

**THE CONSTITUTIONALITY OF DECOLONIZATION BY  
ASSOCIATED STATEHOOD: PUERTO RICO'S LEGAL  
STATUS RECONSIDERED**

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# THE CONSTITUTIONALITY OF DECOLONIZATION BY ASSOCIATED STATEHOOD: PUERTO RICO'S LEGAL STATUS RECONSIDERED

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**Abstract:** International law and constitutional law arguably collide in the present legal relationship between the United States and Puerto Rico. In short, (1) as a matter of *international* law, it is unclear that the current relationship between the United States and Puerto Rico in fact conforms to customary international law norms on decolonization, human rights, and self-determination, as well as explicit U.S. treaty obligations; and (2) as a matter of *national* law, it is unclear that the Constitution *permits* an arrangement between Puerto Rico and the United States—short of separation (independence as a sovereign State) or integration (admission as one of the several states of the Union)—that *could* conform to these norms of contemporary international law. In particular, where, as in Puerto Rico, decolonization takes the form of associated statehood, the Appointments Clause and the Constitution's provisions on the franchise may well be in tension with contemporary international law. In this article, a collaborative effort by scholars focused on constitutional and international law, respectively, we seek to clarify formerly unacknowledged or underappreciated legal tensions in the relationship between Puerto Rico and the United States and to explore potential means by which they might be resolved. One of us adopts a formalist, plain-meaning originalist view of the Constitution, which throws into sharp relief the arguable constitutional defects in the present U.S.-Puerto Rican relationship established more than fifty years ago. The other does not embrace originalism and therefore would not be as quick to exclude a potential resolution of the tensions between international and constitutional law by means of constitutional interpretation. The authors agree, however, that those tensions can no longer be neglected in a State committed to the rule of law. The authors also

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agree that several of the most troubling of the arguable obstacles to constitutional self-governance for Puerto Rico as a State freely associated with the United States can be resolved—with a modest amount of political will and creativity—in a manner that, in effect, elides the oft-intractable debates that afflict modern constitutional theory: *substantive*, even if not *formal*, international legal compliance can be established in a fashion that avoids perennially debated issues of constitutional law and theory. Above all, we seek to facilitate and frame a long-overdue discussion about how, concretely, to reconcile U.S. international obligations toward Puerto Rico with the Constitution.

*I always thought that, when we should acquire Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the third section of the fourth article [of the Constitution], I went as far as circumstances would permit to establish the exclusion.*

—Gouverneur Morris<sup>1</sup>

## INTRODUCTION

International law and U.S. constitutional law collide in the present relationship between the United States and Puerto Rico, and it is unclear that both can survive the collision. For where, as in Puerto Rico, decolonization creates a State<sup>2</sup> freely associated with the United States, the Constitution's Appointments Clause<sup>3</sup> and its provisions on the franchise<sup>4</sup> may well be in tension with international law. Postwar decolonization norms and the principle of the self-determination of peoples require that Puerto Ricans enjoy the right to "external" self-determination<sup>5</sup>—that is, the right to choose political independence,

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<sup>1</sup> Letter from Gouverneur Morris to Henry W. Livingston (Dec. 4, 1803), in 3 THE LIFE OF GOUVERNEUR MORRIS, WITH SELECTIONS FROM HIS CORRESPONDENCE AND MISCELLANEOUS PAPERS 192 (Jared Sparks ed., 1832) [hereinafter Letter from Gouverneur Morris]. Morris was referring to the Territories Clause, which he drafted. See U.S. CONST. art. IV, § 3, cl. 2.

<sup>2</sup> For clarity, throughout this article, we capitalize "State" where it refers to a sovereign country and use the lowercase "state" to refer to one of the several states of the Union.

<sup>3</sup> U.S. CONST. art. II, § 2, cl. 2 (the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . : but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

<sup>4</sup> *Id.* art. I, § 2, cl. 1; *id.* art. II, § 1, cl. 2; *id.* amend. XVII.

<sup>5</sup> The concept of self-determination has come to describe several distinct concepts, which prove, at times, to be in tension with one another. See Gregory H. Fox, *Self-Determination in the Post-Cold War Era: A New Internal Focus?*, 16 MICH. J. INT'L L. 733, 733

integration with an existing state, or free association in referendum expressing the popular will—and, in theory, Puerto Ricans exercised this right under international law in 1952 by choosing a particular arrangement of free association with the United States.<sup>6</sup> But there are serious questions whether the Constitution’s structural provisions permit this arrangement. Simply put, the Constitution may constrain the U.S. ability to decolonize Puerto Rico as the people of Puerto Rico chose in accordance with the requirements of international law.

In this article, a collaborative effort by scholars focused on constitutional and international law, respectively, we seek to clarify this formerly unacknowledged tension and explore potential means by which it might be resolved. One of us adopts a formalist, plain-meaning originalist view of the Constitution, which throws into sharp relief the arguable constitutional defects in the present U.S.-Puerto Rican relationship established more than fifty years ago. The other does not embrace originalism and therefore would not be as quick to exclude a potential resolution of the apparent tensions between international and constitutional law by means of constitutional interpretation.

Notwithstanding these stark methodological differences, however, the authors agree that the tensions can no longer be neglected in a State committed to the rule of law. The profound issues raised by the domestic and international legal status of Puerto Rico need to be faced and resolved. The authors also agree (and aspire to be living proof) that several of the most troubling of the arguable obstacles to constitutional self-governance for Puerto Rico as a State freely associated with the United States can be resolved—with a modest amount of

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(1995) (reviewing YVES BEIGBEDER, *INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY* (1994)) (describing self-determination as “a concept increasingly at war with itself”). Within the sometimes fuzzy conceptual framework of self-determination, considerable attention has focused on and controversy been generated by two questions: first, which groups qualify as “peoples” entitled to self-determination; and second, what does the (collective) right of a people to “freely determine” its “political status” guarantee? *See generally id.* We largely elide the first question here and address only narrow aspects of the second in connection with the status of U.S. territorial possessions.

<sup>6</sup> *See* Proclamation by the Governor of Puerto Rico, Establishment of the Commonwealth of Puerto Rico, July 25, 1952, *reprinted in* DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 198 (Office of the Commonwealth of P.R. in Washington, D.C. ed., 2d ed. 1964) [hereinafter CONSTITUTIONAL DOCUMENTS]. We do not express or intend to imply any view about the legitimacy of this process as a matter of normative or political theory. *Cf.* Joel Colón-Ríos & Martín Hevia, *The (Un)Rule of Law in Puerto Rico: A Republican Approach* 1 & n.2 (Jan. 29, 2008) (unpublished manuscript, available at <http://ssrn.com/abstract=1088883>) (distinguishing formal consent in the Puerto Rican referendum from its “dubious democratic legitimacy”).

political will and creativity—in a manner that, in effect, elides the oft-intractable debates that afflict modern constitutional theory.

The tensions we analyze arise in part because the associated state is a comparatively new form of polity in the international arena—unknown both to the framing generation and to classical, prewar international law. It emerged in the postwar era of decolonization.<sup>7</sup> Yet the U.N. Charter, a binding treaty under the Supremacy Clause,<sup>8</sup> obliges the United States, like all metropolitan member States—that is, States “which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government”—to promote the progressive development of appropriate forms of self-government in those territories.<sup>9</sup> When the Charter entered into force in 1945, the United States held several territories subject to the Charter, most of which it promptly, effectively—and constitutionally—decolonized.<sup>10</sup> Puerto Rico’s decolonization, however, proves far more problematic.

In 1950, Congress enacted Public Law 600, a somewhat oblique statute “*in the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”<sup>11</sup> Puerto Rico thereupon drafted a constitution, which Congress approved in 1952, subject to three compulsory amendments.<sup>12</sup> Puerto Rico accepted these, and its constitution entered into force the same year.<sup>13</sup> Based on these events, the United States represented to the United Nations that Puerto Rico, though formerly “a territory subject to the full authority of the Congress,” had achieved a new status pursuant to “a compact of a bilateral nature whose terms may be changed

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<sup>7</sup> See *infra* notes 47–56 and accompanying text.

<sup>8</sup> See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

<sup>9</sup> See U.N. Charter art. 73.

<sup>10</sup> See *infra* notes 100–106 and accompanying text.

<sup>11</sup> See Act of July 3, 1950, Pub. L. No. 81-600, pmb., 64 Stat. 319, 319 (emphasis added). For the sake of brevity, we will at times refer to the “compact” between the United States and Puerto Rico as a convenient shorthand for Public Law 600’s self-description as being adopted “in the nature of a compact.” Two years later, Congress referred to the arrangement with Puerto Rico “as a compact.” Act of July 3, 1952, Pub. L. No. 82-447, pmb., 66 Stat. 327, 327 (emphasis added). See *infra* note 145 and accompanying text.

<sup>12</sup> See Act of July 3, 1952, 66 Stat. at 327–28.

<sup>13</sup> Proclamation by the Governor of Puerto Rico, Establishment of the Commonwealth of Puerto Rico, July 25, 1952, *reprinted in* CONSTITUTIONAL DOCUMENTS, *supra* note 6 at 198.

only by common consent.”<sup>14</sup> Accordingly, the United Nations removed Puerto Rico from the list of non-self-governing territories—and hence Puerto Rico apparently acquired a new status in 1952, both internationally and within the framework of U.S. constitutional law.<sup>15</sup>

Yet these events raise rather than answer the real questions about Puerto Rico’s present status under both international and domestic law. In short, (1) as a matter of *international* law, it is unclear that the current relationship between the United States and Puerto Rico in fact conforms to customary international law on decolonization, human rights, and self-determination, as well as explicit U.S. treaty obligations;<sup>16</sup> and (2) as a matter of *domestic* law, it is unclear that the Constitution *permits* an arrangement between Puerto Rico and the United States—short of separation (independence) or integration (statehood)—that *could* conform to these norms of contemporary international law. Puerto Rico refers to itself as an *estado libre asociado* (“associated free state”),<sup>17</sup> but although international law now recognizes a variety of associated state relationships as lawful, it is not clear that the Constitution does.

Indeed, since the adoption of Puerto Rico’s constitution in 1952, there have been serious doubts in some quarters whether Puerto Rico genuinely enjoys the kind and quality of self-governance that satisfies international law. Many argue, as did former Attorney General Richard Thornburgh, that the “Constitution knows only the mutually exclusive categories of ‘State’ and ‘Territory.’”<sup>18</sup> In fact, it appears to be the uniform opinion of all three branches of the federal government that, whatever Puerto Rico’s *international* legal status, the putative “Commonwealth” remains, *domestically*, just another territory subject to Congress’s plenary power under the Territories Clause.<sup>19</sup> If so, the United States—or so many have assumed—is in violation of its international legal obligations vis-à-vis Puerto Rico.

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<sup>14</sup> Frances P. Bolton, U.S. Representative to the General Assembly, Nov. 3 Statement by Mrs. Bolton in Committee IV (Trusteeship), in 29 DEP’T ST. BULL. 802, 804 (1953) [hereinafter Nov. 3 Statement by Mrs. Bolton].

<sup>15</sup> See G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630 (Nov. 27, 1953).

<sup>16</sup> See International Covenant on Civil and Political Rights, arts. 1, 25, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>17</sup> See Resolution 22, Approved by the Constitutional Convention of Puerto Rico, Feb. 4, 1952, reprinted in CONSTITUTIONAL DOCUMENTS, *supra* note 6, at 164.

<sup>18</sup> See T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 89–90 (2002).

<sup>19</sup> See U.S. CONST. art. IV, § 3, cl. 2.

We argue that the issues turn out to be both more and less problematic than this account suggests. First, even if the United States retains plenary authority over Puerto Rico as a matter of its internal law, that does not necessarily establish that, in international law, Puerto Rico fails to qualify as an adequately self-governing, autonomous entity that conforms to the criteria for the *particular* arrangement of associated statehood for which Puerto Rico bargained in 1952.<sup>20</sup> International law generally views internal laws as facts to be appraised contextually to determine substantive compliance with international obligations.<sup>21</sup> Given Congress's evident disinclination to intervene in Puerto Rico's local affairs and the federal government's solicitude for Puerto Rico, a contextual analysis suggests that Puerto Rico presently enjoys enough de facto autonomy to satisfy U.S. international obligations toward Puerto Rico arising out of the bilateral compact—regardless of the right answers to perennial constitutional debates about the mysterious Public Law 600 “adopted in the nature of a compact,” which authorized the Commonwealth's establishment.<sup>22</sup>

Yet this conclusion alone does not diffuse several oft-overlooked tensions generated by the interaction of, on the one hand, a legal system based on a late-eighteenth century constitution and, on the other, contemporary international law, which differs profoundly from the classical international legal system known to the framing generation.

First, the Appointments Clause requires that all principal officers of the United States be appointed by the President with the advice and consent of the Senate, although inferior officers may be appointed, if Congress so provides, by the President alone, the courts, or the heads of departments.<sup>23</sup> But *all* “Officers of the United States,” as defined by the Supreme Court in 1976 in *Buckley v. Valeo*, must be appointed by one of these mechanisms.<sup>24</sup> High officials in Puerto Rico's government, including but not necessarily limited to its governor, qualify as officers of the United States under *Buckley*. Yet at present, Puerto Ricans nonetheless directly elect them in prima facie violation of the Appointments Clause.<sup>25</sup> These election procedures constitute

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<sup>20</sup> See G.A. Res. 748, *supra* note 15, at 25–26.

<sup>21</sup> See *infra* notes 192–197 and accompanying text.

<sup>22</sup> See Act of July 3, 1950, Pub. L. No. 81-600, pmbl., 64 Stat. 319, 319.

<sup>23</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>24</sup> See 424 U.S. 1, 125–26 (1976) (per curiam) (defining the term “Officers of the United States” as used in Article II as “any appointee exercising significant authority pursuant to the laws of the United States”).

<sup>25</sup> See P.R. CONST. art. IV, § 1.

vital components of Puerto Rican self-governance; without them, the United States would almost surely be in violation of international law. But they are also arguably (and one of us so argues) unlawful as a matter of domestic U.S. law.<sup>26</sup>

Second, international law requires that associated states enjoy a genuine, popular voice in changes to their political status, and the International Covenant on Civil and Political Rights (“ICCPR”), which the United States has ratified, requires that “[e]very *citizen* shall have the right . . . (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;” and “(b) “[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage . . . .”<sup>27</sup> Puerto Rico, however, merely sends a non-voting observer, or “Resident Commissioner” to Congress, where he exercises whatever persuasive political power he can muster—just as can any other sovereign or private interest affected by U.S. policy.<sup>28</sup> And although Puerto Ricans nominally (by statute and, arguably, the Constitution itself) qualify as full citizens, so long as they reside in Puerto Rico rather than one of the states of the Union, they may not vote in federal elections, because the Constitution vests that power in, respectively, electors appointed by the state legislatures for presidential elections<sup>29</sup> and the citizens of the several states for congressional elections.<sup>30</sup> This voting arrangement is arguably (and one of us so argues) necessary as a matter of domestic U.S. law, but it is also arguably, if not clearly, unlawful as a matter of international law.

In Part I of this article, we seek to ascertain the customary international law that governs the novel postwar entity known as an associated state, one of the three self-determination options available to formerly colonized peoples.<sup>31</sup> The neglect of the law on associated states in the literature is regrettable in itself—for, often, associated states offer an overlooked but plausible political resolution to some of today’s seemingly intractable conflicts between, on the one hand, minorities or peoples with separatist aspirations, and on the other, established States or those dominated by irredentist elites. But an appreciation of the international legal requirements for associated states also

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<sup>26</sup> See *infra* notes 242–319 and accompanying text.

<sup>27</sup> See ICCPR, *supra* note 16, art. 25 (emphasis added).

<sup>28</sup> See 48 U.S.C. § 891 (2006) (stating that Puerto Rico “shall choose a Resident Commissioner to the United States at each general election” for a term of four years).

<sup>29</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>30</sup> *Id.*, art. I, §2, cl. 1..

<sup>31</sup> See *infra* notes 47–88 and accompanying text.



proves indispensable to an accurate appraisal of U.S. compliance with its obligations toward Puerto Rico in the framework of its constitutional legal order.

In Part II, we analyze, from the perspective of, respectively, international and constitutional law, the U.S. legal relationship with Puerto Rico.<sup>32</sup> We focus in part on the complex interpretation and meaning of Public Law 600.<sup>33</sup> But our paramount goal is to identify the extent to which U.S. legal practice, in substance if not necessarily form, conforms to international norms governing decolonization. We argue, contrary to the predominant view, that those norms prove to be flexible enough to make a forceful, though admittedly non-conclusive, case for substantial U.S. compliance with its international obligations toward Puerto Rico.<sup>34</sup> Consequently, the more difficult question is whether substantial compliance is compliance enough—and, if not, whether the Constitution can accommodate a modified arrangement that closes the legal gap.

In Part III, we therefore analyze the extent to which the Constitution may present obstacles to the instantiation of associated statehood for Puerto Rico.<sup>35</sup> We conduct this inquiry in part by means of a dialogue. Professor Lawson argues that the Constitution forbids formal mechanisms to enable Puerto Rican self-governance.<sup>36</sup> Indeed, in his view, the Constitution prohibits—except, perhaps, by means of an Article II treaty arrangement between previously sovereign States—formal self-governing institutions that would satisfy U.S. international obligations, not only toward Puerto Rico, but any other territory of the United States, such as the Commonwealth of the Northern Mariana Islands (“CNMI”). He concludes that the present Puerto Rican government, and the legal framework purporting to authorize it, is unconstitutional.<sup>37</sup> Professor Sloane, in contrast, sees the Constitution—especially in the realm of foreign affairs and international law—more in the spirit of Justice Holmes’s well-known dictum that “when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called

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<sup>32</sup> See *infra* notes 89–232 and accompanying text. To be clear, we reiterate that we do not purport to address any aspect of this relationship from the standpoint of normative or political theory.

<sup>33</sup> See generally Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

<sup>34</sup> See *infra* notes 185–231 and accompanying text.

<sup>35</sup> See *infra* notes 233–373 and accompanying text.

<sup>36</sup> See *infra* notes 240–307 and accompanying text.

<sup>37</sup> See *infra* notes 240–307 and accompanying text.

into life a being the development of which could not have been foreseen completely by the most gifted of its begetters” and, accordingly, that “[w]e must consider what this country has become in deciding” whether the Constitution can legally accommodate a novel form of international polity unknown to the framing generation.<sup>38</sup> He is therefore more sanguine about the ability of the Constitution to evolve to meet the requirements of contemporary international law.<sup>39</sup>

The authors agree, however, that creative mechanisms to ensure *substantive*, even if not *formal*, international legal compliance can be established in a fashion that elides perennially debated issues of constitutional law and theory. We strive to offer concrete proposals to resolve the arguable tensions between, on the one hand, an eighteenth-century Constitution, enacted in an era that accepted colonialism as a legitimate part of the international legal order, and on the other, contemporary international law, which clearly prohibits it. With respect to the Appointments Clause, we argue that Congress and the President can solve this problem, at no obvious political cost, by giving pro forma appointments to the winning parties in Puerto Rican elections.<sup>40</sup> We then consider whether constitutional mechanisms exist by which the United States can vest Puerto Ricans with adequate voting rights and democratic participation in the federal government, which proves to be a more complex problem to solve.<sup>41</sup>

Two potential mechanisms exist to remedy the absence of the franchise for Puerto Rican citizens of the United States. First, the compact with Puerto Rico might be construed to require bilateral consent to any fundamental changes in the relationship between the United States and Puerto Rico or to the scope of the latter’s autonomy.<sup>42</sup> Yet the weight of authority suggests that neither Congress nor

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<sup>38</sup> See *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920).

<sup>39</sup> See *infra* notes 308–319 and accompanying text.

<sup>40</sup> See *infra* notes 320–324 and accompanying text.

<sup>41</sup> See *infra* notes 325–373 and accompanying text. This issue has been litigated repeatedly in recent years. See, e.g., *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 146–47, 150–51 (1st Cir. 2005) (en banc) (dismissing, for the third time, a suit by Gregorio Igartúa alleging that as a Puerto Rican citizen of the United States, he enjoys the right to vote in presidential elections under the ICCPR and customary international law); see also *Romeu v. Cohen*, 265 F.3d 118, 120 (2d Cir. 2001) (rejecting plaintiff’s assertion that as a U.S. citizen residing in Puerto Rico who formerly resided and voted in New York, he had the right to vote in presidential elections by absentee ballot from New York).

<sup>42</sup> That is how Puerto Rico, and some U.S. politicians, understood the compact in 1953. See Letter from Luis Muñoz Marín, Governor of Puerto Rico, to the President of the United States (Jan. 17, 1953), in 28 DEP’T ST. BULL. 588, 589 (1953) [hereinafter Letter from Luis Muñoz Marín] (“Our status and the terms of our association with the United

the executive branch understood Public Law 600 as an irrevocable delegation of Congress's otherwise plenary authority under the Territories Clause, even assuming that such a statute would be constitutional.<sup>43</sup> Second, if the federal government therefore perforce retains plenary power over Puerto Rico as a constitutional matter, Puerto Ricans could be given a voice in that government by vesting them with the franchise. This latter option, however, may well be unconstitutional absent a constitutional amendment.<sup>44</sup> One of us would argue that it is; the other regards the Constitution as capable of evolving to meet the new demands of international law in this regard without doing violence to the constitutional text.<sup>45</sup> We consider several potential solutions in that vein.<sup>46</sup>

We differ, sometimes sharply, on a number of constitutional issues relevant to this analysis, largely because of more basic disagreements about constitutional methodology. But we share a belief in the capacity and need for valid constitutional solutions to the uncertain legal status of Puerto Rico, which has subsisted in a legal limbo for more than fifty years now. Our goals are to expose heretofore unrecognized legal problems; to clarify their scope; to explore them by means of internal dialogue; and, finally, to suggest creative mechanisms that may, assuming political will, ensure substantive, even if not necessarily formal, compliance with contemporary international law—while striving to elide the intractable constitutional issues. Be-

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States cannot be changed without our full consent.”); *see also* Frances P. Bolton, U.S. Representative to the General Assembly, Oct. 30 Statement by Mrs. Bolton in Committee IV (Trusteeship), in 29 DEP'T ST. BULL. 797, 798 (1953) [hereinafter Oct. 30 Statement by Mrs. Bolton] (asserting that the new Puerto Rican constitution created an arrangement with the United States that “may not be amended or abrogated unilaterally”). Several lower federal court decisions have also implied this view. *See, e.g.,* United States v. Quinones, 758 F.2d 40, 42 (1st Cir. 1985) (“Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.”).

<sup>43</sup> *See* ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 165–69 (1989) (reviewing the legislative history of Public Law 600).

<sup>44</sup> *See, e.g.,* Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories, in* FOREIGN IN A DOMESTIC SENSE 182, 196–98 (Christina Duffy Burnett & Burke Marshall eds., 2001) (discussing the restriction of national representation to the states only, and questioning “[t]he degree to which territorial and commonwealth statuses would permit a group that views itself as a territorial people to achieve self-determination within the U.S. constitutional system”).

<sup>45</sup> *See infra* notes 325–373 and accompanying text.

<sup>46</sup> *See infra* notes 371–373 and accompanying text.

cause the present associated statehood relationship arguably violates *both* international and constitutional law, the complex issues of Puerto Rico's legal status, and viable options for its future in the twenty-first century, compel attention. Above all, we therefore seek to facilitate a long-overdue discussion about how, concretely, to reconcile U.S. international obligations toward Puerto Rico with the Constitution.

## I. SELF-DETERMINATION AND ASSOCIATED STATEHOOD IN CONTEMPORARY INTERNATIONAL LAW

### A. *The Evolution of the Right to Self-Determination*

Self-determination, initially associated with Wilsonian idealism and the Versailles peace process that redrew the map of Europe in the wake of the First World War,<sup>47</sup> emerged in the interwar period not as a positive right but as a political principle: "that the new borders of Europe would, to the extent possible, be drawn along national lines."<sup>48</sup> Before the U.N. Charter regime and the advent of international human rights law, it emphatically did not mean that the imperial powers of Europe would permit the peoples of colonized territories to determine their own political destinies.<sup>49</sup>

Following World War II, however, in part because Germany and others abused the idea of self-determination and minority-rights re-

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<sup>47</sup> The historical development of the right of peoples to self-determination as a concept of international law has been analyzed in detail elsewhere. *See generally, e.g.*, Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304 (1994); Diane F. Orentlicher, *Separation Anxiety: International Responses to Ethno-Separatist Claims*, 23 YALE J. INT'L L. 1 (1998). We review it briefly here only to supply the essential context in which the tensions between international and constitutional law that we explore in this study arise.

<sup>48</sup> *See* Orentlicher, *supra* note 47, at 32–33. The Aaland Islands affair is frequently cited as evidence that international law did not, in the aftermath of World War I, recognize self-determination as a right, particularly relative to secessionist claims. *See, e.g.*, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 54 (1992); Kirgis, *supra* note 47, at 304. An international commission created by the new League of Nations denied self-determination to the Islands whose population sought to secede from Finland. *See* Franck, *supra*, at 54; *see also Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question*, League of Nations, Council Doc. 69.20/4/238 (1920); *The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, League of Nations, Council Doc. B7.21/68/106, at 27–28 (1921).

<sup>49</sup> *See* Orentlicher, *supra* note 47, at 39.

gimes as pretexts for aggression,<sup>50</sup> international law fundamentally reconceptualized self-determination such that it evolved into a clear international right to be free from colonial domination.<sup>51</sup> Article 1 of the U.N. Charter cites one of its four principal purposes as being “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,” and Article 73 sets out the obligation of metropolitan states progressively to promote self-government among formerly subjugated peoples and colonies.<sup>52</sup>

A series of General Assembly resolutions shortly followed, which, in effect, established the customary framework for decolonization. In 1950, the General Assembly requested a study of “ways and means which would ensure the right of peoples and nations to self-determination.”<sup>53</sup> Ten years later, it adopted Resolution 1514, which condemned colonialism, reaffirmed the right of self-determination, and called on imperial states promptly to take steps to transfer political power to the peoples of formerly subjugated territories “in accordance with their freely expressed will and desire.”<sup>54</sup> The Assembly recognized, however, that despite the historic injustices of colonialism, not all peoples would necessarily want independence.<sup>55</sup> Nor would it necessarily be in their best interest. For economic, cultural, national security, and other reasons, some former colonies would prefer to retain political ties to their erstwhile imperial States. Resolution 1541, also adopted in 1960, therefore declared that peoples entitled to self-determination could exercise that right by choosing among three political arrangements, each of which would qualify as “a full measure of self-government”: “(a) Emergence as a sovereign inde-

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<sup>50</sup> See WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP* 2 (1996) (noting that “Nazi Germany justified its invasion of Poland and Czechoslovakia on the grounds that these countries were violating the treaty rights of ethnic Germans on their soil”).

<sup>51</sup> Kirgis, *supra* note 47, at 305–08; Orentlicher, *supra* note 47, at 40–41.

<sup>52</sup> U.N. Charter arts. 1, 73.

<sup>53</sup> G.A. Res. 421, ¶ 6, U.N. GAOR, 5th Sess., Supp. No. 20, U.N. Doc. A/1775 (Dec. 1, 1950).

<sup>54</sup> G.A. Res. 1514, at 66–67, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (Dec. 14, 1960).

<sup>55</sup> Cf. MASAHIRO IGARASHI, *ASSOCIATED STATEHOOD IN INTERNATIONAL LAW* 147–48 (2002) (noting that in the General Assembly debates culminating in the historic Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, G.A. Res 2625 (XXV) adopted in 1970, some states “argued that Non-Self-Governing Territories differed greatly, both in natural resources and wealth, size and population and also in the aspiration of the peoples concerned”).

pendent State; (b) Free association with an independent State; or (c) Integration with an independent State.”<sup>56</sup>

Although the meaning of the right to self-determination remains controversial in the context of disaffected minorities and secessionist claims,<sup>57</sup> Resolution 1541 has long been accepted as the authoritative interpretation of this right in the decolonization context. For example, in 1975, the International Court of Justice (“ICJ”) issued its advisory opinion in *Western Sahara*, which affirmed this understanding of the right of self-determination in the context of decolonization.<sup>58</sup> After recalling its 1970 determination in *Namibia* that “the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them,”<sup>59</sup> the Court concluded that “[t]he validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples,”<sup>60</sup> required it to assume that the people of Western Sahara enjoyed a *right* “to determine their future political status by their own freely expressed will.”<sup>61</sup> At the same time, the Court reaffirmed that the realization of this right can take diverse forms. International law, it said, “leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized.”<sup>62</sup> Those forms include, as set out in Resolution 1541, independence, free association, and integration.<sup>63</sup> Two decades later, in

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<sup>56</sup> G.A. Res. 1541, at 29, Annex, Principle VI, U.N. GAOR, 15th Sess., Supp. No. 16, , U.N. Doc. A/4684 (Dec. 15, 1960).

<sup>57</sup> See, e.g., Badinter Comm’n, Opinion No. 1, Conference on Yugoslavia Arbitration Commission, 31 I.L.M. 1494, 1495–97 (1992) (considering possible secessionist claims of the six republics of the Socialist Federal Republic of Yugoslavia).

<sup>58</sup> *Western Sahara*, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

<sup>59</sup> *Id.* at 31 (quoting Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 31 (June 21)).

<sup>60</sup> *Id.* at 33.

<sup>61</sup> *Id.* at 36; see also Reference re Secession of Quebec, [1998] S.C.R. 217 ¶ 114 (Can.), 37 I.L.M. 1340, 1369 (“The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond ‘convention’ and is considered a general principle of international law.”); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT’L & COMP. L.Q. 241, 242 (1994) (noting that “by the end of the 1970s most textbooks addressed self-determination in terms of a legal principle or a right of positive international law”).

<sup>62</sup> See *Western Sahara*, 1975 I.C.J. at 36.

<sup>63</sup> *Id.* at 32. The option of associated statehood has, regrettably, often been neglected. It should not be. Apart from its utility in the decolonization context, it offers a potentially effective compromise in the all-too-common circumstance, as prevalent today as in the

the *East Timor* case, the ICJ characterized the right to self-determination, as expounded in its earlier jurisprudence, as *erga omnes*.<sup>64</sup>

The process of decolonization peaked during the 1960s and 1970s and wound down in the 1980s. After Palau's establishment as an associated state in 1994,<sup>65</sup> the Trusteeship Council suspended its operations,<sup>66</sup> although it still exists and, despite more than a decade of inactivity, "can be convened on demand."<sup>67</sup> Yet several colonial or

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past, in which a disaffected national minority demands independence, but neither the political majority nor the international community as a whole will accept that demand for fear of an inexorable slide toward the destabilization and progressive fragmentation of nation-states. See IGARASHI, *supra* note 55, at 5. An international right to secede may arise in cases of serious political repression or human rights violations. See *Reference re Secession of Quebec*, [1998] S.C.R. 217, ¶¶ 132–34, 138 (Can.), 37 I.L.M. 1340, 1372–73.

<sup>64</sup> *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, 102 (June 30). The international phrase "*erga omnes*" means literally "relative to everyone." It first emerged in the ICJ's decision in *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), in which the Court distinguished between

obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

*Id.* at 32.

<sup>65</sup> T.C. Res. 2199 (LXI), U.N. Doc. T/RES/2199 (May 25, 1994); see also S.C. Res. 956, U.N. Doc. S/RES/956 (Nov. 10, 1994).

<sup>66</sup> U.N. DEP'T OF PUB. INFO., BASIC FACTS ABOUT THE UNITED NATIONS 13 (2004).

<sup>67</sup> Carolyn L. Willson, *Changing the Charter: The United Nations Prepares for the Twenty-first Century*, 90 AM. J. INT'L L. 115, 122 (1996). Self-determination "reemerged as a major issue in the 1990s . . . because of the explosion of post-Cold War State successions," and "[t]he question therefore arose—or, more accurately, reemerged from its dormancy since the interwar period—whether and, if so, under what conditions, the right to self-determination requires that States offer greater autonomy or even independence to disaffected national, ethnic, or other minorities." Robert D. Sloane, *The Policies of State Succession: Harmonizing Self-Determination and Global Order in the Twenty-First Century*, 30 FORDHAM INT'L L.J. 1288, 1306 (2007) (reviewing TAI-HENG CHENG, STATE SUCCESSION AND COMMERCIAL OBLIGATIONS (2006)). A relatively accurate statement of current international law on the issue appears in *Reference re Secession of Quebec*, [1998] S.C.R. 217 (Can.), 37 I.L.M. 1340, in which the Supreme Court of Canada considered whether the right to self-determination might permit Quebec to secede from Canada unilaterally. It concluded that, today, apart from the decolonization context, international law generally requires that self-determination be fulfilled internally, through the political channels available in democratic states and, if necessary, by affording special protections to national minorities. *Id.* ¶ 126, 37 I.L.M. at 1371. Following academic terminology, it referred to this as "internal self-determination—a people's pursuit of its political, economic, social and cultural development within the framework of an existing state." *Id.* In contrast, an "external" right to self-determination—that is, the right of a people to choose independence, free association

other territories remain in the process of self-determination, having never completed—or been unable to complete—the progression contemplated by Resolution 1541.<sup>68</sup> Because the modern concept of self-determination emerged as a genuine right of peoples in the decolonization era and is at its most robust in that context, the colonial origins of these territories validate their continuing right to “external” self-determination: that is, the right to choose independence, associated statehood, or integration according to the freely expressed wishes of their peoples.

Furthermore, the right to self-determination in the decolonization context does not necessarily terminate with the first act of collective political expression. Eritrea, for example, originated as an Italian colony in the late nineteenth century; became an autonomous unit federated with Ethiopia pursuant to General Assembly Resolution 390A in 1950; reunified with Ethiopia in 1962; and declared its independence and seceded to form an independent state in 1993.<sup>69</sup> This suggests that if the arrangement initially adopted by a former colony proves unsatisfactory, its people should, in at least some circumstances, have the right to opt for a new status—be it independence, (a new form of) free association, or integration with an existing State. Associated states in particular, as Resolution 1541 affirms, retain “the freedom to modify the status of [their] territory through the expression of their will by democratic means and through constitutional processes.”<sup>70</sup>

#### B. *Associated Statehood as a Vehicle for Self-Determination*

What, then, is an associated state? Although the political concept has antecedents in the protectorates of the colonial era, it emerged in its modern formulation during the era of decolonization as an alternative to the polar options of independence and integration with an existing State.<sup>71</sup> Some peoples, particularly those in small territories,

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or integration in accordance with Resolution 1541—arises “only in the most extreme cases and, even then, under carefully defined circumstances.” *Id.* International law continues, however, to validate a robust, external right to self-determination for the peoples of former or residual colonies—a right the Court characterized as “undisputed.” *Id.* ¶ 132, 37 I.L.M. at 1372.

<sup>68</sup> See G.A. Res. 1541, *supra* note 56, at 29, Annex, Principle VI.

<sup>69</sup> For an overview, see Minas Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT’L L. REV. 479, 482–88 (1994).

<sup>70</sup> See G.A. Res. 1541, *supra* note 56, at 29, Annex, Principle VII(a).

<sup>71</sup> See W. MICHAEL REISMAN, PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION 9–13 (1975); see also IGARASHI, *supra* note 55, at 5–6. See generally



although naturally keen to exercise their right to autonomy and self-governance, appreciated that their long-term economic, security, or other interests would be better served through some form of continuing association with their erstwhile metropolitan States.<sup>72</sup> Associated statehood accommodated this desire by making an intermediate political status available. The concept of associated states in international law came to embrace a broad spectrum of political arrangements between two entities “characterized by recognition of the significant subordination of and delegations of competence by one of the parties (the associate) to the other (the principal) but maintenance of the continuing international status of statehood of each component.”<sup>73</sup>

The legal evolution of associated statehood dates back to shortly after the adoption of the U.N. Charter. In 1949, the General Assembly began to establish guidelines to instantiate Article 73(e) of the Charter, which obliges metropolitan States to transmit certain information with respect to “territories whose peoples have not yet attained a full measure of self-government.”<sup>74</sup> With Resolution 334, it invited a subcommittee to “examine the factors which should be taken into account in deciding whether any territory is or is not a territory whose people have not yet attained a full measure of self-government.”<sup>75</sup> This resulting list, adopted by the General Assembly in Resolution 567 of 1952, included a separate enumeration of factors “indicative of the free association . . . of a territory on equal status with other component parts of the metropolitan or other country.”<sup>76</sup> Puerto Rico, the principal subject of this article, became perhaps the first explicit freely associated state in 1952.<sup>77</sup> As relevant here, the general factors indicative of free association included the following under the heading “constitutional considerations”: “(i) whether the constitutional guarantees extend equally to the associated territory, (ii) whether

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Margaret Broderick, *Associated Statehood—A New Form of Decolonisation*, 17 INT’L & COMP. L.Q. 368 (1968).

<sup>72</sup> See IGARASHI, *supra* note 55, at 4–5.

<sup>73</sup> See REISMAN, *supra* note 71, at 10; *see also* IGARASHI, *supra* note 55, at 5–6.

<sup>74</sup> U.N. Charter art. 73.

<sup>75</sup> G.A. Res. 334 (IV), ¶ 2 U.N. GAOR, 4th Sess. (Dec. 2, 1949).

<sup>76</sup> G.A. Res. 567 (VI), at 62, U.N. GAOR, 6th Sess. (1952). At that time, the concept of “free association” apparently subsumed both full integration and what would now be called associated statehood. The Assembly recommended “further study” of the situation of territories that “have become neither independent nor fully integrated within another State but which have already attained a full measure of self-government in their internal affairs.” *Id.* at 61 ¶ 3; *see also* IGARASHI, *supra* note 55, at 29.

<sup>77</sup> *See* G.A. Res. 748, *supra* note 15, at 25–26.

there are constitutional fields reserved to the territory, and (iii) whether there is provision for the participation of the territory on a basis of equality in any changes in the constitutional system of the State.”<sup>78</sup>

The guidelines, in other words, contemplated that where association did not effectively mean integration, but rather an intermediate status between integration and independence, sovereign *competences* would be divided between the associate and the principal, yet constitutional *guarantees* would apply, within some reasonable margin of appreciation, equally to the territory of each.<sup>79</sup>

Resolution 1541 explicitly recognized free association as a form of self-determination, and its Annex sets out the essential factors relevant to assessing the legality and propriety of freely associated states. Principle VII of the resolution requires that free association be achieved through democratic processes that reflect the “free and voluntary choice by the peoples of the territory concerned” and that it be a status that “respects the individuality and the cultural characteristics of the territory and its peoples.”<sup>80</sup> Furthermore, the status of free association does not terminate the self-determination process; rather, as already noted, the people of a freely associated state retain the right “to modify the status of [their] territory through the expression of their will by democratic means and through constitutional processes.”<sup>81</sup> Finally, relative to the principal, a freely associated state “should have the right to determine its internal constitution without outside interference,” although this “does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.”<sup>82</sup> Resolution 1541 thus offered critical guidance on the

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<sup>78</sup> G.A. Res. 567, *supra* note 76, at 62.

<sup>79</sup> *See id.*

<sup>80</sup> G.A. Res. 1541, *supra* note 56, at 29, Annex, Principle VII(a).

<sup>81</sup> *See id.*; *see also* IGARASHI, *supra* note 55, at 242 (“The right of an Associate State to terminate unilaterally the association arrangement is an essential component of the right of self-determination.”). Principle VIII, which offers authoritative guidance on the self-determination option of integration, emphasizes that it must be on the basis of full equality of citizenship, rights, and freedoms as between the former colonized people and the citizens of the independent state, but it does not explicitly retain for the former a future right to modify this status. *See* G.A. Res. 1541, *supra* note 56, at 30, Annex, Principle VIII. International law would be unlikely to allow a people that chose integration to engage in a further act of external self-determination, except perhaps, as the Canadian Supreme Court said, “as a last resort,” if that “people is blocked from the meaningful exercise of its right to self-determination internally.” *See* Reference re Secession of Quebec, [1998] S.C.R. 217, ¶¶ 134–35, 37 I.L.M. 1340, 1372–73.

<sup>82</sup> G.A. Res. 1541, *supra* note 56, at 29–30, Annex, Principle VII(b).

indicia of and substantive criteria for associated statehood as a mode of genuine self-determination in the era of decolonization.

But just as it would be too simple to consider the Montevideo Convention on the Rights and Duties of States the final word on the essential criteria for statehood,<sup>83</sup> it would be equally so to view Resolution 1541 in that way relative to associated states. International law recognizes as lawful a range of associated states, some of which manifest greater dependence on the principal than others.<sup>84</sup> The precise contours of associated statehood must be flexible enough to accommodate diverse historical, economic, social, cultural, and political circumstances. At the same time, flexibility can only extend so far: associated states cannot surrender so much autonomy as to be indistinguishable from colonies or protectorates. Indicia or criteria for assessing the legality of associated states include, *inter alia*, the existence of universal suffrage, substantial internal autonomy, “the extent to which the association conduces to a better fulfillment of the human (including economic and social) rights deemed under contemporary prescriptions to be minimum international standards,”<sup>85</sup> and the availability of procedures for either terminating or modifying associated statehood should the associate’s people determine it no longer to be in their interest.<sup>86</sup>

In short, as it has evolved to date, the international status of free association requires constitutional arrangements both internally (within the associate) and externally (within the principal) that, at once, (1) guarantee core international human rights, including equal protection of the laws and meaningful political representation, and (2) reserve certain legal fields for the associate.<sup>87</sup> Yet free association also, by definition, implies political subordination. With every freely associated state, the challenge is to establish a legal framework that can accommodate an enduring relationship of political inequality be-

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<sup>83</sup> See Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>84</sup> Examples include the Cook Islands with New Zealand; and the arrangements of the former Trust Territory of the Pacific Islands (“TTPI”)—the CNMI, Republic of the Marshall Islands, Federated States of Micronesia, and Palau—with the United States. On the Cook Islands, see IGARASHI, *supra* note 55, at 68–112. On the former TTPI associated states, see Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT’L L.J. 1, 33–58 (2004).

<sup>85</sup> REISMAN, *supra* note 71, at 12.

<sup>86</sup> See IGARASHI, *supra* note 55, at 65–66 (enumerating criteria proposed by scholars as indicative of or essential to associated statehood).

<sup>87</sup> See G.A. Res. 567, *supra* note 76, at 62.

tween the principal and associate without compromising the individual equality of their respective peoples and the collective right of the self-determining entity. This is not an easy task under the best of circumstances.<sup>88</sup> The U.S. Constitution further complicates it.

## II. THE STATUS OF PUERTO RICO: COMMONWEALTH OR COLONY?

### A. Introduction

On reflection, the tension between *contemporary* international law and U.S. constitutional law should not be surprising. International law today differs profoundly from that of the late eighteenth century. During the era of the Constitution's framing, colonialism had been an established and accepted feature of the international legal order. The Declaration of Independence—notwithstanding the well-known Jeffersonian rhetoric referring to a supposedly “self-evident” truth that governments “deriv[e] their just powers from the consent of the governed”<sup>89</sup>—did not justify separation from Great Britain based on a repudiation of colonialism, which flourished for almost another two centuries. Instead, it defended the right “to dissolve the political bands” between the American colonies and the British Crown based on “a long train of abuses and usurpations” perpetrated by the latter,<sup>90</sup> an argument that does not cast doubt on the general validity of colonialism. Indeed, the Constitution's ratification twelve years later took place against an international legal backdrop that *presupposed* this colonial framework. Gouverneur Morris, who drafted the Territories Clause, which governs U.S. territories during peacetime,<sup>91</sup> candidly admitted in 1803: “I always thought that, when we should acquire

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<sup>88</sup> Furthermore, because free association may at times be not a final act of self-determination, but rather a kind of least common denominator for territorial communities unable to agree internally on a self-determination option—with some residents favoring independence, others integration with the principal, and still others the status quo—certain forms of associated statehood may be a sign of political inertia. Puerto Rico may be a case in point.

<sup>89</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>90</sup> *Id.* paras. 1, 2. Much of the Declaration consists, in essence, of a “bill of particulars” alleging a litany of misfeasance, malfeasance, and nonfeasance on the part of England in the administration of the American colonies. *See id.*

<sup>91</sup> *See* U.S. CONST. art. IV, § 3, cl. 2. During wartime, occupied territory is governed by the President pursuant to the “executive Power,” although the authors disagree about the scope of that power and the extent to which it may be subjected to congressional and international legal constraints. On the interplay between peacetime and wartime governance of American territory, see generally Gary Lawson & Guy Seidman, *The Hobbesian Constitution: Governing Without Authority*, 95 NW. U. L. REV. 581 (2001).

Canada and Louisiana it would be proper to govern them as provinces, and allow them no voice in our councils. In wording the [Territories Clause], I went as far as circumstances would permit to establish the exclusion.”<sup>92</sup>

It was therefore neither internationally unlawful nor of particular interest to the major European powers when the United States acquired far-flung island possessions stretching from Asia to the Caribbean following the Spanish-American War and governed them as “provinces” with “no voice in our councils.”<sup>93</sup> Of course, the mechanisms of governance of federal territory generated heated debate (and the occasional civil war) within the United States from the founding era through the early twentieth century.<sup>94</sup> But the international law of the era cast no doubt on the legality of U.S. control over the affairs and destinies of its territorial possessions—or of the peoples inhabiting them.

After World War II, of course, matters changed profoundly. International law rapidly evolved to recognize a robust right of peoples to self-determination, that is, the right to “freely determine their political status and freely pursue their economic, social and cultural development.”<sup>95</sup> Article 73 of the U.N. Charter, to which the United States is a (founding) State party, requires metropolitan member States<sup>96</sup> to govern such territories in their inhabitants’ interests, to promote the progressive development of an appropriate form of self-government, and “to transmit regularly to the Secretary-General . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories.”<sup>97</sup> In 1946, the U.N. General Assembly also established the Trusteeship Council,<sup>98</sup> which would administer a trusteeship system to decolonize

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<sup>92</sup> See Letter from Gouverneur Morris, *supra* note 1, at 192. Morris admitted with further candor that had his ambitions for Canada and Louisiana “been more pointedly expressed, a strong opposition would have been made.” *Id.* But this opposition had nothing to do with an aversion to colonialism.

<sup>93</sup> See *id.*

<sup>94</sup> For an overview of the issues and debates surrounding American acquisition and governance of territory, see generally GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004).

<sup>95</sup> See ICCPR, *supra* note 16, art. 1.

<sup>96</sup> U.N. Charter art. 73 (applying to “[m]embers 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”).

<sup>97</sup> See *id.*

<sup>98</sup> G.A. Res. 64 (I), at 122–23, U.N. GAOR, 1st Sess., (Dec. 14, 1946); see also U.N. Charter arts. 86–91.

and establish some form of self-government in extant former colonies, mandates, and other non-self-governing territories.<sup>99</sup>

Now, when the Charter entered into force on October 24, 1945, the United States held several territories subject to these mandates,<sup>100</sup> including Puerto Rico, which it had acquired in 1898 (along with Cuba, Guam, and the Philippines) under the terms of the Treaty of Paris after the Spanish-American War.<sup>101</sup> By and large, postwar U.S. practice toward its colonies rapidly evolved to meet international law's new demands. The United States granted the Philippines full independence in 1946.<sup>102</sup> Hawaii and Alaska became the forty-ninth and fiftieth states of the Union in 1959. Although initially reluctant to surrender control over the Trust Territory of the Pacific Islands ("TTPI") because of its geostrategic value,<sup>103</sup> as the Cold War wound down in the 1980s and 1990s, the United States worked out compacts of free association with its constituents.<sup>104</sup> These arrangements reflected the wishes of the peoples of these former territories, as expressed in free and fair plebiscites, and they clearly satisfy the imperatives of contemporary international law.<sup>105</sup> For the most part, they also pose no constitutional problems.<sup>106</sup>

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<sup>99</sup> See U.N. Charter arts. 75–85.

<sup>100</sup> As of 1952, the United States bore responsibility for one trust territory (the Trust Territory of the Pacific Islands, formerly under Japanese mandate) and six non-self-governing territories (Alaska, American Samoa, Guam, Hawaii, Puerto Rico, and the U.S. Virgin Islands). See III FOREIGN RELATIONS OF THE UNITED STATES 1952–1954, at 1081 (Ralph R. Goodwin ed., 1979); I FOREIGN RELATIONS OF THE UNITED STATES 1947, at 283 (1973). The United States initially submitted information on the Panama Canal Zone pursuant to Article 73(e), but after the Republic of Panama objected, agreed to cease to “transmit information in [the] future on this territory without consulting the Republic of Panama” first. I FOREIGN RELATIONS OF THE UNITED STATES 1947, *supra* at 283.

<sup>101</sup> See Treaty of Paris arts. I–III, U.S.–Spain, Dec. 10, 1898, 30 Stat. 1754.

<sup>102</sup> See Treaty of General Relations between the United States of America and the Republic of the Philippines, U.S.–Phil., July 4, 1946, T.I.A.S. No. 1568.

<sup>103</sup> See Keitner & Reisman, *supra* note 84, at 34–35.

<sup>104</sup> These include the Federated States of Micronesia, the Republic of the Marshall Islands, the Republic of Palau, and the CNMI. See 48 U.S.C. §§ 1901–1973 (2006). For an overview, see Keitner & Reisman, *supra* note 84, at 33–58. The CNMI has a conceptually distinct and constitutionally more problematic legal relationship with the United States than the others, for reasons we explore below. See *id.* at 41–43.

<sup>105</sup> See Keitner & Reisman, *supra* note 84, at 33–58.

<sup>106</sup> In Professor Lawson's view, the sole constitutional defect in the relationship between the United States and the former TTPI states (save for the CNMI) is one of form, insofar as that relationship should have been pursuant to an actual Article II treaty. See U.S. CONST. art. II, § 2, cl. 2. Professor Sloane, in contrast, does not regard congressional-executive or sole executive agreements as unconstitutional as such, although he reserves judgment on whether they may constitutionally be used in lieu of an Article II treaty in this particular context.

Matters are more complicated, however, with respect to Puerto Rico and the CNMI. Unlike Alaska, Hawaii, and the other freely associated states carved from the former TTPI, neither Puerto Rico nor the CNMI has requested either independence from the United States (separation) or admission to the Union as a state (integration), and the United States has therefore had no occasion to decide whether to accede to such a request.<sup>107</sup> Both territories instead describe themselves as commonwealths and operate with a degree of effective autonomy pursuant to compacts of some kind between them and the United States, which purport to vest them with substantial self-governance powers.<sup>108</sup> At the same time, despite some historical developments that might suggest otherwise, all three branches of the federal government assert that the United States ultimately retains plenary authority over all territories, which include, in their view, Puerto Rico and the CNMI<sup>109</sup>—even if, to date, the political branches have been generally disinclined in practice to interfere in their affairs or to exercise that plenary authority. Still, according to the United States, the *de facto* self-governance enjoyed by both Puerto Rico and the CNMI is, in the final analysis, a matter of legislative grace rather than legal right. Furthermore, neither enjoys a democratic voice in

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<sup>107</sup> See Keitner & Reisman, *supra* note 84, at 21–27, 38–44.

<sup>108</sup> See *id.*

<sup>109</sup> See, e.g., United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 2(4) (1998) (“The Commonwealth [of Puerto Rico] remains an unincorporated territory and does not have the status of ‘free association’ with the United States as that status is defined under United States law or international practice.”); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (“Congress, which is empowered under the Territory Clause of the Constitution . . . to ‘make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,’ may treat Puerto Rico differently from States so long as there is a rational basis for its actions”); REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS 5–6 (2007), <http://www.usdoj.gov/opa/documents/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> (“Congress may continue the current commonwealth system indefinitely, but it necessarily retains the constitutional authority to revise or revoke the powers of self-government currently exercised by the government of Puerto Rico.”); see also *United States v. Sanchez*, 992 F.2d 1143, 1152–53 (11th Cir. 1993) (“Congress may unilaterally repeal the Puerto Rican Constitution or the Puerto Rican Federal Relations Act and replace them with any rules or regulations of its choice.”). The courts, however, have not been entirely consistent. See, e.g., *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (“Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution”) (internal quotation marks omitted); *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) (“Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power.”).

the exercise of this plenary federal power.<sup>110</sup> The constitutional status of these entities, to say the least, is unclear.

### B. *The Constitutional Framework for Territorial Governance*

At first glance, the Constitution's rules for territorial governance seem simple. The Territories Clause gives Congress "Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>111</sup> Nothing in the Territories Clause distinguishes among individual territories or classes of territories.<sup>112</sup> It grants Congress "general and plenary"<sup>113</sup> power with respect to federal territory, which amounts to "full and complete legislative authority over the people of the Territories and all the departments of the territorial governments."<sup>114</sup> Relative to the territories, Congress is not limited to the enumerations of powers found outside the Territories Clause; the clause itself effectively *constitutes* Congress as a general government.<sup>115</sup> To be sure, even as a general government that need not find authorization for action in any enumerated constitutional power other than the Territories Clause, affirmative prohibitions in the Constitution, such as those in Article I,

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<sup>110</sup> Political parties can, of course, choose to give territorial citizens a say in the selection of party candidates for federal office: hence the recent Democratic primary, for example, in Puerto Rico. See, e.g., Susan Milligan, *Presidential Primary Brings Attention, Frustration to Puerto Rico*, BOSTON GLOBE, May 31, 2008, at A1. We focus in this article on Puerto Rico, although several of our conclusions might apply with equal force to the CNMI. For analysis of the CNMI, see generally Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180 (2003); Jennifer C. Davis, Comment, *Beneath the American Flag: United States Law and International Principles Governing the Covenant Between the United States and Commonwealth of the Northern Mariana Islands*, 13 TRANSNAT'L LAW. 135 (2000); Gretchen Kirschenheiter, Note, *Resolving the Hostility: Which Laws Apply to the Commonwealth of the Northern Mariana Islands When Federal and Local Laws Conflict*, 21 U. HAW. L. REV. 237 (1999).

<sup>111</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>112</sup> See *id.* In the *Dred Scott* decision, Justice Taney, along with a plurality of Justices, tried to argue that the Territories Clause only embraced territory that belonged to the United States when the Constitution was ratified in 1788. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 432–43, 448–49 (1857). As with much of the *Dred Scott* decision, this was patent nonsense: the reference in the clause to "Territory" applies to after-acquired territory just as surely as the reference to "other Property" refers to other kinds of after-acquired property—as Albert Gallatin had pointed out more than half a century before *Dred Scott*. See LAWSON & SEIDMAN, *supra* note 94, at 75.

<sup>113</sup> *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890).

<sup>114</sup> *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880); see also *Sere and Laralde v. Pilot*, 10 U.S. (6 Cranch) 332, 337 (1810).

<sup>115</sup> See *County of Yankton*, 101 U.S. at 133; see also *Sere and Laralde*, 10 U.S. at 337.



Section 9, or the Bill of Rights, constrain Congress's ability to govern the territories to some extent.<sup>116</sup> At that point, however, matters go from simple to anything but.

Case law from more than a century ago gives Congress freedom to legislate for at least some territories in a fashion that would violate the Constitution in other contexts. A series of Supreme Court decisions in 1901, known collectively as *The Insular Tariff Cases*,<sup>117</sup> held that the Constitution's requirements that "all Duties, Imposts and Excises shall be uniform throughout the United States" and that "[n]o Tax or Duty shall be laid on Articles exported from any State" did not apply to Puerto Rico or to other noncontiguous island territories, so that Congress could impose duties on goods exported from Puerto Rico to the United States.<sup>118</sup> That doctrine quickly expanded to include other constitutional provisions that, in the Court's view, did not necessarily apply to all federal territories.<sup>119</sup> In particular, the inhabitants of territories denominated "incorporated"—a vague and ill-defined term that suggests suitability for future statehood<sup>120</sup>—enjoy the protection of all

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<sup>116</sup> See U.S. CONST. art. I, § 9; *id.* amends. I–X.

<sup>117</sup> See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

<sup>118</sup> See U.S. CONST. art. I, § 8, cl. 1; *id.* art. I, § 9, cl. 5. Clearly, Puerto Rico is not a state, so the Exports Clause by its terms does not apply to Puerto Rico. But if Puerto Rico is part of the United States, and if no duties are permitted on interstate commerce, then the Uniformity Clause seems to require that there be no duties as well on state-to-territory or territory-to-state commerce. Such, at least, was the argument advanced, and rejected by the Supreme Court, in *The Insular Tariff Cases*. See LAWSON & SEIDMAN, *supra* note 94, at 194–95.

<sup>119</sup> For a brief critical summary of *The Insular Cases* (as they came to be called once they were no longer limited to tariff matters), see LAWSON & SEIDMAN, *supra* note 94, at 194–97. For a more thorough treatment by one of the lawyers principally involved in the early litigation, see generally Frederic R. Coudert, *The Evolution of the Doctrine of Territorial Incorporation*, 26 COLUM. L. REV. 823 (1926).

<sup>120</sup> Compare *Boumediene v. Bush*, 128 S. Ct. 2229, 2254 (2008) (describing incorporated territories as "surely destined for statehood"), with *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (describing unincorporated territories as "not clearly destined for statehood"). Before statehood-candidacy emerged as the evident touchstone for "incorporated" status, the Court toyed with other possible meanings of the term, such as the citizenship status of territorial inhabitants or the language of the treaties of acquisition. For a deconstruction of the evolution of the term "incorporation" during the first quarter of the twentieth century, see generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007). In the end, we think there is much to be said for Justice John Marshall Harlan's comments in one of the earliest *Insular Cases*: "I am constrained to say that this idea of 'incorporation' has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel." See *Downes*, 182 U.S. at 391 (Harlan, J., dissenting).

relevant provisions of the Constitution even without congressional extension of those provisions to the territory. In contrast, their counterparts in “unincorporated” territories enjoy the protection of only those provisions viewed by the Court as “fundamental,” absent congressional action making other provisions applicable.<sup>121</sup>

The category of fundamental rights is as arbitrary and ill-defined as the concept of incorporation. Specific cases hold, for example, that the rights to jury trial<sup>122</sup> and indictment by grand jury,<sup>123</sup> which the founding generation would have regarded as the archetype of fundamental rights,<sup>124</sup> do not automatically extend to unincorporated territories. Even though, to the best of our knowledge and research, no current scholar, from any methodological perspective, defends *The Insular Cases*, they remain good law, and “their longevity is now cited against assertions that they ought to be reconsidered.”<sup>125</sup> Indeed, in 2008 in *Boumediene v. Bush*, the Supreme Court, in deciding that alleged enemy combatants detained at Guantanamo Bay enjoy the right to review of their detention through habeas corpus, stated that the “century-old doctrine [of *The Insular Cases*] informs our analysis in the present matter.”<sup>126</sup>

### C. Puerto Rico’s Decolonization: From Colony to Associated State?

As with most federal territories, Puerto Rico has gone through several stages within this constitutional framework.<sup>127</sup> Spain ceded Puerto Rico to the United States in the Treaty of Paris that ended the Spanish-American War.<sup>128</sup> Ratifications of the treaty were exchanged on April 11, 1899, which formally brought Puerto Rico within the compass of congressional power under the Territories Clause.<sup>129</sup>

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<sup>121</sup> See *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922).

<sup>122</sup> See, e.g., *Dorr v. United States*, 195 U.S. 138 (1904).

<sup>123</sup> See, e.g., *Hawaii v. Mankichi*, 190 U.S. 197 (1903). This decision is especially ironic given Hawaii’s current status.

<sup>124</sup> See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 83, 96 (1998).

<sup>125</sup> See ALEINIKOFF, *supra* note 18, at 5.

<sup>126</sup> 128 S. Ct. at 2255.

<sup>127</sup> Puerto Rico has been within the jurisdiction of a foreign power since 1493, when Christopher Columbus claimed it on behalf of Spain during his second voyage. OLGA JIMÉNEZ DE WAGENHEIM, *PUERTO RICO: AN INTERPRETIVE HISTORY FROM PRE-COLUMBIAN TIMES TO 1900* 36–37 (1998). For a short history of Spanish governance, see REISMAN, *supra* note 71, at 24–26.

<sup>128</sup> See Treaty of Paris, *supra* note 101, art. II.

<sup>129</sup> See *id.*

More than a year later, on April 12, 1900, Congress enacted a statute (with an effective date of May 1, 1900) providing for a civil government for Puerto Rico.<sup>130</sup> Under the statute, Puerto Ricans were allowed to elect members of one house of the territorial legislature, but all other legislative and executive officers were federal appointees. Over time, Congress progressively increased the participation of Puerto Ricans in their local government.<sup>131</sup> In 1917, by virtue of the Jones Act, both houses of the legislature became elective, and Puerto Ricans were granted (at least nominal) U.S. citizenship, although they did not receive voting rights in presidential or congressional elections.<sup>132</sup> In 1947, Congress authorized local election of the Puerto Rican governor.<sup>133</sup> This marked the first time in U.S. history that a territorial governor was elected by the territory's people rather than appointed federally.<sup>134</sup>

In 1948, Puerto Rico held national elections in which various political parties and candidates on the island promoted, respectively, the three self-determination options set out in the preceding part: independence as a new sovereign State, integration as a state of the United States, or an intermediate commonwealth status in association with the United States.<sup>135</sup> Those candidates favoring the last preference prevailed, while those favoring "statehood for Puerto Rico and inde-

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<sup>130</sup> See Foraker Act, ch. 191, 31 Stat. 77 (1900). Until the Foraker Act took effect, U.S. military authorities governed Puerto Rico. The constitutionality of non-statutory military governance of a territory during peacetime is at best dubious as an original matter. See generally Lawson & Seidman, *supra* note 91. The Supreme Court sustained it in 1854, however, in *Cross v. Harrison*, 57 U.S. (16 How.) 164 (1854), and later applied that decision to validate the military governments in Puerto Rico. See *Santiago v. Noguera*, 214 U.S. 260, 264-66 (1909); *Dooley v. United States*, 182 U.S. 222, 234 (1901).

<sup>131</sup> See Dorian A. Shaw, Note, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 *FORDHAM INT'L L.J.* 1006, 1020-21 (1994).

<sup>132</sup> See Jones Act, Pub. L. No. 64-368, ch. 145, 39 Stat. 951 (1917).

<sup>133</sup> Act of Aug. 5, 1947, Pub. L. No. 80-362, ch. 490, § 1, 61 Stat. 770, 770-71.

<sup>134</sup> LAWSON & SEIDMAN, *supra* note 94, at 132. Arguably, the mayor of the District of Columbia from 1812 to 1871 was the first exception to this principle, but the extent of his authority was more ambiguous than that of the Puerto Rican governor. See *id.* at 235 n.55.

<sup>135</sup> See Oct. 30 Statement by Mrs. Bolton, *supra* note 42, at 798; see also SURENDRA BHANA, *THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION 1936-1968*, at 114 (1975) (noting that in the 1948 election, "the island's 872,114 registered voters were being called upon to choose from three major sets of candidates, each one fairly clear on where it stood on the status question"); Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico, in 28 *DEP'T ST. BULL.* 585, 586 ¶ 10 (Apr. 20, 1953) [hereinafter Memorandum].

pendence for Puerto Rico were defeated,” and so in 1950, at the insistence of Puerto Rico’s resident commissioner, Congress introduced Public Law 600 to authorize the adoption of a Puerto Rican constitution.<sup>136</sup> It provides in part:

Whereas the Congress of the United States by a series of enactments has progressively recognized the right of self-government of the people of Puerto Rico; and Whereas under the terms of these congressional enactments an increasingly large measure of self-government has been achieved: Therefore . . . [F]ully recognizing the principle of government by consent, this Act is now adopted *in the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.<sup>137</sup>

Public Law 600 further indicated that “[u]pon approval by the Congress the constitution shall become effective in accordance with its terms,”<sup>138</sup> and it accordingly reconfigured the statutory framework governing the relationship between the United States and Puerto Rico to accommodate the anticipated constitutional commonwealth government.<sup>139</sup> Thereafter, Puerto Rico held a constitutional convention and promptly drafted a proposed constitution. Congress ap-

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<sup>136</sup> Memorandum, *supra* note 135, at 586 ¶ 10; *see also* Oct. 30 Statement by Mrs. Bolton, *supra* note 42, at 798.

<sup>137</sup> Act of July 3, 1950, pmbl., Pub. L. No. 81-600, 64 Stat. 319, 319 (emphasis added).

<sup>138</sup> *Id.* § 3.

<sup>139</sup> *Id.* §§ 4–6.

proved it subject to three mandatory amendments,<sup>140</sup> and Puerto Rico then adopted it as amended, effective July 25, 1952.<sup>141</sup>

#### D. *"In the Nature of a Compact"*

Public Law 600's description of itself as a statute "adopted *in the nature of a compact*" is, to the best of our knowledge and research, unprecedented.<sup>142</sup> It is also, perhaps deliberately,<sup>143</sup> ambiguous. Indeed, the term "compact" is itself somewhat mysterious.<sup>144</sup> A statute "adopted in the *nature of a compact*" leaves even more to speculation. Further complicating the issue, the preamble to Public Law 447, which recalls Public Law 600, places a slightly different gloss on the compact formulation: it says that Congress adopted Public Law 600, not "in the nature of" a compact but "*as a compact with the people of Puerto Rico.*"<sup>145</sup> Whether these subtle distinctions had any significance to the drafters and, in general, what Congress (collectively) meant by a compact is unclear from the text. In plain language, however, a compact denotes a binding agreement of some sort. It is therefore certainly arguable that a statute adopted either "as" or "in the nature of" a compact may not be modified unilaterally. Officials of the

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<sup>140</sup> See Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327-28. In particular, Congress insisted that Puerto Rico (1) add a provision requiring that any amendment to the Constitution

be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act [Act of Mar. 2, 1917, ch. 145, 39 Stat. 951 (codified as amended in scattered sections of 48 U.S.C.)], and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact[;]

(2) delete a provision recognizing certain social and economic rights; and (3) add a provision "assuring continuance of private elementary schools." REISMAN, *supra* note 71, at 33 (internal quotation marks deleted).

<sup>141</sup> See Antonio Fernós-Isern, U.S. Special Representative to Committee IV (Trusteeship), Oct. 30 Statement by Dr. Fernos-Isern, in 29 DEP'T ST. BULL. 798, 799 (1953) [hereinafter Oct. 30 Statement by Dr. Fernós-Isern].

<sup>142</sup> The term "compact" itself had seldom appeared in U.S. law. See Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO L.J. 219, 225 (1967). Before Public Law 600, it had been used "in the Northwest Ordinance and in a few enabling acts where it appears that a binding obligation on the part of the federal government was envisaged." *Id.*

<sup>143</sup> See Shaw, *supra* note 131, at 1041-42.

<sup>144</sup> See, e.g., U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460-72 (1978); see generally David E. Engdahl, *Characterization of Interstate Arrangements: When is a Compact Not a Compact?*, 64 MICH. L. REV. 63 (1965).

<sup>145</sup> See Act of July 3, 1952, pmbL., 66 Stat. at 327 (emphasis added)..

United States conveyed this impression of Public Law 600, repeatedly and forcefully, in their oral and written communications to the U.N. General Assembly concluding that reports about Puerto Rico submitted under Article 73(e) should cease.<sup>146</sup> Puerto Rico, they said, had—by virtue of the events described above—attained a new political status in association with, but no longer subject to the unfettered authority of, the United States.<sup>147</sup>

Frances P. Bolton, for example, a member of the U.S. House of Representatives and a principal U.S. delegate to the General Assembly, explained that whereas “[t]he previous status of Puerto Rico was that of a territory subject to the full authority of the Congress of the United States in all governmental matters,” after Public Law 600, the adoption of the Puerto Rican Constitution, and its approval by Congress in Public Law 447, the (unilateral) congressional statutes formerly governing Puerto Rico had been effectively merged into the “provisions of a compact of a bilateral nature whose terms may be changed only by common consent.”<sup>148</sup> Furthermore, she cited her colleagues Senator Hugh Alfred Butler, chairman of the Senate Committee on Interior and Insular Affairs and a co-sponsor of Public Law 600, and Congressman Arthur Lewis Miller, chairman of the House Committee on Interior and Insular Affairs, as well as a decision of a U.S. district court, as authority for the view that Puerto Rico’s constitution now formed part of “a relationship between two parties which may not be amended or abrogated unilaterally.”<sup>149</sup> Puerto Rico, she concluded, henceforth constituted “*a state associated with the United States*,” which “is not a constitutional part of the Federal Union but is associated with the Union by virtue of a bilateral compact.”<sup>150</sup>

Mason Sears, the U.S. delegate to both the Trusteeship Council and the General Assembly’s Committee on Information on Non-Self-Governing Territories, echoed Bolton’s assurances.<sup>151</sup> “A compact,”

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<sup>146</sup> See, e.g., Memorandum, *supra* note 135, at 885–88; Oct. 30 Statement by Mrs. Bolton, *supra* note 42, at 797–98.

<sup>147</sup> See Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 802–04.

<sup>148</sup> See *id.* at 804.

<sup>149</sup> Oct. 30 Statement by Mrs. Bolton, *supra* note 42, at 798; see also Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 802 (representing that “there exists a bilateral compact of association between the people of Puerto Rico and the United States which has been accepted by both and which in accordance with judicial decisions may not be amended without common consent”).

<sup>150</sup> Oct. 30 Statement by Mrs. Bolton, *supra* note 42, at 799 (emphasis in original).

<sup>151</sup> See JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 122–23 (1997).

he said, "is far stronger than a treaty. A treaty can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other."<sup>152</sup> In its memorandum explaining why Article 73(e) reports on Puerto Rico would no longer be filed, the United States insisted that "Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration . . . [and] complete autonomy in internal economic matters and in cultural and social affairs under a Constitution adopted by them and approved by the Congress."<sup>153</sup> Henry Cabot Lodge, Jr., then the principal U.S. Representative to the General Assembly, likewise affirmed Puerto Rico's "new status," as set forth in more detail by Representative Bolton and by the Puerto Rican representative, Antonio Fernós-Isern.<sup>154</sup> Finally, it is worth noting here that Bolton explicitly rejected the suggestion that, subsequent to the compact, Congress would retain plenary authority over Puerto Rico.<sup>155</sup>

Puerto Rico confirmed that it shared the U.S. understanding of the compact and its new status.<sup>156</sup> Governor Luis Muñoz Marín, in a letter to President Eisenhower reprinted as an appendix to the U.S. memorandum to the General Assembly, described the compact and concluded that "[o]ur status and the terms of our association with the United States cannot be changed without our full consent."<sup>157</sup> Dr. Fernós-Isern, Puerto Rico's U.N. representative, subsequently related in detail the sequence of events by which Puerto Rico had arrived at its present status, explained the Commonwealth's structure and the terms of its association with the United States, and concluded that after its establishment, "the last vestige of colonialism has disappeared

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<sup>152</sup> Quoted in TRÍAS MONGE, *supra* note 151, at 123.

<sup>153</sup> Memorandum, *supra* note 135, at 587 ¶¶ 21-22.

<sup>154</sup> Henry Cabot Lodge, Jr., U.S. Representative to the General Assembly, Nov. 27 Statement to the Plenary Session, in 29 DEP'T ST. BULL. 841, 841 (1953) [hereinafter Nov. 27 Statement by Henry Cabot Lodge, Jr.].

<sup>155</sup> Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 802; accord Oct. 30 Statement by Antonio Fernós-Isern, *supra* note 141, at 801 (referring to the view that the U.S. Congress may unilaterally modify the relationship established by Public Law 600 and its aftermath as "a mistaken interpretation" and reiterating that "the compact between the United States and Puerto Rico can be amended or repealed only by mutual consent").

<sup>156</sup> See Oct. 30 Statement by Antonio Fernós-Isern, *supra* note 141, at 799; see also Letter from Luis Muñoz Marín, *supra* note 42, at 588-89.

<sup>157</sup> Letter from Luis Muñoz Marín, *supra* note 42, at 589.

in Puerto Rico.”<sup>158</sup> Consequently, in 1953, based on the explicit representations of both the United States and Puerto Rico, the General Assembly declared that

in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity . . . .<sup>159</sup>

Now, if it is true that, because of Public Law 600 and its progeny, Puerto Rico’s internal self-governance arrangements and the scope of U.S. power over Puerto Rico may be changed from the 1952 baseline only with Puerto Rico’s consent (as these statements suggest), then Puerto Rico clearly qualifies as a genuine associated state, with a local government that operates under the authority of the bilateral compact to which the above statements repeatedly refer. The United States, in that event, has also clearly discharged its decolonization obligations relative to Puerto Rico.<sup>160</sup> Puerto Ricans approved Public Law 600 and the Puerto Rican Constitution in free and fair refer-

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<sup>158</sup> Oct. 30 Statement by Antonio Fernós-Isern, *supra* note 141, at 798–802. Like Bolton, he also affirmed that the compact could not be modified except by mutual consent. *Id.* at 799.

<sup>159</sup> G.A. Res. 748, *supra* note 15, at 26.

<sup>160</sup> In light of the decolonization norms that evolved under the U.N. Charter and the various resolutions of the General Assembly enumerated above, were the people of Puerto Rico subsequently to vote to change their status from associated statehood to full independence, it is likely that contemporary international law would require the United States to accede to that freely determined political status. *See* ICCPR, *supra* note 16, art. 1. To repeat, in modern parlance, Puerto Rico, as a former colony, enjoys an *external* right to self-determination, which vitiates the usual presumption against secession. Yet in the most recent referendum, held in 1998, only 2.54 percent of those participating voted for independence from the United States. *See* REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS, *supra* note 109, at 3–4. This is not to suggest, however, that a majority of Puerto Ricans favor admission to the Union as a state. The actual implications of this referendum remain unclear. In particular, the referendum offered Puerto Rican voters “the options of statehood, independence, a continuation of the current commonwealth arrangement, and ‘free associated status’ (a treaty-based relationship with the United States that purports to grant Puerto Rico full sovereignty and does not guarantee U.S. citizenship to persons born in Puerto Rico).” ALEINIKOFF, *supra* note 18, at 74. But “[a] fifth option—‘none of the above’—won, receiving 50.4 percent of the vote.” *Id.* Professor T. Alexander Aleinikoff, among others, argues that this indicates, not “political nihilism” among Puerto Ricans, but rather “that the options crafted by the ruling pro-statehood party did not adequately reflect their preferences. . . . Rather, they seek an ‘enhanced’ commonwealth status that would increase Puerto Rican autonomy vis-à-vis the federal government.” *Id.* at 87.



enda,<sup>161</sup> thus exercising their right as a former colony to external self-determination by choosing associated statehood in connection with the United States of America.<sup>162</sup> These events doubtless qualify as a recognized form of self-determination under the international framework set forth in the preceding part of this article.

From a domestic and, in particular, a constitutional standpoint, however, the idea that Public Law 600 and the events that followed collectively constitute a compact with Puerto Rico of the sort represented to the United Nations is, at a minimum, questionable. Even assuming for the moment that the Constitution authorizes Congress to bind itself irrevocably and in perpetuity to a bilateral governance arrangement with Puerto Rico of the sort described by U.S. delegates to the United Nations in 1953, it is far from clear—notwithstanding Bolton’s assurances—that either Public Law 600 or Public Law 447 intended to or did accomplish this feat.<sup>163</sup>

In terms of its plain language, Public Law 600, on its face, calls for Puerto Ricans to hold a referendum on that statute and, assuming an affirmative vote, authorizes a convention to draft a Puerto Rican constitution, which “shall provide a republican form of government and shall include a bill of rights.”<sup>164</sup> That constitution, provided that it conforms to Public Law 600 and that Congress and the President first

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<sup>161</sup> The people of Puerto Rico also approved the amendments upon which Congress conditioned its consent to the Puerto Rican constitution and then reapproved the amended constitution in another referendum. See REISMAN, *supra* note 71, at 33.

<sup>162</sup> See Letter from Luis Muñoz Marín, *supra* note 42, at 588–89.

<sup>163</sup> The question whether and when one Congress may bind a subsequent Congress has deeply engaged many thinkers. Compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002) (defending a general entrenchment power) with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (arguing against a general power of Congress to bind successor congresses) and Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231 (2003) (same). Scholars and legal actors considering the effect of Public Law 600 have specifically engaged the question. See, e.g., *The Report by the President’s Task Force on Puerto Rico’s Status: Hearing Before the Senate Committee on Energy and Natural Resources*, 109th Cong., 2d Sess. 84–93 (statement of Charles J. Cooper, Brian S. Koutchouk & David H. Thompson) (2006); José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 21–22 (1999).. We have no desire to plunge directly into that thicket. Professor Lawson wishes to note that the Engagements Clause of Article VI, see U.S. CONST. art. VI, cl. 1 (“All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation”), provides for a specific kind of entrenchment, including entrenchment of the Northwest Ordinance, which *might* counsel against lightly inferring a more general power of entrenchment. But that is as far as he is willing to go at present.

<sup>164</sup> Act of July 3, 1950, § 2, Pub. L. No. 81-600, 64 Stat. 319, 319.

approve it, thereafter “shall become effective in accordance with its terms.”<sup>165</sup> Public Law 600 also repeals enumerated portions of the federal statutory regime that existed at that time.<sup>166</sup>

As a textual matter, except by major and questionable inferences from the ambiguous phrase “in the nature of a compact,” it is at best strained to read the law as purporting to lock into place in perpetuity a relationship between Puerto Rico and the United States, which may not be modified without the former’s mandatory consent.<sup>167</sup> Nothing in the text, for example, purports to be a congressional pledge not to reenact the repealed provisions of the Puerto Rican Federal Relations Act (“PRFRA”)—or not to enact new (perhaps equally or more intrusive) provisions.<sup>168</sup> According to its preamble, Congress adopted Public Law 600 “so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”<sup>169</sup> Leaving aside the arguable significance of the novel phrase “in the nature of a compact,” this purpose is entirely consistent with the prior century and a half of territorial governance.<sup>170</sup> Historically, the federal government has generally sought to provide as much scope for territorial self-government as circumstances permitted, but always subject to the paramount power of Congress lurking in the background.<sup>171</sup> From a textualist standpoint, to read the elliptical phrase “in the nature of a compact” to surrender this paramount power is strained.<sup>172</sup>

Furthermore, in Public Law 447, Congress, although affirming that the Puerto Rican Constitution conformed generally to its prior directive that the constitution “contain[] a bill of rights” and “provide[] for a republican form of government,”<sup>173</sup> approved that constitution subject to three compulsory amendments.<sup>173</sup> The fact that Congress presupposed that it *did* retain power to require Puerto Rico to modify its Constitution seems to evince its belief that it had *not* surrendered plenary authority over the island—despite its virtually con-

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<sup>165</sup> *Id.* § 3.

<sup>166</sup> *Id.* §§ 4–5.

<sup>167</sup> *See id.* pmbl. *But see* Leibowitz, *supra* note 142, at 222 & n.14 (collecting citations for the proposition that the compact indeed established a *sui generis* political entity that lies outside the constitutional ambit of the Territories Clause and therefore may not “be changed without the consent of both Puerto Rico and the United States”).

<sup>168</sup> *See* Act of July 3, 1950, 64 Stat. at 319–20.

<sup>169</sup> *Id.* pmbl.

<sup>170</sup> *See id.*

<sup>171</sup> *See* U.S. CONST. art. IV, § 3, cl. 2.

<sup>172</sup> *See* Act of July 3, 1950, pmbl., 64 Stat. at 319.

<sup>173</sup> *See* Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327, 327–28.

temporaneous representations to the contrary before the United Nations.<sup>174</sup> At the same time, it may be recalled that the Puerto Rican Constitution, which Congress approved in Public Law 447, states that “political power emanates from the people [of Puerto Rico] and shall be exercised in accordance with their will, *within the terms of the compact* agreed upon between the people of Puerto Rico and the United States of America.”<sup>175</sup> A strong argument may be advanced that Congress, by approving the constitution, perforce approved this statement—although that still fails to clarify precisely what either Public Law 600, Public Law 447, or the Puerto Rican Constitution means by “compact.”

Of course, as noted earlier, U.S. officials repeatedly made strong, clear, and public representations to the United Nations affirming, among other things, that future changes to the terms of the U.S.-Puerto Rico relationship must be approved bilaterally.<sup>176</sup> Because of these representations, the United States, as a State, bound itself as a matter of international law to respect that arrangement—regardless of what Congress may have intended. It is well-established that a State, by repeated, public representations intended to induce reliance on the part of other States (or another class of international participant), may bind itself unilaterally.<sup>177</sup> The United States did just that; among other indicia of reliance, its representations induced the General Assembly to adopt a resolution agreeing that reports on Puerto Rico’s status under Article 73(e) were not required after 1952.<sup>178</sup> The United States thereby bound itself, in international law, to the particular understanding of the bilateral compact and associated state relationship expressed before the United Nations orally and in writing. It may not, again as a matter of international law, invoke its domestic law to vitiate, or justify its failure to comply with, any consequent obligations.<sup>179</sup>

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<sup>174</sup> See, e.g., Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 802–04.

<sup>175</sup> PUERTO RICO CONST. art. I, § 1 (emphasis added).

<sup>176</sup> See, e.g., Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 802.

<sup>177</sup> See, e.g., *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 573–74 (Dec. 22); *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253, 267–69 (Dec. 20); *Arbitral Award Made by the King of Spain on December 23, 1906 (Hond. v. Nicar.)*, 1960 I.C.J. 192, 213–14 (Nov. 18); *Legal Status of South-Eastern Territory of Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (May 11).

<sup>178</sup> See G.A. Res. 748, *supra* note 15.

<sup>179</sup> See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* art. 3, G.A. Res. 56/83, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10, Annex (Dec. 12, 2001), *reprinted in* JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT*

But as a matter of domestic law and ordinary canons of statutory interpretation, it is difficult to read Public Laws 600 and 447 to vitiate Congress's otherwise plenary power over Puerto Rico under the Territories Clause.<sup>180</sup> Apart from the textual analysis supplied above, where, as here, serious doubts exist about the constitutionality of a binding, irrevocable bilateral agreement with the inhabitants of a federal territory, the canon of constitutional avoidance counsels against interpreting an ambiguous statute to raise constitutional problems and toward, in this case, an interpretation that leaves Congress's power over Puerto Rico intact.<sup>181</sup> Furthermore, at the time (and certainly since), other members of Congress, executive officers, and official documents disavowed the view that Public Law 600 vitiated Congress's

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AND COMMENTARIES 61, 61 (2002) ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."); *see also id.* at 86–90 (collecting cases and other authorities); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 34–35 (6th ed. 2003); *cf.* Vienna Convention on the Law of Treaties art. 46(1), May 23, 1969, 1155 U.N.T.S. 331 ("A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.").

<sup>180</sup> *See* Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327; Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

<sup>181</sup> *See, e.g., Jones v. United States*, 526 U.S. 227, 239 (1999) (reiterating "the rule, repeatedly affirmed, that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter" (internal quotation marks omitted)). The canon is often traced to Justice Brandeis's famous concurrence in *Ashwander v. Tennessee Valley Authority*. *See* 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))). But others trace its origins to the early nineteenth century and, in particular, the distinct avoidance canon derived from Chief Justice Marshall's statement in *Schooner Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 837 & n.23 (2001) (describing *Charming Betsy* as "the case that many view as containing the germs of the avoidance canon" and collecting authorities); Sanford G. Hooper, Note, *Judicial Minimalism and the National Dialogue on Immigration: The Constitutional Avoidance Doctrine in Zadvydas v. Davis*, 59 WASH. & LEE L. REV. 975, 984 (2002) ("Although legal scholars typically regard the *Ashwander* and *Crowell* opinions as the foundational cases of the avoidance doctrine, the notion that courts should sidestep constitutional questions when possible can be traced back to Chief Justice John Marshall's opinion in *Murray v. Schooner Charming Betsy*." (footnote omitted)). If this pedigree is accurate, there is considerable irony in the fact that, as applied to Public Law 600, the two canons would apparently yield contrary conclusions.

theretofore plenary power of Puerto Rico under the Territories Clause. Outside the U.N. context, many officials maintained that Public Law 600 did not effect any revolutionary change in federal power over Puerto Rico.<sup>182</sup> Within the executive branch, for example, Irwin W. Silverman, Chief Counsel of the Office of Territories of the Department of the Interior, remarked that although

[i]t is our hope and it is the hope of Government, I think, not to interfere with that relationship [between the United States and Puerto Rico established by Public Law 600 and subsequent events] *but nevertheless the basic power inherent in the Congress of the United States, which no one can take away, is in the Congress as provided for in article IV, section 3 of the Constitution . . .* The Congress of the United States has the inherent power under the Constitution to annul any law in any of our Territories. . . .<sup>183</sup>

A proposed amendment to Public Law 600, which would have clarified that it did not modify Congress's plenary power over Puerto Rico, "was attacked and rejected but it is not clear whether it was opposed for technical reasons or because it was thought unnecessary. No one, however, opposed it because he said Congress was making an irrevocable delegation of its constitutional power over territories."<sup>184</sup>

#### E. *International Law and the Compact*

Scholar Arnold H. Leibowitz suggests that one plausible reading of the phrase "in the nature of a compact" is that, as a factual matter, the drafting and adoption of Puerto Rico's constitution would necessarily involve a bilateral process that "required Puerto Rican support."<sup>185</sup> Public Law 600 envisioned a referendum on the statute itself, a constitutional convention, the drafting of a new constitution, and ultimately one or more votes on the final text.<sup>186</sup> All of these steps would necessitate cooperation on the part of the people of Puerto Rico. The phrase "in the nature of a compact" may, in other words, be

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<sup>182</sup> See Eduardo Guzmán, Comment, *Igartúa De La Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 158 n.73 (2001) (collecting statements).

<sup>183</sup> Quoted in LEIBOWITZ, *supra* note 43, at 167 (emphasis added).

<sup>184</sup> *Id.* at 169.

<sup>185</sup> *Id.* at 173–74.

<sup>186</sup> Act of July 3, 1950, Pub. L. No. 81-600, §2, 64 Stat. 319, 319.

an expression with *political* rather than strictly legal significance.<sup>187</sup> Liebowitz's conclusion is non-trivial. For in the final analysis, we believe, the conclusion that Public Law 600 created a *legal* compact in domestic law is not strictly necessary to determine whether, at present, Puerto Rico enjoys the degree and kind of self-government envisioned by the compact and that suffices to qualify it as a genuine associated state. Nor is that conclusion necessary to decide whether the United States has discharged its international decolonization obligations toward Puerto Rico.<sup>188</sup>

Whatever the theoretical scope of Congress's power to regulate Puerto Rican affairs, the fact remains that, in practice, since 1952 Congress has generally allowed Puerto Ricans to govern themselves substantially as the two parties had contemplated at the time. That is, the actual division of powers between Puerto Rico and the United States—even if the partial legal autonomy of Puerto Rico is a fiction in domestic law and, constitutionally, it remains a territory subject to Congress's plenary power—largely conforms to the terms agreed upon in 1952.<sup>189</sup> The instruments that govern the *de facto* present relationship and division of competences between the United States and Puerto Rico include the Constitution, the PRFRA, the Puerto Rican Constitution, and Public Law 600.<sup>190</sup> Within the convoluted legal regime enacted by the interplay of these instruments, Puerto Rico exercises considerable self-governance, even if only because Congress seldom has an interest in intervening in its local affairs.<sup>191</sup> Yet what matters is that the United States has not, to date, interfered with Puerto Rico's *de facto* status as a locally self-governing associated state functioning, essentially as envisioned, pursuant to its Constitution and within the general terms of the compact created, affirmed, and communicated internationally from 1952 to 1953.

International law does not, as a rule, inquire into the internal laws of States; it asks only whether, in substance, a State has met its international legal obligations.<sup>192</sup> That is why, for example, in the re-

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<sup>187</sup> See LEIBOWITZ, *supra* note 43, at 173–74.

<sup>188</sup> As we will see, however, the status and correct interpretation of Public Law 600, “adopted in the nature of a compact,” may be relevant for other purposes. See Act of July 3, 1950, pmbL, 64 Stat. at 319.

<sup>189</sup> See REISMAN, *supra* note 71, at 35–37.

<sup>190</sup> See *id.* at 35.

<sup>191</sup> For a comprehensive overview of the application of these instruments to Puerto Rico, see LEIBOWITZ, *supra* note 43, at 185–227.

<sup>192</sup> See I OPPENHEIM'S INTERNATIONAL LAW § 21 (Robert Jennings & Arthur Watts eds., 9th ed. 1992). This axiom no longer holds categorically in contemporary international law

cent ICJ decisions on U.S. obligations under Article 36 of the Vienna Convention on Consular Relations<sup>193</sup> relating to detained foreign nationals allegedly denied the right to consular assistance, the ICJ has consistently stressed that the means by which the remedial obligation of “review and reconsideration” of criminal judgments against the nationals should be implemented “must be left to the United States.”<sup>194</sup> More generally, as the Permanent Court of International Justice famously put it, “From the standpoint of International Law. . .municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”<sup>195</sup> Municipal laws, that is, generally constitute one of (often) several facts to be appraised in context to determine whether a State has complied with its international legal obligations.<sup>196</sup> *Oppenheim’s International Law* summarizes the principle well:

From the standpoint of international law states are generally free as to the manner in which, domestically, they put themselves in the position to meet their international obligations; the choice between the direct reception and application of international law, or its transformation into national law by way of statute, is a matter of indifference, as is the choice between the various forms of legislation, common law, or administrative action as the means for giving effect to international obligations. These are matters for each state to determine for itself according to its own constitutional practices.<sup>197</sup>

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because of the advent of, among other things, international human rights law, certain international investment law treaties, and other developments that now allow, or even require, international appraisal of matters that would once have been regarded as “essentially within the domestic jurisdiction of any state.” See U.N. Charter art. 2, para. 7.

<sup>193</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

<sup>194</sup> *LaGrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 513–14 ¶ 125 (June 27); *accord Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12, 62–64 (Mar. 31) (affirming the same remedy, to be carried out by the United States “by means of its own choosing”).

<sup>195</sup> *Certain German Interests in Polish Upper Silesia (Ger. v. Pol.)*, 1926 P.C.I.J. (ser. A) No. 7, at 19 (May 25).

<sup>196</sup> See I OPPENHEIM’S INTERNATIONAL LAW, *supra* note 192, § 21, at 83. The lexicon of international law generally uses the adjectives municipal, national, internal, domestic, and local synonymously to refer to the laws of nation-States or countries in contradistinction to international law.

<sup>197</sup> I OPPENHEIM’S INTERNATIONAL LAW, *supra* note 192, § 21, at 82–83. At the same time, Sir Arthur Watts and Sir Robert Jennings, the editors of the most recent edition, point out that some uncertainty exists “about the extent to which a state is in international

On the one hand, this means that States may not invoke their internal laws, even mandates of a constitutional nature, to defeat, or to justify a failure to comply with, international legal obligations.<sup>198</sup> On the other, it leaves States at liberty to carry out their international obligations by whatever means best suit their legal or sociopolitical circumstances.<sup>199</sup> No principle of international law requires that compliance be achieved by obligations of a legal as opposed to a “merely” political nature. Indeed, international lawyers appreciate that, at times, political commitments offer more reliable indicia of intent to comply with a particular obligation than the formal trappings of domestic legislation.

So the fact (if it is a fact) that Congress might have done more based on its asserted plenary authority under the Constitution, or that it might exercise that power to do more in the future in a way that conflicts with the autonomy of Puerto Rico, does not necessarily vitiate U.S. compliance with its postwar decolonization obligations or its internationally binding representations to the United Nations in 1953—on the basis of which the General Assembly issued Resolution 748.<sup>200</sup> From the detached standpoint of international law, Puerto Rico indeed displays “attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity.”<sup>201</sup>

In particular, recall that, according to the G.A. Resolution 567 of 1952, to determine whether a political entity qualifies as an associated state by virtue of a bilateral arrangement, three factors should be taken into account (though no one of these factors is determinative): “(i) whether the constitutional guarantees extend equally to the associated territory, (ii) whether there are constitutional fields reserved to

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law obliged to have laws enabling it to fulfil its international obligations” or, in contrast, “whether what matters is action actually taken in pursuance of the law.” *Id.* § 21, at 85. The answer, they suggest, depends on context, and where, as here, the legal obligation requires the state “to perform or refrain from certain acts, . . . it is actual conduct which determines compliance with a state’s international obligations rather than the terms of the legislation, if any, which a state has enacted.” *Id.* § 21, at 85–86.

<sup>198</sup> See *id.* § 21, at 82–83.

<sup>199</sup> See *id.*

<sup>200</sup> See G.A. Res. 748, *supra* note 15, at 26 ¶ 5.

<sup>201</sup> See *id.*; see also REISMAN, *supra* note 71, at 42–50. On November 30, 1992, President George H.W. Bush directed “all Federal departments, agencies, and officials to treat Puerto Rico administratively as if it were a State insofar as doing so would not disrupt Federal programs or operations.” See REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS, *supra* note 109, at 2. The order remains in effect unless superseded by legislation. *Id.*



the territory, and (iii) whether there is provision for the participation of the territory on a basis of equality in any changes in the constitutional system of the State.”<sup>202</sup>

U.S. practice, in substance if not form, toward Puerto Rico manifestly satisfies the second condition: Puerto Rico enjoys virtually complete autonomy over its local affairs.<sup>203</sup> The first and third conditions, at least at first blush, may seem more problematic.<sup>204</sup>

As to the first, recall that under the *Insular Cases* doctrine, the peoples of so-called unincorporated territories, which, according to the federal government, Puerto Rico remains,<sup>205</sup> may be denied the full panoply of rights, privileges, and immunities enjoyed by citizens and the inhabitants of incorporated territories—even though, Puerto Ricans, by statute, technically qualify as citizens.<sup>206</sup> Hence the bizarre state of affairs, which persists today, that resident aliens physically located within a state of the United States may enjoy greater benefits and rights under federal law than Puerto Ricans *citizens* of the United States. Yet those same citizens, simply by exercising their right to relocate to one of the several states, can acquire “every right of any other citizen of the United States, civil, social and political.”<sup>207</sup> On Puerto Rican soil, however, they remain second-class citizens. In 1980 in *Harris v. Rosario*, for example, the U.S. Supreme Court confirmed that Congress may discriminate against Puerto Ricans in administering the federal Aid to Families with Dependent Children Program.<sup>208</sup> In 1978 in *Califano v. Torres*, the Court had reached a comparable conclusion relative to social security benefits.<sup>209</sup> Professor David Helfeld argues on this basis that, in theory,

it is difficult to imagine any law assigning federal funds discriminatorily against Puerto Rico which would not be con-

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<sup>202</sup> G.A. Res. 567, *supra* note 76, at 62.

<sup>203</sup> *See id.*

<sup>204</sup> *See id.*

<sup>205</sup> *See, e.g.*, United States-Puerto Rico Political Status Act, H.R. 856, 105th Cong. § 2(4) (1998).

<sup>206</sup> *See* Jones Act, Pub. L. No. 64-368, ch. 145, § 5, 39 Stat. 951 (1917).

<sup>207</sup> *Balzac* 258 U.S. at 308; *see also* Leibowitz, *supra* note 142, at 244–45.

<sup>208</sup> 446 U.S. 651, 651–52 (1980).

<sup>209</sup> 435 U.S. 1, 2–4 (1978) (per curiam). Congress justified this decision based on (1) Puerto Rico’s “unique tax status” insofar as it does not contribute to the federal treasury; (2) the expense of including Puerto Rico in the federal program at issue; and (3) and the potential disruption to Puerto Rico’s economy. *Id.* at 5 n.7; *accord Harris*, 446 U.S. at 651–52; *see also* *Torres v. Puerto Rico*, 442 U.S. 465, 468–69 (1979) (affirming the continuing vitality of the *Insular Cases* doctrine relative to Puerto Rico).

sidered rational. . . . After *Harris* Congress is on notice that under the territorial clause it has discretion to exclude totally, or to apply partially to Puerto Rico any program based on federal funds, without violating the principle of the equal protection of the laws.<sup>210</sup>

Yet General Assembly Resolution 567 does not purport to require *complete* equality in constitutional guarantees; it is only one factor that enters into the determination of associated statehood.<sup>211</sup> And although Congress may be “on notice” of its theoretical powers, it has not chosen to exercise them in ways contrary to the figurative “terms” of the bilateral compact entered into, as a matter of international law, in 1952.<sup>212</sup> In practice, whatever the theoretical scope of congressional power over Puerto Rico under the Territories Clause and the *Insular Cases* doctrine, the United States has in fact vested Puerto Ricans with (or recognized judicially) virtually the same constitutional rights and privileges enjoyed by citizens of the several states. The consistent trend since 1952, even if only as a matter of policy, has been to expand this category. The Supreme Court has held, for example, that due process and equal protection apply to Puerto Ricans, although it has—probably deliberately—declined to specify whether these constitutional principles apply by virtue of the Fifth or Fourteenth Amendment.<sup>213</sup> It has also, at least in dicta, extended to Puerto Ricans the right to travel and protection against unreasonable searches and seizures.<sup>214</sup> Puerto Ricans may bring, and have brought, civil rights ac-

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<sup>210</sup> David M. Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 449, 462 (1986).

<sup>211</sup> See G.A. Res. 567, *supra* note 76, at 62.

<sup>212</sup> See Helfeld, *supra* note 210, at 462.

<sup>213</sup> See *Calero-Toldeo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668–69 n.5 (1974) (due process); *Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero*, 426 U.S. 572, 601 (1976) (striking down, as a violation of equal protection, alienage restrictions on civil engineers residing in Puerto Rico and again declining to say “whether it is the Fifth Amendment or the Fourteenth which provides the protection”). Professor Helfeld speculates, plausibly, “that the Court wished to avoid the implications of grounding its decision on either the Fifth or Fourteenth Amendments” because “[i]f it had relied on the former, it might have given the impression that Puerto Rico continues to be a territory,” whereas, had it relied on the Fourteenth Amendment, “that could have been interpreted as the equivalent of defining Puerto Rico as a state of the union.” Helfeld, *supra* note 210, at 456.

<sup>214</sup> *Califano*, 435 U.S. at 4 n.6 (assuming without deciding that the constitutional right to travel extends to the Commonwealth); *Torres*, 442 U.S. at 471 (holding that the Fourth Amendment applies to Puerto Rico, preempting local Puerto Rican legislation that would have permitted the challenged search, although once again eliding the question of

tions under 42 U.S.C. § 1983.<sup>215</sup> As a general rule, Helfeld's remark that "if a state can do it constitutionally, Puerto Rico can do it, and vice versa" accurately captures the constitutional jurisprudence to date.<sup>216</sup> In short, then, even if Congress remains theoretically empowered to modify or eliminate the rights and privileges of Puerto Ricans with the stroke of a pen, current U.S. practice, we conclude, satisfies Resolution 567's directive to ensure that sufficient "constitutional guarantees extend equally to the associated territory."<sup>217</sup>

The third condition set forth in Resolution 567, "whether there is provision for the participation of the territory on a basis of equality in any changes in the constitutional system of the State," poses a greater challenge.<sup>218</sup> Puerto Ricans, even though technically citizens, lack a vote in federal elections (so long as they reside in Puerto Rico);<sup>219</sup> only a non-voting observer in Congress represents their interests.<sup>220</sup> This is because the federal Constitution vests the right to vote in electors, not citizens, and it inextricably ties voting rights to the several states, and yet Puerto Rico is clearly not a state.<sup>221</sup> Under the ICCPR, this constitutional scheme may well pose a problem, as we will later discuss.<sup>222</sup> But in terms of associated statehood, it is not clear that the absence of the franchise per se constitutes a violation of U.S. international obligations under the 1952 bilateral compact.

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"whether the Fourth Amendment applies to Puerto Rico directly or by operation of the Fourteenth Amendment.")

<sup>215</sup> See Helfeld, *supra* note 210, at 471 & nn.82-87.

<sup>216</sup> *Id.* at 457. In fact, the sole "fundamental" right that still "remains in doubt," based on the archaic decision in *Balzac v. Porto Rico*, "is trial by jury in criminal cases." Helfeld, *supra* note 210, at 457-58. Yet Puerto Rico guarantees that right by local legislation in any event, obviating the need for the Supreme Court to rule on it. See *id.* at 458 & n.24; ALEINIKOFF, *supra* note 18, at 83.

<sup>217</sup> G.A. Res. 567, *supra* note 76, at 62.

<sup>218</sup> See *id.*

<sup>219</sup> See *Balzac*, 258 U.S. at 308, 312 (affirming that even though Puerto Ricans enjoy only "fundamental" rights while domiciled in Puerto Rico, should they "move into the continental United States," as citizens, they would "enjoy every right of any other citizen of the United States, civil, social and political").

<sup>220</sup> See 48 U.S.C. § 891 (2006).

<sup>221</sup> See U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."); see also *id.* art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . ."); *id.* amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . .").

<sup>222</sup> See ICCPR, *supra* note 16, art. 25.

Associated statehood, by definition, manifests a relationship of inequality: it is flexible enough to accommodate a broad range or spectrum of relationships of unequal power between principal and associate.<sup>223</sup> The international legality of a particular associated state, such as Puerto Rico, depends in part on the consent of the associate's population.<sup>224</sup> There can be little question that the people of Puerto Rico consented to the degree (or lack thereof) of participation in the federal government of the United States.<sup>225</sup> In 1953, Governor Luis Muñoz Marín confirmed in his letter to President Eisenhower that the Commonwealth relationship “reflects our own decision as to the type of institutions and the kind of relationship to the United States which we desire.”<sup>226</sup> The people of Puerto Rico deliberately chose *not* to become a state, which would have entailed federal voting rights and effective participation in Congress, mainly because of the socioeconomic circumstances of the island. U.S. Representative to the General Assembly Frances Bolton noted, for example, that Puerto Rico and the United States sought “to create such relationships as would insure for the people of Puerto Rico the best opportunities to develop socially, economically, and culturally, taking into consideration their geographic and demographic circumstances.”<sup>227</sup> She later addressed precisely the concern that Puerto Rico would retain only a non-voting resident commissioner in the House of Representatives:

This, Mr. Chairman, cannot be regarded as painful to the people of Puerto Rico. Under the U.S. Constitution, Puerto Rico could obtain full legislative representation in the U.S.

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<sup>223</sup> See REISMAN, *supra* note 71, at 10; Keitner & Reisman, *supra* note 84, at 51; *see also id.* at 63 (depicting the spectrum of potential associated state arrangements in terms of the nature and kind of reserved sovereign competences).

<sup>224</sup> See G.A. Res. 1541, *supra* note 56, at 29, Annex, Principle VII (“Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.”).

<sup>225</sup> *But see* José Trías Monge, *Injustice According to Law: The Insular Cases and Other Oddities*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 44, at 226, 233 (arguing that Puerto Rico's consent is overbroad and therefore invalid and that the status quo “clearly does not meet the decolonization standards set by the United Nations in 1960”); *cf.* Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 504 (1992) (arguing, relative to the CNMI, that even had its people “knowingly sought . . . subservient status, it would not comply with the requirements of international law, just as a contract in which a person agrees to become a slave of another would not be enforced in a domestic court” and that “[o]nly if a people truly have the right to enact the laws that apply to them can it be said that they are self-governing”).

<sup>226</sup> Letter from Luis Muñoz Marín, *supra* note 42, at 589..

<sup>227</sup> Nov. 3 Statement by Mrs. Bolton, *supra* note 14, at 803.

Congress only if it were a State . . . . In that case however the people of Puerto Rico would lose the fiscal advantages which they now enjoy . . . . These arrangements constitute substantial advantages of particular benefit to an area such as Puerto Rico whose natural economic resources are so limited. The admission into the Union under the terms of the Constitution would entail the loss of these advantages. The taxpayers of Puerto Rico would have to contribute over 100 million dollars annually to the U.S. Treasury, a sum which represents 10 percent of the national income of Puerto Rico and nearly 60 percent of its budget. For this reason the majority of the people of Puerto Rico prefer Commonwealth status, albeit it does not provide for full legislative representation in Congress, to statehood . . . . They have expressed this preference emphatically [in multiple referenda].<sup>228</sup>

Puerto Rico's representative, Dr. Fernós-Isern, clearly appreciated this, and in substantial part it drove Puerto Rico's decision to forego both statehood and independence in favor of the intermediate status of associated statehood.<sup>229</sup>

In short, despite Puerto Rico's virtual lack of participation or representation in a federal government that purports to exercise plenary power over it, we think it is wrong to describe Puerto Rico, as some do, as a colony in the international *legal* sense.<sup>230</sup> That could, as

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<sup>228</sup> *Id.* at 804.

<sup>229</sup> See Oct. 30 Statement by Antonio Fernós-Isern, *supra* note 141, at 801 ("Thus the Commonwealth of Puerto Rico, its citizens free from taxes payable to the Federal Treasury, receiving cooperation from the U.S. Government for social, economic, and educational purposes, without any limitation placed upon its autonomy, can make use of all of its resources for social, economic, and cultural development programs, in accordance with its own policies and on the basis of its own philosophy of government.").

<sup>230</sup> *Contra* PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 2-4 (2004) (describing Puerto Rico as a "colony" of the United States, where colony is defined as "a polity with a definable territory that lacks legal and political sovereignty because that authority is exercised by a people other than the inhabitants of the colony"); TRÍAS MONGE, *supra* note 152 at 177-96 (surveying possible legal methods for "decolonizing" Puerto Rico); Rafael Hernández Colón, *Doing Right by Puerto Rico*, 77 FOREIGN AFF. 112, 113 (1998) (observing, as a former governor of Puerto Rico, that many find the current compact undemocratic, "branding it the worst form of colonialism"). This is not to suggest that characterizing Puerto Rico as a colony is necessarily incorrect from a sociopolitical perspective. See, e.g., José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 FOREIGN POL'Y 66, 68-69 (1979) ("[N]o word other than 'colonialism' adequately describes the relationship between a powerful metropolitan state and an impoverished overseas dependency, disenfranchised from the formal lawmaking processes that shape its people's daily lives.").

we have stressed, change in the future should Congress or a future administration adopt a different attitude toward Puerto Rico. But we see no reason, at present, to anticipate this. To the contrary, recent U.S. legislative and executive activity indicate a continuing solicitude for the people of Puerto Rico and a willingness, in the same spirit as President Eisenhower conveyed to the United Nations nearly sixty years ago, to accede to the Puerto Rican people's request should they desire independence or a different status.<sup>231</sup>

At present, the most difficult legal questions surrounding Puerto Rico's current status may well be more domestic than international in the strict sense. Two questions, in particular, invite analysis in our view. First, does the Constitution *permit* the kind and nature of self-governance institutions established in 1952 and that, we believe, presently qualify Puerto Rico as a genuine associated state? Second, do Puerto Ricans have a sufficient voice in their future destiny to satisfy modern international norms on democracy even though they lack the franchise, especially after the United States ratified the ICCPR and assumed an explicit treaty obligation to extend the franchise to "[e]very citizen"?<sup>232</sup> We now turn to these questions.

### III. CAN THE CONSTITUTION ACCOMMODATE ASSOCIATED STATEHOOD?

#### A. *The Appointments Clause*

As a matter of international law, Puerto Rico qualifies as an associated state rather than a colony because it exercises substantially the

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<sup>231</sup> See Nov. 27 Statement by Henry Cabot Lodge, Jr., *supra* note 154, at 841 (conveying this message on behalf of and with the authorization of President Eisenhower). For recent expressions to the same effect, see, for example, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, *supra* note 109, at 10–11 (outlining recommendations for a two-stage plebiscite based on the principle that "[t]he democratic will of the Puerto Rican people is paramount for determining the future status of the territory"); Puerto Rico Self-Determination Act of 2006, S. 2304, 109th Cong., 2d Sess. (2006) (authorizing a constitutional convention for the purpose of proposing to Congress "(1) a new or amended compact of association"; "(2) the admission of the Commonwealth as a State in the United States; or (3) the declaration of the Commonwealth as an independent country"); *see also* H.R. 856, 105th Cong., (1998).

<sup>232</sup> See ICCPR, *supra* note 16, art. 25. The Constitution, as noted, gives voting rights to electors rather than citizens as such, and it ties congressional representation to statehood. See *supra* notes 29–30 and accompanying text. Professor Gerald Neuman characterizes this state of affairs as a "fundamental republican defect" insofar as "the Constitution restricts national representation to the states while giving the national organs governing power over the territories." Neuman, *supra* note 44, at 196–97.

nature and degree of local autonomy and self-governance agreed upon in 1952—even if, in domestic law, this may well be only a precarious state of affairs brought about by “benign neglect” of a sort.<sup>233</sup> Still, it exercises this autonomy through a local Puerto Rican government elected pursuant to the Puerto Rican constitution. That government has competence over local matters more or less to the same extent as does any U.S. state, and it operates without significant interference or direction from the United States. It has largely escaped notice that this arrangement may violate the Appointments Clause.<sup>234</sup>

The Appointments Clause states that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.<sup>235</sup>

If a person qualifies as an “Officer[] of the United States” within the meaning of this clause, then, by its terms, the clause allows only four appointing authorities.<sup>236</sup> For non-inferior (or principal) offi-

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<sup>233</sup> See REISMAN, *supra* note 71, at 35–37.

<sup>234</sup> See U.S. CONST. art. II, § 2, cl. 2. To the best of our knowledge, this potential issue has been raised or hinted at in only two places in the existing literature on Puerto Rico. The first is an undeveloped, almost casual comment by the Department of Justice objecting to a statutory provision granting to the Puerto Rican governor the power to force reconsideration of federal regulations. See *Political Status of Puerto Rico: Hearings on S. 244 Before the Sen. Comm. on Energy and Natural Resources*, 102nd Cong. 190 (1991) (statement of Attorney General Richard Thornburgh) (quoted in T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 36 n.85 (1994) (noting that in comments attached to Thornburgh’s testimony the Department argued that such action constituted “significant governmental authority under the laws of the United States,” as defined by the Supreme Court in *Buckley v. Valeo*, and therefore could only be carried out by a federal official appointed under the Appointments Clause). The second is an article by one of the present authors. See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 866–70 (1990). Professor Lawson was cued to the problem in 1985 by Herman Marcuse, then an attorney-adviser in the Office of Legal Counsel in the U.S. Department of Justice, although he does not believe that Mr. Marcuse ever pursued the issue in writing (and he has no reason to believe that Mr. Marcuse would have approved or disapproved of the direction of Professor Lawson’s further research into the problem).

<sup>235</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>236</sup> See *id.*

cers, the sole proper appointing authority is (1) the President, acting with the Senate's advice and consent.<sup>237</sup> For inferior officers, Congress may, by statute, authorize appointment by (2) the President alone, (3) by an executive department head, or (4) by a court of law, or it may leave in place the default mode of presidential nomination and Senate confirmation.<sup>238</sup>

For purposes of this article, the distinction between principal and inferior officers is immaterial.<sup>239</sup> Assuming officials of the Puerto Rican government fall within the terms of the Appointments Clause as either principal or inferior officers, the Constitution does not authorize their election by the people of Puerto Rico. The sole relevant question is therefore whether Puerto Rican officials qualify as "Officers of the United States" within the meaning of Article II. If they do, Puerto Rico's government, as presently structured, is unconstitutional. Furthermore, there is no easy fix: *any* Puerto Rican government not staffed by federal appointees would be equally unconstitutional.<sup>240</sup>

Professor Lawson has elsewhere endorsed this argument.<sup>241</sup> Professor Sloane, as detailed below, does not. We both, however, believe it imperative to develop valid constitutional solutions that can command universal (or nearly so) assent to enable the people of Puerto Rico to exercise self-governance rights in conformity with the past exercise of their right to self-determination, in which they unambiguously selected associated statehood rather than either integration or independence. Accordingly, to stimulate discussion of this important issue, we try to present, in point-counterpoint fashion, arguments for and against the proposition that the Constitution's structural requirements stand in the way of compliance with the demands of international law (as well as sound governance policy).

Professor Lawson's argument for the unconstitutionality of elected territorial governments begins, and to a large extent ends, with the text of the Appointments Clause.<sup>242</sup> The Constitution does not specifically define the category "Officers of the United States"

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<sup>237</sup> See *id.*

<sup>238</sup> See *id.*

<sup>239</sup> For a detailed treatment of that question, see Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1016–21 (2007).

<sup>240</sup> As, in Professor Lawson's view, would be self-government in any territory.

<sup>241</sup> See Lawson, *supra* note 234, at 866–70, 894–900; LAWSON & SEIDMAN, *supra* note 94, at 129–36.

<sup>242</sup> See U.S. CONST. art. II, § 2, cl. 2.



that is the subject of the Appointments Clause. But without generating much comment or controversy, the Supreme Court has said, in its 1976 decision in *Buckley v. Valeo*, that this designation includes “any appointee exercising significant authority pursuant to the laws of the United States.”<sup>243</sup> The governor and members of the Puerto Rican legislature certainly exercise significant federal authority under the constitution adopted under the authority of Public Law 600.<sup>244</sup> This seems to qualify them *prima facie* as officers of the United States.

But this answer—though, in Professor Lawson’s view, ultimately correct—is far too simple when put so starkly. Not every person who takes significant action pursuant to a federal statute is necessarily an “Officer[] of the United States” within the meaning of the Appointments Clause. If another country chose to incorporate U.S. law into its own law, officials in that country would not need presidential appointments in order to enforce that incorporated U.S. law. They would be acting pursuant to their own independently-derived domestic legal authority rather than U.S. federal authorization, even if the underlying substantive law that they enforced had federal origins—just as foreign courts often apply and administer U.S. law in the course of their duties without thereby becoming federal courts subject to Article III or the Appointments Clause.

Even more to the point, state officials enforce federal law—and have done so since the time of the founding—even though they have not been appointed by any method specified in the Appointments Clause.<sup>245</sup> The reason that state officials do not require federal ap-

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<sup>243</sup> See *Buckley v. Valeo*, 424 U.S. 1, 125–26, 140–43 (1976) (per curiam) (examining the meaning of the term “Officers of the United States” as used in the Appointments Clause in the context of members appointed to the Federal Election Commission). Although *Buckley*’s definition of an officer refers specifically only to “appointee[s],” that does not imply that anyone whose selection results from election rather than appointment lies categorically outside the scope of the Appointments Clause. See *id.* at 125–26. Congress cannot evade the Appointments Clause by stipulating that the Secretary of State shall be selected through a national plebiscite. Cf. *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (holding that the legislature of the Philippine Islands could not provide for legislative appointment to executive agencies). The Court in *Buckley* used the term “appointee” because, in the context of the Federal Election Commission, the Court specifically faced the issue of extraconstitutional modes of appointment rather than the mode of election. See 424 U.S. at 125–26, 140–43. The central point of *Buckley* is that substance rather than form determines the content of the constitutional category “Officer of the United States”: anyone who exercises significant federal authority solely by virtue of federal law must be appointed in conformance with the Appointments Clause. See *id.* at 126.

<sup>244</sup> See Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319.

<sup>245</sup> See Saikrishna Bangalore Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 2006 (1993) (“The Constitution does not need a provision declaring that state executives must

pointment to enforce federal law is that their own states provide that authority. That is, their authority to enforce federal law, which the Constitution makes not merely *applicable* but *supremely* applicable within the states, does not derive from federal law itself; it derives from their powers as states of the Union.<sup>246</sup> It therefore need not conform to the constitutional requirements for federal officials—just as state courts may (and normally must) adjudicate cases involving federal law when it is part of their background jurisdiction but do not, for that reason, become federal courts within the meaning of Article III. If Congress does not want state officials to enforce a particular federal law, it can provide for exclusive federal enforcement, but Congress enacts federal laws against the background of independent state enforcement authority. The interesting constitutional questions concern whether Congress can *compel* state officials to enforce federal law when the state's own law says otherwise,<sup>247</sup> but those questions turn principally on the power of Congress under the Necessary and Proper Clause<sup>248</sup> rather than on the requirements of the Appointments Clause.<sup>249</sup>

To some extent, of course, state officials in every state other than the original thirteen exercise all of their authority pursuant to a federal statute, if only because at some point in time a federal statute necessarily brought those states into existence by admitting them to the Union.<sup>250</sup> Nonetheless, once a state exists, it no longer depends on a federal statute for its authority. State officials then draw their power from a source independent of federal law. Congress can provide for exclusive federal enforcement of a statute whenever it is “necessary and proper for carrying into Execution” federal law, but Congress cannot abolish a state government. So once a state is up and

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enforce federal law; state executive officers must enforce federal law because of the very nature of their office.”).

<sup>246</sup> See U.S. CONST. art. VI, cl. 2.

<sup>247</sup> For an argument that, as an original matter (and more or less coincidentally as a doctrinal matter), the answer is “no” with respect to state legislative and executive officials but “yes” with respect to state judicial officials, see Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 496–98 (2008); Calabresi & Lawson, *supra* note 239, at 1025–34.

<sup>248</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>249</sup> See U.S. CONST. art. II, § 2, cl. 2. On reflection, Professor Lawson thinks there is a case to be made that if a state official's only source of enforcement authority is a federal statute, because the official's own state law denies him or her that authority, then the Appointments Clause may apply, but this point is beyond the scope of this article.

<sup>250</sup> See U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union”).

running *as* a state, its officials no longer exercise their power pursuant to a federal statute. To the extent that the execution of federal law is part of their duties as state officials, they may exercise that authority, barring federal preemption, without worrying about the Appointments Clause.<sup>251</sup>

Private citizens, too, often enforce federal law in a very real sense through private rights of action, even though, again, they have not been appointed in conformity with the Appointments Clause.<sup>252</sup> To explore the issues raised by private enforcement of federal law would require a separate article;<sup>253</sup> here, suffice it to say that as long as private citizens genuinely act to vindicate their own rights rather than (as they arguably do, for example, in *qui tam* litigation) as surrogate law-enforcers, they do not act as “Officers of the United States” in the constitutional sense.<sup>254</sup>

Where in this scheme do the elected officials of the Puerto Rican government fall? In Professor Lawson’s view, constitutionally, they can only be considered federal officials. Puerto Rico, whatever the appropriate interpretation of Public Law 600, is not a foreign State; it does not even consider itself one. The United States could not enter into a treaty with Puerto Rico—except, of course, were it first to separate itself from the United States by a future referendum, an option considered below. Nor can Puerto Rican officials be deemed state officials. In the referenda of the early 1950s, a majority of Puerto Ricans rejected even the desire to become a state,<sup>255</sup> and were Puerto Rico subsequently to vote for statehood, the United States would need to agree to admit it to the Union. Assuming that Puerto Rico remains a territory, it constitutes a federal instrumentality.<sup>256</sup> Of course, it may well be a federal instrumentality that differs in kind or quality from, say, the Federal Trade Commission, but it is a federal instrumentality

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<sup>251</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>252</sup> See *id.*

<sup>253</sup> For explorations of the applicability of the Appointments Clause to nongovernmental actors, see generally Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331 (1998); Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 84–93 (1990).

<sup>254</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>255</sup> See Letter from Luis Muñoz Marín, *supra* note 42, at 588.

<sup>256</sup> See *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286 (9th Cir. 1985) (discussion in the context of Guam).

nonetheless. Under the Constitution, there is simply nothing else for it to be.

It is also clear, on this reasoning, that at least the governor of Puerto Rico is an officer of the United States within the meaning of the Appointments Clause. It is unnecessary to determine just how far the governor's authority over federal law extends. Congress explicitly charges the Governor of Guam, for example, with "the faithful execution of the laws of Guam *and the laws of the United States applicable in Guam*," and that directive unambiguously makes him or her an officer within the meaning of the Appointments Clause.<sup>257</sup> The Puerto Rican Constitution and laws, however, say only that the Puerto Rican governor "shall execute the laws and cause them to be executed."<sup>258</sup> Yet even if that general reference to "the laws" does not include federal law applicable in Puerto Rico (although it would seem to), under the Puerto Rican Constitution, Puerto Rico's governor also "shall enjoy such other powers and must perform such other duties as are devolved upon him by the laws of the United States."<sup>259</sup> One such power "devolved upon him by the laws of the United States" is the power conferred by the Extradition Act, which provides:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District, or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District, or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears

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<sup>257</sup> See 48 U.S.C. § 1422 (2006) (emphasis added).

<sup>258</sup> P.R. CONST. art. IV, § 4, cl. 1; *see also* 3 L.P.R.A. § 1(5) (stating that the governor "shall at all times faithfully execute the laws").

<sup>259</sup> See 3 L.P.R.A. § 1(15).

within thirty days from the time of the arrest, the prisoner may be discharged.<sup>260</sup>

This statute authorizes the governor of Puerto Rico to demand extradition.<sup>261</sup> That ability to compel a state governor to extradite an alleged criminal plainly constitutes “significant authority pursuant to the laws of the United States.”<sup>262</sup> Because the governor of Puerto Rico exercises this and other substantial federal powers, there can be no question within the terms of this argument that he must be appointed in the manner prescribed by the Appointments Clause—as, indeed, was every territorial governor in the United States before 1947.

It is even possible that all local Puerto Rican laws must be considered laws of the United States for constitutional purposes. In that event not only the governor but all Puerto Rican officials, including local legislators, consistently execute federal law and therefore must be appointed under Article II of the Constitution.<sup>263</sup> Whether this is so depends upon the accuracy of the expansive interpretation of “the Laws of the United States” offered by Chief Justice Marshall in 1824 in *Osborn v. Bank of the United States* and the applicability of that interpretation to the execution of laws by executive as well as judicial actors.<sup>264</sup> If that is the correct understanding of the scope of federal law, it would entail that all territorial laws, whether enacted by Congress or a local legislature, constitute federal laws and must be executed by federal appointees.<sup>265</sup>

In sum, according to this argument, the Constitution forbids the creation of elected territorial offices—at least that of the governor and quite possibly those of the local legislature as well. And of course, if Puerto Rico’s institutions of local self-governance violate the Constitution, there is an irreconcilable tension between the imperatives of contemporary international law and the eighteenth-century Constitution. There are, however, a number of possible responses to this apparent problem with territorial self-governance. We offer (without either of us necessarily endorsing) several here for consideration.

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<sup>260</sup> 18 U.S.C. § 3182 (2006).

<sup>261</sup> See *Puerto Rico v. Branstad*, 483 U.S. 219, 229–30 (1987).

<sup>262</sup> See *Buckley*, 424 U.S. at 126.

<sup>263</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>264</sup> See 22 U.S. (9 Wheat.) 738 (1824); see also *Bank of the United States v. Planters’ Bank of Georgia*, 22 U.S. (9 Wheat.) 904 (1824).

<sup>265</sup> For the detailed argument to this effect, see LAWSON & SEIDMAN, *supra* note 94, at 134–36.

First, one might invoke precedent. Although no Supreme Court case directly considers the constitutionality of elected territorial officials, ample precedent, running along two lines, could support the proposition that the Appointments Clause need not apply to territories in the same way that it applies elsewhere in the United States. We (and here Professors Lawson and Sloane speak jointly) suspect, however, that, to most minds, this proposed cure may seem worse than the disease, for the relevant precedents are not ones that should be lightly expanded even were one favorably inclined toward precedent.<sup>266</sup>

The first of these lines of precedent, which dates back nearly two centuries, concerns territorial courts. It has long been settled that courts in federal territories need not conform to the requirements of Article III, and territorial judges therefore need not enjoy tenure during good behavior or guarantees against the diminishment of their salaries while in office.<sup>267</sup> Precedent establishes, in other words, that the Constitution's structural assurances of federal judicial independence do not apply to judicial officers in the territories. If the Constitution's structural provisions for Article III federal judges do not apply in the territories, then, arguably, neither does (or should) the Constitution's structural provisions for federal executive officers.

Professor Lawson has elsewhere argued at length against the view that territorial judges need not conform to the requirements of Article III,<sup>268</sup> and in this regard he finds himself uncharacteristically in the scholarly mainstream, which has been witheringly critical of the territorial courts doctrine.<sup>269</sup> Analysis of this issue is beyond the scope of this study, and we do not mean to dismiss cavalierly all of the arguments in favor of non-Article III territorial courts—nor the concomi-

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<sup>266</sup> Professor Lawson is notoriously hostile to the use of precedent as a tool of constitutional interpretation, but the case against the territorial precedents discussed here is independent of these broader, idiosyncratic doubts. See generally Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

<sup>267</sup> The doctrine dates at least from *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511 (1828), and was roundly reaffirmed in *Palmore v. United States*, 411 U.S. 389, 402–03 (1973).

<sup>268</sup> See Lawson, *supra* note 234, at 878–93.

<sup>269</sup> See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 36–39 (1980); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835*, 49 U. CHI. L. REV. 646, 719 (1982); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 972 (1988).

tant extension of that doctrine to territorial executives.<sup>270</sup> State judges, for example, need not (and often do not) possess the guarantees of judicial independence required by Article III.<sup>271</sup> The Supreme Court has roundly rejected the idea that the absence of these guarantees violates due process.<sup>272</sup> There is nothing intrinsic in the judicial enterprise that requires the guarantees of independence supplied by Article III. Yet the Article III model of federal judicial independence has wide normative appeal,<sup>273</sup> and the cases rejecting it in the territorial context are, at best, obscurely reasoned. One should hesitate before extending these precedents into new territory (so to speak).<sup>274</sup>

A second line of precedent that might be invoked here is that of *The Insular Cases*, the essential contours of which we described earlier.<sup>275</sup> If Congress can legislate for Puerto Rico without regard to the Constitution's tariff provisions—the specific holding of *Downes v. Bidwell*,<sup>276</sup> the most important of *The Insular Cases*—and can legislate for unincorporated territories without regard to the Constitution's guarantees of jury trial,<sup>277</sup> it is not a huge step to say that Congress can legislate for Puerto Rico without regard to the Appointments Clause. Nonetheless, for three reasons, neither of the authors believes that invoking *The Insular Cases* is an attractive response.

First, even the doctrine of *The Insular Cases* concedes that “fundamental” provisions of the Constitution apply to all federal territories whether or not Congress chooses to extend them.<sup>278</sup> It is hard to think of provisions more “fundamental” than the Constitution's core provisions for allocating governmental power, including, for example,

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<sup>270</sup> For a relatively rare defense of the territorial courts doctrine, see generally Christopher D. Man, *Extradition and Article III: A Historical Examination of the “Judicial Power of the United States,”* 10 TUL. J. INT'L & COMP. L. 37 (2002).

<sup>271</sup> See Currie, *supra* note 269, at 719.

<sup>272</sup> See *Weiss v. United States*, 510 U.S. 163, 176–81 (1994) (finding the Due Process Clause does not require that military judges must have a fixed term of office).

<sup>273</sup> See, e.g., Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 154–55 (2006).

<sup>274</sup> Students of territorial governance know that the nondelegation doctrine has repeatedly been held not to apply to territorial governments. See LAWSON & SEIDMAN, *supra* note 94, at 125–27. Professor Lawson believes that this outcome is correct because the nondelegation doctrine is grounded in the Necessary and Proper Clause, which Congress does not need to invoke in order to legislate for territories. See *id.* at 127–29. That limited rationale does not, however, justify refusing to apply the Appointments Clause to the territories.

<sup>275</sup> See *supra* notes 117–126 and accompanying text.

<sup>276</sup> 182 U.S. 244 (1901).

<sup>277</sup> See *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

<sup>278</sup> See LAWSON & SEIDMAN, *supra* note 94, at 195.

the lawmaking processes of Article I, Section 7, or the Constitution's staffing provisions. Considering the sheer number of provisions devoted to the subject, there may be no provisions more fundamental to the constitutional scheme than those that specify the processes for the selection of government officials.<sup>279</sup>

Second, regardless of how Puerto Rico looked in 1901 when *The Insular Cases* were decided or in 1922,<sup>280</sup> today, Puerto Rico seems to be the paradigm of an incorporated territory as modern jurisprudence understands that legal term of art.<sup>281</sup> Even if Puerto Rico's people never seek statehood (and even if they do at some point, but Congress declines to grant it), there can be no question that Puerto Rico remains a prime *candidate* for statehood, a territory that has the "potentialities of statehood."<sup>282</sup> Under *The Insular Cases*, all constitutional provisions, and not only those that have been deemed "fundamental," apply to incorporated territories of their own force (*ex proprio vigore*). There is no obvious reason why this would not include the Appointments Clause.<sup>283</sup>

Finally, the potential invocation of *The Insular Cases* doctrine to justify the constitutionality of an elected territorial governor (and perhaps legislature) is unappealing because those decisions remain a blight on U.S. constitutional jurisprudence. In the first place, *The Insular Cases* rely on two dubious and unjustified distinctions: first, between incorporated and unincorporated territories, and second, be-

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<sup>279</sup> The Constitution contains extensive provisions for the selection and qualifications of the President and Vice President, *see* U.S. CONST. art. II, § 1, cl. 2–6; *id.* amend. XII, XX, XXII–XXIII & XXV; members of the House of Representatives, *see id.* art. I, § 2, cl. 2–4; *id.* art. I, § 4, cl. 1; *id.* art. I, § 5, cl. 1; *id.* art. I, § 6, cl. 2, and the Senate, *see id.* art. I, § 3, cl. 1–3; *id.* art. I, § 4, cl. 1; *id.* art. I, § 5, cl. 1; *id.* art. I, § 6, cl. 2; *id.* amend. XVII; and the federal electorate, *see id.* art. I, § 2, cl. 1; *id.* art. I, § 3, cl. 1; *id.* art. II, § 1, cl. 2, 4; *id.* amends. XV, XVII, XIX, XXIV & XXVI.

<sup>280</sup> The latter year was marked by *Balzac v. Porto Rico*, which held that because of Puerto Rico's status as an unincorporated territory, Congress need not provide for the right to a jury trial in Puerto Rico. 258 U.S. at 313.

<sup>281</sup> If Puerto Rico is best viewed today as an incorporated territory under *The Insular Cases* doctrine, does that mean that Puerto Rico's people automatically, and not only by statute, qualify as U.S. citizens by virtue of Section 1 of the Fourteenth Amendment? *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . ."). The answer is quite possibly yes. *See generally* Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008).

<sup>282</sup> *See* *Granville-Smith v. Granville-Smith*, 349 U.S. 1, 5 (1955); *see also* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990).

<sup>283</sup> Of course, there is also no obvious reason why such a doctrine would not make Article III's judicial independence provisions applicable to incorporated territories, although under current law it does not.



tween fundamental and non-fundamental provisions of the Constitution. The plausibility of a territory's future statehood may, in Professor Lawson's view, be relevant in some circumstances to determining whether the United States has the constitutional power to *acquire* that territory.<sup>284</sup> But nowhere does the Constitution suggest differing federal powers to *govern* territory once it has been properly acquired. Nor does any provision suggest that certain territories merit less constitutional protection because of, for example, lack of geographic contiguity or cultural differences. And although it has become conventional—to the point of banality—in contemporary constitutional jurisprudence to distinguish between fundamental and non-fundamental rights,<sup>285</sup> that distinction is typically employed to *expand* the range of constitutional rights (that is, to include, for example, unenumerated but fundamental rights), not to *exclude* from cognizance rights that the text of the Constitution clearly creates but that have nonetheless been somehow deemed “non-fundamental.”

The distinction between fundamental and non-fundamental constitutional provisions makes even less sense when it is applied to structural provisions of the Constitution, such as the Appointments Clause, rather than rights.<sup>286</sup> The Constitution's structural provisions were designed to work as an integrated whole. The Appointments Clause reads as it does at least in part because of the structure of the rest of Article II: the division of Congress between the House of Representatives and the Senate (and the different roles assigned to each body); the Constitution's silence on the precise structure of the executive department below the level of the President and Vice President; the implementational power granted to Congress in the Necessary and Proper Clause;<sup>287</sup> and so forth. That overall scheme of enumerated, separated, and divided powers is the most vital feature of the Constitution. It is neither meaningful nor principled to try to pick apart which specific clauses, or parts of clauses, are and are not “fundamental” to that scheme.<sup>288</sup>

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<sup>284</sup> See LAWSON & SEIDMAN, *supra* note 94, at 79–85.

<sup>285</sup> See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 1339–1592, 1609–82 (5th ed. 2006).

<sup>286</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>287</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>288</sup> Would, for instance, the extension of *The Insular Cases* in this fashion mean that the Presentment Clause also could be dispensed with when legislation concerns territories? See U.S. CONST. art. I, § 7, cl. 2–3 (stating that every bill that has passed the House and Senate

From the standpoint of an originalist, such as Professor Lawson, *The Insular Cases* are, as Judge Torruella has aptly put it, “a strict constructionist’s worst nightmare.”<sup>289</sup> From the standpoint of one who views the Constitution in more functional or normative terms, as does Professor Sloane, *The Insular Cases* look even worse.<sup>290</sup> They were transparently the product of an overtly racist ideology that viewed the inhabitants of Puerto Rico, Hawaii, and the Philippines as uncivilized—as unworthy of receiving, and incapable of handling, governance according to constitutional norms.<sup>291</sup> Furthermore, in the context of a study of the interplay of international and constitutional law, it is worth noting that *The Insular Cases* originated in substantial part in the (now utterly anachronistic) international law of the era, in particular, the presumptive “right of states to acquire uninhabited territories through discovery and occupation” and the concomitant “right of the acquiring power to govern a territory as it saw fit.”<sup>292</sup> If the price of saving the status quo with Puerto Rico is the continued vitality or extension of *The Insular Cases*, that price is too high.

Yet other potential ways to reconcile Puerto Rico’s international status as an associated state within the meaning of the compact with the Appointments Clause exist, which Professor Sloane finds at least

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and every order, resolution or vote to which the concurrence of the House and Senate is necessary shall be presented to the President for approval).

<sup>289</sup> See Torruella, *supra* note 120, at 306.

<sup>290</sup> In Professor Sloane’s view, originalism, too, is a normative theory, at least in the forms in which it is typically advanced. *But see generally* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997) [hereinafter Lawson, *On Reading Recipes*].

<sup>291</sup> The racist origins of *The Insular Cases* are no secret. See, e.g., GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 89 (1996) (noting “the frank racism that informed the rationale of the Insular Cases”); ALEINIKOFF, *supra* note 18, at 29 (noting that in the cases the distinction between incorporated and unincorporated territories was deemed to turn on congressional intent “based largely on the race and perceived level of civilization of the inhabitants” and that those territories “populated by ‘barbarians’ not thought fit for full U.S. membership were found not to have been incorporated into the United States”); see also *id.* at 94 (“The *Insular Cases*, tainted by racial and religious intolerance, were bad law at the beginning of the twentieth century; they should not control the twenty-first.”).

<sup>292</sup> See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 165 (2002); see also *id.* (“The sovereign had discretion to govern territorial inhabitants either as subordinate colonies and subjects or to give them full citizenship status, and to maintain the laws of the previous sovereign until altered by the new power.”); ALEINIKOFF, *supra* note 18, at 21–23 (noting that “the Court believed that the power to acquire and rule territory was an inherent aspect of statehood in the nineteenth-century world”); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 U. COLO. L. REV. 1127, 1154 (1999); Leibowitz, *supra* note 142, at 241.

plausible. Professor Lawson's constitutional objection to an elected Puerto Rican government presupposes that Puerto Rico remains a federal territory and that the "Constitution knows only the mutually exclusive categories of 'State' and 'Territory.'" <sup>293</sup> That is why, in his view, officers of the government of Puerto Rico—or, at a minimum, its governor—must be "Officers of the United States" within the meaning of the Appointments Clause. Unlike state officials, they do not derive their authority to apply federal law from a source independent of the federal Constitution.

But if the events of 1952–53 indeed established Puerto Rico as an associated state, and if the Constitution does not disable the United States from entering into relationships of associated statehood, <sup>294</sup> then Puerto Rico's officials derive their authority from a distinct source, which is relevantly analogous to that of the several states. The Puerto Rican constitution declares that its authority "emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America," <sup>295</sup> much as the power of state officers to enforce federal law emanates from the people of the states, even if subject to the Constitution, which itself originated in a kind of compact among those states. If that is right, Puerto Rican officials do not qualify as federal officers within the meaning of the Appointments Clause. The fact that it required an act of Congress to bring Puerto Rico into existence as an associated state is of no more consequence, on this view, than the fact that congressional statutes were necessary to admit all states after the original thirteen.

Although Professor Lawson agrees that this argument has a great deal of resonance as a matter of U.S. political theory, he doubts that it offers a valid solution to the Appointments Clause issue he has identified. <sup>296</sup> If Puerto Rico is in fact a distinct political entity whose people may empower a government independent of the federal Constitution, then Puerto Rico is an independent sovereign State—as, indeed, the states of the Union would be but for the peculiar federal arrangement

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<sup>293</sup> ALEINIKOFF, *supra* note 18, at 89–90 (characterizing Attorney General Richard Thornburgh's testimony before the Senate in 1991 regarding the constitutionality of an "enhanced commonwealth" status for Puerto Rico).

<sup>294</sup> *Cf. Missouri v. Holland*, 252 U.S. 416, 433 (1920) ("[I]t is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903))).

<sup>295</sup> PUERTO RICO CONST. art. I, § 1.

<sup>296</sup> See *supra* notes 242–292 and accompanying text.

spelled out in the Constitution itself. No doubt, under international law, Puerto Rico has the right to opt for independence and thereby to establish its own government.<sup>297</sup> But it has not exercised that option, and were it to decide to in the future, the relationship between Puerto Rico and the United States would perforce change significantly.<sup>298</sup> Until that happens, however, Puerto Rico remains under the—and there is no good euphemism for this—control of the United States. The Constitution leaves no wiggle room for a status of “not-quite-independence” or “independence-in-some-respects-but-not-others.” The Constitution recognizes, respectively, “the United States of America,”<sup>299</sup> “the several States,”<sup>300</sup> “foreign Nations,”<sup>301</sup> “Indian Tribes,”<sup>302</sup> and finally, “Territory or other Property *belonging* to the United States.”<sup>303</sup> Political entities in this latter category simply do not have a constitutionally independent source of authority. As an early Supreme Court advocate said of territorial judges a quarter century before the Supreme Court ruled them outside the bounds of Article III:

The executive power exercised within the district of Columbia is the executive power of the United States. The legislative power exercised in the district is the legislative power of the United States.—And what reason can be given why the judicial power exercised in the district should not be the judicial power of the United States? If it be not the judicial power of the United States, of what nation, state or political society is it the judicial power? All the officers in the district are officers of the United States.<sup>304</sup>

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<sup>297</sup> See G.A. Res. 1541, *supra* note 56, at 29, Annex, Principle VI.

<sup>298</sup> Congress would no longer have power under the Territories Clause (or any other constitutional provision) to legislate for Puerto Rico. Nor would a “compact” or a statute “in the nature of a compact” be a legitimate arrangement; agreement between the United States and Puerto Rico would have to take the form of a treaty—or another international agreement, such as a congressional-executive or sole executive agreement, although Professor Lawson, among others, believes these non-treaty practices violate the Constitution. See, e.g., Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). But see Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008).

<sup>299</sup> U.S. CONST. pmbl..

<sup>300</sup> *Id.* art. I, § 2, cl. 1.

<sup>301</sup> *Id.* art. I, § 8, cl. 3. Or “foreign States.” *Id.* art. III, § 2, cl. 1.

<sup>302</sup> *Id.* art. I, § 8, cl. 3.

<sup>303</sup> *Id.* art. IV, § 3, cl. 2 (emphasis added).

<sup>304</sup> *United States v. More*, 7 U.S. (3 Cranch) 159, 168–69 (1805) (argument of Jones).

Within this framework, for the same reasons, officials of the Puerto Rican government must be “Officers of the United States.”<sup>305</sup>

The rub, of course, is the phrase “[w]ithin this framework,” and it is here that Professors Lawson and Sloane part company. What generates the constitutional barrier to Puerto Rico’s present de facto status, as described in the preceding section, is a particular form of originalism,<sup>306</sup> which adopts a formalistic view of both the Appointments Clause and the Territories Clause.<sup>307</sup> Professor Sloane does not share this view,<sup>308</sup> particularly relative to the latter. Many—and perhaps most—constitutional theorists see the Constitution as an organic, constitutive instrument that necessarily evolves and derives its contemporary meaning from, beyond text and structure, historical developments subsequent to the framing, precedent, and the political or moral principles that arguably inform its text. One might also give some weight to the changing status and needs of a powerful State at the dawn of the twenty-first century, at a moment when it occupies a very different global position in a very different international legal order than did the original thirteen colonies after the American War of Independence. Evolving practice, at home and abroad, also may constitute a valid source of constitutional meaning.<sup>309</sup> Early in our constitutional history, Chief Justice Marshall echoed these views when he wrote, albeit in a distinct context:

This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character

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<sup>305</sup> See U.S. CONST. art. II, § 2, cl. 2.

<sup>306</sup> For a concise statement of this interpretive theory and method, see generally Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006).

<sup>307</sup> Federal law has a long history of rejecting formalist arguments in territorial contexts—most notably with respect to the seeming requirements of Article III—so ample precedent could be marshaled for treating territorial officials as beyond the reach of the Appointments Clause. See LAWSON & SEIDMAN, *supra* note 94, at 132–34, 139–87.

<sup>308</sup> Professor Sloane finds the arguments in favor of the variant of originalism embraced by his coauthor normatively unpersuasive for substantially the reasons set forth in Michael C. Dorf, *Recipe for Trouble: Some Thoughts on Meaning, Translation and Normative Theory*, 85 GEO. L.J. 1857, 1857–62 (1997), responding to Lawson, *On Reading Recipes*, *supra* note 290. He declines to offer or embrace any particular constitutional theory except to say that he doubts that there exist any non-normative “ultimate ‘rules’” of constitutional interpretation. See Lawrence H. Tribe, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION 73 (1997).

<sup>309</sup> Cf. *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (Eighth Amendment context).

of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.<sup>310</sup>

Now, the predominant constitutional view—as expressed, in the context of Puerto Rico, by former U.S. Attorney General Richard Thornburgh in Senate testimony nearly two decades ago—is that the “Constitution knows only the mutually exclusive categories of ‘State’ and ‘Territory.’”<sup>311</sup> That may well be correct on an originalist view. It describes the entities recognized by the international law of the late eighteenth century. At that time, either territory belonged to a state, meaning one of a handful of European polities, or it was, legally, *terra nullius*, “the land of no one,”<sup>312</sup> notwithstanding that human beings inhabited many lands so characterized, including Puerto Rico. Territories deemed *terra nullius* could be “discovered”<sup>313</sup> by a state, conferring inchoate title, and that inchoate title could thereafter be perfected by *effectivités*, meaning public displays of effective control and power—or, as the ICJ put it, “the conduct of the administrative authorities as proof of the effective exercise of territorial jurisdiction in the region.”<sup>314</sup>

But neither the law on territorial acquisition and governance nor the nature and diversity of political entities, has remained static since the late eighteenth century. Nor has constitutional law, at least as a descriptive matter. Professor Sloane believes that it would be, at a minimum, advisable to “consider what this country has become in deciding what” the Constitution authorizes,<sup>315</sup> particularly relative to novel international developments that were neither known nor foreseen by the framing generation. An international legal world with only a handful of States and territories bears little resemblance to the contemporary international landscape, populated by States, international

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<sup>310</sup> See *M’Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819) (emphasis in original).

<sup>311</sup> ALEINIKOFF, *supra* note 18, at 89–90.

<sup>312</sup> BLACK’S LAW DICTIONARY 1512 (Bryan A. Garner ed., 8th ed. 2004).

<sup>313</sup> The late novelist Kurt Vonnegut made this point with characteristic irony: “The teachers told the children that [1492] was when their continent was discovered by human beings. Actually, millions of human beings were already living full and imaginative lives on the continent in 1492. That was simply the year in which sea pirates began to cheat and rob and kill them.” KURT VONNEGUT, JR., *BREAKFAST OF CHAMPIONS* 10 (1973).

<sup>314</sup> *Frontier Dispute (Burk. Faso v. Mali)*, 1986 I.C.J. 554, 586 (Dec. 22).

<sup>315</sup> See *Holland*, 252 U.S. at 434.

institutions, associated states along a broad spectrum, and a host of *sui generis* entities, such as Taiwan, The Holy See, the Transdniester Moldovan Republic, and so forth. Furthermore, from the perspective of U.S. law and practice, the binary division between states and territories neither recognizes nor accommodates the broad variety of associated state relationships into which the United States has, in fact, entered—principally with the freely associated states that comprise the former Trust Territory of the Pacific Islands.<sup>316</sup>

If evolving practice constitutes a viable source of constitutional meaning, then the Territories Clause and the concept of “Officers of the United States” within the meaning of the Appointments Clause may and perhaps should evolve to accommodate that practice. Although Attorney General Thornburgh’s view enjoys broad acceptance today, it is not gospel, either in the legal academy or in the Department of Justice.<sup>317</sup> Scholars, notably T. Alexander Aleinikoff, have argued that the Constitution indeed allows the United States to enter into a binding compact with Puerto Rico of the kind represented to the United Nations in 1953.<sup>318</sup> And during three previous administrations (Eisenhower, Kennedy, and Ford), U.S. officials in the Department of Justice and elsewhere concluded “that Congress had the power to enter into an irrevocable compact.”<sup>319</sup>

We present this range of views not to resolve questions of constitutional theory in general or even the proper construction of the Territories and Appointments Clauses to Puerto Rico in particular. Rather, we think it is possible to transcend these debates and reach solutions that should be acceptable to persons with a range of constitutional views and methodologies. For although we disagree on whether the Appointments Clause poses an insuperable obstacle to formal institutions of self-governance in Puerto Rico, and (relatedly) on whether Puerto Rico remains constitutionally subject to the plenary power of Congress under the Territories Clause, we agree that, regardless of constitutional theory, mechanisms can be established that elide the constitutional issues and substantively resolve them

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<sup>316</sup> See Keitner & Reisman, *supra* note 84, at 38, 51.

<sup>317</sup> See ALEINIKOFF, *supra* note 18, at 89–90.

<sup>318</sup> See *id.* at 89–94 (questioning Attorney General Thornburgh’s reasoning and arguing for the need to move beyond hierarchical nineteenth-century notions of sovereignty based on plenary federal power); see also Trías Monge, *supra* note 225, at 235.

<sup>319</sup> See ALEINIKOFF, *supra* note 18, at 89, 251 n.94 (citing Letter from A. Mitchell McConnell, Jr., Acting Assistant Attorney General for Legislative Affairs, to Marlow W. Cook, Co-Chairman, Ad Hoc Advisory Group on Puerto Rico, May 12, 1975); see also TRIÁS MONGE, *supra* note 152, at 126–31, 209 nn.16–17.

from a practical perspective. The existence of the debate highlights the significant problems posed by the United States' relationship with Puerto Rico and the need for creative solutions.

Again, from the perspective of international law, it is ordinarily a matter of indifference how the United States chooses to comply with its international obligations.<sup>320</sup> If it implements them through political rather than strictly legal means, that arrangement, so long as it produces the appropriate outputs, is of no concern to international law. Consequently, were the President and the Senate simply to give pro forma appointments to the elected territorial officials in Puerto Rico, both strict constitutional formalism and international law would be satisfied. On the one hand, the people of Puerto Rico would effectively select their own government; on the other, the literal requirements of the Constitution's text would be formally observed.

This proposal, of course, risks the possibility that a future President and Senate will defy the choices of the Puerto Rican people as expressed in their local elections. But if Puerto Rico remains a U.S. territory subject to plenary congressional power at any rate, there is equally always the risk that Congress will decide to intrude aggressively into the local affairs of the island in disregard of the political commitments it made in the past—or, indeed, even abolish the institutions of local self-government altogether and reestablish a colonial regime. Were that to occur, it would place the United States in clear violation of its international legal obligations. At a minimum, the United States would be obliged to resume periodic reports on Puerto Rico to the Secretary-General under Article 73(e).<sup>321</sup> At that time, the Trusteeship Council would almost certainly resume its operations, and the United Nations, the Organization of American States, other regional and international institutions, and foreign states worldwide would swiftly condemn the United States—with reputational and other international consequences that we doubt the United States wishes to incur. But the United States would have the raw domestic power to do it.<sup>322</sup>

There is no reason, however, to anticipate that the United States would take these or comparable steps—and strong reasons to think

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<sup>320</sup> See I OPPENHEIM'S INTERNATIONAL LAW, *supra* note 191, § 21 at 82–83.

<sup>321</sup> See U.N. Charter art. 73.

<sup>322</sup> See LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 235 (2d ed. 1996) (“In principle, every nation-state has the power—I do not say the right—to violate international law and obligation and to suffer the consequences.”) (footnotes omitted).



that it would not. The United States has consistently been solicitous of the Puerto Rican people and supportive of their aspirations of self-government.<sup>323</sup> We see no reason to anticipate unlikely events before they happen or to strive, without relevant facts, to resolve problems that do not yet exist. Nor is there any apparent downside to the proposal to implement “shadow” appointments and thereby to confer unquestionably valid constitutional authority on the elected officials of Puerto Rico.<sup>324</sup> The tension, if genuine, between constitutional and international legal requirements can, it seems, be mediated with a very modest amount of creativity and political will.

### B. *Enfranchisement: Problems and Prospects*

Of course, the solution proposed in the preceding section will not comprehensively resolve every theoretical or practical problem with the current legal relationship between the United States and Puerto Rico. In particular and most significantly, it does not give Puerto Ricans a voice in the selection of the federal government, which becomes even more critical if, as Professor Lawson believes, Puerto Rico presently remains subject to the plenary control of the United States as a matter of domestic law. Indeed, because Article II of the Constitution specifies that the president shall be elected by state electors, it seems difficult, and perhaps impossible, to craft a mechanism to give Puerto Ricans the right to vote for the President in the absence of a constitutional amendment.<sup>325</sup> The First Circuit recently issued a strongly worded en banc opinion to this effect.<sup>326</sup>

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<sup>323</sup> See REPORT BY THE PRESIDENT’S TASK FORCE ON PUERTO RICO’S STATUS, *supra* note 109, at 10–11 (reiterating the 2005 Task Force Report’s recommendation that Congress should provide for a plebiscite to determine and implement the wishes of the Puerto Rican people to the extent consistent with the Constitution); Trías Monge, *supra* note 225, at 233 (noting that “the United States has been most generous toward Puerto Rico and has clearly harbored nothing but good will toward its people”).

<sup>324</sup> See LAWSON & SEIDMAN, *supra* note 94, at 138.

<sup>325</sup> Cf. U.S. CONST. amend. XXIII (giving residents of the District of Columbia the right to vote in presidential elections).

<sup>326</sup> *Igartúa-De La Rosa v. United States*, 417 F.3d 145, 147–48 (1st Cir. 2005) (en banc) (“That the franchise for choosing electors is confined to ‘states’ cannot be ‘unconstitutional’ because it is what the Constitution itself provides. . . . The path to changing the Constitution lies not through the courts but through the constitutional amending process . . . .”); see also *Romeu v. Cohen*, 265 F.3d 118, 122–24 (2d Cir. 2001) (noting that “the process set out in Article II for the appointment of electors is limited to ‘States’ and does not include territories,” and therefore “the absence of presidential and vice-presidential voting rights for U.S. citizens living in U.S. territories does not violate the Constitution”); cf. *Attorney Gen. of the Territory of Guam v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984) (finding that U.S. citizens residing in Guam do not have the right to vote in presi-

Equally, it seems evident, even to proponents of the compact theory and to those, like Professor Sloane, inclined toward a less formalistic reading of the Territories Clause, that Congress may not “give territories representation in the Senate.”<sup>327</sup>

Yet if the figurative terms of the bilateral compact with Puerto Rico do not, as we have suggested, in fact demand Puerto Rican participation in or full democratic voting rights relative to the federal government, why should effective representation be necessary at all, either domestically or internationally? After all, as explained earlier, the people of Puerto Rico explicitly declined the opportunity to participate in the federal government based on defined and *clearly* constitutional terms as part of the de facto bargain that culminated in their associated statehood. At least at the time, they deemed that to be the option that best served their socioeconomic, cultural, and political interests.<sup>328</sup>

The simple answer is that the United States has since ratified the International Covenant on Civil and Political Rights, Article 25 of which provides:

Every *citizen* shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.<sup>329</sup>

Because a statute, and perhaps the Constitution itself, makes Puerto Ricans U.S. citizens,<sup>330</sup> the ICCPR imposes at least an *international* ob-

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dential elections and that “[a] constitutional amendment would be required” to permit them to vote).

<sup>327</sup> ALENIKOFF, *supra* note 18, at 90.

<sup>328</sup> See *supra* notes 227–229 and accompanying text.

<sup>329</sup> See ICCPR, *supra* note 16, art. 25 (emphasis added). The issue merits analysis in its own right, but we assume for purposes of the following analysis that the qualifier “without unreasonable restrictions” does not vitiate the prima facie U.S. obligation to extend the franchise in *some* respect to Puerto Rican citizens of the United States. See *id.*

ligation on the United States to comply with Article 25. Of course, the United States ratified this treaty subject to a host of substantial reservations,<sup>331</sup> including a declaration purporting to render Articles 1 through 27 “not self-executing.”<sup>332</sup> But whatever the correct view of the perplexing doctrine of non-self-execution, no one contends that it vitiates the international obligation itself.<sup>333</sup> Consequently, we now consider a second tension between international and constitutional law, one generated by a multilateral treaty that superimposes new, and distinctly modern, human rights obligations on the United States relative to the people of Puerto Rico.

At the outset, it is worth reiterating that, at least judged by the number of provisions devoted to the subject, the selection of officials of the United States government is the single most important topic addressed by the Constitution.<sup>334</sup> And throughout, the Constitution makes it quite clear that territorial inhabitants receive no direct voice in that selection process. The House “shall be composed of Members chosen every second Year by the People *of the several States . . .*”<sup>335</sup> The

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<sup>330</sup> Jones Act, Pub. L. No. 368, ch. 145, § 5, 39 Stat. 951 (1917); *see generally* Perez, *supra* note 281 (arguing that the Fourteenth Amendment confers citizenship by birth on Puerto Ricans born in Puerto Rico).

<sup>331</sup> Senate Comm. on Foreign Relations, *Report on the International Covenant on Civil and Political Rights*, U.S. Sen. Exec. Rep. 102-23, 102d Cong., 2d Sess. (1992), 31 I.L.M. 645 (1992). Several of these may be invalid as a matter of international law based on, among other things, their incompatibility with the object and purpose of the treaty. *See* Human Rights Comm., *General Comment No. 24*, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994); Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1952 I.C.J. 15, 24 (May 28); Vienna Convention on the Law of Treaties, *supra* note 179, art. 19(c) (providing that a State may formulate a reservation to a treaty unless, among other things, it “is incompatible with the object and purpose of the treaty”).

<sup>332</sup> U.S. Sen. Exec. Rep. 102-23, *supra* note 331, 31 I.L.M. at 659. Professor Sloane shares the constitutional doubts of those writers who question the comparatively novel practice whereby the President and the Senate unilaterally declare certain manifestly *not* non-self-executing provisions (in the sense of *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829)) to be non-self-executing. *See, e.g.*, Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 346-47 (1995); *see also* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 708 n.61 (1995).

<sup>333</sup> Professor Lawson holds open the possibility that the ICCPR itself is unconstitutional because it may not carry into execution any federal power beyond the treaty power. This possibility, however, rests on a decidedly idiosyncratic view of the scope of the treaty power, which will be withheld for present purposes. *See generally* Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1.

<sup>334</sup> *See supra* note 279 and accompanying text.

<sup>335</sup> U.S. CONST. art. I, § 2, cl. 1 (emphasis added).

Senate, although originally chosen by *state* legislatures,<sup>336</sup> since the 1913 adoption of the Seventeenth Amendment “shall be composed of two Senators *from each State*, elected by *the people thereof* . . . .”<sup>337</sup> The President is selected by the electoral college pursuant to the terms of the Twelfth Amendment.<sup>338</sup> Under the Twenty-Third Amendment, the District of Columbia “shall appoint in such manner as the Congress may direct . . . [a] number of electors . . . equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State . . . .”<sup>339</sup> With respect to the rest of the electoral college, “[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .”<sup>340</sup>

All of these provisions, except for the amendment that partially enfranchised the residents of the District of Columbia, empower the voters or legislatures of the several *states* to select Congress and the President. Territorial residents have no role in the process—though, as noted earlier, political parties may give them a voice in selecting candidates. If the ICCPR truly imposes on the United States an obligation to allow Puerto Rican citizens to participate meaningfully in federal elections, the Constitution seems to make compliance with that obligation impossible absent a constitutional amendment akin to the Twenty-Third Amendment.<sup>341</sup>

As with the Appointments Clause, the authors do not necessarily agree on the constitutionality of *formal* solutions to this conundrum. But also as with the Appointments Clause, we think that that there may be practical, political solutions that circumvent these difficult legal questions. In this case, however, the practical solutions strike both of us as so complex that a constitutional amendment may well be far simpler to implement.

In 2001 in *Romeu v. Cohen*, Judge Pierre Leval of the U.S. Court of Appeals for the Second Circuit suggested a formal solution of sorts that has regrettably received scant attention.<sup>342</sup> The plaintiff Romeu

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<sup>336</sup> *Id.* art. I, § 3, cl. 1.

<sup>337</sup> *Id.* amend. XVII (emphasis added).

<sup>338</sup> *Id.* amend. XII.

<sup>339</sup> *Id.* amend. XXIII, § 1.

<sup>340</sup> *Id.* art. II, § 1, cl. 2.

<sup>341</sup> See ICCPR, *supra* note 16, art. 25.

<sup>342</sup> See 265 F.3d at 127–30 (Leval, J., writing separately).

was a U.S. citizen who had previously voted in federal elections in New York but moved to Puerto Rico in 1999.<sup>343</sup> Under the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”),<sup>344</sup> if Romeu had moved outside the United States, he would have been entitled by federal law to vote by absentee ballot in New York, provided he met the procedural requirements of the statute.<sup>345</sup> The statute, however, considers Puerto Rico part of the United States and therefore does not entitle former state residents who move to Puerto Rico or other territories to require their former states of residence to accept their absentee votes.<sup>346</sup> Romeu challenged this exclusion of territorial citizens on a range of constitutional grounds, alleging, among other things, violations of equal protection, privileges or immunities, and the right to travel.<sup>347</sup> All of his claims were rejected by a unanimous panel of the Second Circuit.<sup>348</sup>

Judge Leval, however, who authored the court’s opinion, added some observations “for himself alone” to suggest how Congress might cure Romeu’s grievance and, by extension, enfranchise Puerto Rican citizens, at least relative to presidential elections.<sup>349</sup> Judge Leval observed that despite Article II, Section 1, as a matter of precedent, “it has long been clear that State legislatures do not have unfettered authority over the appointment of electors.”<sup>350</sup> In particular, under the Fourteenth and Fifteenth Amendments, among others, Congress has enacted, and the Supreme Court has sustained, voting rights legislation intended, for example, to prohibit processes of appointing electors that would violate the Equal Protection Clause or enable others forms of discrimination, as well as to ban durational residency requirements.<sup>351</sup> After canvassing the relevant precedents, including the UOCAVA, he concluded:

If, notwithstanding the command of Article II, section 1 that electors be appointed in the manner that the State legislature directs, Congress may nonetheless impose on the States a requirement that each accept the votes of certain U.S. citi-

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<sup>343</sup> *Id.* at 120 (majority opinion).

<sup>344</sup> 42 U.S.C. §§ 1973ff-1 to -6 (2006).

<sup>345</sup> *See Romeu*, 265 F.3d at 120–21.

<sup>346</sup> *Id.* at 121.

<sup>347</sup> *Id.* at 120.

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 127–30 (Leval, J., writing separately).

<sup>350</sup> *Romeu*, 265 F.3d at 128 (Leval, J., writing separately).

<sup>351</sup> *See id.* at 128–29.

zens who are not residents of the State but reside outside the United States or in other States, I can see no reason why Congress might not also with respect to the presidential election require the State to accept the presidential votes of certain U.S. citizens who are nonresidents of the State residing in the U.S. territories.<sup>352</sup>

Professor Sloane would add that federal compulsion should not be necessary. The Supremacy Clause makes treaties “the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”<sup>353</sup> State laws directing the manner of appointing presidential electors fall within the latter category and presumably must therefore be adjusted to comply with the ICCPR.<sup>354</sup>

Former Chief Judge John Walker concurred in *Romeu* but wrote separately to take issue with Judge Leval’s suggestions for granting territorial citizens federal voting rights by statute.<sup>355</sup> In his view, Congress has no power to impose such a requirement on the states in derogation of their prerogative under Article II absent a constitutional violation that may be remedied pursuant to one of Congress’s enumerated enforcement powers under the various amendments protecting voting rights.<sup>356</sup> Because the court unanimously agreed that denial of Romeu’s alleged right to vote by absentee ballot did not violate any of these amendments, Congress had no violation to remedy.<sup>357</sup> Again, however, it is unclear, in Professor Sloane’s view, why the obligation to adjust the manner of appointing presidential electors does not devolve upon the states directly by virtue of the Supremacy Clause—or, alternatively, why Congress could not pass a statute of the sort envisioned by Judge Leval in order to implement the ICCPR and ensure that the United States meets its treaty obligations, which that Clause makes “the supreme Law of the Land.”<sup>358</sup>

In view of the precedents, there is much to commend Judge Leval’s proposal. In 1970 in *Oregon v. Mitchell*,<sup>359</sup> for example, an 8–1 ma-

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<sup>352</sup> See *id.* at 129.

<sup>353</sup> See U.S. CONST. art. VI, cl. 2.

<sup>354</sup> Cf. Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT’L L. 679, 683 (1998) (“It apparently needs reminding, even after two hundred years, that treaties of the United States are supreme law of the land, and are binding on the states by express provision in the U.S. Constitution.”).

<sup>355</sup> See *Romeu*, 265 F.3d at 131–36 (Walker, C.J., concurring).

<sup>356</sup> *Id.* at 131–36.

<sup>357</sup> *Id.*

<sup>358</sup> See U.S. CONST. art. VI, cl. 2.

<sup>359</sup> 400 U.S. 112 (1970).

jority of the Supreme Court, albeit on a splintered variety of rationales, upheld Congress's constitutional power to override state residency requirements and force states to accept absentee ballots in presidential elections.<sup>360</sup> The UOCAVA, as Judge Leval pointed out, similarly overrides state law to compel states to accept overseas absentee votes that they might otherwise reject.<sup>361</sup> Assuming that *Mitchell* reached the correct result, it is unclear why Congress would be unable to do the same for territorial inhabitants.

From an originalist perspective, however, there is much to commend Judge Walker's objections. Judge Walker examines all plausible (and, in Professor Lawson's judgment, several implausible) sources of enumerated congressional authority to implement Judge Leval's proposal and finds all of them wanting.<sup>362</sup> Especially in the context of presidential electors, the Constitution is quite clear that it commits the selection process to state legislatures, subject only to external constitutional constraints (and congressional enforcement authority pursuant to those constraints).<sup>363</sup> There is no enumerated power that colorably gives Congress power to tell states how they must choose electors.

Professor Lawson, unsurprisingly, comes down on the side of Judge Walker. As does Judge Walker, Professor Lawson gravely doubts the constitutionality of the UOCAVA.<sup>364</sup> He is also quite sure that, from an originalist standpoint, *Oregon v. Mitchell* was wrongly decided—and not just because he agrees with Justice Harlan that Section 1 of the Fourteenth Amendment does not address voting rights. None of the sources of congressional power identified by the various Justices in *Mitchell* is impressive to an originalist. Enforcement of the right to travel, the rationale on which six Justices relied, is even more problematic than enforcement of the right to vote, because the Constitution does not contain an explicit right to travel. The Constitution

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<sup>360</sup> See *id.* at 269–70 (Black, J.) (grounding the power to override residency requirements in Congress's generalized power to create and maintain a national government); *id.* at 147–49 (Douglas, J., concurring in part and dissenting in part) (grounding the power in Congress's enforcement authority under Section 5 of the Fourteenth Amendment to protect the right to vote); *id.* at 237–40 (Brennan, J., White, J., and Marshall, J., concurring in part and dissenting in part) (grounding the power in Congress's enforcement authority under Section 5 to protect the right to travel); *id.* at 285–87 (Stewart, J., Burger, C.J., and Blackmun, J., concurring part and dissenting in part) (also relying principally on enforcement of the right to travel).

<sup>361</sup> *Romeu*, 265 F.3d at 129 (Leval, J., writing separately).

<sup>362</sup> See *id.* at 131–36 (Walker, C.J., concurring).

<sup>363</sup> See *id.* at 134.

<sup>364</sup> See *id.* at 134 n.7.

protects aspects of interstate travel through a variety of provisions, including the Privileges and Immunities Clause,<sup>365</sup> the Commerce Clause,<sup>366</sup> and the Privileges or Immunities Clause,<sup>367</sup> but there is no generalized right to travel for Congress to enforce. Nor is there, as Justice Black maintained, a congressional power “to create and maintain a national government.”<sup>368</sup> There are specific powers granted to specific institutions, including Congress, that collectively serve the end of creating and maintaining a national government, but there is no “create and maintain” clause that stands independently of its constituent parts.<sup>369</sup> Professor Lawson believes the Constitution commits the selection process for presidential electors to the states and that is the end of the matter.

Professor Sloane, in contrast, finds Judge Leval’s proposal creative and intuitively appealing.<sup>370</sup> He would not be so quick either to dispense with long-settled precedent or to take a narrow view of the many congressional powers that might bear on this issue. Rather than engage in yet another constitutional debate, however, we once again want to consider whether international legal obligations towards Puerto Rican residents might be met by circumventing rather than confronting the possible constitutional problems with territorial voting rights. As with the Appointments Clause issue, we agree that such solutions exist in principle. But unlike the previous issue, which could be solved with relative ease by the political departments and with no serious political cost, any solution to the voting rights problem will, we think, be rife with practical and political difficulties.

Territorial citizens of Puerto Rico could be given effective voting rights through the same kind of “shadow” mechanisms that we have already discussed.<sup>371</sup> Congress could authorize, for example, the local election of a number of persons in the various territories equal to the number of representatives in Congress to which they would be entitled if they were states. It could then allow those elected officials to participate, in a substantive but formally nonbinding fashion, in con-

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<sup>365</sup> U.S. CONST. art. IV, § 2, cl. 1.

<sup>366</sup> *Id.* art. I, § 8, cl. 3.

<sup>367</sup> *Id.* amend. XIV, § 1.

<sup>368</sup> *See Mitchell*, 400 U.S. at 269.

<sup>369</sup> For similar reasons, Professor Lawson would also consign to the constitutional junk-heap *Burroughs v. United States*, 290 U.S. 534 (1934), which upheld congressional power to regulate contributions in presidential elections on much the same reasoning employed by Justice Black in *Mitchell*. *See id.* at 545.

<sup>370</sup> *See Romeu*, 265 F.3d at 127–30 (Leval, J., writing separately).

<sup>371</sup> *See supra* notes 320–324 and accompanying text.



gressional deliberations and votes. And Congress could then cast and count its formal votes in a fashion that conforms to the outcomes that would have resulted if the votes of the territorial representatives had official weight. Congress could even inscribe these procedures in House and Senate rules (though such rules could be repealed by a majority at any time and therefore would not add value to the mix).

Such a procedure would, as far as we can tell, comply at least in part with U.S. obligations under the ICCPR.<sup>372</sup> But there is, needless to say, no chance whatsoever that anything like this will happen in the foreseeable future. Such a mechanism would likely dilute the power of existing members of Congress and change the political dynamics of that institution. Our point is only that such a mechanism *could* be implemented without a constitutional amendment. That is, Congress could do it unilaterally, without the consent of the states. With respect to presidential elections, however, matters are even more complicated. The states could, if they wished, implement any of Judge Leval's proposals, either informally or through a compact.<sup>373</sup> But trying to secure that kind of agreement on a proposal that could easily have the effect of overriding the results of a state's election is beyond quixotic. Our point, once again, is only that, given some creative thought, mechanisms exist that could conceivably satisfy U.S. international obligations without the need for constitutional amendments.

#### CONCLUSION

We conclude by noting an option that offers perhaps the simplest solution to the diverse issues explored in this article: Puerto Rico could, as is its international right as an associated state, declare its independence and become a fully sovereign State. The United States and Puerto Rico could then enter into an Article II treaty whereby Puerto Rico delegated certain sovereign competences to the United States. This would effectively establish an arrangement virtually identical to that brought into effect, as a practical matter, by the figurative bilateral compact of 1952. But it would be subject to far fewer constitutional difficulties. Of course, this presupposes political will on both sides, and that may be an unwarranted assumption. Furthermore, a treaty could not resolve the enfranchisement issue. But it is not at all clear that this would even remain an issue were two sovereign States to enter into an associate-principal relationship by treaty—for such a

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<sup>372</sup> See ICCPR, *supra* note 16, art. 25.

<sup>373</sup> See *supra* notes 349–352 and accompanying text.

treaty could, for example, simply delimit the scope of federal laws to which Puerto Rico agreed to be subject, obviating the need for an effective voice in the (now no longer plenary) power of the United States over Puerto Rico.

We do not expect the solutions canvassed in this article to be adopted in the near future, and its point has not been a vain hope to spur such immediate action. Our goal is more modest: to bring these issues into the mainstream of both international and constitutional legal dialogue in the United States. For whatever one's view of the status quo, it should be clear by now that serious arguments exist suggesting that the current arrangement between the United States and Puerto Rico may violate the Constitution, U.S. obligations under general international law, treaties to which the United States is a party—or all of the above. The practical consequences for the people of Puerto Rico have long been decried and documented in detail elsewhere. The situation, in our view, compels far more attention than it has received to date.