though there is no equal protection clause that restrains the actions of the federal government. The equal protection clause of the Fourteenth Amendment by its own terms applies to state and local government: "No state shall . . . deny to any person within its jurisdiction the equal protection of its laws." U.S. CONST. amend. XIV, § 1. However, if the federal government classifies individuals in a way which would violate the equal protection clause, it will be held to contravene the due process clause of the Fifth Amendment. See, e.g., Bolling v. Sharpe, 347 U.S. 497 (1954); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). See analysis in John E. Nowak and Ronald D. Rotunda, CONSTITUTIONAL LAW § 14.1, at 595, 596 (5th ed. 1995).
Constitution in the case of Puerto Rico is the Supreme Court's primary foundation for denying a full application of the Constitution to the residents of Puerto Rico, then the entire basis and theory of the Puerto Rican economic relationship with the United States represents a legal and political anomaly that must fail under the most superficial scrutiny upon reconsideration by the Supreme Court. Although the Court has clearly applied the principle of the supremacy of the United States Constitution over treaties in other cases, the Supreme Court has not yet applied this basic and fundamental doctrine to Puerto Rico. The Supreme Court has in fact refused to imply such an application where such dominant and persuasive factors include the incorporation of Puerto Rico into the Federal judicial system and the grant of United States citizenship to Puerto Ricans. This disparity in rights and privileges compared to those of citizens on the mainland results in a subclass of citizenship by both United States and international standards.

Puerto Rico has prospered economically since 1952. Regardless of the economic benefits that have developed, or of how benign the colonial arrangement may have been, Congress must assert a responsible role in correcting the situation that lends neither the full benefits nor responsibilities of the United States Constitution to 3.8 million United States citizens. Since the Supreme Court has made it clear that Congress must make an express act in order for the benefits of the United States Constitution to apply to Puerto Rico, then Congress must fulfill the responsibility through its role as "guardian" and make the United States Constitution apply to the residents of Puerto Rico by "incorporating" Puerto Rico as a territory or simply by acknowledging that the concept of "unincorporated territory" is unconstitutional. Congress, on its own terms and to the exclusion of the expressed desires of the Puerto Rican leaders, imposed United States citizenship in the 1917 Jones Act. Now, Congress should not postpone the natural fulfillment of the privileges of citizenship by feigning concern that a full application of the United States Constitution would be a forced imposition against the will of the residents of Puerto Rico.

147. Id.
149. See supra note 105 and accompanying text.
150. Downes has not been overruled even though the Supreme Court could choose to do so should an appropriate case reach the level of the Supreme Court.
The current status of an expressly intentional plenary control by Congress neither directs Puerto Rico toward statehood nor toward greater self-government or even independence, but freezes and maintains the status in a manner that does not match the ideal of international standards. If Congress will act to correct the citizenship gap by granting the benefits of constitutional rights as well as imposing the responsibilities of taxation,\textsuperscript{151} whether or not the island residents can agree upon the best status for Puerto Rico, then the residents of Puerto Rico will by necessity take on the responsibility of choosing their status. Among the several alternatives: the incorporation that might lead to statehood; free association in line with the criteria of United Nations Resolution 742; or independence.

The extension of the Constitution to Puerto Rico would not necessarily condemn Puerto Rico to statehood, even though the extension would create a presumption that could ultimately lead to that result. The residents of Puerto Rico could still reject this presumption in favor of a free association since Congress may have, for practical purposes, precluded independence as an option by granting United States citizenship to the residents of Puerto Rico in 1917.

Residents might easily accept the full application of the Bill of Rights; full federal taxation, however, would be the most unpopular aspect of extending the United States Constitution to Puerto Rico. Taxation would be more than warranted where the non-taxation concept that brought Puerto Rico's economic development rests upon an incorrect and mistaken theory that the Treaty of Paris superseded the United States Constitution. By extending the United States Constitution to Puerto Rico, where residents are quite aware of the principle of "no taxation without representation," a drive for voting representation would more than likely follow. This again would not set an inevitable course for statehood. Nevertheless, the resulting representation for Puerto Rico on the mainland would be a necessary condition, per United Nations

\textsuperscript{151} In 1996, Congress may have taken the first step in this direction by quietly killing a set of special tax breaks for United States companies operating in Puerto Rico, ending seventy-five years of Federal incentives that have been the chief lure of the island for American industry. The tax advantages fell victim to budget-balancing pressures and criticism that they were a form of "corporate welfare." President Clinton signed these changes into law as part of the legislation raising the nation's minimum wage. Doreen A. Hemlock, \textit{Puerto Rico Loses Its Edge}, N.Y. TIMES, Sept. 21, 1996, at 31. Cutting incentives will not occur without some inevitable social costs in any transition.
Resolution 742, for achieving a free association or a true common-
wealth.

At best, a great deal of current intransigence by Congress\textsuperscript{152} may stem from its perception that there is no well-defined emergent majority or consensus on a model political arrangement for Puerto Rican status. This void may have signaled to Congress that the time has not arrived to make a change. Congress has not interpreted the consensus that consists solely of dissatisfaction with Puerto Rico's status among island leaders to be a persuasive basis for action. Although Congress may be the dominant partner in this match, the ultimate responsibility for overriding Congressional inertia must lie in the persistence and creative political pressure from the residents of Puerto Rico and its leaders.

Puerto Rico has shown itself willing to take the initiative.\textsuperscript{153} In prior efforts for a plebiscite, the island political parties united to negotiate and lobby Congress for a chance to make a difference in the present status.\textsuperscript{154} Even the Governor who represented the party advocating commonwealth status publicly called for a plebiscite and a change toward a stronger legal and political status.\textsuperscript{155}

The votes by Puerto Rico in the early 1950's did not remedy the second class nature of Puerto Rico's citizenship without full constitutional rights. Nor did the favorable vote justify the continued colonial status where Congress had the legal equivalent of a fiduciary or guardian role that should have included the responsibility of giving Puerto Rico a political status that met minimal United States and international standards. In effect, in 1951-1952, the residents of Puerto Rico voted in favor of the most autonomous option that Congress had allowed the island to vote on since the United States had taken over the administration of Puerto Rico from Spain. Congress had excluded independence and statehood as options on the ballot. Those in favor of the independence option, not offered by the United States, voted in the streets through demonstrations and riots.\textsuperscript{156} In consideration of the circumstances as a whole, Congress' duty to correct the procedural

\textsuperscript{152} See supra note 14.
\textsuperscript{156} See supra note 70 and accompanying text.
and substantive inadequacies of the 1951-1952 votes and other elections must outweigh any reluctance to act due to the perceived lack of an emergent majority and the existence of the strongly felt divisions within the Puerto Rican electorate. More importantly, the stagnation of the Puerto Rican status in the context of the unanimous dissatisfaction among the parties in Puerto Rico and the internationally supported value of self-determination for its own sake make it imperative that Congress design a plebiscite and then administer it in a manner that leaves no doubt about the integrity of the process.

VI. Recommendations

Finally, this article concludes with several recommendations. First, any plebiscite must be based on a complete, detailed, and understandable delineation of the pertinent status options and what the United States is willing to offer for each alternative in benefits for citizens, or in the amount of aid and tariff arrangements for an independent state. Therefore, each political status option must be on the ballot. Second, Congress (in its "guardian-fiduciary" role) must ensure sufficient notice of the plebiscite to the Puerto Rican electorate. Ideally, Congress should fund a substantial educational effort to make the public aware of the costs and benefits of each option.

Third, Congress must pledge to abide by the results of the plebiscite. If Congress cannot legally do so because of a perceived erosion of plenary power, then Congress must take a public and moral stance and honor that commitment. Fourth, Congress must define the plebiscite according to criteria set forth in United Nations Resolution 742 for self-governing territories and look to the United Nation's procedures to supplement its own. As a fifth recommendation, Congress should voluntarily request United Nations observers and utilize the United States' own protective procedures to ensure the integrity of a process in which the results may be very close and not result in a majority. These protections are particularly vital in a context in which past elections between candidates representing Statehood and Commonwealth positions have been extremely close and included allegations of fraud.  

Finally, Congress should consult all interested parties within Puerto Rico in an effort to develop a plebiscite that will be legitimized by the breadth and depth of island participation. This will help to bolster the plebiscite’s legitimacy with the international community, and efforts must be extended to include or coopt the sometimes violent independence faction.158

The United States can voluntarily utilize the United Nations mechanism without conceding any past United States political positions portraying Puerto Rican status as United States “internal affairs,” just as President Jimmy Carter’s acceptance of Daniel Ortega’s invitation to head an observer group in the Nicaraguan elections did not constitute “interference” in Nicaraguan internal affairs.159

If the United States voluntarily accepts the United Nation’s role, there is no guarantee that international criticism will diminish. However, if the United States does make a good-faith effort to correct the procedural inadequacies of the past, there is a much greater probability that the results of a referendum would be accepted by the residents of Puerto Rico as well as by the international community.

On the other hand, there are risks if the United States does not take the aforementioned steps, particularly at a time where this country is applauding the maturation of Eastern Europe and the movement of the former Soviet Republics towards self-government and self-determination. Among these risks is the possibility that any binding plebiscite in the future will continue to fuel local and international debate about the “actual” status of Puerto Rico. After the expense and effort of a renewed plebiscite, any continued debate will unnecessarily squander the resources of the United States, Puerto Rico, and the United Nations. However, with very little more time and expense, the United States can take more careful corrective action.


There need not be a presumption that past votes on the status of Puerto Rico did not represent the actual will of the residents of Puerto Rico at that time. Nor need there be any implication that a plebiscite administered by international precepts, standards and framework will currently result in a choice other than a commonwealth or a continued colonial status. The fact remains that imperfections did occur in past attempts to resolve the status of Puerto Rico, and these blemishes continue to define and characterize Puerto Rico's relationship with the United States and its relationship with the international community. With the current rejection of the status quo by Puerto Rican leaders, Congress can no longer table the issue in the belief that residents themselves will not press their demands or take creative measures to develop self-government with or without Congress' full cooperation.160

Congress has taken some responsibility for its legal position. Senator J. Bennett Johnston rejected outright the "compact" idea and "dual sovereignty" as being a contradiction in terms.161 Senator Johnston dismissed with few words a theory and hope that has been carried preciously for years by many island leaders since Governor Luis Muñoz Marin.

Congress, however, must also seriously scrutinize its own contradictions in (correctly) calling Puerto Rico an entity subject to its plenary power but yet also claiming that Puerto Rico is a "self-governing territory." Congress must assume a greater role in seeking a resolution of these contradictions that will be both constitutional and internationally legitimate. Congress should proceed on a keen and careful course of action in line with the standards and framework of the procedures available through the United States Constitution as applied to "incorporated territories." Therefore, Congress should avail itself of the procedures contained within the United States' voting statutes, and by voluntarily utilizing the resources and processes the United States itself helped establish within the United Nations.

Congress must also seriously scrutinize the historically evolved assumptions that underlie the continued non-representation and non-taxation of island residents and determine their present merit, if any. For Congress to do less is to allow indecision to continue

160. See Alan Wiseman, An Island in Limbo, N.Y. TIMES, Feb. 18, 1990, at 28, on the proposal by a Puerto Rican leader to use the "Tennessee plan" as a precedent to go ahead and elect representatives and senators from Puerto Rico and send them to Congress whether Congress extends its approval or not.

161. Id.
as an accepted status quo, to continue this substantial blemish on
United States' democratic ideals, to perpetuate the second class
citizenship of island residents, and to exacerbate Puerto Rico's
crisis in political identity. Then, just as Puerto Rico has advanced
economically, perhaps Puerto Rico can advance politically to a
power that at least equals what it achieved as a colony under Spain.