

# Michigan Journal of Race and Law

---

Volume 6

---

2000

## Puerto Rico: Cultural Nation, American Colony

Pedro A. Malavet

*University of Florida Fredric G. Levin College of Law*

Follow this and additional works at: <https://repository.law.umich.edu/mjrl>



Part of the [Civil Rights and Discrimination Commons](#), [Law and Race Commons](#), [Legal History Commons](#), and the [Rule of Law Commons](#)

---

### Recommended Citation

Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000).

Available at: <https://repository.law.umich.edu/mjrl/vol6/iss1/1>

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

PUERTO RICO:  
CULTURAL NATION, AMERICAN COLONY<sup>†</sup>

Pedro A. Malavet\*

INTRODUCTION.....	2
I. HISTORICAL DEVELOPMENT OF THE LEGAL RELATIONSHIP BETWEEN PUERTO RICO AND THE <i>ESTADOS UNIDOS DE NORTEAMÉRICA</i> (U.S.A.).....	11
A. <i>Historical Antecedents: The First Colony</i> .....	12
B. <i>The Second Colony: Development of the United States- Puerto Rico Legal Regime</i> .....	21
1. <i>Booty of the Spanish-American War</i> .....	21
2. <i>Legal Consequences of the New Colony</i> .....	23
3. <i>The Current Legal Regime: The <i>Estado Libre Asociado de Puerto Rico</i> (The “Commonwealth” of Puerto Rico)</i> .....	32
C. <i>Consequences of the United States-Puerto Rico Colonial Regime</i> .....	41
II. <i>LA TIERRA DE BORÍNQUEN: FLUIDITY IN THE CONSTRUCTION OF PUERTO RICAN CULTURAL NATIONHOOD</i> .....	45
A. <i>Nationhood: Reality is in Popular Culture</i> .....	48
1. <i>The Importance of the Puerto Rican Cultural Narrative of <i>La Nación Puertorriqueña</i> (The Puerto Rican Nation)</i> .....	48
2. <i>An Anti-Essentialist View of Puerto Rican Cultural Nationhood</i> .....	55
3. <i>Música Popular Puertorriqueña (Puerto Rican Popular Music)</i> .....	61
B. <i>Cultural Survival</i> .....	67
1. <i>Americanization: Cultural Imperialism</i> .....	67
2. <i>Political Repression: <i>Los Subversivos</i></i> .....	71
III. <i>¿QUE SERÁ DE BORÍNQUEN?: REFORMING LIBERAL CITIZENSHIP</i> .....	75
A. <i>The Failure of Liberal Citizenship</i> .....	76
B. <i>A Proposal to Reconstruct Puerto Rican Citizenship Through a Reformed Liberalism</i> .....	87

---

† Copyright 2000 by Pedro A. Malavet. All rights reserved.

\* Assistant Professor, the University of Florida Fredric G. Levin College of Law. JD and LLM, Georgetown University Law Center. Professor Malavet has been an Adjunct Professor of law at Georgetown and at the Pontifical Catholic University of Puerto Rico.

Although I am solely responsible for any shortcomings found herein, this Article benefited from the selfless assistance of many colleagues. I wish to thank Berta Esperanza Hernández-Truyol for her indefatigable support in the writing of this Article. Juan Perea, Michael Seigel, Kevin R. Johnson, Francis McCoy, Christopher Slobogin and Guadalupe Luna provided detailed comments. My research assistant, José García, did excellent work on this Article.

IV. A FRAMEWORK FOR LEGAL REFORM .....	96
A. <i>The End of "Commonwealth" and the Pre/requisite of Independence</i> .....	96
B. <i>The Post-Colonial Status Alternatives: Re/defining Ciudadanía Puertorriqueña (Puerto Rican Citizenship)</i> .....	98
1. Independence.....	98
2. Non-Assimilationist Statehood .....	99
3. Non-Assimilationist, Bilateral Free Association .....	99
CONCLUSION: <i>ESTE SON QUE TRAIGO YO</i> .....	103

Status politics have always impeded the realization of the ideals of life and civilization [in Puerto Rico].

—Luis Muñoz Marín

## INTRODUCTION

Early in the process of American colonization following the Spanish-American War, United States General George Davis said that Puerto Rico, "unlike . . . many other republics, never has been, is not, and probably never will be free."<sup>1</sup> History has so far proved the General right. As a matter of law, Puerto Rico has been a colony for an uninterrupted period of over five hundred years. In modern times, colonialism—the status of a polity with a definable territory that lacks sovereignty<sup>2</sup> because legal/political authority is exercised by a peoples distinguishable from the inhabitants of the colonized region<sup>3</sup>—is the only

---

1. Brigadier General George W. Davis, who was Military Governor of Puerto Rico, made the statement while opposing any initiative that would have given Puerto Rico independence. AIDA NEGRÓN DE MONTILLA, *LA AMERICANIZACIÓN DE PUERTO RICO Y EL SISTEMA DE INSTRUCCIÓN PÚBLICA 1900/1930* 17 (1977).

2. Sovereignty is used here in its positivistic sense to refer to the authority to impose law within the national territory.

3. Legally speaking, Puerto Rico is a colony, as professor Ediberto Román explains:

The term "colony" is generally defined by the international community through the "salt water theory" of colonialism. Under this theory a territory and its population are considered a colony if a body of salt water separates it from the ruling country. The U.N. effectively accepted the salt water theory when the General Assembly adopted Resolution 1541, which defined a dependent territory as a "territory which is geographically separate and is distinct ethnically and/or culturally from the country administrating it.

...  
 Unlike independent states, colonies are possessions of the parent country, having no separate statehood or sovereignty. "The parent state alone . . . possesses [the] international personality and has the capacity to exer-

legal status that the *isla* (island) has known. This Article posits that Puerto Rico's colonial status—particularly its intrinsic legal and social constructs of second-class citizenship for Puerto Ricans—is incompatible with contemporary law or a sensible theory of justice and morality.<sup>4</sup>

Geographically, Puerto Rico is a group of islands<sup>5</sup> with a territory bordered by the Atlantic Ocean and Caribbean Sea. The *isla* is a political entity with a local government elected by the Puerto Ricans who reside on the island. Most significantly for purposes of this Article, Puerto Rico retains a national consciousness, as reflected in its popular culture.<sup>6</sup>

To be sure, Puerto Ricans' strong cultural nationhood contrasts with their lack of legal sovereignty. Puerto Rico legally belongs to the United States<sup>7</sup> but has not been fully incorporated into it.<sup>8</sup> The

---

cise international rights and duties.'” The parent state may, nonetheless, grant or bestow upon its colony a degree of internal autonomy and even grant autonomy over certain external affairs. These rights, however, are generally considered revocable at the discretion of the parent state.

Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1137–38 (1997) (citations omitted).

4. As discussed *infra* Part I.B., the United States has used statutes and judicial opinions to construct second-class citizenship for the Puerto Ricans in Puerto Rico by giving them fewer legal protections and benefits than are allocated to other United States citizens. At the same time, the dominant United States culture socially constructs the Puerto Ricans as second-class peoples, thus creating another form of second-class citizenship, as discussed in Part I.C. below. The United States now faces a paradox. Congress has unfettered *legal* authority to regulate the territory. See *infra* Part I.B. But there are theoretical and moral limitations on the exercise of that power, which are aptly captured in the following statement: “I care not if we have a right to make them miserable, have we not an interest to make them happy.” RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 1 (1984).

5. Unless otherwise expressly indicated, references to the *isla* or island should be read as synonymous with all the Puerto Rican islands. Puerto Rico is composed of several islands. However, it is generally referred to as the “*Isla del Encanto*” (The Enchanted Island, or the Isle of Enchantment), or simply as the “island.” The Islands of Puerto Rico are the main island, known as Puerto Rico, and a series of smaller islands, including, but not limited to, Vieques, Culebra, Mona, and Monito. See 48 U.S.C. § 731 (1999) (“The provisions of this chapter [48 U.S.C. §§ 731 et seq.] shall apply to the island of Puerto Rico and to the adjacent islands belonging to the United States and waters of those islands; and the name Puerto Rico as used in this chapter, shall be held to include not only the island of that name, but all the adjacent islands as aforesaid.”)

6. Professor Román concludes that, because of the Puerto Ricans' cultural identity, “Puerto Rico clearly fits within [the colonial] paradigm.” Román, *supra* note 3, at 1137 (citing Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT'L & COMP. L. 131, 144 (1996) (“Puerto Rico has a racial, religious, linguistic, and territorial identity distinguishable from that of the [United States].”). See also *supra* note 3.

7. Puerto Rico was ceded to the United States upon its victory in the Spanish-American war. See *infra* Part I.B.1.

8. This dichotomy is discussed *infra* note 126 and accompanying text.

Territorial Clause of the U.S. Constitution<sup>9</sup> gives the United States total authority to regulate the Puerto Ricans and their territory.<sup>10</sup>

Puerto Ricans, as United States citizens by operation of law, are both normative, i.e., dominant,<sup>11</sup> and “Other”<sup>12</sup> because of their *puertorriquenismo* (the state of being Puerto Rican). They are culturally normative in *la isla* and legally and culturally “Other,” relative to the “Americans.”<sup>13</sup> This Article articulates a theory of Puerto Rican cultural nationhood that is largely based on ethnicity.<sup>14</sup> In linking ethnicity and citizenship it is imperative, however, to avoid the evils of ethnic strife and balkanization,

9. U.S. CONST. art. IV, § 3, cl. 2. The Clause is discussed *infra* note 165 and accompanying text.

10. This authority is detailed *infra* Parts I.B.2, I.B.3.

11. Normative means the dominant societal paradigm, i.e., what is considered “normal” in a given sociological context. See Berta Esperanza Hernández-Truyol, *Borders (En)gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 891 (1997) (“knowledge is socially constructed,” therefore, the “normative paradigm’s dominance” defines “normal”).

12. In general, as used herein, “Other” and being “Othered” mean to be socially constructed as “not normative.” See, e.g., Cathy J. Cohen, *Straight Gay Politics: The Limits of an Ethnic Model of Inclusion*, in *ETHNICITY AND GROUP RIGHTS* 572 (Ian Shapiro & Will Kymlicka eds., 1997).

Much of the material exclusion experienced by marginal groups is based on, or justified by, ideological processes that define these groups as “other.” Thus, marginalization occurs, in part, when some observable characteristic or distinguishing behavior shared by a group of individuals is systematically used within the larger society to signal the inferior and subordinate status of the group.

*Id.* at 580 (citing ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* (1963)). However, I will also use the term “Other” as a relative term. See *infra* note 19 and accompanying text.

13. The legal construction of Puerto Rican United States citizens as not being cultural “Americans” is discussed *infra* notes 127–32 and accompanying text. The cultural differences between Puerto Ricans and *estadounidenses* (people of the United States) are discussed *infra* Part II.A.

14. To the extent that this Article develops the concept of Puerto Rican cultural nationhood, it is certainly at least partially using ethnicity as a marker for a particular form of citizenship. In the context of the citizenship debates in political and legal philosophy, this is an attempt to define what Ronald Beiner calls the “elusive synthesis of liberal cosmopolitanism and illiberal particularism, to the extent that it is attainable.” Ronald Beiner, *Introduction*, in *THEORIZING CITIZENSHIP* 13 (Ronald Beiner ed., 1995). In trying to come up with this definition, he struggles with what he describes as the “universalism/particularism conundrum”: “To opt wholeheartedly for universalism implies deracination—rootlessness. To opt wholeheartedly for particularism implies parochialism, exclusivity, and narrow-minded closure of horizons.” *Id.* at 12.

while celebrating rather than imposing difference; community consciousness cannot degenerate into fascism.<sup>15</sup>

Being Puerto Rican is a cultural factual reality. However, under the prevailing United States and international regime, it is not a legal reality. One possible way to attain coherence for all the Puerto Rican identities is to advocate the incorporation of the island into the United States of America as a state and the toleration of their "minority culture" within the larger United States society. But this legal and political assimilation is only one of the alternatives available to the Puerto Rican peoples. Because of the Puerto Ricans' cultural citizenship and their identifiable territory, secession, i.e., independence, is also an alternative. Additionally, an independent Puerto Rican nation could freely choose to enter into a supranational affiliated-nation regime with the United States.

Liberal citizenship focuses on the rights of individuals as members of a national political society. Communitarian citizenship theory views the individual as a member of relative communities within the nation-state, and it can illuminate the concept of cultural citizenship.<sup>16</sup> However, contemporary postcolonial citizenship philosophy generally opposes secession, as well as nationalistic enforced homogeneity on the one hand, or ethnic cleansing on the other. As a general rule, ethnic groups should tolerate each other, that is, get along within a larger political society.<sup>17</sup> The theory of justice developed in this work is a specific application of communitarianism that leaves it to the Puerto Ricans to construct the legal citizenship that they desire by legally redefining the Puerto Rican nation.

Because of the exceptional combination of national consciousness and territory,<sup>18</sup> a belief in *ciudadanía Puertorriqueña* (Puerto Rican

---

15. Ronald Beiner ponders the alternative abyss thusly: "Either fascism is a uniquely evil expression of an otherwise benign human need for belonging; or there is a kind of latent fascism implicit in any impulse towards group belonging." *Id.* at 19.

16. The communitarian concept of citizenship views the "citizen as a member of a community." Herman Van Gunsteren, *Four Conceptions of Citizenship*, in *THE CONDITION OF CITIZENSHIP* 36, 41 (Bart van Steenberg ed., 1994). "This conception strongly emphasizes that being a citizen means belonging to a historically developed community. Individuality is derived from it and determined in terms of it." *Id.* Moreover, "identity and stability of character cannot be realized without the support of a community of friends and like-minded kindred." *Id.*

17. Adeno Addis, in arguing against secession, identifies the need for co-existence: "Whether the multiplicity is the 'unintended' consequence of colonialism or the organizing principle, the defining feature, of the particular nation-state, the uncontroverted fact is that most nations are indeed multiethnic and multicultural." Adeno Addis, *On Human Diversity And The Limits Of Toleration*, in *ETHNICITY AND GROUP RIGHTS* 112, 113 (Ian Shapiro & Will Kymicka eds., 1992).

18. Puerto Rico is overwhelmingly occupied by Puerto Ricans, but that presence is certainly not exclusive. There are Anglo-United States citizens, a significant number of naturalized United States citizens, mostly of Cuban descent, and immigrants from other

citizenship) should not be viewed as running contrary to contemporary legal philosophy's embrace of "toleration" of minority cultures. Toleration requires that the Puerto Ricans be given the power to construct a legal citizenship that preserves their cultural citizenship. If the choice is a free one, they can decide to redefine the Puerto Rican state away from the unacceptable coloniality and into independence, United States Statehood or an affiliated state. The point is, that the choice must be legally postcolonial and made by the Puerto Ricans without fear of losing their cultural citizenship.

The next Part of this Article describes the doctrinal problem by critically detailing the historical evolution of the flawed legal relationship between Puerto Rico and the United States. It starts with the first Colonial period—the Spanish colony—in order to create the necessary context. It then examines the acquisition of Puerto Rico by the United States as a result of the Spanish-American War, and the legal consequences of the change in sovereignty on the inhabitants of the island. It then studies the current legal relationship between Puerto Rico and the United States and its inherent construction of legal second-class citizenship for the Puerto Ricans on the island. The Part concludes with a critical discussion of the complex consequences of the current legal regime, particularly how it deprives Puerto Ricans of citizenship and nationhood, and how it socially constructs the Puerto Ricans as second-class citizens within the normative American culture.

Part II begins to provide a solution to the problem by establishing the existence of a Puerto Rican culture that can be distinguished from the dominant United States society. It explains how Puerto Rican popular culture is a non-sovereign form of nationhood and cultural citizenship. It then describes what Puerto Rican culture looks like, and

---

Caribbean Islands, mostly Dominicans. Moreover, the Puerto Rican peoples are, like those in any other society, divided by borderlines of race, gender, and class, among other categories. This point is further developed *infra* Part II.A.2.

In 1990, when the total population of the Island was measured at 3,522,037, there were a total of 90,930 foreign-born persons living there. Their places of origin were identified as follows (With the number in parentheses reflecting the percentage of growth relative to the 1980 census): Dominican Republic, 41,193 (100.4%), Cuba, 19,755 (-3.4%), Europe, 9,108 (22.3%), South America, 7,140 (31.6%), Central America, 6,651 (290.8%), other, 2,917 (-46.0%). FRANCISCO L. RIVERA-BATIZ & CARLOS E. SANTIAGO, ISLAND PARADOX: PUERTO RICO IN THE 1990s 23, 113 (1996). Legal immigration to Puerto Rico in 1994 was 10,463 persons; in 1995, 7,163; in 1996, 8,560; and in 1997, 4,484. IMMIGRATION AND NATURALIZATION OFFICE OF POLICY AND PLANNING, DEPARTMENT OF JUSTICE, LEGAL IMMIGRATION FISCAL YEAR 1997 10 (1999). The 1996 INS illegal immigration estimates showed 34,000 undocumented immigrants residing in Puerto Rico. This figure reflected an estimated annual increase of 3,000 persons from 1992. IMMIGRATION AND NATURALIZATION OFFICE OF POLICY AND PLANNING, DEPARTMENT OF JUSTICE, OCTOBER 1992 AND 1996 ESTIMATED RESIDENT UNDOCUMENTED POPULATION BY STATE OF RESIDENCE (1997).

how it sets the Puerto Rican peoples apart from the *estadounidenses* (people of the United States). In identifying Puerto Rican cultural citizenship, this work constructs Puerto Ricans as “Others” relative to the people of the United States. In doing so, it seeks to differentiate and empower, not to marginalize.<sup>19</sup> The survival of Puerto Rican culture is contextualized in the official attempts to destroy it, and in the political repression that followed its endurance of *Americanization*.<sup>20</sup> Given this separate Puerto Rican cultural citizenship, a sensible legal and political theory must provide the means to construct a postcolonial Puerto Rican legal citizenship. Well-accepted communitarian principles can bring coherence to the legal definition of Puerto Rican citizenship.

Part III explains how Puerto Ricans’ quest to become citizens of an independent nation conflicts with traditional liberal ideals of citizenship which emphasize individuality and co-existence, because liberalism fails to take seriously the problems of non-normative cultural groups, thus imposing an essentialized<sup>21</sup> homogeneity. From the perspective of critical race<sup>22</sup> and LatCritical

19. In addition to its use in the context of marginalization, “Other” can also be used in this type of discourse to describe relative societal group relationships. Compare Addis, *supra* note 17, at 126 (using traditional sense of the term in saying that an imperfect society “at best allows minorities to be tolerated as the marginal Other”) with Addis, *supra* note 17, at 127 (using the relative meaning of the word thusly: “By ‘shared identity’ I mean to refer to an identity that bonds together, partially and contingently, minorities and majorities, such that different cultural and ethnic groups are seen, and see themselves, as networks of communication where each group comes to understand its distinctiveness as well as the fact that that distinctiveness is to a large degree defined in terms of its relationship with the Other.”).

20. Americanization is the process, undertaken in the early part of the last century, of importing and enforcing United States culture to replace Puerto Rican culture. See *infra* Part II.B.1.

21. Essentialism is used herein as Berta Esperanza Hernández-Truyol has described it:

The concept of essentialism suggests that there is one legitimate, genuine universal voice that speaks for all members of a group, thus assuming a monolithic experience for all within the particular group—be it women, blacks, Latinas/os, Asians, etc. Feminists of color have been at the forefront of rejecting essentialist approaches because they effect erasures of the multidimensional nature of identities and, instead, collapse multiple differences into a singular homogenized experience.

Berta Esperanza Hernández-Truyol, *LatIndia II—Latinas/os, Natives, And Mestizajes—A Latcrit Navigation of Nuevos Mundos, Nuevas Fronteras and Nuevas Teorías*, 33 U.C. DAVIS L. REV. 851, 862 n.26 (2000).

22. While definitions are often dangerous, if not impossible, see Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1089, 1089 n.2 (1997); 10 LA RAZA L.J. 3, 3 n.2 (1998) (stating that defining LatCrit is a difficult process), I like this one:

Critical Race Theory is the most exciting development in contemporary legal studies. This comprehensive movement in thought and life—



theory,<sup>23</sup> this Article develops a pluralistic communitarian proposal for the reform of the construction of citizenship in traditional liberalism generally, and American Constitutional liberal theory in particular. The theory developed here will allow liberal theorists to see, through a communitarian lens, that Puerto Rican cultural citizenship and nationhood should become Puerto Rican sovereignty, that is, true legal citizenship and nationhood.<sup>24</sup> As detailed in Part III.B., this paradigmatic

created primarily, though not exclusively, by progressive intellectuals of color—compels us to confront critically the most explosive issue in American civilization: the historical centrality and complicity of law in upholding white supremacy (and concomitant hierarchies of gender, class, and sexual orientation).

Cornel West, *Foreword*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xi (Kimberlé Crenshaw et al. eds., 1995).

Naturally, the strong influence of scholarship produced mostly by and relating to persons of color has not been without controversy. For an overview of the most read critiques, see, e.g., Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 *Geo. L.J.* 251, 263–77 (1992); Richard Posner, *Overcoming Law* 368–84 (1995); Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997).

23. LatCritical means the LatCrit approach to legal theory. Francisco Valdés has written about Praxis in the LatCrit enterprise:

Following from the recognition that all legal scholarship is political is that LatCrit scholars must conceive of ourselves as activists both within and outside our institutions and professions. Time and again, the authors urge that praxis must be integral to LatCrit projects because it ensures both the grounding and potency of the theory. Praxis provides a framework for organizing our professional time, energy and activities in holistic ways. Praxis, in short, can help cohere our roles as teachers, scholars and activists. The proactive embrace of praxis as organic in all areas of our professional lives thus emerges as elemental to the initial conception of LatCrit theory. Praxis therefore serves as the second LatCrit guidepost.

Francisco Valdes, *Foreword: Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 *HARV. LATINO L. REV.* 1, 53 (1997). See also Webster's Ninth Collegiate Dictionary 924 (1986) ("Praxis: action, practice; exercise or practice of an art, science or skill; customary practice or conduct."). See generally Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 *LA RAZA L.J.* 1 (1996); Colloquium, *International Law, Human Rights and LatCrit Theory*, 28 *U. MIAMI INTER-AM. L. REV.* 177 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 *HARV. LATINO L. REV.* 1 (1997); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 *CHICANO-LATINO L. REV.* (1998); Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 *U. MIAMI L. REV.* 575 (1999); Symposium, *Rotating Centers, Expanding Frontiers: LatCrit Theory and Marginal Intersections*, 33 *U.C. DAVIS L. REV.* 751 (2000). See also Symposium, *LatCrit Theory: Latinas/os and the Law*, 85 *CAL. L. REV.* 1087 (1997); 10 *LA RAZA L.J.* 1 (1998).

24. This Article focuses on how the United States has actually treated Puerto Rico, and how that conflicts with contemporary legal and political theory, so as to require a

shift<sup>25</sup> in the legal construction of Puerto Rican sovereignty and citizenship is justified by Puerto Rican cultural nationhood, the survival of which represents the failure of United States colonization and liberal jurisprudence. This Part continues by developing a reformation<sup>26</sup> of liberalism, by applying contemporary theories of communitarianism, tailored truly to recognize and promote cultural citizenships while maintaining pluralistic national legal/political cultures, to develop a

---

new paradigm. Accordingly, it will refer only sparingly to the current treatment of the other United States territories. However, the theory of justice developed herein is a call for fair treatment of all of the United States's colonized peoples. On the current treatment of United States territorial possessions, see generally STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* (1995); Walter Otto Weyrauch, *Book Review: S.K. Laughlin: The Law of United States Territories and Affiliated Jurisdictions*, 44 AM. J. COMP. L. 675 (1996); see also ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 140–41 (1989).

25. Philosophical paradigm shifts can be analogized to a process of religious conversion because they are fundamentally subjective processes:

[A] scientific revolution occurs when one paradigm is replaced by another. Paradigm shifts cause scientists to view the world in new and different ways. During scientific revolutions, then, scientists experience perceptual shifts. According to Kuhn, the transition from one paradigm to another is a conversion experience that cannot be compelled by logical argument.

George A. Martínez, *Philosophical Considerations and the Use of Narrative in Law*, 30 RUTGERS L.J. 683, 701 (1999) (citations omitted). Therefore, Professor Martínez concludes, “[s]ince racial divisions are founded in something other than reason—i.e., deeply held prejudices and sentiments—perhaps it can only be undone by techniques, such as narrative, that do not depend on reason.” *Id.* at 705. Or are those calling for paradigm shifts simply appealing to common sense? See BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 518–19 (1995) (“My main objective, therefore, was not to present the blueprint of a new order, but merely to show that the collapse of the existing order or disorder—which Fourier significantly called ‘subversive order’—does not entail barbarism at all. It means, rather, an opportunity to reinvent a commitment to authentic emancipation, a commitment, moreover, which, rather than being a product of enlightened vanguardist thought, unfolds as sheer common sense.”).

26. “Reform,” as used herein, means a “process of transmutation” and “structural metamorphosis,” “with a view to being a cause of conforming behavior.” Phillip Allott, *Note and Comment: Mare Nostrum: A New International Law of the Sea*, 86 AM. J. INT’L L. 764 (1992). It is the achievement of a new paradigm, not an interim step on the way thereto. Compare Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1105 (1995) (arguing that “re-formation” of flawed child-protection law can only be “an interim strategy until transformation is possible.”).

On my reluctant use of post-modern language, see Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293 (2000).

coherent, just, and moral approach to the Puerto Rican citizenship and political status problem.<sup>27</sup>

A communitarian theory of citizenship gives the Puerto Ricans the right to determine their legal and political future because of their cultural citizenship. A pluralistic legal/political vision would allow the Puerto Rican peoples to co-exist among themselves and/or within a continued postcolonial relationship with the United States.

Part IV is a brief discussion of the legal framework for the determination of Puerto Rico's future, produced through the lens of the specific theory of justice developed here. Initially, the Part reiterates that the current colonial status is morally unacceptable because it imposes second-class legal and social citizenships on the Puerto Ricans. Independence is the only just status that will empower the Puerto Ricans permanently to re/define their citizenship, through a re/construction of their state into an independent Republic of Puerto Rico, the United States State of Puerto Rico, or an affiliation between the United States and the Republic of Puerto Rico by international agreement.

The Article concludes with a call for Congressional and/or judicial reassessment of the postcolonial, non-essentialist, non-assimilationist legal alternatives available to the Puerto Ricans and the

---

27. This Article seeks to use communitarianism to justify the existence of Puerto Ricans as independent peoples. In so doing, I must carefully avoid the extremes of misguided utopian communitarianism on the one hand, and the attacks on "radical multiculturalism" on the other. On misguided forms of communitarianism, see Addis, *supra* note 17, at 127 (arguing that communitarians make the mistake of viewing "the notion of shared identity" as "a final state of harmony"). On "radical multiculturalism," see generally FARBER & SHERRY, *supra* note 22, at 3, 133-37 (stating that Critical Race Theory, a form of what the authors label "radical multiculturalism," is analogous to the mental disease of paranoia and represents "an abandonment of moderation and a dearth of common sense;" narratives used by "radical multiculturalists" lack scholarly analytical frameworks, are exclusionary even to the point of racism and anti-Semitism, and ultimately "prove" untruthful). For responses, see Kathryn Abrams, *How to Have a Culture War*, *Book Review*, 65 U. CHI. L. REV. 1091, 1126 (1998) ("Farber and Sherry's flawed and inflammatory critique moves us in precisely the wrong direction"); Richard Delgado, *Chronicle: Rodrigo's Book of Manners: How to Conduct a Conversation on Race Standing, Imperial Scholarship and Beyond: Beyond All Reason*, 86 GEO. L.J. 1051, 1072 (1998) (narratives are fact-patterns that illustrate the discussion; "[T]he scholarly community should be less concerned about scholarship that fails to state a claim in the most familiar manner . . . and receptive to the newer modes of scholarship, such as the essay and chronicle, which may be full of analysis and new ideas and, in that sense, even more useful than the usual fare."). For more general illustrations and explanations of the use of narrative in legal scholarship, see, e.g., Carrie Menkel-Meadow, *Excluded Voices: New Voices In The Legal Profession Making New Voices In The Law*, 42 U. MIAMI L. REV. 29 (1987); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989); Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (providing a sympathetic and very thorough review of the use of narrative in feminist legal scholarship); Charles Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992).

*estadounidenses*. The final goal of this process must be a re/definition of Puerto Rican legal and political citizenship, through a postcolonial re/construction of the state in a manner that preserves the Puerto Ricans' cultural citizenship.

I. HISTORICAL DEVELOPMENT OF THE LEGAL RELATIONSHIP  
BETWEEN PUERTO RICO AND THE  
*ESTADOS UNIDOS DE NORTEAMÉRICA* (U.S.A.)

When those states which have been acquired are accustomed to live at liberty under their own laws, there are three ways of holding them. The first is to despoil them; the second is to go and live there in person; the third is to allow them to live under their own laws, taking tribute of them, and creating within the country a government composed of a few who will keep it friendly to you. Because this government, being created by the prince, knows that it cannot exist without his friendship and protection, a city used to liberty can be more easily held by means of its citizens than in any other way, if you wish to preserve it.

—Niccolò Machiavelli, *The Prince*<sup>28</sup>

The legal relationship between the United States of America and Puerto Rico was formed on the basis of one colonial power forcibly evicting another. After 400 years of Spanish colonial rule, as the object of the *conquista* (conquest),<sup>29</sup> Puerto Rico, and its inhabitants, became the spoils of war. The Treaty of Paris<sup>30</sup> transferred sovereignty over Puerto Rico from Spain to the United States. However, beyond terminating Spanish citizenship, the treaty did not define the legal citizenship of the inhabitants of Puerto Rico. Rather, it expressly reserved this power for the United States Congress; implicitly, it was initially left to the courts.<sup>31</sup> Thereafter, the courts gave the United States Congress almost unfettered authority legally to define the rights and duties of the Puerto Ricans, and the regime applicable to the

---

28. NICCOLÒ MACHIAVELLI, *THE PRINCE* 46 (Luigi Ricci trans., Mentor 1980).

29. On the doctrine of acquisition by conquest, see *Johnson v. MacIntosh*, 21 U.S. 543, 8 Wheat. 543 (1823), discussed *infra* note 224.

30. See TREATY OF PARIS (1898), reprinted in 1 P.R. LAWS ANN. 16 (1999) [*hereinafter* TREATY OF PARIS].

31. See *infra* Part I.B.2.

island.<sup>32</sup> Ever since, legislation has clearly established the non-existence of Puerto Rican legal nationhood and the lack of independent Puerto Rican citizenship.<sup>33</sup>

For practical and legal reasons that are detailed below, the United States constructed for Puerto Rico the type of regime that Machiavelli recommended to his prince “creating within the country a government composed of a few who will keep it friendly to you.”<sup>34</sup> The locals are governed by the locals, but the power is wielded by the Prince through careful legal and social constructs of citizenship.

#### A. Historical Antecedents: The First Colony

The legal construction of colonial status for the territory now known as Puerto Rico began with Spanish *conquistadores* (conquerors). The official start of the Spanish colony dates to November 19, 1493, when Christopher Columbus arrived in Puerto Rico during his second voyage to the Americas and claimed the island for Spain.<sup>35</sup>

The Spanish began full-scale colonization during the 16th Century.<sup>36</sup> This brutal process of conquest meant the destruction of the

32. In a series of cases now known as the Insular Cases, most of which were decided during the 1901 Supreme Court term, the Court defined the legal rights of the inhabitants of the new territories as well as the power of the United States Congress to legislate the legal regime applicable both to the territories and to their peoples. See discussion *infra* notes 105–32 and accompanying text.

33. See discussion *infra* Parts I.B & C. Compare *Ramírez de Ferrer v. Mari-Bras*, 97 JTS 128 (1997) (finding that Puerto Rican citizenship existed independently from United States citizenship under Puerto Rico election law).

34. MACHIAVELLI, *supra* note 28, at 46. Most of the repressive activities discussed *infra* Part II.B.2. had active participation of Puerto Rican police and other local officials.

35. Columbus’ second voyage was at the command of a fleet of 17 ships that is believed to have landed on what is today called Puerto Rico on November 19, 1493. See FEDERICO RIBES TOVAR, *A CHRONOLOGICAL HISTORY OF PUERTO RICO 12–13* (Anthony Rawlings & Peter Bloch trans, 1973); see also *THE PUERTO RICANS: A DOCUMENTARY HISTORY* (Kal Wagenheim & Olga Jiménez de Wagenheim eds., 1994).

36. Columbus left Puerto Rico on November 22, 1493. See RIBES TOVAR, *supra* note 35, at 14. It was not until 1504 that Vicente Yáñez Pinzón returned to the island at the head of a privately financed expedition. In 1505, the King of Spain appointed him governor. However, he did not last long. See *id.* at 13. Colonization is generally thought to have started in earnest on July 12, 1508, when Juan Ponce de León set sail from the Dominican Republic to Puerto Rico, under appointment from the Spanish crown. See *id.* However, some historians challenge this notion. See AURELIO TIÓ, *NUEVAS FUENTES PARA LA HISTORIA DE PUERTO RICO* (1961) (arguing that Ponce de León had made a previous unauthorized trip to Puerto Rico, landing on June 24, 1506). See also ROBERT H. FUSON, *JUAN PONCE DE LEÓN AND THE SPANISH DISCOVERY OF PUERTO RICO AND FLORIDA 71–75* (2000) (after a thorough review of the historical record, this Ponce de León biographer agrees with Tió).

natives,<sup>37</sup> the introduction of slavery,<sup>38</sup> and careful attempts by the Spanish Government to maintain White-Spanish domination over the island.<sup>39</sup> The period of the 17th and 18th centuries is marked by the

37. "Columbus encountered Tainos throughout most of the West Indies. . . . A second peripheral group, the Island-Caribs, lived on the islands from Guadeloupe southward, separating the Tainos from South America." IRVING ROUSE, *THE TAINOS: RISE & DECLINE OF THE PEOPLE WHO GREETED COLUMBUS* 5 (1992). The Caribes and the Spanish fought a type of "guerrilla" war during the early 16th century, with many raids on Puerto Rican soil and military response from the Spanish. By the end of the century, the Caribes were no longer raiding. See RIBES TOVAR, *supra* note 35. The Taino, on the other hand, were enslaved in the *encomiendas* and by the 18th century were almost completely gone. See PEDRO MALAVET VEGA, *HISTORIA DE LA CANCIÓN POPULAR EN PUERTO RICO* (1493–1898) at 96 (1992) (Noting that in 1509, 60,000 Tainos were forced into the *encomiendas*; only 14,636 were left by 1515, and 1,537 were left by 1530; a 1778 census showed only 2,302 Tainos living in Puerto Rico, mostly in the central mountains.).

38. The first Spanish slaves in Puerto Rico were the natives. Caribes were enslaved upon capture, usually the result of combat during a raid by the Caribes on Puerto Rico, or raids by the Spaniards fighting the Caribes. The Taino were subjected to a form of servitude that is described below. The legal authority to capture and enslave Indians for use in Puerto Rico was given to Cristóbal de Sotomayor on June 15, 1510. See RIBES TOVAR, *supra* note 35, at 30. Later, enslaved White women who had been "rescued" from Moorish captivity during the *reconquista* (Re-conquest) in the Iberian Peninsula, were sent to the Americas to "start a new life." See *id.* at 45, 66. However, clearly the most significant slave group in Puerto Rico was African slaves, the importation of whom started in 1510. See *id.* at 29.

The *encomienda* (to entrust) system deserves separate attention. On December 20, 1503, Queen Isabella of Spain issued a Royal order instructing the governor of Puerto Rico to "*compel and force* the said Indians to associate with the Christians of the island and to work on their buildings, and to gather and mine the gold and other metals, and to till the fields and produce food for the Christian inhabitants and dwellers of the said island . . ." *THE PUERTO RICANS*, *supra* note 35, at 18–19. The edict itself identified the problem that it was trying to resolve as follows:

We are informed that because of the excessive liberty enjoyed by said Indians they avoid contact . . . with the Spaniards to such an extent that they will not even work for wages, but wander about idle, and cannot be had by the Christians to convert to the Holy Catholic Faith . . . .

*Id.* at 18. While the Tainos were ostensibly considered "free" men under the edict, the reality was that they were enslaved. See *id.* at 19–22.

39. In 1527, the King ordered White men in Puerto Rico to marry White women, in order to increase the White population. See RIBES TOVAR, *supra* note 35, at 68. The particularly Spanish form of White racism might seem paradoxical in the context of a racially mixed society. However, Spanish White racism pervades the first colonial period. For example, one observer wrote:

With all this, there is nothing more ignominious on this island than to be black, or to be descended from them; a white man insults any of them, with impunity, and in the most contemptible language; some masters treat them with unjust rigor, . . . resulting in disloyalty, desertion, and suicide.

*THE PUERTO RICANS*, *supra* note 35, at 34 (quoting FRAY YÑIGO ABBAD Y LASIERRA, *NOTICIAS DE LA HISTORIA GEOGRÁFICA, CIVIL Y POLÍTICA DE LA ISLA DE SAN JUAN BAUTISTA DE PUERTO*

development of a Puerto Rican *criolla/o*, island-born culture,<sup>40</sup> and by external challenges to Spanish control of Puerto Rico.<sup>41</sup> The Spaniards would not face serious internal opposition in Puerto Rico until the slave rebellions of the late-18th and early-19th centuries<sup>42</sup> and the pro-independence revolts of the late-19th century.

Although the history of Puerto Rican armed struggle against the Spanish colony is short<sup>43</sup> and unsuccessful,<sup>44</sup> this resistance represents an

RICO (Madrid 1788)). This is only the first instance when the authorities expressed concern over the racial balance in Puerto Rico and took affirmative steps to ensure White supremacy. I hope to explore this process in detail in a future article. On racial prejudice in Spanish colonial Puerto Rico, see generally JAY KINSBRUNER, *NOT OF PURE BLOOD: THE FREE PEOPLE OF COLOR AND RACIAL PREJUDICE IN NINETEENTH-CENTURY PUERTO RICO* (1996).

40. *Criollos* means “native-born Puerto Ricans.” *THE PUERTO RICANS*, *supra* note 35, at 33. In this Article, the term will be used inclusively to extend to the entire Puerto Rican diaspora. But what persons, or more directly, what races, are included within the term can be a matter of controversy. An early colonial Spanish view was that *criolla/o* referred to “[t]hose who are born [in Puerto Rico], no matter from what breed or mixture . . . . The Europeans are called *blancos* [whites], or *hombres de la otra banda* [men from the other side].” *Id.* at 33 (quoting *ABBAD Y LASIERRA*, *supra* note 39). On the other hand, some would limit the term to apply to White native-born persons. Others, more subtly, refer to the *criollo* elites, who were White. See, e.g., JOSÉ TERRERO, *HISTORIA DE ESPAÑA* 437 (Juan Regla ed., 1972) (Referring to “las clases criollas ilustradas[.]” the “enlightened criollo classes”).

41. The Island was attacked by many would-be conquerors. Sir Francis Drake failed to take it when the guns of El Morro heavily damaged his fleet in 1595. See *OLGA JIMÉNEZ DE WAGENHEIM*, *PUERTO RICO: AN INTERPRETATIVE HISTORY FROM PRE-COLUMBIAN TIMES TO 1900* 59–60 (1998). The Earl of Cumberland succeeded in taking the city in 1598, but was forced to withdraw two months later, after disease killed many of his men and the locals kept up their attacks on his garrison. See *id.* at 60–61. The Dutch successfully landed in San Juan on September 24, 1625, but were forced to withdraw on November 2, after heavy losses. See *id.* at 62–64. Although there were no more serious attacks on San Juan until 1797, there were many small-scale hit-and-run attacks on other parts of the island during the 18th century. For example, the British had occupied the Island of Vieques from 1685 to 1688 and continued to attack it thereafter because it was a critical link for escaping English and Dutch slaves, who were granted freedom in Puerto Rico by order of the Council of the Indies. See *id.* at 64–65.

The last foreign attack on the island, prior to the Spanish-American War, was the English invasion of 1797. Sixty frigates carrying 7,000 men attacked on April 17, 1797, landing three miles east of San Juan. But the capital’s fortifications, and the mobilization of the regular army, the reserves, and volunteers, including many exiles from Haiti, helped to defeat them. See *id.* at 101–03. They retreated on May 2, 1797, and San Juan would not be attacked again for over 100 years. See *id.*

42. See *id.*

43. On September 23, 1868, the *Grito de Lares*, an attempted independence revolt, was staged by a group of about 400 Puerto Rican *criollas/os*. On September 24, 1868, the Republic of Puerto Rico was proclaimed in the municipality of Lares in the West-Central part of the island. It lasted about a week, because the Spanish had already intercepted the ship carrying guns to the revolutionaries, and the insurrection was quickly defeated. See *OLGA JIMÉNEZ DE WAGENHEIM*, *PUERTO RICO’S REVOLT FOR INDEPENDENCE: EL GRITO DE LARES* 1 (1993).

44. By October 10, 1868, the governor-general of the Island declared complete victory over the *Grito de Lares* and reported to his superiors that all the rebels had been captured. See *id.*

important part of the process of the Puerto Ricans constructing themselves as something “Other” than Spanish, that is to say, the *criolla/o* becoming the *Puertorriqueña/o* (Puerto Rican).<sup>45</sup> Eventually, the weakness of the Spanish Empire, and the *Puertorriqueñas/os*’ desire for self-rule,<sup>46</sup> would partially accomplish through legal and political means what the freedom fighters could not obtain by the force of arms.<sup>47</sup>

---

at 101. Professor Wagenheim reports that 523 persons were arrested for the revolt. *See id.* at 106. Eight rebels reportedly died of wounds received in combat. *See id.* A judicial report in early 1869, on the eve of a political amnesty, showed that 80 prisoners had died in jail, 126 had been released, and 269 were still serving sentences. *See id.* at 102. While several of the revolutionary leaders had been condemned to die in the “*garrote vil*,” those sentences were commuted to ten years’ imprisonment. *See id.* at 105. The *garrote* was the method of execution used by the Spanish. It involved the slow suffocation of the prisoner by compressing his throat, either with a rope tightened by a long stick, or by a mechanical device made of metal. *See BLACK’S LAW DICTIONARY* 612 (5th ed. 1979) (defining “garroting”).

45. *Puertorriqueñas/os* emerged as a *politically* conscious peoples as a result of the *Grito de Lares*. Juan Antonio Corretjer, for example, argues that “we became Puerto Ricans” on the day of the *Grito de Lares*. *THE PUERTO RICANS*, *supra* note 35, at 61–67. He attributes its failure to a lack of weapons, and to the lack of concerted action caused by the need to move up the attack, as a result of the capture of the weapons cache. *See id.* Professor Wagenheim has also written along similar lines. *See generally* WAGENHEIM, *supra* note 43. While the *criolla/o* identity developed much earlier, that was a cultural self-awareness. When “we became Puerto Rican,” the *criolla/o* identity developed a political consciousness that was independent from Spain.

46. Self-rule is not synonymous with independence. The failed attempts at a violent struggle for independence made clear that Puerto Rico lacked the kind of standing rebel army that could be found in Cuba. This at least partly explains why the Puerto Ricans welcomed the “autonomy” that was granted in 1898, whereas the Cuban independence fighters did not. The Cuban revolutionaries had fought a series of wars with the Spanish during the 19th century, most notably the Ten Years War (1868–1878) and the War of Independence that started on September 13, 1895 and ended with the United States victory in the Spanish-American War. *See* CARLOS MÁRQUEZ STERLING & MANUEL MÁRQUEZ STERLING, *HISTORIA DE LA ISLA DE CUBA* 90–123, 134–56 (1975). It was estimated that 42,000 Cubans were fighting 126,000 Spanish regulars and 60,000 volunteers in early 1896. *See* TERRERO, *supra* note 40, at 544–45. Máximo Gómez, the last survivor of the great revolutionary generals, entered Havana to celebrate the Spanish defeat on February 24, 1899. (Cuba was officially turned over to the United States in January 1899). *See* STERLING & STERLING, *supra*, at 160. Upon seeing the large crowds welcoming him into Havana, Gómez is reported to have told an aide: “If all these people had fought with us, we would have expelled Spain from Cuba years ago.” *Id.* José Martí, a better poet and politician than a general, had died in his first battle, at *Dos Ríos*, on May 19, 1895. *See id.* at 132–33. Antonio Maceo, a very good general, had been killed in combat in *Punta Brava* on December 7, 1896. *See id.* at 138–40.

47. This is certainly an encouraging precedent. However, the process was not totally unaffected by violence. The Spanish government that granted the Charter of Autonomy that is discussed below was headed by newly-named President Práxedes Mateo Sagasta. Sagasta rose to power on October 4, 1897. His predecessor, Antonio Cánovas del Castillo, a monarchist who opposed autonomy for Cuba and Puerto Rico, had been assassinated in Barcelona in August 1897. TERRERO, *supra* note 40, at 514–18, 548. Historian Osvaldo García reports that the assassin visited Puerto Rican independence leader



The Spanish authorities that controlled Puerto Rico reported directly to Madrid for the first time in 1795.<sup>48</sup> During the next 103 years, the legal regime that governed Spain generally, and its relationship with the insular possessions more specifically, was caught up in Spain's chaotic introduction to constitutionalism. This process would lead to the independence of all the Spanish Americas, except Cuba and Puerto Rico, early in the 19th Century. For Cuba and Puerto Rico, a political process of home rule would be interrupted by the Spanish-American War.

The first Constitution to apply in Spain was imposed in 1808 by Napoleon Bonaparte at the point of a gun.<sup>49</sup> The first *Spanish* constitution was the *Constitución de Cádiz*<sup>50</sup> (Constitution of Cadiz) of 1812,<sup>51</sup>

Ramón Emeterio Betances in Paris before the assassination. After trying to convince the assassin to desist from the murder, Betances sent him 1000 francs for financial support. See MALAVET VEGA, *supra* note 37, at 443 n.1120.

48. See generally, PEDRO MALAVET VEGA, *EVOLUCIÓN DEL DERECHO CONSTITUCIONAL EN PUERTO RICO* 21–22 (1998). Puerto Rico was freed from reporting to the *Cabildo* of Santo Domingo when the island of Hispaniola was ceded by Spain to France. The cession was part of the Treaty of Basel between France and Spain. The previously French side of Hispaniola was at this time occupied by Haitian independence forces, and the Spanish gave the eastern end of the island to the French. See EDILBERTO MARBÁN ESCOBAR, *II CURSO DE HISTORIA DE AMÉRICA* 187 (1966). The actual transfer of the island did not occur until 1801 because Napoleon was otherwise occupied in Europe. A French expeditionary force landed in 1801, commanded by Napoleon's brother-in-law, Charles Leclerc. The French forces, then commanded by Rochambeau, surrendered on November 9, 1803. While the French maintained a small presence in Eastern Haiti until 1809, the Republic was officially declared on January 1, 1804. 8 *ENCYCLOPEDIA BRITANNICA* 551 (1984). The Haitians and the Dominicans kept fighting it out until the independence of Santo Domingo (the Dominican Republic) was declared in 1821. See MARBÁN ESCOBAR, *supra*, at 187–88.

49. In Spanish, this is known as the *Constitución de Bayona*, *Bayona* being the Spanish name of the French city Bayonne, in southwestern France. After the French invaded Spain in 1808, King Charles IV abdicated in favor of his son, Ferdinand VII, who then fled to Bayonne. Under the influence of Napoleon Bonaparte, Ferdinand "gave back" the throne and his father then abdicated in favor of Napoleon. Napoleon then imposed the Bayonne Constitution, naming his brother, Joseph Bonaparte, King of Spain. See TERRERO, *supra* note 40, at 394–97. For a transcript of this constitution, see *CONSTITUCIONES Y CÓDIGOS POLÍTICOS ESPAÑOLES 1808–1978* 21 (Julio Montero ed., 1998).

50. See *Constitución Política de la Monarquía Española*, in *CONSTITUCIONES Y CÓDIGOS*, *supra* note 49, at 37.

51. In the midst of the bloody struggle with the French, the Spanish *Cortes* were convened in the city of Cádiz, in Southern Spain. Historically, the *Cortes* were composed of bishops, noblemen, and "good men of the villages." King Alfonso IX pledged, upon their first convocation in León in 1188, that he would not wage war, agree to peace, or enter into treaties without consulting the *Cortes*. While the nature of their powers is not entirely clear, they voted on taxes and, upon their request, the kings issued special judicial and administrative orders. See TERRERO, *supra* note 40, at 166. By 1810, the *Cortes* had rarely been convened for several centuries, but the Regency Council, a sort of resistance government that ruled in the absence of Ferdinand VII, convened them in León, then Cádiz. See *id.* at 417–18. On September 24, 1810, the new *Cortes* decreed that Spanish sovereignty resided in them, as a Parliament. The *Cortes* expressly rejected the French regime, and they recognized

which purported to give equality to White Spanish citizens in the overseas possessions,<sup>52</sup> putting them on a par with Spaniards born in Spain,<sup>53</sup> and gave all the American Possessions representation in the *Cortes*, now the Spanish parliament.<sup>54</sup> The return of the monarchy in 1814 invalidated this constitution.<sup>55</sup>

The brief restoration of the Constitution of Cadiz in 1820<sup>56</sup> did not have a lasting governing effect in Spain,<sup>57</sup> but it allowed most of its

---

Ferdinand VII as their lawful king, albeit with highly limited authority. The *Cortes* proclaimed the *Constitución de Cádiz* on March 19, 1812. This completed their transformation into a legislative body. The constitution provided that the *Cortes* would be composed of one elected representative for each 70,000 citizens. Although universal suffrage was also established, members were indirectly elected by a rather convoluted system. See 1 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 31–32 (1980).

52. Article 10 of this Constitution identified the Spanish possessions outside the Iberian Peninsula as: the *Balearic* and Canary islands, with other African possessions; New Spain, New *Galicia* and the Yucatan Peninsula; Guatemala, and the internal and external provinces of the East, and the internal provinces of the West; the island of Cuba and the two Floridas, the Spanish part of the island of Hispaniola, and the island of Puerto Rico with the others adjacent to them and to the continent on either ocean; New Granada, Venezuela, Perú, Chile, and the provinces of the Plate River and all the islands adjacent in the Pacific and Atlantic oceans; the Philippine islands and those that depend upon its government. *CONSTITUCIONES Y CÓDIGOS*, *supra* note 49, at 40.

53. Article 10 of the Constitution recognized the American possessions as part of Spain, including the island of Puerto Rico and those adjacent to it. *See id.* Article 18 gave Spanish citizenship to everyone who “by both lines [paternal and maternal] bring their origin from Spanish dominions in both hemispheres, and who are residents of in any town of those same dominions.” *Id.* at 41 (translation by author). However, Article 22 stipulated that persons who by either line of descendancy could be “reputed to be originated in Africa” could be given letters of citizenship by the *Cortes*, provided they met criteria set forth in the article, such as marriage to a “proper woman” or practice of a profession, participation in useful industry, or use of their own money. *Id.*

54. All the provinces of Spain, including the territories of the Americas, were given one deputy in the *Cortes*, for every 70,000 citizens. *See id.* at 42. The only exception was the Dominican Republic, which was allowed to send only one deputy, regardless of population. *See id.* The population numbers would be determined in accordance with the census of 1797. *See id.* Puerto Rico would have received one deputy under this scheme.

55. After being defeated at Leipzig, Napoleon had to abandon Spain. He released Ferdinand VII, who returned to Spain and abrogated the *Constitución de Cádiz* on May 4, 1814. *See TRÍAS MONGE*, *supra* note 51, at 35.

56. On January 1, 1820, 20,000 Spanish soldiers awaiting embarkation to fight in the wars of independence in the Americas mutinied in Cádiz. Commander Rafael Riego led them, and they forced the King to restore the 1812 Constitution. *See TERRERO*, *supra* note 40, at 425–27. This was the seminal moment for the Americas in the period of turmoil that began with the Napoleonic invasion of Spain and for the ensuing fight between the Spanish monarchists and republicans, because it allowed the overseas possessions on the American continents to become independent.

57. The effect was not lasting because the monarchy retook power and again invalidated the constitution in 1823. On October 1, 1823, Ferdinand VII had fled Spain and allied himself with France. One hundred thousand Spaniards reportedly lost their lives

empire in the Americas to become independent.<sup>58</sup> For the remaining peoples of the Spanish Americas, Cuba and Puerto Rico, the return of the old regime meant the loss of Spanish citizenship and participation in the political process granted by the *Constitución de Cádiz*. White *Cubanas/os* (Cubans) and *Puertorriqueñas/os* were back to being subjects of Spain, but not citizens thereof. It would take more than half a century for the possessions to recover from those losses, and, unfortunately, by the time those reforms were reintroduced a war would produce a change in the applicable constitutional regime.

Nevertheless, in a process that started in 1876,<sup>59</sup> the Spanish crown began to reconsider the legal regime that governed the islands of Cuba and Puerto Rico.<sup>60</sup> The implementation of the Constitutional authorization was not undertaken in earnest until 1895.<sup>61</sup> In a series of enactments,<sup>62</sup> Cuba and Puerto Rico received increasing levels of home rule and the rights of Spanish citizens.<sup>63</sup> Legal Spanish citizenship was

---

during the repression that accompanied the King's return to power. Riego was hanged and his body dismembered in a square of Madrid. *See id.* at 427–28. This sad pattern of fighting between the nobility and clergy, who favored the absolute Catholic monarchy or dictatorship, on the one hand, and those who favored a liberal Republic, on the other, marked Spanish history for two centuries.

58. Most of the Spanish empire in the Americas was lost between 1821 and 1824. The Viceroyalty of New Spain (Mexico and Central America) was lost in 1821, when the *Cortes* refused to ratify a treaty between Mexican leader Agustín de Iturbide and the Viceroy that would have granted independence, but with the Spanish King as nominal ruler. On September 27, 1821, Iturbide and his army entered Mexico City, and Mexico became free. *See id.* at 456–57. Central America, which was part of the Viceroyalty of New Spain, became free with Mexican independence. *See id.* at 458. The defeat at Ayacucho on December 9, 1824, sealed the fate of the Army of the Viceroy of Perú and marked the end of the war of liberation in South America. *See id.* at 456. Cuba and Puerto Rico remained under Spanish control.

59. This period was during the reign of Alfonso XII, who in the beginning of his reign was a minor and was represented by the Queen Regent María Cristina of Bourbon. Article 1 of this constitution gave Spanish citizenship to anyone born in Spanish territory. There do not appear to be any racial exclusions, such as those found in the Constitution of 1812. *See* CONSTITUCIONES Y CÓDIGOS, *supra* note 49, at 145.

60. Article 89 of the Constitution of the Spanish Monarchy of 1876 gave the government the power to issue special legislation for the governance of the *provincias del ultramar* (the overseas provinces). Clause two of this Article gave Cuba and Puerto Rico the right to be represented in the *Cortes*, the Spanish legislature, once special legislation to that effect was enacted. *See* ALFONSO L. GARCÍA MARTÍNEZ, PUERTO RICO: LEYES FUNDAMENTALES 11 (1989).

61. The implementation occurred during the reign of Queen Regent María Cristina of Hapsbourg, who ruled in the name of her child Alfonso XIII. *See id.* at 13.

62. *See generally id.*

63. To be sure, these reforms were not just motivated by the more liberal Spanish Republic, but also by the inability to maintain their dying empire. Nevertheless, it is clear that they were more acceptable to the Puerto Ricans than to the Cubans. In the late 1890s, Luis Muñoz Rivera, the leader of the Puerto Rico Autonomist Party, rebuffed

formally granted to the native-born inhabitants of Cuba and Puerto Rico in 1897.<sup>64</sup>

On November 25, 1897, Spain legislated an autonomous charter for Puerto Rico. The charter granted self-government by an elected lower chamber of the legislature, a partially-elected and partially-appointed upper legislative chamber, and an appointed high executive, known as the Governor-General.<sup>65</sup> A separate decree extended the civil rights guarantees of the 1876 Spanish Constitution to apply in Puerto Rico.<sup>66</sup> The Charter of Autonomy purported to be a *bilateral compact*,<sup>67</sup> because the decree stated that it could be amended only upon request by the local legislature.<sup>68</sup> However, because of the method for passage of this act by the *Cortes*, the limitation on unilateral amendment by the Spanish parliament was not really binding on them and constituted, rather, a “declaration of principles” that the Spaniards were free to ignore.<sup>69</sup>

On March 27, 1898, the elections for Puerto Rico’s first autonomous government were held, and on July 17, 1898, the local parliament was installed<sup>70</sup>—an imperfect form of home rule, as the Spaniards retained the authority to appoint certain members of the upper chamber of the legislature<sup>71</sup> and to set eligibility requirements, which ensured that

---

plans for a military attack against the Spanish produced by pro-independence forces in New York. See WAGENHEIM, *supra* note 41, at 198–99. On the other hand, General Máximo Gómez was still fighting the Spanish when the United States invaded Cuba in 1898.

64. Article 1 of the Decree of 9 November 1897 gave Spanish citizenship to the Spanish subjects in the Antilles on an equal footing as residents of the Peninsula. GARCÍA MARTÍNEZ, *supra* note 60, at 93.

65. Title I, Article 2 reads: “The island shall be governed by an insular parliament, consisting of two chambers, and by the Governor-General, representing the mother country, who shall exercise supreme authority.” CHARTER OF AUTONOMY, Title 1, art. 2 (1897), reprinted in 1 P.R. LAWS ANN. 2 (1999).

66. See TRÍAS MONGE, *supra* note 51, at 128.

67. The current regime between Puerto Rico and the United States is also labeled a “bilateral compact,” as discussed *infra* Part I.B.3.

68. Article 2 of the “Additional Articles” at the end of the *Carta Autonómica* provided that any changes to the constitutions of Cuba and Puerto Rico could only be made by legislation issued by the *Cortes*, and only upon the request of the islands’ legislatures. See GARCÍA MARTÍNEZ, *supra* note 60, at 113. “When the present Constitution shall be once approved by the *Cortes* of the Kingdom for the islands of Cuba and Puerto Rico, it shall not be amended except by virtue of a special law and upon the petition of the insular parliament.” CHARTER OF AUTONOMY, *supra* note 65, at Additional Articles, art. 1.

69. See TRÍAS MONGE, *supra* note 51, at 128. Whether the Estado Libre Asociado had the same aspirations on both sides is discussed *infra* at Part I.B.3.

70. See TRÍAS MONGE, *supra* note 51, at 129–30.

71. Title III, Article 5: “The council shall be composed of fifteen members, of whom eight shall be elected in the manner directed by the electoral law and seven shall be appointed by the Governor-General acting for the Crown, from among such persons as

only the pro-Spanish economically powerful classes were eligible.<sup>72</sup> This proved unacceptable to the pro-independence Puerto Ricans exiled in New York, who encouraged the United States invasion<sup>73</sup> and even provided interpreters and scouts for the United States Army.<sup>74</sup> It is unfortunate that the independence forces failed to understand that they were dealing with a weakening Spanish Empire that would eventually lose, before they encouraged the imperial ambitions of the United States.<sup>75</sup>

---

have the qualifications specified in the following articles." CHARTER OF AUTONOMY, *supra* note 65, at Title III, art. 5

72. Title III, Article 6 of the Charter provided:

To be entitled to sit in the council of administration it is necessary to be a Spanish subject; to have attained the age of thirty-five years; to have been born in the island, or to have had four years' constant residence therein; not to be subject to any pending criminal prosecution; to be in the full enjoyment of his political rights; to have his property free from attachment; to have had for two or more years previous an annual income of four thousand pesos; to have no interest in any contract with either the insular or the home Government.

The shareholders of a stock company shall not be considered as Government contractors, even if the company has a contract with the Government.

*Id.* at Title III, art. 6. Four thousand pesos was a considerable income in those days. See MALAVET VEGA, *HISTORIA*, *supra* note 37, at 293 (teacher made 180 pesos a year in 1866); *id.* at 351 (in the 1880s, peasants made four to seven reales a day); *id.* at 448–49 (cost of staple foods in 1898 was measured in fractions of pesos); *id.* at 505–08 (discussing the Puerto Rican economy during this period). Additionally, note the loophole that allowed the stockholders of companies that did business with the state to hold legislative office.

73. The *Borinquen Club*, a pro-independence Puerto Rican group, was founded in New York City in 1892. After their call for revolution against Spain was rejected by autonomist leaders in Puerto Rico, officers of the group, which by then had changed its name to the Puerto Rico Section, met with Senator Henry Cabot Lodge in 1898 to ask the "United States government for help in evicting Spain from Puerto Rico." WAGENHEIM, *supra* note 41, at 198–99.

74. See ANGEL RIVERO, *CRÓNICA DE LA GUERRA HISPANO AMERICANA EN PUERTO RICO* 425 (1998).

75. To be sure, many believed that the United States would quickly give Puerto Rico independence after the invasion, as it did Cuba. But what these people clearly underestimated, both in Puerto Rico and in Cuba, was how disruptive America's imperial dreams would become for both of our Islands. Some leaders saw it coming. As Professor Wagenheim describes it:

[I]n early July [1898 . . . Ramón Emeterio Betances] . . . predicted, 'if Puerto Ricans don't act fast after the Americans invade, the island will be an American colony forever.' A press release from the White House on July 21 confirmed Betances' worst fears. It said in part, 'Puerto Rico will be kept. . . . That is settled, and has been the plan from the first. Once

## B. *The Second Colony: Development of the United States-Puerto Rico Legal Regime*

### 1. Booty of the Spanish-American War

On April 19, 1898, the United States Congress passed a joint resolution authorizing the President to use force if Spain “failed to pacify Cuba.”<sup>76</sup> The Spanish-American War officially began on April 21, 1898.<sup>77</sup> United States troops landed in Guánica, Puerto Rico, on July 25, 1898,<sup>78</sup> while a naval force blockaded<sup>79</sup> San Juan harbor.<sup>80</sup> Although there were

---

taken it will never be released. . . . Its possession will go towards making up the heavy expense of the war to the United States.’

WAGENHEIM, *supra* note 41, at 200 (citations omitted).

76. President McKinley signed the resolution on April 20. On April 21, the United States Ambassador to Spain delivered an ultimatum to the Spanish government giving them until noon on April 23, 1898, to pacify Cuba or leave. See RIVERO, *supra* note 74, at 14–15. As discussed *infra* Part I.C, the island’s value as a strategic military base was at least part of the motivation for the war and the invasion of Puerto Rico. See also the discussion of Puerto Rico’s importance to the United States between Assistant Secretary of the Navy Theodore Roosevelt and Senator Henry Cabot Lodge *infra* note 187.

77. On April 25, 1898, the United States Congress made a Declaration of War, retroactive to April 21, 1898. Unfortunately, the American warship *Nashville* had captured the Spanish ship *Buenaventura* on April 22, 1898; thus the retroactive date. See RIVERO, *supra* note 74, at 16.

Angel Rivero, a Puerto Rican-born officer in the Spanish Army, wrote the most complete history of the War in Puerto Rico. See *id.* Paradoxically, he had been arrested for “intervening in political matters” and spent 15 days in one of the vaults in El Morro fortress when, in March 1898, he was released and returned to regular duty. He held the rank of Captain and was put in command of the Fort San Cristóbal, which guarded the Northeastern end of the defenses of the Old City of San Juan and all the artillery batteries in and around that fortress. See *id.* at 1–2.

78. Among the United States troops that landed in Guánica was the poet Carl Sandburg. For an account of the landing and the Puerto Rico campaign, see CARL SANDBURG, *ALWAYS THE YOUNG STRANGERS*, 413–18 (1953). Excerpts of his book referring to the Puerto Rico campaign are in *THE PUERTO RICANS*, *supra* note 35, at 96–98.

79. Rivero reports that the blockade began on June 22, 1898, with a brief naval engagement between the United States cruiser *St. Paul* and the Spanish cruiser *Isabel II* and the destroyer *Terror*. See RIVERO, *supra* note 74, at 145–56.

80. The strategy of laying siege to San Juan and landing troops in the south might appear to have been a clever tactic. The naval force would keep the bulk of the Spanish troops and all warships defending Puerto Rico concentrated in the fortified city of San Juan, while the invading land forces were put ashore in the lightly-fortified south. At least one critic, however, thought it a strategic blunder. Captain Rivero is critical of the United States military strategy in Puerto Rico, arguing that by landing so far from the main Spanish defenses, the Americans put themselves in for a long and arduous campaign across the Island. See *id.* at 65–66. He felt that the best way to take Puerto Rico was to land as close as possible to the San Juan defenses. See *id.*

casualties,<sup>81</sup> and soldiers on both sides feared for their lives,<sup>82</sup> the Spanish forces in Puerto Rico did not put up much of a fight.<sup>83</sup> The United States quickly, if unheroically, captured the island.<sup>84</sup> United States forces took Ponce on July 28 without firing a shot, and the Commander of the invasion force issued a Proclamation indicating that he brought the “blessings of liberty” to the “Porto Ricans.”<sup>85</sup>

81. Spain had more than 18,000 soldiers and suffered casualties of 17 killed, 88 wounded, with 324 taken prisoner. The United States had more than 15,000 soldiers and suffered casualties of 3 killed and 40 wounded. Almost all of the United States casualties occurred at the hands of irregulars. See HÉCTOR ANDRÉS NEGRONI, *HISTORIA MILITAR DE PUERTO RICO* 340 (1992); CARR, *supra* note 4, at 28.

82. Although the campaign cannot be described as long or especially bloody, young men on both sides died and those who lived did so in fear. In his personal diary, a Puerto Rican-born gunnery officer in the Spanish Army recounted the agonizing wait to be attacked in San Juan, once they knew that United States troops had landed in the south and were marching north. They were also well aware of the presence of American warships offshore. The wait proved too stressful for two of his comrades, who attempted suicide. See RIVERO, *supra* note 74, translated in *THE PUERTO RICANS*, *supra* note 35, at 99–103. Carl Sandburg, from the United States perspective, recounts his own deep fear of being attacked during the first night after his unit landed in Guánica. However, the only shots he heard were fired by a unit from Illinois that apparently lost its cool during the night, firing so wildly that they hit the transport carrying General Miles—the task force commander—, several red-cross nurses, and, presumably, fellow men-in-arms. See *THE PUERTO RICANS*, *supra* note 35, at 96–97.

83. The guns of San Juan had not fired a hostile shot since they repelled the English invasion in 1797, and they had not been upgraded since that battle. See RIVERO, *supra* note 74, at 44, 465–75. After hostilities broke out, the troops in Puerto Rico asked for supplies essential to make their artillery shells explode. The terse response from the Spanish Ministry of War was: “Send money.” *Id.* at 45.

84. From Guánica, the United States forces split, with one column traveling west-northwest toward *San Germán* and later to *Mayagüez*, the other traveling east toward *Ponce*. As previously mentioned, they took Ponce on July 28. From Ponce, one column traveled north toward *Adjuntas* and *Utüado*, while another traveled east-northeast, along the road from Ponce to San Juan. In late July and early August, a force under the Command of Major General John R. Brooke landed in the southeastern harbor of Arroyo. See *id.* at 181–293. Troops also landed in Fajardo, on the northeast coast. See *id.* at 353–78.

85. On this date, Major General Nelson Miles, commander of the United States forces in Puerto Rico, issued a proclamation announcing:

To the inhabitants of Puerto Rico: In the prosecution of the war against the Kingdom of 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 Porto Rico [sic] . . . . They bring you the fostering arm of a nation of free people, whose greatest power is in its justice and humanity to all those living within its folds.

The chief object of the American military forces will be to overthrow the armed authority of Spain and to give to the people of your beautiful island the largest measure of liberty consistent with this military occupation . . . . [We have] come to bring protection, not only to yourselves

By August 12, 1898, the *estadounidenses* had stopped military operations in Puerto Rico. On September 14, 1898, most of the remaining Spanish troops left the island on board four Spanish war vessels.<sup>86</sup> October 18 was the final day of the official surrender of San Juan to the United States troops, and the last few Spanish soldiers sailed home aboard the warship *Montevideo* on October 23.<sup>87</sup> The second colony thus began.

## 2. Legal Consequences of the New Colony

The Treaty of Paris, signed on December 10, 1898, and consented to by the United States Senate and ratified by the President in 1899, officially ended the Spanish-American War.<sup>88</sup> The island of Puerto Rico thus became a prize of war.<sup>89</sup>

Between September 1898 and April 12, 1900, Puerto Rico was under military rule, supervised by the War Department.<sup>90</sup> This period witnessed the "*partidas*," well-organized mobs that fought in the mountains of Puerto Rico during the months just following the Spanish-American war.<sup>91</sup> This was class warfare; it began with the poor attacking

---

but to your property, to promote your prosperity and bestow upon you the immunities and blessings of the liberal institutions of our government

....

CARR, *supra* note 4, at 31.

86. "The warships *Isabel II*, *Concha*, *Terror* and *Ponce de León* sailed on the morning tide." RIBES TOVAR, *supra* note 35, at 380.

87. See RIVERO, *supra* note 74, reprinted in THE PUERTO RICANS, *supra* note 35, at 102-03.

88. The official title is "Treaty of Peace Between the United States of America and the Kingdom of Spain." See TREATY OF PARIS, *supra* note 30; see also JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 327 (2000) (citing 11 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 615-19 (Charles I. Bevans ed., 1974) [*hereinafter* TREATIES]).

89. Article II of the Treaty reads: "Spain cedes to the United States the island of Porto Rico [sic] and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões." PEREA ET AL., *supra* note 88, at 327 (citing TREATIES, *supra* note 88, at 615-19). The editors of the Puerto Rico collection changed the references to "Porto Rico" included in the original English to "Puerto Rico." See TREATY OF PARIS, *supra* note 30, at art. II.

90. See generally RAUL SERRANO GEYLS, 1 DERECHO CONSTITUCIONAL DE ESTADOS UNIDOS Y PUERTO RICO 439-442 (1986); CARMEN RAMOS DE SANTIAGO, EL GOBIERNO DE PUERTO RICO 55-60 (1970); CARR, *supra* note 4, at 32-33. For an interesting description of the period, see ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 140-41 (1989).

91. See generally FERNANDO PICÓ, 1898: LA GUERRA DESPUES DE LA GUERRA (1987); RIVERO, *supra* note 74, at 421-26.



the Spaniards but quickly extended to attacks on wealthy *criollas/os*.<sup>92</sup> The new targets were mostly White *mallorquines*<sup>93</sup> and *corsos*<sup>94</sup> who owned coffee plantations and, thus, controlled what was then the most powerful part of the economy.<sup>95</sup> The United States military restored “order” and earned the gratitude and allegiance of the Puerto Rican elites, at the expense of poor people. The Americans also shifted the emphasis from the mountain economy of coffee to the coastal valleys and to the production of sugar.<sup>96</sup>

On April 12, 1900, The Foraker Act introduced a United States-appointed civilian government on the island.<sup>97</sup> The island’s chief executive, the governor, was named by the President of the United States.<sup>98</sup> The President also appointed the members of the local cabinet, known as the Executive Council, who further acted as the upper legislative house.<sup>99</sup> The lower house of 35 was elected by the people.<sup>100</sup> The Puerto Rico Supreme court would have a Chief Justice and Associate justices appointed by the President of the United States.<sup>101</sup> The Federal District Court for Puerto Rico was introduced.<sup>102</sup> This regime lasted until 1917, when it was replaced by the Jones Act.<sup>103</sup>

The citizenship status of Puerto Ricans during this period remained less than clear. Article IX of the Treaty of Paris provided that:

92. See PICÓ, *supra* note 91.

93. Natives of Mallorca, Spain. See 2 DICCIONARIO DE LA LENGUA ESPAÑOLA 862 (1984).

94. Natives of Corsica. See 1 DICCIONARIO DE LA LENGUA ESPAÑOLA 387 (1984).

95. This was a time of servitude and company stores. The process by which the *mallorquines* and *corsos* had emigrated to Puerto Rico and leapfrogged the local economic hierarchy to become merchants and owners of large coffee plantations is studied in INMIGRACIÓN Y CLASES SOCIALES EN EL PUERTO RICO DEL SIGLO XIX (Francisco A. Scarano ed., 1985).

96. A scholar describes “sugar fever” thusly: “In 1898 Puerto Rico had a relatively diversified export economy based on sugar, coffee, and tobacco. Puerto Rico also had a thriving cattle industry, which virtually disappeared after pasture lands were converted for sugarcane cultivation.” PEDRO A. CABÁN, CONSTRUCTING A COLONIAL PEOPLE: PUERTO RICO AND THE UNITED STATES, 1898–1932 68 (1999).

97. Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended in various sections of Title 48 of the United States Code). See also 1 P.R. LAWS ANN. 24–48 (1999).

98. Foraker Act § 17 (“The Governor of Puerto Rico” will be the island’s “chief executive officer.” He shall be appointed by the President, by and with the advice and consent of the Senate, for a four-year term.).

99. See generally Foraker Act §§ 18–26. Section 27 provides that the Council shall be one of the two houses of the legislative assembly. Foraker Act § 27. The Executive Council is argued to have been the most important element in the process of “Americanizing” Puerto Rico. See CABÁN, *supra* note 96, at 122–26.

100. See *id.*

101. See *id.* at § 33.

102. See *id.* at § 34.

103. Jones Act of 1917, ch. 145, 5, 39 Stat. 951, 953 (1917).

Spanish subjects, *natives of the Peninsula*, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners.

★ ★ ★

*The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.*

★ ★ ★<sup>104</sup>

Thus, the *peninsulares* (natives of the Iberian Peninsula) were given the choice of retaining their Spanish citizenship, but the native-born Puerto Ricans were not; they lost the Spanish citizenship that had been granted in late 1897. Yet again, the native inhabitants of the island become subjects of a colonial power, but not citizens thereof. Despite the language of the treaty, until Congress acted on the matter, defining the legal citizenship of the non-Spanish inhabitants of Puerto Rico would be left to the United States courts.

There is a group of cases, known as the “Insular Cases,” regarding the legal status of Puerto Rico and its inhabitants, decided during the early part of the 20th century by the United States Supreme Court.<sup>105</sup>

---

104. Treaty of Paris, Dec. 10, 1898, U.S.–Spain, art. IX, T.S. No. 343, in PEREA ET AL., *supra* note 88, at 327 (citing TREATIES, *supra* note 88, at 615–19).

105. Some scholars would limit the label “Insular Cases” to include only nine cases resolved by the United States Supreme Court during its 1901 term. Applying specifically to Puerto Rico, see *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (“We are therefore of opinion that the Island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution . . . .”); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (stating that duties imposed after signing of Treaty of Paris were not properly executed); *Dooley v. United States*, 182 U.S. 222, 235 (1901) (finding that after the Treaty of Paris, Puerto Rico was no longer subject to United States tariffs); *Goetze v. United States*, 182 U.S. 221, 222 (1901) (holding that Puerto Rico is not a foreign country under United States tariff laws); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (Ruling that Puerto Rico is an island territory, not a foreign country, within meaning of United States tariff laws). However, cases resolved between 1901 and 1922 provided needed interpretation and clarification of the legal regime applicable to America’s overseas territories. *Balzac v. People of Porto Rico* [sic], 258 U.S. 298 (1922), appears to be the last case that could fall in this category. For a general discussion of this debate, see Efrén Rivera Ramos, *The Legal Construction Of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225 (1996).

Basically, they all ruled that Puerto Rico was an unincorporated territory of the United States, i.e., part of the United States, but subject to absolute Congressional legislative authority under Art. 1 § 8 of the United States Constitution.<sup>106</sup> The residents of Puerto Rico were citizens of Puerto Rico but not of the United States. Unfortunately, this Puerto Rican citizenship is utterly meaningless outside the United States-Puerto Rico legal regime because citizenship and nationality are linked in international law, and Puerto Rico is not a nation.<sup>107</sup>

In *De Lima v. Bidwell*,<sup>108</sup> the United States Supreme Court ruled that Puerto Rico was not a foreign country, for purposes of the imposition of import tariffs in the United States.<sup>109</sup> The island had become a territory of the United States by virtue of the ratification of the Treaty of Paris. However, it had not been *incorporated* into the United States, because that would have required an affirmative act by the entire Congress, not just a treaty ratification.<sup>110</sup>

In *Downes v. Bidwell*,<sup>111</sup> an opinion issued on the same day as *De Lima*, a deeply divided court ruled

that the Island of Puerto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island [to the United States]

. . . .<sup>112</sup>

106. The Necessary and Proper Clause: “[Congress shall have the power] [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. 1, § 8.

107. Under international law, Puerto Rican citizenship is not recognized. Therefore, until the grant of United States citizenship in 1917, a Puerto Rican was, in the words of a Democratic United States Senator, “a man without a country. Can any man conceive of a more tyrannical form of government?” CARR, *supra* note 4, at 36 (citing Congressional Record, 56th Cong., 1st sess., April 5, 1900, p. 4954).

108. 182 U.S. 1 (1901).

109. The Court narrowly construed the question presented in the case: “This case raises the single question whether territory acquired by the United States by cession from a foreign power remains a ‘foreign country’ within the meaning of the tariff laws.” *Id.* at 174.

110. In his dissenting opinion, Justice McKenna indicates that the status of Puerto Rico thus represented “a relation to the United States between that of being a foreign country absolutely and of being domestic territory absolutely . . . .” *Id.* at 220 (McKenna, J., dissenting).

111. 182 U.S. 244 (1901).

112. *Id.* at 287. The Foraker Act required “the payment of ‘fifteen per centum of the duties which are required to be levied, collected and paid upon like articles of merchandise imported from foreign countries.’ ” *Id.* at 247–48.

In so ruling, the court rejected the argument that in matters of taxation Congress could not treat the United States territory of Puerto Rico differently from a United States state; thus, Puerto Rican exports to the United States mainland were subject to duties that were not imposed on the products of the several states.<sup>113</sup> This opinion further enforced the cleavage between a territory that is a “part of” the United States but has not been “incorporated” thereto.<sup>114</sup> But most importantly, this opinion, over a vigorous dissent by four justices,<sup>115</sup> gave to the United States Congress almost unfettered discretion to do with Puerto Rico as it wants. Justice Gray’s concurring opinion would prove to be prophetic when it stated that “[i]f Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the

---

113. In other words, the equal taxation provision of the Constitution did not benefit Puerto Rico. *Compare* U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts, and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States.”).

114. In his dissenting opinion, Justice Harlan finds the distinction less than compelling:

I am constrained to say that this idea of “incorporation” has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Puerto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and Congress could not thereafter impose any duty, impost or excise with respect to that island and its inhabitants, which departed from the rule of uniformity established by the Constitution.

*Downes*, 182 U.S. at 391 (Harlan, J., dissenting).

115. In a dissenting opinion written by Chief Justice Fuller, joined by Justices Harlan, Brewer, and Peckham, these justices made a call for constitutional values to prevail over the desire for Empire:

They may not indeed have deliberately considered a triumphal progress of the nation, as such, around the earth, but, as Marshall wrote: “It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor of the American people, when it was adopted. It is necessary to go farther, and to say that, had this particular case been suggested, the language would have been so varied, as to exclude it, or it would have been made a special exception.

This cannot be said, and, on the contrary, in order to the successful extension of our institutions, the reasonable presumption is that the limitations on the exertion of arbitrary power would have been made more rigorous.

*Id.* at 374–75 (Fuller, C.J., dissenting).

Constitution."<sup>116</sup> However, Justice White's concurring opinion includes an important caveat that suggests that territorial status cannot last forever:

Conceding, then, for the purpose of the argument, it to be true that it would be a violation of duty under the Constitution for the legislative department, in the exercise of its discretion, to accept a cession of and permanently hold territory which is not intended to be incorporated, *the presumption necessarily must be* that that department, which within its lawful sphere is but the expression of the political conscience of the people of the United States, will be faithful to *its duty under the Constitution, and, therefore, when the unfitness of particular territory for incorporation is demonstrated the occupation will terminate.* I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution.<sup>117</sup>

The Jones Act of 1917 amended the local government rule and gave Puerto Ricans United States citizenship.<sup>118</sup> The Governor was granted the right to appoint his cabinet, with the advice and consent of the local senate.<sup>119</sup> Intermediate appeal from the Puerto Rico Supreme Court to the United States First Circuit Court of Appeals was imposed.<sup>120</sup> However, even this law left certain areas of confusion about Puerto Rican citizenship.<sup>121</sup>

116. *Id.* at 346. This position would eventually be adopted by a majority of the court in *Balzac*, discussed *infra* notes 122–32.

117. *Id.* at 343–44 (emphasis added).

118. See Jones Act of 1917 (conferring U.S. citizenship on all “citizens of Porto Rico [sic],” while adopting the definition of Puerto Rican citizenship included in the Foraker Act).

119. See *id.* at § 13.

120. See *id.* at § 43.

121. Professor Ediberto Román provides an excellent description of the shortcomings of this law:

[This] initial grant of U.S. citizenship did not come without confusion. The Jones Act of 1917 did not make any provision for persons born in Puerto Rico after the passage of the Act. The Immigration and Nationality Act of 1952 generally resolved this confusion: All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941, subject to the jurisdiction of the United States, residing on January 13, 1941, in Puerto Rico or other territory over which the United States exercises rights of sovereignty and not citizens of the United States under any other Act, are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13,

*Balzac v. People of Porto Rico*<sup>122</sup> was resolved after the signing of the Jones Act. It ruled that, even after the grant of United States citizenship to the residents of Puerto Rico, not all United States constitutional protections applied in the territory.<sup>123</sup> Fundamental rights, generally those guaranteed by the Due Process Clause, would automatically apply in the unincorporated territories.<sup>124</sup> However, personal freedoms would not. Among the latter are the right to trial by jury and the right to uniform

---

1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.

Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 19 n.146 (1998) (citation omitted). See Puig Jimenez v. Glover, 255 F.2d 54 (1st Cir. 1958) (holding that plaintiff born in Puerto Rico in 1922, who resided on the island for 14 years, but whose return from a visit to Spain was delayed from 1936 to July 1941 because of the Spanish Civil War, was a United States citizen pursuant to the statute because she established her residence in Puerto Rico prior to the trip to Spain and her absence was involuntary).

122. 258 U.S. 298 (1922). *Balzac* brought some clarity to the issue by expressly adopting one of the many views expressed in the earlier Insular Cases. It stated that “the opinion of Mr. Justice White of the majority, in *Downes v. Bidwell*, has become the settled law of the court.” *Id.* at 305.

123. The court cites with approval Justice White’s position:

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in Article IV, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise, does not require that body to enact for ceded territory, not made a part of the United States by Congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

*Id.* (quoting *Dorr v. United States*, 195 U.S. 138, 149 (1904)).

124. The Court explained the applicability of fundamental rights to the unincorporated territories thusly:

The Constitution, however, contains grants of power and limitations which in the nature of things are not always and everywhere applicable, and the real issue in the *Insular Cases* was not whether the Constitution extended to the Philippines or Porto Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements. The guaranties of certain fundamental personal rights declared in the Constitution, as for instance that no person could be deprived of life, liberty or property without due process of law, had from the beginning full application in the Philippines and Porto Rico, and, as this guaranty is one of the most fruitful in causing litigation in our own country, provision was naturally made for similar controversy in Porto Rico.

*Id.* at 312–13.

taxation.<sup>125</sup> Furthermore, home rule in Puerto Rico was due to a Congressional delegation and thus subject to the almost unfettered discretion of the United States Senate and House of Representatives.<sup>126</sup>

*Balzac* constitutionally constructs the United States citizenship of Puerto Ricans as second class, as long as they remain on the territory of Puerto Rico. Accordingly, it creates a distinction between the rights of United States citizens living in Puerto Rico and United States citizens living in “the United States proper.”<sup>127</sup> The Supreme Court explained the motivation behind this construction of Puerto Rican second-class citizenship in United States nativistic terms when it distinguished the island from Alaska:

Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by *American citizens*. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents. . . .<sup>128</sup>

Given that the Court was interpreting the Act that gave United States citizenship to the Puerto Ricans when making the statement quoted above, there is in it a clear assumption that the Puerto Rican United States citizens are not the “American citizens” who could re-settle an “American” State. In recognizing the impossibility of creating an Anglo-Saxon majority on the island, the Court also constructed the Puerto Ricans as “Others.”<sup>129</sup> Because the Puerto Ricans are so “Other,”

125. See *Balzac*, 258 U.S. at 305 (trial by jury); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (taxation); *Downes v. Bidwell*, 182 U.S. 244 (1901) (same).

126. Puerto Rico is thus classified as an “unincorporated” but “organized” territory. This means that Congress has not affirmatively incorporated the territory into the Union, but that it has created a local government therefor. Incorporation of a territory without statehood has only occurred once in United States history (Alaska). See *Rasmussen v. United States*, 197 U.S. 516 (1905); LAUGHLIN, *supra* note 24, at 89–91 (1995) (discussing the incorporation experience and the unincorporated but organized territories).

127. The Court expressly indicates that as long as they choose to remain on the Island, Puerto Ricans who are United States citizens will not enjoy the full rights of American citizenship. It thus distinguishes between Puerto Ricans as individual United States citizens and as collective inhabitants of Puerto Rico. As individuals, they are free “to enjoy all political and other rights” granted United States citizens, if they “move into the United States proper.” *Balzac*, 258 U.S. at 311. But as long as they remain on the Island, they cannot fully enjoy the rights of United States citizenship.

128. *Id.* at 309 (emphasis added).

129. Again, the Supreme Court is rather clear in *Balzac*:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have

the incorporation of the territory into the United States could not be inferred; it had to be clearly expressed by Congress.<sup>130</sup> Moreover, the passage of the Jones Act had already brought out the congressional construction of Puerto Ricans as being mostly of African descent and, thus, belonging to “an inferior race,” which made incorporation into the United States as a state impossible for some legislators.<sup>131</sup> The Puerto Ricans were thus legally constructed, by statute and constitutional opinion, as “Others” relative to the United States, and their citizenship as

---

prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire. One of its greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse. Congress has thought that a people like the Filipinos or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when . . . [U]ntil the Act of 1917, giving a new Organic Act to Porto Rico, the United States has been liberal in granting to the Islands acquired by the Treaty of Paris most of the American constitutional guaranties, but has been sedulous to avoid forcing a jury system on a Spanish and civil-law country until it desired it. We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on an exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights.

*Id.* at 310–11.

130. The Court wrote:

We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people. Incorporation has always been a step, and an important one, leading to statehood. Without, in the slightest degree, intimating an opinion as to the wisdom of such a policy, for that is not our province, it is reasonable to assume that when such a step is taken it will be begun and taken by Congress deliberately and with a clear declaration of purpose, and not left a matter of mere inference or construction.

*Id.* at 311.

131. See *infra* note 221.



expressly inferior, i.e., second class, at least so long as they choose to reside on the island.<sup>132</sup>

### 3. The Current Legal Regime: The *Estado Libre Asociado de Puerto Rico* (The “Commonwealth” of Puerto Rico)

La Farsa del Estado Libre Asociado—cruel, inhumana—no sólo se refleja trágicamente en la estructura gubernativa, sino también manifiesta sus dañosos efectos en el cuerpo desnutrido, el alma enferma y la conciencia abochornada de nuestro pueblo.

¿Hasta cuándo?

—Vicente Géigel Polanco<sup>133</sup>

In 1932, the United States Congress finally got the island’s name right, changing the mistaken “Porto Rico” to “Puerto Rico.”<sup>134</sup> Unfor-

132. Additionally, in “the United States proper” American cultural conservatism devalues non-White, English-speaking ethnic groups despite their legal citizenship. But there remains the question of whether Puerto Rican statutory citizenship has some legal limitations that travel beyond the Puerto Rican borderlands. For example, can Puerto Ricans born in Puerto Rico become President of the United States? In other words, are Puerto Rican statutory citizens “natural born Citizen[s]” of the United States? See U.S. CONST. art. II, § 1, cl. 5 (“No Person except a *natural born Citizen*, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President.” (emphasis added)). This concept first came up when Barry Goldwater became a candidate for President, because he had been born in the territory, rather than in the State of Arizona. The matter is unresolved, and it will not be further addressed in this Article.

133. VICENTE GÉIGEL POLANCO, *LA FARSA DEL ESTADO LIBRE ASOCIADO* 202 (1981). Author’s translation: “The farce of the Commonwealth—cruel, inhumane—not only is reflected in the governing structure, but also manifests its harmful effects in the malnourished body, the sick soul, and the ashamed conscience of our people. Until when?”

134. Act of May 17, 1932, ch. 190, 47 Stat. 158:

That from and after the passage of this resolution [May 17, 1932] the island designated ‘Porto Rico’ in the Act entitled ‘An Act to provide a civil government for Porto Rico, and for other purposes,’ approved March 2, 1917, as amended, shall be known and designated as ‘Puerto Rico’. All laws, regulations, and public documents and records of the United States in which such island is designated or referred to under the name of ‘Porto Rico’ shall be held to refer to such island under and by the name of ‘Puerto Rico.’

The Act is now codified as 48 U.S.C. § 731a (1999).

tunately, 25 years later Puerto Rico received the misnomer of the "Commonwealth" of Puerto Rico.<sup>135</sup>

On July 3, 1950, the United States Congress approved Law 600<sup>136</sup> to give Puerto Ricans the right to form an elected self-government. The act explained its purpose thusly: "Fully recognizing the principle of government by consent, this act is now adopted in the nature of a *compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."<sup>137</sup>

After law 600 was approved by referendum in Puerto Rico,<sup>138</sup> a Constitutional Convention in the island adopted a constitution, which was then submitted to the Congress for its approval.<sup>139</sup> During the process of drafting the Puerto Rico Constitution, the Convention also approved several explanatory resolutions. Resolution Number 22 gave the Puerto Rican definition of the English term "Commonwealth"<sup>140</sup> and selected it as the English equivalent of the Spanish *Estado Libre Asociado*. Resolution Number 23, the "Final Declarations of the Constitutional Convention of Puerto Rico," stated that Puerto Rico was acquiring "complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact [between Puerto Rico and the

135. To the extent that this term was intended to suggest a relationship similar to that of the Commonwealth of Virginia or the Commonwealth of Massachusetts, the legal reality of Puerto Rico's continued territorial status, as discussed below, makes it a misnomer as applied to the island.

136. See Act of July 3, 1950, ch. 446, 64 Stat. 319 (1950). The Act is now codified, together with non-superseded portions of the Foraker Act of 1900 and the Jones Act of 1917, at 48 U.S.C. §§ 731-731e (1999).

137. Act of July 3, 1950, ch. 446, § 1, 64 Stat. 319 (1950) (codified as amended at 48 U.S.C. § 731b (1999)).

138. Law 600 was approved by a favorable vote of 76.5 percent of the voters, with 65 percent of all eligible voters going to the polls. FERNANDO BAYRÓN TORO, *ELECCIONES Y PARTIDOS POLÍTICOS DE PUERTO RICO* 215 (4th ed. 1989).

139. See § 3, 64 Stat. at 319 (codified as amended at 48 U.S.C. § 731d (1999)).

140. Resolution No. 22 of [the Puerto Rico] Constitutional Convention: To determine in Spanish and in English the name of the body politic created by the Constitution of the people of Puerto Rico, *reprinted in* 1 P.R. LAWS ANN. 135-36 (1999). The resolution reads in part:

Whereas, the single word 'commonwealth,' as currently used, clearly defines the status of the body politic created under the terms of compact existing between the people of Puerto Rico and the United States, i.e., that of a state which is free of superior authority in the management of its own local affairs but which is linked to the United States of America and hence is a part of its political system in a manner compatible with its federal structure.

United States of America].”<sup>141</sup> This resolution went on to state that any changes to the new legal regime would require the “mutual consent” of Puerto Rico and the United States.<sup>142</sup>

Congress amended and approved the new Puerto Rican Constitution on July 3, 1952.<sup>143</sup> It then returned the constitution for ratification by the People of Puerto Rico.<sup>144</sup> The amendments provided: (1) that students in private schools were exempt from the compulsory public education requirement of Article II, section 5, of the Puerto Rico constitution;<sup>145</sup> (2) that Article II, section 20, of the proposed Puerto Rico Constitution—a declaration of Human Rights—should be eliminated;<sup>146</sup>

141. Resolution No. 23: Final Declarations of the Constitutional Convention of Puerto Rico, *reprinted in* 1 P.R. LAWS ANN. 136–37 (1999).

142. *Id.* (“Having full political dignity the Commonwealth of Puerto Rico may develop in other ways by modifications of the Compact through mutual consent.”).

143. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, *reprinted in* 1 P.R. LAWS ANN. 138–39 (1999).

144. The ballot that was used for approval depicted a hoe for approval and a wheel for disapproval, each accompanied by the question of approval or disapproval, printed in Spanish. A facsimile of the ballot can be found at 1 P.R. LAWS ANN. 133 (1999). The Puerto Rico Constitution was approved by a favorable vote of 81.5% of those voting, with 59% of eligible voters going to the polls. See BAYRÓN TORO, *supra* note 138, at 215.

145. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, *reprinted in* 1 P.R. LAWS ANN. 138–39 (1999). The language, as amended, can be found in P.R. CONST. art. II, § 5. The section, as amended, is transcribed below, with the language added by the United States Congress highlighted in italics:

§ 5. Public education

Every person has the right to an education which shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. There shall be a system of free and wholly non-sectarian public education. Instruction in the elementary and secondary schools shall be free and shall be compulsory in the elementary schools to the extent permitted by the facilities of the state. *Compulsory attendance at elementary public schools to the extent permitted by the facilities of the Commonwealth, as herein provided, shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices.* No public property or public funds shall be used for the support of schools or educational institutions other than those of the state. Nothing contained in this provision shall prevent the state from furnishing to any child non-educational services established by law for the protection or welfare of children.

P.R. CONST. art. II, § 5.

146. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, *reprinted in* 1 P.R. LAWS ANN. 138–39 (1999). The language that Congress expressly rejected can be found in P.R. CONST. art. II, § 20:

§ 20. Human rights recognized; duty of people and government

The Commonwealth also recognizes the existence of the following human rights:

and (3) that Article VII, section 3, should have added to it language that essentially would require Congressional approval of amendments to the Puerto Rico Constitution.<sup>147</sup> The Constitutional Convention accepted these amendments by Resolution Number 34 of July 10, 1952, as required by the Joint Resolution. Governor Muñoz-Marín then promulgated the constitution on July 25, 1952.<sup>148</sup> The congressional resolution did not require any further action by voters for the enactment of those parts of the Puerto Rico Constitution that it neither struck nor amended.<sup>149</sup> However, the two sections that were ordered amended by the Congress would not become effective until they were approved, as

The right of every person to receive free elementary and secondary education.

The right of every person to obtain work.

The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.

The right of every person to social protection in the event of unemployment, sickness, old age or disability.

The right of motherhood and childhood to special care and assistance.

The rights set forth in this section are closely connected with the progressive development of the economy of the Commonwealth and require, for their full effectiveness, sufficient resources and an agricultural and industrial development not yet attained by the Puerto Rican community.

In the light of their duty to achieve the full liberty of the citizen, the people and the government of Puerto Rico shall do everything in their power to promote the greatest possible expansion of the system of production, to assure the fairest distribution of economic output, and to obtain the maximum understanding between individual initiative and collective cooperation. The executive and judicial branches shall bear in mind this duty and shall construe the laws that tend to fulfill it in the most favorable manner possible.

P.R. CONST. art. II, § 20.

147. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, *reprinted in* 1 P.R. LAWS ANN. 138–39 (1999). The language, as amended, can be found in P.R. CONST. art. VII, § 3 (“No amendment to this Constitution shall alter the republican form of government established by it or abolish its Bill of Rights. Any amendment or revision of this Constitution shall be consistent with the resolution enacted by the Congress of the United States approving this Constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, of the Eighty-first Congress, adopted in the nature of a compact.”).

148. See Proclamation: Establishing the Commonwealth of Puerto Rico, *reprinted in* 1 P.R. LAWS ANN. 141–42 (1999). July 25, 1952, the date of the proclamation, is also the anniversary of the American invasion of Puerto Rico.

149. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, *reprinted in* 1 P.R. LAWS ANN. 138–39 (1999) (stating that the Puerto Rico Constitution “shall become effective” once the Constitutional Convention accepted the language as amended by the Congress and the Governor of Puerto Rico issued the necessary proclamation).

amended, by the People of Puerto Rico.<sup>150</sup> Accordingly, the Puerto Rico government submitted the amended language of Article II, § 5 and Article VII, § 3 to popular vote during the General Elections of 1952. Both amendments were “approved.”<sup>151</sup> Interestingly, the Puerto Rico voters were not asked to “approve” the removal of the Human Rights declaration.<sup>152</sup>

The United States quickly moved to take advantage of this new “compact” in the international arena. On January 19, 1953, the Department of State issued a press release announcing that the United States would no longer report to the United Nations on Puerto Rico, because “the new Commonwealth cannot be considered as a non-self-governing territory”<sup>153</sup> under Article 73 of the United Nations Charter.<sup>154</sup>

On March 23, 1953, the United States Ambassador to the United Nations, Henry Cabot Lodge, Jr., wrote to the United Nations Secretary General that Puerto Rico’s new form of government was consistent with self-determination and thus not subject to the reporting requirements of Article 73 of the United Nations Charter.<sup>155</sup> The memorandum sent to the United Nations in support of the Ambassador’s statements described the process as follows: “At the request of the people of Puerto Rico and with the approval of the Government of the United States, Puerto Rico has voluntarily entered into the relationship with the United States that *it* has chosen to describe as a ‘commonwealth’ relationship.”<sup>156</sup> In the

150. However, in order to enable the people of Puerto Rico to vote to amend the Constitution, Art. VII, § 3 was implemented as originally drafted, but only for the purpose of allowing its amendment, as well as the amendment of Art. II, § 5. See Public Law 447, July 3, 1952, ch. 567, 66 Stat. 327, reprinted in 1 P.R. LAWS ANN. 138–39 (1999).

151. See Proclamation: Amendments to the Constitution of the Commonwealth of Puerto Rico (1953), reprinted in 1 P.R. LAWS ANN. 142–43 (1999).

152. See *id.*

153. DEP’T ST. BULL., Feb. 1953, at 229–30. The press release was based on an exchange of telegrams between Governor Luis Muñoz-Marín and President Harry S. Truman. See *id.* at 230.

154. See U.N. CHARTER art. 73, in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW: SELECTED DOCUMENTS 17–18 (1991).

155. See Memorandum By the Government of the United States of America Concerning the Cessation of Transmission of Information under Article 73(e) of the Charter With Regard to the Commonwealth of Puerto Rico, March 23, 1953, DEP’T ST. BULL., Apr. 1953, at 584–85 [*hereinafter* Puerto Rico Memorandum]; see also ANTONIO FERNÓS ISERN, ESTADO LIBRE ASOCIADO DE PUERTO RICO: ANTECEDENTES, CREACIÓN Y DESARROLLO HASTA LA ÉPOCA PRESENTE 213 (1988).

156. Puerto Rico Memorandum, *supra* note 155, at 587 (emphasis added); see also FERNÓS ISERN, *supra* note 155, at 220. The letter from Ambassador Lodge and the Memorandum were jointly assigned Number A/AC.35/L.121 by the United Nations. See UNITED NATIONS RESOLUTIONS, IV RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, 1952–53 198 n.7 (Dusan J. Djonovich ed., 1973). The United Nations explains that “A” stands for the Assembly, “AC” for Ad Hoc Committee, and “L.” for a document of “limited distribution (i.e., generally draft documents).” *United Nations, Document Symbols:*

memorandum, the United States Delegation quotes from the Resolutions of the Puerto Rico Constitutional Convention, indicating that it “expresses the views of the people of Puerto Rico as to the status they have now achieved.”<sup>157</sup> It then quoted the self-determination statements made in Resolution Number 23, discussed above, in which the Puerto Rico constitutional convention stated that there was a bilateral compact between Puerto Rico and the United States.

In advocating the non-reporting position, United States representatives went even further. “Mason Sears, United States delegate to the [United Nations] Committee on Information, . . . [stated] ‘A compact . . . is far stronger than a treaty. A treaty can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.’”<sup>158</sup> Ohio Congresswoman Frances Bolton, who was also a member of the United States Delegation to the United Nations, stated: “The relationships previously established also by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.”<sup>159</sup> The United Nations voted to accept the United States’ position that it was no longer required to report to the United Nations under Article 73.<sup>160</sup>

Despite these carefully worded acts of obfuscation before the United Nations, and notwithstanding some lower court decisions,<sup>161</sup> the real American view of Puerto Rico’s status was conclusively expressed by the United States Supreme Court in three very terse per curiam opinions: *Califano v. Torres*,<sup>162</sup> *Torres v.*

---

*United Nations Documentation*, at <http://www.un.org/Depts/dhl/resguide/symbol.htm> (Last updated Jan. 16, 2001). Note the careful drafting of this statement. It states that Puerto Rico *thinks* it is a bilateral compact, without ever accepting that notion on behalf of the United States.

157. Puerto Rico Memorandum, *supra* note 155, at 587.

158. JOSÉ TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 123 (1997).

159. *Id.* at 123.

160. *Cessation of the transmission of information under Article 73 e of the Charter in respect of Puerto Rico*, G.A. Res. 748, U.N. GAOR, 8th Sess., Supp. No. 17, at 25–26, U.N. Doc. A/2630 (1953).

161. See, e.g., *Mora v. Mejías*, 115 F. Supp. 610, 612 (D. Puerto Rico 1953), *aff’d* 206 F.2d 377 (1st Cir. 1953) (holding that the Commonwealth of Puerto Rico has the status of a state); *Mora v. Torres*, 113 F. Supp. 309, 313–20 (D. P.R. 1953) (finding that the United States Constitution no longer applies to Puerto Rico based on the “new relationship” between the United States and Puerto Rico); see also JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 162 (1985) (commenting that statements on Puerto Rico’s status in the *Mora* case, and the nature of the “compact” were “at best dicta”); SERRANO GEYLS, *supra* note 90, at 496–507.

162. 435 U.S. 1 (1978).

*Puerto Rico*,<sup>163</sup> and *Harris v. Rosario*.<sup>164</sup> In these cases the Court ruled that Puerto Rico was still an organized but unincorporated territory of the United States, subject to almost limitless Congressional power.

The Territorial Clause of the Constitution of the United States reads as follows:

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.<sup>165</sup>

In *Califano v. Torres*, the Supreme Court reiterated what it had said in the Insular Cases, that Puerto Rico was an unincorporated territory of the United States. The three appellees in this case had moved from Massachusetts, Connecticut, and New Jersey to Puerto Rico. While living in the states, they had received Supplemental Security Income, pursuant to a federal Social Security Administration program, for “qualified aged, blind, and disabled persons.”<sup>166</sup> Upon arrival in Puerto Rico, their benefits were cancelled. The Supreme Court let this discrimination stand. The Court explained that “[t]he exclusion of Puerto Rico in the amended program is apparent in the definitional section. . . . [The] Act . . . states that no individual is eligible for benefits during any month in which he or she is outside the United States. The Act defines ‘the United States’ as ‘the 50 States and the District of Columbia.’ . . .”<sup>167</sup> The Justices then concluded that:

[w]e deal here with a constitutional attack upon a law providing for governmental payments of monetary benefits. Such a statute ‘is entitled to a strong presumption of constitutionality.’ ‘So long as its judgments are rational, and not invidious, the legislature’s efforts to tackle the problems of the poor and the needy are not subject to a constitutional straightjacket.’<sup>168</sup>

163. 442 U.S. 465 (1979).

164. 446 U.S. 651 (1980).

165. U.S. CONST. art. IV, § 3, cl. 2.

166. Under Section 1611(f) of the Act, residents of the 50 states and the District of Columbia were the only ones eligible for the new benefits, which were substantially larger than from the old programs, which remained in effect for the territories. See *Torres*, 446 U.S. 651.

167. *Id.* at 2–3 (citations omitted).

168. *Id.* at 5 (citing *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)). How curious that the Court uses the language of the war on poverty to justify the denial of funds to the poorest American citizens.

The "rational basis" for Congress' action in this case was described by the Court in *Harris*: "In [Califano], we concluded that a similar statutory classification was rationally grounded on three factors: Puerto Rican residents do not contribute to the federal treasury;<sup>169</sup> the cost of treating Puerto Rico as a State under the statute would be high; and greater benefits could disrupt the Puerto Rican economy."<sup>170</sup> In *Torres*, the United States Supreme Court ruled that Congress had the power to grant, and conversely to withhold, constitutional guarantees from the United States citizens who may be found in Puerto Rico.<sup>171</sup>

*Harris* further exposed Puerto Rico's continued territorial status. In this case the United States Supreme Court, summarily, but with a written opinion, ruled that the lower level of reimbursement provided to Puerto Rico under the Aid to Families with Dependent Children program did not violate the Fifth Amendment's equal protection clause.<sup>172</sup> Congress, pursuant to its authority under the territorial clause of the United States Constitution, can make any needful rules that affect the territories, and, accordingly, it may treat Puerto Rico differently from states if it has a rational basis for its actions. The court itself explained its ruling thusly: "Congress, which is empowered under the Territory Clause of the Constitution . . . to 'make all needful Rules and Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions."<sup>173</sup>

Accordingly, Puerto Rico is subject to the national legislative and executive regulatory processes performed in the United States, and the

---

169. This is, of course, incorrect. While Puerto Ricans do not pay federal income taxes, they do pay Social Security, FICA and other federal taxes. See *infra* notes 192, 226.

170. *Harris*, 446 U.S. at 652. It is difficult to conceive how \$300 million for children's welfare would *negatively* disrupt the Puerto Rican economy.

171. See *Torres*, 442 U.S. at 470 (holding that a Florida resident who traveled to Puerto Rico was protected under the Fourth Amendment against a warrantless search conducted without probable cause upon entry into the Island). The Supreme Court described the power of Congress thusly:

Congress may make constitutional provisions applicable to territories in which they would not otherwise be controlling . . . . Congress generally has left to this Court the question of what constitutional guarantees apply to Puerto Rico . . . . However, because the limitations on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.

*Id.* (citations omitted).

172. 446 U.S. 651 (1980).

173. *Id.* at 652.



laws and regulations that are produced are enforced in Puerto Rico by federal executive and judicial officials. But at the same time Puerto Ricans do not get meaningful participation in the political process at the national level, because they do not get to vote for President of the United States,<sup>174</sup> and their only congressional representation is a non-voting representative in the House.<sup>175</sup> There is, therefore, a fundamental democratic deficit in the manner in which Puerto Rico is ruled by the United States. The fundamental notion of three separate and co-equal branches of government, central to the American notion of a “Republican Form of Government,”<sup>176</sup> is missing in Puerto Rico. Moreover, this lack of empowerment is firmly established in the United States Constitution, and it cannot be changed by simple legislation or executive action.<sup>177</sup>

Thus, a few years into the second century of United States occupation, Puerto Ricans are subject to the almost total discretion of the United States Congress in constructing their legal rights. So far, that construction has made the United States citizenship of Puerto Ricans living in Puerto Rico second class, because it does not entitle the holders thereof to the same political and civil rights as those living in “the United States proper,” the 50 states.

---

174. *De la Rosa v. United States*, 842 F. Supp. 607, 609 (D. P.R. 1994), *aff'd* 32 F.3d 8 (1st Cir. 1994) (“[G]ranting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or [the adoption of] a constitutional amendment.”). *But cf. Igartúa de la Rosa v. United States*, 107 F. Supp. 2d 140, 141, 148 (D. P.R. 2000) (“The present political status of Puerto Rico has enslaved the United States citizens residing in Puerto Rico by preventing them from voting in Presidential and Congressional elections and therefore is abhorrent to the most sacred of the basic safeguards contained in the Bill of Rights of the Constitution of the United States—freedom.” Accordingly, in denying the government’s Motion to Dismiss, the court ruled that United States citizens residing in Puerto Rico, either by birth or by relocation from the United States mainland, have a constitutional right to vote in Presidential elections.), *rev’d* *Igartúa de la Rosa v. United States*, 229 F. 3d 80 (1st Cir. 2000).

175. 48 U.S.C. § 891 (1994) (allowing a “Resident Commissioner” to represent Puerto Rico in the United States Congress). The Resident Commissioner’s “role in Congress is determined by the House rules under which he may be a member of only three House committees and may introduce bills and speak on the House floor. He may not vote. . . .” LEIBOWITZ, *supra* note 24, at 224.

176. *See* U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

177. *Cf. I.N.S. v. Chadha*, 462 U.S. 919, 958–59 (1983) (“legislative veto” requiring supermajority of Congress to overrule executive actions pursuant to congressional legislative delegation of authority was “a convenient shortcut,” but it was unconstitutional because Congress cannot legislatively bind future Congresses). *See also Torres*, 442 U.S. at 470 (describing judicial reluctance to general application of constitutional safeguards to Puerto Rico).

### C. Consequences of the United States-Puerto Rico Colonial Regime

History reveals that one of the *estadounidenses'* goals in their defeat of the Spanish in the Spanish-American War was to acquire Puerto Rico's soil.<sup>178</sup> Since 1898, the United States continuously has used the island as a military outpost,<sup>179</sup> and it appears especially interested in continuing to do so now for military training<sup>180</sup> and as a strategically crucial base of operations.<sup>181</sup>

---

178. Puerto Rico was important to the United States for military/strategic and economic reasons. The United States desired the island as a strategic location when the Spanish-American War broke out. See CARR, *supra* note 4, at 25–28. Today, it is considered essential for the defense of the West. See *id.*

179. For example, Roosevelt Roads officially includes the Vieques training area and has three bays that can accommodate the Navy's largest capital ships, nuclear aircraft carriers. The base covers 37,000 acres on the main island of Puerto Rico and 22,000 acres in Vieques. It has 100 miles of roads and a capacity of 6,000 people, including 2,575 active military personnel. It has 200,000 military visitors a year and receives 45,000 flights, 1,200 ships and 5,400 small vessels a year. It houses a communications complex with five underground levels. The base serves as a staging area for operations in Guantanamo and the Panama Canal. It hosts joint exercises with NATO and with air and naval forces of Central and Latin America. M. MEYIN & J. RODRIGUEZ, *EL APARATO MILITAR NORTEAMERICANO EN PUERTO RICO* 38–41 (1982).

Other United States bases in Puerto Rico include Ft. Buchanan; Sabana Seca (communications center, intelligence and espionage); Camp Tortuguero (training center); and Salinas Training Area (training center mainly used by the National Guard). The National Guard, however, uses additional bases throughout the island, particularly in Bayamon, Puerto Nuevo, San Juan, Isla Verde, Punta Salinas (Toa Baja), Aguadilla, Yauco, Ponce, Salinas, and Caguas. *Id.* at 41–42. Active-duty United States personnel in Puerto Rico totaled 3,699 in 1985. ROBERT E. HARKAVY, *BASES ABROAD: THE GLOBAL FOREIGN MILITARY PRESENCE* 124 (1989). The Aguada Navy Communications base provides a long-range transmitter to communicate with submerged submarines. *Id.* at 162. Aguada, Isabela, and Sabana Seca provide for communications with surface combatants. *Id.* at 163. Puerto Rican bases also have provided tracking and telemetry data for missiles tested from Cape Canaveral. *Id.* at 234. The Point Borinquen station helps to monitor solar emissions and their effect on military communications. *Id.* at 244.

180. Vieques is a small island off the southeast coast of Puerto Rico's main island. The United States Navy has been using it for live-fire military exercises for over 60 years. In June 2000, a stray bomb dropped by a Marine aviator killed a Puerto Rican civilian guard, bringing to the surface the simmering resentment of the locals over the use of their island. The Navy described Vieques as the "only place its Atlantic fleet can hold simultaneous land, air and sea exercises using live fire." *Despite Protests, Navy Resumes Shelling of Puerto Rican Island*, N.Y. TIMES, June 26, 2000, at A10. The United States has 12,375 miles of coastline. THE WORLD FACTBOOK, available at <http://www.shopthenet.net/publiclibrary/factbook96/factbook/us-l.htm> (Last visited April 8, 2001). President Clinton, during the final year of his presidency, declared that United States coastlines must be protected. Exec. Order No. 13158, May 26, 2000. While Section 2(c) of the Executive Order specifically included Puerto Rico among the areas in which "natural and cultural resources within the marine environment" are to be protected, *Id.* at § 1, apparently that does not include *all* 311 miles of coastline in Puerto Rico. THE WORLD FACTBOOK, available at <http://www.cia.gov/cia/publications/factbook/geos/rq.html> (Last visited April 8, 2001).

181. In 1982 the United States Department of State put it clearly: "[The Caribbean area's] shipping lanes are vital to U.S. defense and prosperity." Nearly one-half of U.S.

Notwithstanding the increased dependence on Puerto Rican soil for military bases and training, the United States has a long history of disregard for the health<sup>182</sup> and dignity of the Puerto Rican people.<sup>183</sup> Since the

trade, two-thirds of our imported oil, and many strategic minerals pass through the Panama Canal or the Gulf of Mexico.” JAMES N. CORTADA & JAMES W. CORTADA, U.S. FOREIGN POLICY IN THE CARIBBEAN, CUBA, AND CENTRAL AMERICA 1 (1985). Additionally, with the closing of the Panama Canal Zone to American military occupation, the Roosevelt Roads Naval Base has become even more important and Fort Buchanan has become one of the new bases for the U.S. Army South, part of the United States Southern Command, which also includes the United States Atlantic Fleet. See United States Southern Command, at <http://www.southcom.mil/home> (Last modified March 29, 2001).

182. The studies for contraception medication and the use of sterilization procedures have produced some troubling questions. See FEDERICO RIBES TOVAR, THE PUERTO RICAN WOMAN 202–203 (1972). The military tested Agent Orange in El Yunque National Rain Forest before using in it Vietnam. *Caribbean News Brief*, UPI, June 10, 1983, LEXIS, News: Wire Service Stories Library; “Environmentalists say Vieques’ delicate coral reefs have been largely obliterated. Long stretches of its once pristine beaches now stand littered with tons of shrapnel, unexploded shells, discarded military hardware, and even the radioactive debris of bombs that the U.S. Defense Department now admits were tipped with depleted uranium. The uranium-tipped weapons were used in direct violation of Pentagon rules.” James E. Garcia, *Vieques Conflict Remains Unresolved*, May 19, 2000, available at LA PRENSA SAN DIEGO, <http://www.laprensa-sandiego.org/archieve/may19/rico.htm> (Last visited April 11, 2001).

183. Teddy Roosevelt, Jr., who had been appointed governor of the island by President Herbert Hoover, called Puerto Ricans “shameless by birth” and added that he did not “know anything more comic and irritating than Puerto Rico.” ARTURO MORALES CARRIÓN, PUERTO RICO: A POLITICAL AND CULTURAL HISTORY 212, 220 (1983). Another appointed governor, Rexford G. Tugwell, later President of the University of Chicago, referred to Puerto Ricans as “mulatto, Indian, Spanish people” and said they made “poor material for social organization.” *Id.* at 232; see also *infra* note 383.

In 1932, a letter written by then-Rockefeller Institute cancer researcher Dr. Cornelius P. Rhoads was published in Puerto Rico. The good doctor wrote that working in Puerto Rico

would be ideal, except for the Porto Ricans [sic]. They are beyond doubt the dirtiest, laziest, most degenerate and thievish race of men ever inhabiting this sphere. It makes you sick to inhabit the same island with them. They are even lower than Italians. What the island needs is not public health work but a tidal wave or something to totally exterminate the population. It might then be livable. I have done my best to further the process of extermination by killing off 8 and transplanting cancer into several more. The latter has not resulted in any fatalities so far. . . . The matter of consideration for the patients’ welfare plays no role here—in fact all physicians take delight in the abuse and torture of the unfortunate subjects. . . .

TRUMAN CLARK, PUERTO RICO AND THE UNITED STATES 1917–1933 152–53 (1975); see also THOMAS MATTHEWS, LA POLÍTICA PUERTORRIQUEÑA Y EL NUEVO TRATO 41 (1975). “Rhoads admitted he had written the letter . . . but explained that it was only a form of personal recreation; he wrote fictitious letters expressing the anti-Puerto Rican sentiment among

outset of United States colonization, it was evident that the United States interest in conquering land did not extend equally to the colonized peoples.<sup>184</sup> The uses the United States has made of Puerto Rico since 1898 reveal this particularized interest.<sup>185</sup>

Contrary to scholarly statements that Puerto Rico is a forgotten American colony,<sup>186</sup> *la isla* is in fact a colony that the United States has

*some continental residents he knew, intending to use the material someday in a novel.*" CLARK, *supra*, at 154 (emphasis added); see also LUIS ANGEL FERRAO, PEDRO ALBIZU CAMPOS Y EL NACIONALISMO PUERTORRIQUEÑO 77–79 (1990); MATTHEWS, *supra*, at 42. Although the matter is currently under review by medical researchers, an investigation at the time did not link any suspicious deaths or cases of cancer to Dr. Rhoads. CLARK, *supra*, at 211. Therefore, on the record, the incident appears to reflect reprehensible attitudes, rather than genocidal conduct. Rhoads went on to become the director of the Sloan-Kettering Clinic. Today, cancer researchers eagerly accept the prestigious Cornelius P. Rhoads Award. See Walter Isaacson, *To Our Readers*, TIME, May 18, 1998, at 4.

184. The Treaty of Paris, through which Spain ceded Puerto Rico to the United States, did not guarantee United States citizenship for the inhabitants of Puerto Rico, unlike the Treaty of Guadalupe Hidalgo, which ceded conquered Mexican territory and promised Mexican inhabitants status as United States citizens. In fact, the Spaniards on the Island could choose to retain their citizenship, but everyone else on it was left in a legal limbo. This is not to say that they were not interested *at all* in the people. The United States wanted *consumers*, not citizens. See generally Román, *supra* note 3. Later, citizenship was granted to make Puerto Ricans eligible to die for "our" country, see discussion of the Jones Act, *supra* notes 118–21; REXFORD GUY TUGWELL, THE STRICKEN LAND: THE STORY OF PUERTO RICO 70 (1946), but certainly *not* to receive all the "blessings of liberty" that are supposed to accompany that citizenship. See the discussion of *Califano v. Torres* and *Harris v. Rosario*, *supra* notes 165–77.

185. The Puerto Rican colonial experience has many parallels to that of Chicanas/os. One prominent example is land dispossession. Guadalupe Luna has studied the Chicana/o experience and summarized it as follows:

Neither sovereignty nor property rights could forestall American geopolitical expansion in the first half of the nineteenth century . . . . [T]he study of Mexican land dispossession suggests both the need to expand the traditional approach to teaching property law as well as the importance of deploying the Treaty of Guadalupe Hidalgo and international law in the struggle for racial equity.

Guadalupe T. Luna, *Chicana/Chicano Land Tenure In The Agrarian Domain: On The Edge Of A "Naked Knife"*, 4 MICH. J. RACE & L. 39, 39 (1998).

186. See, e.g., Román, *supra* note 3. I do not disagree with my friend Ediberto Román on the use of "forgotten" in *his* article, because Puerto Rico *is* forgotten and frankly simply unknown by most Americans. I think, however, that Professor Román is much too kind when he states: "Thus, the United States has led much of the world in condemning colonial exploitation and yet remains forgetful about its own transgressions." *Id.* at 1209. I rather seek to emphasize his earlier conclusion that ". . . the United States has attempted to elude the colonizer label through legal fictions such as the incorporation doctrine and the creation of the commonwealth status and the half-truths repeatedly told to the international community." *Id.* at 1124–25 (footnote omitted). The only substantial disagreement that I have with Professor Román is with his statement that "as Puerto

never forgotten.<sup>187</sup> The United States has designed a process of governance that *hides* Puerto Rico in plain view. Puerto Rico's carefully crafted legal regime is designed to obfuscate the true colonial status of Puerto Rico because it is both part of the United States legal structure but different and apart from it. To be sure, such a dichotomy was necessary for the United States to further its post-World War II movement for self-determination of peoples.<sup>188</sup> Thus, externally, the United States needed to hide its own colonial empire from allies to whom it was preaching about de-colonization, and from the United Nations.<sup>189</sup>

As plainly explained in *Balzac*, while internally the Puerto Ricans are viewed as United States citizens, they are nonetheless viewed as social and legal "Others." The United States hides Puerto Rico from "mainland" "real *estadounidenses*" by socially constructing Puerto Ricans in the United States as greedy immigrants<sup>190</sup> and Puerto Ricans in Puerto Rico as ungrateful foreigners.<sup>191</sup> At the same time, the United States legally constructs Puerto Ricans as second-class citizens, by giving them statutory United States citizenship which—far from an act of democratic kindness—proves to be the ultimate weapon of the Empire. The United States imposes on the Puerto Ricans each and every burden of American

---

Rico's strategic importance has diminished, the United States has become less interested in its colonized possession and has undermined Puerto Rico's economy by stripping it of the U.S.-based economic development incentives that were critical to Puerto Rico's economic viability." *Id.* at 1125. I agree that the United States has undermined the Puerto Rican economy. However, as I see it, Puerto Rico has become increasingly strategically important to the United States, as a place for military training, such as at Vieques, and as a location for military installations, such as Roosevelt Roads and others, in an era when the Philippines are closed to them and the Panama Canal Zone has been turned over to the Panamanians. Thus, Puerto Rico is back to being "the Malta of the Caribbean" and a critical link in United States military strategy for the defense of the Panama Canal and operations in South America.

187. This was true from the very conception of the Second Colony, as exemplified by the following correspondence:

Assistant Secretary of the Navy Theodore Roosevelt, in a personal letter to Senator Henry Cabot Lodge, wrote: ". . . do not make peace until we get Porto Rico [sic]." Lodge replied: "Porto Rico [sic] *is not forgotten and we mean to have it*. Unless I am utterly . . . mistaken, the administration is now fully committed to the large policy that we both desire."

THE PUERTO RICANS, *supra* note 35, at 89 (emphasis added).

188. See, e.g., Puerto Rico's New Self-governing Status, March 21, 1953, DEP'T ST. BULL., Apr. 20, 1953, at 584-85 (U.S./U.N. press release).

189. See *supra* Part I.B.3.

190. See, e.g., Albert M. Carillo, *Expert Report of Albert M. Carillo*, 5 MICH. J. RACE & L. 339, 344, 350-52 (1999).

191. See *infra* notes 225-27, and accompanying text.

citizenship, such as taxation,<sup>192</sup> military service, and subjection to the criminal laws of the United States.<sup>193</sup> Conversely, the United States gives to the United States citizens who live in Puerto Rico the lowest levels of benefits compared to any citizen living in the states.<sup>194</sup> Finally, the colonial power attempts to shift the burden for taking the initiative on status determination to the Puerto Rican people.<sup>195</sup> The next Part will discuss how Puerto Ricans culturally construct themselves, and how this conflicts with the legal and social construction of their citizenship imposed by the United States.

## II. LA TIERRA DE BORÍNQUEN: FLUIDITY IN THE CONSTRUCTION OF PUERTO RICAN CULTURAL NATIONHOOD

*Preciosa te llaman los bardos  
que cantan tu historia;  
no importa el tirano te trate  
con negra maldad.  
Preciosa serán sin bandera,  
sin lauros, ni gloria.  
Preciosa, Preciosa  
te llaman los hijos  
de la libertad.*

—Rafael Hernández<sup>196</sup>

---

192. Contrary to the usual assertion that Puerto Ricans do not pay United States taxes, see, e.g., *Hundreds Gather to Welcome Pardoned Militants in Puerto Rico*, N.Y. TIMES, Sept. 12, 1999, at A27 (asserting that “Puerto Ricans do not pay federal taxes”), Puerto Ricans on the island contribute billions of dollars annually to the United States treasury. See 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, 176–77 n.68–69 and accompanying text (1998) (“The local personal income tax in Puerto Rico is higher than in most states, including both federal and local contributions. The people of Puerto Rico also pay other federal taxes and user fees such as Social Security, unemployment and Medicare taxes, and customs duties. According to Barceló [the Resident Commissioner], the U.S. Treasury collected \$2.5 billion from the island in 1993.”).

193. See *id.* Compare *United States v. Acosta Martínez*, 106 F. Supp. 2d 311 (D. P.R. 2000) (holding the federal death penalty statute inapplicable in Puerto Rico because it is incompatible with the Puerto Rico constitution, which was approved by Congress).

194. See the discussion of *Califano v. Torres* and *Harris v. Rosario*, *supra* notes 165–77.

195. See the discussion *infra* notes 438–41 and accompanying text.

196. Asociación Puertorriqueña de Coleccionistas de Música Popular (ACOMPO), 2 *La Canción Popular* 71 (1987) [*hereinafter La Canción Popular*]. Author’s translation: Beautiful/Precious call you the bards/ who sing your history;/ no matter if the tyrant treats you/ with black malice/ Beautiful you shall be without a flag, without laurels nor glory./ Beautiful, Beautiful/ call you the sons of liberty. This song was written in the 1930s, and the tyrant to which it refers is the United States. In order to avoid the openly political

When the Americans got to the shores of Guánica Bay on July 25, 1898, they were met by cultural citizens of Puerto Rico, not simply the inhabitants of a distant Spanish outpost.<sup>197</sup> The Puerto Ricans, in 1898, politiqued, studied, prayed, sang, and loved in Spanish. More than a century later, they still do, despite concerted efforts by the United States government to destroy this culture during the first few decades of occupation.

What does it mean for people to “belong” to a cultural community—to what extent are individuals’ interests tied to, or their very sense of identity dependent on, the particular culture? And do people have a legitimate interest in ensuring the continuation of their own culture, even if other cultures are available in the political community—is there an interest in cultural membership which requires independent recognition in a theory of justice?<sup>198</sup>

In the island’s context, Puerto Rican cultural citizenship “requires independent recognition in a theory of justice” because under contemporary communitarian theory a cultural form of nationhood, combined with identifiable territory, must be legally recognized in order to achieve true justice. Indeed, the existence of Puerto Rican cultural citizenship results in the construction of Puerto Ricans as “Others” relative to “real” Americans—the people of the United States. In order to attain justice and full citizenship, this “Othering” must differentiate and empower, not marginalize.<sup>199</sup>

---

statement, many singers would substitute the word “tyrant” with “destiny.” The use of the phrase “black malice” is disturbing, probably an example of internalized oppression, since Rafael Hernández was Black.

197. This is much like the Spaniards being met by the Taino people when they arrived on Puerto Rico’s shores. However, unlike the Taino culture, which was destroyed, Puerto Rican culture has managed to survive the new invader.

198. WILL KYMLICKA, *LIBERALISM COMMUNITY AND CULTURE* 3 (1989).

199. Because this is a deployment of narrative, some scholars might argue that it is thus “unscientific”:

[Critics claim that] narrative seeks to change perspectives of the dominant group through stories instead of reason. Thus, the use of narrative is anti-reason. This argument is not persuasive. The storyteller’s reliance on something other than rational argument to change points of view is *consistent with scientific practice*. . . . [S]cientific revolutions occur when there is a paradigm shift. During such a shift, scientists begin to look at the world in different ways. Such a paradigm shift is a conversion experience which . . . cannot be produced by rational argument or reason. Thus, the position of the advocates of narrative is at least as strong as actual scientific practice.

Martínez, *supra* note 25, at 704 (emphasis added; citations omitted).

Negatively constructing a minority as a different (and lesser) “Other” is often a tool deployed by the normative group to marginalize a different culture.<sup>200</sup> For example, as discussed in the preceding section, the normative United States culture has legally constructed Puerto Ricans as second-class citizens.

“Other,” however, can also be used positively to empower a previously marginalized people,<sup>201</sup> provided that we then avoid the creation of an essentialized version of the group, which sees “Othering” as an end in itself,<sup>202</sup> rather than as a step on the way to a just society.<sup>203</sup>

Even though Puerto Rico is not a sovereign nation, there is an identifiable Puerto Rican cultural national consciousness that developed during the 400 years of the Spanish colonial rule.<sup>204</sup> Although there were natives who had lived in *Boriquén* for centuries prior to the arrival of Columbus,<sup>205</sup> the Taino were essentially annihilated during the first few years of the Spanish conquest. Therefore, any remaining native influence is quite attenuated, and it was the process of conquest and colonization by the settlers who were brought to or allowed to enter the island that produced the Puerto Rican peoples. The distinction between *criollas/os* (native-born Puerto Ricans) and *peninsulares* (Spaniards born in Spain) developed very early in the colony. However, ultimately, the *puertorriqueñas/os* emerged as an identifiable peoples during the 19th Century, before the United States invasion.<sup>206</sup>

The next section of this Part is a description of the relevance of Puerto Rican cultural nationhood, and a description of what Puerto Rican culture actually looks like, even its faultlines, and how it sets Puerto Ricans apart from the dominant *anglo/o* culture of the United

200. Professor Adeno Addis identifies this negative use of “Othering.” Addis, *supra* note 17, at 126 (an imperfect society “at best allows minorities to be tolerated as the marginal Other”).

201. Professor Addis’s work is again enlightening. See *id.* at 127 (“By ‘shared identity’ I mean to refer to an identity that bonds together, partially and contingently, minorities and majorities, such that different cultural and ethnic groups are seen, and see themselves, as networks of communication where each group comes to understand its distinctiveness as well as the fact that distinctiveness is to a large degree defined in terms of its relationship with the *Other*.” (emphasis added)).

202. This could be the undesirable, and perhaps unintended product of misguided forms of communitarianism. See *id.* (communitarians make the mistake of viewing “the notion of shared identity” as “a final state of harmony” (citations omitted)).

203. See generally RUTH LISTER, *CITIZENSHIP: FEMINIST PERSPECTIVES* (1997); ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

204. See generally MALAVET VEGA, *supra* note 37, at 502–04 (describing Puerto Rican cultural national consciousness as expressed in popular music).

205. See *supra* notes 35–36.

206. See MALAVET VEGA, *supra* note 37, at 542–47 (describing differences between Puerto Rico and Spain and the 19th century South American republics).



States. The section describes how Puerto Rican popular culture is a non-sovereign form of nationhood and cultural citizenship. The second section details how Puerto Rican culture resisted and survived the culturally imperialistic efforts of the United States to “Americanize” the Puerto Ricans because of the impossibility of substituting them on the island. The section also discusses the political repression that accompanied and then followed the Americanization debacle.

#### A. Nationhood: Reality is in Popular Culture

##### 1. The Importance of the Puerto Rican Cultural Narrative of *La Nación Puertorriqueña* (The Puerto Rican Nation)

Defining “culture” can be a difficult process for the critical scholar. For example:

While claiming that they had no wish to add a 165th formal definition of culture to the 164 they had examined, [two important cultural studies scholars] did finally sum up the way in which ‘this central idea is now formulated by most social scientists:’ ‘Culture consists of patterns, explicit and implicit, of and for behavior acquired and transmitted by symbols.’ And ‘the essential core of culture consists of traditional . . . ideas and especially their attached values.’<sup>207</sup>

Culture has many forms of expression, among them literature, history, the economy, music, law, the arts, folklore, dance, religion, education, language, and politics.<sup>208</sup> It “includes the institutions, prejudices, ideals, attitudes, tools, superstitions, truths, errors and operating projects within the community.”<sup>209</sup>

207. Compare the extended discussion of culture and the hundreds of competing definitions of the term in ADAM KUPER, *CULTURE: THE ANTHROPOLOGISTS’ ACCOUNT* 58 (1999) (“While claiming that they had no wish to add a 165th formal definition of culture to the 164 they had examined, Kroeber and Kluckhohn did finally [give their own definition]”).

208. See generally *PROBLEMAS DE LA CULTURA EN PUERTO RICO*, FORO DEL ATENEO PUERTORRIQUEÑO, 1940 (1976) (discussing Puerto Rican culture). The symposium was held in 1940, but the text was published in 1976. Alexander Goldenweiser states that culture is “a generic term that we use to encompass everything that man has accomplished over what has been given to him by nature, in his attempts to resolve the problems that life presents to him.” Jaime Benítez, *Definiciones de Cultura*, in *PROBLEMAS DE LA CULTURA*, *supra*, at 11 (quoting Alexander Goldenweiser, *Cultural Anthropology*, in *THE HISTORY AND PROSPECTS OF THE SOCIAL SCIENCES* 210–54 (H.F. Barnes ed., 1925)) (translation by author).

209. Benítez, *supra* note 208, at 19.

In constructing this broad and complex concept of culture, this Article focuses specifically on popular culture, as opposed to “high culture” or “mass-media culture.”<sup>210</sup> Accordingly, it reviews the production of culture by the people of Puerto Rico. This work maintains that Puerto Rican culture, particularly its popular culture, is a strong affirmation of nationhood.<sup>211</sup> Preliminarily, however, it is important to interrogate whether it is possible to promote and protect Puerto Rican cultural identity without developing an essentialized version of that culture that enforces just another version of normativity.

Reconciling the essentialist critique and non-essentialist desire to identify Puerto Rican culture accurately as a possibility is the necessary first step to any serious and effective deployment of that culture, in its many forms and visions. As a matter of theory, the goals are easily stated: to produce a non-essentialist, unromanticized representation of Puerto Rican culture that can be contrasted from United States culture. The narrative of Puerto Rican cultural nationhood and citizenship itself serves as a juxtaposition to the United States-sponsored normative narrative that effects the (mis)representation of *la cultura Puertorriqueña* (the Puerto Rican culture).

Psychology has long recognized that narrative is

the primary form by which human experience is made meaningful. Narrative meaning is a cognitive process that organizes human experiences into temporally meaningful episodes. Because it is a cognitive process, a mental operation, narrative meaning is not an ‘object’ available to direct observation. However, the individual stories and histories

---

210. KUPER, *supra* note 207, at 4–5.

Culture is the gift of educated taste that marks off a lady or a gentleman from the upstart. For those in the Marxist tradition, culture has its place in the larger class war. High culture cloaks the extortions of the rich. Ersatz mass culture confounds the poor. Only popular cultural traditions can counter the corruption of the mass media.

*Id.*

211. I have long had an interest in the serious study of our culture. I have edited several books on this subject, mostly by my father. See, e.g., PEDRO MALAVET VEGA, *NAVIDAD QUE VUELVE* (1987) [*hereinafter*, MALAVET VEGA, NAVIDAD] (detailing Puerto Rican Christmas traditions and songs); PEDRO MALAVET VEGA, *DEL BOLERO A LA NUEVA CANCIÓN* (1988) [*hereinafter* MALAVET VEGA, BOLERO] (describing the evolution of Puerto Rican popular music since 1950); PABLO MARCIAL ORTÍZ RAMOS, *A TRÉS VOCES Y GUITARRAS* (1991) (detailing the development of the Latin American voice-and-guitar trio form of music); MALAVET VEGA, *supra* note 37; PEDRO MALAVET VEGA, *LAS PASCUAS DE DON PEDRO* (1994) [*hereinafter* MALAVET VEGA, PASCUAS].

that emerge in the creation of human narratives are available for direct observation.<sup>212</sup>

Thus, peoples' expressions about themselves—what is identified here as a peoples' popular cultural narratives—is a lens into their lives. The Puerto Rican narratives are a lens into the cultural nationhood of the *isla* and into the Puerto Rican citizenship self-construct.<sup>213</sup>

In the context of the international law debate over the treatment of peoples and cultures, self-determination in mapping cultural nationhood and citizenship is a crucial element in an anti-essentialist process.<sup>214</sup> Moreover, to the extent that essentialist “othering” links race to ethnicity and nationality,<sup>215</sup> the perspective of Critical Race Theory is needed to properly structure and re/form the doctrine.<sup>216</sup>

212. DONALD E. POLKINGHORNE, NARRATIVE KNOWING AND THE HUMAN SCIENCES 1 (1988).

213. However, storytelling, no matter how invaluable an insight into cultural tropes, is not an uncontroversial communications model. For three lengthy anti-narrative critiques, see generally Tushnet, *supra* note 22; Posner, *supra* note 22; FARBER & SHERRY, *supra* note 22. I discuss the debate over narrative generally in my essay Pedro A. Malavet, *Literature and the Arts as Antisubordination Praxis: LatCrit Theory and Cultural Production: The Confessions of an Accidental Crit*, 33 U.C. DAVIS L. REV. 1293 (2000).

214. The International Covenant on Civil and Political Rights provides: “[E]thnic, religious or linguistic minorities [have a right] to enjoy their own culture, to profess and practice their own religion, [and] to use their own language.” G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 56, U.N. Doc. A/6316 (1966).

215. In the international law discourse, race is linked to ethnicity and nationality, thus collapsing nations into racial classifications. The International Convention on the Elimination of Race Discrimination defines discrimination thusly:

. . . any distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

*International Convention on the Elimination of All Forms of Racial Discrimination*, Part I, Art. 1, opened for signature March 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereinafter *Race Convention*]. The Race Convention notes as its purpose “the achievement of one of the purposes of United Nations which is to promote and encourage universal respect for an observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion . . .” *Id.* at 212–13.

216. For a general discussion of international law from a LatCrit perspective, see, e.g., Berta Esperanza Hernández-Truyol, *Women’s Rights As Human Rights—Rules, Realities And The Role Of Culture: A Formula For Reform*, 21 BROOK. J. INT’L L. 605 (1996). Professor Hernández-Truyol explains how human rights have been used in the women’s rights discourse:

For example, in the reproductive freedom area, women’s rights activists have transformed the concept of reproductive rights from the narrow concept of women’s health in maternity and childbirth (Which stereo-

Understanding why we cannot abandon the field of civil and human rights discourse to White Angla/o United States academics requires an understanding of the concept that “truth” is not “neutral”<sup>217</sup>—especially legal truth,<sup>218</sup> which, in the context of citizenship, much like in the context of race and ethnicity, is plainly socially constructed as a result of normativity and essentialism.<sup>219</sup> Thus, narratives can be and are used by

---

types “women as wombs”), to a holistic view coalescing a great amalgam of rights including first, second, and third generation human rights. These generations of rights are all promised by, and included in, the documents that constitute the foundation of international human rights norms, i.e., the Universal Declaration, the ICCPR, and the Economic Covenant, as well as various other international, regional, and conference documents such as the Women’s Convention, the Race Convention, the American Convention, the African Charter, the European Convention, the Cairo Programme of Action, the Social Summit Declaration and Programme of Action, and the Beijing Platform for Action for the Fourth World Conference on Women. These instruments provide for the protection of rights to privacy, health, equality and non-discrimination, education, religion, travel, family life, decision-making regarding the number of children and their spacing, information, life, liberty, security of the person, integrity of the person, freedom from torture, freedom from slavery, political participation, free assembly and association, work, enjoyment of the benefits of scientific progress, development, environment, peace, democracy, self-determination, and solidarity, to name various of the rights pertinent to the protection of women’s international status and condition as human beings.

*Id.* at 622–29 (citations omitted). See generally Hernández-Truyol, *supra* note 11 (explaining how to use critical legal theory to reform the liberal origins of international law’s protection of human rights and, conversely, how to use human rights theory to complement United States critical legal theory).

217. Cf. Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 548 (1991) (“Whenever one raises the question of including the personal, especially the personal experiences of people of color, one hears the response by many that color does not and cannot matter to the legal discourse. ‘Truth is colorblind,’ is the unstated, but assumed, premise that undergirds the discussion in this area.”).

218. As a teacher of civil procedure, I emphasize to my students that the judicial resolution of disputes requires that all parties to a case be afforded due process of law. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (finding state exercise of personal jurisdiction over nonresident defendant subject to 14th Amendment Due Process Clause); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (holding state pre-judgment property seizure procedures subject to 14th Amendment Due Process Clause). Due process requires that the judge base his or her decision on the “truth,” which in this context means the “legal truth” that is established in court, on the basis of applicable rules.

219. See Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 64, 64 (Richard Delgado ed., 1995) (stating that if the discussion comes from the dominant group, it will suffer from “a form of shared reality in which its own superior position is seen as natural”); Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal*

the dominant group to enforce their “truth” and to undermine minority rights.<sup>220</sup> Accordingly, differently located epistemological narratives are essential in the culture debates over citizenship and nationhood within a LatCritical international legal context.

The narrative about Puerto Ricans by the United States carefully cultivates the view that the people of Puerto Rico are too Brown,<sup>221</sup> too Latina/o<sup>222</sup> and too “foreign”<sup>223</sup>—too unassimilable<sup>224</sup>—to be incorporated into the United States.

*Thought*, 139 U. PA. L. REV. 933 (1991) (offering a critical review of normative jurisprudence); Linda S. Greene, *Multiculturalism as Metaphor*, 41 DEPAUL L. REV. 1173, 1175–82 (1992) (stating that a “normative vacuum” produces a lack of Supreme Court enforcement of true equality).

220. See generally ROBERT S. CHANG, *DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE* 12 (1999). Professor Chang gives examples of how American popular culture, especially in film, constructs Asian Americans. He presents an excellent comparative analysis of the White American vs. “Other” races construct in D.W. Griffith’s *The Birth of a Nation*—Black bodies “violating” White women are used to play on White Americans’ fear of miscegenation—and Cecil B. DeMille’s *The Cheat*, which portrayed a Japanese man as a “sexual transgressor,” again in order to play on the miscegenation fears of White Americans. *Id.* at 12, 13–17.

221. During the Congressional debate on the 1917 Organic Act for Puerto Rico, United States Representative Joseph Cannon stated that the “the racial question” made the Puerto Ricans ineligible for statehood and made them suspect as “people competent for self-government.” PEREA ET AL., *supra* note 88, at 346. He supported his argument with the following statistical analysis: “Porto Rico is populated by a mixed race. About 30 per cent pure African. . . . 75 to 80 percent of the population . . . was pure African or had an African strain in their blood.” *Id.*

222. Puerto Ricans are constructed as the Other, much as Latinas/os are generally so constructed within United States borderlands:

The existing, essentialist notion of the “American” has excluded “others” who look or sound foreign to the self-selected norm setters, creating a class of aliens within the borders. This “American” ideal excludes many, particularly Latinas/os, who cannot blend into the “melting pot” because of the colorizing, feminizing, spanishizing, and latinizing consequences of their membership. This “American” definition of normativity has created an exclusive/elite community with *fronteras* denying access to “others.”

Hernández-Truyol, *supra* note 11, at 926.

223. The paradox of citizenship for Puerto Ricans is rather striking. On the one hand, they are citizens of the United States, but on the other hand, they are socially constructed as being “foreign.” Pro-independence Puerto Ricans always have a hard time with this one. Since they *want* to be foreign, relative to the United States, they want to be citizens of the Republic of Puerto Rico. For a good scholarly discussion of the paradox, see Román, *supra* note 121. For an American perspective on Puerto Ricans being constructed as *foreign*, see TUGWELL, *supra* note 184, at 70, 481.

224. See *Johnson v. MacIntosh*, 21 U.S. 543, 8 Wheat. 543 (1823). In this case the Supreme Court ruled that the “right of discovery” and the “right of conquest” gave Europeans legal title over the American continents. It stated as well that Native Americans could not be *assimilated*, i.e., they could not be “incorporated with the victorious

More recently, Puerto Ricans have been portrayed as “unpatriotic”<sup>225</sup> and “ungrateful” in the public discourses over the release of Puerto Rican Political prisoners,<sup>226</sup> and over the protests of the Navy’s use of Vieques as a bombing range.<sup>227</sup> In addition to legally constructing Puerto Ricans as second-class citizens, as detailed in Part I.B, the United

nation, and become subjects or citizens of the government with which they are connected.” *Id.* at 584–85. Incorporation was not “practicable,” thus requiring the Europeans to choose between “abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword.” *Id.* at 589. The Supreme Court justified genocide as follows:

When the conquest is complete, . . . the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, . . .

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

*Id.* at 589–90. On Latina/o assimilation generally, see Kevin R. Johnson, “Melting Pot” or “Ring of Fire”?: *Assimilation and the Mexican-American Experience*, 85 CAL. L. REV. 1259 (1997) (providing a poignant discussion of growing up Latina/o in California); George A. Martínez, *Latinos, Assimilation and the Law: A Philosophical Perspective*, 20 CHICANO-LATINO L. REV. 1 (1999) (drawing analogies between American demands of assimilation and *Star Trek’s* Borg characters).

225. See, e.g., Editorial, *The Pentagon and Vieques*, WASH. POST, Oct. 22, 1999, at A32, 1999 WL 23310076 (“Chairing a Vieques hearing Tuesday, Sen. John Warner said that, doing their patriotic duty, his own constituents in Quantico sit closer to an active live-fire range than do residents of Vieques.”).

226. An article in the *New York Times* reflects this latter attitude. On September 13, 1999, the paper ran an article headlined “Hundreds Gather to Welcome Pardoned Militants in Puerto Rico.” The last paragraph of that story read as follows: “As residents of a United States commonwealth, Puerto Ricans do not pay Federal taxes but receive \$11 billion annually in Federal aid. They are United States citizens but cannot vote for President.” *Hundreds Gather*, *supra* note 192.

The statement, as drafted, is factually incorrect. Puerto Ricans do not pay federal income taxes, but they do pay Social Security and FICA taxes on income earned in Puerto Rico. See *supra* note 192. But, more importantly, the article implies that those who believe in Puerto Rican independence are being ungrateful to the United States for its “generosity” in providing “federal aid.” This characterization is carefully calculated to create a false impression of Puerto Ricans as living off the “generosity” of the United States. Puerto Rico is a United States Territory, and Puerto Ricans are United States citizens. Therefore, the United States is simply fulfilling its obligations to citizens of the United States, not providing “aid” out of the goodness of its heart. In fact, the United States citizens residing in Puerto Rico receive federal benefits at a rate lower than citizens residing in the Continental United States. See discussion of *Harris v. Rosario*, *supra* notes 169–70 and accompanying text.

227. The use of Vieques is discussed *supra* note 180.

States reinforces this de-valuation of Puerto Rican citizenship and nationhood by using stereotyping narratives about Puerto Rican difference and Otherness.<sup>228</sup>

However, minority and subordinated communities can utilize narratives to counter the “singular homogenized experience” produced by the essentializing of identities imposed by majority society. The power of Puerto Rican cultural nationhood can be used as a vehicle to speak the truth to “power”<sup>229</sup>—the dominant American society.<sup>230</sup> Thus, the narra-

228. *West Side Story* is probably the dominant narrative of the Puerto Rican story by and for *estadounidenses*. Take the lyrics to *America*:

ANITA: Puerto Rico: You ugly island. . . . Island of tropic diseases. Always the hurricanes blowing, Always the population growing. . . . And the money owing. And the babies crying. And the bullets flying . . . .

. . .

ROSALIA: I like the city of San Juan.

ANITA: I know a boat you can get on.

ROSALIA: Hundreds of flowers in full bloom.

ANITA: Hundreds of people in each room!

. . .

ROSALIA: I'll drive a Buick through San Juan.

ANITA: If there's a road you can drive on!

ROSALIA: I'll give my cousins a free ride.

ANITA: How can you get all of them inside?

. . .

ROSALIA: I'll bring a TV to San Juan.

ANITA: If there's a current to turn on!

ROSALIA: I'll give them new washing machine.

ANITA: What have they got there to keep clean?

LEONARD BERNSTEIN ET AL., *America, on WEST SIDE STORY* (Columbia Records 1995). The manner in which this song is performed is offensive, with affected language that mirrors only the worst of stereotypes about Puerto Ricans.

229. “Speaking truth to power” was most recently invoked by Professor Anita Hill’s book of that title, in which she describes her experience during the confirmation hearings for Supreme Court Justice Clarence Thomas, but it had been used before. See generally ANITA HILL, *SPEAKING TRUTH TO POWER* (1997); MANNING MARABLE, *SPEAKING TRUTH TO POWER: ESSAYS ON RACE, RESISTANCE, AND RADICALISM* (1996); AARON B. WILDAVSKY, *SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS* (1987).

230. In fact, it has been done for a very long time in the context of the American debate over race. See, e.g., FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (B. Quarles ed., Belknap Press 1967) (1845).

tive of Puerto Rican cultural nationhood developed below serves as an antidote to the normative narrative promoted by the United States.

## 2. An Anti-Essentialist View of Puerto Rican Cultural Nationhood

While reflecting a social consciousness distinct from that of its two colonial rulers, Puerto Rican popular culture is both the product and the prisoner of 500 years of history under Spanish and United States colonial rule. Puerto Rican culture is not ideal; it has racialized, ethnicized, and gendered faultlines that will be engaged in this Article. The pivotal point for this Article is that Puerto Rico's culture is different from the United States' culture. Puerto Rican culture represents a peoples who had a distinct consciousness before the first *estadounidense* came ashore in 1898, because the *Puertorriqueña/o* was not then culturally Spanish and is not now culturally "American." Accordingly, Puerto Rican cultural nationhood, under international post-colonialist principles, deserves legal sovereignty. Such a paradigmatic shift appears to necessitate a transition to independence from subordination—a separate passport.<sup>231</sup>

Culturally, Puerto Rico was a Latin American country when the first United States troops came ashore in Guánica in 1898. Today, it is still culturally a Latin American country, populated by Latinas and Latinos, despite the strong efforts to "Americanize" the country during the early part of United States colonial rule.<sup>232</sup>

It is noteworthy that, because of the ongoing colonial experience, one can speak of Puerto Rican cultures: one for the island and another for the culture of the Puerto Ricans who reside on the mainland.<sup>233</sup> The two are in fact linked into a broader, diverse, Puerto Rican cultural experience. However, while this Article acknowledges these borderlands and intersectionalities, it focuses on Puerto Rican culture on the island, because that is the culture that will determine the future of the *isla*.<sup>234</sup>

231. This is needed at least as a transitional step on the way to a post-colonial relationship between the two cultures, as discussed in Part IV *infra*.

232. See generally NEGRÓN DE MONTILLA, *supra* note 1; see *infra* Part II.B.1.

233. Puerto Rico has almost four million residents, and there are more than 2.7 million Puerto Ricans on the United States mainland. RIVERA-BATIZ & SANTIAGO, *supra* note 18, at 23, 127 (stating that the 1990 census recorded 3.5 million residents of Puerto Rico and 2.7 million Puerto Ricans on the mainland). On the cultural links between mainland and island Puerto Rican communities generally, see RUTH GLASSER, *MY MUSIC IS MY FLAG: PUERTO RICAN MUSICIANS AND THEIR NEW YORK COMMUNITIES, 1917–1940* (1995); ANGEL G. QUINTERO RIVERA, *¡SALSA SABOR Y CONTROL!: SOCIOLOGÍA DE LA MÚSICA "TROPICAL"* (1998).

234. While the theory of justice developed herein accounts for and encourages Puerto Ricans in exile to return to the island, it does recognize that on the one hand not everyone will want or be able to return to Puerto Rico, and on the other hand, the colonial



The Spanish Colony of 1493 to 1898 created, for worse and for better, Puerto Rican culture. But this society is not the culture of the Taino natives who greeted Columbus in the Caribbean; it is not the culture of the Africans, free and enslaved, who came or were brought to the island; and it is not the culture of the *conquistadores*, Spanish or *estadounidense*. Rather it is a separate and distinct hybrid that forms the basis for the thesis of this work. The Spaniards effectively designed the blueprint for the gender, cultural, religious, ethnic, and racial mix on the island by destroying the natives, raping the native women, bringing in settlers, allowing immigration, and importing African slaves. The Spanish then proceeded legally to define and organize their practically constructed local society.<sup>235</sup>

Within this complex context, Puerto Ricans started to construct a Puerto Rican selfhood—a separate and distinct history.<sup>236</sup> The result of that process is that the prevailing society in Puerto Rico is today Spanish-speaking, largely Catholic, and racially diverse. Unfortunately, like many other societies, Puerto Rican culture is also heteropatriarchal,<sup>237</sup> sexist,<sup>238</sup> racist,<sup>239</sup> homophobic,<sup>240</sup> and elitist.<sup>241</sup> An empirical study of

nature of the island is determined by both its distinct culture *and* territorial identity. Accordingly, the future of the colony must be determined by those who reside there.

235. This is not to suggest that there were no other influences. Immigration and smuggling were major parts of the Puerto Rican experience during the Spanish colonial period. See generally INMIGRACIÓN, *supra* note 95.

236. On the development of Puerto Rican culture during the 400 years of Spanish rule, see generally MALAVET VEGA, *supra* note 37. For an interesting collection of historical Puerto Rican folktales, mostly dating to the Spanish period, see ROBERT L. MUCKLEY & ADELA MARTÍNEZ SANTIAGO, *STORIES FROM PUERTO RICO/HISTORIAS DE PUERTO RICO* (1999).

237. See generally RAFAEL L. RAMÍREZ, *WHAT IT MEANS TO BE A MAN: REFLECTIONS ON PUERTO RICAN MASCULINITY* (Rosa E. Casper trans., 1999); FRANCES R. APARICIO, *LISTENING TO SALSA: GENDER, LATIN POPULAR MUSIC, AND PUERTO RICAN CULTURES* (1998).

238. See especially two narratives about Puerto Rico and exile told from feminist perspectives, JUDITH ORTIZ COFER, *SILENT DANCING: A PARTIAL REMEMBRANCE OF A PUERTO RICAN CHILDHOOD* (1990); and ESMERALDA SANTIAGO, *WHEN I WAS PUERTO RICAN* (1993); see also APARICIO, *supra* note 237. On the plight of Latina immigrants to the United States more generally, see OLIVA M. ESPÍN, *LATINA REALITIES: ESSAYS ON HEALING, MIGRATION, AND SEXUALITY* (1997); OLIVA M. ESPÍN, *WOMEN CROSSING BOUNDARIES: A PSYCHOLOGY OF IMMIGRATION AND TRANSFORMATIONS OF SEXUALITY* (1999).

239. For a provocative challenge of the traditional views on Puerto Rican identity, particularly the denial of existing racism and race-based hierarchies, see JOSÉ LUIS GONZÁLEZ, *EL PAÍS DE CUATRO PISOS Y OTROS ENSAYOS* (1980); KINSBRUNER, *supra* note 39.

240. RAMÍREZ, *supra* note 237, at 92.

241. See, e.g., EILEEN J. SUÁREZ FINDLEY, *IMPOSING DECENCY: THE POLITICS OF SEXUALITY AND RACE IN PUERTO RICO, 1870–1920* (1999) (focusing mainly on sexuality and

Puerto Rican “intolerance” found that the test subjects were openly willing to admit a strong dislike for homosexuals, who were the identified group that was most likely to suffer from discrimination.<sup>242</sup> The same study also identified xenophobia<sup>243</sup> and class discrimination<sup>244</sup> among Puerto Ricans. But, despite its internal faultlines, fundamentally, Puerto Rican culture is different; it is “Other” than the normative narrative about the Anglo United States culture.<sup>245</sup>

The law and its institutions, starting with those imposed by the Spaniards, are an important part of Puerto Rican culture. Both reflect a mixture of its two colonial rulers. In the area of constitutional, criminal, administrative, and procedural law, Puerto Rico has a system that has been forged by United States’ influence.<sup>246</sup> In private law, especially those areas covered by the Civil Code,<sup>247</sup> Puerto Rico bears an unmistakable

---

race, but using class as an essential context for its discussion); AURORA LEVINS MORALES, *MEDICINE STORIES: HISTORY, CULTURE AND THE POLITICS OF INTEGRITY* 93–95 (1998).

242. Jorge Benítez Nazario, *La Intolerancia y la Cultura Puertorriqueña*, in *LAS CARPETAS: PERSECUCIÓN POLITICA Y DERECHOS CIVILIES EN PURTO RICO* 117–32 (Ramón Bosque Pérez & José Javier Colón-Morera eds., 1997) (finding that gay men and lesbians were more likely to suffer from discrimination than the second-highest group, ex-convicts).

243. Anti-“foreigner” feelings were expressed, with Dominicans as the overwhelming target (54 out of 77 respondents who express anti-foreigner views). See *id.* at 126. For an excellent study of the treatment of Dominicans in Puerto Rico, see MILAGROS ITURRONDO, *VOCES QUISQUEYANAS EN BORINQUEN* (2000).

244. “Other social origin” was identified as the basis of discrimination by the study. See Benítez Nazario, *supra* note 242, at 126. However, the definition of “social origin” is unclear.

245. In this regard, this Article seeks to avoid resolving the dispute over multiculturalism within the United States communities. In order to create the distinction that is important herein, the Article will contrast Puerto Rican culture to the type of vision of American culture reflected, for example, in *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922), which assumed the existence of a common law, Anglo-Saxon American cultural paradigm. See *supra* notes 122–30 and accompanying text.

Additionally, it is not the purpose of this Article to engage in comparative analysis of the positive and negative aspects of each culture. This Article does not intend in any way to articulate a competition among cultures in order to declare some kind of “natural” or “moral” victory or inherent superiority of Puerto Rican culture over the United States culture, beyond the Puerto Rican culture’s ability to survive.

246. See generally MALAVET VEGA, *DERECHO CONSTITUCIONAL*, *supra* note 48; JOSÉ TRÍAS MONGE, *EL CHOQUE DE DOS CULTURAS JURÍDICAS IN PUERTO RICO* (1991).

247. Principally these areas are Family Law, Contract, Property and Torts. See generally Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, a Historical and Comparative Model*, 19 HASTINGS INT’L. & COMP. L. REV. 389 (1996) [*hereinafter* Malavet, *Counsel*]; Pedro A. Malavet, *The Non-Adversarial, Extra-Judicial Search For Legality And Truth: Foreign Notarial Transactions As An Inexpensive And Reliable Model For A Market-Driven System Of Informed Contracting And Fact-Determination*, 16 WIS. INT’L L.J. 1 (1997) [*hereinafter* Malavet, *Non-Adversarial*]; Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?*, 31 J. MARSHALL L. REV. 945 (1998) [*hereinafter* Malavet, *Monopoly*].

Spanish influence.<sup>248</sup> Despite the clash of the two different legal cultures,<sup>249</sup> Spanish civil law on the one hand, and Anglo-American common law on the other, both have managed to co-exist, producing a uniquely Puerto Rican mixed law approach.<sup>250</sup>

But while the rules of law might reflect a multi-colonial mixture, the language used in the law is Spanish,<sup>251</sup> which is incontrovertibly the dominant language on the island,<sup>252</sup> and it is the language of local administration and public education.<sup>253</sup> Spanish is also the language of the popular arts,<sup>254</sup> and, hence, culture.<sup>255</sup> As will be shown here, Puerto

248. The Puerto Rico Civil Code, now Title 31 of the Laws of Puerto Rico Annotated, is still substantially the Spanish Civil Code for Puerto Rico and Cuba of 1898. M. Rodríguez Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 TUL. L. REV. 1, 345 (1948).

249. One area where the clash has produced particularly unhappy results is tort law. See generally GUAROA VELÁZQUEZ, *LAS OBLIGACIONES: SEGÚN EL DERECHO PUERTORRIQUEÑO* xxiv (1964); Carmelo Delgado Cintrón, *La Tansculturación del Pensamiento Jurídico en Puerto Rico*, 45 REV. JUR. U.P.R. 305 (1976); CARMELO DELGADO CINTRÓN, *DERECHO Y COLONIALISMO* (1988).

250. See generally Malavet, *Counsel*, *supra* note 247; Malavet, *Non-Adversarial*, *supra* note 247; Malavet, *Monopoly*, *supra* note 247.

251. Since Spanish was used as a matter of course, the Foraker Act and the Jones Act needed to expressly stipulate that proceedings in the United States District Court and appeals from the Supreme Court of Puerto Rico to the Circuit Court must be conducted in English. Foraker Act, 31 Stat. 77 (1900) (codified at 48 U.S.C. § 864 (1994)) ("All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language."); Jones Act of 1917, § 42, 39 Stat. 966 ("All pleadings and proceedings in [the District Court of the United States for Puerto Rico] shall be conducted in the English language."). In *People v. Superior Court*, 92 P.R.R. 580 (1965), the Puerto Rico Supreme Court denied a litigant's request to proceed in English rather than in Spanish in local court, even though both English and Spanish were the official languages. See *People v. Superior Court*, 92 P.R.R. at 589–90 ("the means of expression of our people is Spanish, and that is a reality that cannot be changed by any law"). See also P.R. CIVIL CODE art. 13 ("[I]n case of discrepancy between the English and Spanish texts of a statute passed by the Legislative Assembly of Porto Rico [sic], the text in which the same originated in either house, shall prevail in the construction of said statute, except in the following cases: (a) If the statute is a translation or adaptation of a statute of the United States or of any State or Territory thereof, the English text shall be given preference over the Spanish. (b) If the statute is of Spanish origin, the Spanish text shall be preferred to the English. (c) If the matter of preference cannot be decided under the foregoing rules, the Spanish text shall prevail.").

252. While this is true for the *isla*, it is not for Puerto Ricans outside Puerto Rico, for whom bilingualism, and sometimes English mono-lingualism, are the norm. See Celia Alvarez, *Code-Switching in Narrative Performance: Social, Structural, and Pragmatic Function in the Puerto Rican Speech Community in East Harlem*, in *SOCIOLINGUISTICS OF THE SPANISH-SPEAKING WORLD: IBERIA, LATIN AMERICA, UNITED STATES* 271–98 (Carol A. Klee & Luis A. Ramos-García eds., 1991).

253. See the discussion of the language of instruction, *infra* notes 306–09.

254. Spanish is the language to the extent that the art form uses languages, as is the case, for example, in literature and music.

255. Language is generally considered an essential part of ethnicity or ethnic identity. See generally Joshua A. Fishman, *Language, Ethnicity and Racism*, in *SOCIOLINGUISTICS: A READER* 329, 336 (Nikolas Coupland & Adam Jaworski eds., 1997).

Rico's cultural tropes—dietary and celebratory, including musical—are uniquely *Puertorriqueñas/os*.

For example, dietary practices have long been considered an essential part of a culture; Puerto Rico is no exception. Although there are Puerto Rican Jews and Moslems,<sup>256</sup> the strict dietary rules of those religions do not apply to the Puerto Rican staple diet.<sup>257</sup> Accordingly, pork is a major part of the diet, especially on celebratory occasions,<sup>258</sup> and shellfish and all other forms of seafood are traditional foods, as one would expect in a tropical island.<sup>259</sup> Rice, red beans, *tostones* or *mofongo*,<sup>260</sup> and the daily loaf of bread are staple foods. *Panaderías* (bread stores) can be found in almost every neighborhood, invariably offering *pan de agua* (Water bread) or *pan de manteca* (bread with lard).<sup>261</sup> Rum, made from sugar cane, is the national alcoholic drink.<sup>262</sup> *Piraguas*, shaved ice covered

---

256. Religious diversity in the Latina/o communities is not rare. For an artistic exploration and (Re)construction of a Latina's identity that includes Palestinian Orthodox Christianity and Polish Judaism, while growing up in El Salvador, see artist Muriel Hasbun's exhibit *Santos y Sombras* (Saints and Shadows), <http://www.zonezero.com/exposiciones/fotografos/muriel2/> (visited Apr. 6, 2001).

257. On the Puerto Rican diet generally, see CARMEN ABOY VALLDEJULI, *COCINA CRIOLLA* (1992) (a classic Puerto Rican cookbook that is also available in English); MARTA COLL-CAMALEZ DE VELÁZQUEZ ET AL., *SILUETAS QUE PUEDEN CAMBIAR: CALORÍAS EN PLATOS Y ALIMENTOS DE USO FRECUENTE EN PUERTO RICO Y EN OTROS PAÍSES DE AMÉRICA Y EL CARIBE* (1991) (a dietary and caloric guide based on the traditional Puerto Rican diet, with bilingual index).

258. The traditional Christmas meal will include roast pork, rice with *gandules* (pigeon peas), and *pasteles*. MALAVET VEGA, *NAVIDAD*, *supra* note 211, at 31.

259. The Taino inhabitants of Puerto Rico used shellfish, especially conch, as a major part of diet. They left huge mounds of discarded conch shells for archaeologists to find. On the Taino diet generally, see ROUSE, *supra* note 37, at 13, 57.

260. *Tostones* are pieces of plantain that are fried once to get the plantain soft; the plantain is then pressed and fried again until crunchy on the outside. *Mofongo* is plantain that is fried only until soft, and is then mixed with garlic, pork rinds and olive oil, and formed into a ball. ABOY VALLDEJULI, *supra* note 257, at 188, 228. The *mofongo* may sometimes be fried again or baked after being made into a ball. Both *tostones* and *mofongo* are often served stuffed with seafood prepared in a light tomato sauce, or with *asopao*, a heavy rice-based soup that is traditionally made with either chicken or seafood. *Id.* at 317.

261. Hence, the sale of bread is closely regulated by the government. See, e.g., 23 P.R. LAWS ANN. § 919 (1999) (Regulating the labeling and weight allowances of bread); 24 P.R. LAWS ANN. § 851 (1999) (defining terms used in statute regulating flour products, including bread).

262. Rum has been produced in Puerto Rico for centuries, both legally and illegally. The illegal kind is called *pitorro*, or the more colorful appellation *lágrimas de mangle* (tears from the salt-water swamp). See MALAVET VEGA, *NAVIDAD*, *supra* note 211, at 37–40. Don Q (short for Don Quijote) is made in Ponce. But there are many other brands, including Bacardi, which came to Puerto Rico upon leaving Havana. Homegrown brands include Palo Viejo and Ron del Barrilito (the three-star variety is an excellent dark rum aged in barrels).

in syrup and served in a cup, and home-made ice creams made with local fruits are very popular in the tropical heat and are traditionally served from a movable cart.

Shared celebrations, such as *fiestas patronales* (patron saint festivals) and important holidays, usually of a religious nature, such as Christmas and Holy Week, mark Puerto Rican culture. The patron saint festivals are celebrated in every municipality in Puerto Rico and are regulated by Puerto Rico's laws.<sup>263</sup> The celebration always includes food, drink, and music of all kinds, but dance music, especially salsa, attracts the most people. Traditionally, one day of the *patronales* will be dedicated to honoring and remembering the *ausentes* (absent persons), usually persons who have migrated away from the town. In fact, many Puerto Ricans living in the United States choose this date to return to their home towns.

In an example of United States influence, but adapted to the Puerto Rican way, Thanksgiving is now celebrated, but mostly it marks the start of the Christmas holiday. The content of the Christmas celebration, and its length, however, are much different from the United States traditional celebration; they are definitely Puerto Rican. *Parrandas*, very common during Christmas, are basically large moving parties in which a musical serenade is brought to a friend or family member's home. In exchange for good music and the company of friends, the home owner welcomes the group into the house and gives them food and drink.<sup>264</sup> The traditional Christmas foods are *lechón asado* (Roast pig), *arroz con gandules* (Rice with pigeon peas), *pasteles* (a mixture of yucca and plantain, stuffed with beef, pork, or chicken, wrapped in banana leaves).<sup>265</sup> For dessert, there is *coquito* (Puerto Rican coconut eggnog)<sup>266</sup> and *arroz con dulce* (Rice flavored with coconut milk and sweetened with brown sugar).<sup>267</sup>

---

263. See, e.g., 15 P.R. LAWS ANN. § 80 (1995) (allowing for "picas" (kiosks for gambling) only during patron saint celebrations); 21 P.R. LAWS ANN. § 4359 (1995) (excluding patron saint feast day celebrations from limitation on election-year spending by municipalities); 21 P.R. LAWS ANN. § 4309 (1995) (allowing municipal governments to adjust their budgets with revenues from patron saint feast days). The Attorney General of Puerto Rico issued an opinion indicating that "there is no [constitutional] prohibition against participation of the Church in programming certain activities which are traditionally performed at municipal *fiestas*." Op. Sec. Just. No. 1983-14, at 69.

264. If the music is bad, the door remains closed (unless they are *really* good friends!). The *trullas* are part of an open, outdoor celebration of Christmas that is part of the tropical tradition. See MALAVET VEGA, NAVIDAD, *supra* note 211, at 40-42. The concept of a designated driver becomes important on these occasions.

265. *Id.* at 28-29.

266. *Coquito* is made with raw egg yolks, sweetened condensed milk, condensed milk, and coconut milk (made by blending coconut shavings with water), flavored with a spice broth of water in which cloves, cinnamon, and nutmeg are boiled. Rum is optional. It is served chilled. *Id.* at 28-29.

267. The smell of *arroz con dulce* is unmistakable. Cinnamon, cloves, and annis are boiled, and their smells permeate the entire house. For a good recipe and a narrative

The Christmas holidays include the Epiphany, January 6,<sup>268</sup> the date when children usually get toys.<sup>269</sup> The overall celebration lasts beyond the Epiphany into the so-called *octavas* and *octavitas*—a full eight days of further partying or religious observance, depending on the participants.<sup>270</sup>

Turning specifically to musical heritage as a vehicle of a singular culture, this piece will now present the history and development of Puerto Rican nationality by tracing the emergence of *música popular Puertorriqueña* (Puerto Rican popular music).

### 3. *Música Popular Puertorriqueña* (Puerto Rican Popular Music)

Popular music in particular represents the Puerto Rican identity. Notwithstanding the contemporary globalization of *música latina* (Latin music), prominently displaying Puerto Ricans like Marc Anthony, Jennifer López, and Ricky Martin, there is general agreement on many diverse forms of Puerto Rican popular music. However, there is a strong debate over whether there is a single specific Puerto Rican “national music,” driven by the overall debate between defenders of “high culture” versus “popular culture,” which is often reduced to questions of class and race.

description of the process of making *arroz con dulce*, see MALAVET VEGA, PASCUAS, *supra* note 211. *Pegao*, which literally means “stuck,” refers to the rice that sticks to the bottom of the pot. For many Puerto Ricans, this hard, crunchy byproduct of the rice cooking process is a real delicacy. The *pegao* from *arroz con dulce*, still warm, is a real Christmas treat.

268. The Catholic celebration of the Epiphany is also the occasion for the *Promesa de Reyes* (Promise to the Wisemen). Usually, when faced with a difficult situation, a family will make a religious vow to hold a large celebration in honor of the Three Wise Men if their prayers are answered. The fulfillment of the *promesa* requires the building of an altar to the Wisemen. The altar becomes the location for rosaries to be recited, and often sung, usually by women. The rosaries start on the night of January 5 and last into the morning of January 6. On January 6, the celebration, which always includes music, is held. Neighbors, family, and friends are invited. See MALAVET VEGA, NAVIDAD, *supra* note 211, at 28–29. A friend who is a physician is credited with saving the life of a young boy. He is usually the guest of honor at the family’s *promesa*, which has been held for over ten years. The family lives in modest home, but they have slowly built a large parking area and a cement building (almost as large as their home) to host the *promesa*.

269. There has been some incursion of the American tradition of Santa Claus, which has meant that gifts are given to children on December 25. This is often also justified in practical terms, since kids have more time to play with their toys before having to go back to school. Nevertheless, toy sales are strongest between December 26 and January 5.

270. The *octavas* are the eight days after the Epiphany. As a religious observance, the Catholic Church maintains a solemn liturgy. As part of the popular Christmas holiday, they are an extension of the holiday season. *Octavitas* is another eight-day extension of the celebration or observance, which, depending on the person, could last indefinitely. See MALAVET VEGA, NAVIDAD, *supra* note 211, at 30–31.

The traditional view is that the *Danza*, a waltz-like salon dance music usually composed by classically trained musicians, is the Puerto Rican national music.<sup>271</sup> *Danza* is Puerto Rican, but it is the music adopted by and associated with the upper class and cannot fairly be considered the “National” music in the context of *cultura popular* (popular culture).<sup>272</sup> The alternative candidates for the title of national music are *salsa*, especially favored by those who defend the African influence in Puerto Rican culture, and the *seis*, a music produced by the Puerto Rican *jíbaro*, the agricultural peasant of the mountains. José Luis González, in his critical essay *El País de Cuatro Pisos*,<sup>273</sup> bemoans both the classist and racist use of *Danza* with its inherent denial of the African experience, as well as the

271. See, e.g., ANTONIO S. PEDREIRA, *INSULARISMO* 154–55 (1971) (“*Danza* is a faithful reflection of who and what” the Puerto Ricans are.); Amaury Veray, *La Misión Social de la Danza de Juan Morel Campos*, in *ENSAYOS SOBRE LA DANZA PUERTORRIQUEÑA* 38–45 (Maria Rosado ed., 1977) (though he recognizes that it is upper class music, he argues that *Danza* is our most refined music, which has become the best musical reflection of Puerto Ricans); Héctor Campos Parsi, *La Música en Puerto Rico*, in *MÚSICA, LA GRAN ENCICLOPEDIA DE PUERTO RICO*, 2 (Vicente Báez ed., 1977) (stating that *Danza* was a national popular musical form developed by “educated musicians, of refined taste”).

272. The adoption of *Danza* is favored as a racist and classist construct when one focuses on the audience that listened and danced to it, which is clearly the social construct built around the cult of the *Danza*. However, the association of *Danza* with Whiteness and privilege is more difficult to understand when one looks “behind the music” at the most famous composers of *Danzas*, many of whom were Black, classically trained musicians who were not members of the upper class. See *id.* at 248, 315–18. This is part of a long social construction of Puerto Rican art as being White because it was made for Whites. Yet it ignores the fact that those making the art were often Blacks, whose contribution is often devalued by stating that the composers, musicians, or other artists were slaves who were given instruments or trained by their masters. These statements do not stand up to critical scrutiny, however. The contribution of persons of color to Puerto Rican culture is undeniable. *Id.* at 469–78 (analyzing the Black and African influence in Puerto Rican popular music). Additionally, Puerto Rico’s most famous painter was José Campeche, the mulatto son of a slave who bought his own freedom. Thus, the social construction of class and race conflicts with the reality. I hope to explore this problem and trace it to its origin in the development of *criolla/o* culture in a future article.

273. González specifically criticizes the “jibarism” of the plantation owners who yearn to return to the “good old days” of Spanish classism and racism. GONZÁLEZ, *supra* note 239; JOSÉ LUIS GONZÁLEZ, *NUEVA VISITA AL CUARTO PISO* 215–17 (1987); JOSÉ LUIS GONZÁLEZ, *PUERTO RICO: THE FOUR STOREYED COUNTRY* (Gerald Guinness trans., 1990).

The publication of this and other essays which so openly challenged Puerto Rican racism caused a major uproar within Puerto Rican scholarly circles. Many pointed out that Mr. González, who self-identifies as the son of Puerto Rican father and Dominican mother, was born in the Dominican Republic and has lived mostly in exile in Mexico, where he is a professor of literature at the National Autonomous University in Mexico City. See, *EL PAIS DE CUATRO PISOS* 105 (essay on the author in exile).

cult of the *jíbaro*, which he likewise associates with an enforced preference for whiteness.<sup>274</sup>

However, the *jíbaro seis* has a powerful and legitimate claim to being a Puerto Rican national popular music that is neither classist nor racist. It was the music of the true *jíbaro*, the poor peasant farmer of Puerto Rico, and it was born in Puerto Rico in the 19th century, has had a strong and long-standing influence in Puerto Rican music generally, is easily identified by most Puerto Ricans as “Puerto Rican music,” and is still popular music today.<sup>275</sup> Additionally, the *seis* uses the most important native musical instrument, the *cuatro*.<sup>276</sup> Long before *salsa* or its historical antecedents like the *plena* had appeared, the *seis* was the music of the poor, namely most *puertorriqueñas/os*.<sup>277</sup>

This Article is not concerned with awarding the title of Puerto Rican national musical form, but, ultimately, the debate over Puerto Rican national music serves clearly to underscore two things: one, the richness and diversity within Puerto Rican culture; two, the problematics of race

---

274. There is no doubt that even though it was made by persons who were not members of the White upper class, the *Danza* was embraced and adopted by Puerto Rico's White elite. See Eugenio Fernández Méndez, *Puerto Rico en el siglo XIX: siglo de la lucha por la democracia y la autonomía*, 50 REVISTA DEL INSTITUTO DE CULTURA PUERTORRIQUEÑA 36 (1971) (describing *Danza* as the music favored by the lords of the large sugar plantations). There is also a racist tinge in what González rightly identifies as a romanticized version of the *jíbaro* that has been adopted by the upper classes as a counter to the African influence in modern Puerto Rico.

275. This is contrary to *Danza*, which most people in and out of the island would not be able to associate with Puerto Rico, and which was popular in the 19th century but not the 20th. See generally MALAVET VEGA, *supra* note 37 (describing the history of Puerto Rican popular music, including *Danza*).

276. The *tainos* had drums, *palitos* (Wooden sticks), *güiros* (dried hollow gourds with ridges played with rasps), and *maracas*, which are still used in Puerto Rican music. *Id.* at 98–102. However, the one instrument that was produced in Puerto Rico and that has endured the test of time is the *cuatro*, a small stringed instrument that got its name because initially it had four strings. Later, it developed into four double strings, and eventually a fifth set of strings was added, for the current configuration of ten. Nonetheless, its name is still the *cuatro*. *Id.* at 489–90. *Cuatuos* are handmade in almost an artisanal way in Puerto Rico, often by persons who are excellent woodworkers but who lack specific training in the production of musical instruments. Accordingly, they vary greatly in quality, and keeping them in tune, especially because of their high-tension stringing, is a challenge. The strings are metal, and playing them requires a pick and strong fingers. The sound of the *cuatro* is high-pitched, somewhat similar to that of an American banjo. It is an essential instrument for anyone playing *seis*, and almost every one of the traditional Christmas songs.

277. The *seis* traces its roots to the early 19th century, whereas the *plena* is a musical form of the 20th century. The *plena*'s origins are in the *bombas* of the late 19th century. *Bombas* were originally slave dances that used drums called *bombas*. *Id.* at 129–39.



and class that can be found in the racially mixed *cultura india, española y africana* (Indian, Spanish, and African culture) of Puerto Rico.<sup>278</sup>

Music and dance create a link among the three major influences within the Puerto Rican peoples. The Taino natives engaged in dances, often designed to tell important tribal stories, called *areytos*.<sup>279</sup> The Puerto Rican *criolla/o* was often accused of being much too interested in dancing.<sup>280</sup> Even the now-much-too-respectable *Danza* was considered “scandalous” by some conservative *criollas/os*, who criticized the closeness of the dancers and their movements.<sup>281</sup> Today, *salsa*<sup>282</sup> and *merengue*<sup>283</sup> keep the Puertorriqueñas/os moving together fast, and *boleros* (slow ballads), a bit more slowly.

Music is naturally an essential element of daily life as well as of special occasions.<sup>284</sup> Music can be designed for dancing, for listening, or for both. The result is the constant presence in Puerto Rico of big bands that play dance music and smaller groups that play music to be listened to, rather than to be danced to. The best example of the latter are the

278. This listing is by order of arrival. The gender problematics in music and culture generally are also being addressed from feminist perspectives. See, e.g., APARICIO, *supra* note 237.

279. See ROUSE, *supra* note 37, at 14–17; MALAVET VEGA, *supra* note 37, at 96–98, 101.

280. Several authors of extensive histories of Puerto Rico during the 18th century specifically note the Puerto Rican’s love for dancing and dance parties that lasted for days. See, e.g., THE PUERTO RICANS, *supra* note 35, at 35 (quoting the work of Fray Iñigo Abbad published in 1788, stating that “The favorite diversion of these *isleños* [islanders] is dancing: They organize a dance for no other reason than to pass the time”).

281. A letter to the editor of a newspaper in Ponce, Puerto Rico, published on May 13, 1854, urged all “decent” parents not to allow their children to dance *Danza*. MALAVET VEGA, *supra* note 37, at 237.

282. There is some controversy over *salsa*’s place of birth, i.e., whether it was really born in the Caribbean as a variant of the *guaracha*, or in the barrios of New York, as what my dad calls the “*himno nacional del barrio latino de Nueva York*” (the national anthem of the Latina/o barrio in New York). See MALAVET VEGA, BOLERO, *supra* note 211, at 151–81. There is some doubt about the origin of the term *salsa* as applied to the Latina/o musical genre. Commercially, it appears in Venezuela, where it had been popularized in the mid-1960s by a disc-jockey, and a record titled *Llegó la Salsa*, issued in 1966. The FANIA movie “*Salsa*,” filmed during a live performance in New York City in 1971, also made the term popular. The 1970s are also the beginning of the great migration from New York to Puerto Rico of the Fania All Stars. See *id.*

283. *Merengue* was a name initially given to what today is known as *Danza* in Puerto Rico. However, its contemporary usage refers to a form of dance music with a definite Afro-Caribbean beat that is most associated with the Dominican Republic.

284. In a study of 50 songs that Felipe Rodríguez included in his repertoire, Malavet Vega found that most of them discussed male-female relationships. PEDRO MALAVET VEGA, LA VELLONERA ESTÁ DIRECTA: FELIPE RODRÍGUEZ (LA VOZ) Y LOS AÑOS CINCUENTA 395 (1987). However, in the text of the songs there are other important themes as well, such as family, home, work, children, childhood, church or religion, history, social and political facts, weddings, illness, God or Jesus, and death. *Id.* at 405.

*Trios* (three person groups) that specialize in *boleros*, slow ballads that could be a slow dance, but more often were listened to.<sup>285</sup> The big bands are initially the precursors of *salsa* and are now the main practitioners of it, with the *Sonora Ponceña* (Ponce Band) and *El Gran Combo de Puerto Rico* (The Big Band from Puerto Rico) celebrating 50 years in show business last year.<sup>286</sup> Today, *salsa* is undoubtedly the most popular form of Puerto Rican music.<sup>287</sup>

Popular music is a part of the cultural fabric of the Puerto Ricans not simply because of its capacity to entertain and to make people move; it often presents an unflinching look at the realities and hardships of daily life. The *baquiné* is a party to celebrate that a baby who died during or shortly after birth has gone to heaven without suffering the hardships of life on earth. Specifically as to Christmas tradition, the book *Navidad que Vuelve* (Christmas Returns) examined the song *Los Reyes No Llegaron*,<sup>288</sup> (The Wisemen/Kings did not Arrive), which was a perfect description of the level of poverty in Puerto Rico in the 1950s. *Los Reyes* tells the story of a young orphan who thinks that the wise men have forgotten him, because they did not bring him a present.<sup>289</sup> Another poignant example of a song carrying a message of economic hardship is *Lamento Borincano* (Puerto Rican Lament), a song that describes the toil involved in a day in the life of a farmer in Puerto Rico at the beginning of the 20th century.<sup>290</sup>

Music can overcome many challenges. It can plainly contain political subtexts; and it can be a teaching tool that allows the singer to bypass society's problems, such as illiteracy, and still manage to educate. In

285. On this genre generally, see MALAVET VEGA, *BOLERO*, *supra* note 211, and ORTÍZ RAMOS, *supra* note 211. On the strong relationship between this genre of music and Puerto Rican culture in and outside the Island, see MALAVET VEGA, *supra* note 284.

286. The big bands of Cuba dominated the dance beat from the 1930s until the 1960s. In Puerto Rico, *Rafael Cortijo y su Combo* broke loose in the early 1950s. This was the quintessential Latin Big Band, which transformed the Latin beat into *salsa*. *El Gran Combo de Puerto Rico* was founded in 1952. *La Sonora Ponceña* also began in the 1950s, but it hit its stride in the 1960s and 1970s, and it is still going strong. *Salsa* then exploded in popularity in the Latina/o community in New York City. See MALAVET VEGA, *BOLERO*, *supra* note 211, at 151–81. The FANIA record label—the *salsa* version of Motown—was founded in New York in 1964. In the early 1970s, *salsa* icons such as Eddie Palmieri, Willie Colon, Hector Lavoe, and Ismael Miranda (*Maelo*) were making *salsa* incredibly popular. The songs of Tite Curet Alonso and Ruben Blades, who first became internationally popular when he recorded with Willie Colon, also helped to popularize the genre. See *id.* at 161.

287. *Salsa* also has become very popular across cultural boundaries, especially with the success of New York-born Puerto Rican Marco Antonio, better known as Marc Anthony.

288. MALAVET VEGA, *NAVIDAD*, *supra* note 211, at 133.

289. See generally *id.* at 27.

290. *La Canción Popular*, *supra* note 196, at 70.

1951, songs were produced to instruct people on how or why to fill out the ballot: “*Referéndum, referéndum, referéndum quiere decir . . . / la consulta que se le hace al pueblo*” is a song explaining that a referendum is a consultation of the people by ballot. This song was commissioned by the Popular Democratic Party and used in support of the approval of Puerto Rico’s 1952 Constitution by popular ballot.<sup>291</sup>

Puerto Rican popular music, with its oral tradition, represents an important form of resistance in a repressive colonial society. Moreover, in the colonial context, cultural expression takes on the added dimension of political self-awareness and assertiveness. This has happened during both colonial rules.

During Spanish colonial rule, for example, the song *El Ciclón* (the Hurricane) was in fact a reference to Spanish colonial rulers. The author describes how the singing birds in their cages—a reference to the many persons put in jail by the new government imposed by Spain—stop singing when the *Ciclón* is coming.<sup>292</sup> Songs also recognized Puerto Rico’s wish for independence and accompanying self-awareness as a people.<sup>293</sup> Lola Rodríguez de Tió provided a call to arms in the revolutionary version of *La Borinqueña*,<sup>294</sup> the Puerto Rican national anthem (now with different lyrics).<sup>295</sup>

Puerto Ricans have also engaged in the use of song as a vehicle for resistance with the second colonial rulers. The *música de protesta*, music of [political] protest, in Puerto Rico in the late 1960s and 1970s, includes a heavy dose of pro-independence sentiment.<sup>296</sup> For example, Andrés

291. MALAVET VEGA, *supra* note 37, at 24. The popular vote for the Constitution of Puerto Rico, which became effective in 1952, was held on June 4, 1951. See RIBES TOVAR, *supra* note 35, at 516–17.

292. MALAVET-VEGA, *supra* note 37, at 352–57.

293. For example, “*El Grito de Lares/ se ha de repetir/ y todos sabremos/ vencer o morir*” (The Cry of Lares/ shall be repeated/ and we all shall know [how]/ to win or to die) is part of a song remembering the attempted anti-Spanish revolt in Lares, Puerto Rico, on September 23, 1868. *Id.* at 265–67, 273.

294. The opening lyrics of the Rodríguez de Tió version of *La Borinqueña* called on Puerto Ricans to fight for independence: “*¡Despierta boriqueño,/ que han dado la señal!/ ¡Despierta de ese sueño,/ que es hora de luchar!*” (Wake up boriqueño/ the signal has been given!/ Wake up from that sleep/ now is the time to fight!). *Id.* at 267. “Boriqueño,” also spelled “borinqueño,” is a reference to the inhabitants of *Boriquén* or *Borinquen*, a bastardization of the native term for the island today called Puerto Rico.

295. Compare the fiery words of the Rodríguez de Tió version to the submissive text of the current official version, which opens as follows: “*La Tierra de Borinquen,/ donde he nacido yo,/ es un jardín florido/ de mágico primor*” (The land of *Borinquen*/ where I have been born/ is a flowery garden/ of magical beauty). It is not hard to see why Doña Lola was described by her contemporaries as a *pólvora* (explosive black powder). *Id.* at 266. The version *La Borinqueña* by Rodríguez de Tió also states in part: “*Nosotros queremos la libertad/ y nuestro machete nos la dará*” (We want our liberty / and our machetes will give it to us). *Id.* at 268.

296. See generally MALAVET VEGA, *BOLERO*, *supra* note 211, at 115–50.

Jiménez, “*El Jíbaro*,” demands that Puerto Ricans stand up to the American tyranny, by exclaiming: *¡Coño, despierta boricua!*, loosely translated into “damn wake up people of Puerto Rico.”<sup>297</sup>

Accordingly, as just shown with the example of its music, Puerto Rican culture is a rich and diverse tapestry that does indeed mix Native, Spanish, and African heritage. It is a strong culture that is rightly proud, if perhaps a bit unaware of its cultural faultlines. Nevertheless, it is a culture based on shared social experiences, consistent with its tropical origin. The shared Spanish-speaking, *pastel*-eating, *coquito*-drinking experience, among many other complex relationships, produces the Puerto Rican nation.<sup>298</sup>

The survival of Puerto Rican culture, as reflected in the very limited examples discussed above, is the definitional schism between the United States and the Puerto Rican peoples. Puerto Rican culture is clearly different from that which is dominant in the United States. The assimilationist attempts to destroy and to replace it with an essentialized version of “American” culture that are detailed below failed. Cultural assimilation has been and positively will continue to be impossible for the United States to achieve. As a result, the practical choices left to the United States and to the Puerto Ricans are either some form of political assimilation and cultural co-existence on the one hand, or independence, on the other.

## B. Cultural Survival

### 1. Americanization: Cultural Imperialism<sup>299</sup>

Due to its large population and limited territory, Puerto Rico did not offer the United States the opportunity of exporting “its own” Anglo-Saxon people and culture to the island.<sup>300</sup> In addition to the

297. Of course, protest can have its costs. In Puerto Rico, pro-independence artists like Lucecita Benítez, Roy Brown, Américo Boschetti, Antonio Cabán Vale, Sharon Riley, Andrés Jiménez, Danny Rivera, and others were targeted for surveillance by the police. MALAVET VEGA, *supra* note 37, at 21. In Argentina, 1.3% of the *desaparecidos* were artists. *Id.* at 22.

298. This is not to suggest that you cannot be Puerto Rican if you consume none of these items or speak no Spanish. However, these are *symbols* of culture and nation. They will be deployed here to identify and empower. See generally KUPER, *supra* note 207, at 58.

299. Cultural Imperialism is used here to mean the “phenomenon” of “ideological and cultural annexation.” CARLA FRECCERO, *POPULAR CULTURE: AN INTRODUCTION* 68 (1999). Conversely, the process of “[c]ollective and concerted resistance to programmatic cultural imperialism [is] . . . called ‘cultural’ or ‘mental’ decolonization.” *Id.*

300. See the Puerto Rico-Alaska comparison in *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1921). See also the discussion *supra* note 126.

impossibility of creating an Anglo-Saxon majority on the island, because of the construction of Puerto Ricans as belonging to an inferior “race”<sup>301</sup> and accorded a lower level of citizenship,<sup>302</sup> United States “[i]mperialists deployed liberalism, republicanism, and racism to contend that America’s lucky new subjects should be tutored in enlightened civilization and self-governance.”<sup>303</sup> United States officials in fact did not expect the process of assimilation to be difficult because Puerto Ricans were mostly illiterate,<sup>304</sup> and, the *estadounidenses* believed, receptive (or perhaps vulnerable) to the message.<sup>305</sup> They underestimated the depth and breadth of the culture described in the preceding section.

The most obvious effort to re/construct Puerto Rican identity was the imposition of English<sup>306</sup> as the language of administration<sup>307</sup> and instruction<sup>308</sup> and the accompanying use of public education as a weapon

301. See, e.g., MORALES CARRIÓN, *supra* note 183, at 232; *supra* note 221.

302. See the discussion about second-class citizenship *supra* notes 122–30 and accompanying text.

303. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 429 (1997).

304. Martin Braumbaugh, Education Commissioner, stated in his 1901 report that most Puerto Ricans did not even speak “pure Spanish” and that only a minority were already educated, mostly in Europe. JOSÉ SOLÍS, PUBLIC SCHOOL REFORM IN PUERTO RICO: SUSTAINING COLONIAL MODELS OF DEVELOPMENT 57 (1994).

305. Victor Clark, president of the Insular Council on Education, stated:

The great mass of Porto Ricans is still passive and plastic. . . . Its ideals are in our hands to be created and molded. If we americanize the schools and inspire the teachers and students with the American spirit . . . the island will become in its sympathies, view and attitudes . . . essentially American.

*Id.* at 57 (quoting and translating from NEGRÓN DE MONTILLA, *supra* note 1, at 250) (footnote omitted).

306. The Language Act of 1902 established English and Spanish as co-equal official languages in Puerto Rico. Puerto Rico Language Act of 1902, *repealed by* 1 P.R. LAWS ANN. §§ 51–55 (1991) (“in all the Departments of the Commonwealth government and in all the courts of this Island, and in all public offices the English language and the Spanish language shall be used indiscriminately”). 1 P.R. LAWS ANN. § 51 (1982) (Repealed). As discussed, the local courts continued to function in Spanish.

307. Although Spanish and English were in theory coequal, the United States-appointed administration tried to create a preference for English. See *generally* SOLÍS, *supra* note 304. Even the Puerto Rico Supreme Court, with its Presidentially-appointed American judges, ruled that the English version of a Civil Code provision would control when it came into conflict with the Spanish version. *Cruz v. Dominguez*, 8 P.R.R. 551, 555–56 (1905) (“There can be no doubt that the English text, which was signed by the Governor, is the law which must govern.”). This is no longer the case by express provision of the Puerto Rico Civil Code. P.R. CIVIL CODE art. 13.

308. See NEGRÓN DE MONTILLA, *supra* note 1, at 9–10. It is difficult to pin down the exact enactment that imposed English-language instruction because, as Dr. Negrón reports, many of the regulations were issued by the Commissioners in letters. *Id.* at 15

against Puerto Rican consciousness. One scholar has described this attempt at “silencing the [Puerto Rican] culture” as follows:

Probably nowhere was the U.S. economic development plan for Puerto Rico more consciously promoted than in the public schools. Through a rationalization of the perceived necessary prerequisite of the Americanization of the culture for economic and social development, the grounds were established for the legitimacy of arguments and policies requiring English as the language of instruction and a centralized public school administration.<sup>309</sup>

The official attempts to “Americanize”<sup>310</sup> Puerto Rico included well-orchestrated efforts to encourage an American, rather than a Puerto Rican, form of patriotism.<sup>311</sup> This included the celebration of United States holidays<sup>312</sup> and the American way of celebrating them, such as replacing the three wise men with Santa Claus.<sup>313</sup> Public displays of

(noting that many of these “circular letters” were neither dated nor numbered). Section 23 of the Public Schools Act of 1901 gave the Commissioner a great deal discretion:

The Commissioner of Education . . . shall prepare and promulgate all courses of study; conduct all examinations; prepare and issue all licenses or certificates to teachers; fix the salaries of teachers; select and purchase all school books, supplies, and equipments necessary for the proper conduct of education; . . . and formulate such rules and regulations as he may from time to time find necessary for the effective administration of [a system of schools in Puerto Rico].

ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO, C.B. 22, § 23 (1901).

309. SOLÍS, *supra* note 304, at 47.

310. The first United States-appointed Commissioner of Education for Puerto Rico put it thusly in his Annual Report: “The spirit of American institutions and the ideals of the American people, strange as they do seem to some in Porto Rico [sic], must be the only spirit and the only ideals incorporated in the school system of Porto Rico [sic].” *Id.* at 48–49.

311. Dr. Aída Negrón de Montilla has conducted one of the most comprehensive studies of this process and its effect on public education in Puerto Rico. See generally NEGRÓN DE MONTILLA, *supra* note 1. In her introduction to the book, she provides a listing that I discuss in this and the few succeeding footnotes and accompanying text.

312. This included making July 25 a legal holiday “to commemorate the anniversary of the first landing of American troops in Porto Rico [sic].” ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO, H.B. 90 (1901). In addition, “New Year’s day, Washington’s birthday, Good Friday, Fourth of July, Twenty-fifth of July, Thanksgiving Day, [and] Christmas” were originally the legal holidays for the public schools in Puerto Rico. *Id.* at C.B. 22, § 11.

313. In Puerto Rico, it is traditional to give gifts to children during the Epiphany, the Catholic celebration of the visitation of the Christ child by the three wise men. See generally MALAVET VEGA, NAVIDAD, *supra* note 211, at 27–30. This produced one of best

pro-American patriotism and honoring United States symbols<sup>314</sup> and heroes were encouraged by, among other means, songs taught to young school children.<sup>315</sup> There were also “attempts to transplant American school curricula to Puerto Rico.”<sup>316</sup>

Imposing the new language of instruction included substituting “local Spanish-language textbooks with American English-language texts,”<sup>317</sup> as well as requiring English-language proficiency for all teachers.<sup>318</sup> Puerto Rican students and teachers were encouraged to study in the United States.<sup>319</sup> The process also included encouraging assimilation of the island into the United States<sup>320</sup> and opposing independence for Puerto Rico.<sup>321</sup>

Nevertheless, Puerto Rican identity and culture proved resilient enough to survive “Americanization.” By 1949, the newly elected local government changed the language of instruction to Spanish.<sup>322</sup> The failure of *americanización* is a definitional moment in the United States-

short stories in Puerto Rican literature: *Santa Clo Va a la Cuchilla* by Abelardo Díaz Alfaro. Santa Claus' Christmas visit to a public school in the barrio *Cuchilla* in a town in Puerto Rico ends with all the Puerto Ricans, children and their parents, scattering in horror at the sight of the fat, White, red-nosed Santa Claus. ABELARDO DÍAZ ALFARO, TERRAZO 89–93 (1948).

314. In his Annual Report for 1901, the Commissioner of Education mentions: “saluting the [United States] flag,” “[playing the United States] National Anthem,” “Acts with the flag,” “patriotic readings,” “patriotic songs,” and “marches and performances by the band.” NEGRÓN DE MONTILLA, *supra* note 1, at 65.

315. I have never forgotten the song that I was taught in kindergarten in Puerto Rico: “*Yo nunca, nunca digo una mentira, pues quiero ser igual a Jorge Washington, quien fue el mas grande los hombres, y nunca, nunca dijo una mentira.*” (I never, never tell a lie, because I want to be just like George Washington, who was the greatest of all men, and never, never told a lie.)

316. *Id.* at 9–10 (translation by the author). This also included “attempts to copy the structure and legal organization of the American school system.”

317. *Id.* at 9–10 (translation by the author).

318. *Id.*

319. *Id.* The first legislative assembly approved a bill requiring that public funds be spent to send students to study in the United States. ACTS AND RESOLVES OF THE FIRST LEGISLATIVE ASSEMBLY OF PORTO RICO, H.B. 35 (1901).

320. Assimilation was encouraged by, among other things, emphasizing the “benefits” of American citizenship. NEGRÓN DE MONTILLA, *supra* note 1, at 9–10.

321. This included expelling “from the school system students or teachers involved in what, in the judgment of the department of education, was anti-American activity.” *Id.* (translation by the author).

322. See AMÍLCAR A. BARRETO, LANGUAGE, ELITES, AND THE STATE: NATIONALISM IN PUERTO RICO AND QUEBEC 118 (1998). The Puerto Rico schools are divided into elementary schools (K–6th grade), intermediate schools (7, 8, and 9th grades) and high Schools (10, 11, and 12th grades). P.R. REGULATIONS Title 18, § 31-91. The language of instruction for junior high schools is Spanish. “Every subject in the elementary schools, except English, shall be taught in the Spanish language.” P.R. REGULATIONS Title 18, § 31-93.

Puerto Rico relationship. To the extent that the United States viewed Americanization as a prelude to assimilation, the failure of the former precludes proceeding with the latter.

## 2. Political Repression: *Los Subversivos*

In the beginning of the colony Puerto Ricans were viewed as overwhelmingly poor, uneducated people who could nonetheless be “saved” by Americanization.<sup>323</sup> The Americanization project included persecution of those perceived to favor Puerto Rican independence. However, the rejection of American cultural substitution required a re/construction of Puerto Ricans as ungrateful and possibly even dangerous. The policy emphasis then changed from one of cultural indoctrination to one of political control and, sometimes, repression.<sup>324</sup>

From the time of the Ponce Massacre in 1937<sup>325</sup> to the murder of Juan Mari Pesquera and the murders on the Cerro Maravilla<sup>326</sup> and their

323. See the discussion of Governor Rexford G. Tugwell’s *THE STRICKEN LAND*, *infra* note 374.

324. “[I]n March, . . . FBI Director Louis Freeh stunned a congressional budget hearing by conceding that his agency had violated the civil rights of many Puerto Ricans over the years and had engaged in ‘egregious illegal action, maybe criminal action.’” Juan Gonzalez, *Feds’ Files Reveal Dirty War: Secret papers document FBI’s campaign against Puerto Rican dissidents*, N.Y. DAILY NEWS, May 23, 2000, at 14.

325. On Palm Sunday, March 31, 1937, the pro-independence Puerto Rico Nationalist Party marched through the streets of Ponce. The mayor had initially granted a permit for the march, but had tried to rescind it at the last minute after Governor Blanton Winship “ordered the chief of police, Colonel Orbeta, to tell the mayor” to do so. After a shot of “undetermined origin,” the police fired into the crowd. Nineteen were killed, including two police officers. “A later inquiry by the American Civil Liberties Union . . . concluded that there had been a ‘gross violation of civil rights and incredible police brutality.’” MORALES CARRIÓN, *supra* note 183, at 238. My grandmother, Otilia Vega Ruiz, then pregnant, was shopping in Downtown Ponce on that date. She had to run for her life. Lucky for me, she survived, since the child of this pregnancy was my father.

326. On July 25, 1978, at the Cerro Maravilla, Carlos Soto Arriví and Rubén Dario Rosado were murdered by the Puerto Rico Police, reportedly while FBI agents waited some distance away. (In hearings before the Puerto Rico Senate, witnesses testified that FBI agents were in the vicinity of the Cerro Maravilla on the date of the murders.) A few minutes after the ill-fated independentistas were taken by the police, a reportedly elated Governor Carlos Romero Barceló announced during a Commonwealth Day celebration that a “terrorist attack” on the Cerro Maravilla had been beaten back by police. MANUEL SUÁREZ, *REQUIEM ON CERRO MARAVILLA: THE POLICE MURDERS IN PUERTO RICO AND THE U.S. GOVERNMENT COVERUP 74* (1987). The day after the murders, the *carro público* driver who was kidnapped by the undercover police officer to take him and his two victims to the Cerro Maravilla walked into what would later be my office at Villa Esperanza F. No. 66 in Ponce, to talk to my *padrino* (godfather). The truth that he told on that date—that the police officer kidnapped him at gunpoint, and that the two young independentistas he took with him were murdered while they begged for their lives—would take years to come out.



official cover-up,<sup>327</sup> there has been a history of political violence directed at pro-independence forces in Puerto Rico.<sup>328</sup> The application of the Little Smith Act and the “subversive files” are the best examples of generalized anti-independence repression.

In events that led to the constitutional challenge of the law, Enrique Ayoroa Abreu was arrested on November 10, 1950 for violating Law 53 of 1948,<sup>329</sup> known in Puerto Rico as *La Ley de la Mordaza* (the Gag Law) or as “the Little Smith Act.”<sup>330</sup> His crime consisted of attending meetings

---

327. The administration of former United States President James P. Carter, who is now known as a champion of civil and human rights, is alleged to have sold out those two lives and participated in the coverup in exchange for primary votes. The basic allegation is that Carter, then embroiled in a tight contest for the Democratic Presidential nomination with Edward Kennedy, wanted Puerto Rico’s 41 Democratic convention delegates. “In December 1979, it is known, Romero [Carlos Romero Barcelo, then governor of Puerto Rico] met with then-President Jimmy Carter and Attorney General Benjamin Civiletti. Shortly thereafter, Romero, who had previously backed Republicans, endorsed Carter in his primary election race against Sen. Edward Kennedy.” Diana Maychick, *On Film: Film as Expose*, THE RECORD, May 6, 1990, at E1 (Reviewing the movie “A Show of Force”). See also ANNE NELSON, MURDER UNDER TWO FLAGS: THE U.S., PUERTO RICO, AND THE CERRO MARAVILLA COVER UP (1986) (the book on which the movie “A Show of Force” was based). Unfortunately for Mr. Carter, he only got 21 of the 41 delegates during the March 1980 primary. See generally SUÁREZ, *supra* note 326, at 127–53.

328. To be fair, nationalists did engage in violence of their own, particularly during the 1950 nationalist revolt in Puerto Rico. “On March 1, 1954: Four Puerto Rican nationalists fire 30 shots from the U.S. House visitors’ gallery, wounding five congressmen. Nov. 1, 1950: Two Puerto Ricans, Griselio Torresola and Oscar Collazo, attempt to assassinate President Harry S. Truman at Blair House in Washington. Torresola is killed and his partner and three police officers are wounded.” D’Jamila Salem, *Terrorist Acts on American Soil*, L.A. TIMES, Feb. 27, 1993, at D1 (including a timeline of attacks tied to Puerto Rican nationalists). Nevertheless, for anyone keeping score, the record of violence and persecution clearly puts independence supporters as the victims of United States imperialism. See generally EL ASESINATO POLÍTICO EN PUERTO RICO (Ivonne Acosta Lespier ed., 1998).

329. Law 53 of June 10, 1948, *quoted in* People v. Burgos, 75 P.R. Dec. 535, 535 n.1 (1953) (the *La Ley de la Mordaza* was constitutional under both the Puerto Rico and United States Constitutions, and it had not been preempted by the Smith Act). Mr. Ayoroa-Abreu was the uncle of my godfather and law partner José Enrique Ayoroa-Santaliz.

330. See generally *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (holding that Federal Smith Act, now codified as 18 U.S.C. § 2385 (1999), imposing criminal liability on anyone who advocates the overthrow of the United States government, preempts state laws).

of the Nationalist Party and displaying a Puerto Rican flag<sup>331</sup> in his apartment in Old San Juan.<sup>332</sup>

Persons were deemed to be “*subversivos*” (subversives) because they favored the independence of Puerto Rico. Accordingly, *subversivo*, was thrust into the legal consciousness of all Puerto Ricans by the Puerto Rico Supreme Court decision in *Noriega-Rodríguez vs. Hernández-Colón*,<sup>333</sup> in which the court held that the practice of opening police files to investigate persons because of their political views was unconstitutional. The court appointed a special master to take control of the files and instructed him to return them to their subjects.<sup>334</sup> By contrast, American intelligence agencies, some of which are not chartered for domestic investigations, were heavily involved in Puerto Rico.<sup>335</sup> The

---

331. Because of the criminalization of the display of the Puerto Rican flag, today Puerto Ricans are rather fond of making regular public displays of the single-star flag, often hanging it on their cars’ rearview mirrors.

332. See IVONNE ACOSTA, *LA MORDAZA: PUERTO RICO 1948–1957* 124–25 (1987). In a note handwritten on the inside cover of this book, my godfather recounts the seizure of the “evidence” of his uncle’s patriotism, and thus the violation of the law, the Puerto Rican flag that he displayed on top of his bed in his apartment in Old San Juan.

For more on the campaign of repression that produced the files, see *id.* For an excellent collection of the legal documents related to the landmark “subversive” files decision by the Puerto Rico Supreme Court, see *LAS CARPETAS*, *supra* note 242.

333. 122 P.R. Dec. 650 (1988).

334. See also *Noriega Rodríguez v. Hernández-Colón*, No. CE-89-578, 1992 PR Sup. LEXIS 248, at 23–25 (1992) (holding that the files could not be edited to remove the names of undercover agents or other informants before being returned to their subjects). More recently, the Governor of Puerto Rico issued an executive order authorizing the payment of a small damage award to persons whose files exceeded 30 pages.

Many of the so-called “*carpetas de subversivos*” (subversive files), which have been returned to their subjects, are now available for review. I have had the opportunity to examine several of them. I started with those of two law partners: my father and my godfather. My father’s was file number 31336 and had 60 pages. According to a special form titled “*Oficina de Inteligencia*” (Office of Intelligence), the officer put an “x” to indicate that my father was active in a pro-independence movement, but that “no,” he was not dangerous. *Carpeta* No. 31336, at 55 (copy on file with the author). My godfather’s *carpeta* consists of 543 pages. *Carpeta* No. 9296 (copy on file with the author). My friend Mario Edmundo Vélez showed his 247-page *carpeta* to a group of friends, myself included, during a luncheon in 1992. *Carpeta* No. 24844 (copy on file with the author). We were horrified to find pictures of our friends with bullet holes in them. The police had used his picture for target practice at the police academy. More disturbingly, they felt empowered to keep a record of such an act in their files.

335. One clear example is the FBI’s COINTELPRO operation. See Carmen Gautier Mayoral and Teresa Blanco Stahl, *COINTELPRO en Puerto Rico: documentos secretos del FBI (1960–1971)*, in *LAS CARPETAS*, *supra* note 242, at 255–297. These activities perhaps reflect the difference between the Puerto Rico Supreme Court’s view of such acts—expressed in the *Hernández-Colón* decision—and that of the United States Supreme Court. See *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115 (1956) (Smith Act activities against the communist party not held unconstitutional); and *Laird v. Tatum*, 408 U.S. 1; 92 S. Ct. 2318; 33 L. Ed. 2d 154 (1972) (existence of “data

FBI, for example, dedicated most of its agents in Puerto Rico not to investigate bank robberies and other crimes, but to follow *independentistas* (independence supporters) and to attempt to sabotage the movement.<sup>336</sup>

Puerto Rico's cultural assertiveness was seen as resistance, and it had to be stopped. In the process, independence was constructed as an unacceptable alternative to the United States and a disaster for Puerto Ricans.<sup>337</sup>

These events thus depict the tension between Puerto Rico's statutory United States passport and their separate and distinct Puerto Rican identity. Thus, to engage these stresses, the remainder of this Article will be dedicated to exploring the contemporary debate over citizenship in legal and political philosophy, and how that may elucidate a methodology towards establishing a Puerto Rican citizenship. Its specific purpose is to inform the development of citizenship models that can account for the cultural existence of the Puerto Rican peoples and provide post-colonial alternatives available to enable a free choice of future legal/political status that is consistent with contemporary theories of justice and morality.

---

gathering system" in which the Pentagon created files on persons it deemed dangerous, did not unduly chill the files' objects' first amendment rights).

336. See, e.g., SUÁREZ, *supra* note 326, at 348–50. Suárez details operations around the 1968 elections in Puerto Rico, for example. He indicates that FBI agents spent a great deal of their time keeping tabs on the pro-independence movement. They even faked political messages, attributed to different segments of the movement, in order to cause discord. One example was the attempt to argue that Juan Mari Bras, a socialist party leader, was having an affair with an independence leader's wife. *Id.* The history of intelligence-gathering on Puerto Rico's dissenters is long. During the first World War, the War Department created the Military Intelligence Division (MID). MID was divided into two divisions; the first, called the "Positive Branch, . . . collected information on military, political, economic, and social condition; and [the second,] the Negative Branch . . . investigated and suppressed sabotage and espionage." In Puerto Rico, MID shifted its focus from alien enemies to political dissenters, and the "intelligence officer for the district simply took over the insular police force of eight hundred men." JOAN M. JENSEN, *ARMY SURVEILLANCE IN AMERICA, 1775–1980* 172 (1991).

337. Morales Carrión describes how the Roosevelt Administration approved the filing of "a bill to offer Puerto Rico its independence in a referendum," but not as an initiative of the administration. MORALES CARRIÓN, *supra* note 183, at 235. The expectation among United States officials was that the dire economic situation prevailing on the Island would scare Puerto Ricans away from independence. This was accompanied by the trial and conviction of Nationalist Party leader Pedro Albizu Campos, in a second trial, with a carefully chosen jury. To the surprise of American officials, even pro-statehood leaders said that they would rather starve, and they threatened to vote in favor of independence. *Id.* at 236.

## III. ¿QUE SERÁ DE BORÍNQUEN?: REFORMING LIBERAL CITIZENSHIP

¡Que será de Borínquen,  
mi Dios querido!  
¡Que será de mis hijos  
y de mi hogar!

—Rafael Hernández<sup>338</sup>

Puerto Rican cultural nationalism conflicts with the traditional ideals of individuality and co-existence held by both classical and modern liberalism in their approach to citizenship. The tension arises out of liberalism's failure to take seriously the problems of non-normative cultural groups, which results in the imposition of an essentialized homogeneity on colonized peoples.<sup>339</sup> In the following Parts this work develops a proposal for the reform of the traditional liberal theory of citizenship. Critical race theory generally, and LatCrit theory in particular, can critique and reform liberalism to recognize that it is not at odds with a communitarian vision of citizenship, if it chooses to value group identity. Additionally, communitarianism can avoid the pitfalls of nationalism by embracing a pluralistic political solidarity. This reformed vision facilitates Puerto Rican cultural citizenship and nationhood to realize Puerto Rican sovereignty, i.e., true legal citizenship and nationhood.

The first section in this Part analyzes the proper jurisprudential framework to study and critique the current status of Puerto Rico and its inherent construct of second-class citizenships. Such exploration assists in resolving the future status of the *Isla del Encanto* (Enchanted Isle) by bringing clarity to the legal construct of Puerto Rico and of the Puerto Rican peoples. The second Part suggests, based on the existence of a Puerto Rican identity and culture, that the current legal regime that governs the relationship between Puerto Rico and the United States is illegitimate because it is colonial and not based on the principles of self-determination, which in turn deprives the Puerto Ricans of an acceptable form of legal citizenship. The Part then deploys communitarian principles to produce a reformed liberal vision of Puerto Rican citizenship that recognizes cultural diversity and promotes political freedom and participation.

---

338. *La Canción Popular*, *supra* note 196, at 70. Author's translation: What will be of *Borínquen*,/ my Dear Lord!/ What will be of my children/ and of my home!

339. As explained in the Introduction, *supra*, this can occur on the level of the United States-Puerto Rico relationship and within the Puerto Rican community, where existing hierarchies also produce "Othering." The "Othering" within the Puerto Rican people has produced important critiques of Puerto Rican nationalism. See, e.g., *PUERTO RICAN JAM: RETHINKING COLONIALISM AND NATIONALISM* (Frances Negrón-Muntaner & Ramón Grosfoguel eds., 1997).

A. *The Failure of Liberal Citizenship*

Ronald Dworkin has succinctly described liberalism as follows:

... a theory of equality that requires official neutrality amongst theories of what is valuable in life. That argument will provoke a variety of objections. It might be said that liberalism so conceived rests on skepticism about theories of the good, or that it is based on a mean view of human nature that assumes that human beings are atoms who can exist and find self-fulfillment apart from political community. . . . [But] liberalism cannot be based on skepticism. Its constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right. Liberalism does not rest on any special theory of personality, nor does it deny that most human beings will think that what is good for them is that they be active in society. Liberalism is not self-contradictory: the liberal conception of equality is a principle of political organization that is required by justice, not a way of life for individuals.<sup>340</sup>

Significantly, critiques of liberalism are generally founded on skepticism, or downright rejection of liberal claims of egalitarianism and neutrality. Accordingly, “liberal” responses to critical theorists’ attacks on liberalism often bemoan the use of incorrect or overly “selective” definitions of liberal theory. For example, Dworkin accuses critical legal studies (CLS) scholars in general,<sup>341</sup> and Mark Tushnet in particular,<sup>342</sup> of misconstruing the fundamental tenets of liberalism. He argues that CLS’s contentions “about the incoherence of liberalism, have so far been spectacular and even embarrassing failures” because “[t]hey begin and end in a defective account of what liberalism is, an account supported by no plausible reading of the philosophers they count as liberals.”<sup>343</sup> In the specific context of the debate of multiculturalism and citizenship, liberal stalwart Will Kymlicka writes that “critics of ‘the liberal tradition’ are often attacking different targets.”<sup>344</sup>

---

340. RONALD DWORKIN, *LAW’S EMPIRE* 441 (1986).

341. *Id.* at 274–75, 440–41 n.19.

342. *Id.* at 440–41 n.19.

343. *Id.* at 274.

344. KYMLICKA, *supra* note 198, at 9. He explains that

some discussions are directed at the articulated premisses [sic] of specific liberal theorists, others at the habits and predispositions of liberal-minded politicians and jurists, yet others at some more nebulous world-view

But, it is equally difficult to discern a clear definition of “liberal theory” from the defenses of liberalism mounted by self-mapped liberals. Dworkin wrote the definition quoted at the opening of this section to counter what he characterized as Tushnet’s “mistaken” characterizations of his views. Kymlicka is purposefully elusive,<sup>345</sup> but he does explain that the political morality of liberalism that he defends claims that “[o]ur essential interest is in leading a good life, in having those things that a good life contains.”<sup>346</sup>

Professors Dworkin and Kymlicka present important objections to the critiques of liberal theory that challenge the critics to prove the shortcomings of liberalism and/or to admit that they are using liberal theory to construct a new paradigm for a more complicated world.<sup>347</sup>

which underlies Western culture generally, not just our political culture. These different aspects of the liberal tradition are often in conflict with each other, as they are in any such tradition.

*Id.* at 9.

345. He explains his purpose and reticence as follows:

... Firstly, my concern is with liberalism as a normative political philosophy, a set of moral arguments about the justification of political action and institutions.

\*\*\*

Secondly, my concern is with what liberals *can* say in response to these recent objections [by communitarians, socialists, and feminists], not with what particular liberals actually have said in the past. Still, as a way of acknowledging intellectual debts, if nothing else, I hope to show how my arguments are related to the political morality of modern liberals from J.S. Mill through to Rawls and Dworkin.

*Id.* at 9–10 (italics in original).

346. *Id.* at 10. He then adds that

... we have two preconditions for the fulfillment of our essential interest in leading a life that is good. One is that we lead our life from inside, in accordance with our beliefs about what gives value to life; the other is that we be free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide.

\*\*\*

... According to liberalism, since our most essential interest is in getting these beliefs right and acting on them, government treats people as equals, with equal concern and respect, by providing for each individual the liberties and resources needed to examine and act on these beliefs. This requirement forms the basis of contemporary liberal theories of justice.

*Id.* at 12–13.

347. Kymlicka, for example, would argue that recognition of community and culture is a process of the evolution of liberalism, rather than a competing paradigm that requires the

Therefore, in order to avoid the analytical shortcomings discussed above, it is necessary to articulate working definitions of liberalism(s).

“Classical liberalism” means a legal and political philosophy that “focuses on the idea of limited government, the maintenance of the rule of law, the avoidance of arbitrary and discretionary power, the sanctity of private property and freely made contracts, and the responsibility of individuals for their own fates.”<sup>348</sup> Classical liberalism historically defines individual “destinies” in supremacist and hetero-patriarchal ways, thus creating an unequal type of citizenship in which some men rule over other men and over all the women.<sup>349</sup> Reflecting its classical liberal origins, the United States Constitution enshrined into American law an exclusive and unequal form of citizenship that accepted slavery,<sup>350</sup> dispossessed Native Americans,<sup>351</sup> and disenfranchised women.<sup>352</sup>

rejection of liberalism. “Considering the nature and value of cultural membership not only takes us down into the deepest reaches of a liberal theory of the self, but also outward to some of the most pressing questions of justice and injustice in the modern world.” *Id.* at 258.

348. Alan Ryan, *Liberalism*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 293 (Robert E. Goodin & Philip Pettit eds., 1993). Historical credit for liberalism is given to John Locke, Adam Smith, Alexis de Toqueville, and Friedrich von Hayek. *See id.* at 293. However, its roots can be traced to ancient Athens, especially as depicted in Aristotle’s *Politics*. *See* J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times* 29–31, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 29; *see also* POSNER, *supra* note 22, at 23 n.33 (discussing the Greek origin of “classical” liberalism).

349. By “nature” some men rule and others are ruled, and men are meant to rule over women. Pocock, *supra* note 348, at 31 (“For Aristotle, . . . the citizen must be a male of known genealogy, a patriarch, a warrior, and the master of the labor of others (normally slaves), and these prerequisites in fact outlasted the ideal of citizenship, as he expressed it, and persisted in Western culture for more than two millennia.”).

350. *See generally* *Dred Scott v. Sanford*, 60 U.S. 393, 404–05 (1856) (holding that African slaves imported into the United States and their descendants, free or otherwise, “are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and whether emancipated or not, yet remained subject to their [sic] authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”); *see also* U.S. CONST. art. I, § 2, cl. 3 (slaves contribute 3/5 to their masters’ entitlement to congressional representation); U.S. CONST. art. I, § 9, cl. 1 (Limiting the power of Congress to restrict the slave trade), U.S. CONST. art. IV, § 2, cl. 3 (Runaway slaves had to be returned to slave states). *See generally* PEREA ET AL., *supra* note 88, at 104 (explaining that “despite the protections of slavery in the Constitution, its drafters were careful not to use the word ‘slave’ at all, despite language that was understood by all to refer to slaves”). *See also* the discussion of the Territorial Clause, *supra* notes 165–77 and accompanying text.

351. *See* U.S. CONST. art. I, § 2, cl. 3 (stating that Native Americans do not count for apportionment purposes); *Johnson v. MacIntosh*, 21 U.S. 543, 5 Wheat. 543 (1823) (subjecting Native Americans to Whites’ “right” to conquer their land and to expel them by force).

352. *Cf.* U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

Modern liberalism, on the other hand, “is exemplified by John Stuart Mill’s *On Liberty*, with its appeal to ‘man as a progressive being’ and its romantic appeal to an individuality which should be allowed to develop itself in all its ‘manifold diversity.’”<sup>353</sup> Modern liberalism, in contrast to socialism, is not theoretically confiscatory, but its clearest legal/political achievement is the modern democratic welfare state. “Negatively, the aim is to emancipate individuals from the fear of hunger, unemployment, ill-health and a miserable old-age, and positively, to attempt to help members of modern industrial societies to flourish in the way Mill and von Humboldt wanted them to.”<sup>354</sup> Kymlicka and Dworkin position themselves among modern liberals.<sup>355</sup>

Although liberalism is not inherently progressive,<sup>356</sup> its modern form can point to *apparently* neutral theories of justice *vis-à-vis* the individual. But these arguments ignore the effects of liberal theories’ historical shortcomings. Classical liberalism generally, and American Classical Liberalism in particular, were explicitly based on flawed notions of White/racial and male/gender supremacies. Modern liberalism, on the other hand, especially the American form of modern liberalism, suffers from the cultural imposition of supremacies.

Section one of the Fourteenth Amendment reads, in part: “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”<sup>357</sup> To the extent this provision creates formal universal<sup>358</sup> United States citizenship, it is belied by the reality of that citizenship, which is often constructed on the basis of faultlines defined by essentialized notions of race. A comparison between the treatment of former Mexican citizens under the Treaty of Guadalupe Hidalgo<sup>359</sup> and the

353. Ryan, *supra* note 348, at 294.

354. *Id.* at 295.

355. See KYMLICKA, *supra* note 198, at 10 (“modern liberals from J.S. Mill through to Rawls and Dworkin”).

356. “[I]t is not always a progressive doctrine, for many classical liberals are skeptical [sic] about the average human being’s ability to make useful advances in morality and culture, for instance.” Ryan, *supra* note 348, at 293.

357. U.S. CONST. amend. XIV, § 1. The section continues as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

358. Universal citizenship means a general entitlement to formally equal citizenship that is basic to liberalism. However, as the case study used below shows: “Appeals to universal reason typically serve to silence, stigmatize and marginalize groups and identities that lie beyond the boundaries of a white, male, Eurocentric hegemon. Universalism is merely the cover for an imperialistic particularism.” BEINER, *supra* note 14, at 9.

359. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930 [*hereinafter* Treaty of Guadalupe Hidalgo]. On the Treaty of Guadalupe Hidalgo, see generally THE LEGACY OF THE MEXICAN AND SPAN-



treatment of Puerto Ricans under the Treaty of Paris illustrates this point.<sup>360</sup>

The Treaty of Guadalupe Hidalgo ended the War between the Republic of Mexico and the United States, just like the Treaty of Paris ended the War between Spain and the United States. The effect of both wars and treaties was United States control of the conquered lands and of the people who had been living there prior to the conquest. However, as discussed above, the normative regime created by the Treaty of Paris legally constructed Puerto Ricans as formal second-class citizens. Chicanas/os, on the other hand, got what on the surface appeared to be a more favorable legal regime as a result of the Treaty of Guadalupe Hidalgo, because they received United States citizenship as expressly promised in Article IX of that treaty.<sup>361</sup>

Nevertheless, as detailed by Guadalupe Luna,<sup>362</sup> Mexicans were dispossessed of their land,<sup>363</sup> in spite of their formal United States citizenship

ISH-AMERICAN WARS: LEGAL, LITERARY AND HISTORICAL PERSPECTIVES (Gary D. Keller & Cordelia Candelaria eds., 2000) (offering a collection of English and Spanish scholarly works discussing the events surrounding the Mexican and Spanish-American Wars); RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO* (1989) (analyzing the ways in which the treaty has influenced the domestic history of the United States as well as the history of United States-Mexican relations); Symposium, *Understanding the Treaty of Guadalupe Hidalgo on its 150th Anniversary*, 5 SW. J.L. & TRADE AM. 3 (1998) (featuring articles and comments from a number of judges and scholars regarding the treaty).

360. To this limited study, we might add the mistreatment of Native Americans and the Native Hawaiians. See Eric K. Yamamoto, et al., *Indigenous Hawaiians' Human Rights in United States Courts*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* (Berta Esperanza Hernández-Truyol ed., 2001).

361. Title IX of the Treaty of Guadalupe-Hidalgo, as ratified by the United States Senate, reads, in pertinent part:

The Mexicans \* \* \* shall be incorporated into the Union of the United States and be admitted, at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution.

PEREA ET AL., *supra* note 88, at 262 (citing V TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 219 (Hunter Miller ed., 1937)). The language in italics was inserted by the United States Senate. The authors explain this change:

Rather than admit Mexicans into the Union "as soon as possible," the Senate made their admission more discretionary, "at the proper time," to be judged by Congress. The original language raised the scary (to Anglos) prospect of Mexicans on an equal legal footing with whites. To avoid equality, the Senate gave Congress discretion to admit states containing Mexicans whenever Congress deemed it "proper."

*Id.* at 262.

362. Luna, *supra* note 185, at 39.

363. Professor Luna summarizes her findings:

and their legal rights.<sup>364</sup> Initially, Article VIII of the Treaty of Guadalupe Hidalgo appears to guarantee the rights of Mexicans who choose to stay in the United States.<sup>365</sup> However, an indication of things to come was given when the United States removed proposed Article X—which

---

From the time the Founders signed the United States Constitution to the present, considerations of race have governed the agricultural agenda and the resulting control of the nation's natural resources. The counter-story presented here reveals that throughout most of American legal history, biased interpretations of the law created a system that dispossessed and disenfranchised individuals of Mexican background. Moreover, Constitutional directives protecting property rights were held hostage to the whims of the interpreters of law. Alienated from their property, Chicanas/Chicanos were treated as foreigners and disallowed full citizenship status. In the aggregate, their stories present complex analytical issues. The governmental practices involved in their dispossession played a significant role in determining their current economic status in ways that are difficult to reconcile with present understandings in property law.

*Id.* at 142–43 (citations omitted).

364. Since it was clear that the American courts were just another instrument of the Empire, *mexicanos* found other ways of resisting. “Mexicans who had been routed or later displaced from their lands mounted armed, violent resistance. Much of this resistance can be understood as guerrilla warfare against an oppressor. Much of it took place on the newly created border of the Rio Grande now dividing former Mexico in two.” PEREA ET AL., *supra* note 88, at 291. See also *id.* at 291–99 (describing a series of conflicts between *mexicanos* and *americanos* in the United States Southwest between 1859 and 1967).

365. Article VIII of the Treaty of Guadalupe–Hidalgo reads:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected, on this account, to any contribution, tax, or charge whatever.

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States.

Treaty of Guadalupe Hidalgo, *supra* note 359, at art. VIII.

guaranteed property rights of Mexicans who stayed in what now became the United States<sup>366</sup>—from the Treaty of Guadalupe Hidalgo.<sup>367</sup> Eventually however, whatever rights were granted to Mexicans who stayed in the United States mattered little in United States courts.<sup>368</sup>

366. The Article that was originally agreed to, read as follows:

All grants of land made by the Mexican government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico.

PEREA ET AL., *supra* note 88, at 261. Upon the recommendation of then President Polk, however, the Senate refused to consent to it, and it deleted it. *Id.*

367. “To quiet the ensuing protests of Mexicans, who presumably feared that pre-existing land titles would not be honored in the absence of Article X, the United States issued a Statement of Protocol that provided the following:”

The American government by suppressing the Xth article of the Treaty of Guadalupe Hidalgo did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants . . . preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals.

Conformable to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories, are those which were legitimate titles under the Mexican law of California and New Mexico up to the 13th of May, 1846 and in Texas up to the 2nd of March, 1836.

*Id.* (citing Rodolfo Acuña, *OCCUPIED AMERICA* 19–20 (3d ed. 1988) (quoting *COMPILATION OF TREATIES IN FORCE* 402 (1899)).

368. *United States v. San Jacinto Tin Co.*, 23 F. 279 (C.C.D. Cal. 1885), includes an unusually candid and powerful description of the dispossession of Chicanas/os:

Those familiar with the notorious public history of land titles in this state need not be told that our people coming from the states east of the Rocky mountains very generally denied the validity of Spanish grants . . . and, determining the rights of the holders for themselves, selected tracts of land wherever it suited their purpose, without regard to the claims and actual occupation of holders under Mexican grants. . . . Many of the older, best-authenticated, and most-desirable grants in the state were thus, more or less, covered by trespassing settlers. When the claims of Mexican grantees came to be presented for confirmation, these settlers aided the United States; the most formidable opposition usually coming from them, first, to the confirmation of the grants, on every imaginable ground, of which the most frequent was fraud in some form at some stage of the proceedings. When confirmed, and the officers of the government came to the location, the contest became still more vigorous and acrimonious; the trespassing settlers, or adverse claimants . . . seeking to have the confirmed grant located so as not to interfere with their claims or interests. . . . Charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties, and these

Despite formal citizenship, Chicanas/os were constructed as “racially” inferior. In fact, American politicians initially opposed the Mexican war on the basis that it presented a clear and present danger to White supremacy, and thus, to *their* American republic.<sup>369</sup> Accordingly, the promises of citizenship that were made were heavily conditioned.<sup>370</sup> Finally, as discussed above, Mexicans were denied their legal property rights in spite of their citizenship. However, by the time they got to Puerto Rico, the American Empire did not even make a promise of citizenship to Puerto Ricans. It simply took the land and denied citizenship to the residents.<sup>371</sup>

Cornel West describes the normative paradigm of American liberalism that produces these injustices:

. . . The historical articulation of the experiential weight of African slavery and Jim Crowism to forms of U.S. patriarchy, homophobia, and anti-American (usually communist and socialist) repression or surveillance yields a profoundly conservative culture.

The irony of this cultural conservatism is that it tries to preserve a highly dynamic corporate-driven economy, a stable election-centered democracy, and a precious liberties-guarding rule of law. This irony constitutes the

---

reckless charges by disappointed trespassing and opposing claimants, in many instances, as in this case, involved the officers of the government, as well as the claimants under the grant.

*Id.* at 295–96. See also Luna, *supra* note 185, at 40–41.

369. PEREA ET AL., *supra* note 88, at 263 (“The final, revised language quieted the racial fears of [Senator John] Calhoun, concerned over the Mexican racial threat to white rule in the United States. The revised language also relieved public angst over possible political participation by Mexicans.” (internal citation omitted)).

370. See *supra* note 361.

371. José A. Cabranes has characterized this as follows: “For the first time in American history, in a treaty acquiring territory for the United States, there was no promise of citizenship . . . [nor any] promise, actual or implied, of statehood. The United States thereby acquired not ‘territories’ but possessions or ‘dependencies’ and became, in that sense, an ‘imperial’ power.” José A. Cabranes, *CITIZENSHIP AND THE AMERICAN EMPIRE* 20 (1979) (quoting J. Pratt, *AMERICA’S COLONIAL EXPERIMENT* 68 (1950)), cited in PEREA ET AL., *supra* note 88, at 328. The authors of *RACE AND RACES*, in my view, correctly ask “Do you agree with this comment? In light of New Mexico’s 62-year struggle for statehood?” *Id.*

I certainly agree with Judge Cabranes that the Treaty of Paris represents the first time when the *treaty* itself did not guarantee citizenship and with his conclusion that no promise of statehood was either expressed or implied for Puerto Ricans. However, that this was the *first time* that territories were acquired without a promise of statehood is a difficult conclusion to accept, in light of the Chicana/o experience.

distinctive hybridity of American liberalism (in its classical and revisionist versions). . . .<sup>372</sup>

Following from West's observations, the construction of Puerto Rican citizenship reflects a failure of liberalism, in any form, to weave a post-colonial citizenship theory for the Puerto Rican peoples that properly accounts for their cultural nationhood. American liberalism, because of its underlying cultural conservatism, could not possibly produce such a citizenship construct because its approach to Puerto Rico, using the Territorial Clause of the Constitution, was analogous to the legal construction of slaves as non-citizens in the United States Constitution, and to the construction of Blacks as inferior citizens after the end of slavery. Rubin Francis Weston explains:

Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern "counterrevolutionary" point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the Negro to a status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.<sup>373</sup>

The United States acted in an imperialistic manner that de-valued Puerto Rican culture and even the Puerto Rican peoples' self-discipline.<sup>374</sup> Moreover, the United States saw itself as the "savior" of

---

372. Cornel West, *The Role of Law in Progressive Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 708, 709 (David Kairys ed., 1998).

373. PEREA ET AL., *supra* note 88, at 328 (quoting RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM* 15 (1972)).

374. Tugwell quotes a "continental" educator who taught in Puerto Rico as stating that "talk about [Puerto Rican] culture" as a justification for resistance to English language instruction was "insincere, an invented reason for not doing a difficult but necessary thing, an excuse for having failed to follow a course which every practical consideration dictates." TUGWELL, *supra* note 184, at 480. Learning English was "unpopular" among Puerto Ricans "because it required discipline." *Id.* at 481. However, while he demanded that Puerto Ricans adopt English, Tugwell was willing to accept bilingualism; "Spanish to the south, and English to the north" he explained. *Id.* at 480.

Puerto Rico.<sup>375</sup> In return, it demanded assimilation as the price of its generosity. To resist cultural assimilation, especially to resist English, would mean that American “subsidies were not going to keep coming to a hostile, suspicious, *foreign* country.”<sup>376</sup>

In the context of their current status, Puerto Ricans suffer from America’s positive toleration,<sup>377</sup> and, unfortunately, lack the power to benefit from or to enforce any negative toleration<sup>378</sup> that might help to restrain the colonial rulers. At best, what the United States displays towards Puerto Rico can be classified as “paternalistic toleration.”<sup>379</sup> The

375. Puerto Rico, “with two million people on her small acreage,” was not self-sufficient and thus depended on emigration to work in the United States, and upon “the most generous subsidy from her rich Northern associate.” *Id.* at 481.

376. *Id.* at 481. Resistance to English meant Puerto Rico was “isolat[ing] itself culturally and defy[ing] the world.” *Id.* He explains that

[F]oreigners did not interest us. It was true that Puerto Ricans had been made citizens in 1917 on the only occasion when serious revision of the Organic Act [prior to Law 600] was undertaken after 1900, but it was done in a sudden realization of strategic possibilities, not as part of a policy, and, significantly enough, in time of war when Puerto Rican loyalty was important. Americans generally had not come to think of Puerto Ricans as real citizens—rather, when they thought of them at all, as citizens of a sort of second class.

*Id.* at 70 (emphasis added). And he adds: “To be American citizens without a State to live in, without representation in the Congress, without even incorporation of their Territory, was to exist in a monstrously illogical situation.” *Id.* at 71.

“Loyalty” was important because of the first World War. The United States declared war on Germany on April 2, 1917. Over 236,000 Puerto Ricans were registered by the Selective Service, and 18,000 were selected to serve. A racially segregated Puerto Rican regiment of 4,000 men was sent to Panama after becoming part of the United States Army in May of 1917. See MORALES CARRIÓN, *supra* note 183 (characterizing Puerto Rican military service as an act of “patriotism”).

377. Addis says of positive toleration: “[T]he development of reason is strongly tied to the development of toleration in a given society.” Addis, *supra* note 17, at 119.

378. Addis defines negative toleration as follows: “In the context of the relationship among groups, the negative dimension of toleration restrains the majority from trampling on the views, beliefs, and commitments of minorities.” *Id.*

379. Addis explains that it is:

[P]aternalistic, because the toleration is one *extended* by the majority as an act of self-restraint by the majority (as an act of social generosity) to share a social space with a culture that the majority believes does not merit to share such social space. For minorities, paternalistic toleration is often purchased at the heavy price of not being recognized as equal participants in the polity, ironically the very thing that toleration is meant to cure.

*Id.* at 120 (1997).

problem with paternalistic toleration is that it is based upon the notion of the inherent superiority of the tolerator.<sup>380</sup>

Puerto Rico's statutory second-class citizenship constitutes a "contradiction . . . between universal rights and restricted citizenship [that is] impossible to sustain."<sup>381</sup> Moreover, because of the underlying defects of American liberalism, even formally equal United States citizenship—to the extent that such a notion exists—<sup>382</sup> will not resolve the problems inherent in the current statutory citizenship, because of the reality of America's culture of privilege.<sup>383</sup> A solution to this citizenship problem requires a new theoretical paradigm that is free from liberal perpetuation of privilege, in general, and American cultural conservatism in particular.

380. Addis explains it thusly:

[I]nsofar as paternalistic toleration does not provide for, and is in fact hostile to, the notion of the tolerator taking the tolerated group seriously and engaging it in a dialogue, the polity cannot cultivate an important virtue, what Benjamin Barber has referred to as "civility (Reciprocal empathy and respect)." One can hardly develop empathy for those that one only knows as the alien and strange. To have reciprocal empathy is to first attempt to understand the Other, but there cannot be understanding the Other if one is not prepared to engage the other in a dialogue. And here I am not simply, even primarily, talking about individual dialogues but rather institutional dialogues.

*Id.* at 121 (citations omitted).

381. Michael Ignatieff, *The Myth of Citizenship*, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 57.

382. Some commentators talk about the myth of American citizenship. In considering the myth, one scholar defines the term both in the "noble" sense as "bearer of truth in disguised form" and in its "more ironical meaning" as "fanciful, dubious, inflated, and untrue." *Id.* at 57.

383. Again, the attitudes of New Dealer Rexford G. Tugwell are enlightening. When he was Secretary of Agriculture, he accompanied First Lady Eleanor Roosevelt during her trip to Puerto Rico in March 1934. His writings indicate how even under assimilationist policies, his view was that Puerto Ricans would still belong to an inferior race:

I rather dislike to think that our falling fertility must be supplemented by these people. But that will probably happen. Our control of the tropics seems to me certain to increase immigration from here and the next wave of the lowly. . . . [S]ucceeding the Irish, Italians and Slavs . . . will be these mulatto, Indian, Spanish people from the south of us. They make poor material for social organizations but you are going to have to reckon with them.

MORALES CARRIÓN, *supra* note 183, at 232.

B. *A Proposal to Reconstruct Puerto Rican Citizenship  
Through a Reformed Liberalism*

In producing a new theory of alternative citizenships for Puerto Rico, this section will initially focus on the fundamental question of replacing or reforming liberalism. After that, it proposes a general framework for developing a redefinition of Puerto Rican citizenship that is informed by contemporary communitarian theory. The first difficult analytical problem can be summarized as follows:

. . . American liberalism diffuses the claims of American radicals by pointing to long-standing democratic libertarian practices, despite historic racist, sexist, class, and homophobic constraints. Hence, any feasible American radicalism seems to be but an extension of American liberalism.<sup>384</sup>

Postmodernism<sup>385</sup> points out the theoretical shortcomings of current philosophical movements, and warns against the mistakes of extremism, at any end of the philosophical spectrum. In the current deconstructionist postmodern age, the idea of liberal universalism is rejected as being “merely a cover for imperialistic particularism.”<sup>386</sup>

In order to redefine Puerto Rican citizenship, one must first redefine the Puerto Rican nation as a state.<sup>387</sup> Such an approach implies a rejection of the ideal of cosmopolitan, i.e., universal, supranational

384. West, *supra* note 372, at 709.

385. Although I find his treatment of postmodernism overly harsh, there are some helpful descriptions in David West’s essay, *The Contribution of Continental Philosophy*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 39 (Robert E. Goodin and Phillip Pettit eds., 1993).

Postmodernism proposes a last desperate leap from the fateful complex of Western history. Anti-humanism, with its critique of the subject and genealogical history, has shaken the pillars of Western political thought. Heidegger’s ‘dismantling’ of metaphysics and Derrida’s deconstruction carry the corrosion of critique to the fundamental conceptual foundations of modernity.

*Id.* at 64. Westf adds later in the essay: “Postmodernists seek to disrupt all forms of discourse, and particularly forms of political discourse, which might encourage the totalitarian suppression of diversity.” *Id.* at 65.

386. Beiner, *supra* note 14, at 9 (“Appeals to universal reason typically serve to silence, stigmatize and marginalize groups and identities that lie beyond the boundaries of a white, male, Eurocentric hegemon. Universalism is merely the cover for an imperialistic particularism.”).

387. As Professor Beiner explains: “Theorizing citizenship requires that one take up questions having to do with membership, national identity, civic allegiance, and all the commonalities of sentiment and obligation that prompt one to feel that one belongs to *this* political community rather than *that* political community; . . . .” *Id.* at 19.



citizenship.<sup>388</sup> Cosmopolitan citizenship theorists would construct the Puerto Ricans as “citizens of the world” rather than of Puerto Rico; but this would constitute an imposed homogeneity, the natural product of the cultural conservatism inherent in traditional liberalism.

Initially, it is critical to acknowledge that the nation state is still relevant despite external and internal challenges to sovereignty.<sup>389</sup> External challenges to sovereignty lead countries to surrender it, at least partially, to supranational organizations for example.<sup>390</sup> Internal challenges to sovereignty might lead to a decentralization of governmental power that is not necessarily the same as diversity; in fact, it may well be the exact opposite thereof unless these changes are driven by a progressive political theory.<sup>391</sup> Nevertheless, to the extent that this Article advocates citizenship and nationhood, or at least the choice thereof by the Puerto

388. Martha Nussbaum advocates cosmopolitan citizenship thusly:

The accident of where one is born is just that, an accident; any human being might have been born in any nation. Recognizing this, [Diogenes'] Stoic successors held, we should not allow differences of nationality or class or ethnic membership or even gender to erect barriers between us and our fellow human beings. We should recognize humanity wherever it occurs, and give its fundamental ingredients, reason and moral capacity, our first allegiance and respect.

Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM 2, 7 (Joshua Cohen ed., 1996).

389. Michael Ignatieff argues that the nation state is in fact more important:

The paradox of the global economy is that the nation state becomes *more* not *less* important as our instrument for defending our interests and solving our problems in the international sphere. Any tendency to balkanize spheres or to concede self-determination to provincial interests puts us in a dilemma. We want a strong local government to be responsive to our local needs and we need a strong federal government to speak for us in the global sphere.

Ignatieff, *supra* note 381, at 76.

390. See, e.g., Case 6/24, *Costa v. Ente Nazionale Per L'Energia Elettrica*, 1964 E.C.R. 585, 3 C.M.L.R. 425, 456 (1964) (“The transfer, by member States, from their national orders in favour of the Community order of the rights and obligations arising from the Treaty, carries with it a clear limitation of their sovereign right upon which a subsequent unilateral law, incompatible with the aims of the Community cannot prevail.”); Case 26/62, *van Gend en Loos v. Nederlandse Tarifcommissie*, 1963 E.C.R. 1, 2 C.M.L.R. 105, 129 (1963) (“[T]he Community constitutes a new legal order in international law, for whose benefit the [member] States have limited their sovereign rights, albeit within limited fields. . .”). See generally JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* 34–43 (1988).

391. A good example of this occurred in Fiji, when, reportedly, a multiracial democracy was replaced by the surrender of the nation to a particular ethnic group, for the express purpose of disenfranchising all other ethnic groups. See *Fiji Signs Pact With Rebels in Hostage Standoff*, N.Y. TIMES, July 10, 2000, at A3.

Rican peoples, it first seeks to redefine the island as a sovereign nation.<sup>392</sup> Some might argue that such a paradigm shift requires an internal redefinition of the state.<sup>393</sup> Because this theory is intended to apply both to a new Puerto Rican state and to an existing United States, it does indeed require the United States to change its basic view of justice and morality as well.

Accordingly, any theory must also make fundamental decisions about how to view individuals, *vis-à-vis* the state, and themselves. “[W]e can simplify the history of the concept of citizenship in Western political thought by representing it as an unfinished dialogue between the Aristotelian and the Gaian formulae, between the ideal and the real, between persons interacting with persons and persons interacting through things.”<sup>394</sup> Comparative legal analysis is important here, because in Roman Law, and in its current heir, the Civil Law, “things” includes a broader conception of property rights and adds moral obligations to the basic notion of contracts. Accordingly, the Gaian, and really Roman legal vision, is that of a state providing rules and citizens living by them, or seeking the state’s assistance in resolving disputes. Thus, the Aristotelian ideal is that of a citizen belonging to and participating in the body politic, and the Gaian reality was that of citizenship as the legal, formal existence of the individual as controller of rights and assets.

In the Puerto Rican context, the definition of their rights is controlled by the American state, as is the definition of the polity to which they are entitled. Puerto Ricans are unable meaningfully to participate in

---

392. As discussed below, however, this may be an end in itself, or a prelude to a legitimate free choice to join with the United States in some form of permanent political union, be it as a state or as an affiliated state, in a real bilateral compact. See *infra* Part IV.B.3.

393. For example, Michael Walzer, as described by Professor Beiner, advocates the civil society model:

The basic idea here was that active involvement in an autonomous civil society composed of a multitude of voluntary associations separate from (or opposed to) the sphere of the state, represents a superior form of citizenship as compared with the decayed citizenship of subservience to an all-pervasive paternalistic state.

Beiner, *supra* note 14, at 4. Professor Walzer himself explains this anti-positivism notion as the “anti-politics alternative.” “The words ‘civil society’ name the space of uncoerced human association and also the set of relational networks—formed for the sake of family, faith, interest, and ideology—that fill this space.” Michael Walzer, *The Civil Society Argument*, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 153. By way of illustration, he discusses Konrad’s work, which suggests “turning our backs” on the dictatorial regimes of the old Eastern Block and retreating into social relationships independent of the state. *Id.* at 167–68.

394. Pocock, *supra* note 348, at 42.

the process of defining the state of their citizenship. Inclusion and empowerment are the only solutions to this fundamental problem.

Still, the argument could be made that Puerto Ricans simply ought to strive for better treatment within the United States. This is an application of the general communitarian rule that persons should strive to get along rather than move for secession. Certainly, the recent history of ethnic strife in the Balkans should lead to great pause. But Puerto Rico clearly constitutes an exception to the rule, and independence should be one of the possibilities available to them.<sup>395</sup>

Communitarian theoretical principles generally provide the best solution to the Puerto Rican citizenship problem, starting by identifying the shortcomings of liberal citizenship. "The individualism that underlies liberalism isn't valued at the expense of our social nature or our shared community."<sup>396</sup> Traditional liberal theory simply fails to recognize the rights of colonized peoples to exist as a free people, rather than as assimilated individuals.<sup>397</sup>

395. As discussed *infra* at text accompanying note 399, because Puerto Rico is an identifiable territory, the possibility of independence or secession is physically possible and theoretically defensible.

396. KYMLICKA, *supra* note 198 at 2–3. Kymlicka goes on to defend liberal political theory:

[c]ontemporary liberals do not, in general, discuss the difference between nation-states and multinational states, and obviously do not think of cultural plurality as raising new and difficult issues for liberal theory of equality. But that first impression is misleading, for thinking about cultural plurality raises a host of important questions about the nature of liberal individualism and equality.

*Id.*

397. Kymlicka again describes the debate by noting that:

[a]ny one of these claims would, if sound, pose a serious challenge to liberal beliefs about culture and community. Taken together, they suggest that liberalism is *obviously* inadequate in these matters, that liberals are denying the undeniable, neglecting the most readily apparent facts of the human condition. And this neglect is exacting a high price: liberals, in a misguided attempt to promote the dignity and autonomy of the individual, have undermined the very communities and associations which alone can nurture human flourishing and freedom. Any theory which hopes to respect these facts about the way in which we are socially constructed and culturally situated will have to abandon the 'atomistic' and 'individualistic' premises and the principles of liberal theories of justice.

*Id.* at 2.

Adeno Addis' work is helpful in explaining the failure of traditional liberal theory to recognize and promote group rights. First, Addis acknowledges colonialism and its resulting multiculturalism.<sup>398</sup> Addis explains the general opposition to secession by suggesting that

[a]s a general response to diversity in political units, however, separation seems as impractical as it is dangerous. It is impractical partly because not all groups that believe themselves to be marginalized and excluded from the social and political life of the polity *live in a defined territorial unit*. In such circumstances, secession will not be a viable answer to the problem of exclusion and discrimination. Indeed, the notion of separation under these conditions is likely to lead to a process of ethnic cleansing. It is also true that not all groups that have grievances against a dominant majority want to secede, even if that were practically possible. They simply wish to participate equally and fully in the life of the political community.<sup>399</sup>

Of course, Puerto Rico being an island populated overwhelmingly by Puerto Ricans, is the kind of territorial unit in which secession might be acceptable, even in the context of Addis's thesis. However, at the same time, a sensible theory of justice cannot ignore the possibility that the Puerto Ricans, given a truly free choice, might wish to remain within the United States and simply choose political participation within the American nation. Additionally, nationalism, either Puerto Rican or American, cannot become dogma. Just as Puerto Ricans should be respected as a minority culture within the United States, they should respect disenfranchised communities within the Puerto Rican peoples, either under American or Puerto Rican sovereignty.<sup>400</sup>

However, to the extent that communitarian co-existence is the chosen model, traditional liberal toleration is inherently inadequate for colonized peoples, because it undermines their rights to *cultural*

---

398. "Whether the multiplicity is the 'unintended' consequence of colonialism or the organizing principle, the defining feature, of the particular nation-state, the uncontroverted fact is that most nations are indeed multiethnic and multicultural." Addis, *supra* note 17, at 113.

399. *Id.* (citation omitted) (emphasis added).

400. Pocock uses the French Revolution as an example to describe the terrifying results of citizenship becoming dogma, which justifies the destruction of your "enemies," i.e., outsiders. The French revolution went from an uprising of citizens against the *ancien régime*, to the terror of citizenship being deployed to justify the destruction of the enemy. Virtue became terror. See Pocock, *supra* note 349, at 49–50.

existence.<sup>401</sup> Addis indicates that pluralistic solidarity, i.e., cultural co-existence and political co-operation, while avoiding the extremes of nationalism, is the solution to this failure of liberal citizenship.<sup>402</sup> Addis uses this concept to support his opposition to the assimilation or the removal of ethnic minorities. As indicated in the discussion of secession above, this must be construed as precluding only the “forced” removal of the colonized people by the colonizing power. It ought not be applied to limit the right of the colonized people to remove themselves from the colonizer’s body politic. The Puerto Ricans must thus be able to develop “shared identities”<sup>403</sup> within their own community as citizens of the Republic of Puerto Rico, or within the United States community, as citizens of the United States.

---

401. “Toleration comes in abundance only after the tolerated group has been re-described so as to rob it both of its significance and the nature of its complaints.” Addis, *supra* note 17, at 125.

402. By this Addis means that solidarity alone is not enough, that solidarity must manage to respect diversity:

Emphasis on solidarity without providing the mechanism through which the fact of pluralism (and difference) can be recognized and normatively affirmed is to commit the error of the communitarian, who simply asserts solidarity, with the consequence that minorities will be either forcibly assimilated or forcibly removed. Either option is not, and ought not to be, attractive to minorities.

*Id.* at 126.

403. Addis explains:

By “shared identity” I mean to refer to an identity that bonds together, partially and contingently, minorities and majorities, such that different cultural and ethnic groups are seen, and see themselves, as networks of communication where each group comes to understand its distinctiveness as well as the fact that distinctiveness is to a large degree defined in terms of its relationship with the Other. Viewed in this way, the notion of shared identity is not a final state of harmony, as communitarians would claim. It is rather a process that would allow diverse groups to link each other in a continuous dialogue with the possibility that the life of each group will illuminate the conditions of others such that in the process the groups might develop, however provisionally and contingently, “common vocabularies of emancipation,” and of justice. I think Seyla Benhabib is right when she observed that “[t]he feelings of friendship and solidarity result . . . through the extension of our moral and political imagination . . . through the actual confrontation in public life with the point of view of those who are otherwise strangers to us but who become known to us through their public presence as voices and perspectives we have to take into account.

*Id.* at 127 (arguing that the notion of shared identity is not a final state of harmony, as communitarians would claim) (citations omitted).

Nationalism may be deployed as a positive force,<sup>404</sup> as long as it is limited by a communitarian consciousness.<sup>405</sup> Puerto Ricans should be able to choose to be Puerto Rican patriots,<sup>406</sup> as more generally, peoples of the world should be able to choose a national affiliation. This implies a rejection of the notion that being Puerto Rican (or American or Irish, for that matter) first and a citizen of the world second is morally questionable or irrelevant.<sup>407</sup> Nussbaum's idea that the emphasis on

404. Walzer describes this type of nationalism:

The quality of nationalism is also determined within civil society, where national groups coexist and overlap with families and religious communities (two social formations largely neglected in modernist answers to the question about the good life) and where nationalism is expressed in schools and movements, organizations for mutual aid, cultural and historical societies. It is because groups like these are entangled with other groups, similar in kind but different in aim, that civil society holds out the hope of a domesticated nationalism. In states dominated by a single nation, the multiplicity of the groups pluralizes nationalist politics and culture; in states with more than one nation, the density of the networks prevents radical polarization.

Walzer, *supra* note 393, at 166.

405. In other words, nationalism does not have to be inherently fascist. See discussion at *supra* note 15.

406. Martha Nussbaum describes political theory based on patriotism and nationalism as follows:

Richard Rorty urges Americans, especially the American left, not to disdain patriotism as a value, and indeed to give central importance to "the emotions of national pride" and "a sense of shared national identity." Rorty argues that we cannot even criticize ourselves well unless we also "rejoice" in our American identity and define ourselves fundamentally in terms of that identity. Rorty seems to hold that the primary alternative to a politics based on patriotism and national identity is what he calls a "politics of difference," one based on internal divisions among America's ethnic, racial, religious, and other subgroups. He nowhere considers the possibility of a more international basis for political emotion and concern.

Nussbaum, *supra* note 388, at 4.

407. This is Martha Nussbaum's position as she explains:

Once someone has said, I am an Indian first, a citizen of the world second, once he or she has made that morally questionable move of self-definition by a *morally irrelevant characteristic*, then what, indeed, will stop that person from saying, as Tagore's characters so quickly learn to say, I am a Hindu first, and an Indian second, or I am an upper-caste landlord first, and a Hindu second? Only the cosmopolitan stance of the landlord Nikhil—so boringly flat in the eyes of his young wife Bimala and his passionate nationalist friend Sandip—has the promise of transcending these divisions, because only this stance asks us to give our first allegiance

cosmopolitanism teaches our children to share is a very typically flawed example of liberalism.<sup>408</sup> Sharing built on the recognition of and respect for difference is a superior theoretical model for a diverse world.<sup>409</sup>

The resulting vision of citizenship is a pluralist, communitarian, and nationalistic form of citizenship. It is universal, in that the rights of all citizens within the polity are recognized.<sup>410</sup> However, recognition is not based on the traditional liberal view of the individual as an island, but rather on that of an individual as a person and as a member of relative communities. This is not advocating a “cultural fragmentation of citizenship”<sup>411</sup> but rather the empowerment of the cultural citizen as

to what is morally good—and that which, being good, I can recommend to all human beings.

*Id.* at 5 (emphasis added) (Referring to RABINDRANATH TAGORE, *THE HOME AND THE WORLD*).

408. In answering the question “What should we teach our children?” Nussbaum writes:

Most important, should they be taught that they are, above all, citizens of the United States, or should they instead be taught that they are, above all, citizens of a world of human beings, and that, while they happen to be situated in the United States, they have to share this world with the citizens of other countries?

*Id.* at 6.

409. This is the only way to deal with the paradox of difference. To the extent that difference was legally constructed before, and is socially constructed and legally protected today,

[e]qual treatment requires everyone to be measured according to the same norms, but in fact there are no ‘neutral’ norms of behavior and performance. Where some groups are privileged and others oppressed, the formulation of law, policy, and the rules of private institutions tend to be biased in favor of the privileged groups, because their particular experience implicitly sets the norm. Thus, where there are group differences in capacities, socialization, values, and cognitive and cultural styles, only attending to such differences can enable the inclusion and participation of all groups in political and economic institutions. . . .

Iris Marion Young, *Polity and Group Difference*, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 198.

410. Clearly, Professor Nussbaum would find this argument unconvincing. Speaking of American citizenship, she writes: “We say that respect should be accorded to humanity as such, but we really mean that Americans as such are worthy of special respect. And that, I think, is a story that Americans have told for far too long.” Nussbaum, *supra* note 388, at 15. The defect in this analysis is the failure to value the nation-state. While a global community that gets along is a desirable goal, most human interactions occur at the local level. The advantages of multiculturalism and civil society models are that they account for diversity at both the macro (global/nation) and micro (nation/community) levels.

411. Beiner, *supra* note 14, at 5.

providing the path to justice in a multicultural society. In the context of the Puerto Ricans within the United States, justice requires that they be allowed to choose the nation to which they wish to belong. In the context of internal Puerto Rican faultlines, justice requires that the Puerto Ricans not marginalize women, Blacks, and homosexuals—to name a few internally disadvantaged groups. This last notion is very important for the sake of consistency, since Puerto Ricans ought treat themselves as they would have themselves be treated if they choose to remain within United States sovereignty. Nevertheless, the fundamental result of the theory of justice discussed here is that the Puerto Ricans, as cultural citizens of a defined territory, should be given the choice of defining their nation and their allegiance either to Puerto Rico or the United States.

Puerto Ricans would be making a choice between legal sovereignty for themselves or cultural sovereignty within a supranational political culture.<sup>412</sup> This requires the United States to live up to the ideal described by Jürgen Habermas of a diverse “political culture” that exercises “constitutional patriotism.”<sup>413</sup>

This new vision of Puerto Rican citizenship can be accomplished by American recognition of the sovereignty of the Puerto Rican peoples as a necessary prerequisite to truly free choice for the Puerto Ricans to re-define themselves and their national sovereign allegiance. It would be illegitimate to require the Puerto Ricans to make a decision in the context of continued colonial rule, because that would be inconsistent with the theories of justice developed here. The context of the Puerto Ricans’ choice cannot continue to be the flawed American liberalism that is enshrined into United States law. Only the United

---

412. See Jürgen Habermas, *Citizenship and National Identity*, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 264 (“One’s own national tradition will . . . have to be appropriated in such a manner that it is related to and relativized by the vantage points of the other national cultures. It must be connected with the overlapping consensus of a common, supranationally shared political culture. . . . Particularist anchoring of *this sort* would in no way impair the universalist meaning of popular sovereignty and human rights.”).

413. See *id.*

[E]xamples of multicultural societies like . . . the United States demonstrate that a political culture in the seedbed of which constitutional principles are rooted by no means has to be based on all citizens sharing the same language or the same ethnic and cultural origins. Rather, the political culture must serve as the common denominator for a constitutional patriotism which simultaneously sharpens an awareness of the multiplicity and integrity of the different forms of life which coexist in a multicultural society.

*Id.*



States can empower the Puerto Ricans to make a free choice, by setting the Puerto Ricans free.

#### IV. A FRAMEWORK FOR LEGAL REFORM

##### A. *The End of "Commonwealth" and the Pre/requisite of Independence*

In order to produce an acceptable permanent status for Puerto Rico, the legal alternatives must be defined and then tested for consistency with the new theory of justice developed in the preceding section. But, to the extent that the available philosophical and legal alternatives require the acceptance of a new paradigm that at the very least makes the current status unacceptable, the implementation of the law will be difficult, for reasons that an observer of the human condition identified long ago:

. . . It must be considered that there is nothing more difficult to carry out, nor more doubtful of success, nor more dangerous to handle, than to initiate a new order of things. For the reformer has enemies in all those who profit by the old order and only lukewarm defenders in all those who would profit by the new order, this lukewarmness arising partly from fear of their adversaries, who have the laws in their favour; and partly from the incredulity of mankind, who do not truly believe in anything new until they have had actual experience of it. . . .<sup>414</sup>

The legal framework developed below might rightly strike many as legally obvious, given the analysis in the previous section. However, as the language quoted above indicates, not everyone shares a common definition of "obvious" in matters as *political* as the construction of Puerto Rican status.

There are people inside and outside the island who continue to defend Puerto Rico's current status as not colonial because the people of Puerto Rico have agreed to it.<sup>415</sup> While criticizing this acquiescence might strike some as being anti-democratic,<sup>416</sup> one of the purposes of this

---

414. MACHIAVELLI, *supra* note 28, at 49–50.

415. A United States District Court judge ruled last summer that there is a bilateral compact between Puerto Rico and the United States. See *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312–15 (D. P.R. 2000). While this position is legally untenable, as discussed *supra* Part I.B.3, its continued articulation illustrates the necessity for legal clarity and honesty.

416. After all, the "Commonwealth" has directly or indirectly received substantial popular votes in Puerto Rican plebiscites. In 1967, the commonwealth status won a plebiscite. MALAVET VEGA, *supra* note 48, at 40. On October 14, 1993, the common-

Article is partially to remove the current status debate from the political to the legal arena. Only the absolute, if perhaps ruthless, clarity of the law<sup>417</sup> will allow the Puerto Rican status issue to move beyond the political attempts to justify and to defend the current "Commonwealth" status, which is a legally and morally flawed regime. Conversely, only the clarity of the legal alternatives will allow a truthful, legitimate political debate to take place.

The current "Commonwealth" status is a colonial regime that allocates to the United States Congress the ultimate authority to rule over Puerto Rico.<sup>418</sup> Additionally, the commonwealth status legally constructs the Puerto Ricans on the island as second-class citizens. The communitarian theory of justice devised above clearly establishes that the legal and social construction of Puerto Ricans as second-class citizens is unacceptable. Therefore, the current commonwealth status is not an acceptable alternative for the permanent resolution of the problem of Puerto Rican citizenship.

Independence, the entry of Puerto Rico as the 51st state of the Union, or an international bilateral compact between an independent Puerto Rico and the United States, would end the island's colonial status and establish a legally sound and egalitarian relationship between the United States and Puerto Rico. A reconstruction of the Puerto Rican state along those lines would also reform Puerto Rican legal citizenship as required by a pluralistic communitarian theory of justice that empowers Puerto Rican cultural citizens while preventing the deployment of culture as dogma. Accordingly, Puerto Ricans would freely choose a form of political solidarity, rather than having an essentialized vision of "getting along" imposed upon them by the United States.

In order to be fully consistent with the theory of justice described above, the status choice must be made under conditions that ensure Puerto Rican self-determination. The most effective way to accomplish this is independence, or at the very least the assurance thereof, by the United States. In other words, independence, and the accompanying power for the Puerto Rican peoples to exercise their free and sovereign

---

wealth obtained 48.4%, statehood 46.2%, and independence 4.4% of the votes cast. *Id.* In 1998, the "None of the Above" option which was supported by the pro-Commonwealth party in the status plebiscite, received the majority of the votes cast, beating statehood 50.2% to 46.5% of the votes cast. Lance Oliver, *Puerto Rican Party Urges Vote for "None of the Above"*, ORLANDO SENTINEL, Oct. 16, 1998, at A6; Maria T. Padilla, *The Winner: None of the Above*, ORLANDO SENTINEL, Dec. 14, 1998, at A1.

417. As discussed herein, the current legal status of Puerto Rico is a matter of well-established United States statutory and constitutional statements. *See supra* Part I.B. Those statements however, are inconsistent with contemporary theories of justice and morality. *See supra* Part III.A.

418. *See supra* Part I.B.3.

will, is an essential prerequisite to a permanent decision on Puerto Rican status and citizenship.<sup>419</sup>

The remaining subsections of this Part will present the legal alternatives for the construction of Puerto Rico status and Puerto Rican citizenship, and discuss their relative advantages and disadvantages, through the lens of the new theory of justice developed above.

### B. *The Post-Colonial Status Alternatives: Re/defining Ciudadanía Puertorriqueña (Puerto Rican Citizenship)*

#### 1. Independence

Independence is the one alternative that is acceptable under any applicable legal regime. However, the experience of Cuba and the Philippines after receiving independence from the United States underscores the need to avoid any remaining legal influence by the United States incorporated into the new Puerto Rican constitution.<sup>420</sup>

Additionally, as the East-Timor situation has recently taught us, the process of independence needs to be carefully structured and thought out. There will have to be a political and economic transition to make independence workable.

Another transitional issue will be how to deal with those American citizens of Puerto Rican descent, in both Puerto Rico and in the United States, who wish to stay in the United States. For Puerto Rico, the issue will become how to define citizenship in a manner that welcomes the displaced peoples of Puerto Rico, both inside and outside *la isla*, and invites all persons who have chosen to make the island their home to stay.<sup>421</sup>

Additionally, Puerto Ricans have fought in America's wars and worked for its government and for its companies. Transition of retirement and health plans, such as Social Security, Medicare, Veterans' benefits, and private retirement programs, will have to be provided.<sup>422</sup>

---

419. However, this is not the only way of accomplishing statehood. A plebiscite bill that guaranteed non-assimilationist statehood would perhaps be acceptable.

420. This is to be distinguished from the Platt Amendment in the Cuban Constitution and the Defense provisions of the Philippine Constitution. Basically, when granting independence to both Cuba and the Philippines, the United States imposed into their constitutions provisions that allowed the United States Congress to overrule decisions made by those purportedly independent nations. This limitation on their sovereignty allowed the United States to pursue its own interests over those of the Cubans and the Filipinas/os.

421. Israel is an important example of a working system that constantly tries to welcome new persons into its citizenship.

422. In 1992, the United States made financial transfers to Puerto Rico that totaled \$5,025.2 million. Of that amount \$2,414.1 million were Social Security payments,

## 2. Non-Assimilationist Statehood

Statehood would mean legal and political equal protection, if not necessarily equality because of the failures of American liberalism and constitutionalism discussed above. Nevertheless, it would avail access to the courts and to the opportunities afforded by the American legal and political processes. This status would be legally and philosophically much superior to the current colonial condition.

The path to statehood, under United States domestic law, is straightforward, legally speaking.<sup>423</sup> Problems might arise, however, because of conditions placed on the entry into statehood. Congress has the power to impose conditions on admission into statehood,<sup>424</sup> although those conditions are only enforceable prior to admission into the union.<sup>425</sup> In order to be consistent with the theory of justice developed in Part III.B., Congress cannot impose conditions on the entry of Puerto Rico into statehood that would compromise the cultural identity of the Puerto Ricans, because that would be internally anti-communitarian, and fundamentally immoral and unjust. The Puerto Ricans should not be presented with a choice between being culturally Puerto Rican and legally American.<sup>426</sup>

## 3. Non-Assimilationist, Bilateral Free Association

The final alternative is something in between statehood and independence, that is, something other than the current illegitimate

\$382.4 million were veterans benefits, and \$100.2 million were federal pension payments. RIVERA-BATIZ & SANTIAGO, *supra* note 18, at 76 (table 4.7). At least some of these plans may be considered vested and thus payable regardless of the location of the recipient, but perhaps not regardless of their citizenship.

423.

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.

424. *Coyle v. Smith*, 221 U.S. 559, 568 (1911) (“The constitutional provision concerning the admission of new States is not a mandate, but a power to be exercised with discretion.”).

425. *Id.* (holding that after becoming a state, Oklahoma’s legislature could change location of its capital, despite congressional statehood condition that it be located elsewhere).

426. Such a choice would be created, for example, if the Congress were to heed calls to require the imposition of English as the only official language of Puerto Rico. See U.S. English, Inc., *Avoiding an American Quebec: The Future of Puerto Rico and the United States*, (calling on Congress to impose a requirement of English as the only official language in Puerto Rico, as a condition for statehood), at <http://www.us-english.org/foundation/issues/prbriefing.asp> (visited Apr. 7, 2001).

colonial regime described in Part I.B.3 It must be a truly bilateral compact, i.e., an agreement that is equally binding both on the People of Puerto Rico and the People of the United States. A binding agreement between the Puerto Ricans and the *estadounidenses* can be accomplished under United States law or under International Law, and probably under a combination of the two systems.

An amendment to the United States Constitution could produce an agreement which, under domestic United States law, would be binding on the United States and Puerto Rico. The amendment would authorize the United States Congress to negotiate a new Act to govern the relationship between Puerto Rico and the United States, and it would provide the requirements for its passage, as well as its general parameters. Once the act is negotiated and ratified, the agreement becomes binding on both sides and may not be amended unilaterally by either side, by express provision of the amendment. The amendment could also provide a time limitation for ratification of the amendment, and for agreement on the United States–Puerto Rico pact.

This would be superior to the current statutory regime that is clearly subject to unilateral Congressional action under United States law. Therefore, under United States law,<sup>427</sup> the only legal vehicle to produce a mutually binding agreement between the people of Puerto Rico and the people of the United States would be to amend the United States Constitution.<sup>428</sup> However, the amendment would have to be carefully crafted to prohibit its repeal or amendment<sup>429</sup> without the

427. A treaty would be mutually binding under international law. The rule of *Pacta sunt servanda* or Article 26 of the Vienna Convention on the Law of Treaties, provides that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331 [*hereinafter* Vienna Convention]. Additionally, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.” *Id.* at art. 27.

However, I have limited my discussion herein to the realities of United States law. Moreover, I believe that there is no possible enforcement mechanism that could prevent unilateral action by the United States government; and Puerto Rico would simply be unable to enforce it on its own against the most powerful nation in the world.

428. U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .”). See generally *National Prohibition Cases*, 253 U.S. 350, 386 (1920) (“[Once an] Amendment, by lawful proposal and ratification has become a part of the Constitution, [it] must be respected and given effect the same as other provisions of that instrument.”).

429. Cf. U.S. CONST. amend. XVIII (“[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohib-

consent of the people of Puerto Rico, if it is to create a truly bilateral compact.<sup>430</sup>

A treaty is also an available alternative, at least in theory. Again, independence for Puerto Rico would be a necessary prerequisite for a treaty, since only internationally recognized nations can enter into treaties.<sup>431</sup> Accordingly, the benefit of a treaty regime would be international recognition of Puerto Rican sovereignty and the enforceability of the treaty through international legal processes.

However, under the United States legal regime, this method suffers from a fundamental weakness in that it would be subject to subsequent unilateral congressional action under United States law.<sup>432</sup> Therefore, in order to produce an agreement that is bilaterally enforceable under both domestic United States and international law, and one in which Puerto Rico's sovereignty is seriously cognizable, associated status will probably require *both* a constitutional amendment and a treaty regime between the United States and the Republic of Puerto Rico. Other alternatives

---

ited") and U.S. CONST. amend. XXI ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

430. While the idea of an "unconstitutional constitutional amendment" is oxymoronic under current United States law, the Puerto Rico-United States Post-Colonial Legal Regime Constitutional Amendment could require approval in the manner traditionally used to amend the United States Constitution *and* require further approval by the people of Puerto Rico as well. There is precedent for making a particular provision of a constitution not subject to Amendment: The "Eternity Clause" in Article 79, paragraph 3 of the German Basic Law. It "bars any amendment to the Basic Law that would tamper with the principle of federalism of impinge upon 'the basic principles laid down in Articles 1 and 20.' Article 1 . . . sets forth the principle of human dignity and imposes upon the state the affirmative duty 'to respect and protect it,' whereas Article 20 proclaims the basic principles governing the polity as a whole—*i.e.*, federalism, democracy, republicanism, separation of powers, the rule of law, popular sovereignty, and the social welfare state." Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 846 (1991).

431. Puerto Rico would have to be a "state" under international law in order to enter into such an agreement. *See* Vienna Convention, *supra* note 427, at art. 1 ("The present convention applies to treaties between states.").

432. Under the Supremacy Clause, treaties signed by the president and approved by a two-thirds majority of the Senate become the "law of the land." U.S. CONST. art. II, § 2 (The president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . ."); U.S. CONST. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . ."). However, while approved treaties displace inconsistent state laws, the treaty itself can be overridden by a subsequent act of Congress, provided that Congressional intent to abrogate the statute is clearly stated in the law. *Cf.* *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456 (S.D.N.Y. 1988) (holding that the Anti-Terrorism Act of 1987, 22 U.S.C. §§ 5201–03, did not override Headquarters Agreement between United States and United Nations because Congress failed expressly to state that this was its intention).

simply would not be compatible with the theory of justice developed in this Article. The constitutional amendment would have to authorize the entry into a treaty between the Republic of Puerto Rico and the United States of America.<sup>433</sup>

The basic paradigm shift required by the specific theory of justice developed above is that the Puerto Rican peoples must be free to redefine their legal citizenship. This means that an essential pre-requisite to the re-definition of Puerto Rican citizenship is a re-definition of the state; Puerto Rico must become a sovereign state in order for the Puerto Ricans to be able to redefine their citizenship *vis-à-vis* their relationship with the United States and their relationship among themselves.

The discussion of the legal alternatives presented above might appear to be a surrender to the nomocratic state.<sup>434</sup> But that conclusion would be wrong, because the formal legal solutions discussed above are evaluated on the basis of the telocratic vision of the state that is derived from the theories of justice developed earlier in this Article.

Additionally, it might seem paradoxical to allow two regimes that involve co-existence within the United States to be adopted after acquiring nationhood and independence, especially after criticizing American citizenship for its flawed foundation. However, the process of reforming theories of citizenship and the state that is supported here is one that is intended to apply to any society generally. The Puerto Rican context is used as the specific case study for its arguments. To allow for a future under United States citizenship in statehood, or under a lesser form of United States/Puerto Rican citizenship under an affiliated republic(s) model, is to enable the Puerto Ricans to choose the legal regime under which they wish to struggle to build a just society. As is indicated above, neither Puerto Rican nor United States societies are perfect. The purpose of the theories developed here is to allow any society to strive for a balance of justice and morality. At the same time, the formal legal regime within which this will take place will be chosen by the people. The process must be mutual, as it involves the peoples of both Puerto Rico and the United States. It must be free for both.

---

433. Independence for Puerto Rico could be accomplished by statute prior to passage of the Amendment, or it could be included in the amendment itself.

434. Nomocratic means a "rule governed" state, as distinguished from a telocratic, or result-governed, state. George Armstrong Kelly, *Who Needs a Theory of Citizenship*, in *THEORIZING CITIZENSHIP*, *supra* note 14, at 79, 85.

## CONCLUSION: ESTE SON QUE TRAIGO YO

*Y ahora comprendo por qué  
fallaron en su intención.  
Ay mira, no cantan de corazón,  
y no hay clave que no brinquen.  
Por eso, para que se afinquen  
aquí les traigo mi son.*

—Tite Curet Alonso<sup>435</sup>

The current colonial status into which the United States has legally constructed Puerto Rico is simply unacceptable when we apply a new paradigm of American constitutional patriotism that allows the conservative United States constitutional liberalism to become a progressive pluralistic communitarian legal theory. Moreover, the clarity of the law, informed by a new philosophical vision, will break the political obfuscation that hides the Puerto Rican colony in plain view.

Even the Insular Cases, with their conservative cultural approach to American constitutional liberalism, suggest that Puerto Rico as a permanent unincorporated territory, which it has been during the 100 years of American rule, is *constitutionally* unacceptable. In *Downes v. Bidwell*, the dissenters called on their brethren to resist the temptation to give Congress too much power in relation to their new Empire.<sup>436</sup> While the majority refused to heed this warning, in that same case, Justice White indicated that there would come a time when the United States Congress would be constitutionally required to make a choice about Puerto Rico's entry into the Union as an incorporated territory and/or a state.<sup>437</sup> In other words, with legislative power comes responsibility, both under the United States Constitution and under fundamental notions of justice and morality.

Moreover, the obligation to make a request for a decision cannot be imposed on Puerto Rico. Some commentators have reached essentialized conclusions indicating that it is the Puerto Ricans who are at fault for perpetuating colonial status.<sup>438</sup> This is an incredible example of imposing

435. MALAVET VEGA, BOLERO, *supra* note 211, at 151. Author's translation: And now I understand why/ they failed in their intention./ Oh, look, they do not sing from the heart/ and there is no key that they will not trample/ That is why, so that they will settle down/ here I bring them my song.

436. See *supra* note 115 and accompanying text.

437. See *supra* note 117 and accompanying text.

438. See e.g., CARR, *supra* note 4, at 11:

The deep sense of frustration that haunts Puerto Rico is self-induced. Congress will not act as long as the democratic process in Puerto Rico



the Stockholm syndrome<sup>439</sup> on the victims of colonial occupation and absolving the perpetrator of that occupation from all responsibility.<sup>440</sup>

It is simply preposterous to suggest that it is up to a people under colonial occupation to demand a specific non-colonial solution.<sup>441</sup> While colonized peoples should be free to demand freedom, they cannot be required to do so. The choice to end colonial occupation of other territories must be made by the imperial power, not by the occupied nation. It is the constitutional obligation of the United States Congress to decide whether or not Puerto Rico should become a post-colonial state. The power to do so is clearly allocated to the United Congress.<sup>442</sup> This Article

gives no clear indication of the status Puerto Ricans wish to enjoy. . . .  
 “Divide and rule” was the classic device for the maintenance of colonial rule. The United States does not need to foster it. The Puerto Ricans divide themselves.

439. “Stockholm syndrome: The unnatural close relationship that occasionally develops between a hostage and a criminal or terrorist and his or her captor. It was first described with regard to a woman held hostage in a bank in Sweden who remained faithful to the thief during his imprisonment.” THE CAMBRIDGE ENCYCLOPEDIA 1156 (David Crystal ed., 1990).

440. Critical legal theory has long recognized the shortcomings of viewing legal problems from the perspective of the perpetrator. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in CRITICAL RACE THEORY, *supra* note 22, at 29, 30 (“fault” and “causation” are “central to the perpetrator perspective,” i.e., “conscious” and “intentional” are the only illegal types of discrimination, which allows “aloof” Whites to preserve privilege by simply denying culpability); see also Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, in CRITICAL RACE THEORY, *supra* note 22, at 235, 254 (arguing that the intent requirement in civil rights cases means that “[t]he legal establishment has not responded to civil rights claims that threaten the superior societal status of upper and middle class whites.”).

441. This is the perfect Catch-22. Puerto Ricans are carefully monitored for any indication of pro-independence sentiment and constantly bombarded with fear of statehood and independence. At the same time, the United States says that the people of Puerto Rico are free to choose their status, and until they make a clear choice, the Congress is not obligated to act. In a moment of partisan candor, President Clinton stated that “the unwillingness of the Congress to give a legislatively-sanctioned vote to the people of Puerto Rico to let them decide the status of Puerto Rico” was one of the causes of the “Vieques issue.” President William Clinton, Press Conference (Feb. 16, 2000), available at [http://abcnews.go.com/sections/us/DailyNews/clinton\\_trans\\_2\\_000216.html](http://abcnews.go.com/sections/us/DailyNews/clinton_trans_2_000216.html).

442. However, the Supreme Court can also contribute to this process by taking the earliest possible opportunity to issue its first comprehensive decision on the status of Puerto Rico since *Balzac* was decided in 1922. The recent Supreme Court decisions discussed in Part I.B.3. were terse *per curiam* opinions.

There are two important opinions challenging the status of Puerto Rico and its citizenship making their way up the judicial pipeline that would afford the Court an opportunity to express its view. See *Igartúa de la Rosa v. United States*, 107 F. Supp. 2d 140 (D. P.R. 2000) (Ruling that United States citizens who reside in Puerto Rico have a constitutional right to vote in presidential elections), *rev'd* *Igartúa de la Rosa v. United*

provides the legislators with the theoretical and legal framework to exercise that power responsibly. The Congress must first define the Puerto Rican cultural nation as a legal nation. This is the only way for the United States to recognize and to respect the cultural citizenship and nationhood of Puerto Ricans and to enable the free will of Puerto Ricans to make a final status decision.

“Getting along” and “thriving within” are generally the strongest philosophical solutions to the challenges of multiculturalism, particularly in an era in which “secession” threatens to become synonymous with “ethnic cleansing.”<sup>443</sup> Serious legal and philosophical models in the contemporary world must avoid the balkanization that we see today both at home<sup>444</sup> and around the world.<sup>445</sup> Secession may only rarely be appropriate, but Puerto Rico is an example of just such an exceptional situation.

---

States, 229 F.3d 80 (1st Cir. 2000); *United States v. Acosta Martínez*, 106 F. Supp. 2d 311, 312–15 (D. P.R. 2000) (holding that there is a bilateral compact between Puerto Rico and the United States that cannot be unilaterally amended by the United States Congress without the approval of the Puerto Rican people). While in the opinion of this author both these decisions are legally incorrect, their aspirational tone appeals to the notions of justice and morality that are discussed in this Article.

443. Just a simple check of the headlines in a Sunday *New York Times* can be disturbing. See, e.g., John F. Burns, *Arrests Shake Ancient Roots of Iran's Jews*, N.Y. TIMES, Oct. 17, 1999, at A1 (discussing the arrest of several Iranian Jews on charges of spying for Israel; an Iranian Jew is quoted as saying: “This is my country, my Iran. . . . When the mullahs made their revolution, I could have left, like many Jews, but I decided not to go. And Why? Because my family came here 2,500 years ago.”); Ian Fisher, *Oil Flowing in Sudan, Raising the Stakes in its Civil War*, N.Y. TIMES, Oct. 17, 1999, at A3 (describing how the Sudan, the largest country in Africa, has seen a resurgence of its civil war, which “is, in many ways, a religious conflict, pitting the Muslim north against the Christian south”).

444. Again, one particular Sunday *New York Times*’ readings provide examples. Denise Grady, *White Doctors, Black Patients, Not a Simple Case of Health Racism*, N.Y. TIMES, Oct. 17, 1999, at D1 (“A study found that [in the United States] Blacks were less likely than whites to get surgery for early stages of lung cancer and, as a result, more likely to die from a potentially curable disease.”).

445. Marlise Simons, *In New Europe, a Lingual Hodgepodge*, N.Y. TIMES, Oct. 17, 1999, at A5. At a time when the European Union is producing a more economically united Europe, there is strong resurgence of regional languages and culture. The European Union has even created a bureau to promote the local cultures. One of its officials is quoted as saying: “When the media report on ethnic groups, it is usually about conflict. . . . We want to provide some balance. There’s so much else going on that’s very rich.” *Id.* Michel Le Bris, a novelist for Brittany, in France, states, “We now accept that our identity can have several layers. . . . We can feel European and French and Breton all at once. But the answer is to remain open. If not, you become a bastion, a Serbia.” *Id.* (How sad for the Serbians, their name has become a synonym for racism and hatred.) On the previous page, beneath the headline *Czechs’ Wall for Gypsies Stirs Protests Across Europe*, the paper reports how a Czech municipality has “erected a wall 70 yards long down the street separating the two-family homes of Czechs on one side from the decrepit communal apartment buildings inhabited mostly by Gypsy families on the other.” *Czechs’ Wall for Gypsies Stirs Protests Across Europe*, N.Y. TIMES, Oct. 17, 1999, at A4.

Nevertheless, as discussed above, secession is only one of the choices available to the Puerto Ricans.

One positive step towards the recognition of Puerto Rican nationhood and citizenship would be for the United States Congress to give to Puerto Ricans the protections of the United States constitution that apply to an incorporated territory.<sup>446</sup> But this must be a short transitional step on the way to Puerto Rico's nationhood, but a necessary step on the way to a permanent resolution of the status issue that is freely accepted by the Puerto Rican peoples. Accordingly, it would be consistent with this theory of justice for Puerto Rican nationhood to be a prelude to a permanent relationship with the United States that is truly empowering and respectful of the Puerto Ricans' cultural existence, i.e., a non-assimilationist form of statehood or an associated state.

Thereafter, both countries and peoples can negotiate the morally and legally acceptable alternatives that were outlined above. That means that the Puerto Ricans will have the choice of mutually negotiating, with the People of the United States, a post-colonial future that is consistent with contemporary theories of justice that ensure legal respect of culture(s) and multi/cultural political co-existence.

---

446. This has only legally occurred once in United States history, with Alaska. See *Rasmussen v. United States*, 197 U.S. 516 (1905); see also LAUGHLIN, *supra* note 24, at 89–91 (discussing the incorporation experience, as well as the unincorporated but organized territories).