

Incorporating the Lonely Star: How Puerto Rico came to be Incorporated and Earned a Place in the Sisterhood of States

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STUDENT SHOWCASE ARTICLE

**Incorporating the Lonely Star: How Puerto Rico
Became Incorporated and Earned a Place in the
Sisterhood of States**

*By: Willie Santana*¹

In the prosecution of the war against . . . Spain by the people of the United States in the cause of liberty, justice, and humanity, its military forces have come to occupy the island of Puerto Rico. They come bearing the banner of freedom. . . . They bring you the fostering arm of a free people, whose greatest power is in its justice and humanity to all those living within its fold.²

Major General Nelson A. Miles, Commander of U.S. Forces in Puerto Rico, in a proclamation issued in 1898 upon the American invasion of the island.

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² FRENCH ENSOR CHADWICK, *THE RELATIONS OF THE UNITED STATES AND SPAIN: THE SPANISH-AMERICAN WAR*, Vol. II, 297 (1911).

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I. Introduction

On November 7, 2012, Americans all around the nation celebrated or bemoaned the result of the quadrennial presidential election. Meanwhile, a historic vote in Puerto Rico to reject the existing status of the island went largely unnoticed in the rest of the United States.³ Popular indifference towards Puerto Rico and the other American territories was not always the rule. In fact, the election of 1900 was largely decided on the issue of what to do with the new American possessions,⁴ and a series of Supreme Court decisions, later collectively named the INSULAR CASES, were front and center in the national dialogue during the early twentieth century.⁵

While largely unknown today, the Insular Cases are immensely significant because they created a dichotomy of

³ When asked whether voters supported the present territorial status of the island, fifty-four percent of voters voted “No.” A large majority of registered voters, seventy-seven percent, participated in the vote. PUERTO RICO ELECTIONS COMMISSION, PRESENT FORM OF TERRITORIAL STATUS – ISLAND WIDE RESULTS, *available at* http://div1.ceepur.org/REYDI_NocheDelEvento/index.html#en/default/CONDICION_POLITICA_TERRITORIAL_ACTUAL_ISLA.xml.

⁴ The territories in question at the time of the 1900 election were the four islands ceded to the United States pursuant to the treaty ending the Spanish-American War—Cuba, Guam, the Philippines, and Puerto Rico. A Treaty of Peace between the United States and Spain, 30 Stat. 1754. Modern American territories include Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. U.S. DEPARTMENT OF STATE, DEPENDENCIES AND AREAS OF SPECIAL SOVEREIGNTY, *available at* <http://www.state.gov/s/inr/rls/10543.htm>.

⁵ Although the exact list of Insular Cases is debated, for the purposes of this paper, the Insular Cases include: *Balzac v. Porto Rico*, 258 U.S. 298 (1922), *De Lima v. Bidwell*, 182 U.S. 1 (1901), *Goetze v. United States*, 182 U.S. 221 (1901), *Dooley v. United States*, 182 U.S. 222 (1901), *Armstrong v. United States*, 182 U.S. 243 (1901), *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Huus v. N.Y. and Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

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status—a novel concept at the time—for American territories under the Constitution’s Territorial Clause.⁶ Under the Insular Cases, territories are classified as either incorporated or unincorporated. Incorporated territories are nascent states, while unincorporated territories are subject to the plenary power of Congress in perpetuity unless Congress changes the territory’s status.⁷ This principle, enshrined in law by the same Fuller Court that framed the infamous separate-but-equal doctrine, is known as the territorial incorporation doctrine.

While the public debate over whether the United States, a nation born of anti-colonial fever, could itself become an imperial power has largely subsided, its consequences live on today. Although the issues raised by the territorial incorporation doctrine are of consequence to all modern American territories, most discussion of these issues is centered on Puerto Rico—by far the largest American territory, both in size and population.⁸

The chief premise behind the doctrine of territorial incorporation is that, because territories are “subject to the sovereignty of and []owned by the United States,” they are not foreign in the “international sense. . . . [but are] foreign

⁶ The Territorial Clause of the Constitution reads: “The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2.

⁷ The Court held that because “incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view,” Congress did not incorporate Puerto Rico by granting Puerto Ricans citizenship. *Balzac v. Porto Rico*, 258 U.S. 298, 306 (1922).

⁸ At nearly 4 million residents, the population of Puerto Rico far surpasses that of the other territories. In comparison, the next highest populated territory has a total population of 181,000. U.S. CENSUS BUREAU, ESTIMATED RESIDENT POPULATION WITH PROJECTIONS available at <http://www.census.gov/compendia/statab/2012/tables/12s1313.pdf>.

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to the United States in a domestic sense.”⁹ In reaching this decision, the Court was influenced heavily by a series of Harvard Law Review articles, many of which were open in their paternalism, and sometimes contempt, for the inhabitants of the new possessions.¹⁰

The true significance behind the doctrine of territorial incorporation as a constitutional principle is that the doctrine placed the new territories outside a traditional territorial transition process that was older than the Constitution itself. The territory-to-state process was first conceived by the Congress of the Confederation of the United States through the Northwest Ordinance of 1787.¹¹ The ordinance itself influenced the drafting of the Territorial Clause of the Constitution during the Philadelphia Convention. This ordinance was later amended to be compatible with the new Constitution by the First Congress of the United States and signed into law by George Washington in 1789. Although the Northwest Ordinance was explicitly drafted to govern only the modern Midwest (then known as the Northwest Territory), with few

⁹ *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

¹⁰ For the five contemporary articles discussing the legal disposition of the American possessions see Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition of Government by the United States of Island Territories*, 12 HARV. L. REV. 393 (1899); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions: A Third View*, 13 HARV. L. REV. 155 (1899); James B. Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1890). Mr. Baldwin, for example, did not attempt to clothe his contempt for the residents of the new American possessions, openly describing citizens of Puerto Rico as “ignorant and lawless brigands that infest[ed]” the island. Baldwin, *supra* note 10, at 451.

¹¹ GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, BREAKTHROUGH FROM COLONIALISM, VOL. I., at Loc. 639 (Kindle ed. 2012) [hereinafter STATEHOOD STUDY].

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exceptions each subsequent territory followed the same process to transition to statehood after the formation of the union.¹²

The Northwest Ordinance transition-to-statehood process can be broken down into three steps.¹³ First, Congress appoints a governor, secretary, and judiciary to administer the territory. The territorial governor and judiciary establish laws to govern the territory, and these laws are subject to congressional oversight.¹⁴ In phase two, the territory establishes a more representative form of government where the territorial citizens elect a house of representatives, while the governor and a new upper chamber remain appointed by Congress.¹⁵ This upper chamber, the Legislative Council, is appointed from names submitted by the territorial legislature. During this stage, the legislature also elects a non-voting delegate to Congress. The third stage requires a fully republican form of government and mandates admission to the union as a matter of right.¹⁶ The people of Puerto Rico expected to follow this process after the island came under the sovereignty of the United States, but to date Puerto Rico continues to exist not as a nation or a state, but as a territory or possession—a quasi-colony of the United States.¹⁷

¹² Thirty one-states joined the Union following the process set out by the Northwest Ordinance, the most recent being the former Territory of Hawaii. In fact, only the original thirteen colonies and the states of Kentucky (ceded from Virginia), Vermont (independent), Maine (ceded from Massachusetts), West Virginia (ceded from Virginia), Texas (independent) and California (U.S. Military rule post-Mexican American War) joined the Union through a process other than that established by the Northwest Ordinance. STATEHOOD STUDY, *supra* note 11, at loc. 929.

¹³ STATEHOOD STUDY, *supra* note 11, at loc. 639-655.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ EDGARDO MELÉNDEZ, PUERTO RICO'S STATEHOOD MOVEMENT, 2-12 (Bernard K. Johnpoll ed., 1988).

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America won Puerto Rico after a thirteen-day military campaign. A force of 3,415 American soldiers encountered little opposition and were instead greeted by Puerto Ricans with cheers of: “¡Viva Puerto Rico [A]mericano!”¹⁸ Even prior to the invasion, a strong annexationist movement existed because the United States was, as it is today, the main export market for Puerto Rico’s goods, and also because of an attraction to America’s classical liberal governing philosophy.¹⁹ Puerto Rico’s pre-invasion annexationist movement actually aided the invasion force in selecting its initial targets and provided assistance to the U.S. military as it moved through the island.²⁰ Because of the annexationist movement’s involvement in the invasion of Puerto Rico, expectations were high that the invasion would in time lead to the island joining the several states as a full member of the union. The annexationist movement transitioned to a statehood party, the Republican Party of Puerto Rico, shortly after the invasion.²¹

Among the modern political parties on the island, the pro-statehood New Progressive Party can trace its philosophical roots back to the Republican Party of Puerto Rico, founded on July 4th, 1899.²² Early actions taken by the United States on the island—the passing of an Organic

¹⁸ *Id.* at 21.

¹⁹ *Id.* at 17-18.

²⁰ *Id.* at 20-21.

²¹ The Republican Party of Puerto Rico was founded on July 4, 1899 and sought the “definitive and sincere annexation” of Puerto Rico to the United States with the goal of the island’s eventual admission as a state. *Id.* at 36.

²² *Partido Nuevo Progresista* in Spanish (PNP). The modern PNP organization has its technical roots in the Partido Estadista Republicano (PER) of the 1960’s, but the intellectual father of Puerto Rico’s statehood movement is José Celso Barbosa who founded the Republican Party of Puerto Rico in 1899.

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Act in 1900,²³ the establishment of Federal Courts in the island, a series of economic reforms, and later the wholesale grant of American citizenship to those living (and born thereafter) in Puerto Rico—fanned the hopes of annexation on the island. The Supreme Court has periodically dashed those hopes ever since.²⁴

The legal issues presented by Puerto Rico and the other territories acquired by the United States at the turn of the twentieth century were novel and thus ripe for Supreme Court review.²⁵ For the first time, the United States assumed sovereignty over land not only non-contiguous to its existing states and territories, but also over culturally distinct peoples with little connection to Anglo-American tradition.²⁶ In some ways, these issues remain unresolved today, as the territories still exist in an ambiguous, perpetual, quasi-colonial status.

At first, however, the issue of Puerto Rico's status appeared more certain. When Congress passed an organic act for Puerto Rico in 1900, it seemed to have placed Puerto Rico on the track to statehood. The Act created a territorial government to succeed the military commission that governed the island since its invasion and created the office of Resident Commissioner, a non-voting delegate to the House of Representatives.²⁷ This organic act largely

²³ 31 Stat. 77 (1900).

²⁴ Meléndez, *supra* note 17 at 33-34.

²⁵ The imperialism debate refers generally to a national conversation that took place at the turn of the century, but specifically to the election of 1900. DUKE UNIVERSITY PRESS, FOREIGN IN A DOMESTIC SENSE PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION 4 (Christina Duffy Burnett & Blake Marshall eds. 2001) [Hereinafter Burnett].

²⁶ Although the former Mexican colonies of California, New Mexico, and the Republic of Texas were largely populated by distinct cultural and ethnic peoples, a large population of American immigrants already resided in these locales.

²⁷ 31 Stat. 77 (1900).

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mirrored the organic acts of the other territories that followed the Northwest Ordinance path to statehood, and mostly parallels the first phase of that process.²⁸

Meanwhile, one of the main issues of the presidential election of 1900 was whether the Constitution extended in full force to the newly acquired territories. McKinley, an imperialist who argued that the Constitution did not necessarily extend to the new territories, won the election. Shortly thereafter the Supreme Court adopted this position in the Insular Cases.²⁹

The Supreme Court announced the territorial incorporation doctrine in *Downes v. Bidwell*.³⁰ The case centered on a shipment of oranges from Puerto Rico to New York. Under the Organic Act of Puerto Rico, goods from Puerto Rico were subject to the same fees and duties as good from foreign countries, but the fees were discounted by eighty-five percent.³¹ Mr. Downes paid the import duties under protest and sued for a refund. The lawsuit argued that since Puerto Rico was not a foreign country, the Uniformity Clause prohibited these fees.³² Mr. Downes relied on a then-recent court decision that held Puerto Rico and the other territories ceded to the United States pursuant to the Treaty of Paris had ceased to be foreign countries.³³ The Court framed the issue in the case as whether the “revenue clauses of the Constitution extend of their own force to our newly acquired territories.”³⁴

Declaring without discussion that “[t]he Constitution itself does not answer the question,” the Court then crafted an extraconstitutional answer to the question

²⁸ 31 Stat. 77 (1900); Statehood Study, *supra* note 11 at loc. 929.

²⁹ Burnett, *supra* note 25 at 4.

³⁰ *Downes v. Bidwell*, 182 U.S. 244 (1901).

³¹ *Id.* at 247-48.

³² *Id.*

³³ The case Mr. Downes relied upon is another one of the Insular Cases: *De Lima v. Bidwell*, 182 U.S. 1 (1901).

³⁴ *Downes*, 182 U.S. at 249.

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presented to it.³⁵ The Court discussed the history of the Northwest Ordinance and the Territorial Clause of the Constitution, but focused most of its analysis distinguishing the Treaty of Paris from the Louisiana Purchase Treaty and the Joint Resolution Annexing the Republic of Hawaii. Interestingly, after analyzing the Louisiana Purchase and noting that the treaty explicitly provided that the people of this territory were to be guaranteed the “enjoyment of all the rights, advantages, and immunities of citizens of the United States” as soon as possible, the Court declared that Congress “would [n]ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our [culture], shall become at once citizens of the United States.”³⁶ Ultimately, because the Court was “of [the] opinion that the power to acquire territory by treaty implies . . . [the power] to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in . . . the ‘American empire,’” and because the Treaty of Paris provided “that the civil rights and political status of the native inhabitants [of the ceded territory] . . . shall be determined by Congress,” the Court held that the uniformity clause did not apply to Puerto Rico and its sister insular territories.³⁷

The Court’s brief discussion of the territorial inhabitants’ status in the “American Empire” implied initially that citizenship would alter the state of affairs. Indeed, the Court pointed out that if citizenship were granted to the inhabitants of the new territories and their “children thereafter born, whether savages or civilized” it would result in “extremely serious” consequences.³⁸ The decision was silent on what these serious consequences

³⁵ *Id.*

³⁶ *Id.* at 252, 280.

³⁷ *Id.* at 279-80.

³⁸ *Id.* at 279.

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could be, but the use of the word “savages” certainly provides a vivid hint.

Although *Downes* seemed to settle the issue of whether Puerto Rico was incorporated, and the consequences of this unincorporated status, the issue recurred. In 1915, Congress amended the Judicial Code to extend federal appellate jurisdiction over the Supreme Courts of Puerto Rico and the Territory of Hawaii.³⁹ In 1917, Congress passed the Jones–Shafroth Act, which granted American Citizenship to all former Spanish subjects and their children living in Puerto Rico.⁴⁰ The Act also established the Puerto Rican Senate and split up Puerto Rico’s government into legislative, executive, and judicial branches, thus mirroring state governments.⁴¹ Finally, the Act created the Federal District Court for the District of Puerto Rico and placed that new court under the appellate jurisdiction of the First Circuit Court of Appeals. The Act also made Puerto Rico subject to all federal statutes.

Many annexationists in Puerto Rico took these actions to mean that Congress was moving Puerto Rico from the traditional “phase one” of the Northwest Ordinance scheme to phase two of that process. Implicit in this theory was the assumption that by making Puerto Ricans citizens and establishing a territorial government, Congress had in fact incorporated Puerto Rico into the union.

The Supreme Court would disappoint annexationists once again. Despite the breadth of the Jones Act, the Court again held that Puerto Rico was an unincorporated territory of the United States in *Balzac v. Porto Rico*.⁴² Balzac came to the Court upon a writ of error

³⁹ 38 Stat. 803 §246 (1915).

⁴⁰ The Jones Act (39 Stat. 951) provided a mechanism for Puerto Ricans to reject the grant of citizenship, only 288 did so.

⁴¹ 39 Stat. 951 (1917).

⁴² *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

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from the Supreme Court of Puerto Rico.⁴³ Mr. Balzac was a newspaper editor facing a charge of misdemeanor criminal libel. He demanded a jury trial under the Sixth Amendment. The district court declined.⁴⁴ Asserting constitutional error, Mr. Balzac appealed to the Puerto Rican Supreme Court, which affirmed the lower court's decision. The defendant then appealed to the Supreme Court of the United States.⁴⁵

The Court held that extending American citizenship to the residents of Puerto Rico did not incorporate Puerto Rico into the United States, so the Court affirmed Mr. Balzac's conviction.⁴⁶ The Court declared that the Jones Act did not confer upon Puerto Ricans any additional right, other than the right to move to the mainland with the same rights and responsibilities as any other citizen.⁴⁷ More specifically, the Court ruled without dissent that it is not the *status* of a person that determines the applicability of constitutional provisions, but *locality*.⁴⁸

The Court has not discussed the territorial incorporation doctrine in detail since. Instead, it has relied on the doctrine to extend or deny constitutional rights to the residents of Puerto Rico and to analyze the constitutionality of various provisions of a myriad of federal statutes.

On two occasions, however, the Court cast doubt on the continued validity of the doctrine. First, the Court noted in *Reid v. Covert*, a case involving military servicemen overseas, that the scope of the Insular Cases was to facilitate the temporary government of the territories, and thus the doctrine did not have wider

⁴³ *Id.* at 300.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Only fundamental rights are extended to the unincorporated territories, and since at the time, a right to a jury trial was not deemed a fundamental right, this issue was dispositive. *Id.* at 306.

⁴⁷ *Id.* at 308.

⁴⁸ *Id.* at 309.

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applicability.⁴⁹ Therefore, unless a century-old exercise of sovereignty and rule can be regarded as temporary, the doctrine no longer applies.

Likewise, in *Torres v. Puerto Rico*, the Court decided that the protections of the Fourth Amendment extended to Puerto Rico.⁵⁰ Justice Brennan's concurrence, joined by three other Justices, argued that the Insular Cases were clearly not "authority" on the question of "the application of the Fourth Amendment – or any other provision of the Bill of Rights – to the Commonwealth of Puerto Rico."⁵¹

The Court has also noted that it "may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance."⁵² The ties between Puerto Rico and the United States have indeed strengthened significantly since the Court decided the Insular Cases. Today, more Puerto Ricans reside in the mainland United States than in Puerto Rico;⁵³ there is a Supreme Court Justice of Puerto Rican descent;⁵⁴ and hundreds of

⁴⁹ 354 U.S. 1, 14 (1957).

⁵⁰ 442 U.S. 465, 471 (1979).

⁵¹ *Id.* at 475-76 (Brennan, J., concurring).

⁵² *Boumediene v. Bush*, 553 U.S. 723, 758 (2008) (discussing the Insular Cases to determine what constitutional rights extended to enemy combatants held prisoner in Guantanamo Bay).

⁵³ 4,623,716 Puerto Ricans resided in the United States as of the 2010 Census, while the population of Puerto Rico was 3,725,789. Census Bureau, *The Hispanic Population: 2010*, at 3 available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (last visited Feb. 15, 2013); Census Bureau, *2010 Census Interactive Population Search*, available at <http://www.census.gov/2010census/popmap/ipmtext.php?fl=72> (last visited Feb. 15, 2013).

⁵⁴ Sheryl Stolberg, *Woman in the News: Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES, May 26, 2009, available at http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html?_r=0.

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thousands of Puerto Ricans have served with distinction in the United States Armed Forces since the Spanish-American war.⁵⁵ With Puerto Ricans in prominent and visible roles at all levels of American society, Puerto Ricans are no more foreign to the United States than are New Yorkers, Texans, or Hawaiians.

II. Statehood Historically

The Constitution mentions new states only twice. The text of the New States Clause, Article 3 section 4, protects the geographic and political integrity of existing states.⁵⁶ The clause requires consent from a state's legislature for any cession of territory by a state for the formation of a new one, or the combination of several states for the same purpose.⁵⁷ By negative implication, the clause is the only constitutional prescription for forming a new state. The clause thus vests Congress with any other power to admit new states. The New States Clause was born out of a perceived deficiency of the Articles of Confederation—the controversy surrounding the authority of the Congress of the Confederation to pass the Northwest Ordinances governing territories.⁵⁸

⁵⁵ *Statement by Anabelle Rodriguez, Secretary of Justice for the Commonwealth of Puerto Rico, on the Bombing on Vieques*, http://www.pbs.org/newshour/bb/military/jan-june01/vieques_4-27.html (last visited Feb. 1, 2013).

⁵⁶ The New States Clause reads: “New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” U.S. CONST. art. IV, §3, cl. 1.

⁵⁷ U.S. CONST. art. IV, §3, cl. 1.

⁵⁸ Statehood Study, *supra* note 11 at loc. 787. See also THE FEDERALIST NO. 38 (James Madison).

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The Northwest Ordinance of 1787, dealing with the disposition of the western territories, is regarded as among the most important acts of the Congress of the Confederation, second only to the convening of the Philadelphia Convention.⁵⁹ The creation of architecture for the administration and disposition of these territories was no small feat. This achievement was critical to the formation of the union, as the unclear status of the western territories almost derailed the ratification of the Articles of Confederation.⁶⁰ The smaller landless states feared being overpowered in the union by the larger states with western lands and refused to ratify the Articles unless the larger states relinquished their claim over their unsettled western territories.⁶¹ It was not until the State of Virginia, under the leadership of Thomas Jefferson, agreed to cede its western territory to the Confederacy, and the other landed states followed suit, that the Articles of Confederation were finally ratified.⁶²

Having solved the problem of ratification, the Congress of the Confederation was immediately faced with the urgent matter of what to do with the ceded territory. The Articles of Confederation were silent on the creation and admission of new states, so the Congress tried to craft a process.⁶³ Several proposals emerged. The earliest proposal treated the territories as colonies of the states that ceded each territory.⁶⁴ However, fear of perpetual

⁵⁹ The Library of Congress, *Primary Documents in American History Northwest Ordinance*, <http://www.loc.gov/rr/program/bib/ourdocs/northwest.html> (last visited Mar. 1, 2013).

⁶⁰ Statehood Study, *supra* note 11 at loc. 497 (noting that deadlock over the disposition of the western lands that many states laid claims to delayed ratification of the Articles of Confederation).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 510.

⁶⁴ *Id.* at loc. 514.

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ownership of these territories by the Confederacy became a strong concern, and the idea emerged for a compact between the states and the Confederacy that ensured self-governance for the territorial colonies and guaranteed their eventual admission into the Union.⁶⁵ This compact came to being as The Resolution of 1780, and it provided that the territory was to be “formed into distinct republican states, which shall become members of the federal union, and have the same rights of sovereign[ty] . . . as the other states.”⁶⁶ The purpose of this compact was to preserve the rights of the states and prevent imperialism.⁶⁷ Thus, through this compact, the Congress of the Confederacy would assume control over the territories for the explicit purpose of constituting new states.

Shortly after the Congress passed the Resolution of 1780, Thomas Paine proposed the creation of a new state, the state of Vandalia, in a region that today covers modern West Virginia, Kentucky, and parts of Pennsylvania.⁶⁸ Although the state was never formed, the Paine plan proposed transitional steps to statehood that were eventually paralleled by the Northwest Ordinance.

A few years after Paine’s proposal, several Continental Army veterans led by General Rufus Putnam proposed forming a new state in modern-day Ohio by granting ownership of the land to veterans of the American Revolution and providing the veterans with farming

⁶⁵ *Id.*

⁶⁶ Congress of the Confederacy of the United States, *1780 Resolution on Public Lands*,

<http://www.minnesotalegalhistoryproject.org/assets/1780%20Resolution%20on%20Public%20Lands.pdf> (last visited Feb. 20, 2013).

⁶⁷ Statehood Study, *supra* note 11 at loc. 514.

⁶⁸ George H. Alden, *The Evolution of the American System of forming and Admitting New States into the Union*, 18 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 79, 83 (1901) (detailing the Paine Plan).

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equipment.⁶⁹ In return, this military state would provide for the defense of the union. Richard Bland, a delegate from Virginia, proposed a similar plan that would reserve ten percent of the lands in the new states to benefit the Confederacy in its efforts to provide for the defense of the union and other public works.⁷⁰ Both plans failed in Congress.

Although the Paine, Putnam, and Bland plans were unsuccessful in the creation of new states, elements of each plan can be found in the foundation of America's state-making architecture, the Northwest Ordinance. In 1784, Virginia presented the Confederacy with the Deed of Cession for its western territories and spurred action on the territories' disposition in Congress.⁷¹ The same year, a committee led by Thomas Jefferson referred a plan to the Congress for the creation of sixteen curiously named new states.⁷² Congress passed this plan into law with only minor amendments. The plan provided for an initial territorial government at the behest of settlers or through an order of Congress. Once the population of a territory reached twenty thousand, its citizens could call a constitutional convention and form a state government. This first version of the Northwest Ordinance prescribed certain parameters for the would-be state government structures, most notably a guaranteed republican form of government. This guarantee was later incorporated into the Constitution of the United States.⁷³

The 1784 ordinance was never implemented, and a new ordinance was passed in 1785. The second Northwest

⁶⁹ *Id.* at 84.

⁷⁰ *Id.* at 85.

⁷¹ Statehood Study, *supra* note 11, at loc.580.

⁷² Jefferson would have named the new states: Sylvania, Michigania, Cherronesus, Assenisippia, Metropotaima, Illinoia, Saratoga, Washington, Polypotamia, and Pelisipia.

⁷³ Statehood Study, *supra* note 11, at loc. 596.

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Ordinance is only notable because it established the basic survey system of townships that ensured a more orderly settlement of the western lands. A shift in leadership, from Jefferson to Monroe, and the emergence of powerful prospecting companies⁷⁴ seeking to exploit the western territories moved Congress to expressly repeal the ordinance of 1784 and enact the Northwest Ordinance of 1787. Thus, the Northwest Ordinance of 1787 became the nation's state formation system into the twentieth century.

As stated above, the ordinance established a three-stage process culminating on admission to the union as a matter of right. Like the ordinance of 1874, it provided that the new states should enter the union subject to specific covenants. It is also striking that the articles of compact between the Confederacy and the future states contained provisions strikingly similar to those that would become enshrined in the Bill of Rights and the Fourteenth Amendment.⁷⁵

The Articles of the Confederacy failed to address many of the challenges that faced the nascent American nation. Recognizing these weaknesses, Congress called for a constitutional convention. The Framers convened in Philadelphia in May of 1787; the result was the Constitution of the United States. After agreeing on more pressing issues such as the necessity for a stronger national government, how this government would be subdivided, and how the states were to be represented in this new national body politic, the convention turned its attention to the mechanisms for the management of the existing western territories and the admission of new states.

This discussion about admission of new states focused on two main points: the silence of the Articles of Confederation on the subject and the existing Northwest

⁷⁴Specifically, the Ohio and Scioto prospecting companies.

⁷⁵*Id.* at loc. 670.

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Ordinances.⁷⁶ In many ways, the two foci of discussion were interrelated; while the wisdom of the territorial scheme created by the ordinances was fairly accepted, authority for the system's creation was doubtful. The convention delegates were faced with the choice of legitimizing the territorial scheme by crafting authority for Congress to enact it, or to strip the national government of its control over the lands ceded to the federal government by the states.⁷⁷ The delegation from Virginia proposed granting the power to admit states to the Congress and submitted a draft resolution to that effect for consideration by convention delegates. The delegates adopted the Virginia resolution as a working draft for this provision.⁷⁸

Beginning with the Virginia proposal, the Framers debated whether the new states would be admitted on equal footing as the original states and how to protect the existing states from being dismembered in order to reduce their influence. Eventually, the drafters decided that unequal membership in the union was antithetical to the post-colonial ideals the new nation was born out of, but agreed that the integrity of the existing states should be protected.⁷⁹ Thus, the Virginia proposal was amended so that consent of a state would be necessary before it could be divided to form a new one. The Framers borrowed language from the Northwest Ordinance of 1787 and the Resolution of 1780 to draft what became the New States Clause of the Constitution. Having established authority

⁷⁶THE FEDERALIST NO. 38 (James Madison) (noting that the territorial system was conceived “without the least color of constitutional authority”). Curiously, the most influential of the land ordinances, the Northwest Ordinance of 1787, was passed while the constitutional convention was in session.

⁷⁷C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 57-58 (1949).

⁷⁸Statehood Study, *supra* note 11, at loc. 812.

⁷⁹*Id.* at loc. 845.

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for Congress to admit new states, the convention turned its attention to the disposition and governance of the territories and the ability of the central government to hold property. Through several amendments, language giving Congress authority to “dispose of and make all needful rules” for all territory and property of the United States was approved without amendment in the final draft of the Constitution.⁸⁰ The Constitution was ratified by June of 1788.

a. Routes to Statehood

Congress now has clear power over the disposition of the western territories; since ratification, thirty-one states have followed the process from territories organized by Congress under an organic act into full statehood.⁸¹ Congress first exercised its new territorial authority when it organized the Southwest Territory, the modern state of Tennessee, following the three-phase model of the Northwest Ordinance of 1787.⁸² Shortly after the organization of the Southwest Territory, Congress reenacted the Ordinance of 1787 as the First Organic Act for the Northwest Territory in 1789.⁸³ The rest of the states followed somewhat similar paths.

b. Unique States

a. *California*

⁸⁰ The territorial clause of the constitution does not appear to have been hotly debated. It reads: The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state. U.S. CONST. art. IV, §3, cl. 2.

⁸¹ See *supra* note 12 and accompanying text.

⁸² Statehood Study, *supra* note 11 at loc. 1754.

⁸³ *Id.* at loc. 906.

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California, although it followed the Tennessee Plan⁸⁴ to achieve statehood, is unique in that California transitioned from a sparsely populated former colony of Mexico under American military rule to a state of the union without ever being organized as a territory.⁸⁵ California was not organized as territory because Congress could not decide what role slavery would play, if any, in the new territory.⁸⁶ This controversy continued as Congress debated California's petition for statehood. Representatives from southern states objected to California's request for admission as a free state since there was no counterbalancing slave state to admit in order to maintain the balance of power between the free and slave states of the union. Congress even discussed splitting California in two at the Mason-Dixon Line.⁸⁷ Additionally, some members of Congress felt that allowing California to skip the territorial transition process would undermine the state-making system.⁸⁸ Abolitionist and slave-holding factions eventually negotiated the Compromise of 1850, and California was admitted to the union as a free state.

b. New Mexico

⁸⁴ The term *Tennessee Plan* refers to the largely self-driven process that Tennessee followed into statehood. The then-Southwest territory organized its own legislature, called for a constitutional convention, and boldly declared its territorial status ended before Congress ever saw its petition for statehood. The territory also elected its congressional delegation and sent them to Washington without congressional consent. The Tennessee plan was implemented successfully by the states of Michigan, Iowa, California, Oregon, Kansas, and Alaska. *Id.* at loc. 1775, 1997.

⁸⁵ *Id.* at loc. 6450.

⁸⁶ *Id.* at loc. 6710.

⁸⁷ *Id.* at loc. 6758.

⁸⁸ *Id.* at loc. 6726.

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Congress passed an organic act establishing territorial government for the territory of New Mexico as part of the compromise leading to California's admission to the union in the year 1850.⁸⁹ By the time of its organization, the Territory was already populous enough to petition for statehood, and the same year as its organization an unofficial convention drafted a state constitution. This constitution was written both in English and Spanish and declared that New Mexico was a non-slaveholding state.⁹⁰ Because of tensions leading up to the Civil War and irregularities in the original state elections, this first effort for statehood failed. The process of establishing a state government would suffer fits and starts for decades. Efforts in Congress also suffered similar fates, with several bills narrowly failing, stifled by technicalities or dying at the conference stage.⁹¹ New Mexico would remain a territory for sixty-two years before achieving statehood. New Mexico finally joined the union in 1912 through the enabling-act route to statehood (as opposed to the Tennessee Plan route). Although many internal and external factors led to this delay, the substantial Hispanic population of the territory and the territorial government's adherence to Spanish as an official language in the territory were large factors. In fact, the enabling-act admitting New Mexico to the union explicitly prescribed the use of English in public schools.⁹²

c. Hawaii

The most recent addition to the community of states, the insular state of Hawaii, is unique in a myriad of ways. Together with Alaska, it is one of only two non-

⁸⁹ *Id.* at loc. 10921, 10954.

⁹⁰ *Id.* at loc. 10970.

⁹¹ *Id.* at loc. 11250.

⁹² *Id.* at loc. 11314.

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contiguous states. It is the only island-state and the only bilingual state.⁹³

Hawaii's relationship with the United States has been a tenuous one. The road to statehood for Hawaii began with sugar. In 1875 the Kingdom of Hawaii and the United States signed what today would be recognized as a free trade agreement. The treaty allowed Hawaiian sugar and other goods to reach to American markets duty free and ceded territory to the U.S. Navy for what later became the Pearl Harbor Naval Base.⁹⁴ The treaty was very lucrative to Hawaii, but its sugar production came to be dominated by American companies and industrialists.

In 1890, a series of tariffs in the United States threatened the island's sugar market and American sugar industrialists realized that the annexation of the island would eliminate the tariff. These industrialists enlisted the United States Minister to Hawaii's assistance, and he persuaded the U.S. Marine Corps to assist the industrialists in overthrowing the Hawaiian monarchy.⁹⁵ The American businessmen then set up a provisional government in Hawaii to request annexation by the United States. Despite President Cleveland's calls for the monarchy's reinstatement, and his characterization of the actions by U.S. personnel as dishonorable, the monarchy was never reinstated.⁹⁶ Instead, the provisional government called a constitutional convention and formed the independent Republic of Hawaii. The Cleveland administration reluctantly engaged in diplomatic relations with the new government. The Hawaiian Republic negotiated a treaty of annexation, but it was never ratified in the U.S. Senate.

⁹³ Hawaiian is designated as a co-official language in the island along with English. HAW. ST. CONST. art. XV, § 4.

⁹⁴ The treaty became known as the Reciprocity Treaty of 1875. 19 Stat. 625 (1875).

⁹⁵ H.R. Res 2001, 53rd Cong. (1894).

⁹⁶ S. J. Res. 19, 103d Cong. (1993).

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The onset of the Spanish-American war raised Hawaii's profile as a base in the Pacific Campaign against Spain in the Philippines. Following the process used to annex Texas, the United States soon annexed Hawaii as a territory pursuant to a joint resolution of Congress.⁹⁷

Unlike Texas, Hawaii was organized as a territory pursuant to an organic act in 1900, and Hawaii's path to statehood took several decades.⁹⁸ Congress debated the subject of Hawaiian statehood in 1935 and again in 1937, but on both occasions the bills failed amid strong opposition.⁹⁹ In 1941, after the Japanese attack on Pearl Harbor, the territorial government ceded all independent authority when it declared martial law on the islands. Martial law ended in 1944.¹⁰⁰ World War II signaled a break in the Hawaiian statehood movement, but after the war it began again in earnest. In 1950, a Hawaiian state constitution was approved by more than seventy-five percent of voters. This vote was followed in 1954 by a 100,000-signature petition, reportedly weighing two hundred and fifty pounds.¹⁰¹ As with prior states, partisan negotiations stalled Hawaii's admission. Democrats ironically thought that Hawaii was a reliably Republican state and insisted that reliably Democrat Alaska be admitted first.¹⁰² In 1959, President Eisenhower signed the

⁹⁷ This resolution became known as the Newlands Resolution, after Mr. Francis Newland who first proposed it. 30 Stat. 750 (1898).

⁹⁸ The Hawaiian Organic Act. 31 Stat. 141 (1900).

⁹⁹ The Honolulu Advertiser, *Timeline: Hawaii's March to Statehood*, <http://the.honoluluadvertiser.com/specials/statehood/statehoodTimeline> (last visited Feb. 28, 2013).

¹⁰⁰ HawaiiHistory.org, *This Day in History: Martial Law Ends*, <http://www.hawaiihistory.org/index.cfm?fuseaction=ig.page&PageID=44> (last visited Feb. 28, 2013).

¹⁰¹ Timeline: March to Statehood, *supra* note 99.

¹⁰² Yahoo, *Alaska celebrates statehood as two others consider options* (2013), <http://news.yahoo.com/alaska-celebrates-statehood-two-others-consider-options-110020290.html>.

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Hawaii Enablement Act and Hawaii became the last state to join the union.

III. Political Path of Other Insular Territories of the United States

The United States currently exercises sovereignty over five inhabited island chains as unincorporated territories: American Samoa, the Northern Mariana Islands, the U.S. Virgin Islands, Guam, and Puerto Rico. Each has its own history of American acquisition and governance. They will be discussed, in order, as comparison points to the Puerto Rican experience.

a. American Samoa

The islands now known as American Samoa came under American sovereignty through a compromise between Germany, England, and the United States in 1899.¹⁰³ At different points in the 19th Century, all three nations laid claim to the entire archipelago. Since ratification of the Tripartite Convention, the islands have been governed as an unorganized territory of the United States.¹⁰⁴ The islands were first administered by the U.S. Navy and later by Department of the Interior.¹⁰⁵

b. Northern Mariana Islands

¹⁰³ This compromise is embodied in a treaty known as the *Tripartite Convention*. 31 Stat. 1878 (1900).

¹⁰⁴ Central Intelligence Agency, *The World Factbook: American Samoa*, <https://www.cia.gov/library/publications/the-world-factbook/geos/aq.html>.

¹⁰⁵ Exec. Order No. 10264, 16 F.R. 6417 (1951) (transferring control of the islands known as American Samoa from the Department of the Navy to the Department of the Interior effective July 1951).

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The Northern Mariana Islands are part of the same archipelago as the Island of Guam. At the end of the Spanish-American War, Spain ceded Guam to the United States and sold the rest of the archipelago to Germany.¹⁰⁶ Japan invaded the islands during World War I and retained control until the United Nations put the islands under American protection after World War II.¹⁰⁷ The Northern Mariana Islands made several attempts to reunify with Guam but were ultimately unsuccessful.¹⁰⁸ The Northern Mariana Islands' government then decided to pursue a closer relationship to the United States and formed a territorial government in 1978.¹⁰⁹ It has remained in that role since.

c. U.S. Virgin Islands

The United States purchased the then-Danish West Indies from Denmark in 1916 for the purpose of constructing a naval base in the archipelago. When both nations ratified the treaty, the islands became the U.S. Virgin Islands.¹¹⁰ Interestingly, the naval bases were built

¹⁰⁶ For the treaty selling the Northern Mariana Islands to Germany, *see* German-Spanish Treaty of 1899, Ger.-Spain, Feb. 12 1899, Gaceta de Madrid [Madrid Gazette], 1 de Julio de 1899 (Spain) available at <http://www.boe.es/datos/pdfs/BOE/1899/182/A00001-00001.pdf> (providing for the sale of the Carolinas and Mariana Islands –with the exception of Guam- to Germany for 25 million Spanish Pesetas or 17 million German Marks) (author's translation).

¹⁰⁷ University of Hawaii, Trust Territory of the Pacific Islands, <http://libweb.hawaii.edu/digicoll/ttp/tpi.html>.

¹⁰⁸ The reasons for the failure of reunification attempts are outside the scope of this paper, but the opposition stems, at least in part, from NMI native cooperation with the Japanese during World War II. *See also*, Haidee V. Eugenio, *NMI, Guam reunification will be up to the people*, SAIPAN TRIBUNE, Apr. 26, 2011 available at

<http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=10892>.
¹⁰⁹ 90 Stat. 263 (1976).

¹¹⁰ 39 Stat. 1706 (1916)

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in Puerto Rico instead. The U.S. Virgin Islands are governed as an unincorporated territory of the United States and administered by the Department of the Interior.

d. Guam

Guam came under U.S. jurisdiction by the Treaty of Paris of 1898. President McKinley immediately placed the island under the control of the U.S. Navy because of its strategic position in the Pacific Ocean.¹¹¹ The Navy controlled Guam until the Japanese Empire invaded the island during World War II.¹¹² The Japanese Empire controlled the island from 1941 until 1944, when allied forces invaded the island and restored the Naval Government.¹¹³ Congress finally granted Guamanians American citizenship and a civilian government in 1950 through an organic act.¹¹⁴ The issue of status in modern Guam has only been tested once in 1982, and Guamanian support for non-territorial options was weak.¹¹⁵ Although the issue of status is important to Guamanians, focus on this political issue has diminished in recent years.¹¹⁶

e. Cuba and the Philippines

¹¹¹ *Guam History and Culture*, <http://www.guam-online.com/history/history.htm>; Central Intelligence Agency, *The World Factbook: Guam*, <https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html>.

¹¹² *Guam History*, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ Organic Act of Guam, Ch. 512, 64 Stat. 384 (1950).

¹¹⁵ Robert A. Underwood, *Guam's Political Status*, GUAMPEDIA (Aug. 13, 2012), <http://guampedia.com/guams-political-status/> (last visited Mar. 20, 2013) (noting that a territorial option received fifty-one percent of the vote in the 1982 plebiscite, statehood received twenty one percent, and independence five percent).

¹¹⁶ *Id.*

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There are also two former U.S. Territories that moved on to nationhood: Cuba and the Philippines. The United States exercised control over Cuba and the Philippines at the beginning of the twentieth century. Like Puerto Rico and Guam, Spain ceded these islands to the United States under the Treaty of Paris. Cuba, however, was never intended to remain an American possession and declared its independence a mere three years after the Treaty of Paris in 1901.¹¹⁷

The Philippines, however, followed a rockier path to nationhood starting in 1896 with the Philippine revolution.¹¹⁸ The revolution ebbed and flowed for two years until the revolutionaries allied with the United States during the Spanish-American War.¹¹⁹ This Philippine-Spanish conflict officially ended in 1898 when the Kingdom of Spain ceded the island chain to the United States. The revolutionaries did not recognize American sovereignty over the islands and revolted in 1899.¹²⁰ The United States quickly subdued the revolution. The Philippines remained an unincorporated territory until the end of World War II. The United States granted the Philippines independence through the Philippine Independence Act.¹²¹ The Act provided for a ten-year transition period and culminated with Philippine sovereignty in 1946.

IV. Puerto Rico's Path

Puerto Rico is the first unincorporated territory of the United States and the only one of Spain's former

¹¹⁷ Chadwick, *supra* note 2 at 434-35.

¹¹⁸ *August 1896:Revolt in the Philippines*, PUB. BROAD.SYS., <http://www.pbs.org/crucible/t15.html> (last visited Mar. 20, 2013).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Philippine Independence Act, Ch. 85, 48 Stat. 456 (1934).

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colonies in the western hemisphere to remain a possession of another nation. The relevant political history of the island begins with the arrival of Christopher Columbus in 1493 and the first Spanish settlement in 1508. Despite attempts by France in 1528, England in 1595, and the Dutch in 1625 to wrestle control of the island from the Spanish, the Kingdom of Spain maintained almost continuous control over the island for more than four centuries. Early in the nineteenth century, Spain granted citizenship to its subjects in Puerto Rico and the island was represented in the Spanish Parliament through its provincial government pursuant to the Cadiz Constitution.¹²² Spain stripped this representation and provincial autonomy from the island when the Cadiz Constitution was revoked several years later. High taxes imposed by the Spanish Crown and a strict policy of exile for dissenters sparked a popular uprising for independence known as *El Grito de Lares*.¹²³ The Spanish authorities subdued this rebellion, but it led Spain to grant Puerto Rico more control over its affairs.¹²⁴ In 1898, a semi-autonomous government convened in the island after popular elections.¹²⁵

This semi-autonomous government would not last long. The United States included Puerto Rico as a target for its Caribbean intervention during the Spanish-American War at the behest of Puerto Rican exiles in New York.¹²⁶ American forces invaded the island in the summer of

¹²² CADIZ CONST. Art. I. *available at* http://www.congreso.es/docu/constituciones/1812/ce1812_cd.pdf (last visited Feb. 28, 2013) (declaring that the Spanish Nation is comprised of Spaniards in both hemispheres) (author's translation).

¹²³ Translated to "The Lares Cry," named after the small town in southern Puerto Rico where it took place.

¹²⁴ Meléndez, *supra* note 17, at 16.

¹²⁵ This authority was granted to Puerto Rico and the other Spanish provinces in the *Carta Autonómica* in 1897. *Puerto Rico History*, <http://www.topuertorico.org/history4.shtml>.

¹²⁶ Meléndez, *supra* note 17, at 16.

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1898.¹²⁷ By December, the war was over and the United States and the Kingdom of Spain signed a treaty of peace in Paris. The terms of the treaty gave control over the islands of Cuba, Puerto Rico, Guam, and the Philippines to the United States.¹²⁸ The treaty was quickly ratified in the United States Senate the following year.

Between the ratification of the treaty and the passage of the first organic act for the island, Puerto Rico was under a military government. The military government was short lived, but it efficiently implemented a number of reforms aimed at integrating the island into the American way of life.¹²⁹ Congress established a territorial government in 1900 through the Foraker Act.¹³⁰ This law established the island's court system, introduced a series of property reforms to foster the island's sugar economy, and created the office of the Resident Commissioner, Puerto Rico's non-voting delegate to Congress.

The island of Puerto Rico gained more autonomy in the second decade of the twentieth century with the passing of the Jones-Shafroth Act of 1917. The most significant effect of the act was the extension of citizenship to all Puerto Ricans living in the island and their children.¹³¹ The act also divided the territorial government into the traditionally American legislative-executive-judicial silos and mandated the popular election of the territorial legislature. Under the Jones Act, the governor remained an appointed official. Notably, no Puerto Rican would serve in the office until 1946. The Jones Act was amended in 1948 and Puerto Ricans for the first time had a fully representative local government.¹³² Elections were held

¹²⁷ Meléndez, *supra* note 17, at 17.

¹²⁸ Burnett, *supra* note 25, at 3.

¹²⁹ Meléndez, *supra* note 17, at 33-34.

¹³⁰ Burnett, *supra* note 25 at 5; Meléndez, *supra* note 17, at 34.

¹³¹ Jones-Shafroth Act of 1917, ch. 145, 39 Stat. 951 (1917).

¹³² See Elective Governor Act, ch. 485, 61 Stat. 770 (1947).

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later that year and the first popularly elected Puerto Rican governor took office in 1949.

A strong separatist movement advocated for Puerto Rico's independence from the United States during the first third of the twentieth century but ultimately failed to gain popular support on the island. By the middle of the century, the movement had significantly weakened. Many factors led to the decline, including Puerto Rico's inclusion in New Deal legislation, the island's strong participation in both World Wars and the conflict in Korea, a fracturing of the movement, and a mass migration of Puerto Ricans to the continental United States.

One of the major reasons for the separatist movement's decline was that one of its most charismatic leaders, Luis Muñoz Marín, broke with the movement when he refused to support an independence bill that was being considered by Congress in 1936. Shortly thereafter Mr. Muñoz¹³³ helped found the Partido Popular Democratico (PPD), the island's modern current pro-commonwealth party. Mr. Muñoz became the island's first popularly elected governor and served in the role for four continuous four-year terms.

Governor Muñoz presided over a period of rapid change for Puerto Rico. On July 4, 1950, President Truman signed Public Law 600 and the governor's administration set out to draft a constitution for Congress' approval.¹³⁴ The governor called for a constitutional convention and christened the convention's new constitution the Estado Libre Asociado (ELA), directly translated as Free Associated State. To avoid confusion that Puerto Rico was a state, the ELA would be referred to as the Commonwealth in the United States. This Puerto Rican Constitution was approved with two minor

¹³³ Per Puerto Rican custom, the second last name is omitted when addressing a person by their last name.

¹³⁴ Puerto Rican Federal Relations Act, ch. 446, 64 Stat. 319 (1950).

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amendments in Congress the following year and took effect upon the results of a popular referendum approving the ELA on July 25, 1952.¹³⁵ The ELA has remained largely unchanged, but despite attempts by Governor Muñoz to reduce what can be best termed as cultural erosion on the island, Puerto Rican society has changed significantly under the ELA.

V. The Future for Puerto Rico

The adoption of the ELA had the effect of cementing the political debate in the island around the issue of status. Governor Muñoz's PPD continues to advocate a version of the ELA, the annexationists became statehooders under the banner of the PNP, and what was left of the separatist movement became the Partido Independentista Puertorriqueño (PIP). To some extent, however, each party seeks the same end: The resolution of the island's political status once and for all.

a. Continued Territorial Status – Estado Libre Asociado

One option for Puerto Rico's future is inaction. As previously established, the Insular Cases make it possible for Puerto Rico to remain a territory of the United States in perpetuity. Fortunately, inaction is disfavored both in Puerto Rico and the United States.¹³⁶ Maintaining the ELA

¹³⁵ Congress approved the Puerto Rican Constitution through the passage of Public Law 447. Act of July 3, 1952, ch. 563, 66 Sta. 327 (1952).

¹³⁶ See PUERTO RICO ELECTIONS COMMISSION, *supra* note 3 and accompanying text. For the policy of the United States with reference to Puerto Rico's status, see Exec. Order No. 13,183, 65 F.R. 82889 (2000) (establishing the President's Task Force on Puerto Rico's Status with a stated goal to "help answer the questions that the people of Puerto Rico have asked for years regarding the options for the islands'

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is also contrary to the principles of self-governance and self-determination that the United States is founded upon. Thus, final resolution of this issue is long overdue and necessary.

b. Independence

Clearly, one way to resolve the island status is for Puerto Rico to become a free and independent nation. Precedent exists for this option in the experience of former Treaty of Paris territories Cuba and the Philippines, both independent today.¹³⁷

Independence would preserve Puerto Rico's culture to a greater extent than either of the other possible governing structures and would mean protecting the central role of the Spanish language in the island. Legitimate concerns exist, however, about the island's municipal debt and its ability to economically support itself if it were to gain independence. Additionally, Puerto Ricans have come to take pride in and value their American citizenship, which would be at risk if Puerto Rico became independent.¹³⁸

future status"); Report by President's Task Force on Puerto Rico's Status at 10-11 (2007) *available at* <http://www.justice.gov/opa/documents/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> (last visited Mar. 20, 2013) (recommending a mandate of periodic votes until Puerto Ricans choose a non-territorial option and defining the non-territorial options as independence or statehood).

¹³⁷ It is important to note Cuba was treated differently in the Treaty of Paris and was never meant to remain under American sovereignty, the Philippines were granted independence in through an act of Congress. Philippine Independence Act, 48 Stat. 456 (1934).

¹³⁸ There is no guarantee that Puerto Ricans in the mainland would retain their American citizenship if Puerto Rico became independent. There is precedent to the contrary. The Philippine Independence Act stripped all Filipinos of their American citizenship upon the island chain's independence whether they were living in the United States or abroad. 48 Stat. 456 §14 ("Upon the final and complete withdrawal of

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Furthermore, a large Puerto Rican Diaspora has strengthened the ties between Puerto Rico and the United States to such an extent that disconnecting the communities could have negative social and political repercussions both on the mainland and the island.¹³⁹ Finally, and perhaps as a result of the aforementioned factors, Puerto Rican support for independence is very low. The island has voted on the question of status four times since the enactment of the ELA and the most support that independence has been able to garner was 5.5% of the votes in 2012.¹⁴⁰

c. Enhanced Commonwealth

The pro-commonwealth party of the island proposes that an *enhanced or sovereign commonwealth* would best achieve Puerto Rican sovereignty.¹⁴¹ Under the enhanced commonwealth, Puerto Ricans would remain American citizens and Puerto Rico would assume sovereignty over its own internal and external affairs. The PPD's proposal for an enhanced commonwealth would be based on a treaty of free association that would continue federal funding for programs on the island while reducing the federal administrative footprint in Puerto Rico.¹⁴² On the surface,

[the United States from] the Philippine Islands the immigration laws of the United States. . . shall apply to *persons who were born* in the Philippine Islands to the same extent as in the case of other foreign countries).

¹³⁹ See Census Bureau, *supra* note 53.

¹⁴⁰ Puerto Rico Elections Commission, *Non-Territorial Options – Island Wide Results*, available at http://div1.ceepur.org/REYDI_NocheDelEvento/index.html#en/default/OPCIONES_NO_TERRITORIALES_ISLA.xml (last visited Feb. 1, 2013).

¹⁴¹ Burnett, *supra* note 25, at 20.

¹⁴² *Id.* at 20-21.

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this solution appears to be a silver bullet to solve the issue of Puerto Rico's status. The enhanced commonwealth would preserve the American citizenship of all Puerto Ricans, protect Puerto Rican culture from further cultural erosion, and Puerto Rico would be self-sovereign for the first time since before colonialism.

The enhanced commonwealth, however, may be incompatible with the Constitution of the United States because its dual promises of sovereignty and continued birthright American citizenship are irreconcilable. Further, it is an open question whether Congress would approve such a change, and why they would. From Congress' point of view, Puerto Rico would remain a relatively expensive proposition with less federal oversight and without an obvious reason why it should support a basically independent state.

The PPD's enhanced commonwealth proposal is very similar to a proposed commonwealth for the island of Guam that was debated by Congress in 1994.¹⁴³ The Guam proposal would have required the mutual consent of the citizens of Guam and of Congress before any act of Congress became applicable in the island. Because the act was incompatible with the long-recognized supreme power of Congress to dispose of the territories, the Act never made it out of committee. Congress' power over the territories is supreme, or plenary, because the Constitution recognizes only States and Territories and granted authority over the latter to Congress.¹⁴⁴ The territories are akin to municipalities in the states and are thus "mere subdivisions" of the United States. Congress' power over the territories remains "so long as they remain in a territorial condition."¹⁴⁵ Thus, even if Congress agreed to

¹⁴³ Guam Commonwealth Bill, H.R. 1521, 103d Cong., 1st Sess. (1993).

¹⁴⁴ *Nat'l Bank v. Cnty of Yankton*, 101 U.S. 129, 132-33 (1880).

¹⁴⁵ *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).

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an enhanced commonwealth solution, it could change its mind at any time. Only if Puerto Rico were to become independent, then negotiate on even ground with the United States for a treaty that continued federal funding in the island, would Congress be bound. Again, the political feasibility of such a negotiation is an open question.

The problem for the PPD's enhanced commonwealth is that remaining "in a territorial condition" is important to the enhanced commonwealth's second pillar—the preservation of American citizenship for persons born in the island. The Constitution did not contain a provision for citizenship until the Fourteenth Amendment's ratification. The Fourteenth Amendment explicitly extends birthright citizenship only to those born in *and* "subject to the jurisdiction" of the United States.¹⁴⁶ Thus, for the enhanced commonwealth's promise of continued birthright citizenship to Puerto Ricans to stand constitutional scrutiny, Puerto Rico must remain "subject to the jurisdiction" of the United States. It is clear that the ELA as it stands today is disfavored both by the United States and the people of Puerto Rico, and the enhanced commonwealth proposal is at best uncertain and at worst unworkable under the United States Constitution.

d. Statehood

The only other political avenue for the final resolution of Puerto Rico's status is for the island to join the community of states in the union. The prospect of becoming a state has steadily gained support in Puerto Rico since the first status referendum in 1967. Statehood

¹⁴⁶ U.S. CONST. amend. XIV.

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received 39% of the vote then, but it garnered 46.3% in 1993, 46.5% in 1998, and 61.3% in 2012.¹⁴⁷

In the 115 years since Puerto Rico came under American sovereignty, Puerto Ricans have steadily integrated into American culture and the institutions of American government have grown substantially in the island. The local political organization is virtually identical to those in the fifty states and Puerto Rico's economy has fully integrated with that of the mainland United States. This high degree of social and political integration over the past century makes transition to statehood the most easily implemented of all the possible non-territorial options.

Despite the fact that Puerto Ricans have been part of American society for over a century, there is strong opposition on the island and the mainland to a Puerto Rican state. On the island, both the independence and commonwealth parties oppose statehood, articulating concern for the protection of Puerto Rican culture and identity. These parties point out that by becoming a state, Puerto Rico would lose its Olympic team, the ability for Puerto Ricans to compete in pageants like the Miss Universe competition, and that Puerto Ricans would be forced to adopt English as their first language.

Whether Puerto Rico would remain Spanish speaking is a key issue for statehood opponents on the island and the mainland, with island opponents fearing English and mainland opponents demanding it. The mainland opposition also articulates economic and political concerns. On the economic front, if admitted, the island would be the poorest state of the union. Its per capita income is not even half of Mississippi's, currently the nation's poorest state, and the island's unemployment rate is almost double the national measure. Becoming a state

¹⁴⁷ For the results of the votes through 1993, see Burnett, *supra* note 25 at 21. For the results of the 2012 vote, see Non-Territorial Options, *supra* note 140.

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would eliminate caps on direct aid to households in the island, which will dramatically increase the number of welfare recipients in Puerto Rico.

The other front of opposition in the mainland is political. If Puerto Rico were to be admitted to the union, it would be awarded five or six representatives and two senators in Congress. Republicans fear that Puerto Rico would be a reliably Democratic state. Large state delegations from states like California also fear their influence would be diluted by giving up a number of representatives in the house. Another avenue of political opposition is that admission of Puerto Rico as a state may prompt the other insular territories to petition for statehood.

Although the opposing arguments to Puerto Rico's statehood are formidable, they are by no means ironclad. The island opposition on the grounds of protecting the cultural integrity of Puerto Ricans, while laudable, fails to take into account that each state of the union is culturally distinct from the others. This cultural diversity existed at the time of the American Revolution and it remains a fact today. It is true that the distinct culture of some states is more accentuated than others, but it would be inaccurate to say that Hawaiians, New Yorkers, Texans and Louisianans are not culturally distinct from one other.

The issue of language, likewise, is soluble. If admitted, Puerto Rico would not be the first bilingual state, a distinction held by New Mexico, nor would it be the only currently bilingual state—Hawaii's state languages are English and Hawaiian.¹⁴⁸

As for the economic questions, the effects of Puerto Rico's admission to the union are difficult to predict. It is very possible, if not likely, that economic activity in the island would increase upon its admission.¹⁴⁹ Indeed,

¹⁴⁸ See *supra* notes 91, 93.

¹⁴⁹ On a grander scale, for example, the reunification of Germany produced an economic boom for the unified German nation. Steven

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American companies often stay away from investing in Puerto Rico because of its uncertain relationship with the United States. Tourism would likely also increase as more Americans come to the realization that they can travel to Puerto Rico without a passport.¹⁵⁰

The political opposition to the Puerto Rico's admission to the island is also founded on shaky premises. Puerto Ricans on the island do not currently view politics from a Democrat or Republican point of view. Island politics have revolved around the issue of status for more than sixty years. Any attempt to predict how Puerto Ricans will fall along party lines would be futile. In fact, until 2012, the two highest offices in the island—the Governor and Resident Commissioner—were held by a Republican and a Democrat. Both men were members of Puerto Rico's statehood party.

Opposition to Puerto Rico's statehood on the grounds that the other insular territories will also seek statehood upon Puerto Rico's admission is unwarranted. First, unlike Puerto Rico, the population of the other insular territories is relatively small.¹⁵¹ Admitting states with such small populations is not likely to be desirable or feasible. Secondly, Puerto Rico is further along the political process to statehood than any of the other insular territories. For example, the Department of the Interior administers all other insular territories while Puerto Rico is largely self-

Greenhouse, *Evolution in Europe; East-West Berlin, a Boomtown in the Making*, N.Y. TIMES, July 2, 1990, at A1 (noting that an economic boom in Germany in the early 1990s was the direct result of German reunification).

¹⁵⁰ Americans can already travel to the island without a passport, but it is not a widely known fact. Carlos Romero-Barcelo, *Puerto Rico, U.S.A.: The Case for Statehood*, 59 FOREIGN AFF. 60, 80-81 (1981).

¹⁵¹ If admitted Puerto Rico would be the 29th most populous state of the union. See *supra* note 8 and accompanying text.

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governed as a de facto state.¹⁵² Finally, of the other insular territories, only Guam has ever taken steps indicating a desire for eventual admission.¹⁵³ Thus, at least for the moment, the people of the insular territories appear satisfied with their current status.

VI. Puerto Rico's Incorporation

The Supreme Court once opined that “[i]t may well be that over time the ties between the United States and any of its unincorporated territories strengthen in ways that are of constitutional significance.”¹⁵⁴ Puerto Rico has reached that tipping point. In the century since the United States invaded the island, Puerto Ricans have risen to some of the highest positions in the Federal Government. Puerto Ricans have served as Federal Judges, American Ambassadors, Generals, and Admirals. Since 2009, with the confirmation of Justice Sonia Sotomayor, a Puerto Rican sits on the highest court of the land.

Many Puerto Ricans, including Justice Sotomayor's mother, have served in the United States military since 1898. In fact, if Puerto Rico were a state, it would be among the highest in per capita volunteering for the armed forces.¹⁵⁵

More evidence of the strengthening of ties to the United States is the 1966 Public Law 89-571, which made the Federal District Courts in Puerto Rico into Article III courts, an act that Congress has not taken with other unincorporated territories.¹⁵⁶ All federal agencies treat Puerto Rico in the same manner they would a state. Unless

¹⁵² *History of the Office of Insular Affairs*,
<http://www.doi.gov/oia/about/history.cfm>.

¹⁵³ See *supra* note 115 and accompanying text.

¹⁵⁴ *Boumediene*, 553 U.S. at 758.

¹⁵⁵ Rodriguez, *supra* note 55.

¹⁵⁶ 80 Stat. 764 (1966).

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otherwise specified, all civil and criminal federal laws apply to Puerto Rico as they do to the states.¹⁵⁷ Perhaps the most reliable indicator of the integration of Puerto Rico into American society is the fact that as of the census of 2010, more Puerto Ricans resided in the United States than in Puerto Rico.¹⁵⁸

VII. Conclusion

It has been more than a century since American forces quietly landed on a beach in southern Puerto Rico and were received with cheers of “Viva Puerto Rico Americano.” Ninety-six years have passed since Puerto Ricans joined the brotherhood of citizenship with their continental counterparts. Four hundred thousand Puerto Ricans have served in the United States military and have risen to the highest levels of American society. Despite all of this, Puerto Ricans on the island remain sentenced to second-class citizenship. This situation is patently unfair to Puerto Ricans on the island, who have no vote in a Congress with plenary power over their affairs. The situation is also unfair to Americans on the mainland who largely subsidize Puerto Rico’s government.

This past November, Puerto Ricans rejected the current territorial status of the island. That much is clear. Opponents of statehood have raised questions about the interpretation of the statehood portion of the vote, but even they cannot deny that a majority of Puerto Ricans voted to do away with the territorial nature of their relationship with the United States. Ultimately, everyone involved is best served by a final resolution to this question, and that can only come through statehood or independence. Of those, statehood best respects the sacrifices made by Puerto

¹⁵⁷ 48 U.S.C § 734; Memorandum on the Commonwealth of Puerto Rico, 57 F.R. 57093 (1992).

¹⁵⁸ See *supra* note 53 and accompanying text.

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Ricans in the past century and reflects the gradual but significant integration of the island into American society.

The Supreme Court of the United States once declared that Puerto Rico was “not foreign in the “international sense . . . [but] foreign to the United States in a domestic sense.”¹⁵⁹ This proclamation was arguably erroneous even in its time, and it definitely is today. Puerto Rico and its people are no longer foreign to the United States in a domestic or international sense; accordingly, it makes no sense to consider them as such.

¹⁵⁹ *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

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