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## **An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status**

Lani E. Medina\*

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# An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status

Lani E. Medina

## **Abstract**

In the case of Puerto Rico, the exercise of self-determination has raised, and continues to raise, particularly difficult questions that have not been adequately addressed. Indeed, as legal scholars Gary Lawson and Robert Sloane observe in a recent article, “[t]he profound issues raised by the domestic and international legal status of Puerto Rico need to be faced and resolved.” Accordingly, this Note focuses on the application of the principle of self-determination to the people of Puerto Rico. Part I provides an overview of the development of the principle of self-determination in international law and Puerto Rico’s commonwealth status. Part II provides background information on the political status debate in Puerto Rico and focuses on three key issues that arise in the context of self-determination in Puerto Rico. Part III explains why Puerto Rico’s political status needs to be resolved and how the process of self-determination should proceed in Puerto Rico. Ultimately, this Note contends that the people of Puerto Rico have yet to fully exercise their right to self-determination.

# AN UNSATISFACTORY CASE OF SELF- DETERMINATION: RESOLVING PUERTO RICO'S POLITICAL STATUS

*Lani E. Medina\**

*“[O]nce the principle of equal citizenship and the plight of our colonial peoples have been fully understood, there becomes no way to deny admission to the citizens of Puerto Rico when and if they exercise their right to self-determination by choosing to demand that status.”*

—Luis R. Dávila-Colón<sup>1</sup>

## INTRODUCTION

Puerto Rico's status as a U.S. territory since 1898<sup>2</sup> has been a subject of widespread debate for many years. Some have focused on the constitutionality of the current relationship between the United States and Puerto Rico<sup>3</sup> and whether Puerto Rico still qualifies as a U.S. colony.<sup>4</sup> Others have focused on Public Law 600, the U.S. statute that led to Puerto Rico's establishment as a

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\* J.D. Candidate, 2010, Fordham University School of Law; B.A., 2005, Columbia University. The author would like to thank Professor Gráinne de Búrca for her guidance during the drafting process of this Note; Professor Robin A. Lenhardt for encouraging her to write this Note in the first place; and her friends and family for their love and support.

1. Luis R. Dávila-Colón, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. INT'L L. 315, 374 (1981).

2. See *infra* note 83 and accompanying text (referring to the Treaty of Peace between the United States and Spain).

3. See, e.g., Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1556 (2008) (“[T]he status of Puerto Rico under U.S. law raises innumerable questions of democratic theory and constitutional law.”); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT 15, 15 (1995) (“The constitutional status of Puerto Rico raises complex and interesting puzzles.”).

4. Compare Jason Adolfo Otaño, Note, *Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum*, 27 FORDHAM INT'L L.J. 1806, 1811 (2004) (contending that Puerto Rico is still a U.S. colony), with Natsu Taylor Saito, *Asserting Plenary Power Over the “Other”: Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 472 (2002) (describing the U.S. position that Puerto Rico is a commonwealth, not a U.S. colony).

commonwealth in 1952,<sup>5</sup> and whether the United Nations (“U.N.”) should have subsequently removed Puerto Rico from the list of non-self-governing territories in 1953.<sup>6</sup>

The Honorable Gustavo A. Gelpí, U.S. District Court Judge for District Court for the District of Puerto Rico, recently concluded that Puerto Rico is an incorporated territory of the United States even without any affirmative language from the U.S. Congress to that effect.<sup>7</sup> The court stated, “[a]ctions speak louder than words. Although Congress has never enacted any affirmative language such as ‘Puerto Rico is hereby an incorporated territory,’ its sequence of legislative actions from 1900 to present has in fact incorporated the territory.”<sup>8</sup>

While Puerto Rico has been “increasingly integrated” into the United States over the years, as legal historian Christina Duffy Burnett explains, Puerto Rico “still has not been ‘incorporated’ into the United States in a constitutional sense.”<sup>9</sup> In other words, the island remains an unincorporated U.S. territory over which the U.S. Congress has plenary power.<sup>10</sup> Puerto Rico’s status as an unincorporated U.S. territory derives from the territorial incorporation doctrine,<sup>11</sup> a judicially-created doctrine based on the U.S. Supreme Court’s analysis of the Territorial Clause of the U.S. Constitution in a group of cases decided in the early twentieth century, known as the *Insular Cases*.<sup>12</sup> Based on the island’s territorial status, the people of Puerto Rico do not

5. See *infra* notes 89–92 (discussing Public Law 600 and Puerto Rico’s establishment as a commonwealth).

6. See *infra* note 108 (noting that the United Nations continues to monitor Puerto Rico’s status).

7. See *Consejo de Salud Playa Ponce v. Rullan*, 586 F. Supp. 2d 22, 41 (D. P.R. 2008) (concluding that Puerto Rico is an incorporated U.S. territory based on the sequence of actions that Congress has taken with regard to Puerto Rico from 1900 to 2008).

8. *Id.*

9. Christina Duffy Burnett, “*They Say I am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659, 714 (2008).

10. Luis Fuentes-Rohwer, *The Land that Democratic Theory Forgot*, 83 IND. L.J. 1525, 1540 (2008) (positing that through U.S. Supreme Court jurisprudence, “Congress holds plenary powers over the island,” but that “residents of Puerto Rico enjoy only those guarantees of the Bill of Rights deemed by the Court as fundamental”). *But see infra* notes 94–95 and accompanying text (describing the compact theory, which takes a different position on this issue).

11. See *infra* note 120 (discussing the territorial incorporation doctrine, sometimes referred to as the “un-incorporation” or “unincorporation” doctrine).

12. See *infra* notes 122–24 (discussing the seminal cases of *Downes v. Bidwell*, 182 U.S. 244, 287 (1901), and *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922)).

receive equal treatment under the U.S. Constitution even though they are U.S. citizens<sup>13</sup> and serve in the U.S. armed forces in large numbers.<sup>14</sup> They cannot vote for the U.S. President,<sup>15</sup> have no voting representative in the U.S. Congress,<sup>16</sup> and they receive disproportionately lower levels of aid under various federal programs compared to U.S. state citizens.<sup>17</sup>

Since Puerto Rico became a commonwealth,<sup>18</sup> there has been a longstanding recognition that the island's status is unsatisfactory.<sup>19</sup> Despite removing Puerto Rico from the list of non-self-governing territories,<sup>20</sup> the U.N. Decolonization Committee, for example, continues to monitor Puerto Rico's

13. See *infra* Part I.B.3 (providing an overview of the unequal treatment of Puerto Ricans with special attention to the doctrine of territorial incorporation).

14. See *Hearing on H.R. 2499 Before the H. Comm. on Natural Resources*, 111th Cong. 11 (2009) [hereinafter *H. Hearing on H.R. 2499*] (testimony of Rep. Dan Burton) ("Puerto Ricans have fought in our wars as proud U.S. citizens. In fact, Puerto Ricans have sent more of their sons and daughters to serve in the United States military than all but one other state."); Maurice Ferre, *Presidential Race: Puerto Rico's Ironic Role*, *MIAMI HERALD*, May 30, 2008, at A17 ("In our current wars in Iraq and Afghanistan, there are more Puerto Ricans serving, per capita, than residents from 49 states.").

15. See, e.g., *Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (holding that the people of Puerto Rico have neither a constitutional right nor a claim in international law to vote in the presidential election); see also *infra* notes 126–27 and accompanying text (discussing *Igartúa-De La Rosa* in more detail).

16. See *infra* note 85 and accompanying text (referring to the Foraker Act, which established a nonvoting Resident Commissioner in Congress).

17. See John D. Ingram, *Puerto Rican Independence: Whose Choice? The People of Puerto Rico or the United States Government?*, 2001 L. REV. MICH. ST. U. DET. C.L. 85, 93–94 (2001) ("Puerto Rican citizens are less favorably treated under some federal benefit programs, most notably Aid to Families with Dependent Children, Medicaid and food stamps."); JOELY B. ROMAN OQUENDO & SONIA M. PÉREZ, *NAT'L COUNCIL OF LA RAZA, TANF IMPLEMENTATION IN PUERTO RICO: A SUMMARY OF DATA ON LEAVERS 8* (2004) ("[A]lthough Puerto Rico is required to meet the same [federal guideline] requirements as the states, the island does not receive funding to implement the TANF [Temporary Assistance for Needy Families] program comparable to that received by the states.").

18. See *infra* note 92 and accompanying text (noting that Puerto Rico's commonwealth status officially came to being on July 25, 1952).

19. See, e.g., Nelson D. Hermilla, *Puerto Rico 1898–1998: The Institutionalization of Second Class Citizenship?*, 16 *DICK. J. INT'L L.* 275, 284 (1998) ("[A]lthough the political parties in Puerto Rico disagree on the exact nature of any change of status, they all agree that the present political and legal relationship of Puerto Rico with the United States is unsatisfactory."); see also Lisa Napoli, *The Puerto Rican Independistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 *CARDOZO J. INT'L & COMP. L.* 131, 146 (1996) ("The United States is beginning to react internally to the increasing international consciousness of Puerto Rico's unsatisfactory political status.").

20. See *infra* note 100 and accompanying text (referring to Generally Assembly Resolution 748).

status and call upon the United States to facilitate the process of self-determination in Puerto Rico.<sup>21</sup> Moreover, three plebiscites and one referendum<sup>22</sup> held in Puerto Rico since 1967 have proved inconclusive,<sup>23</sup> and the creation of the President's Task Force on Puerto Rico's Status in 2005 has yet to yield any meaningful resolution to the island's political status.<sup>24</sup> President

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21. See *infra* note 108 and accompanying text.

22. There is considerable confusion over the terms "plebiscite" and "referendum" with regard to the principle of self-determination. Most scholars appear to agree that both devices constitute a process whereby people are consulted on a particular issue. See Ruth E. Gordon, *Some Legal Problems with Trusteeship*, 28 CORNELL INT'L L.J. 301, 347 n.121 (1995) ("Plebiscite is a subset of the larger category of referendum. It is a type of referendum wherein the proposal at issue concerns the matter of sovereignty."); Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L 601, 626 n.94 (2003) ("Both plebiscites and referendums are methods of submitting an important measure to direct vote of the people." (quoting J. PATRICK BOYER, LAWMAKING BY THE PEOPLE: REFERENDUMS AND PLEBISCITES IN CANADA 13 (1982))); see also Zejnullah Gruda, *Some Key Principles for a Lasting Solution of the Status of Kosova: Uti Possidetis, the Ethnic Principle, and Self-Determination*, 80 CHI.-KENT L. REV. 353, 369-70 (2005) ("A plebiscite is a vote by which the people of an entire country express an opinion for or against a proposal, especially on a choice of government or ruler."); Dorian A. Shaw, Note, *The Status of Puerto Rico Visited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT'L L.J. 1006, 1061 (1994) ("A 'plebiscite' is a 'vote of the people expressing their choice for or against a proposed law or enactment, submitted to them, and which, if adopted, will work a change in the constitution, or which is beyond the powers of the regular legislative body.'" (quoting BLACK'S LAW DICTIONARY 1153 (6th ed. 1990))). Scholars, however, disagree on the binding nature of these devices. Compare Anthony M. Stevens-Arroyo, *Island in the Sun?*, NEWSDAY (New York), Mar. 22, 1989, at 66 (defining a plebiscite as "an internationally supervised procedure of self-determination, in which before the vote, foreign troops of occupation are removed and all colonial claims have to be renounced in favor of the people's freedom" and defining a referendum as "a non-binding consultation in which Congress has the last word, like a parent in an argument with a child"), with Municipal World, Plebiscites and Referendums, <http://www.municipalworld.com/index.php/Elections/PlebiscitesAndReferendums> (last visited Feb. 28, 2010) (defining plebiscite as "[t]he public expression of a community's opinion without binding force" and referendum as "[t]he process of referring a political question to the electorate for a direct decision by general vote"). This Note takes no position on this issue, except to point out that the plebiscites and referendum held in Puerto Rico were nonbinding because they took place without prior approval from Congress. See *infra* Part IIA.2 (discussing the legality of the plebiscites and referendum held in Puerto Rico).

23. For information on the 1991 referendum, see *infra* notes 153-57 (discussing the 1991 referendum held in Puerto Rico). For information on the three plebiscites, see *infra* notes 148-52, 158-73 (providing an overview of the 1967, 1993, and 1998 plebiscites).

24. See *infra* notes 185-86 and accompanying text (describing the task force's recommendation for a federally-sanctioned plebiscite to be held in Puerto Rico). Although bills following the task force's recommendation have been introduced in Congress, none have passed. See *infra* notes 188-89 (listing different versions of the

Barack Obama has, however, indicated that he will work to resolve Puerto Rico's political status during his administration.<sup>25</sup> According to President Obama, "self-determination is a basic right that has to be addressed, no matter how difficult."<sup>26</sup>

In the case of Puerto Rico, the exercise of self-determination has raised, and continues to raise, particularly difficult questions that have not been adequately addressed. Indeed, as legal scholars Gary Lawson and Robert Sloane observe in a recent article, "[t]he profound issues raised by the domestic and international legal status of Puerto Rico need to be faced and resolved."<sup>27</sup> Accordingly, this Note focuses on the application of the principle of self-determination to the people of Puerto Rico. Part I provides an overview of the development of the principle of self-determination in international law and Puerto Rico's commonwealth status. Part II provides background information on the political status debate in Puerto Rico and focuses on three key issues that arise in the context of self-determination in Puerto Rico. Part III explains why Puerto Rico's political status needs to be resolved and how the process of self-determination should proceed in Puerto Rico. Ultimately, this Note contends that the people of Puerto Rico have yet to fully exercise their right to self-determination.

## I. *BACKGROUND ON PUERTO RICO'S POLITICAL STATUS*

What does the principle of self-determination mean for the people of Puerto Rico, and how should it be applied? These are the underlying questions that this Note seeks to explore. Part I of this Note focuses on the ambiguous principle of self-determination and its application in the case of Puerto Rico.

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"Puerto Rico Democracy Act," one of which, H.R. 2499, is currently pending in the House of Representatives).

25. See Jeannette Rivera-Lyles, *Obama Vows to Solve Puerto Rico's Status*, ORLANDO SENTINEL, Jan. 13, 2009, at A5 (noting that Obama pledged to "enable the question of Puerto Rico's status to be resolved" during his first term in a letter to Governor Luis Fortuño); see also Karen J. Carrillo, *New U.S. Policies Toward Puerto Rico and Cuba?*, N.Y. AMSTERDAM NEWS, Jan. 15, 2009, at 2 (discussing President Obama's commitment to resolving Puerto Rico's political status).

26. Carrillo, *supra* note 25, at 2 (quoting a statement from Obama read by a representative).

27. Gary Lawson & Robert Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1125 (2009).

Part I.A provides a brief overview of the principle of self-determination in international law. It discusses the emergence of this principle and its development through several international instruments. Part I.A also focuses on the distinction between internal and external self-determination. Part II.B focuses on the colonial relationship between the United States and Puerto Rico and the island's commonwealth status. In addition, Part II.B describes the United Nations' role in determining Puerto Rico's commonwealth status.

### A. *The Principle of Self-Determination*

The principle of self-determination came into acceptance during the twentieth century as having played a significant role in ending colonialism. Yet, the precise scope and meaning of the principle of self-determination in international law remains unclear.<sup>28</sup> Despite its ambiguity, the principle of self-determination remains one of the important principles in modern international law.

#### 1. The Emergence of the Principle of Self-Determination

The principle of self-determination in international law primarily emerged from the periods following World War I and World War II.<sup>29</sup> Following the victory of the Allies in World War I, the principle of self-determination became the vehicle for

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28. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 27 (rev. ed. 1996) ("Perhaps no contemporary norm of international law has been so vigorously promoted or widely accepted as the right of all peoples to self-determination. Yet the meaning and content of that right remain as vague and imprecise as when they were enunciated by President Woodrow Wilson and others at Versailles."); see also Mitchell A. Hill, *What the Principle of Self-Determination Means Today*, 1 ILSA J. INT'L & COMP. L. 119, 120 (1995) ("There is no clear consensus . . . as to what the meaning and content of that right is, and it has gained the distinction of 'being one of the most confused expressions in the lexicon of international relations.'" (quoting W. OFUATEY-KODJOE, *THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW* vii (1977))).

29. See Hill, *supra* note 28, at 121 (noting that the principle of self-determination developed from "the post-World War I period of nationalism and the post-World War II period of decolonization"); Melissa A. Jamison, *Rural Electric Cooperatives: A Model for Indigenous Peoples' Permanent Sovereignty Over their Natural Resources*, 12 TULSA J. COMP. & INT'L L. 401, 422 (2005) ("Self-determination developed as a principle of international law during the period between World War I and World War II.").



redividing Europe.<sup>30</sup> In an address to the U.S. Senate, President Wilson declared that “[n]o peace can last, or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed, and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were property.”<sup>31</sup>

Initially, the principle of self-determination only applied to newly-created nations within the defeated Austro-Hungarian and Ottoman empires.<sup>32</sup> The idea of expanding the principle further jeopardized the stability of world order and may have conflicted with the interests of the Allies.<sup>33</sup> Thus, self-determination during the post World War I period did not apply to colonies held by the Allies. Following World War II, however, self-determination served as a legal basis for justifying the process of decolonization.<sup>34</sup>

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30. See HANNUM, *supra* note 28, at 27–28 (“With the disintegration of the Austro-Hungarian and Ottoman empires during World War I, . . . the principle of self-determination became the obvious vehicle for the re-division of Europe by the victorious powers.”); Inge V. Porter, *Two Case Studies in Self-Determination: The Rock and the Bailiwick*, 4 SAN DIEGO INT’L L.J. 339, 343 (2003) (“Most commentators agree that the modern understanding of the principle of self-determination started with the dismantling of the Ottoman and Austro-Hungarian empires after the First World War.”).

31. 54 CONG. REC. 1741, 1742 (1917) (address by U.S. President Woodrow Wilson).

32. See HANNUM, *supra* note 28, at 28 (“Self-determination was considered only for ‘nations’ which were within the territory of the defeated empires; it was never thought to apply to overseas colonies.”); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 50 n.26 (1998) (“Initially, when World War I was drawing to a close, the idea of self-determination of peoples was advanced to legitimize the disintegration of the world empires of the time, and within that meaning entailed the right of ‘peoples’ in the sense of (territorially defined) nations to political independence.”).

33. See HANNUM, *supra* note 28, at 28 (“[S]elf-determination in 1919 had little to do with the demands of the peoples concerned, unless those demands were consistent with the geopolitical and strategic interests of the Great Powers.”); see also Hill, *supra* note 28, at 122 (“Wilson and the other world leaders realized that they could not extend the right of self-determination beyond the confines of Europe without greatly disturbing the world order.”).

34. See Hill, *supra* note 28, at 122 (“Since 1945 the principle of self-determination primarily has been used to provide a legal basis for the process of decolonization.”); Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT’L L. 1, 8 (2009) (noting that self-determination was understood as another word for decolonization in the 1960s).

## 2. Self-Determination in the U.N. Charter

The U.N. Charter mentions the principle of self-determination in articles 1(2)<sup>35</sup> and 55.<sup>36</sup> These articles propose that friendly relations between nations “be based on respect for the principle of equal rights and self-determination of peoples,”<sup>37</sup> putting self-determination at the forefront of international relations.<sup>38</sup> The U.N. Charter, however, frames self-determination very broadly, and vaguely defines what constitutes a “people.”<sup>39</sup> Moreover, the U.N. Charter balances articles 1(2) and 55 against article 2(7), which states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction.”<sup>40</sup> For this reason, the principle of self-determination most likely did not constitute a rule of

35. U.N. Charter art. 1, para. 2 (stating that one of the purposes of the United Nations was “[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace”).

36. U.N. Charter art. 55 (“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”).

37. U.N. Charter art. 1, para. 2.

38. See JAMES SUMMERS, PEOPLES AND INTERNATIONAL LAW: HOW NATIONALISM AND SELF-DETERMINATION SHAPE A CONTEMPORARY LAW OF NATIONS 149 (2007) (stating that articles 1(2) and 55 of the U.N. Charter “put self-determination at the foundations of the international community”); see also Patrick Macklem, *Militant Democracy, Legal Pluralism, and the Paradox of Self-Determination*, 4 INT’L J. CONST. L. 488, 500 (2006) (“The principle of self-determination receives freestanding international legal affirmation in article 1(2) of the charter of the United Nations, which lists it as one of the purposes of the United Nations, and article 55 of the charter . . .”).

39. See SUMMERS, *supra* note 38, at 150 (“The equal rights and self-determination of peoples was framed in general terms in the Charter, without the peoples being specified. Definitions of what a people might be were particularly vague.”); see also Csaba K. Zoltani & Frank Koszorus, Jr. *Group Rights Defuse Tensions*, 20 FLETCHER F. WORLD AFF. 133, 140 (1996) (“Articles 1 and 55 of the U.N. Charter refer to the self-determination of peoples but treat it as a vague principle, not necessarily as a right, and apply it to territories rather than to ethnic groups.”).

40. U.N. Charter art. 2, para. 7.

international law when the U.N. Charter was drafted, despite its political significance.<sup>41</sup>

Chapters XII–XIII (articles 75–91) of the U.N. Charter relate to trust territories—territories that the League of Nations held after World War I and World War II, and territories that administering states voluntarily placed under the International Trusteeship System.<sup>42</sup> Eleven territories were placed under the trusteeship system during the early years of the United Nations.<sup>43</sup> Since then, those territories have achieved independence or voluntarily associated themselves with a state, with Palau as the last trust territory to achieve self-governance by entering into free association with the United States in 1994.<sup>44</sup>

Chapter XI (articles 73–74) relates to non-self-governing territories—territories with peoples who have yet to achieve “a full measure of self-government,” as defined by General Assembly Resolution 1541 (XV).<sup>45</sup> Today, sixteen non-self-governing territories, primarily located in the Atlantic and Caribbean, remain.<sup>46</sup> Most former non-self-governing territories, such as

41. See HANNUM, *supra* note 28, at 33 (“There is probably a consensus among scholars that, whatever its political significance, the principle of self-determination did not rise to the level of a rule of international law at the time the U.N. Charter was drafted.”); Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT’L L. 1, 12 (1993) [hereinafter Hannum, *Rethinking Self-Determination*] (“Whatever its political significance, the principle of self-determination had not attained the status of a rule of international law by the time of the drafting of the United Nations Charter or in the early United Nations era.”).

42. See International Trusteeship System, <http://www.un.org/depts/dpi/decolonization/trust.htm> (last visited Mar. 2, 2009) (describing the International Trusteeship System established in 1945).

43. See Trust Territories that Have Achieved Self-Determination, <http://www.un.org/depts/dpi/decolonization/trust4.htm> (last visited Mar. 2, 2010) (listing Cameroons under British administration, Cameroons under French administration, Nauru, New Guinea, Ruanda-Urundi, Somaliland, Tanganyika, Togoland under British administration, Togoland under French administration, Trust Territory of the Pacific Islands (Commonwealth of the Northern Mariana Islands, Federated States of Micronesia, Palau, and the Republic of the Marshall Islands) and Western Samoa as trusteeship territories).

44. See *id.* (listing the current status of each territory); see also International Trusteeship System, *supra* note 42 (“Today, all 11 Territories have either become independent States or have voluntarily associated themselves with a State. With no Territories left in its agenda, the Trusteeship System had completed its historic task.”).

45. See *infra* notes 67–68 (providing an overview of General Assembly Resolution 1541).

46. See Non-Self-Governing Territories Listed by the 2002 General Assembly, <http://www.un.org/depts/dpi/decolonization/trust3.htm> (last visited Mar. 2, 2010) (listing American Samoa, Anguilla Bermuda, the British Virgin Islands, the Cayman

Timor-Leste, have become independent states.<sup>47</sup> A few territories, such as Goa, have been incorporated into an existing state.<sup>48</sup> Other territories, such as the Cook Islands and Niue Island, have entered into free associations<sup>49</sup> with other states.<sup>50</sup> Finally, some territories, such as Macao and Hong Kong, have been removed from the list of non-self-governing territories based on special circumstances.<sup>51</sup> Puerto Rico also falls under the latter category,

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Islands, the Falkland Islands (Malvinas), Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St. Helena, Tokelau, Turks and Caicos Islands, the United States Virgin Islands, and Western Sahara as non-self-governing territories).

47. See Andrew Townend, *Tokelau's 2006 Referendum on Self-Government*, 5 N.Z. J. PUB. & INT'L L. 121, 125 (2007) ("For most non-self-governing territories that have been decolonised under United Nations auspices, self-government has meant independence."); CENT. INTELLIGENCE AGENCY, *THE CIA WORLD FACTBOOK: 2010*, at 674 (2009) (noting that Timor-Leste was internationally recognized as an independent state on May 20, 2002).

48. See HANNUM, *supra* note 28, at 40 n.128 ("Goa and other Portuguese dependencies in India . . . were incorporated into India in 1961[.]"); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMP. L.Q. 857, 881 (1994) ("[T]he international community recognised the incorporation of Goa into India . . .").

49. See HANNUM, *supra* note 28, at 17 ("Associated statehood is a relatively modern concept that has arisen out of United Nations discussions with respect to the exercise of self-determination by non-self-governing territories. The modern associated state is perhaps closest to a protected independent state, with an essential attribute being the ability unilaterally to terminate the 'association' with another state."); Chimène I. Keitner & Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 2 (2003) ("An association is formed when two states of unequal power voluntarily establish durable links. In the basic model, one state, the associate, delegates certain responsibilities to the other, the principal, while maintaining its international status as a state. Free associations represent a middle ground between integration and independence."); see also KEITH BEA & R. SAM GARRETT, CONG. RESEARCH SERV., *POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS 2* (2009), available at <http://www.fas.org/sgp/crs/row/RL32933.pdf> ("[F]ree association generally implies negotiated legal, economic, or defense ties between two independent nations. Three former territories—the Republic of the Marshall Islands (RMI), the Federated States of Micronesia (FSM), and the Republic of Palau (Palau)—are currently engaged in free association with the United States. (Following World War II, the U.S. administered all three of those territories on behalf of the United Nations, although they were never U.S. territories per se.) Based on current compact agreements with the RMI, FSM, and Palau, the U.S. provides those countries with defense protection and various forms of economic aid. Citizens of the countries may work and attend school in the U.S., but they are not U.S. citizens."). See generally Lawson & Sloane, *supra* note 28, at 1137–40 (discussing associated statehood as a vehicle for self-determination).

50. See HANNUM, *supra* note 28, at 40 n.128 (noting that the Cook Islands and Niue Island entered into a free association in 1965 and 1974 with New Zealand); Hannum, *Rethinking Self-Determination*, *supra* note 41, at 40 n.164 (stating the same).

51. See HANNUM, *supra* note 28, at 40 n.128 ("Macao and Hong Kong . . . were removed from the list at the request of China, on the grounds that they were integral

as this Note explains below, regarding the circumstances leading to Puerto Rico's removal from the list of non-self-governing territories.<sup>52</sup>

### 3. Self-Determination in the Twin Covenants

The International Covenant on Civil and Political Rights ("ICCPR")<sup>53</sup> and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),<sup>54</sup> sometimes referred to as the "twin" covenants,<sup>55</sup> also codify the principle of self-determination.<sup>56</sup> Article 1 of both the ICCPR and ICESCR states in relevant part: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."<sup>57</sup> The ICCPR also recognizes a right to popular participation—the individual right to freely participate in political affairs following the exercise of self-determination<sup>58</sup>—in

parts of the Chinese state illegally occupied by Portugal and the United Kingdom, respectively . . ."); Hannum, *Rethinking Self-Determination*, *supra* note 41, at 40 n.164 (same).

52. See *infra* Part I.B.2 (providing an overview of the circumstances that led to Puerto Rico's removal from the list of non-self-governing territories under General Assembly Resolution 748 and the ensuing scholarly debate).

53. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

54. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-19 (1978), 993 U.N.T.S. 3 [hereinafter ICESCR].

55. See SUMMERS, *supra* note 38, at 154 (referring to the International Covenant on Civil and Political Rights ("ICCPR") and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") as the "twin Human Rights Covenants"); Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 268 (2004) (referring to the ICCPR and ICESCR as the "twin international covenants").

56. See Howard J. Vogel, *Reframing Rights from the Ground Up: The Contribution of the New U.N. Law of Self-Determination to Recovering the Principle of Sociability on the Way to a Relational Theory of International Human Rights*, 20 TEMP. INT'L & COMP. L.J. 443, 452 (2006) ("Both the ICCPR and its companion, the ICESCR, affirm the right to self-determination."); see also Borgen, *supra* note 34, at 7 (noting that article 1 of the ICCPR and ICESCR moved the concept of self-determination from an aspirational ideal to a recognized right).

57. ICCPR, *supra* note 53, art. 1(1); ICESCR, *supra* note 54, art. 1(1).

58. See Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 CORNELL INT'L L.J. 579, 591-92 (1992) ("Popular participation is the right of individuals, subsequent to the exercise of self-determination, to participate freely and effectively in the state and form of government chosen."); see also Paul H.

article 25.<sup>59</sup> The Senate, however, attached a “not self-executing” declaration to articles 1 through 27 of the ICCPR,<sup>60</sup> which means that the ICCPR cannot be directly enforced in U.S. courts according to the U.S. Supreme Court.<sup>61</sup>

#### 4. Self-Determination in General Assembly Resolutions

Although non-binding, U.N. General Assembly resolutions have helped facilitate the process of decolonization and the development of the principle of self-determination. General Assembly Resolution 1514 (XV), entitled “Declaration on the granting of independence to colonial countries and peoples,” declares that “[a]ll peoples have the right to self-determination” and that “[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.”<sup>62</sup> In addition, Resolution 1514 called for immediate steps to be taken with regard to the existing trust and non-self-governing territories in 1960,<sup>63</sup> facilitating the

Brietzke, *Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict*, 14 WIS. INT'L L.J. 69, 114 n.116 (1995) (providing a similar definition).

59. See ICCPR, *supra* note 53, art. 25 (“Every citizen shall have the right and the opportunity . . . without unreasonable restrictions: (a) [t]o take part in the conduct of public affairs, directly or through freely chosen representatives; (b) [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; [and] (c) [t]o have access, on general terms of equality, to public service in his country.”).

60. See U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (“[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.”).

61. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (“[T]he Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing.”); see also *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 137 (2d Cir. 2005) (“[T]he ICCPR, came with attached RUDs [Reservations, Understandings, and Declarations] declaring that the ICCPR is not self-executing. This declaration means that the provisions of the ICCPR do not create a private right of action or separate form of relief enforceable in United States courts.”).

62. G.A. Res. 1514 (XV), art. 2–3, U.N. Doc. A/4684 (Dec. 14, 1960).

63. *Id.* art. 3 (“Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.”).

process of decolonization for those territories.<sup>64</sup> Because of its significance, some have referred to Resolution 1514 as the “Magna Carta” of decolonization.<sup>65</sup>

General Assembly Resolution 1541 (XV), entitled “Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter,” provides guidance to determine when an administering state must transmit statistical and other technical information about a non-self-governing territory for monitoring purposes under article 73<sup>66</sup> of the U.N. Charter.<sup>67</sup> Principle VI to the annex of Resolution 1541 identifies three status options that each constitute a full measure of self-government: “(a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.”<sup>68</sup> Thus, if a non-self-governing territory achieves any of the above measures of self-government, the administering state no longer has an obligation to transmit information about that territory under article 73 of the U.N. Charter. As Part III points out, Puerto Rico has not achieved a “full measure of self-government” within the meaning of Resolution 1541 because Puerto Rico is not sovereign nation,

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64. See SUMMERS, *supra* note 38, at 194 (explaining how General Assembly Resolution 1514 “marked at [sic] turning point in the policy of the General Assembly towards colonial self-determination” and how the process of decolonization “gained momentum” at this time); Sompong Sucharitkul, *Asian Perspectives of the Evolution of International Law: Thailand’s Experience at the Threshold of the Third Millennium*, 2 CHINESE J. INT’L L. 527, 530 (2002) (“General Assembly Resolution 1514 in 1960 set into motion the irreversible process of decolonization of all territories which at that moment were still non-self-governing.”).

65. See Porter, *supra* note 30, at 347 (noting that some scholars consider General Assembly Resolution 1514 the “Magna Carta” of decolonization); see also SUMMERS, *supra* note 38, at 195 (“The Colonial Independence Declaration has been called the ‘Magna Charta’ of decolonisation.”).

66. U.N. Charter art. 73, para. e (stating that administering states have an obligation “to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the [non-self-governing] territories for which they are respectively responsible”).

67. G.A. Res. 1541 (XV), annex, U.N. Doc. A/4651 (Dec. 15, 1960) (outlining the principles to guide member states in the determination of whether they have an obligation under article 73 of the United Nations (“U.N.”) Charter to transmit information).

68. *Id.*

in free association with the United States, and it is not a U.S. state.<sup>69</sup>

General Assembly Resolution 2625 (XXV), entitled “Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,” expands on the list of status options that constitute a full measure of self-government.<sup>70</sup> In addition to independence, free association, and integration, Resolution 2625 recognizes “the emergence into any other political status freely determined by the people” as a mode of self-determination.<sup>71</sup> Very little research has considered the validity of Puerto Rico’s status under Resolution 2625. At least one scholar, however, Steven Hillebrink, asserts that Puerto Rico does not satisfy Resolution 2625’s requirements.<sup>72</sup>

#### 4. Internal and External Self-Determination

Contemporary questions about the principle of self-determination center on two issues: whether it should apply outside the colonial context; and when oppressed minority groups within a state have a right to secede.<sup>73</sup> The distinction

69. See *infra* notes 233–34 and accompanying text (noting that Puerto Rico’s commonwealth status does not fit into any of the measures of self-government that General Assembly Resolution 1541 identifies).

70. See Cherylyn Brandt Ahrens, *Chechnya and the Right of Self-Determination*, 42 COLUM. J. TRANSNAT’L L. 575, 580 (2004) (“[T]he General Assembly seemed to expand the definition of self-determination beyond de-colonization with Resolution 2625 . . . .”); see also Eric Ting-lun Huang, *The Evolution of the Concept of Self-Determination and the Right of the People of Taiwan to Self-Determination*, 14 N.Y. INT’L L. REV. 167, 180 (2001) (“When the UN General Assembly passed Resolution 2625 . . . there was no doubt that self-determination might extend beyond the traditional notion of decolonization.”).

71. G.A. Res. 2625 (XXV), annex, ¶ 1, U.N. Doc. A/8028 (Oct. 24, 1970).

72. STEVEN HILLEBRINK, *THE RIGHT TO SELF-DETERMINATION AND POST-COLONIAL GOVERNANCE: THE CASE OF THE NETHERLANDS ANTILLES AND ARUBA* 106–07 (2008) (stating that in terms of Resolution 2625, “[t]here seems to exist little doubt in the legal literature and otherwise that Puerto Rico’s status does not represent a full measure of self-government or a form of complete decolonization . . . [because] ‘there are obvious imperfections in the association status of Puerto Rico’, namely the reserved Congressional powers, the application of US Federal law in Puerto Rico, and the relative absence of Puerto Rico as an actor in international politics” (quoting W. MICHAEL REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION, STUDIES IN TRANSNATIONAL LEGAL POLICY* 49 (1975))).

73. See Hill, *supra* note 28, at 122–23 (explaining that the U.N. “has been far from clear regarding whether the right to self-determination should be extended beyond the colonial context and used as a basis for allowing the secession of oppressed minority groups within an independent state”). Compare Paul A. Clark, *Taking Self-Determination*



between internal self-determination and external self-determination has emerged as one measure for identifying which rights a group enjoys under the principle of self-determination, including whether that group has a right to secede.<sup>74</sup> Internal self-determination concerns the protection of a group's rights within a state, and external self-determination concerns a group's right to independence and statehood.<sup>75</sup>

The Canadian Supreme Court clarified the distinction between internal and external self-determination in the 1998 decision, *Reference re Secession of Quebec*.<sup>76</sup> According to the court, internal self-determination refers to "a people's pursuit of its political, economic, social and cultural development within the framework of an existing state," and external self-determination, as stated in Resolution 2625, refers to "[t]he establishment of a

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*Seriously: When Can Cultural and Political Minorities Control their Own Fates?*, 5 CHI. J. INT'L L. 737, 743 (2005) ("Despite the attempt by leaders of many existing states to limit the idea of self-determination (say, for example, to limit its application to colonialism), most commentators have concluded that that attempt has failed, as more and more groups seek recognition as 'a people,' and the international community repeatedly finds that the best way to end a civil war, or oppression of a minority, is the separation of the warring groups into separate states."), with Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT'L L.J. 453, 459 (2003) ("The applicability of the right [of external self-determination] to peoples has been said to make it inapplicable to minorities, a distinction which emerges from the ICCPR, which regulates the rights of minorities in Article 27 and reserves the right to self-determination to peoples in Article 1."). For a thorough discussion on the application of the principle of self-determination to noncolonial and minority groups, see Geoff Gilbert, *Autonomy and Minority Groups: A Right in International Law?*, 35 CORNELL INT'L L.J. 307, 336–39 (2002).

74. See Special Committee on European Affairs of the New York City Bar, *Executive Summary: Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova*, 14 ILSA J. INT'L & COMP. L. 379, 383–84 (2008) ("The norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of 'internal self-determination,' the protection of minority rights within a state, and 'external self-determination,' secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself."); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 481 (1994) ("We must distinguish the right to enjoy human rights domestically—'internal self-determination'—from the right of a group in an independent state to secede—'external self-determination.'").

75. See SUMMERS, *supra* note 38, at 31–32 ("Internal self-determination relates to the exercise of the right within a state," and "[e]xternal self-determination is more concerned with the right of peoples to independence and statehood."); see also; Haile, *supra* note 74 (providing a similar definition for the notions of internal and external self-determination); Special Committee on European Affairs of the New York City Bar, *supra* note 74 (same).

76. [1998] 2 S.C.R. 217.

sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people . . . .”<sup>77</sup>

The court further explained that external self-determination could be exercised in cases concerning colonial peoples—peoples “subject to alien subjugation, domination or exploitation outside a colonial context”—<sup>78</sup> and, as a last resort, in situations where “a people is blocked from the meaningful exercise of its right to self-determination internally.”<sup>79</sup> The court concluded that the people of Quebec did not fall into any of these circumstances simply because they failed to reach an agreement with the government on amendments to Canada’s constitution.<sup>80</sup> Accordingly, they did not have an external right of self-determination to secede from Canada.<sup>81</sup> As Part III of this Note observes, it is unclear whether Puerto Rico qualifies as a case of internal or external self-determination because of the island’s ambiguous political status.<sup>82</sup>

### B. *Puerto Rico’s Commonwealth Status*

In order to appreciate the complexity surrounding the exercise of self-determination in Puerto Rico, it is important to understand the circumstances that led to the island’s establishment as a commonwealth. Part I.B will, therefore, focus

77. *Id.* at 282 (quoting G.A. Res. 2625, *supra* note 71, annex, ¶ 1).

78. *Id.* at 285.

79. *Id.* at 285–86.

80. *See id.* at 287 (“The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.”).

81. *See id.* at 287 (“In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions.”).

82. *See infra* notes 239–43 and accompanying text (noting how Puerto Rico can be classified as either a case of internal or external self-determination, depending on how one views the nature of the island’s political status).

on the colonial relationship between the United States and Puerto Rico. Special attention is given to the debate surrounding the United Nations' removal of Puerto Rico from the list of non-self-governing territories in 1953 and the unequal treatment of the people of Puerto Rico based on the U.S. territorial incorporation doctrine.

### 1. Establishment of Puerto Rico's Commonwealth Status

After Puerto Rico became a U.S. colony in 1898 following the Spanish-American War,<sup>83</sup> Congress granted Puerto Rico a measured degree of autonomy from 1900 to 1947. First, Congress passed the Organic Act of Puerto Rico, also known as the Foraker Act of 1900,<sup>84</sup> which established a local civil government in Puerto Rico and a non-voting resident commissioner in Congress.<sup>85</sup> Next, Congress conferred statutory U.S. citizenship on people born in Puerto Rico with the Jones Act of 1917.<sup>86</sup> The Jones Act also established an elected senate and house of representatives within Puerto Rico.<sup>87</sup> Finally, Congress amended the Organic Act of Puerto Rico in 1947 to allow the people of Puerto Rico to elect their own governor.<sup>88</sup>

The approval of Public Law 600 in 1950 authorized the Puerto Rican legislature to draft a local constitution for the island subject to the approval of the people of Puerto Rico and Congress.<sup>89</sup> Congress adopted Public Law 600, "in the nature of a

83. Treaty of Peace, U.S.-Spain, art. II, Dec. 10, 1898, 30 Stat. 1754 ("Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones.").

84. An Act Temporarily To Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), ch. 191, 31 Stat. 77 (1900) (codified as amended at 48 U.S.C. § 731-916 (2006)).

85. *See id.* § 39.

86. An Act to Provide a Civil Government for Porto Rico, and for Other Purposes (Jones Act), § 5, ch. 145, 39 Stat. 951 (1917) (codified as amended at 8 U.S.C. § 1402 (2006) (granting U.S. citizenship to all citizens of Puerto Rico)).

87. *See id.* §§ 25-27 (establishing a legislature in Puerto Rico).

88. *See* An Act to Amend the Organic Act of Puerto Rico (The Elective Governor's Act), ch. 490, § 1, 61 Stat. 770, 770-71 (1947) ("[T]he Governor of Puerto Rico shall be elected by the qualified voters of Puerto Rico . . .").

89. An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico (Public Law 600), §§ 1-2, ch. 446, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731b-731c (2006)) ("[T]his 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.").

compact.”<sup>90</sup> Voters ratified the proposed constitution of the Commonwealth of Puerto Rico on March 3, 1952.<sup>91</sup> Congress approved the proposed constitution chosen by the people of Puerto Rico on July 3, 1952, and, on July 25, 1952, the Commonwealth of Puerto Rico officially came into being.<sup>92</sup>

The compact language of Public Law 600 has been the subject of much scholarly debate.<sup>93</sup> Compact theorists believe that Congress gave up its plenary power over Puerto Rico when it passed Public Law 600.<sup>94</sup> Thus, they also believe that Puerto Rico ceased to be a U.S. colony when it became a commonwealth in 1952.<sup>95</sup> Territorial supremacy theorists, on the other hand, argue

90. *Id.* § 731b.

91. See CENT. INTELLIGENCE AGENCY, *supra* note 47, at 552 (stating that the Puerto Rican constitution was ratified on March 3, 1952, and approved by the U.S. Congress on July 3, 1952).

92. See *id.* (stating that the Puerto Rican constitution became effective on July 25, 1952). In Spanish, the official name of Puerto Rico is, “*Estado Libre Asociado de Puerto Rico*,” which in English means, “Associated Free State of Puerto Rico.” 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, 194 n.19 (1998); see also Rafael A. Declet, Jr., *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico's Political Status, and the Right of U.S.-Resident Puerto Ricans to Participate*, 28 SYRACUSE J. INT'L L. & COM. 19, 34 (2001) (describing the dispute over the name of Puerto Rico's new status as a commonwealth).

93. Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 872 (2005) (“Puerto Rico's status debate has largely focused on the ‘compact’ theory. At issue is whether Puerto Rico and the United States may enter into a permanent union, or ‘compact,’ without either Puerto Rico becoming a state of the Union, or the United States amending its Constitution.”); Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 483 (2002) (“[A] central debate in Puerto Rico's political sovereignty debate in the territory is whether the creation of the commonwealth status was the result of a compact between equals.”) see also *infra* notes 94–98 (providing an overview of the views of compact, territorial supremacists, and conventional entrenchment theorists).

94. See David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or “Federacy”?* 122 POL. SCI. Q. 115, 123 (2007) (stating that the compact theory school of thought “argues that Congress legally does not have plenary power over Puerto Rico”); see also Otaño, *supra* note 4, at 1810 (describing the view that both Puerto Rico and the United States are bound by a compact and therefore neither party can denounce the compact without the permission of the other party).

95. See Carlos R. Soltero, *Is Puerto Rico a “Sovereign” for Purposes of the Dual Sovereignty Exception to the Double Jeopardy Clause?*, 28 REV. JUR. U. INTER.-AM. P.R. 183, 191 (1994) (describing the view that “Puerto Rico in 1952 ceased to be an ‘unincorporated territory’ or a colony” when it became a commonwealth); see also José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. U.P.R. 1, 23 (1999) (“Defenders of Commonwealth status claim that Puerto Rico became free upon the establishment of the Commonwealth.”).

that that the Territorial Clause of the U.S. Constitution ultimately controls the relationship between Puerto Rico and the United States; so Congress did not give up its plenary power over Puerto Rico by passing Public Law 600.<sup>96</sup>

At least one scholar, David A. Rezvani, takes a middle position, which he refers to as the “conventional entrenchment theory.”<sup>97</sup> This theory holds that that Congress still has legal plenary power over Puerto Rico, but nonlegal conventions have nullified this power and have frozen the application of the Territorial Clause with respect to Puerto Rico.<sup>98</sup> The Honorable Gustavo A. Gelpí also appears to take a middle position on the nature of the relationship between the United States and Puerto Rico, given his conclusion that, based on legislative actions taken since 1900, Congress has impliedly incorporated Puerto Rico into the United States.<sup>99</sup>

## 2. Removal of Puerto Rico from the List of Non-Self-Governing Territories

In 1953, the United Nations passed General Assembly Resolution 748 (VIII), entitled “Cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico,” thereby removing Puerto Rico from the list of non-self-governing territories.<sup>100</sup> According to Resolution 748, the people of Puerto Rico exercised their right to self-determination by the terms of the island’s newly acquired status as a

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96. See Rezvani, *supra* note 94, at 124 (“Members of this school emphasize the overriding legal force of the territorial clause of the U.S. Constitution” and “reject any notion that the vague references to ‘compact’ in Puerto Rico’s constitution have any binding force.”); see also Otaño, *supra* note 4, at 1810 (explaining that others believe that Puerto Rico’s status as an unincorporated territory of the United States “has changed little since the early twentieth century”).

97. Rezvani, *supra* note 94, at 125 (introducing the conventional entrenchment theory).

98. See *id.* (stating that the conventional entrenchment theory “claims that Congress’ plenary power is indeed legally intact but nevertheless nullified and rendered inoperable by conventional rules”).

99. See *supra* notes 7–8 (discussing the *Consejo de Salud Playa Ponce* holding).

100. G.A. Res. 748 (VIII), ¶ 5, U.N. Doc. A/2630 (Nov. 27, 1953) (“[I]n the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity . . .”).

commonwealth in 1952.<sup>101</sup> As such, the United States no longer had an obligation to provide reports to the United Nations on Puerto Rico's progress toward decolonization and self-government.<sup>102</sup> The General Assembly passed Resolution 748 by a relatively slim margin of twenty-two to eighteen with nineteen abstentions.<sup>103</sup>

One reason for this close vote may have been the extent to which Puerto Rico's relationship with the United States does not satisfy the criteria set forth in General Assembly Resolution 742 (VIII), entitled "Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government."<sup>104</sup> The annex of Resolution 742 contains three parts, which outline factors indicative of the attainment of independence, free association with a territory on an equal basis, and separate systems of self-government.<sup>105</sup> Some authors, such as Jason Adolfo Otaño and Dorian A. Shaw, claim that Puerto Rico's commonwealth status does not satisfy the factors indicative of a free association with the United States.<sup>106</sup> Another scholar, Arron Guevara, asserts that Puerto Rico has not attained a legitimate status as a separate system of self-government because Public Law 600 did not allow the people of Puerto Rico to choose among various possibilities, including independence.<sup>107</sup>

101. *See id.* ¶ 4 ("[W]hen choosing their constitutional and international status, the people of the Commonwealth of Puerto Rico have effectively exercised their right to self-determination . . .").

102. *See id.* (agreeing that the United States should no longer be required to transmit information concerning Puerto Rico pursuant to article 73(e) of the U.N. Charter).

103. *See* H.R. REP. NO. 105-131, pt. 1, at 2 (1997); *see also* 1999 LULAC Resolutions, Puerto Rico Resolution 10, <http://www.lulac.org/advocacy/resolutions/resolve99.html> (last visited Nov. 23, 2009).

104. G.A. Res. 742 (VIII), U.N. Doc. A/2630 (Nov. 27, 1953).

105. *See id.* annex (identifying "Factors Indicative of the Attainment of Independence" in the "First part"; "Factors Indicative of the Attainment of Other Separate Systems of Self-Government" in the "Second part"; and "Factors Indicative of the Free Association of a Territory on Equal Basis with the Metropolitan or Other Country as an Integral Part of that Country or in Any Other Form" in the "Third part").

106. *See* Otaño, *supra* note 4, at 1855 ("Of the fifteen factors indicative of free association, the P.R. Commonwealth arrangement fails to fulfill five."); *see also* Shaw, *supra* note 22, at 1056 (arguing that the unequal treatment of the people of Puerto Rico by the United States violates General Assembly Resolution 742).

107. Arron Guevara, *Puerto Rico: Manifestations of Colonialism*, 26 REV. JUR. U. INTER-AM. P.R. 275, 288 (1992) ("Under the 'Factors Indicative of the Attainment of Other

Despite removing Puerto Rico from the list of non-self-governing territories, the U.N. Decolonization Committee has continued to monitor the island's status.<sup>108</sup> The Decolonization Committee has prepared several reports and drafted resolutions (some of which have been adopted), reiterating the people of Puerto Rico's right to self-determination under Resolution 1514.<sup>109</sup> In addition, the Decolonization Committee has repeatedly called upon the United States to expedite the process of self-determination for the people of Puerto Rico.<sup>110</sup>

### 3. Unequal Treatment of the People of Puerto Rico Under the Commonwealth Status

Puerto Rico's commonwealth status offers the people of Puerto Rico certain advantages and disadvantages. In terms of advantages, although they pay local income taxes and Social Security taxes, the people of Puerto Rico do not pay federal

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Separate Systems of Self-Government' consideration is given in paragraph (A)(2) to the freedom of choosing 'between several possibilities, including independence.' Puerto Rico was only given one choice, however, either accept Pub. L. 600, and gain a little more autonomy, or continue with the status quo." (quoting G.A. Res. 742, *supra* note 105, annex, pt. 2, ¶ (A)(2)) (footnotes omitted)).

108. See Jesus G. Roman, *Does International Law Govern Puerto Rico's November 1993 Plebiscite?*, 8 LA RAZA L.J. 98, 135 (1995) ("[T]he United Nations has continued to monitor the United States-Puerto Rico relationship through the Decolonization Committee . . ."); see also Bashar Ja'afari, U.N. Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Special Comm. Decision of 9 June 2008 Concerning Puerto Rico*, ¶ 16, U.N. Doc. A/AC.109/2009/L.13 (Mar. 17, 2009) (listing Decolonization Committee reports with information on actions with respect to Puerto Rico that the United Nations has taken prior to 1974 through 2007).

109. See generally U.N. Special Comm. Decisions on Puerto Rico, [http://www.un.org/Depts/dpi/decolonization/docs\\_reports\\_rapporteur.htm](http://www.un.org/Depts/dpi/decolonization/docs_reports_rapporteur.htm) (last visited Mar. 2, 2010) (providing links to decolonization committee reports on Puerto Rico from 2003 to 2009).

110. E.g. U.N. Special Comm. on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, *Special Comm. Decision of 14 June 2007 Concerning Puerto Rico*, ¶ 3, U.N. Doc. A/AC.109/2008/L.7 (June 2, 2008) (calling upon the United States to assume its responsibility to "expedite a process that will allow the Puerto Rican people to fully to exercise their inalienable right to self-determination and independence"); see also Press Release, U.N. Special Comm. on Decolonization Approves Text Calling on United States to Expedite Self-Determination Process for Puerto Rico, U.N. Doc. GA/COL/3193 (June 15, 2009) ("The Special Committee on Decolonization this afternoon approved a draft resolution calling upon the Government of the United States to expedite a process that would allow the Puerto Rican people to exercise fully their inalienable right to self-determination and independence.").

income taxes.<sup>111</sup> In addition, the people of Puerto Rico enjoy representation in the international community. As a commonwealth, Puerto Rico can participate under its own flag in the Olympic Games<sup>112</sup> and currently has a member on the International Olympic Committee.<sup>113</sup> Puerto Rico also participates under its own flag in the Miss Universe pageant.<sup>114</sup> Puerto Rico's international representation is such a source of pride among the people of Puerto Rico that the Popular Democratic Party, Puerto Rico's pro-commonwealth party,<sup>115</sup> has used the loss of Puerto Rico's participation in the world Olympic Games and the Miss Universe Pageant as an argument against U.S. statehood.<sup>116</sup>

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111. See Arjun Garg, *A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives*, 41 COLUM. J.L. & SOC. PROBS. 1, 51 n.14 (2007); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 411 (2002); José D. Román, *Trying to Fit an Oval Shaped Island Into a Square Constitution: Arguments for Puerto Rican Statehood*, 29 FORDHAM URB. L.J. 1681, 1695 (2002); Ediberto Román, *The Citizenship Dialectic*, 20 GEO. IMMIGR. L.J. 557, 609 n.203 (2006).

112. See Olympic.org, Puerto Rico, <http://www.olympic.org/en/content/national-olympic-committees/puerto-rico/> (last visited Mar. 2, 2010) (recognizing Puerto Rico as participating country since 1948); see also Deplet, *supra* note 92, at 44 n.174 ("Puerto Rico is one of the few non-sovereign states which is permitted representation under its own flag at the Olympics . . .").

113. See Olympic.org, Mr. Richard L. Carrion, <http://www.olympic.org/en/content/the-ioc/members/mr-richard-l-carrion/> (last visited Mar. 2, 2010) (listing Carrion as a member of the International Olympic Committee).

114. See Miss Universe: Members, <http://www.missuniverse.com/members/contestants>. In fact, since the first Miss Universe pageant held in 1952, Miss Universe About Us, <http://www.missuniverse.com/info/history> (last visited Mar. 2, 2010), Puerto Rico has won five titles, an achievement in which the people of Puerto Rico take a great deal of pride. See Miss Universe Titleholders, <http://www.pageant.com/universe/titleholders/index.html> (last visited Mar. 2, 2010); see also David C. Indiano, *The Top 10 Myths About Puerto Rico Statehood*, 52 FED. LAW. 8, 9 (2005) ("[P]articipation in the [world Olympic] games remains a great source of 'national' pride in Puerto Rico, as does participation in the Miss Universe contest, where Puerto Rico's representatives have shined."); Mike Williams, *Puerto Rico Mulls Statehood*, ATLANTA J. CONST., Dec. 23, 2007, at A12 (describing how intensely proud Puerto Ricans are to have won five Miss Universe titles in the history of the pageant).

115. See *infra* notes 140–43 (providing an overview of the Popular Democratic Party).

116. See Manuel Perez-Rivas, *The State Of Mind In Puerto Rico*, NEWSDAY (N.Y.), Nov. 12, 1993, at 4 ("The opposition Popular Democratic Party, which favors keeping commonwealth status, has pointed out that statehood would mean no Puerto Rican flag at the Olympics and no Miss Puerto Rico to vie for the Miss Universe crown - the current Miss Universe is from Puerto Rico - in addition to other sources of cultural pride."); Michael Remez, *Winds of Change: Puerto Ricans Vote Sunday on the Island's Future Status*, HARTFORD COURANT, Dec. 12, 1998, at A1 ("Opponents of statehood fear the island



The disadvantages that Puerto Rico's commonwealth status imposes, however, appear to outweigh the advantages that the island's status offers them. As previously noted, the people of Puerto Rico cannot vote for U.S. President,<sup>117</sup> and only have a nonvoting resident commissioner to represent them in the U.S. House of Representatives.<sup>118</sup> In addition, the people of Puerto Rico receive disproportionately low levels of aid under various federal programs.<sup>119</sup>

The unequal treatment of the people of Puerto Rico under the U.S. Constitution derives from the territorial incorporation doctrine, or, as some have described it, the "unincorporation" doctrine.<sup>120</sup> This doctrine derives from the U.S. Supreme Court's analysis of the Territorial Clause of the Constitution, which states that "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>121</sup>

The Supreme Court shaped the relationship between the United States and Puerto Rico through the territorial incorporation doctrine in a group of cases decided in the early

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would lose its Spanish language and culture, becoming dominated by American influences. Some lament the potential loss of Puerto Rico's international identity: As a commonwealth, it can field its own Olympic teams, for example, or enter a contestant in the Miss Universe Pageant.").

117. See *supra* note 15 and accompanying text; see also *infra* notes 126–27 and accompanying text (discussing *Igartúa-De La Rosa v. United States* in greater detail).

118. See *supra* note 85 (referring to the Foraker Act, which established the position of Resident Commissioner in Puerto Rico); see also Ricardo Alfonso, *The Imposition of the Death Penalty in Puerto Rico: A Human rights Crisis in the Path Towards Self-Determination*, 76 REV. JUR. U.P.R. 1077, 1092 (2007) ("The Resident Commissioner of Puerto Rico, the Island's only elected 'representative' in Congress, has the right to speak but not to vote on legislation before the House of Representatives.").

119. See *supra* note 17 and accompanying text (describing the lower levels of aid that the people of Puerto Rico receive under federal programs, such as Medicaid and Temporary Assistance for Needy Families).

120. See, e.g., Benjamin Madison, *Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of the Principles that Transcend the U.S. Constitution*, 17 U. FLA. J.L. & PUB. POL'Y 347, 428 (2006) ("The Insular Cases had spawned what was known as the 'unincorporation' doctrine."); see also Charles R. Venator Santiago, *Race, Space, and the Puerto Rican Citizenship*, 78 DENV. U. L. REV. 907, 916 (2001) (focusing on "the doctrine of un-incorporation").

121. U.S. CONST. art. IV, § 3, cl. 2.

twentieth century, known as the *Insular Cases*.<sup>122</sup> In the seminal case of *Downes v. Bidwell*, the Supreme Court held that Puerto Rico “is a territory appurtenant and *belonging to the United States, but not part of the United States* within the revenue clauses of the Constitution.”<sup>123</sup> Moreover, in *Balzac v. Porto Rico*, the Court held that the Sixth Amendment right to a trial by jury did not apply in Puerto Rico because the people of Puerto Rico did not have any constitutional rights absent Congress’ clear intent to incorporate the island into the United States.<sup>124</sup>

Today, the territorial incorporation doctrine continues to justify the unequal treatment of the people of Puerto Rico. In *Harris v. Rosario*, for example, the Supreme Court held that the lower level of financial assistance that the people of Puerto Rico received under the former Aid to Families with Dependent Children program did not violate the Due Process Clause of the Fifth Amendment.<sup>125</sup> Moreover, in *Igartúa-De La Rosa v. United States*, the U.S. Court of Appeals for the First Circuit upheld the denial of the people of Puerto Rico’s right to vote for U.S. president.<sup>126</sup> In so doing, the court rejected the plaintiff’s arguments that: (1) residents of Puerto Rico have a constitutional right to vote for President as U.S. citizens; (2) the United States violates its obligations under the ICCPR, the Universal

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122. See Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 982–83 (2009) (“The *Insular Cases*, a series of Supreme Court decisions handed down between 1901 and 1922, have long been reviled as the cases that held that most of the Constitution does not ‘follow the flag’ outside the United States.”). But see PEDRO A. MALAVET, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* 38 (2004) (“Some scholars limit the label [of the *Insular Cases*] to only nine cases, which were resolved by the U.S. Supreme Court in 1901–02. Others take a broad view, identifying the insular cases as a more complex series that helped create the ‘American empire.’”).

123. 182 U.S. 244, 287 (1901) (emphasis added).

124. 258 U.S. 298, 309 (1922) (“In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury, except as his own representatives in his legislature shall confer it on him. The citizen of the United States living in Porto Rico cannot there enjoy a right of trial by jury under the federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.”).

125. 446 U.S. 651, 651–52 (1980) (holding that as long as it had a rational basis for its actions, Congress could treat Puerto Rico differently from U.S. states pursuant to the Territorial Clause of the Constitution and, in this case, Congress had a rational basis for treating Puerto Rico differently under the AFDC program).

126. 417 F.3d 145, 146–47 (1st Cir. 2005) (rejecting Igartúa’s claim that he had a right to vote for U.S. President for the third time).

Declaration of Human Rights, and Inter-American Democratic Charter by denying the people of Puerto Rico of this right; and (3) there is a customary international law that requires the United States to grant them the right to vote in presidential elections.<sup>127</sup>

The territorial incorporation doctrine has also contributed to the current problem of poverty in Puerto Rico.<sup>128</sup> According to U.S. Census Bureau data from the 2006 Puerto Rico Community Survey, the median family income in Puerto Rico (US\$20,425) is about a third that of the United States (US\$58,526) and less than half that of Mississippi (US\$42,805), which has the lowest median family income of any U.S. state.<sup>129</sup> In addition, the individual poverty rate in Puerto Rico (45.4%) is also three times higher than the U.S. average and twice as high as any U.S. state.<sup>130</sup> As

127. *Id.* at 147–48, 150–51 (“Voting for President and Vice President of the United States is governed neither by rhetoric nor intuitive values but by a provision of the Constitution”; “[t]he treaties in question here do not adopt any legal obligations binding as a matter of domestic law,”; and “[n]o serious argument exists that customary international law, independent of the treaties now invoked, requires a particular form of representative government.”). The Honorable Juan Torruella, a native of Puerto Rico who sits on the U.S. Court of Appeals for the First Circuit and dissented in *Igartúa-De La Rosa*, contends that the United States, as a signatory to the ICCPR, has violated its obligations under the treaty regarding Puerto Ricans’ right to popular participation because the people of Puerto Rico cannot vote for President and have no voting representative in Congress. See Juan Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 77 *REV. JUR. U.P.R.* 1, 41–42 (2008) (asserting that the United States “does not meet or comply with” its treaty obligations under the ICCPR for the above reasons).

128. See Emilio Pantojas-Garca, *The Puerto Rican Paradox: Colonialism Revisited*, 40 *LATIN AM. RES. REV.* 163 (2005) (“Underlying the reality of Puerto Rican poverty . . . are the ‘colonial status of the island and the second-class citizenship forced on its people . . .’” (quoting SUSAN S. BAKER, *UNDERSTANDING MAINLAND PUERTO RICAN POVERTY* 203 (2002))); Puerto Rico Statehood Society, *Statehood Issues*, <http://studentorgs.gwu.edu/prss/statehoodissues/> (last visited Mar. 2, 2010) (“[A]ny such poverty [in Puerto Rico] is the result of the current colonial status, where the U.S. citizens of Puerto Rico do not have equal rights in regards to benefits, rights, and responsibilities.”).

129. See Press Release, U.S. Bureau of the Census, *Puerto Rico has Higher Homeownership, Larger Households* (Apr. 2, 2008), available at [http://www.census.gov/newsroom/releases/archives/american\\_community\\_survey\\_acs/cb08-cn55.html](http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb08-cn55.html) (providing statistics for Puerto Rico relative to the rest of the nation); see also Fed. Reserve Bank of N.Y., *Communities in Focus: Puerto Rico*, [http://www.newyorkfed.org/regional/community\\_puertorico.html](http://www.newyorkfed.org/regional/community_puertorico.html) (last visited Mar. 2, 2010) (“Puerto Rico’s per capita personal income in 2005 was \$12,502. Per capita income for the rest of the nation was \$34,586.”).

130. See Press Release, U.S. Bureau of the Census, *supra* note 129 (“Since 2000, Puerto Rico’s individual poverty rate decreased from 48.2 percent to 45.4 percent.

these statistics suggest, the territorial incorporation doctrine has had real-life consequences for the people of Puerto Rico.

Part I has provided an overview of the principle of self-determination and Puerto Rico's commonwealth status. This background provides the legal foundation and context necessary for a meaningful discussion of the exercise of self-determination in Puerto Rico. This Note now turns to Part II, which focuses on the political status debate in Puerto Rico and three issues that the exercise of self-determination in Puerto Rico raises.

## II. *COMPETING VISIONS ON SELF-DETERMINATION IN PUERTO RICO*

The political status debate has dominated politics in Puerto Rico for many years.<sup>131</sup> Accordingly, Part II begins by providing an overview of the political status debate in Puerto Rico. Part II.A provides an overview of the two main political parties in Puerto Rico, the pro-commonwealth Popular Democratic Party and the pro-statehood New Progressive Party. Part II.A also provides an overview of the 1967, 1993, and 1998 plebiscites held in Puerto Rico and the 1991 referendum. Part II.A ends with an overview of the President's Task Force on Puerto Rico's Status and the recommendation that the task force has made for a federally-sanctioned plebiscite to be held in Puerto Rico.

Through a presentation of two competing bills introduced in the 110th Congress,<sup>132</sup> Part I.B focuses on three issues raised by the exercise of self-determination in Puerto Rico: (1) whether Congress or the people of Puerto Rico should initiate the final process of self-determination in Puerto Rico; (2) which status options should be presented to the people of Puerto Rico in a

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However, this rate was more than three times as high as the rate for the United States overall and more than twice as high as any state."); *see also* Fed. Reserve Bank of N.Y., *supra* note 129 ("About 45 percent of Puerto Rico's residents live below the poverty threshold.").

131. *See, e.g.*, Eduardo Jose Fernandez, Note, *La Isla Del Escape: America's Escape from Corporate Taxes & Puerto Rico's Taxed Future*, 19 FLA. J. INT'L L. 311, 315 (2007) ("Puerto Rican politics have revolved around Puerto Rico's status and its relationship with the United States."); Opinion, *With OTEC, We Might Export Electricity*, PACIFIC DAILY NEWS (Hagatna, Guam), Mar. 10, 2008, at A14 ("The political status issue so dominates Puerto Rico politics that the three main parties have nothing else on their agendas.").

132. *See infra* notes 190–92 (introducing House bills 900 and 1230 of the 110th Congress).

status plebiscite; and (3) whether mainland Puerto Ricans should be permitted to vote on Puerto Rico's future political status.<sup>133</sup> As Part II.B suggests, the political status debate in Puerto Rico raises complicated questions for which there are no clear answers.

#### A. *The Political Status Debate in Puerto Rico*

The people of Puerto Rico take island politics seriously. In terms of voter turnout, Puerto Rico ranks among the highest in the world.<sup>134</sup> As one insider observed, “[t]he politics in Puerto Rico are intense—so intense that on election day over 85% of the electorate turn out to vote; a turnout rate not seen on the mainland.”<sup>135</sup> Despite voting on the island's status on a few occasions, the people of Puerto Rico still disagree strongly on the issue.<sup>136</sup> The following subparts provide some explanation as to

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133. The exercise of self-determination in Puerto Rico raises additional questions, such as the U.S. attempt to Americanize the people of Puerto Rico through the imposition of the English language, which is beyond the scope of this Note. For an in-depth discussion of this issue and the related issue of the role that the Spanish language plays in the cultural identity of the people of Puerto Rico, see José Julián Álvarez-González, *Law, Language & Statehood: The Role of English in the Great State of Puerto Rico*, 17 *LAW & INEQ.* 359 (1999). See also Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 *REV. JUR. U. INTER-AM. P.R.* 1 (1982); Ángel R. Oquendo, *Liking To Be in America: Puerto Rico's Quest for Difference in the United States*, 14 *DUKE J. COMP. & INT'L L.* 250 (2004) [hereinafter Oquendo, *Liking to Be in America*]; Ángel R. Oquendo, *Puerto Rican National Identity and United States Pluralism, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 315 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter Oquendo, *Puerto Rican National Identity*]; Alicia Pousada, *The Singularly Strange Story of the English Language in Puerto Rico*, 3 *MILENIO* 33 (1999); Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 *VILL. L. REV.* 1119, (1997). In addition, this Note does not address the U.S. political will to make Puerto Rico the 51st U.S. state should the people of Puerto Rico exercise their right to self-determination and choose the statehood status option. Although relevant, the political aspects surrounding Puerto Rican statehood are also beyond the scope of this Note.

134. See Jeannette Rivera-Lyles, *Puerto Ricans Gain Option of Going Green this Election*, *ORLANDO SENTINEL*, Nov. 4, 2008, at A5 (“Puerto Rico has one of the highest voter turnouts in the hemisphere, with a minimum of eighty-two percent of the electorate regularly participating in elections.”); see also *H. Hearing on H.R. 2499*, *supra* note 14, at 1 (opening statement of Nick J. Rahall, Chairman, H. Comm. on Natural Resources) (“Having some of the highest voter turnout rates in our Nation, Puerto Rico shames many of our own States with its energy and enthusiasm in electing its leaders.”).

135. Maria Echaveste, *Brown to Black: The Politics of Judicial Appointments for Latinos*, 13 *BERKELEY LA RAZA L.J.* 39, 41 n.4 (2002).

136. See F.E. Guerra Pujol, *Puerto Rico as a Critical Locality: Is a Post-Colonial Puerto Rico Possible? A Game-Theoretic Analysis of the Impasse Over Puerto Rico's Status*, 20 *ST. THOMAS L. REV.* 561, 565 (2008) (“[T]he Puerto Rican electorate is closely divided

why the island's political status remains in limbo, and, why, as Ángel Oquendo put it, there is a "profound tension in the soul of the Puerto Rican people."<sup>137</sup>

### 1. Major Political Parties in Puerto Rico: The PDP and the NPP

Politics in Puerto Rico center on two groups, the pro-commonwealth Popular Democratic Party ("PDP") and the pro-statehood New Progressive Party ("NPP").<sup>138</sup> A third party, the Puerto Rican Independence Party ("PIP"), enjoys little support in Puerto Rico.<sup>139</sup>

PDP members and other pro-commonwealth supporters favor increased autonomy for Puerto Rico but wish to maintain ties with the United States.<sup>140</sup> Some, for example, would like Puerto Rico to have "greater autonomy in domestic and external affairs, a demand for veto power over the United States laws applicable to the island and the full funding of federal programs, similar to the states, but without the corresponding obligation to pay federal income taxes."<sup>141</sup> The ideology of the PDP stems from

between statehood and the status quo . . . ."); *see also* Burnett, *supra* note 93, at 871 (stating that the political status debate has "deeply divided" the people of Puerto Rico).

137. Oquendo, *Liking To Be in America*, *supra* note 133, at 250.

138. *See* Frank E. Guerra, *Comment on Bush vs. Gore and the Clems-Piazza Broken-Bat Incident*, 39 REV. DER. P.R. 197, 222 n.8 (2000) (noting that the "two major political parties [in Puerto Rico] are the Popular Democratic Party (PDP), which favors Puerto Rico's current 'Commonwealth' status, and the New Progressive Party (NPP), which favors statehood"); Fernandez, *supra* note 131, at 315 (stating that the PDP and the NPP "are the leading parties").

139. *See* Ingram, *supra* note 17, at 95 ("[T]here is very little support in Puerto Rico for independence."); *see also* Guerra, *supra* note 138, at 222 n.8 ("Though it once was a formidable political party, today the Puerto Rican Independence Party (PIP) has a negligible and paltry following at best.").

140. *See* Puerto Rico Governor Seeking Vote on Status, N.Y. TIMES, Jan. 4, 1989, at A11 ("The Governor and his ruling Popular Democratic Party favor enlarging the commonwealth agreement to obtain the most autonomy while keeping Puerto Rico within the United States."); *see also* Hermilla, *supra* note 19, at 284 n.27 (1998) ("Although the Popular Democratic Party (PDP) or the 'Commonwealth' party is generally characterized as supporting the status quo, the PDP has urged for a more expansive definition of commonwealth that goes way beyond the status quo . . . .").

141. Hermilla, *supra* note 19, at 284 n.27; *see also* Román, *supra* note 133, at 1180-81 (1997) ("The PDP favors an enhanced commonwealth status . . . . PDP supporters have long argued that [commonwealth] status ensures cultural identity while at the same time promoting economic stability without the obligation of federal taxes that faces citizens of the individual states."); *see Puerto Rico Seeks UN Help for Greater Autonomy*, USA TODAY, Sep. 29, 2007, [http://www.usatoday.com/news/world/2007-07-29-puerto-rico-autonomy\\_n.htm](http://www.usatoday.com/news/world/2007-07-29-puerto-rico-autonomy_n.htm) ("Party officials say they want to maintain U.S. ties, but also to be able

the “best of both worlds” narrative promoted by Luis Muñoz Marín, Puerto Rico’s first democratically elected governor.<sup>142</sup> Muñoz Marín believed that “the United States-Puerto Rico commonwealth relationship could evolve to a ‘new kind of state . . . equal but different from statehood . . . sovereignty within sovereignty.’”<sup>143</sup>

NPP members and other statehood proponents, on the other hand, favor full integration into the United States.<sup>144</sup> The United States Council for Puerto Rico Statehood (the “Council”) and the Center for Puerto Rico Equality and Advancement (the “Center”), for example, contend that statehood would afford the people of Puerto Rico equal civil and political rights under the Constitution.<sup>145</sup> In addition, the Council contends that Puerto Rico would cease being a financial drain on the United States if it were to become a state, because statehood would strengthen the

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to negotiate trade pacts and import products carried on ships not registered in the United States, among other powers.”).

142. See Oquendo, *Puerto Rican National Identity*, *supra* note 133, at 318–19 (noting that Luis Muñoz Marín founded the PDP in 1938 and that the PDP “conceived a political status which would give Puerto Ricans ‘the best of both worlds’: the cultural sovereignty benefits of independence and the economic stability of statehood”); Román, *supra* note 133, at 1184 (“Arguing that the people of Puerto Rico could have ‘the best of both worlds’ under the rubric of an enhanced commonwealth association with the United States, Muñoz Marín, considered the founder of the country, was the great proponent of the commonwealth status. As the first popularly elected Governor, Muñoz Marín acquired an unprecedented following in Puerto Rico.”).

143. Román, *supra* note 133, at 1184 (quoting RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 73 (1984)).

144. See Hermilla, *supra* note 19, at 284 n.27 (1998) (“The New Progressive Party . . . advocates statehood and wants to achieve its objectives for Puerto Rico within the Constitution by full integration into the United States as the 51st state with all rights and obligations, including the payment of federal taxes.”); see also The New Progressive Party Point of View, <http://www.puertoricousa.com/english/pnp.htm> (last visited Mar. 2, 2010) (“The New Progressive Party, also known as the ‘Statehood’ party believes in full integration into the United States as the 51st state of the union.”).

145. U.S. Council for Puerto Rico Statehood, *Statehood Issues*, <http://www.prstatehood.com/issues/index.asp> (last visited Mar. 2, 2010) (stating that the United States “cannot continue to operate a colony, forcing U.S. citizens to accept a second-class citizenship, one without full political rights and equal representation, and not guaranteed by the constitution. The United States is a republic, not an empire.”); Ctr. for Puerto Rico Equality and Advancement, *Our Principles*, <http://puertoricoadvancement.org/principles.aspx> (last visited Mar. 2, 2009) (“The Center affirms that only through statehood can Puerto Rico attain the promise of equal citizenship and with it, both the inherent rights and responsibilities of American citizenship.”).

island's economy.<sup>146</sup> Thus, despite having to pay federal income taxes if the island were to become a state, the higher disposable income and economic growth that statehood would bring would more than offset this cost.<sup>147</sup>

## 2. Plebiscites and Referenda Regarding Puerto Rico's Political Status

The government of Puerto Rico first organized a status plebiscite in 1967.<sup>148</sup> Voters had the option of choosing between commonwealth, statehood, and independence.<sup>149</sup> With 60.5% of the votes, the commonwealth option won the plebiscite.<sup>150</sup> Statehood and independence party members, however, purportedly boycotted the 1967 plebiscite,<sup>151</sup> and interference by U.S. intelligence agencies may have tainted the plebiscite.<sup>152</sup> The 1967 plebiscite, therefore, may have been flawed.

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146. Council for Puerto Rico Statehood, *supra* note 145 (“Puerto Rico would no longer be a substantial cash drain on the U.S. economy. With statehood, the Puerto Rico economy will grow, become a source of additional revenue to the national treasury, and be less costly in support for the unemployed, the underemployed, and for disabled individuals who require public assistance.”); *see also* Karina Camacho, Note, *The United States-Puerto Rico Relationship: Incomplete Decolonization*, 48 HOW. L.J. 491, 511 (2004) (“[S]tatehooders believe that statehood would serve best to improve Puerto Rico’s economy.” (footnote omitted)).

147. Council for Puerto Rico Statehood, *supra* note 145 (describing the economic benefits of U.S. statehood for Puerto Rico).

148. *See* BEA & GARRETT, *supra* note 49, at 11 (“Following the recommendation of the Commission on the Status of Puerto Rico . . . the government of Puerto Rico organized a popular vote on the status options in July 1967.”); *see also* Hermilla, *supra* note 19, at 300 n.103 (noting that the 1967 plebiscite was the first one held in Puerto Rico).

149. *See* BEA & GARRETT, *supra* note 49, at 29 (listing the ballot options for the 1967 status plebiscite); *see also* KEITH BEA, CONG. RESEARCH SERV., POLITICAL STATUS OF PUERTO RICO: BACKGROUND, OPTIONS, AND ISSUES IN THE 109TH CONGRESS, CONGRESS RESEARCH SERVICE, LIBRARY OF CONGRESS 11 (2005) *available at* [http://digital.library.unt.edu/ark:/67531/metacrs6708/m1/1/high\\_res\\_d/](http://digital.library.unt.edu/ark:/67531/metacrs6708/m1/1/high_res_d/) (same).

150. *See* BEA & GARRETT, *supra* note 49, at 29.

151. BEA, *supra* note 149, at 10 (“Members of the independence and statehood party reportedly boycotted the plebiscite.”); Roman, *supra* note 108, at 112 (stating that the statehood and independence parties boycotted the 1967 plebiscite).

152. *See* BEA, *supra* note 149, at 10 (“One political analyst contended that the 1967 plebiscite ‘was tainted by blatant interference by United States intelligence agencies documented and denounced as ‘hanky-panky’ in a White House memorandum issued during the Carter presidency.” (quoting Juan M. Garcia Passalacqua, *The 1993 Plebiscite in Puerto Rico: A First Step to Decolonization?*, 93 CURRENT HIST. 103, 106 (1994))); Román, *supra* note 133, at 1162 (“[T]he PDP, which supported an enhanced



Twenty-four years later, the people of Puerto Rico voted in a referendum, which asked them to approve an amendment to be incorporated into Puerto Rico's constitution.<sup>153</sup> The 1991 Referendum included proposals on "the right to determine the status of Puerto Rico without being subject to the plenary powers of Congress, guarantees of the continuance of Puerto Rico's culture, . . . and a guarantee of U.S. citizenship based on constitutional, not statutory authority."<sup>154</sup> The PDP and PIP urged the people of Puerto Rico to vote "yes," in support of their "Puerto Ricanness."<sup>155</sup> The NPP, by contrast, considered a "yes" vote as a rejection of their affiliation with the United States and therefore urged the people of Puerto Rico to vote "no" to the proposed amendment.<sup>156</sup> Most voters (53.6%) voted against the amendment.<sup>157</sup>

After the 1991 referendum, the people of Puerto Rico participated in two nonbinding plebiscites, one in 1993 and one in 1998.<sup>158</sup> The Puerto Rican legislature authorized the 1993 plebiscite after Congress failed to approve legislation regarding Puerto Rico's political status.<sup>159</sup> Voters were presented with the

commonwealth status, obtained a majority after Puerto Rico's two other political parties balked at U.S. involvement in the process and called for an abstention from voting.").

153. See BEA & GARRETT, *supra* note 49, at 11 (stating that voters in Puerto Rico were asked in a referendum "to vote on self-determination or rights that would be incorporated into the commonwealth constitution . . ."); BEA, *supra* note 149, at 10 (same).

154. BEA & GARRETT, *supra* note 49, at 11–12.

155. See BEA & GARRETT, *supra* note 49, at 12 ("Both the PDP and the PIP urged a 'yes' vote."); NANCY MORRIS, *PUERTO RICO: CULTURE, POLITICS, AND IDENTITY* 61 (1995) ("The message that referendum supporters were sending within the island was that a 'yes' vote approving the referendum was a vote for 'Puerto Ricanness.'").

156. See MORRIS, *supra* note 155, at 61 (noting that the NPP urged voters not to reject the proposed amendment); see also U.S. GEN. ACCOUNTING OFFICE, *PUERTO RICO: CONFUSION OVER APPLICABILITY OF THE ELECTORAL LAW TO REFERENDUM PROCESS*, 2, Rep. No. GAO-93-84 (1993), available at <http://archive.gao.gov/t2pbat5/149253.pdf> (stating that the NPP opposed the 1991 referendum and urged a "no" vote).

157. See BEA & GARRETT, *supra* note 49, at 12, 29; BEA, *supra* note 149, at 11.

158. See Torruella, *supra* note 127, at 42 n.194 ("There were plebiscites conducted in 1967, 1993, and 1998, but they were provided for by the local legislature and thus not binding on Congress."); see also See DICK THORNBURGH, *PUERTO RICO'S FUTURE: A TIME TO DECIDE*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES PRESS 20 (2007) (noting that the 1967, 1993, and 1998 plebiscites were conducted locally and without federal authorization).

159. See BEA & GARRETT, *supra* note 49, at 12 & n.41. ("In the 1992 election campaign, the PNP candidate for governor urged, and the legislature agreed, that a plebiscite on status be held 'after the U.S. Congress failed to approve' status legislation." (quoting H.R. REP. NO. 104-713, pt. 1, at 18 (1996))); BEA, *supra* note 149, at 9 (same).

status options of commonwealth, statehood, and independence.<sup>160</sup> Neither the commonwealth nor the statehood option received a majority vote although the commonwealth option received a slightly higher percentage of votes than the statehood option did, 48.6% versus 46.4%, respectively.<sup>161</sup> The independence option received only 4.4% of the votes.<sup>162</sup>

Mainland Puerto Ricans also voted on the island's political status in a parallel plebiscite that took place in New York City in October 1993.<sup>163</sup> A group of mainland Puerto Ricans decided to organize the parallel plebiscite because the Puerto Rican legislature would not permit them to vote in the island plebiscite.<sup>164</sup> Seventy voting machines were scattered throughout New York City in areas with significant Puerto Rican populations.<sup>165</sup> Those born in Puerto Rico or with at least one parent born in the island were eligible to vote with proper documentation.<sup>166</sup> Similarly to the 1993 island plebiscite, mainland Puerto Ricans were presented with the status options of statehood, commonwealth, and independence.<sup>167</sup> The

160. See BEA & GARRETT, *supra* note 49, at 29; BEA, *supra* note 149, at 11.

161. See BEA & GARRETT, *supra* note 49, at 29; BEA, *supra* note 149, at 11.

162. See BEA & GARRETT, *supra* note 49, at 29; BEA, *supra* note 149, at 11.

163. See DeClet, *supra* note 92, at 52 (stating the parallel plebiscite took place from October 7–9, 1993); Molly Gordy, *Nuyoricans Get Eager*, NEWSDAY (Melville, N.Y.), Oct. 7, 1993, at 6 (noting that the balloting began on October 7, 1993).

164. See DeClet, *supra* note 92, at 51 (“Puerto Rican leaders in the United States organized their own ‘parallel plebiscite’ so that their voices would be heard along with those of their countrymen in Puerto Rico.”); David Gonzalez, *Another Vote*, N.Y. TIMES, Oct. 7, 1993, at B3 (“It [the parallel plebiscite] was organized by a group of mainland Puerto Rican politicians and advocacy groups who were angered by their exclusion from the island’s Nov. 14 nonbinding plebiscite on Puerto Rico’s political status.”).

165. See Gordy, *supra* note 163, at 6 (“The vote today, tomorrow and Saturday is certified by the city Board of Elections, which is providing 70 voting booths throughout the five boroughs.”).

166. See DeClet, *supra* note 92, at 53 (limiting voting to individuals born on the island or with “at least one Puerto Rican parent” and requiring voters to submit documentation or sign an affidavit affirming their Puerto Rican heritage); Molly Gordy, *No Say, But it Could Sway Nuyoricans Ready to Vote on P.R. Status*, NEWSDAY (Melville, N.Y.), Oct. 4, 1993, at 14 (“Eligibility for the New York plebiscite [was] limited to those who [could] produce proof of Puerto Rican birth or parentage with documents, such as a birth certificate, passport, marriage license or military papers.”).

167. See *infra* note 168 and accompanying text (describing the outcome of the parallel plebiscite based on these three status options).

commonwealth option won with 59% of the votes, 37% of the voters chose statehood, and 4% chose independence.<sup>168</sup>

The last plebiscite that took place in Puerto Rico was in 1998. Similarly to the 1993 plebiscite, Congress failed to approve legislation regarding Puerto Rico's political status, prior to the 1998 plebiscite.<sup>169</sup> Unlike the 1993 plebiscite, however, voters were given five status options from which to choose: (1) Limited self-government (current commonwealth); (2) Free association; (3) Statehood; (4) Sovereignty (independence); and (5) None of the above.<sup>170</sup> PDP members advocated the "none of the above" option because they favored an enhanced commonwealth status for Puerto Rico and disagreed with the use of the federal government's definition of Puerto Rico as a "territory" of the United States on the ballot for the current commonwealth option.<sup>171</sup> The "none of the above" option received the majority of votes (50.3%) by a razor thin margin, and the statehood option followed closely with 46.6% of the votes.<sup>172</sup> Less than 1% of voters chose the current commonwealth and free associations options, and the independence option received 2.6% of the votes in the 1998 plebiscite.<sup>173</sup>

168. See Delet, *supra* note 92, at 53 ("The tally in New York City was Commonwealth, 59%, statehood, 37%, and independence, 4%."); Molly Gordy, *P.R. Statehood Losing*, *NEWSDAY* (Melville, N.Y.), Oct. 14, 1993, at 40 ("Of the 10,101 votes cast by machine, 4 percent were cast for independence, 37 percent for statehood and 59 percent for the status quo [the commonwealth option].").

169. See Román, *supra* note 133, at 1173-75 & nn.267-74 (comparing House bill 856 with House bill 3024); see also THORNBURGH, *supra* note 158, at 20 (noting that the 1998 plebiscite "was also without federal authorization").

170. See BEA & GARRETT, *supra* note 49, at 29; see also BEA, *supra* note 149, at 11.

171. See THORNBURGH, *supra* note 158, at 20 ("Once Puerto Rico's current 'commonwealth' was presented on a ballot as defined by federal law (i.e., as a territory), rather than in the 'enhanced' form proposed by the local pro-commonwealth party, that option received less than one-tenth of 1 percent of the vote . . ."); see also BEA & GARRETT, *supra* note 49, at 13 ("Commonwealth advocates, among others, reportedly urged a vote for 'none of the above.' They asserted that the commonwealth definition on the ballot 'failed to recognize both the constitutional protections afforded to [their] U.S. citizenship and the fact that the relationship is based upon the mutual consent of Puerto Rico and the United States.'" (quoting DON YOUNG & GEORGE MILLER, *THE RESULTS OF THE 1998 PUERTO RICO PLEBISCITE 20*, SERIAL NO. 106-A (1999))).

172. See BEA & GARRETT, *supra* note 49, at 13, 29 (identifying the percentage of votes received under the "none of the above" and statehood options in the 1998 status plebiscite); see also BEA, *supra* note 149, at 11 (same).

173. See BEA & GARRETT, *supra* note 49, at 29 (identifying the percentage of votes received under the current commonwealth, free association, and independence options in the 1998 status plebiscite); see also BEA, *supra* note 149, at 11 (same).

Today, the people of Puerto Rico remain divided on the status options of U.S. statehood and enhanced commonwealth.<sup>174</sup> Recent polls suggest that the political tide appears to be turning in favor of statehood supporters,<sup>175</sup> as evidenced by the 2008 gubernatorial election held in Puerto Rico where the winner, former Resident Commissioner Luis Fortuño, is a member of the pro-statehood NPP, in addition to the current Resident Commissioner, Pedro Pierluisi, who ran with Fortuño.<sup>176</sup> The 2008 gubernatorial race in Puerto Rico represented a major victory for the NPP.<sup>177</sup>

### 3. The Recommendation of the President's Task Force on Puerto Rico's Status

In December 2000, President Clinton signed Executive Order 13,183, establishing the President's Task Force on Puerto Rico's Status ("President's Task Force" or "Task Force").<sup>178</sup> The purpose of the Task Force "is to provide options for Puerto

174. See *supra* note 136 and accompanying text (recognizing the disagreement among the people of Puerto Rico regarding the island's future political status).

175. See U.S. Council for Puerto Rico Statehood, *New Poll: Statehood Favored by Large Majority in Puerto Rico* (July 14, 2008), available at [http://www.prstatehood.com/news/poll\\_071408.pdf](http://www.prstatehood.com/news/poll_071408.pdf) (citing a 2008 poll conducted by the Kaagan Research Associates of New York that showed 57% of the people of Puerto Rico want U.S. statehood and only 34% prefer the status quo); Frances Ruan, *Poll: Statehood Gains Ground as Status Preference*, CARIBBEAN BUSINESS (Puerto Rico), July 9, 2009, [http://www.caribbeanbusinesspr.com/news02.php?nw\\_id=1796&ct\\_id=26](http://www.caribbeanbusinesspr.com/news02.php?nw_id=1796&ct_id=26) (citing a 2009 poll conducted by Gaither International that indicated that commonwealth support fell to below 40% while support for statehood increased to 51%); see also *infra* note 176 and accompanying text (describing the NPP victory in the gubernatorial and Resident Commissioner races in November 2008).

176. Frances Robles, *Embattled Puerto Rico Governor Soundly Defeated*, MIAMI HERALD, Nov. 5, 2008, at A12 (describing Fortuño's victory over Aníbal Acevedo Vilá (misspelling of name in article) who was facing charges of campaign finance fraud at the time of the 2008 gubernatorial election); see also *New Governor Elected*, CARIBBEAN UPDATE (Millburn, N.J.), Dec. 1, 2008, available at 2008 WLNR 25866707 ("Born in 1960, [Luis Fortuño was] Puerto Rico's Resident Commissioner in the US Congress, and ran in a fourway gubernatorial race representing the pro-statehood NPP. His running-mate Pedro Pierluisi also won the Resident Commissioner race, becoming the island's next representative in Congress.").

177. See *New Governor Elected*, *supra* note 176 ("Luis Fortuño on Nov. 4 gave the New Progressive Party (NPP) its biggest victory in the party's 40-year history."); Damien Cave, *Puerto Rico Governor Promises Changes*, N.Y. TIMES, Nov. 28, 2008, at A28 (noting that Fortuño won by "about 220,000 votes, one of the widest margins in decades . . .").

178. EXEC. ORDER NO. 13183, 65 FED. REG. 82889 (Dec. 23, 2000) (establishing the Task Force).

Rico's future status and relationship with the Government of the United States."<sup>179</sup>

The President's Task Force has published two reports since its inception, one in December 2005 and one in December 2007.<sup>180</sup> Until recently, the Task Force's next report was due in December 2009.<sup>181</sup> On October 30, 2009, however, President Obama signed an Executive Order extending the deadline for the Task Force to submit its next report to the President no later than one year from the order's date.<sup>182</sup> The executive order also broadened the Task Force's mission to include economic development matters in Puerto Rico.<sup>183</sup>

In its 2005 report, the Task Force stated the U.S. Constitution recognizes U.S. statehood and independence as the only two non-territorial options between the United States and Puerto Rico.<sup>184</sup> Based on this premise, the Task Force recommended a federally-sanctioned plebiscite that first asks the

179. PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS I (2007), *available at* <http://www.usdoj.gov/opa/documents/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> [hereinafter 2007 TASK FORCE REPORT].

180. *See id.* (quoting from the 2007 Task Force report); *infra* note 184 (referring to the 2005 Task Force report).

181. *See* Exec. Order No. 13,319, 68 Fed. Reg. 68233 (Dec. 3, 2003) (instructing the Task Force to issue reports at least once every two years).

182. *See* Exec. Order No. 13,517, 74 Fed. Reg. 57239 (Oct. 30, 2009) (stating that the Task Force "shall submit to the President a report on the actions it has taken . . . no later than 1 year from the date of this order").

183. *See id.* (amending section I of Executive Order 13183 to include the following sentence: "It is also the policy of the executive branch to improve the treatment of Puerto Rico in Federal programs and to promote job creation, education, health care, clean energy, and economic development on the islands."); *see also* Press Release, U.S. Dep't of Justice, The President's Task Force on Puerto Rico's Status Holds First Meeting (Dec. 15, 2009), *available at* <http://www.justice.gov/opa/pr/2009/December/09-asg-1343.html> (noting that President Obama signed an Executive Order on October 30, 2009, expanding the Task Force's "focus to include matters affecting Puerto Rico's economic development").

184. *See* PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS IO (2005), *available at* [http://puertoricoadvancement.org/Documents/presidential\\_task\\_force\\_report\\_on\\_puerto\\_rico\\_-\\_december2005.pdf](http://puertoricoadvancement.org/Documents/presidential_task_force_report_on_puerto_rico_-_december2005.pdf) [hereinafter 2005 TASK FORCE REPORT] ("Although the current territorial status may continue so long as Congress desires, there are only two non-territorial options recognized by the U.S. Constitution that establish a permanent status between the people of Puerto Rico and the Government of the United States. One is statehood. Under this option, Puerto Rico would become the 51st State with standing equal to the other 50 States. The other is independence. Under this option, Puerto Rico would become a separate, independent sovereign nation.").

people of Puerto Rico “whether they wish to remain a U.S. territory subject to the will of Congress or to pursue a constitutionally viable path toward a permanent non-territorial status with the United States.”<sup>185</sup> “If the people of Puerto Rico elect to pursue a permanent non-territorial status,” the second step requires “Congress [to] provide for an additional plebiscite allowing the people of Puerto Rico to choose between one of the two permanent non-territorial options.”<sup>186</sup> The 2007 Task Force report reiterated its prior recommendation for a federally-sanctioned plebiscite to be held in Puerto Rico but left open “alternative action by Puerto Rico itself to express its views to congress.”<sup>187</sup>

### B. *Three Issues that Resolving Puerto Rico's Political Status Raises*

Since 2006, several bills regarding Puerto Rico's status have been introduced in Congress.<sup>188</sup> One bill, H.R. 2499, the Puerto Rico Democracy Act of 2009, is currently pending in Congress.<sup>189</sup> This Note focuses on H.R. 900, the Puerto Rico Democracy Act of 2007 (“Democracy Act”),<sup>190</sup> which was amended on April 22, 2008,<sup>191</sup> and on H.R. 1230, the Puerto Rico Self-Determination Act of 2007 (“Self-Determination Act”).<sup>192</sup> Even though these bills died, the issues that they raise provide a useful springboard from which to analyze how the process of self-determination should proceed in Puerto Rico.

185. *Id.*

186. *Id.*

187. 2007 TASK FORCE REPORT, *supra* note 179, at 10.

188. *See* Puerto Rico Democracy Act of 2007, S. 1936, 110th Cong. (2007); Puerto Rico Democracy Act of 2006, H.R. 4867, 109th Cong. (2006); Puerto Rico Democracy Act of 2006, S. 2661, 109th Cong. (2006); Puerto Rico Self-Determination Act of 2006, H.R. 4963, 109th Cong. (2006); Puerto Rico Self-Determination Act of 2006, S. 2304, 109th Cong. (2006).

189. Puerto Rico Democracy Act of 2009, H.R. 2499, 111th Cong. (2009) (providing for the people of Puerto Rico a federally-sanctioned self-determination process).

190. H.R. 900, 110th Cong. (2007) (providing for the people of Puerto Rico a federally-sanctioned self-determination process).

191. *See* H.R. REP. NO. 110-597 (2008) (recommending that House bill 900 as amended pass the House of Representatives).

192. H.R. 1230, 110th Cong. (2007) (“[R]ecogniz[ing] the right of the People of Puerto Rico to call a Constitutional Convention through which the people would exercise their natural right to self-determination” and “establish[ing] a mechanism for congressional consideration of such decision . . .”).

### 1. Who Should Initiate the Process

A threshold question that arises in the context of self-determination in Puerto Rico is whether the United States or Puerto Rico should initiate the process. If adopted by Congress, the Democracy Act would have established a federally-sanctioned plebiscite where residents of Puerto Rico would first vote on whether “Puerto Rico should continue to have its present form of territorial status and relationship with the United States” or whether “Puerto Rico should pursue a constitutionally viable permanent non-territorial status.”<sup>193</sup> In other words, step one of this process would have asked the people of Puerto Rico whether they would like to maintain the island’s commonwealth status or whether they want change.

The Democracy Act proposed that a plebiscite be conducted no later than December 31, 2009.<sup>194</sup> If a majority voted for change, Congress would have recognized the people of Puerto Rico’s inherent authority to

call a Constitutional Convention . . . for the purpose of proposing to the People of Puerto Rico a self-determination option which, if approved by the People of Puerto in a referendum, would be presented to Congress . . . or conduct a plebiscite administered by the Puerto Rico State Elections Commission to consider a self-determination option with the results presented to Congress.<sup>195</sup>

The Self-Determination Act would have called a single constitutional convention “for the purpose of proposing to the People of Puerto Rico a Self-Determination Option, which if approved by the People of Puerto Rico in a referendum would be presented to Congress by the Constitutional Convention as a Self-Determination Proposal.”<sup>196</sup> If approved by the people of Puerto Rico, the Self-Determination Proposal would have been presented to Congress.<sup>197</sup> If neither the people of Puerto Rico

193. H.R. REP. NO. 110-597, at 1.

194. *See* H.R. 900 § 3(a) (“The Puerto Rico State Elections Commission shall conduct a plebiscite in Puerto Rico during the 111th Congress, but not later than December 31, 2009.”).

195. H.R. REP. NO. 110-597, at 1–2.

196. H.R. 1230 § 3.

197. *See id.* (“Congress recognizes the inherent authority of the People of Puerto Rico to call a Constitutional Convention, constituted by a number of delegates to be determined in accordance to legislation approved by the Commonwealth of Puerto

nor Congress approved the proposal, the constitutional convention would reconvene to formulate another self-determination option to present to the people of Puerto Rico and Congress.<sup>198</sup>

The Democracy Act and Self-Determination Act represent two competing theories on how the final process of self-determination in Puerto Rico should proceed. The Democracy Act reflects the view that Congress should take the critical first step toward implementing a process of self-determination for the people of Puerto Rico.<sup>199</sup> Those, such as Dick Thornburgh, former U.S. Attorney General and governor of the Commonwealth of Pennsylvania,<sup>200</sup> who support a definitive resolution of Puerto Rico's political status have stressed the need for Congress to pass legislation authorizing a plebiscite.<sup>201</sup> According to Thornburgh, for example, “[a]ny plebiscite by voters in Puerto Rico among locally formulated status alternatives that might or might not assure their transition to full self-government is inconclusive and potentially disruptive unless the alternatives presented to the voters have previously been approved by Congress . . . .”<sup>202</sup>

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Rico, for the purpose of proposing to the People of Puerto Rico a Self-Determination Option, which if approved by the People of Puerto Rico in a referendum would be presented to Congress by the Constitutional Convention as a Self-Determination Proposal.”).

198. *Id.* § 4(a)(1)–(2) (describing the approval or rejection process of the self-determination proposal).

199. *See, e.g., Hearing on H.R. 900 and H.R. 1230 Before the Subcomm. on Insular Affairs of the H. Comm. on Natural Resources*, 110th Cong. 47 (2007) [hereinafter *H. Hearing on H.R. 900 and H.R. 1230*] (statement of Thomas C. Goldstein, Partner, Akin Gump Strauss Hauer & Feld, LLP) (“[T]he power to resolve the political status of Puerto Rico is vested exclusively in Congress and the local constitutional process must operate within any framework created by Congress.”); *see also* Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 103 (2000) (“It is the constitutional obligation of the United States Congress to decide whether or not Puerto Rico should become a post-colonial state.”).

200. *See* THORNBURGH, *supra* note 158, at 103 (providing information about Dick Thornburgh); *see also* *Citizens Want Political Status Defined*, ORLANDO SENTINEL, Jun. 14, 2007, at 19A (“Dick Thornburgh is a former governor of Pennsylvania and a former U.S. attorney general.”).

201. *See* THORNBURGH, *supra* note 158, at 86 (“History teaches us that Congress must take the initiative in framing the terms for resolution of Puerto Rico’s political status.”); *see also* *H. Hearing on H.R. 2499*, *supra* note 14, at 65 (statement of Thomas Rivera-Schatz, President, S. of Puerto Rico) (asking Congress “to succeed where more than 50 previous Congresses have failed” by passing House bill 2499).

202. THORNBURGH, *supra* note 158, at 18.



By contrast, the Self-Determination Act reflects the position that the initial process of self-determination in Puerto Rico should come from the people of Puerto Rico.<sup>203</sup> In accordance with the compact theory,<sup>204</sup> the Self-Determination Act states that “[a] Self-Determination Option must be based on the sovereignty of the People of Puerto Rico and not subject to the plenary powers of the territorial clause of the Constitution of the United States.”<sup>205</sup> Thus, the Self-Determination Act sought to have the people of Puerto Rico initiate the process of self-determination through a constitutional convention.<sup>206</sup>

## 2. Which Status Options to Include

A second question that arises in the context of self-determination in Puerto Rico is whether a “new or modified commonwealth” status should be included on a ballot. Following the recommendation of the President’s Task Force, the Democracy Act introduced in the U.S. House of Representatives stated that the people of Puerto Rico would be able to choose between the options of statehood or independence if they voted for change in the initial plebiscite.<sup>207</sup> Under the statehood option, “Puerto Rico [would have been] admitted as a State of the Union, on equal footing with the other States . . . .”<sup>208</sup> The independence option would have allowed “Puerto Rico [to] become a sovereign nation, either fully independent from or in free association with the United States under an international agreement that preserves the right of each nation to terminate the association . . . .”<sup>209</sup>

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203. *See supra* notes 196–98 and accompanying text (discussing the constitutional convention proposed in House bill 1230).

204. *See supra* notes 94–95 and accompanying text (describing the compact theory based after Public Law 600 was passed).

205. H.R. 1230, 110th Cong. § 2 (2007).

206. *See supra* notes 196–98 and accompanying text (discussing the constitutional convention proposed in House bill 1230).

207. H.R. 900, 110th Cong. § 3(c) (2007) (describing the procedure if a majority of voters in the initial plebiscite favored pursuing a permanent nonterritorial status for Puerto Rico).

208. *Id.* § 3(c)(1).

209. *Id.* § 3(c)(2). The amended version of the Democracy Act stated that Congress recognized the right of the people of Puerto Rico to call a constitutional convention or another plebiscite if voters chose to pursue a constitutionally-viable permanent nonterritorial status for Puerto Rico. *See* H.R. REP. NO. 110-597, at 3 (2008) (declining to set forth specific status options). As previously noted, however, statehood and

The Self-Determination Act, on the other hand, recognized a “new or modified commonwealth” as a status option in addition to U.S. statehood and independence.<sup>210</sup> The Self-Determination Act did not explain what this status option would mean for Puerto Rico. One could, however, envision a variety of forms a “new or modified commonwealth” status could take. A “new or modified commonwealth” could, for example, enhance the civil and political rights of the people of Puerto Rico by allowing them to vote for President or gain voting power in Congress.<sup>211</sup> In addition, it could expand Puerto Rico’s autonomy by allowing the island to trade and enter into treaties with foreign nations.<sup>212</sup>

Not surprisingly, pro-statehood and pro-commonwealth supporters disagree on which status options should be presented to the people of Puerto Rico. The NPP and their supporters favored the Democracy Act because they believe that including a “new or modified commonwealth” status option avoids the hard choice that the people of Puerto Rico ultimately need to make between U.S. statehood and independence.<sup>213</sup> The current commonwealth status, in their view, is a discriminatory status that promotes the second-class treatment of the people of Puerto Rico.<sup>214</sup>

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independence are the only nonterritorial options that the Constitution recognizes according to the President’s Task Force. *See* 2005 TASK FORCE REPORT, *supra* notes 185–86 and accompanying text (describing the Task Force’s two-step proposal regarding Puerto Rico’s political status). The amended version of the Democracy Act, therefore, did not substantively differ from the bill introduced in the House of Representatives.

210. H.R. 1230, 110th Cong. § 2(2) (2007) (proposing that a “new or modified commonwealth” status be presented to the people of Puerto Rico).

211. *See supra* Part I.B.3 (describing the unequal treatment of the people of Puerto Rico).

212. *See supra* notes 140–43 and accompanying text (providing an overview of the PDP).

213. *See* THORNBURGH, *supra* note 158, at 86–87 (“Members of Congress (and certain political leaders in Puerto Rico) should stop pretending that some ‘enhanced commonwealth’ status would avoid hard choices between statehood and independence.”); *see also* H. *Hearing on H.R. 900 and H.R. 1230*, *supra* note 199, at 198–99 (statement of Jose F. Aponte-Hernandez, Speaker, H.R. of Puerto Rico) (“[I]n order to conclude the long overdue problem of Puerto Rico’s self-determination, [Congress] must make certain that the status options provided in any referendum to the US citizens who reside in Puerto Rico be limited to those that are constitutional viable, non-territorial, non-colonial and fully democratic in nature. In other words, they must be limited to options that guarantee full self-government by the people of Puerto Rico.”).

214. *See* THORNBURGH, *supra* note 158, at 87 (“A ‘commonwealth’ is simply a form of nonpermanent territorial status that implements limited self-government at the

Critics of the Democracy Act, such as former Governor of Puerto Rico, Aníbal Acevedo-Vilá, suggested that it was biased toward U.S. statehood and called for a process that would have distorted the will of the people of Puerto Rico.<sup>215</sup> They emphasize the importance of maintaining a flexible arrangement between the United States and Puerto Rico.<sup>216</sup> From their perspective, the Self-Determination Act “[was] not slanted against or for any political status option” because it “offer[ed] a fair, democratic and inclusive means for the people of Puerto Rico to express their voice and exercise their right of self-determination.”<sup>217</sup>

### 3. Who Gets to Vote

A third question that arises in the context of self-determination in Puerto Rico is whether mainland Puerto Ricans should be permitted to vote on the island’s political future. The Democracy Act would have permitted mainland Puerto Ricans born in Puerto Rico to vote in a status plebiscite in addition to

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discretion of Congress and leaves territorial residents subject to the unchecked power of a Congress in which they have no voting representatives.”); *see also* Ctr. for Puerto Rico Equality and Advancement Mission Statement, <http://puertoricoadvancement.org/mission.aspx> (last visited Mar. 2, 2009) (“[T]he end of the island’s current disenfranchised, dysfunctional territorial status is in the best interests of both the people of Puerto Rico and our fellow citizens on the mainland U.S.”).

215. *See H. Hearing on H.R. 900 and H.R. 1230, supra* note 199, at 166 (statement of Aníbal Acevedo-Vilá, Governor of Puerto Rico) (“Now, the same people who could not convince the citizens of the Island to vote for statehood, are trying—again—to change the rules of the game, crafting a system to force statehood upon Puerto Rico [in H.R. 900]. Rather than give every Puerto Rican an equal opportunity to have his or her voice heard, these statehood advocates have designed a series of referendums that would distort the will of the people.”).

216. *See* José R. Coleman Tió, *Democracy, Not Statehood: The Case for Puerto Rican Congressmen*, 116 *YALE L.J. POCKET PART* 397, 399 (2007) (“Because Puerto Ricans support a relationship that both assures a strong union with the United States and also maintains local power over local affairs, commentators and legislators are wrong to reject flexible arrangements and to insist only on independence or statehood. By insisting on those two arrangements, commentators disparage Puerto Ricans’ own democratic decisions and perhaps even imply that Puerto Ricans are ignorant of their own best interests.”); *see also* Camacho, *supra* note 146, at 492–93 (expressing support for an enhanced commonwealth status).

217. *See* PRFAA, Press Release, Puerto Rico Self-Determination Act of 2007 (H.R.1230) (2007) (on file with author) (“Unlike other initiatives past and present, the ‘Puerto Rico Self-Determination Act of 2007’ is not slanted against or for any particular political status option. The bill offers a fair, democratic and inclusive means for the people of Puerto Rico to express their voice and exercise their right of self-determination.”).

the people of Puerto Rico.<sup>218</sup> The Self-Determination Act would have extended voting eligibility to mainland Puerto Ricans with at least one parent born in Puerto Rico.<sup>219</sup> The fact that the stateside Puerto Rican population now exceeds that of the island may offer some explanation for this general agreement.<sup>220</sup> According to a 2007 report by the North American Congress on Latin America, leaders in Puerto Rico have increasingly turned to mainland Puerto Ricans for support on island issues since the 1990s as a result of the Puerto Rican diaspora.<sup>221</sup>

Advocates have asserted several arguments in favor of granting mainland Puerto Ricans the right to vote in a status plebiscite. Many mainland Puerto Ricans, they claim, take a great deal of pride in being Puerto Rican and care about the island's political status, which intertwines with their identity.<sup>222</sup> In

218. H.R. 900, 110th Cong. § 3(c)(1)–(2) (2007) (indicating that “[a]ll eligible voters under the electoral laws in effect in Puerto Rico,” and “[a]ll United States citizens born in Puerto Rico who comply, to the satisfaction of the Puerto Rico State Elections Commissions, with all Puerto Rico State Elections Commission requirements (other than the residency requirement)” would have been permitted to vote in a plebiscite conducted under H.R. 900); *see also* Jorge Duany, *The Puerto Rican Diaspora to the United States: A Postcolonial Migration?* 25 (Nov. 7, 2008) (unpublished paper), available at [http://www.centropr.org/documents/events/jorge\\_duany\\_puerto\\_rican\\_diaspora.pdf](http://www.centropr.org/documents/events/jorge_duany_puerto_rican_diaspora.pdf) (“The Puerto Rico Democracy Act of 2007 (H.R. 900), a bill sponsored by Serrano and Fortuño, would extend the right to vote to US residents born on the Island.”).

219. H.R. 1230, 110th Cong. § 2(4)–(5) (2007) (defining the people of Puerto Rico as “residents in the Commonwealth of Puerto Rico and non-resident Puerto Ricans” and non-resident Puerto Ricans as “individuals who are not legal residents of the Commonwealth of Puerto Rico and who are either born in Puerto Rico or have one parent born in Puerto Rico”).

220. *See, e.g.*, Angelo Falcón, *The Diaspora Factor: Stateside Boriquas and the Future of Puerto Rico*, 40(6) NACLA REP. ON THE AMS., Nov.–Dec. 2007, at 29 (“According to the latest U.S. Census estimates, in 2005 there were about 3,780,000 Puerto Ricans living in the States compared to about 3,670,000 in Puerto Rico.”). The mainland Puerto Rican population continues to slightly outnumber that of the island. *Compare* U.S. Bureau of the Census, 2008 American Community Survey for those of Hispanic/Latino Origin, available at [http://factfinder.census.gov/servlet/DTTTable?\\_bm=y&-geo\\_id=01000US&-ds\\_name=ACS\\_2008\\_1YR\\_G00\\_&-lang=en&-mt\\_name=ACS\\_2008\\_1YR\\_G2000\\_B03001&-format=&-context=dt](http://factfinder.census.gov/servlet/DTTTable?_bm=y&-geo_id=01000US&-ds_name=ACS_2008_1YR_G00_&-lang=en&-mt_name=ACS_2008_1YR_G2000_B03001&-format=&-context=dt) (estimating a U.S. Puerto Rican population of 4,216,533), *with* CENT. INTELLIGENCE AGENCY, *supra* note 47, at 552 (estimating an island population of 3,971,020 as of July 2009).

221. *See* Falcón, *supra* note 220, at 29 (explaining that it wasn’t until the 1990s that the relationship between the stateside and island communities “took on an increasingly political nature . . . [because it] was then that the stateside Puerto Rican community increased its representation in the U.S. House of Representatives from one to three—two from New York and one from Chicago, all Democrats”).

222. *See* Christine MacDonald, *Statehood Issue Divides Area’s Puerto Ricans*, BOSTON GLOBE, Mar. 15, 1998, at 1 (“Martinez said she cares about the island’s political fate

addition, most have families who live there.<sup>223</sup> Advocates, such as Rafael Deolet, have also invoked the doctrine of *jus sanguinis* for the proposition that Puerto Rican nationality extends to all persons of Puerto Rican descent, including those residing in the mainland.<sup>224</sup> Finally, advocates contend that the people of Puerto Rico do not cease being Puerto Rican just because they migrated to the United States.<sup>225</sup>

Several arguments, however, have been made against allowing mainland Puerto Ricans to vote on the island's political future in the past. According to opponents, identifying and registering eligible voters throughout the states and abroad would present logistical difficulties.<sup>226</sup> Opponents have also argued that it is unfair to permit mainland Puerto Ricans to vote on Puerto Rico's status when the outcome of a vote on the future

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because it intertwines with her identity." (quoting Lisa Martinez, a Puerto Rican who was born and raised in the United States)); see also Raymond Hernandez, *New York Vote Plan Seeks to Gain Voice In Puerto Rico Status*, N.Y. TIMES, July 26, 1993, at A1 ("Once you raise the question of a plebiscite, you have to include all people of Puerto Rican descent . . . We have very close ties to the island." (quoting former City Councilman Jose Rivera of the Bronx)).

223. See Tamara Lytle & Jeannette Rivera-Lyles, *Governor: Let Off-Islanders Vote on Puerto Rico*, ORLANDO SENTINEL, Feb. 28, 2007, at A4 ("Allowing Puerto Ricans living outside the island . . . to participate is only fair . . . We [islanders] all have a relative who lives in the mainland, and we all know that relative calls himself Puerto Rican." (quoting former Puerto Rico Governor Aníbal Acevedo-Vilá)); Mireya Navarro, *U.S. Puerto Ricans Debate Right to Vote on Island's Future*, N.Y. TIMES, June 5, 1990, at B1 ("Many Puerto Ricans who came to the United States note that they own property in Puerto Rico and most of their families remain there.").

224. Deolet, *supra* note 92, at 46 (claiming that because Puerto Rico has remained a civil law jurisdiction since the 16th century, the doctrine of *jus sanguinis* governs Puerto Rican nationality).

225. See Navarro, *supra* note 223 ("Just because we left we don't stop being Puerto Rican . . . We shouldn't be denied the right to vote." (quoting Reinaldo Pacheco, a native of Puerto Rico who migrated to New York City)); see also Hernandez, *supra* note 222 ("Puerto Rico is still my country. I wish I was there now." (quoting Angel Allalo who left the island for economic reasons)).

226. See Miriam Ramirez de Ferrer, *No Way, José (Serrano)! Only Residents of Puerto Rico Should be Entitled to Vote in the 1998 Plebiscite*, PUERTO RICO HERALD, July 31, 1997, <http://www.puertorico-herald.org/issues/970731/top-story-970731.html> ("Who qualifies as a Puerto Rican? How do you go about registering 1 million voters scattered throughout the 50 states, not to mention those Puerto Ricans who live abroad? When do they vote, and where? Who's going to print the ballots, hold the election and pay the costs?"); see also Hernandez, *supra* note 222 ("Gov. Pedro J. Rossello and his pro-statehood New Progressive Party rejected any formal participation in the vote from people on the mainland because of what he described as logistical problems.").

status of Puerto Rico will not directly affect them.<sup>227</sup> Finally, opponents have asserted that mainland Puerto Ricans have “already voted against the status quo with their feet.”<sup>228</sup>

### III. *RESOLVING PUERTO RICO'S POLITICAL STATUS*

Puerto Rico's commonwealth status has created a world of confusion. Torn between their cultural identity and desire for stronger ties with the United States, the people of Puerto Rico disagree on which status option would best serve them in the future.<sup>229</sup> On the other hand, the people of Puerto Rico are tired of the status quo.<sup>230</sup> Even though the United Nations continues to call upon the United States to facilitate the process of self-determination in Puerto Rico, Congress has yet to take action.<sup>231</sup> Moreover, aside from recommending a federally-sanctioned plebiscite regarding Puerto Rico's political status in 2005,<sup>232</sup> the President's Task Force has done little to help resolve the island's political status.

Part III of this Note focuses on the resolution of Puerto Rico's political status. Part III.A explains why the island's political status needs to be resolved. Part III.B explains how the process of self-determination should proceed in Puerto Rico based on the issues of: (1) whether Congress or the people of Puerto Rico

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227. See Ramirez de Ferrer, *supra* note 226 (“Since mainland Puerto Ricans will continue to enjoy all the benefits of their current residency, it would be the height of hypocrisy for them to foist on the Puerto Ricans left behind, a political status that they themselves will neither be subject to (unless statehood if chosen) nor restricted by (if independence or the status quo win out.”)); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 47 n.282 (1998) (“While I object in the most strongest terms to the colonial status for Puerto Rico, as a resident of the mainland who will not be as directly affected as the resident's [sic] of the territory by any ultimate decision on its status, I do not believe it is my place to impart my view on the preferred legitimate status option-statehood or independence.”).

228. Ramirez de Ferrer, *supra* note 226.

229. See *supra* note 137 and accompanying text (describing the “profound tension” within the soul of Puerto Ricans); see also *supra* note 136 and accompanying text (noting the disagreement among the people of Puerto Rico regarding the U.S. statehood and enhanced commonwealth status options).

230. See, e.g., *supra* notes 172–73 and accompanying text (describing the 1998 plebiscite where the current commonwealth option received less than 1% of the vote and the majority of voters chose the “none of the above” status option).

231. See *supra* notes 108–10 and accompanying text (discussing the U.N.'s monitoring efforts of Puerto Rico in recent years).

232. See *supra* notes 184–86 and accompanying text (describing the Task Force's recommendation for a federally-sanctioned plebiscite to be held in Puerto Rico).

should initiate the process of self-determination in Puerto Rico; (2) which status options should be presented to the people of Puerto Rico; and (3) whether Mainland Puerto Ricans should be permitted to vote on Puerto Rico's future political status.

A. *Why Puerto Rico's Political Status Needs to Be Resolved*

Puerto Rico's political status is unsatisfactory and therefore needs to be resolved. From a classification perspective, the island's political status is extremely problematic. Puerto Rico's commonwealth status, for example, does not fit into any of the status options that Resolution 1541 identifies.<sup>233</sup> The island is not an independent state, in free association with the United States, and Puerto Rico has not been integrated into the United States as a state.<sup>234</sup> In addition, neither the United States nor the U.N. Decolonization Committee appears to recognize Puerto Rico as a "political status freely determined by the people" within the meaning of Resolution 2625.<sup>235</sup>

Whether Puerto Rico qualifies as a case of internal or external self-determination is also unclear.<sup>236</sup> Prior to its establishment as a commonwealth, Puerto Rico was a U.S. colony.<sup>237</sup> Once it became a commonwealth in 1953, and the United Nations removed it from the list of non-self-governing territories, however, Puerto Rico's status as a colony, at least with the respect to the international community, changed.<sup>238</sup>

Does Puerto Rico now qualify as a case of internal self-determination? On the one hand, Puerto Rico enjoys a certain degree of autonomy and international recognition as a

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233. See *supra* note 68 and accompanying text (describing the status options that General Assembly Resolution 1541 recognizes).

234. See *generally supra* notes 83–110 (providing an overview of Puerto Rico's commonwealth status and the United Nations' removal of Puerto Rico from the list of non-self-governing territories).

235. See *supra* note 71 and accompanying text (discussing the status options that General Assembly Resolution 2625 recognizes).

236. See *supra* notes 75–81 and accompanying text (discussing the distinction between internal and external self-determination).

237. See *supra* notes 83–88 and accompanying text (discussing Puerto Rico's road to self-government prior to Public Law 600).

238. See *supra* notes 94–95 and accompanying text (describing the compact theory view of Puerto Rico's political status).

commonwealth,<sup>239</sup> which suggests that it qualifies more as a case of internal self-determination. Moreover, there is very little support for independence in Puerto Rico.<sup>240</sup> On the other hand, the territorial incorporation doctrine still defines the relationship between Puerto Rico and the United States,<sup>241</sup> and Public Law 600 did not offer the people of Puerto Rico the option of independence.<sup>242</sup> These facts suggest that Puerto Rico is still a U.S. colony, and therefore qualifies more as a case of external self-determination.<sup>243</sup>

A more substantive issue regarding Puerto Rico's political status is that it perpetuates the second-class treatment of the people of Puerto Rico. As previously noted, the territorial incorporation doctrine still defines the relationship between the United States and Puerto Rico.<sup>244</sup> Because of this doctrine, the people of Puerto Rico do not receive equal treatment under the Constitution,<sup>245</sup> and have limited political and social rights as statutory U.S. citizens.<sup>246</sup> While it is true that the people of Puerto Rico do not pay federal income taxes, they do pay other taxes<sup>247</sup> and have fought to defend the United States in large numbers, as evidenced by their military service.<sup>248</sup> In short, Puerto Rico's

239. *See supra* notes 112–14 and accompanying text (noting that Puerto Rico can participate under its own flag in the Olympics and Miss Universe contest).

240. *See supra* note 139 and accompanying text (noting that very little support for the PIP exists in Puerto Rico); *see also supra* notes 162, 168 (noting that the independence option received just 4.4% of the votes in the 1993 plebiscite in Puerto Rico and just 4% in the 1998 plebiscite).

241. *See supra* note 10 and accompanying text (explaining that as a constitutional matter, Congress maintains plenary power over Puerto Rico); *see also supra* Part I.B.3 (providing an overview of the unequal treatment that the people of Puerto Rico receive under the U.S. Constitution based on the territorial incorporation doctrine).

242. *See supra* note 107 and accompanying text (noting Guevara's position regarding General Assembly Resolution 748 and Puerto Rico's removal from the list of non-self-governing territories).

243. *See supra* notes 73–79 and accompanying text (discussing the distinction between internal and external self-determination).

244. *See supra* notes 9–10 and accompanying text (discussing the relationship between Puerto Rico and the United States).

245. *See generally* Part I.B.3 (providing an overview of the unequal treatment of the people of Puerto Rico under Puerto Rico's commonwealth status).

246. *See id.*

247. *See supra* note 111 and accompanying text (explaining that the people of Puerto Rico pay local and social security taxes even though they do not pay federal income taxes).

248. *See supra* note 14 and accompanying text (noting that the people of Puerto Rico serve in the U.S. Armed Forces in large numbers).



political status unjustly disadvantages the people of Puerto Rico, who deserve to be treated as equal U.S. citizens.

Moreover, the people of Puerto Rico are not satisfied with the island's political status. Since the island became a commonwealth in 1952, the people of Puerto Rico have asserted several legal challenges to their unequal treatment as U.S. citizens.<sup>249</sup> In addition, they have organized three plebiscites and one referendum in an attempt to redefine Puerto Rico's relationship with the United States.<sup>250</sup> These attempts have all failed, due in part to partisan politics in Puerto Rico,<sup>251</sup> but also because of Congress's inability or unwillingness to move forward the process of self-determination in Puerto Rico.<sup>252</sup>

### B. *How Puerto Rico's Political Status Should be Resolved*

As Part II.B of this Note described, there are three key issues to resolving Puerto Rico's political status: (1) whether Congress or the people of Puerto Rico should initiate the process of self-determination in Puerto Rico; (2) which status options should be presented to the people of Puerto Rico; and (3) whether mainland Puerto Ricans on the island's future political status. Part III.B argues that Congress should initiate the process of self-determination in Puerto Rico by passing legislation authorizing a federally-sanctioned plebiscite for Puerto Rico. Part III.B also argues that the people of Puerto Rico should only be presented with the status options of U.S. statehood and independence because it is in their interests to put a definitive end to Puerto Rico's colonial relationship with the United States. Finally, Part III.B maintains that only the people of Puerto Rico should be permitted to vote on Puerto Rico's future political status.

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249. *See supra* notes 125–27 and accompanying text (discussing the *Harris* and *Igartúa-De La Rosa* decisions).

250. *See supra* notes 148–73 and accompanying text (discussing the 1967, 1993, and 1998 plebiscites held in Puerto Rico and the 1991 referendum).

251. *See generally supra* Part II.A (providing an overview of the political status debate in Puerto Rico).

252. *See supra* notes 159, 169 and accompanying text (noting that Congress failed to pass legislation regarding Puerto Rico's political status prior to the 1993 and 1998 plebiscites).

### 1. Congress Should Take the First Step

Congress should take the first step in initiating the process of self-determination in Puerto Rico because Congress continues to maintain plenary power over the island.<sup>253</sup> Critics of the notion that Congress should bear the initial responsibility in resolving Puerto Rico's political status will likely assert two arguments. First, they will likely contend that the people of Puerto Rico should initiate the process of self-determination because they are the ones who hold this right. Second, critics will probably contend that Congress should not initiate the process of self-determination until the people of Puerto Rico know what they want.<sup>254</sup>

The first argument assumes that congressional action in initiating a process for resolving the island's status undermines the people of Puerto Rico's right to self-determination. International law, however, does not require that the people of Puerto Rico initiate the process of self-determination in Puerto Rico. As explained in Part I, *supra*, self-determination is an ambiguous principle in international law with very few clear rules.<sup>255</sup> All it requires is that the people of Puerto Rico have a fair and just opportunity to vote on the future status of the island.<sup>256</sup> Both the federally-sanctioned plebiscite proposed in the Democracy Act and the constitutional convention proposed in the Self-Determination Act satisfy this requirement.<sup>257</sup> Moreover, Congress has a normative obligation to facilitate the process of self-determination in Puerto Rico as a signatory to legal instruments, such as the ICCPR.<sup>258</sup>

The second argument, that Congress should wait until the people of Puerto Rico know what they want before initiating the

253. *See supra* note 96 and accompanying text (describing the view of territorial supremacy theorists who contend that Congress did not give up its plenary power over Puerto Rico when passing Public Law 600).

254. *See supra* notes 159–62, 169–73 and accompanying text (providing an overview of the inconclusive 1993 and 1998 plebiscites).

255. *See supra* note 28 and accompanying text (noting the imprecise nature of the principle of self-determination).

256. *See, e.g., supra* note 57 and accompanying text (referring to the use of principle of self-determination in article 1 of the ICCPR and the ICESCR).

257. *See supra* Part II.B.1 (discussing the issue of whether Congress of the people of Puerto Rico should initiate the process of self-determination in Puerto Rico).

258. *But see supra* note 61 and accompanying text (noting that the United States has attached several reservations, declarations, and understandings to the ICCPR).

process of self-determination, fails to take into account the colonial relationship between the United States and Puerto Rico. Although the people of Puerto Rico should bear some responsibility for their inability to take a definitive position on Puerto Rico's political status, it is important to keep in mind how strongly the people of Puerto Rico value their relationship with the United States.<sup>259</sup> After all, Puerto Rico has been an unincorporated U.S. territory since 1898,<sup>260</sup> and the people of Puerto Rico have been statutory U.S. citizens since 1917.<sup>261</sup> For this reason, it is easy to see why they have had a difficult time deciding on the island's future political status.

In moving forward, Congress should stop dragging its feet and pass legislation on Puerto Rico's political status.<sup>262</sup> Congressional legislation is critical to resolving the status of Puerto Rico because it would demonstrate recognition by the United States of its obligation and commitment to enabling the people of Puerto Rico to exercise their right of self-determination. Granted, the island's political status is a complicated matter that raises questions that many would prefer to avoid. Ignoring the issue, however, as President Obama suggests, will not make it go away.<sup>263</sup> If anything, the passing of time will further complicate efforts to resolve Puerto Rico's political status.

The President's Task Force should also take a more proactive role in facilitating the process of self-determination in Puerto Rico. Since proposing a federally-sanctioned plebiscite for Puerto Rico in its 2005 report and expanding on it in its 2007 report, the Task Force has done little to help resolve the island's

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259. *See supra* note 137 and accompanying text (noting the "profound tension" within Puerto Ricans' souls and questioning how "Puerto Ricans, on the one hand, celebrate their national cultural difference and, on the other hand, want even closer ties with the United States").

260. *See supra* note 83 and accompanying text (discussing the Treaty of Peace following the Spanish-American war).

261. *See supra* note 86 and accompanying text (discussing the Jones Act, which granted the people of Puerto Rico statutory U.S. citizenship).

262. *See, e.g., supra* notes 199–202 and accompanying text (stressing the need for Congress to pass legislation regarding Puerto Rico's political status).

263. *See supra* note 26 (quoting President Obama's commitment to resolve Puerto Rico's status).

status.<sup>264</sup> With the Task Force's next report due by the end of this year<sup>265</sup> and President Obama's pledge to facilitate the resolution of Puerto Rico's status,<sup>266</sup> perhaps the people of Puerto Rico will have an opportunity to participate in a binding plebiscite that will bring an end to the status quo in the near future.

## 2. Statehood and Independence Should be the Only Options

The people of Puerto Rico should not be presented with a "new or modified commonwealth" as a status option. First, this status option is not realistic. As the President's Task Force has made clear, statehood and independence are the only constitutionally viable status options for the people of Puerto Rico aside from the island's current status.<sup>267</sup> Moreover, Congress does not appear willing to amend the U.S. Constitution to allow for the possibility of a "new or modified commonwealth" for Puerto Rico.<sup>268</sup> Finally, presenting the status option of a "new or modified commonwealth" would allow the people of Puerto Rico to continue avoiding the hard choice between U.S. statehood and independence.<sup>269</sup> For all these reasons, the "new or modified commonwealth" status option should be eliminated.

Opponents suggest that elimination of this status option would not result in a proper exercise of self-determination.<sup>270</sup> This argument has some appeal. After all, forcing the people of Puerto Rico to choose between statehood and independence puts pro-commonwealth supporters who seek change in a difficult position.<sup>271</sup> The principle of self-determination, however, does not require that a "new or modified commonwealth" status

264. *See supra* notes 185–86 and accompanying text (noting the two-step process that Task Force introduced in its 2005 first report on Puerto Rico's political status).

265. *See supra* note 182 and accompanying text (referring to Executive Order 13,517).

266. *See supra* note 26 and accompanying text (noting President Obama's pledge to facilitate the process of self-determination in Puerto Rico).

267. *See supra* note 184 and accompanying text (observing that there are only two non-territorial options that are viable under the U.S. Constitution).

268. *See, e.g., supra* note 188 (listing prior versions of the Self-Determination Act that have died in Congress).

269. *See supra* note 213 and accompanying text (describing an argument against including the "new or modified" status option).

270. *See supra* notes 215–17 and accompanying text (discussing pro-commonwealth arguments against the Democracy Act proposal).

271. *See supra* notes 215–17 and accompanying text (discussing pro-commonwealth arguments against the Democracy Act proposal).

be presented to the people of Puerto Rico.<sup>272</sup> Moreover, the three modes of self-government that Resolution 1514 recognizes suggest a preference in international law for clear status options to be presented to the people of Puerto Rico.<sup>273</sup> More importantly, the time for change in Puerto Rico has come, and eliminating the “new or modified commonwealth” status option would represent a positive step toward achieving this goal.

### 3. Mainland Puerto Ricans Should Not Be Permitted to Vote

Only the people of Puerto Rico should be permitted to vote in a future status plebiscite. As a normative matter, Puerto Rico’s political status does not directly affect mainland Puerto Ricans, who receive equal treatment under the U.S. Constitution as U.S. citizens.<sup>274</sup> In other words, unlike the people of Puerto Rico, mainland Puerto Ricans would not have to live with an outcome that they disagree with on a daily basis. Moreover, as a practical matter, permitting mainland Puerto Ricans to vote in a status plebiscite would complicate the process of self-determination in Puerto Rico. Inadequate resources will likely be an issue just as it was in the 1993 parallel plebiscite held in New York City.<sup>275</sup> Accordingly, limiting voting to the people of Puerto Rico makes the most sense.

Still, there appears to be little disagreement on the question of whether some mainland Puerto Ricans should have the right to vote in a status plebiscite.<sup>276</sup> As previously noted, the Democracy Act would have allowed mainland Puerto Ricans born in Puerto Rico to vote on the island’s political future, and the

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272. *See generally supra* Part I.A (providing an overview of the principle of self-determination and its use in international instruments).

273. *See supra* note 68 and accompanying text (providing an overview of General Assembly Resolution 1541, which recognizes independence, free association, and integration as providing for a full measure of self-government). *But see supra* note 71 and accompanying text (providing an overview of General Assembly Resolution 2625, which also recognizes “the emergence into any other political status freely determined by the people” as providing for a full measure of self-government).

274. *See supra* note 227 and accompanying text (noting that a change in the Puerto Rico’s political status would not directly affect Puerto Ricans residing in the United States).

275. *See supra* note 165 and accompanying text (stating that only seventy voting machines were available in the 1993 parallel plebiscite held in New York).

276. *See generally supra* Part II.B.3 (comparing the competing views on whether mainland Puerto Ricans should be permitted to vote in a status plebiscite).

Self-Determination Act would have expanded this group to mainland Puerto Ricans with at least one parent born in Puerto Rico.<sup>277</sup> Excluding all mainland Puerto Ricans from voting in a status plebiscite, therefore, does not appear to be a viable option.

Because the mainland Puerto Rican population now exceeds the island population, the potential number of mainland voters may be very large.<sup>278</sup> It is important, therefore, to limit the number of eligible mainland voters. Limiting eligible mainland voters to those born in Puerto Rico is preferable to permitting Puerto Ricans with at least one parent who was born the island to vote in a status option. The group of eligible mainland voters could be further reduced to those who have lived in the United States for a certain number of years. Although arbitrary, such line-drawing may be necessary to ensure that the people of Puerto Rico get the primary say in deciding how Puerto Rico's political status should be resolved.

### CONCLUSION

For too long, the people of Puerto Rico have been treated as second-class U.S. citizens. Because of its ambiguous commonwealth status, Puerto Rico has remained an unincorporated territory "belonging to[,] but not part of"<sup>279</sup> the United States. Contrary to the beliefs of some, Puerto Rico's commonwealth status cannot afford the people of Puerto Rico the "best of both worlds." The disproportionately low level of federal aid that Puerto Rico receives is egregious. Moreover, the staggering poverty rate in Puerto Rico compared to U.S. states goes largely unnoticed. In short, Puerto Rico's commonwealth status is unsatisfactory, and the people of Puerto Rico should be given an opportunity to exercise their right of self-determination in a way that will definitively resolve the status of Puerto Rico.

Although resolving the status of Puerto Rico will be difficult, ignoring the issue will not make it go away. Accordingly, the U.S. Congress should stop dragging its feet and pass legislation authorizing a binding plebiscite on Puerto Rico. Likewise, the

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277. See *supra* notes 218–19 and accompanying text (describing the provisions of the Democracy Act and the Self-Determination Act on eligible voters).

278. See *supra* note 220 and accompanying text (noting that the stateside Puerto Rican population exceeds that of the island).

279. *Balzac v. Porto Rico*, 182 U.S. 244, 287 (1901).

President's Task Force should take a more active role in promoting self-determination in Puerto Rico. In terms of the international community, the U.N. Decolonization Committee should put more pressure on the United States to facilitate the process of self-determination in Puerto Rico. Finally, the people of Puerto Rico themselves should do a better job of making their dissatisfaction with the status quo known.

Sadly, whether meaningful progress toward resolving Puerto Rico's status in the near future remains to be seen. In the meantime, the territorial incorporation doctrine continues to disenfranchise nearly four million citizens with little or no legal remedy or political recourse. The people of Puerto Rico deserve better than the ambiguity that the commonwealth status has offered them for the past sixty-odd years. The time has come for the people of Puerto Rico to fully exercise their right of self-determination and end their colonial ties with the United States.