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Bringing Democracy to Puerto Rico: A Rejoinder

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BRINGING DEMOCRACY TO PUERTO RICO: A REJOINDER

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The debate over the status of Puerto Rico under U.S. law has grown boring and stale. Consider a recent exchange in the pages of the Yale Law Journal, initiated by José Coleman Tió's proposal for Congress to enfranchise residents of Puerto Rico under the Territorial Clause. Two responses criticized the proposal as "dubious, . . . highly questionable," and "[a]s a normative matter, a bad idea." For these critics, either the Constitution forecloses the right to vote for territorial residents or else the Coleman Tió proposal would impede the march towards a permanent resolution of the status question. This Essay joins this debate at the margins. It agrees that the status of Puerto Rico as a U.S. colony must come to an end. Yet something far more significant lies within this debate. Puerto Rico has been a U.S. colony for over a hundred years, disenfranchised and thus powerless to alter its political destiny. This is the conventional story. But as the example of the U.S. Navy's evacuation of Vieques illustrates, the people of Puerto Rico are not as powerless as is often assumed. How to explain this chapter in the history of Puerto Rico? These are questions worth asking. For example, what does the Navy's response tell us about the people of Puerto Rico and their power to exact change? How does this answer inform the debate over Puerto Rico's colonial status? And if the people of Puerto Rico can force the Navy to evacuate Vieques yet remain disenfranchised and subject to plenary powers, what does that tell us about the people of Puerto Rico? What does that tell us about their apparent complacency as colonial subjects and second-class citizens under U.S. rule?

Borinquen, la tierra del edén,
la que al cantar, el gran Gautier
llamó la perla de los mares
ahora que tu te mueres con tus pesares
déjame que le cante yo también.[1]

INTRODUCTION

Questions of democratic theory and election law have taken on added significance around the globe, and the United States is no exception. It is fashionable to offer the 2000 presidential election as a prime example, yet this was only the latest exemplar of a much larger problem, a problem with a long history and lineage. For support, insert here your statute or constitutional amendment of choice: the Twelfth, Fifteenth, Nineteenth, or Twenty-third Amendment, among others; or perhaps the Voting Rights Act of 1965 and its various extensions and amendments; the Electoral Count Act; or the Help America Vote Act of 2002. Running a democracy is an ongoing exper-

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[1] RAFAEL HERNANDEZ, Lamento Borincano, *on* LAMENTO BORINCANO (Arhoolie Productions 2001).

iment filled with difficult and contested questions, both normative and empirical.

The case of the island of Puerto Rico, and the mass disenfranchisement of all American citizens within its borders, presents one such difficult and contested question. The relevant law is remarkable in its simplicity: citizens do not vote directly for the President—states appoint electors for the Electoral College[2]—and only those living in the states can elect congressional representatives.[3] Puerto Rico is not a state, and so, a strict and unforgiving reading of the relevant constitutional language is all that is required to disenfranchise Puerto Ricans. Citizens of Puerto Rico cannot participate in federal elections, in other words, because the Framers intended it that way.

This formulation begs a host of interesting questions about American democracy, constitutional structure and interpretation, and election law in particular. As such, Puerto Rico offers democratic theorists, constitutionalists, and election law scholars an inimitable treasure trove for examining questions at the heart of our democratic experiment. For example: what is the meaning of American citizenship, and does it encompass the right to participate in federal elections? Can we justify withholding the right to vote from citizens due to place of residence? And far more pressing in light of the history of U.S. control over Puerto Rico, how elastic and far-reaching is the notion of consent as applied to proposals to end the colonial condition of the people of Puerto Rico?

This Essay addresses some of these questions and, in so doing, joins a recent debate in the pages of the *Yale Law Journal* over a "novel" proposal to bring a measure of American democracy to the people of Puerto Rico. In his provocative essay, *Six Puerto Rican Congressmen Go to Washington*,[4] José Coleman Tió looks to congressional efforts to enfranchise residents of Washington, D.C., as a model for extending the same right to the people of Puerto Rico. Coleman Tió contends that, under its power to "dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States," i.e., the Territorial Clause, Congress could correct the egregious undemocratic condition of Puerto Rico by allotting to the island congressional representation without transforming it into the fifty-first state.[5] This is precisely what some Members of Congress are attempting to do through the District of Columbia House Voting Rights Act of 2007, and he argues that the same logic applies to the case of Puerto Rico.

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[2] U.S. CONST. art. I, § 2.

[3] *See* U.S. CONST. art. I, § 2 (requiring the House of Representatives to be chosen only by "the People of the several States"); *id.* art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII (amended 1913) ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.").

[4] José Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 YALE L.J. 1389 (2007), *available at* http://yalelawjournal.org/content/view/541/.

[5] *Id.* at 1390.

In separate responses, John C. Fortier and Christina Duffy Burnett criticize Coleman Tió's proposal as "dubious,"[6] "highly questionable,"[7] and "[a]s a normative matter, . . . a bad idea."[8] They agree, as do most jurists and commentators, that those who advocate for congressional representation for Puerto Rico "seek a just end"[9] and that their "goal is laudable."[10] Yet they argue that Coleman Tió's proposal is constitutionally suspect[11] and a temporary fix that, as in the past, will "short-circuit[ ] the effort to achieve a lasting solution."[12] They conclude that the only solution for this untenable situation is to admit Puerto Rico as the fifty-first state. Until then, the people of Puerto Rico must endure their colonial status, disenfranchised and at the whim of the U.S. Congress.

Part I examines the three leading objections to Coleman Tió's proposal and concludes that they do not present insurmountable obstacles. Part II explores the argument at the heart of criticisms of the Puerto Rican condition: the notion of consent, and particularly the view that the people of Puerto Rico are complicit in their own colonial condition, first by approving the terms of its own constitution, and subsequently by upholding this decision in three subsequent plebiscites. These arguments are not as promising as advertised. This Essay concludes that the debate over the status of Puerto Rico has focused on the wrong set of questions. As Part III contends, this is ultimately a debate about the duties of citizenship in a mature democracy.

I.

Article I, Section 2 of the U.S. Constitution could not be any clearer: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[13] This clause refers unambiguously to the authority of the "People of the several States" to send representatives to the House. Puerto Rico is many things to many people—a territory, a commonwealth, even a colony—but a state it is not. Given this reality, citizens of the island are not represented in the U.S. House of Representatives.

An intriguing solution to this lamentable reality looks to the powers of Congress under the Territorial Clause. These are Congress' notorious plenary powers, boundless in scope and subject to nary a check or a balance. Under these expansive powers, José Coleman Tió argues that Congress

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[6] John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J. 403, 407 (2007), *available at* http://thepocketpart.org/2007/05/19/fortier.html.

[7] Christina Duffy Burnett, *Two Puerto Rican Senators Stay Home*, 116 YALE L.J. 408, 408 (2007), *available at* http://thepocketpart.org/2007/05/19/burnett.html.

[8] *Id.*

[9] Fortier, *supra* note 6, at 407.

[10] Duffy Burnett, *supra* note 7, at 408.

[11] *See* Fortier, *supra* note 6, at 404.

[12] Duffy Burnett, *supra* note 7, at 412.

[13] U.S. CONST. art. I, § 2, cl. 1.

could consider Puerto Rico a state for purposes of Article I, Section 2. The critics disagree. This Part examines the debate.

A.

The first criticism has a curious—even quaint—simplicity that is hard to shake. The relevant language could not be any clearer: only states send representatives to Congress. Puerto Rico is not a state. *Ergo*, Puerto Rico cannot send representatives to Congress. In the words of John Fortier, "The text of the Constitution is clear that states are the only entities that will have representation in Congress, not independent districts, territories, expatriate communities, military bases, and so forth."[14] Case closed.

This argument is the easiest to set aside. Whatever one makes of the status of Puerto Rico post-1952, it is true that Puerto Rico is not a state. But this concession merely begins the discussion. Consider in this vein Article III, Section 2, which grants jurisdiction to federal courts for cases between citizens of different states and is codified under 28 U.S.C. § 1332 (2000). Of particular interest is § 1332(d), which defines "states" for purposes of this statute to include the "Commonwealth of Puerto Rico." If Congress cannot extend congressional representation to entities other than "states" under the relevant constitutional language, then it must follow that Congress cannot create jurisdiction between citizens of a state and citizens of a territory. Imagine the worst case scenario: a citizen of Puerto Rico sues a citizen of the U.S. Virgin Islands in federal court. Does the court have jurisdiction?

Undoubtedly. A leading answer focuses on the status of Puerto Rico post-1952. According to Judge Magruder, writing in *Mora v. Mejias*, the adoption of a constitution and its union with the United States did not turn the island into the forty-eighth state, yet it did transform it into a state "within a common and accepted meaning of the word."[15] This would mean that Puerto Rico is deemed sovereign over all matters within its borders "not ruled by the Constitution."[16] Consequently, laws enacted by the legislature of Puerto Rico may be considered "state statutes" for purposes of the particular federal statute under review. This is a question of statutory construction, nothing more.

For example, in reviewing whether a statute from Puerto Rico is considered a state statute under 28 U.S.C. § 2281, i.e., the Three-Judge Court Act, the U.S. Supreme Court explained that treating statutes from the island as state statutes "serves, and does not expand, the purposes of § 2281."[17] Note the syllogism: the statute covers only state legislative enactments; Puerto Rico is literally not a state; yet enactments from the island legislature may be

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[14] Fortier, *supra* note 6, at 404.

[15] 206 F.2d 377, 386-87 (1st Cir. 1953).

[16] *Id.* at 387 (dicta).

[17] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 (1974); *see also* Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572 (1976) (under *Calero-Toledo*, federal courts have concurrent jurisdiction with Puerto Rican courts to hear § 1983 claims).

considered state enactments within the meaning of the statute without contravening the purposes of the federal law. A state is thus a state, unless it is not.

And so Puerto Rico, albeit technically not a state, may be deemed a state for purposes of Article I, Section 2. The argument is not complicated, if prior cases serve as a guide: Members of the House of Representatives are chosen by the several states; Puerto Rico is not a state; yet the island may be considered a state for purposes of Article I without contravening the purposes of the constitutional provision. Much can be said for this view. At the very least, the case law makes clear that simply pointing to the constitutional language is not enough.

B.

Part of the argument for turning Puerto Rico into a state for statutory purposes hinges on the express power of Congress under the Territorial Clause. The same way that Congress can turn Puerto Rico into a state for purposes of diversity jurisdiction, or the Three-Judge Court Act, or full faith and credit, it also can turn Puerto Rico into a state for purposes of apportioning seats in the House under Article I. This argument, as with the argument in the previous section, is not terribly complex: Congress has plenary powers over the island under the Territorial Clause, including the power to grant Puerto Rico representation in Congress. If Congress deems Puerto Rico a state under Article III, it is hardly a stretch to suggest that it can consider Puerto Rico a state for purposes of Article I.

The critics respond in a way that is neither surprising nor terribly complicated. They argue that the mere existence of a plenary power over the territories does not mean that Congress may deploy it any way it wishes, even in contravention of explicit constitutional commands. According to Duffy Burnett, "What Congress can do in any given circumstance does not depend on the 'amount' of power it possesses . . . but rather on the action in question, the relevant circumstances, and the applicable constitutional provisions."[18] Congress could not, for example, reserve a seat on the Supreme Court for a resident of Puerto Rico, nor could Congress prevent residents of the District of Columbia from assuming the Presidency.[19] Similarly, Congress could not assign a seat to the territories in direct contravention of a constitutional command by simple legislation.

This response runs into the same objections raised in the previous section. The argument fails as a general question of constitutional interpretation, as Congress has deemed Puerto Rico a state many times, with the Supreme Court's blessing. Hence, to say that Congress cannot do this, or to point to the "structural clauses of the Constitution,"[20] which clearly delimit

[18] Duffy Burnett, *supra* note 7, at 411.
[19] Fortier, *supra* note 6, at 406.
[20] Duffy Burnett, *supra* note 7, at 411.

congressional representation to the states, is not enough. To be sure, there is a line between what Congress can and cannot do under the Territorial Clause. But a critic cannot simply assume that Puerto Rican statehood falls on the prohibited side of the line.

C.

A third response takes on the merits of the proposal and concludes that it is "a bad idea."[21] There is much to be said for these merit-based criticisms. First, granting Puerto Rico representation in the House of Representatives is only a partial solution to the larger question of status. Worse yet, doing so would give Congress another excuse to ignore the underlying problem for the foreseeable future. Second, if one accepts the view that Congress could and should grant citizens of Puerto Rico representation in the House by mere legislation, one must be reconciled to the fact that Congress could always take this representation away. And finally, it is a bad idea to give the island equal representation in the House while retaining its exemption from federal income taxes. In Duffy Burnett's words, "[t]his makes voting rights yet another federal handout—another big fat favor handed down from on high by Congress to its lowly colonial subjects. Have we not had our fill of the benevolent empire?"[22]

These are all valid and important criticisms. But make no mistake: these are policy arguments, not democratic theory or constitutional law. At their root, these criticisms display a condescension that is hard to shake. There is a clear sense that, to these critics, the proposal and its details are secondary, for there is much larger game. There is only one right answer—statehood—and any proposal short of this magic solution will fall short, one way or another.

This is standard fare for the status debate. It is also what makes it so frustrating. To immerse oneself in this debate is to enter a minefield rich with coded messages masquerading as good-faith arguments. The three status positions do all the hard work. Consider the three criticisms presented earlier. I never thought it possible that anyone would be against granting island residents a modicum of representation. To supporters of statehood this is a bad idea, however, since it would lessen some of the pressure for resolving the status of the island. Supporters of independence make the same argument. Yet supporters of commonwealth status embrace any such proposals, as they would retain the status quo. All the while, the fact that island residents remain disenfranchised over a century after the United States took possession of the island recedes to the background.

If unconvinced, see the debates in Congress over H.R. 900, the Puerto Rico Democracy Act of 2007, and H.R. 1230, the Puerto Rico Self-Determination Act of 2007. Independence and statehood supporters have rallied be-

[21] *Id.* at 408.
[22] *Id.* at 411.

hind the virtues of H.R. 900,[23] while those who support commonwealth status throw their support behind H.R. 1230.[24] As far as this debate is concerned, this is everything you need to know.

And so, the normative debate is stale and ultimately boring. To be sure, statehood or independence would resolve much of this debate once and for all. But that is a straightforward and fairly settled question, no longer worthy of space on the pages of a law review. The example of Puerto Rico is far more interesting for what it teaches us about the notion of popular consent and the inherent duties of citizenship. This is the topic of the next Part.

II.

The people of Puerto Rico first adopted their existing constitution in 1952 under congressional authority vested by Public Law 600.[25] In three subsequent plebiscites, they renewed their commitment to their status as disenfranchised members of the American community.[26] For whatever else they tell us, these plebiscites may be understood as three independent moments in time when voting pluralities on the island consented to American rule—in all its puzzling and embarrassing percolations—through its commonwealth status.[27] This leads to an awkward admission: how to complain about the present condition for Puerto Rico when its own citizens do not seem to mind their condition all that much? Are not these plebiscites consistent with the great traditions of American democracy, and particularly the concept of popular consent?

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[23] *See, e.g., H.R. 900, Puerto Rico Democracy Act of 2007; and H.R. 1230, Puerto Rico Self-Determination Act of 2007: Legislative Hearings Before the Subcomm. on Insular Affairs of the H. Comm. on Natural Resources*, 110th Cong. 5-9 (2007) (statement of Luis Fortuño, Resident Commissioner from the Commonwealth of Puerto Rico), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34236.pdf; *id.* at 172-77 (statement of Pedro Rosselló, Former Governor and Current Sen., Commonwealth of Puerto Rico, and President, New Progressive Party); *id.* at 205-08 (statement of Carlos Romero Barceló, Former Governor, Commonwealth of Puerto Rico, and Former Member of the U.S. Cong.); *id.* at 168-71 (statement of Rubén Berríos-Martínez, President, Puerto Rican Independence Party).

[24] *See, e.g., id.* at 163-68 (statement of Governor Aníbal Acevedo-Vilá, Commonwealth of Puerto Rico and President, Popular Democratic Party); *id.* at 208-11 (statement of José L. Dalmau-Santiago, S. Minority Leader for the S. of Puerto Rico, Popular Democratic Party); *id.* at 211-14 (statement of Héctor Ferrer Ríos, H. Minority Leader for the H.R. Puerto Rico, Popular Democratic Party).

[25] Pub. L. No. 81-600, 64 Stat. 319 (1950) (providing "for the organization of a constitutional government by the people of Puerto Rico").

[26] These plebiscites took place in 1967, 1993, and 1998. *See* JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 130, 135 (1997); Johnny Smith, Note, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 270-71 (2007). For the results, see Elections in Puerto Rico: General Election, Plebiscite and Referendum Results Lookup, http://electionspuertorico.org/cgi-bin/events.cgi (last visited Feb. 23, 2008).

[27] *See* Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 39 (1998).

It would appear so. According to John Fortier, for example, "Puerto Rico's referenda, in which the island's citizens have voted against statehood and in favor of commonwealth status, suggest that the values of democracy may be best served by honoring that outcome and retaining commonwealth status."[28] This is an argument for the continuous reaffirmation of the status quo, warts and all. This is an argument for democracy in its purest form, for giving the people what they want, exactly the way they want it.

But this argument can be taken too far, in at least two ways. First, proponents of the consent view argue that the people of Puerto Rico consented to commonwealth status in 1952 and three more times since then. But the consent argument must demand much more than that. To what exactly are the people of Puerto Rico consenting with these plebiscites? To say that the commonwealth option has won out is not to say that the people of Puerto Rico consented to arbitrary rule and disenfranchisement. In fact, I suspect that, if asked, most Puerto Ricans today would not consent to either disenfranchisement or plenary powers. But such is the virtue of a plebiscite, where agenda setting and elite influence carry inordinate weight.

Here is a plausible counter-story. Looking to the 1952 compact and the establishment of a commonwealth, citizens of Puerto Rico were only seeking to improve their condition as partial members of the United States. Some in Puerto Rico might have even harbored the hope that the new compact would incorporate the island into the United States. At this moment in time, consent to plenary power and disenfranchisement, coupled with a new constitution and a measure of self-government, was clearly better than the alternative, which up to that point included plenary powers and disenfranchisement but little else.

Moving the clock ahead to 1967, 1993, and 1998 does not improve the story much. Take for example the 1998 plebiscite, where voters were offered five choices: statehood, commonwealth status under plenary powers and revocable U.S. citizenship, independence, free association under a treaty with the United States, and "none of the above."[29] The results of the plebiscite were as follows:[30]

Preference	Share of Vote
None of the above	50.3%
Statehood	46.5%
Independence	2.5%
Free association	0.3%
Commonwealth	0.1%

[28] Fortier, *supra* note 6, at 406.

[29] *See* 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, 18-19 (1999).

[30] *See id.* at 19.

These results raise more questions than they answer. Looking only at the choices on the ballot, you immediately wonder who was responsible for selecting these particular choices (unsurprisingly, the plebiscite was called by the legislature, then controlled by the statehood party). Note also that neither statehood nor commonwealth status were supported by a majority of voters. Voters in fact rejected the plebiscite altogether. This plebiscite does not support the conclusion that the people of Puerto Rico consented to the brand of commonwealth then existing in 1998. Far from it.

This argument should not be surprising to students of plebiscites or to those who closely follow the politics of Puerto Rico. Yet it might be surprising to those who rely on these plebiscites as signaling the consent of the people of Puerto Rico for their present condition. The consent argument demands much more evidence.

The second response assumes that the consent argument has real bite and that the people of Puerto Rico in fact consented to their existing commonwealth. But even if true, the consent argument merely begins all critical inquiries. And in fact, it is here where we find the truly interesting questions over the status of Puerto Rico. After all, the best face we can place on the status of Puerto Rico brands the condition of the island under American rule as "colonialism by consent."[31] Hard as one might try, how else to explain support for a condition that subjects your country to discretionary rule by another with no existing recourse to exact political change?[32] More to the point, the argument that Puerto Ricans have consented to their present disenfranchisement leaves me a bit perplexed, for it puts in play issues that should not be open to democratic deliberation. There are matters so intrinsic to a community, so basic to its politics, that a body politic cannot consent to them.[33] In their best light, and if these accounts are correct that citizens of Puerto Rico have in fact consented to their own disenfranchisement, these plebiscites demonstrate that the people of Puerto Rico are happy slaves.[34] The next Part looks to political process theory in support of this view.

III.

The burgeoning scholarship and case law on the status of Puerto Rico is almost universal in its condemnation of what is nothing less than colonial status and second-class citizenship. But this is where the parallels end. The scholars, unburdened by questions of *stare decisis* and settled law, are free

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[31] T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 33 (1994).

[32] Ediberto Román ascribes this acceptance to a Gramscian cultural hegemony, whereby Puerto Ricans have "adopt[ed] the dominant culture's perception of reality." Román, *supra* note 27, at 40.

[33] Subjecting oneself to slavery is the obvious example, yet by no means an isolated one. Selling one's vote provides another. *See* Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455 (1994).

[34] *See* Luis Fuentes-Rohwer, On the Making of Happy Slaves (unpublished manuscript, draft on file with the Harvard Latino Law Review).

to call for the end of this appalling condition, and many do precisely that.[35] The path of the courts is not quite as unbounded, yet their conclusions are remarkably similar and take us directly to the heart of the law of democracy. That is, after professing their incapacity to put an end to the status question,[36] the opinions close by nodding towards the realm of political questions. As Chief Judge Boudin wrote in his opinion for the court in *Igartua de la Rosa v. United States*, "[t]he case for giving Puerto Rico the right to vote in presidential elections is fundamentally a political one and must be made through political means."[37] Under this argument, the questions raised by the status of Puerto Rico are for Congress and the Executive, not the federal courts, to determine.

This argument finds its greatest proponent in the late Justice Frankfurter. In his opinion for the Court in *Colegrove v. Green*,[38] he explained that the matter at hand—a grossly malapportioned congressional delegation—"must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination."[39] This was not to say that the charges leveled by the petitioners were not "grave evils and offend public morality."[40] They were. But he offered that the Constitution did not place on the Court the duty to remedy all evils. As he wrote, "The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights."[41] Or as he wrote in his blistering dissent in *Baker v. Carr*,[42] "[i]n this situation, as in others of like nature, appeal for relief does not belong here. Appeal must be to an informed, civically militant electorate. In a democratic society like ours, relief

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[35] *See, e.g.*, Igartua de la Rosa v. United States, 229 F.3d 80, 89 (1st Cir. 2000) (Torruella, concurring) (condemning the present political status of Puerto Rico as "colonial treatment by the United States"); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 160 (1998) ("The premise of this Article is that Puerto Rico is a nation under the colonial domination of the United States."); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

[36] *See, e.g.*, Igartua de la Rosa v. United States, 331 F. Supp. 2d 76, 81 (D.P.R. 2004) ("We find that plaintiffs' arguments—albeit disturbing—do not constitute a 'special justification' and are, therefore, not legally sufficient to allow us to depart from clear and applicable precedent.").

[37] 417 F.3d 145, 151 (1st Cir. 2004). This was the position from the time of *Igartua I*. *See* Igartua de la Rosa v. United States (*Igartua I*), 842 F. Supp. 607, 609 (D.P.R. 1994); Igartua de la Rosa v. United States (*Igartua II*), 229 F.3d 80, 83 (1st Cir. 2000); Igartua de la Rosa v. United States (*Igartua III*), 113 F.Supp.2d 228, 237-40 (D.P.R. 2000); *see also* Romeu v. Cohen, 121 F. Supp. 2d 264, 274-75 (S.D.N.Y. 2000).

[38] 328 U.S. 549, 552 (1946).

[39] *Id.* at 554.

[40] *Id.*

[41] *Id.* at 556.

[42] 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

must come through an aroused popular conscience that sears the conscience of the people's representatives."[43]

This Part examines the political question claim as applied to the status of Puerto Rico. The argument has two complimentary strands. The first is prudential in nature and worries about the Court's legitimacy and standing in the public eye. This position is traditionally associated with Justice Frankfurter. In his view, the Court should not undertake to decide controversies of a political nature, or what he called "the clash of political forces in political settlements."[44] The Court decides questions of law, not politics, and for the public to come to believe otherwise would threaten the Court's legitimacy, that is, the public's belief in the Court's detachment from day-to-day politics.

This argument carries very little purchase in modern times, if it ever did. Even at the time when Justice Frankfurter wrote these words, the Court entered the political minefield that is legislative redistricting and emerged not only unscathed but triumphant, its legitimacy enhanced by the engagement.[45] Anyone who doubts this conclusion need only examine the litigation following the 2000 presidential election,[46] and the Court's decision in *Bush v. Gore*.[47] If the public did not (significantly) lose respect for the Court and its work as detached from politics then,[48] it is unlikely that it ever will.

For this reason, I set these arguments aside. The Supreme Court could decide the question of the status of Puerto Rico if it chose to do so, but it chooses not to decide. This is a classic question of judicial will.[49]

Instead, this Part examines the second strand of the political question argument, or what I call its "political process" component. This is the view that the issue in question must be decided by the political process, and only when the process malfunctions should the courts offer a solution. In light of the disenfranchisement of the people of Puerto Rico, this argument does not appear promising. It is a truism that the political process is hopelessly malfunctioning yet lacks the traditional incentives to correct itself. In theory, this leaves the people of Puerto Rico in an unenviable position, lacking the means to protect their interests in the political process and facing a judiciary that lacks the will to correct this grave injustice.

This Part concludes on a cautiously optimistic note. For in the end, it would appear that the people of Puerto Rico may in fact influence the political process to their benefit. The fact that the status question has remained stagnant for over fifty years might evidence not the colonial nature of the

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[43] *Id.* at 270.

[44] *Id.* at 267.

[45] *See* Robert G. McCloskey, *The Reapportionment Cases*, 76 HARV. L. REV. 54 (1962).

[46] *See* Samuel Issacharoff et al., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000 (2001).

[47] 531 U.S. 98 (2000).

[48] *See* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001).

[49] *See* Luis E. Fuentes-Rohwer, *Reconsidering the Law of Democracy: Of Political Questions, Prudence, and the Judicial Role*, 47 WM. & MARY L. REV. 1899 (2006); *cf.* Luis E. Fuentes-Rohwer, *Domesticating the Gerrymander: An Essay on Standards, Fair Representation, and the Necessary Question of Judicial Will*, 14 CORNELL J.L. & PUB. POL'Y 423 (2005).

status of Puerto Rico but the ambivalence of the people of Puerto Rico over its relationship *vis-à-vis* the United States. As with the courts, resolving the question of Puerto Rican colonialism might also be a question of will. And it might just be the case that the people of Puerto Rico do not have it.

A.

Those who speak of a "political solution" for the status problem of Puerto Rico are aiming their arguments precisely here. Whether in creating statehood, independence, or "enhanced commonwealth," the point is that Congress, and only Congress, must take the first step. This is true under both the process argument and the law of territorial possessions under the *Insular Cases*.[50]

The real question, however, should not be about what Congress *can* do but, rather, why Congress would *ever* do anything at all. As Judge Torruella explained in *Igartua III*:

> Stagnation is inevitable, for there is a political vacuum in the Puerto Rico–United States linkage. No effective political pressure can be exercised by the subjects of this colonial relationship on the national political institutions with power to solve the problem. It is precisely because this discrete population of United States citizens is kept in a voteless state by the national political institutions that have "plenary powers" over Puerto Rico that a "political solution" is not a realistic option.[51]

There is simply no direct incentive for Congress to respond to the wishes of the people of Puerto Rico or to resolve the status question at all. Worse yet, Congress is effectually insulated from any direct political pressure coming from Puerto Rico, leading Judge Torruella to contend that the island will be relegated to a state of "perpetual inequality."[52]

An obvious response to this view, implicit in Chief Justice Taft's opinion for the Court in *Balzac v. Porto Rico*,[53] goes as follows. It is true that Puerto Ricans cannot vote for federal office, yet they can always travel to the continental United States, where they can vote once they meet their state's residential requirements. This argument has real bite in places like Chicago, New York, or, more recently, central Florida, where mass migrations from the island might lead to the opportunity to elect a representative of the Puerto Rican community's choice—Representatives Nydia Velázquez,

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[50] For a discussion of the *Insular Cases*, see United States v. Verdugo-Urdiquez, 494 U.S. 259, 268 (1990).

[51] Igartua de la Rosa v. United States, 417 F.3d 145, 168 (1st Cir. 2005) (Torruella, J., dissenting).

[52] Igartua de la Rosa v. United States, 386 F.3d 313, 316 (1st Cir. 2004) (Torruella, J., dissenting).

[53] 258 U.S. 298, 308 (1922) ("[The Jones Act] enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political.").

Luis Gutierrez, and José Serrano readily come to mind. These new representatives could then advocate for a resolution to the political status of Puerto Rico.

As a question of democratic theory and voting rights law, this argument is fine as it goes. These are not easy questions by any means, and I do not mean to suggest otherwise,[54] but they *are* questions that our voting rights world is equipped to handle. The argument implicit in *Balzac* falls decidedly short as a way to solve, or even address adequately, the Puerto Rican status question. To suggest that Puerto Ricans in the United States can advocate, within their limited means and spheres of influence, for a resolution to the status of Puerto Rico (by, for example, calling their congressional representative or staging a rally at their local public forum of choice) is not to say that this is a promising solution or even a helpful way to resolve this important issue. For it is plainly obvious that recent migrants from Puerto Rico can exert little if any political pressure on the politics of the United States.[55] The same is true of representatives who speak for Latino constituencies.

This reality paints the people of Puerto Rico into a difficult corner. Take any issue you can think of, from tax credits intended to spur economic development for the island to social and unemployment benefits or the status question itself. Congress may decide to create tax incentives for the island, only to then repeal them when it concludes that they are nothing more than "corporate welfare."[56] Congress may do so even if the repeal "may devastate the territory's economy."[57] Alternatively, Congress may offer residents of Puerto Rico fewer social benefits than residents of the fifty states, terminate unemployment benefits altogether, or, in the end, set Puerto Rico free, independent from the United States. Congress may do all those things, and it would appear that there is not a thing that citizens of Puerto Rico can do about it.

B

Justice Frankfurter anticipated moments such as this one, when a recalcitrant legislature would refuse to go along with the wishes of a strong constituency. These situations place the onus on the electorate to fight harder and do real political work. The next move required, in Justice Frankfurter's

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[54] Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 909 (1995) (contending that questions of group-rights must be handled sensitively and within their particular context, particularly in the voting rights area, where "[t]he risk is that, once legitimized, entitlement-based group claims will overwhelm this vulnerable process").

[55] *Igartua de la Rosa*, 417 F.3d at 168 (Torruella, J., dissenting) ("The political pressure that can be exercised by those who took Chief Justice Taft's advice, and moved to the Mainland, is so diluted in the general population of the United States as to make any political pressure by them exiguous.").

[56] *See* Thomas R. Barker, *Ending "Welfare as We Know It" (Corporate Welfare, That Is): International Taxation and the Troubled History of Internal Revenue Code Section 936*, 21 SUFFOLK TRANSNAT'L L. REV. 57 (1997).

[57] Román, *supra* note 35, at 1203.

words, "an informed, civically militant electorate" to "sear[ ] the conscience of the people's representatives."[58]

This argument applies with particular poignancy to the case of Puerto Rico. This is a polity that cares deeply about its politics and takes great pride in its civic militancy.[59] In specific reference to the status question, its popular conscience is clearly aroused; this is an issue that engulfs the politics of the island and is well known to all at an early age.[60] And so, if Justice Frankfurter's argument has any bite whatsoever, the people of Puerto Rico may have political recourse after all.[61]

Consider in this vein the U.S. Navy's recent evacuation of Vieques. The Navy has occupied large portions of this island off the coast of Puerto Rico for many decades and used it for target practice, to the displeasure of many in Puerto Rico. In 1999, a live bombing exercise resulted in the death of David Sanes, a native of Vieques and civilian employee of the Navy. Mr. Sanes' death sparked waves of protests and civil disobedience against the Navy. The list of prominent protesters and supporters for the Navy's evacuation was quite impressive and included movie stars, political figures both in Puerto Rico and the United States, and sports figures.[62] Under traditional process theory, it was likely that Congress and the President would trip all over themselves to resolve this public relations fiasco.

The relationship between Puerto Rico and the United States is anything but traditional, however, and so neither Congress nor the President needed to fear direct political retaliation for ignoring the protests in Vieques. And yet, the unexpected happened. In late 1999, the government of Puerto Rico began talks with the U.S. government to end the Navy's involvement in Vieques, which culminated in an agreement in 2001 that guaranteed the Navy's evacuation of Vieques by 2003.[63] In the end, the political pressure had the desired effect and, in so doing, raises a very interesting question: How to explain the success?

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[58] Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

[59] *See* Marie Horrigan, *Two Bills on Puerto Rico's Status Reflect Split on the Island*, N.Y. TIMES, Apr. 30, 2007 ("For Puerto Ricans, politics is 'a national sport . . . .' 'They eat, breathe and talk politics all the time.'" (quoting Michael E. Veve, a Puerto Rico-born attorney practicing in Washington, D.C.)), *available at* http://www.nytimes.com/cq/2007/04/30/cq_2652.html?pagewanted=print.

[60] *See* PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO 49-99 (2004).

[61] Igartua de la Rosa v. United States, 417 F.3d 145, 159 (1st Cir. 2005) (Torruella, J., dissenting) (complaining that the people of Puerto Rico are "lacking any political recourse" for resolving their present condition).

[62] *See* Civil Disobedience at Vieques, http://cndyorks.gn.apc.org/caab/articles/vieques37.htm (last visited Feb. 23, 2008); List of Navy-Vieques Protesters and Supporters, http://en.wikipedia.org/wiki/List_of_famous_Navy-Vieques_protesters_and_supporters (last visited Aug. 1, 2007).

[63] *See* Dan Canedy, *Vieques: Navy Leaves a Battered Island, and Puerto Ricans Cheer*, N.Y. TIMES, May 2, 2003; José A. Delgado, *Oficial la Transferencia de Tierra*, EL NUEVO DIA, May 1, 2003, *available at* http://www.vieques-island.com/navy/FueraMarina.html; David E. Sanger & Christopher Marquis, *U.S. Said to Plan Halt to Exercises on Vieques Island*, N.Y. TIMES, June 14, 2001, at A1.

Arguably, as Justice Frankfurter predicted, "an informed, civically militant electorate . . . sear[ed] the conscience of the people's representatives."[64] On this particular issue, the death of Mr. Sanes pushed the people of Puerto Rico past its tipping point. The implications of this argument for the status debate are significant. If the people of Puerto Rico could move the federal government to take any action concerning an issue of grave interest, such as the Navy's involvement in Vieques, then we must explain its inability to move the federal government on the status question. My best guess reflects the fractured state of the electorate and the inability of one of the status options—independence, enhanced commonwealth, or statehood—to carry a voting majority on the island. The people of Puerto Rico do not move beyond the status quo because they are collectively ambivalent about the course they wish to take for the future. The status question remains in doubt largely because the people of Puerto Rico are not sure where they wish to go.

In the meantime, the political and scholarly debate rages on, while the people of Puerto Rico remain disenfranchised and under discretionary rule at the hands of an overseas empire. These are important debates, and I do not intend to minimize them. Yet to my mind, the real import of the status of Puerto Rico under U.S. rule lies in how it informs larger debates over the duties of citizenship. For in the end, I am not sure that the choice selected by the people of Puerto Rico to this day—the status quo as it has existed for over half a century—is a permissible one to make as citizens in a republic. Matters of self-determination and human dignity must be much higher on our list than that.

Conclusion

The status of Puerto Rico as a U.S. colony must come to an end. And on this score, the answer is clear: the plenary powers as applied to the island must end and the U.S. citizens residing on the island must receive the right to vote in federal elections. Unfortunately, this solution is lost amidst the larger debate over the status of the island under U.S. law. For many involved in this debate, these arguments are at best a partial solution and a roadblock to a lasting and definitive resolution to the status question. Fearing complacency should these partial solutions be adopted, those involved in the status debate focus on the larger prize.

This Essay joins this conversation at the margins and argues that something quite significant lies within this debate. Puerto Rico has been a U.S. colony for over a hundred years, disenfranchised and thus powerless to alter its political destiny. This is the conventional story. But as the example of the U.S. Navy's evacuation of Vieques illustrates, the people of Puerto Rico are not as powerless as is often assumed. How to explain this chapter in the history of Puerto Rico? Such a question gives rise to others worth asking.

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[64] Baker v. Carr, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).

For example, what does the Navy's response tell us about the people of Puerto Rico and their power to exact change? How does this answer inform the debate over Puerto Rico's colonial status? And if the people of Puerto Rico can force the Navy to evacuate Vieques, yet remain disenfranchised and subject to plenary powers, what does *that* tell us about the people of Puerto Rico?