Foreign in a Domestic Sense

Puerto Rico, American Expansion, and the Constitution

Edited by

Christina Duffy Burnett

and Burke Marshall

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To my late grandfather, Francisco Ponsa Feliú
C. D. B.

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Preface

Para ser digno y libre, ¿a quién esperas?
Lo serás, si es que quieres, cuando quieras.
—Luis Muñoz Rivera, "A Cualquier Compatriota" (1887)

As this book was nearing completion, the debate over the future of the island of Puerto Rico, one of five U.S. territories, took a puzzling turn. Suddenly, we learned (from political leaders on the island and in Congress) that it was, perhaps, "too soon" to resolve the problem of Puerto Rico's colonial status. Although the island had been a colony for half a millennium—and an American colony since the end of the nineteenth century—now, on the verge of the twenty-first, it seemed untimely, to some, for the island's colonial existence to come to an end. The reason? Puerto Rico's electorate had recently participated in a "status plebiscite" (a nonbinding referendum offering several status options), and a slight majority had cast a befuddling vote: "none of the above." This inscrutable result suggested to many that the issue of Puerto Rico's colonial status was best left untouched. A friend to whom I tried to explain the plebiscite laughed when I told her of the winning non-option. "Isn't that a vote for the status quo?" she asked. And I, unable myself to believe it (or perhaps to accept it), responded that the issue was more complicated than it seemed. I hoped.

Puerto Rican patriot Luis Muñoz Rivera would, if he were here, shake his head in wonder. "To have dignity and to be free," he wrote of his people in 1887, "for whom are you waiting? You will be so, if that is what you want, whenever you want it." That was over one hundred years ago, and the status quo at the time was four centuries of Spanish colonial rule. Over the course of the last of those centuries, Puerto Rico had gained and lost varying degrees of local self-government and representation in the Spanish Parliament innumerable times, as the island's fate had fallen victim to Spain's

tempestuous domestic politics and the disintegration of her overseas empire. Muñoz Rivera had (understandably) grown impatient, and that was still more than a decade before U.S. troops landed on the shores of the southern Puerto Rican town of Guánica, on the 25th of July 1898. Their arrival effected a transition, in the words of one scholar, "from Spanish Colony to American Possession." General Nelson A. Miles professed, on behalf of the people of the United States, to come "bearing the banner of freedom," but the dawn of the twentieth century, like the dawn of the twenty-first, was apparently too soon for this freedom to be fully bestowed upon the people of Puerto Rico.

That Muñoz Rivera had grown impatient with his own people suggests that perhaps something more complicated was afoot than the mere imposition from above of an imperialist government against the will of the people. The people, his words seem to tell us, were in some sense complicitous in their own colonization. The same is said today, though not always with the same tinge of frustration that is evident in Muñoz Rivera's poetic chiding. Puerto Rico is a colony, it is conceded, but this, for now, is the "will of the people," expressed by them in the exercise of their inalienable right to self-determination. This consent, it is argued, renders the colonial reality more complicated (not as easy to denounce, in other words) than it would be if the United States were still simply imposing an imperialist government from above, against the popular will.

Without a doubt, it is complicated. But "more" so? When was imperialism simple? Is there really a simple distinction between the imposition from above of an unwanted colonial regime and the inability of the colonial subjects to agree on a path toward decolonization? Can the lingering divisions among colonized people ever be fully separated from the inherent divisiveness of a regime imposed from above? Are these not at some point mutually constitutive? One might say, looking at the result of the 1998 plebiscite, that the people of Puerto Rico exercised their inalienable right to self-determination, and a majority of them—fully 50.3 percent, to be exact—chose to remain a colony. One might also say, however, that the oldest strategy for governing recalcitrant subjects—divide and conquer—was subtly at work.

A long-overdue and commendable reluctance on the part of the United States to impose an unwanted solution upon Puerto Rico's colonial problem has become indistinguishable from a less commendable willingness to do nothing at all about the problem, now well cloaked in the unimpeachable rhetoric of noninterference with the principles of "self-determination"

and the "will of the people." This inaction rests on flawed premises: that Puerto Rico's status problem is somehow untouched by the actions and inactions of the people of the United States and their government; that this problem has no real consequences for them.

This book is inspired by a desire to impeach this unimpeachable rhetoric, to expose these flawed premises. Respecting the right of self-determination is not the same as doing nothing (or, as is more common when it comes to the United States's relationship with its territories, knowing nothing). Rather than fostering self-determination, doing nothing further divides the nearly four million United States citizens—yes, United States citizens—who live in Puerto Rico, thereby ensuring that this island remains a colony. And a situation in which four million U.S. citizens are colonial subjects does not just *have* consequences for this nation—it *is* the dire consequence of the United States's unfinished flirtation with imperialism.

When Spain ceded Puerto Rico, Guam, and the Philippines to the United States in 1898, the question of their status—one headline called it "the question of the hour"—galvanized the nation; its leading legal scholars represented just one among numerous groups who readily engaged in the urgent debate over the future of these new "possessions." The people of the possessions themselves were conspicuously absent from this debate. Today, the reverse is true. Now it is the people of the metropolis whose voices are conspicuously absent from a debate that consumes political life in the remaining colonies. Yet voices from the mainland are desperately needed. The impasse in the debate over the status of the U.S. territories is due largely to their peoples' fear and uncertainty over how, precisely, the mainland would respond to change. A principal aim of this book is thus to lure American legal scholars back to the unresolved problem of territorial status in the United States, reminding them (and asking them to remind others) that the "question of the hour" is now the question of a century, and none the less urgent for it.

The essays collected in this volume reflect the belief that a rigorous scholarly examination of the United States's complicated colonial problem has a crucial role to play in its resolution. The book focuses heavily on constitutional analysis because U.S. constitutional jurisprudence—most notably the *Insular Cases* of 1901—is the source of the colonial status in which the territories are still trapped. Such an examination requires careful and constructive dialogue, inclusive of participants from the territory and the mainland, and respectful of all points of view. We have tried hard to achieve that here. It also requires faith—faith that the people of Puerto Rico

do want dignity, equality, and an end to their colonial dilemma. I have no doubt that they do, although I suspect that there are many Puerto Ricans (I among them) who, like Muñoz Rivera, have often been puzzled by the majority's apparent choices. But it is crucial to remember—as the essays in this book remind us—that the people of Puerto Rico are not the only ones confronted with a decision, though they, at least, are aware of it.

The people of the United States, though most are *not* aware of it, confront a decision as well. They continue to be complicitous in a vestigial colonialism. The "anti-imperialists" of the turn of the century, after all, warned of consequences we live with today: The United States continues to exercise sovereignty over people (now its own citizens) denied equal membership in the Union; the colonial system that many warned would betray the nation's commitments to freedom and equality endures. (In the words of one Supreme Court Justice at the time, this would create an "utterly revolting" situation.) And because apathy and ignorance will not make the situation disappear, our contributors ask once more: What kind of a nation are we? What kind of a nation ought we to be? This collection of essays is inspired by the hope that in another hundred years, on the bicentenary of the Spanish-American War, someone will pick up this book and look back, to a time long ago, when we reexamined the living legacy of an imperialist past and the anti-imperialists finally had their day.

This project grew out of a conference I organized at Yale Law School marking the centenary of the Spanish-American War, entitled "Foreign in a Domestic Sense: Reflections on the Centenary of the United States' Acquisition of Puerto Rico," which took place on March 27–29, 1998. Twelve of the seventeen essays in this book are revised and expanded versions of presentations given at that conference. (The essays added subsequently include the Introduction and the chapters by Mark S. Weiner, Brook Thomas, Juan Perea, and Rogers M. Smith.) I express my heartfelt gratitude to the many individuals and institutions who made that event possible, among them: co-sponsors Dean Anthony T. Kronman of Yale Law School and Dean Antonio García Padilla of the University of Puerto Rico School of Law; Yale Law School Dean of Students Natalia Martín and her assistant Brooke Goolsby; Judge José A. Cabranes of the Court of Appeals for the Second Circuit; my classmate and co-organizer Damon J. Hemmerdinger; moderators Rogers M. Smith, Burke Marshall, Judith Resnik, Akhil Reed Amar, and Owen Fiss; and Raymond Craib and my husband, D. Graham Burnett, curators of *Insular Visions 1898,* an exhibit on the Spanish-American War at Yale's Sterling Memorial Library that opened the conference. Dean Kron-

man saw the project through from beginning to end, dedicating to it an extraordinary amount of time, energy, and resources; he also secured additional financial support from the law school that enabled me to devote several months after graduation to editing this volume. Judge Cabranes, with his keen sense of good mentorship, provided essential guidance throughout, generously sharing his wisdom on all matters Puerto Rican. Others, too many to name here, contributed their time and efforts, and I am deeply grateful to them all.

I am indebted to the contributors to this book, both those who participated in the conference and expanded their presentations into essays for publication and those whose pieces we were fortunate to add subsequent to the conference to round out the historical component of the book. I am especially grateful to Sanford Levinson, whose continued work on the topic of territories and American expansion includes revisions to the latest edition of his constitutional law casebook, *Processes of Constitutional Decisionmaking* (with Akhil Reed Amar, Jack Balkin, and Paul Brest), for the inclusion of material on the *Insular Cases*. Herbert W. Brown III gave this project support and encouragement from the beginning, as did series editor Gil Joseph. My sister Nicole provided invaluable research assistance, and my sister Adriana kept me honest with her invariably tough questions. To Valerie Millholland and Pam Morrison at Duke University Press, and to Chris Mooney, who applied his considerable talents to preparing the index, I am thankful for their infinite patience and hard work.

My coeditor, Burke Marshall, is a role model and an inspiration. To my parents, Edda Ponsa Duffy and Lawrence E. Duffy, I owe more than I can repay. And to my husband, Graham, thank you. *A nadie te pareces. . . .*

C. D. B.

Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented

Christina Duffy Burnett and Burke Marshall

The phrase that entitles this book, and which describes the constitutional status of the "territories" of the United States, appeared in an opinion of the United States Supreme Court much noted in its time, and crucial to the period of United States imperialism a century ago, but almost forgotten since then: *Downes v. Bidwell.*[1] This was one of a series of decisions known as the *Insular Cases,* which in 1901 gave legal sanction to the colonization of islands taken by the United States at the close of the Spanish-American War: Puerto Rico, Guam, and the Philippines.[2] In those cases, the Supreme Court held that these islands were neither "foreign" countries nor "part of the United States." Instead, they were something in between: in the words of Justice Edward Douglass White, whose concurrence in *Downes* would eventually be adopted by a unanimous Supreme Court, they were "foreign to the United States in a domestic sense."[3] They had not been, he explained, "incorporated" into the United States upon their acquisition from Spain, but were, in the phrase the Court would later adopt, "unincorporated territories,"[4] belonging to—but not a part of—the United States.

Over the course of the twentieth century, these and a number of other territories would find themselves in relationships with the United States that might well be described as "foreign in a domestic sense," though each in a different sense. Today the so-called unincorporated territories include the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, the U.S. Virgin Islands, and American Samoa. These islands have a combined population of approximately 4 million, 3.8 million of whom live in Puerto Rico. Although each of the U.S. territories has a different status—by which we mean its particular relationship to the United States—they have several features in common: Congress governs them pursuant to its power under the Territorial Clause of the U.S. Constitution;[5] none is a sovereign independent country or a state of the Union; people born in the territories are U.S. citizens, or, in the case of American

Samoa, U.S. "nationals"; all are affected by federal legislation at the sole discretion of Congress; none has representation at the federal level.[6] In addition, they share varying levels of dissatisfaction with their current relationships to the mainland, still colonial despite gradually increased levels of local self-government.[7] In the Commonwealth of Puerto Rico, dissatisfaction with the status quo is one of the few areas of consensus in an otherwise acrimonious status debate; even the party that advocates the continuation of "commonwealth" status has long sought to replace the current status with an "enhanced" or "perfected" version.[8]

The *Insular Cases,* decided between 1901 and 1922, invented and developed the idea of unincorporated territorial status in order to enable the United States to acquire and govern its new "possessions" without promising them either statehood or independence. Over time, however, the *Insular Cases* and the unusual status they invented have led in turn to a curious reversal: now, many of the U.S. citizens who live in the territories *themselves* reject both statehood and independence, the options denied the inhabitants of the territories by the *Insular Cases* at the turn of the last century. No one today defends the colonial status sanctioned by these cases, yet the idea of a relationship to the United States that is somewhere "in between" that of statehood and independence—somehow both "foreign" and "domestic" (or neither)—has not only survived but enjoys substantial support. A territorial status born of colonialism has been appropriated by colonial subjects. Justice White's rhetorical flourish is therefore doubly suitable as a title: in a historical sense, the curious juxtaposition of the foreign and the domestic captures the essence of the much-aligned status imposed "from above" on the former Spanish colonies in 1901; in the current context, the same phrase embodies a crucial feature of some decolonizing solutions now proposed "from below."

What has happened to being somewhere in between "foreign" and "domestic" that has made it so desirable to so many? Many residents of the territories gravitate toward the idea of a status in between statehood and independence and struggle to implement it on their own terms—why? And why, at the same time, do so many others adamantly oppose these efforts, insisting that only statehood or independence can provide a truly noncolonial solution to the territories' status dilemma?

The essays in this book confront these and related questions concerning territorial status; about half of them address the U.S. territories generally, while the rest focus on the largest and most populous, Puerto Rico. The principal aim of this book is to examine the history, content, and implica-

tions of the idea that certain statuses within the United States's constitutional framework are appropriate only for certain groups of people in certain geographical locations. A crucial but long-neglected chapter in the narrative of the United States's development as a nation, the story of the U.S. territories—those invisible American colonies—and their unusual and widely misunderstood relationship to the United States challenges our understanding of who "we, the people" are, and questions cherished assumptions about our principles of liberal constitutional government and our ideals of citizenship, federalism, sovereignty, representation, and equality.

Our introduction roughly mirrors the structure of the book, tracing a trajectory from the historical context (sections 1 and 2), to more specific questions of constitutional jurisprudence (sections 2 and 3), to related issues of sovereignty, citizenship, culture, and national identity (sections 3 and 4). We begin with a brief discussion of the historical context of the *Insular Cases,* and then take a closer look at two of these cases, *Downes v. Bidwell* and *De Lima v. Bidwell.*[9] Turning then to Puerto Rico, we provide an overview of the debate over the island's current status, emphasizing the central role that constitutional questions play in that debate. Moving finally from the constitutional to the normative, we offer some observations concerning the preconditions to a sound resolution of the status dilemma. We conclude with a summary of the chapters.

History and Expansion: 1898

The "Spanish-American War" of 1898, a short-lived conflict both in time and in American memory, lasted from the explosion of the U.S.S. *Maine* in the Havana harbor on February 15, 1898, to the signing of the Treaty of Paris on December 10 of that year.[10] The war took place as a broader debate unfolded in the United States over whether the nation could—and should—become an imperialist power. Victory over Spain presented the United States with the opportunity to try its hand at some European-style colonial governance. Defeated, Spain ceded to the United States the islands of Cuba and Puerto Rico in the Caribbean, and Guam and the Philippines in the Pacific. Although Congress had previously disclaimed any intention to take permanent sovereignty over Cuba, no such bar existed with respect to Puerto Rico, Guam, or the Philippines.[11] In the words of Article IX of the Treaty of Paris: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[12]

THE POLITICAL DEBATE

Not knowing quite what to do with these new "possessions" and the culturally and racially different peoples who inhabited them, the United States held onto them while a debate between "imperialists" and "anti-imperialists" raged on. This "fervent controversy . . . led to a flood of controversial literature, phrase-making in and out of Congress, and to a bitterness which almost threatened to resemble the controversies over the Fugitive Slave Law and the Missouri Compromise. . . . The election of 1900 largely turned upon the so-called issue of Imperialism."[13] The presidential race between William McKinley and William Jennings Bryan cast the debate in terms of the catchy (but somewhat misleading) question of whether the Constitution "followed the flag," with Bryan arguing that it did, and McKinley insisting that it need not.[14]

As we discuss in more detail below, to ask whether the Constitution followed the flag was in effect to ask whether, if these territories were to be kept under U.S. sovereignty, they must eventually be granted statehood. The United States already had territories, of course, and the Constitution did not entirely "follow the flag" to any of them. Rather, Congress exercised nearly absolute, or "plenary," power over territories under the Territorial Clause of the Constitution, which gives Congress "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"[15] without any requirement that such territory have representation in the national government. In this sense, the labels "imperialist" and "anti-imperialist" are not entirely accurate: many anti-imperialists did not object to the acquisition of territories per se, or to their quasi-colonial governance under the Territorial Clause. Instead, they objected to the idea that arose with respect to the former Spanish colonies: that Congress could subject them to *permanent* territorial status, without intending ever to admit them into the Union as full and equal member states. (Most anti-imperialists, rejecting the idea of permanent territories, also rejected the idea of statehood for the former Spanish colonies, and urged instead that they be granted independence.)[16] The "imperialists," on the other hand, insisted that not all territories must follow the pattern established by the Northwest Ordinance of 1787, whereby they had evolved through several stages culminating in statehood. Some territories, they argued, could be held indefinitely, as colonies, to be dealt with in whatever way Congress saw fit. The imperialist mood of the time was captured in essay titles such as "How Great Britain Governs Her Colonies" and "The Rights of a Conqueror." The mood was contagious; with the election of McKinley, the voters sanctioned imperialism.[17]

Even then, however, it remained unclear whether the United States could—constitutionally—keep colonies indefinitely. No matter how readily the general public took to the idea of possessing colonies, the constitutional question could not be fully resolved until the Supreme Court stepped in. In the meantime, the United States went ahead and governed the new territories. In Puerto Rico, it established first a military government, and then a colonial civil government, created as in prior territories by an organic act, in this case the Foraker Act of 1900.[18] This government was headed by an American governor appointed by the president of the United States. Six appointed American department heads, together with five persons born in Puerto Rico, composed the nonelective Executive Council, one of two legislative chambers. The other, a House of Representatives, consisted of thirty-five elected representatives from Puerto Rico. The Foraker Act did not grant the inhabitants of Puerto Rico U.S. citizenship. Nor, it turned out, did the Act "incorporate" the island into the United States.

THE SCHOLARLY DEBATE

Before the debate on imperialism reached the Supreme Court, numerous civic and political leaders weighed in with views on the constitutional dilemma presented by the newly acquired territories and their inhabitants. The stature of the participants in this debate—former U.S. president Benjamin Harrison, the presidents-to-be of Harvard University and the University of Chicago, and prominent professors, deans, judges, and attorneys—suggests the widespread recognition at the time that the new territories raised questions of profound significance for the future of the American nation. The dozens of articles appearing in law reviews alone contained a wealth of arguments concerning such fundamental issues as the purposes and advantages of a written constitution; the meaning of the phrase "United States"; the distinction between the status of territories and the status of their inhabitants; the differences between civil and political rights; the distinctions between "citizens," "nationals," and "aliens"; and more.

The most frequently cited contributions to this debate were five articles that appeared in the *Harvard Law Review* between 1898 and 1899.[19] Each contains an invaluable analysis of territorial status throughout the history of the United States, but the central question they addressed—and the one the Supreme Court would take up thereafter—was whether the phrase "United States" includes territories. Two concluded that it does, two that it does not.[20] The fifth, an article by future Harvard president Abbott Lawrence Lowell entitled "The Status of Our New Possessions—a Third View," seemed to fall somewhere in between. In this article, Lowell made the novel

argument that some territories are part of the United States and others not. This argument, further developed by Justice White in his concurrence in *Downes v. Bidwell* two years later, would become the doctrine of territorial incorporation.

Lowell characterized his "third view" as a compromise between the two "opposing theories" that had been "very ably advocated" by his peers: C. C. Langdell and James Bradley Thayer on the one hand, and Carman F. Randolph and Simeon E. Baldwin on the other.[21] Langdell and Thayer had advocated a version of the imperialist position: they argued that the "United States" excludes territories, and that the new territories could therefore be governed as colonies if Congress so chose. Randolph and Baldwin, in contrast, had advocated a version of the anti-imperialist view, whereby all areas under American sovereignty become a part of the United States upon acquisition.

Lowell, on the other hand, saw the issue as a matter of discretion: "[T]he incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or the treaty-making authorities," he wrote.[22] Thus distinguishing between the "incorporation" of territory and its "acquisition," Lowell argued that Congress alone can determine whether to incorporate a territory into the United States, and he noted that Congress had not done so with respect to Puerto Rico, Guam, or the Philippines. This was clear, he argued, from the language of the Treaty of Paris, which had left the "civil rights and political status of the native inhabitants" of these islands up to Congress.[23] Thus these islands were not a part of the United States, and might never be. The decision was up to Congress, and Congress alone.[24]

Subtle and persuasive as Lowell's legal arguments were, they were driven in large part by somewhat less subtle views of Anglo-Saxon superiority, to which he devoted little space in his law review articles but which he expressed at greater length elsewhere.[25] In this, he agreed with all four of his peers, imperialist and anti-imperialist alike. His views on race, along with his views on the constitutional status of territories, would find support among the Justices of the Supreme Court.[26]

Expansion and Constitution: A Closer Look at Downes v. Bidwell

When in 1901 the Supreme Court finally turned to the question of the new territories, the Justices disagreed as vigorously as the nation's leading legal scholars had done. The *Insular Cases* of 1901 have been seen by many as the

most controversial decisions of the Court since *Dred Scott.* "This grave question," wrote one contemporary commentator, "confronts us inexorably, and a true or false answer is sure incalculably to affect our future civilization."[27] A "judicial drama of truly Olympian proportions,"[28] was how another commentator described these cases some years later; in the words of a more recent account, the *Insular Cases* "helped shape national identity and secure a unique place in history for the Fuller Court."[29] But they also caused a great deal of confusion, even among the Justices themselves. In *Downes v. Bidwell,* generally considered the most important of the *Insular Cases* (because it produced the most detailed exposition of Justice White's doctrine of incorporation), the Court found itself so far from consensus that it produced five separate opinions. Three of these agreed with the specific holding, and two dissented, but not one garnered a majority in its reasoning. The complexity of this case—and its importance for understanding the status of unincorporated territories—requires that we examine it in some detail.

THE JUDICIAL DEBATE

Downes arose out of a dispute between a businessman by the name of Samuel Downes, operating through the firm of S. B. Downes & Company, and the customs collector of New York. The collector had charged Downes a duty of $659.35 on a shipment of oranges from Puerto Rico under the Foraker Act, which had authorized duties on Puerto Rican goods of up to 15 percent of those charged on goods from foreign countries. This reduced duty was thus not the exact equivalent of a duty on "foreign" goods, yet it meant Puerto Rico was being treated differently from other areas in the United States, as no duty at all would have been charged on goods originating elsewhere in the "United States."

Downes paid the duty under protest and later challenged it in court. The question ultimately presented to the Supreme Court was whether the requirement set forth in the Uniformity Clause of the Constitution—that "all duties, imposts and excises . . . be uniform throughout the United States"[30]—applied to Puerto Rico, in which case the duty would have been unconstitutional. To answer this question, the Court first turned to the same question the *Harvard Law Review* articles had addressed, though in slightly narrowed form: whether Puerto Rico was part of the "United States," for purposes of the Uniformity Clause. The Court held that it was not.

Justice Henry Billings Brown's opinion "for the Court" was not joined by any of the other Justices.[31] Brown took the position that the phrase "United

States" does not include the territories and, therefore, that the Uniformity Clause—the terms of which cover only the United States—does not apply to territories unless Congress chooses to apply it by legislation, which it had not done in the case of Puerto Rico. Justice White wrote a concurrence, joined by Justices George Shiras and Joseph McKenna, in which he echoed Abbott Lawrence Lowell's argument that some territories are part of the United States and others not.[32] Puerto Rico was among the latter, he explained, and it was for this reason that the Uniformity Clause did not apply to the island. (White agreed with Brown that Congress could apply the requirement of uniformity by legislation, but that it had not done so in this case.) Justice Horace Gray wrote a third and very brief concurrence in which he agreed with the substance of White's opinion; he emphasized simply that any territory taken by cession from a foreign sovereign must undergo a transition before becoming part of the United States.[33]

The dissenters, who included Chief Justice Melville Weston Fuller and Justices David Brewer, Rufus Wheeler Peckham, and John Marshall Harlan, argued that the phrase "United States" includes all territories subject to American sovereignty, without exception, and that the Uniformity Clause applies to them all, including Puerto Rico. They wrote two dissenting opinions: the first, written by the Chief Justice, was joined by all the other dissenters; in addition, Justice Harlan wrote a dissenting opinion of his own.[34]

In his opinion for the Court, Justice Brown set forth what has come to be known as the "extension theory."[35] According to this theory, Congress has sole discretion over whether to "extend" the Constitution to the territories, because they are not part of the United States. Governmental action in the territories, Brown reasoned, is limited only by certain fundamental prohibitions. In order to identify these prohibitions, he explained, one must look primarily to the distinction between "natural" and "artificial" rights: the former are protected everywhere and at all times, while the latter are "peculiar to our system of jurisprudence" and protected only within the "United States."[36] Brown thus relied on a distinction between the limits on congressional action in the territories, derived generally from fundamental principles of natural justice, and the limits applicable to governmental action within the United States, which are spelled out in the Constitution.[37]

Although his opinion has been characterized as a theory of wholly extra-constitutional governmental power, Justice Brown did note that a few constitutional provisions containing fundamental limitations apply everywhere, even in the territories. "To sustain the judgment in the case under

consideration," he wrote, "it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states."[38] Brown did not provide an exhaustive list of either of these categories, but as examples of the former, he listed the constitutional prohibitions against bills of attainder, ex post facto laws, and titles of nobility.[39] The requirement of uniformity, in any case, was not among these universally applicable limitations, and so could be disregarded outside the "United States."

Justice White in his concurrence was among the first to suggest that Justice Brown's opinion had authorized entirely extraconstitutional governmental power over the territories. Distinguishing his own view, White wrote: "In the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, *not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable.*"[40] In fact, this reasoning is very similar to Brown's, for Brown too acknowledged that all constitutional provisions expressing fundamental prohibitions are operative everywhere. The difference between their views arises in the next step in White's analysis. The determination of whether a given provision is applicable, White explained, "involves an inquiry into the situation of the territory and its relations to the United States."[41] Contrary to Brown, who placed all territories in the same category—that is, outside the United States—White placed some in this category and others within the United States. In his view, the *status* of a given territory—specifically, whether that territory has been "incorporated" into the United States—is the key factor in a case-by-case analysis of which constitutional provisions constrain governmental action there.

Rather than elaborate on the precise meaning of "incorporation," Justice White devoted most of his opinion to defending the idea that Congress has sole discretion over whether and when to incorporate—whatever that might mean. Thus, despite the central role of the idea of incorporation in White's opinion, the consequences of incorporation remained unclear. Moreover, despite White's attempt to distinguish himself from Brown by insisting that the Constitution is operative everywhere and at all times, his doctrine of incorporation proves difficult to distinguish from Brown's so-called extension theory. As far as unincorporated territories were concerned, the theories looked exactly the same: In either scenario, these ter-

ritories were not considered part of the "United States," and only certain fundamental constitutional prohibitions constrained governmental action there.

Skeptical of Justice White's distinction between categories of territories, the dissenters refused to concede that incorporation meant anything at all. "Great stress is thrown upon the word 'incorporation,' " wrote Chief Justice Fuller, "as if possessed of some occult meaning, but I take it that the [Foraker Act] made Porto Rico, whatever its situation before, an organized territory of the United States. Being such, and the act undertaking to impose duties by virtue of clause 1 of § 8, how is it that the rule which qualifies the power does not apply to its exercise in respect of commerce with that territory?"[42] To the dissenters, the issue was simple: if Congress could impose upon Puerto Rico a civil government, and regulate commerce with it, then the island must be a part of the United States, and the Uniformity Clause must apply there.

Skeptical also of distinctions between fundamental or natural and artificial rights, the dissenters characterized *both* Justice Brown's and Justice White's opinions as theories of extraconstitutional governmental power. Justice Harlan was particularly emphatic in this criticism. "It will be an evil day for American liberty," he warned in his separate dissent, "if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violation of the principles of the Constitution."[43]

Justice Harlan's impassioned language proved less persuasive to his brethren on the Court than it has to most students of the *Insular Cases* since. Thus a majority of the Justices confirmed that the United States could acquire and govern new territories unhindered by certain otherwise applicable constitutional restrictions—and unencumbered by any implicit commitment eventually to grant these places and their peoples full membership in the Union.

Scholarship on the *Insular Cases* has focused primarily on the former consequence—the inapplicability of constitutional provisions. Hence the question of whether the Constitution "follows the flag" has persisted over time as the preferred shorthand for describing the holding in these cases. Put in more technical legal terms, the question is whether the Constitution applies *"ex proprio vigore"* or of its own force to unincorporated territories. According to this account, the holding that Puerto Rico was not part of the United States stood for the broader proposition that the Constitution did

not "follow the flag" or apply *ex proprio vigore* to the unincorporated territories. The colonial status of Puerto Rico and the other unincorporated territories has therefore been attributed primarily to Congress's so-called plenary power over these territories.[44]

This interpretation of the cases is rooted not least of all in the Justices' own characterizations of each other's views. As described above, Justice White took Justice Brown to task for espousing the idea that the Constitution is not operative everywhere and at all times, while the dissenters criticized all of the Justices in the majority for precisely the same reason. Similarly, scholarly accounts of the *Insular Cases* have conflated the question of whether a territory is "incorporated" with the question of whether the Constitution "applies" there, as in this representative account: "[T]he doctrine [of incorporation] asserts that the domestic territories are of two kinds: 'incorporated' and 'unincorporated. . . .' Since such incorporated territories are infant or incipient States, the federal Constitution, including the Bill of Rights, fully applies to them."[45]

Yet this way of framing the issue—by connecting the idea of incorporation to the applicability of the Constitution—is perhaps not the best way to capture the full significance of the doctrine of incorporation. Indeed, this way of framing the issue is somewhat misleading. As noted earlier, the Constitution had never "followed the flag" to any of the territories.[46] Some of its provisions had, to be sure, but even then it was not clear that these applied *ex proprio vigore,* as opposed to being in force via congressional legislation or by "inference and the general spirit" of the Constitution.[47] True, the *Insular Cases* established that even fewer constitutional provisions applied in unincorporated territories (such as the requirement of uniformity).[48] Yet other provisions—most notably those concerning representation at the federal level and the guarantee of a republican form of government—had never "applied" in any territory. Moreover, Congress had always exercised plenary power over territories under the Territorial Clause: as the Supreme Court had explained, "The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants";[49] Congress, by virtue of its plenary power, could make "a void act of the Territorial legislature valid, and a valid act void."[50]

To say that "the federal Constitution, including the Bill of Rights, fully applies" to incorporated territories is thus somewhat inaccurate; it is also to lose sight of the real distinction between incorporated and unincorporated territories—and of why it is plausible to say that the *Insular Cases* sanctioned imperialism. Why, for instance, is it more imperlialistic to withhold

uniformity, as *Downes* did with respect to unincorporated territories, than to withhold representation in the federal government, as had always been the case in all territories? Why, in other words, were only the new territories *colonies*?

They were, and the reason lay in the relationship between incorporation and "incipient statehood." The idea that Congress had discretion over whether to incorporate a territory freed Congress from any suggestion that it must follow the pattern established by the Northwest Ordinance of 1787 whereby all territories had evolved through various stages of increasing self-government culminating in statehood. The discretion not to incorporate a territory made clear not only that the acquisition of territory need never lead to statehood (or, for that matter, to independence) but also that Congress could postpone a decision concerning the ultimate status of a territory altogether.[51]

This holding simply rejected a long-standing *assumption* that territorial status must, eventually, lead to statehood.[52] Nothing in the Constitution, after all, actually requires Congress to make a state out of a territory. The *Insular Cases,* however, transformed that long-held assumption into a congressional power to make an affirmative commitment to grant statehood at some future date—a commitment effected by means of the *incorporation* of a territory. Conversely, the withholding of incorporation from certain territories now functioned as the equivalent of an explicit denial of the promise of statehood. By using incorporation as the basis of an affirmative constitutional distinction between two categories of territories, Justice White separated those to which Congress had promised a final status from those from which Congress had withheld any promise at all.

Congress, it should be noted, already exercised other forms of plenary power over entities that would never be states—namely, the District of Columbia and Indian tribes.[53] The status of these entities, however, while bitterly contested, was not left entirely unresolved. Contrary to their (concededly unenviable) situation, the unincorporated territories were denied even the promise of any final status, either within the constitutional framework or outside of it. They were subjected not only to an unequal condition but also to absolute uncertainty concerning their ultimate status—uncertainty about who they were, where they belonged, and what their future held. Their fate was left to the sole discretion of Congress: Congress could eventually commit to grant them statehood; it could change its mind entirely and release them into independence; or it could postpone the decision forever. The withholding of a commitment to a final, permanent status thus

was what truly distinguished the new territories from the old. It was a difference not of degree but of kind. It meant that Congress could now employ the *means* of colonial government toward an *end* other than statehood—that is, as an end in itself. Thus American imperialism was born of a deferred decision.[54]

EMPIRE BY DEFERRAL

The tremendous uncertainty inherent in this unprecedented status was captured by Chief Justice Fuller in an oft-quoted passage in his dissent in *Downes:* "[T]he contention seems to be that, if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period. . . ."[55] Indeed, the contention was precisely that. In Justice White's words: "The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."[56]

This passage is frequently cited for language that captures the paternalistic tenor of White's rhetoric—"owned," "appurtenant," "possession"—but its references to "the international sense" and "the domestic sense" shed even greater light on the status of the new territories. Denied a place both within the United States and outside of it, Puerto Rico, and the other new territories by implication, became foreign *relative to* states and incorporated territories, and domestic *relative to* foreign countries.

A comparison of cases dealing with these different contexts illustrates the point. *Downes* concerned the former (the domestic context); *De Lima v. Bidwell* dealt with the latter (the foreign or international context).[57] In *De Lima,* the plaintiff had challenged duties imposed on a series of shipments of sugar from Puerto Rico to the United States, after the ratification of the Treaty of Paris but before passage of the Foraker Act. These had been imposed under the Dingley Act, which provided for duties on goods shipped to the United States from "foreign countries." In *De Lima,* the Court held that Puerto Rico was not a "foreign country" for purposes of the Dingley Act and, hence, that the duties were invalid.

The apparent inconsistency between *Downes* and *De Lima* was vigorously criticized.[58] How could Puerto Rico *both* not be a "foreign country" *and* not be part of the "United States"? Critics included eight of the nine Justices of

the Fuller Court itself—only Justice Brown joined the majority in both cases, while his eight colleagues switched sides from *De Lima* to *Downes*. Yet Brown's opinions were consistent; indeed, the key to understanding the doctrine of incorporation lies in understanding how they were consistent. Combined, Brown's opinions in *De Lima* and *Downes* capture the innovation in the *Insular Cases* even better perhaps than Justice White's famous concurrence in *Downes* does by itself.

In adhering to the view that the new territories were neither foreign countries nor part of the United States, Justice Brown rejected a simple distinction between the foreign and the domestic. Exclusion from these two categories—the United States and foreign territory—did not mean exclusion from all categories. It meant inclusion within the boundaries of what might be called the United States's *sphere of sovereignty.* Lacking the right words to describe territory subject to U.S. sovereignty but not a part of the United States, Brown referred to the new territories as "domestic," but at the same time sought to expand that category by distinguishing between domestic territory as a whole and the narrower subcategory of the United States proper. Accordingly, Justice Brown rejected the notion that either the Dingley Act or the Uniformity Clause should apply to such places. The former applied by its terms to foreign countries, the latter to the United States. The Foraker Act, in contrast, was uniquely intended for the territory to which it applied—Puerto Rico—a territory squarely within the United States's sphere of sovereignty but not within the United States.

Curiously, the dissenting opinion in *De Lima,* written by Justice McKenna and joined by Justices Shiras and White (the same three who signed onto White's concurrence in *Downes*), described this challenge to the boundary between foreignness and domesticity far more clearly than Justice Brown did, even as these dissenters insisted that Puerto Rico must be treated as a "foreign country" under the Dingley Act. McKenna wrote:

> Settle whether Porto Rico is "foreign country" or "domestic territory," to use the antithesis of the opinion of the court, and, it is said, you settle the controversy of this litigation. But in what sense, foreign or domestic? Abstractly or unqualifiedly—to the full extent that those words imply—or limitedly, in the sense that the word foreign is used in the customs laws of the United States? If abstractly, the case turns upon a definition, and the issue becomes single and simple, presenting no difficulty, and yet the arguments at bar have ranged over all the powers of government, and this court divides in opinion. If at the time the

> duties, which are complained of, were levied, Porto Rico was as much a foreign country as it was before the war with Spain; if it was as much domestic territory as New York now is, there would be no serious controversy in this case. If the former, the terms and the intention of the Dingley act would apply. If the latter, whatever its words or intention, it could not be applied. Between these extremes there are other relations, and that Porto Rico occupied one of them and its products hence were subject to duties under the Dingley Tariff act can be demonstrated.[59]

Undoubtedly Brown would have agreed with most of this passage, short of the conclusion that Puerto Rico's products "hence were subject to duties under the Dingley Tariff act." For Brown, it was precisely because Puerto Rico had a relationship to the United States *between the extremes* that Congress must legislate specifically for Puerto Rico, rather than rely on the Dingley Act. The dissenters' criticism of Brown thus seems misplaced, both because they, not Brown, forced Puerto Rico into the "foreign" category, and because they overlooked the more important antithesis in Brown's opinion: an antithesis not between foreign and domestic, but between the domestic broadly conceived—that within the United States's *sphere of sovereignty*—and the more narrow domestic subcategory of the United States itself.

It may be that these three dissenters (the fourth, Justice Gray, wrote his own brief opinion in *De Lima* as well as in *Downes*) overlooked the extent of their agreement with Justice Brown because he used the term *domestic* to describe Puerto Rico's status in *De Lima,* although evidently he meant, as they did, that Puerto Rico occupied a status between the extremes of the domestic and the foreign. In any event, the real source of their disagreement with Brown concerned the narrower question, posed by the facts in *De Lima,* of what would be the consequences of Congress's failure to legislate with respect to a particular subject matter—in this case tariffs—immediately following the ratification of a treaty of cession. Brown concluded that tariffs applicable to foreign countries would cease to apply to conquered territory until Congress provided for new ones, while McKenna, Shiras, and White reasoned that the formerly applicable tariffs would continue to apply until they were replaced with legislation such as the Foraker Act. Thus these four Justices reached an agreement as to the holding in *Downes,* for that case involved congressional legislation that none of them doubted Congress had the power to enact with respect to the new territories. Yet Brown's

rejection in *De Lima* of the idea that the new territories should simply be treated as foreign countries until Congress got around to legislating for them arguably reflects a better understanding of the consequences of the new category, or at least a more rigorous application of it. White's concurrence in *Downes,* in turn, may be the view ultimately embraced by the Court largely because the word *incorporation* more successfully captured the idea of the domestic broadly conceived—of a sphere of sovereignty distinct from and extending beyond the boundaries of the United States.

Walter LaFeber has argued that the *Insular Cases* were a crucial step in the transformation in constitutional thought between 1890 and 1920 that "resolved the terrible tension emerging between the new foreign policy and the traditional Constitution by separating the two." In LaFeber's view, the idea that the United States could conduct foreign affairs unrestrained by constitutional provisions gradually took hold during this period, and the *Insular Cases* contributed to this "false separation of foreign and domestic affairs" by "ratifying McKinley's conquests and by allowing the United States government to rule the conquered as it saw fit."[60] LaFeber's account (one somewhat reminiscent of the idea of the Constitution following the flag) rests in part on the premise that the government of a conquered people properly belongs in the category of foreign affairs—only by assuming this can one conclude that these cases contributed to the separation of the Constitution from foreign policy. Yet as we have seen, not only were the several Justices of the Fuller Court who took sides with the imperialists at pains to demonstrate that the Constitution remained in force wherever the United States exercised sovereignty (if only with respect to its most basic guarantees), but they also strongly questioned the false separation between foreign and domestic affairs. As Justice McKenna put it in his dissent in *De Lima,* "to set the word foreign in antithesis to the word domestic proves nothing."[61]

The other four Justices—those who joined Justice Brown in the majority in *De Lima* and dissented in *Downes*—took issue with the constitutionality (not to mention the desirability) of this liminal category of territory. They rejected this third view, as Lowell had described it, of the new territories' status, which subjected them to U.S. sovereignty but excluded them from equal membership in the Union. In their view, what followed from *De Lima*'s holding that the territories were not foreign was the conclusion that the territories were part of the United States. A reasonable conclusion, one would have thought. Nevertheless, a liminal category of territories subject to U.S. sovereignty was precisely what the *Insular Cases* made possible. To argue that the holdings in *Downes* and *De Lima* were inconsistent is to overlook *how* they made imperialism possible.

The *Insular Cases* and subsequent Supreme Court opinions would apply a case-by-case inquiry to determine which constitutional provisions and federal laws apply to which unincorporated territories, thus developing and clarifying the first feature of Justice White's doctrine—that fewer constitutional protections limit governmental action in unincorporated territories.[62] However, the case law would shed little light on the meaning of incorporation itself, thus leaving open many questions concerning this second feature of his doctrine. In 1917, the Jones Act would confer U.S. citizenship, though not representation, upon the residents of Puerto Rico (an action taken by Congress without consulting the Puerto Rican people).[63] The Supreme Court would explain soon thereafter that U.S. citizenship had not incorporated the island into the Union, and would use this opportunity to establish that incorporation requires the express intent of Congress.[64] Beyond that, the Supreme Court has not elaborated on the scope of Congress's discretion with respect to the final status of unincorporated territories. The dispute over the precise content of this power is at the heart of today's status debate. The central questions in this dispute—must Congress decide, at some point, what to do about a territory's final status, and may Congress implement a final, noncolonial status other than statehood or independence?—continue to divide the people of Puerto Rico, to whom we now turn.

Constitution and Membership: Puerto Rico and the Legacy of the Insular Cases

A century after the status of the new territories occupied center stage in American political and scholarly discussions, the issue and the colonies it affected have long faded from the national stage, but the debate rages on in the territories themselves. In Puerto Rico, discontent with the island's current status is well-nigh universal, but the island is deeply divided both as to what the island's status ought to be instead and as to what, constitutionally, it may be.

It is widely agreed that both Congress and a majority of the inhabitants of the territory must consent to any resolution to the current colonial situation and that the terms of a transition out of the current status must be acceptable to both sides. There is also little dispute that an agreement to implement either statehood or independence would not run afoul of the Constitution, although there are a number of questions concerning the requirements of a transition into either of these options, such as whether an independent Puerto Rico could retain U.S. citizenship for its people, or whether a state of

Puerto Rico could remain officially bilingual, as the island has been for most of the past century. Similar questions apply to the options in between statehood and independence: it is not clear, for instance, whether any status other than statehood could guarantee U.S. citizenship for people born in Puerto Rico, nor is it clear whether any status other than independence could guarantee that Spanish would remain one (or the) official language of the island. But the intermediate options raise additional questions, since the idea of a permanent, nonterritorial status that is neither statehood nor independence—nor any of the other options provided for in the Constitution—is without precedent in American federalism, and necessarily involves much constitutional terra incognita.

THE DEBATE OVER COMMONWEALTH STATUS

Puerto Rico's transition into "commonwealth"[65] status in 1952 raised these questions in a debate that continues today. Four years earlier, the island had for the first time elected its own governor, choosing the man who conceived of the island's commonwealth status, Luis Muñoz Marín.[66] The founder and leader of the Popular Democratic or "Commonwealth" Party, Governor Muñoz Marín went on to win repeated reelections, remaining in power until he chose not to run for a fifth term in 1964. The transition into commonwealth status officially began when President Truman signed Public Law 600 authorizing a constitutional convention.[67] That convention, in turn, led to the approval in a 1952 referendum of the Constitution of the Commonwealth of Puerto Rico and the new status by a vote of 76.4 percent. This result inaugurated the Commonwealth, but did not put an end to the status debate.

The Commonwealth of Puerto Rico has been described in several judicial opinions, including Supreme Court decisions, as "sovereign over matters not ruled by the [federal] Constitution."[68] Whether this means the island ceased to be an unincorporated territory, and what "matters" exactly the federal Constitution "rules," remain the sources of considerable disagreement.[69] At the heart of this disagreement is the language of the preamble to Public Law 600, to the effect that that law authorized a relationship between island and mainland "in the nature of a compact."[70]

According to the "compact theory," P.L. 600 and the 1950–52 process terminated Puerto Rico's territorial status, unincorporated or otherwise, replacing it with a mutually binding "bilateral compact" which ended Congress's absolute sovereignty over the island under the Territorial Clause, and thus purged the relationship of its colonial attributes.[71] The contrary view

holds that P.L. 600 and the process it authorized did not and could not end Puerto Rico's colonial status, because P.L. 600 is a federal law, and is thus repealable by Congress without Puerto Rico's consent.[72] According to this view, Congress could not, even if it wanted to, *permanently* relinquish its nearly absolute sovereignty under the Territorial Clause, except by implementing another status specifically provided for in the Constitution, by amending that document, or by granting a territory independence.[73]

Supporters of the compact theory insist that the adoption of the Constitution of Puerto Rico was itself a sovereign act of the people of Puerto Rico and, as such, that it effected a transfer of sovereignty from Congress which Congress may not rescind. In response, opponents of the compact theory insist that if this "sovereign act" required the authorization of a higher sovereign, it merely represented a delegation of powers of self-government by that higher sovereign. Thus, goes this argument, the relationship may resemble a compact (as the preamble to P.L. 600 acknowledges), but it cannot be a binding agreement, and is therefore still colonial.

This debate continues unabated. The answers to these unresolved questions have important implications with respect to the future of the island. If it is possible for the United States and Puerto Rico to enter into such a truly binding compact—whether or not this happened in 1952—then it may be possible to create a status other than statehood or independence that is not subject to congressional power (and repeal) under the Territorial Clause and thus, arguably, not colonial. If this is not possible, then it would seem that the only way out of the colonial predicament is statehood, independence, or a constitutional amendment. The disagreement is not merely "political": differing views about what is constitutionally possible shape the different views about what is desirable.

Despite this continued disagreement, events subsequent to 1952 (including Supreme Court case law concluding that the Territorial Clause is still the source of Congress's power over Puerto Rico)[74] led to an increasing consensus that whatever the island became in 1952, it did not cease to be some kind of colony of the United States, and that whatever its level of "sovereignty," it is not enough.

The events of 1952 did put an end to the debate at the United Nations, at least for a time. Upon the approval of commonwealth status, at the request of Governor Muñoz Marín, the United States sought to cease transmitting information on Puerto Rico to the United Nations' Decolonization Committee under Article 73(e), which requires administering powers to transmit information on non-self-governing territories.[75] The argument was, of

course, that Puerto Rico was no longer a non-self-governing territory—precisely the issue that was disputed. The governor's request initiated an effort that culminated in November of 1953 with the General Assembly's decision that the United States could indeed cease transmitting Article 73(e) reports on Puerto Rico. In theory, this resolved the matter in the international arena. The process, however, further fanned the flames of the debate about the true nature of Puerto Rico's status.[76] Moreover, the process did not put an end to what has been described by one scholar as Governor Muñoz's "gnawing feeling" that Puerto Rico remained a colony of the United States.[77] These doubts led the Commonwealth Party to initiate a vigorous and lasting effort to "perfect" or "enhance" the status achieved in 1952. Efforts to implement these enhancements have thus far encountered the obstacle of a largely indifferent Congress and the opposition of territorial groups who favor statehood or independence, largely because of their own "gnawing feeling" that anything in between will always be colonial.

"ENHANCED" COMMONWEALTH

Proponents of enhanced commonwealth have put forward a slate of desiderata that reveal a vast gap between the current arrangement and a suitably noncolonial status, among them: a grant, by Congress to Puerto Rico, of sovereignty greater than that of a state (but not independence); a promise of permanent union with the United States (but not statehood); a guarantee of U.S. citizenship for persons born in Puerto Rico now and in the future; local control over areas traditionally under federal control, such as immigration and foreign trade; a grant of power for the local government selectively and unilaterally to nullify federal laws on a case-by-case basis; an unambiguous statement by Congress to the effect that the relationship between the United States and Puerto Rico is in the form of a binding compact, alterable only by mutual consent.[78] In short, enhanced commonwealth could be described as a modern-day confederate state or a nation within a nation; its proponents call it the "best of both worlds."

The goal of this combination of features is, put simply, to enable Puerto Rico to maintain a separate national identity, with its distinctive culture and language, and to foster its international personality and economic growth, while preserving U.S. citizenship and deeply entrenched ties (themselves also cultural and economic) to the United States. Under this arrangement, the applicability of constitutional provisions (and federal laws) would still be subject to a case-by-case analysis, but now primarily by Puerto Rico's government.

There can be no doubt that many Puerto Ricans like this idea, regardless of its feasibility. In 1967, an option defined as commonwealth status "with authorization for further development" won a local nonbinding plebiscite with 60.5 percent of the vote, compared to 38.9 percent for statehood and 0.39 percent for independence. A second nonbinding plebiscite in 1993 yielded a narrower victory for enhanced commonwealth, this time with 48.6 percent of the vote, against 46.3 percent for statehood and 4.4 percent for independence. A third nonbinding plebiscite in 1998, discussed in more detail below, yielded a victory for an enigmatic "none of the above" option.

When the first two plebiscites did not lead to congressional action, the legislature of Puerto Rico requested clarification from Congress concerning whether the 1993 plebiscite had had a binding effect and, if so, what steps should follow.[79] In response, the relevant congressional committees made clear that they would not consider the results of a plebiscite to be binding unless Congress first approved the options offered on the ballot.[80] They suggested also that the "enhancements" to commonwealth status might be constitutionally unacceptable, a plausible but contested claim.[81]

This congressional assertion of a prerogative to define the options of a binding plebiscite echoes the imperialist premises implicit in any claim of congressional power over Puerto Rico's fate. At the same time, there is a strong argument that, since Congress must agree to any solution that requires a continuation of U.S. sovereignty (along with a permanent guarantee of U.S. citizenship), congressional agreement to the options *prior* to a plebiscite would save the people of Puerto Rico the grief of an emotionally draining and politically divisive vote that might result in a status not acceptable to Congress—as, by some accounts, has happened every time Puerto Rico has voted on the matter since 1967. This was, in part, the reasoning behind the controversial "Young bill," first introduced in 1996 by Representative Don Young, a Republican from Alaska, and designed to authorize a congressionally sponsored plebiscite with options acceptable to Congress. The Young bill passed by one vote in the House on March 4, 1998, but died in the Senate several months later.[82]

It would be difficult to exaggerate the divisions the Young bill caused. As originally introduced, the bill did take a clear position, as Puerto Rico had urged Congress to do for so long, concerning which status options would be acceptable to Congress. Its position, however, ruled out commonwealth status altogether, causing immediate and overwhelming opposition to the bill on the island, primarily (though not only) on the part of the Commonwealth Party.[83] The ultimate result of the political maneuvering that fol-

lowed was a bill offering three status options: statehood; commonwealth without "enhancements"; and independence/free association.[84]

The Young bill in its final form remained unacceptable to supporters of enhanced commonwealth status, mainly the Commonwealth Party. They argued that, by leaving out the enhanced commonwealth option (which had, after all, prevailed in previous plebiscites), the bill failed to respect the people's right of self-determination. This, combined with the inclusion of the far less attractive status quo version of "commonwealth" (along with several other aspects of the bill's wording), led to widespread charges that the Young bill was slanted in favor of the statehood option.[85] The response of the bill's supporters to these objections was that a number of features of enhanced commonwealth are, simply, constitutionally impermissible; that the bill represented what Congress would accept (based on what is constitutional); and that if the lack of enhancements to commonwealth status would lead the people to prefer statehood, this would be the appropriate consequence of a ballot offering accurate definitions of truly viable status options. Because the bill died in the Senate, Congress's official position on the status issue remains unresolved.

Frustrated by the demise of the Young bill, the pro-statehood government held a third nonbinding plebiscite in December 1998. The options on that ballot included: independence; "free association" (this time as a status distinct from independence); statehood; commonwealth (again without enhancements); and "none of the above."[86] The government loosely modeled the options on those provided by the Young bill rather than consulting with the other political parties. That decision, and the wording chosen to describe the "commonwealth" option, led the Popular Democratic Party to oppose this plebiscite as well, urging voters to protest it by choosing "none of the above." While, by some accounts, the government's definition of *commonwealth* shined the unforgiving light of truth on the colonial status quo (thus giving the people a chance to express their opinion on the status quo, rather than on the "best of both worlds" version of commonwealth that had been presented in prior plebiscites), by other accounts this definition improperly distorted the status quo, once again trying to force a vote for statehood. Either way, that option did not do well. A mere 0.06 percent of the electorate voted for the (unenhanced) commonwealth option, while 50.3 percent chose "none of the above," and 46.6 percent opted for statehood. "Free association" and independence split the remainder.

What did this result mean? The mainland media dramatically oversimplified the matter by reporting a victory for the status quo. And in truth,

nothing would change with "none of the above." Yet if this were the whole truth, the results of the December 1998 plebiscite would be, above all, heartbreaking, for until that moment, a divided electorate had at least agreed in its rejection of the current colonial status. The choice, though, was arguably just the opposite: an emphatic rejection of yet another futile exercise—another nonbinding referendum for which Congress, once again, had failed to approve the options, and which it would therefore be likely to ignore. Thus, even as the mainland wondered at Puerto Rico's inability to make up its mind, Puerto Ricans once again began to wait for Congress to make up its mind.

Membership and Recognition: Beyond the Legacy?

The seemingly irreconcilable divisions in Puerto Rico's status debate are the result not only of disagreements about the constitutionality of the options but also about their desirability. A resolution of the question of constitutionality would bring one much closer to understanding the options for decolonization, but not all the way there. The normative questions embedded in the status debate concern the kinds of trade-offs that distinct racial, ethnic, and cultural groups ought to be able to make in order to maintain their association with a larger polity while asserting and protecting their distinctive identities.

RECOGNITION VERSUS REPRESENTATION

In the case of Puerto Rico, this question is raised in starkest form in the context of voting and representation, because a status in between statehood and independence, no matter what its advantages, would not include equal representation at the federal level for U.S. citizens living in Puerto Rico (unless this were implemented via constitutional amendment). This is one example of an acknowledged limit on Congress's power to prescribe a status for territories: the states' federal representation may not be diluted, and only states, and to a limited extent the District of Columbia, have a right to federal representation.

Under the intermediate statuses now sought, equal federal representation would be traded for the combination of greater local sovereignty and permanent association to the mainland described above. In this scenario, some form of nullification power over federal laws would presumably make up for the lack of representation. Many see the price in this trade-off as too high: they consider the idea of remaining U.S. citizens without equal repre-

sentation in the federal government as colonial, even if this comes with a reduced level of federal sovereignty and a high level of local sovereignty. Many others see in such increased local sovereignty, with the kind of group recognition it would imply, a cure for the colonial attributes of the lack of representation at the federal level.

This disagreement poses an extremely difficult challenge in the context of American liberalism. On the one hand, groups emerging from a colonial status have an especially strong moral claim to official government recognition, on *their* terms. (Colonial status, of course, is a form of "group recognition" too.) On the other hand, group recognition is in tension with the ideals of liberalism whenever it involves the sacrifice of rights and privileges ordinarily associated with citizenship. The embodiment in law of different statuses for different racial, cultural, and ethnic groups strays dangerously far from the principle of individual equality before the law, and must be judged in that context as well.

In other words, whereas the arguments of the imperialists of the turn of the century—that the cultural integrity and economic development of the mainland must be fostered at the expense of its colonies—have long been discredited, today few would argue with the idea that the cultural integrity and economic development of the *colonies* must be fostered. The risk, of course, is that this would once again come at the expense of a group—though now only a subgroup within the colony, made up of those who, by voting either for statehood or independence, continue to reject the idea of partial, unequal membership in any nation.

This tension, between a colonial group and the subgroups within it, reveals one of the most intractable problems of the status debate: discerning the "will of the Puerto Rican people." Appeals to the right of self-determination and the will of the Puerto Rican people embody extremely important principles, to be sure, and denote essential preconditions in the process of decolonization. Yet they also beg the most difficult questions of the status debate, for to accept that a group of U.S. citizens living under federal sovereignty may exchange representation (or any other right or privilege associated with U.S. citizenship) in return for greater local sovereignty—and that this may be done over the opposition of a minority within that group—is to accept an arrangement for that group that would not be acceptable for U.S. citizens living in a state.

Perhaps such an arrangement is the best solution to the island's unique colonial dilemma; perhaps Puerto Rico's differences do, after all, demand a different system of government. Yet as long as that system involves federal

sovereignty and American citizenship, the United States has an obligation to evaluate it according to those principles that ordinarily apply to its "own" citizens. It must not again rely on what seems good enough for "other" people. The latter, after all, looks suspiciously like the reasoning that sanctioned colonialism a century ago.

In Puerto Rico, any of the numerous views on status involves enormously complex commitments; a constructive conversation about status must not oversimplify them. The debate on status reaches its lowest point when one group is accused of being willing to jettison its culture, or another of being willing to dispense with true equality, or another of yielding to an inflexible vision of national identity. In fact, Puerto Ricans are confronted with impossibly difficult choices imposed upon them by centuries of colonial domination. It is quite likely that all Puerto Ricans wish to preserve their culture, ensure true equality, and nurture a communal identity, and that they disagree as to how best to achieve this combination of goals. Accusations to the contrary debase the discussion of status. That these desires sometimes seem contradictory, or that their content varies from party to political party, is not the result of one side's desire to sabotage the other's vision. It is the result of a colonial legacy that has produced conflicting identities, conflicting desires, and conflicting commitments, and situated those conflicts in a complex network of legal forms, precedents, and principles. With this legacy in mind, we hope with this book to make a contribution toward a constructive conversation, and toward the long-awaited resolution to the status question.

Summary of Chapters

José A. Cabranes paves the way for a dialogue about territorial status with a historical overview of the relationship between Puerto Rico and the United States during the past century. Identifying those easily forgotten areas of consensus in Puerto Rico's status debate, he approaches the explosive topic of territorial status with his observations on that "political expletive," the word *colonialism.* Noting that the term can be informative as well as pejorative, and choosing to use it in the former sense, he reminds us that the idea of colonialism is useful simply because it points toward common ground, since *all* of the political camps of Puerto Rico seek *de*colonization.

Mark S. Weiner provides a rich account of the intellectual atmosphere that made U.S. colonialism possible, in an analysis that explores a concept he calls "ethno-juridical discourse." Moving beyond the claim that law can

be an instrument for the pursuit of racist aims, Weiner argues that race and law are mutually constitutive concepts. In this account, the idea that the Anglo-Saxon race was superior to other races—an idea at the root of the turn-of-the-century desire to govern territories without admitting them into the Union—was entangled with the idea that Anglo-Saxon culture was especially suited for lawmaking and state-building. This reasoning justified colonialism not simply with the idea that whites were superior, but rather that they were superior at *governing*—a notion clearly on the minds of the justices in the *Insular Cases.*

Brook Thomas's contribution locates the events of the turn of the century in the context of a transformation in the United States's conception of itself as a nation. He describes the events surrounding the Spanish-American War as part of a fundamental transition from an idea of the United States as a "compact of contracting entities" to that of a "corporate model of a nation-state," whereby, somehow, the "United States" ceased to be a plural term; *they* became *it.* Thomas explains the role of the metaphor of "incorporation" in this process, and in doing so, shows how metaphor generally (and, in *Downes,* the metaphor of incorporation specifically) facilitates legal transformation by maintaining the appearance of continuity.

A similar interest in the power of language informs Efrén Rivera Ramos's analysis of the category of "unincorporated territories." Unmasking the colonial aims of this category, Rivera draws attention to another way in which legal rhetoric facilitates transformation, in this case by maintaining the appearance of neutrality. As Rivera sees it, the creation of the "unincorporated territory" not only was a questionable strategy based on illegitimate claims to sovereignty, but has long been discredited, and must no longer be cited in the debate on territorial status. He calls on Congress simply to renounce its absolute sovereignty over these territories, wrongly claimed and unjustifiably upheld in the *Insular Cases,* and to proceed with a solution to Puerto Rico's status on the basis of a recognition of the island's sovereignty.

This reminder that the status debate must contend with the *Insular Cases,* be they an illegitimate obstacle or a binding precedent (or, distressingly, both), provides a transition into Sanford Levinson's discussion of the place of the *Insular Cases* in the canon of constitutional law—or rather, their lack of a place there, an oversight that Levinson decries and addresses here. Levinson's analysis offers something valuable and unusual: a review of the wealth of material on pre-1898 territorial history that we find in *Downes.* By discussing the key role of the *Insular Cases* in the broader history of American territories, Levinson points the way toward a revisionist account of American constitutional history.

Juan Perea's contribution also locates the *Insular Cases* within the broader history of the United States, in this case its previous attempts to withhold full membership from racial "others" while exercising sovereignty over them nevertheless. Perea describes how racist attitudes against Mexicans caused resistance to their admission as full members in the nation, at the same time that their lands were readily annexed. Perea uses this precedent to shed light on the legal reasoning in *Downes* and the later treatment of Puerto Ricans.

In the next essay, E. Robert Statham Jr. then argues that those previous instances were perhaps analogous but also different in important ways. Statham identifies a framework for understanding what happened in 1898–1901 that distinguishes these territorial acquisitions from their precursors. The difference, in short, was that the rationale for expansion had changed from some notion of growth to an idea of power. While territorial acquisition had been part of a process of domestic growth until 1898, from that point on the United States seems to have decided it was finished "growing," even as it acquired more territory. The reason for this change, Statham explains, was that the acquisitions of 1898 crossed an imaginary line dividing diversity of the tolerable kind from diversity of an unacceptable sort. "Growth" could accommodate the former; only imperialism could handle the latter.

Gerald L. Neuman closes Part I with a synthesis of two centuries of territorial jurisprudence, laying the groundwork for the legal and constitutional specificities that we encounter when we turn to the case of Puerto Rico in Part II. His account proposes dividing territorial jurisprudence into a number of phases, with two major approaches evolving throughout these phases. The "membership" approach recognizes a privileged relationship to the constitutional project for some individuals or locales under the government's sovereignty—one might call them "members." The second approach, or "mutuality of obligation" approach, requires that a claim of sovereignty be justified by the enjoyment of corresponding constitutional rights and limits for all; that is, all who are subject to a nation's sovereignty must be full members in it. According to this framework, the *Insular Cases* represent a version of the "membership" approach, denying membership to the inhabitants of territories under American sovereignty. Asking whether this may have created "parallel" constitutional systems, one for members and another for territorial (and other) nonmembers, Neuman challenges the assumption that we are governed by a unified constitutional document.

Mark Tushnet's essay opening Part II picks up where Neuman's leaves off. If this nation has created parallel systems—indeed, even if a territorial