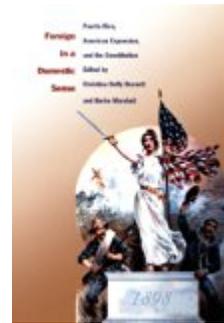


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Puerto Rico and the Liminal Status of the U.S. Territories

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Americans think of the United States as having a liberal, federal republic: “liberal,” because it is founded on principles of political equality and individual rights; “federal,” because the responsibilities of government are divided between the state and national governments, and because political representation is determined geographically, by state and state-based congressional districts; a “republic,” because decisions are made by citizens indirectly, through elected officeholders and their appointees.

The existence of Puerto Rico belies all three commonplaces. Puerto Rico is part of the United States, yet Puerto Ricans do not enjoy the same individual rights as U.S. citizens from the fifty states (they are not guaranteed the right to trial by jury, for instance) or receive the same membership benefits (Congress has capped SSI and AFDC benefits for Puerto Rican recipients). Puerto Rico comes under the sovereignty of the United States (under the 1899 Treaty of Paris, following the Spanish-American War, and the Supreme Court’s rulings in the *Insular Cases*, beginning with *Lima v. Bidwell*, 182 U.S. 1 [1901]) and is subject to the plenary power of Congress, the executive branch, and the federal courts, yet it lacks representation in the legislative or executive branch.

Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution, a compilation of essays by federal judges, legal scholars, political scientists, and oth-

ers edited by Christina Duffy Burnett and Burke Marshall, sheds important light on the historical, constitutional, cultural, and political realities of the Commonwealth of Puerto Rico and, more generally, the expansion of the United States beyond the fifty states. The editors divide the seventeen chapters (and “A Note on the *Insular Cases*” by Burnett) into four sections, “History and Expansion,” “Expansion and Constitution,” “Constitution and Membership,” and “Membership and Recognition.”

The contributors approach Puerto Rico’s political position from distinct viewpoints, a diversity that illuminates the many aspects of Puerto Rico’s position as an “unincorporated territory.” At the same time, the diversity of the contributions - from, say, Mark Weiner’s exposition of the Teutonic ethno-juridical discourse reflected in the *Insular Cases* to Richard Thornburgh’s explanation of U.S. territorial policy with respect to Puerto Rico based on his political experience in the Bush administration - highlights those points where the contributions intersect.

Several of these points bear restatement.

One is that Puerto Rico is a colony, subject to the sovereignty of the U.S. government, a government over which Puerto Rico has little effective control. The terms of the Treaty of Paris, in conjunction with the *Insular Cases* (most notably *Downes v. Bidwell*, 182 U.S. 244 [1901]) and the 1952 legislation that established Puerto Rico as a commonwealth, have kept it as a dependency of the United States. Puerto Rico thus stands as a contradiction to the principles of representative government.

Indeed, its status does not match the U.N.'s 1960 criteria of decolonization. Instead, the U.S. government has claimed that the status of Puerto Rico is a domestic matter, beyond the jurisdiction of the United Nations.

Even so, to identify Puerto Rico as a "colony" may obscure as much as it reveals. A majority of Puerto Ricans have not approved alternatives to the status quo, whether statehood or independence. Instead, plebiscites conducted in 1993 and 1998 indicate that Puerto Ricans are deeply divided over the future of Puerto Rico, although the plebiscites suggest that only a small minority seeks complete independence from the United States. Furthermore, the federal courts have upheld Puerto Rico's distinctive commonwealth status, rejecting the propositions that federal laws apply municipally (as they would if Puerto Rico were simply an unincorporated territory), that Puerto Rico has no sovereignty whatsoever, and that the establishment of the Commonwealth did not change the nature of the relationship between Puerto Rico and the U.S. government.

Also, there is the \$10 billion a year in aid that Puerto Rico receives from the United States, a benefit that its political leaders presumably do not want to forgo. Finally, Puerto Ricans can exit: they can move to the states, especially New York and Florida (*see* Burnett and Marshall, Cabranes, Thomas, Rivera Ramos, Statham, Trías Monge, and Thornburgh).

A second point of consensus is the contributors' focus on the *Insular Cases*, a series of 23 Supreme Court decisions beginning in 1901 that distinguished between U.S. territories that were assumed to be temporary dependencies and later to become states, and those that were to remain as territories and not to become states. Yet the ruling of the *Insular Cases*, creating the category of "unincorporated territory," has no basis in the Constitution (in fact, the Constitution is silent on the quantity and quality of U.S. territorial expansion) and runs contrary to democratic principles of self-rule.

Nonetheless, the *Insular Cases* have provided the legal justification for the United States' overseas possessions, and they have legitimated the second-class status accorded to the inhabitants of Puerto Rico, the Philippines (from 1898 until 1946), Guam, American Samoa, the U.S. Virgin Islands (after 1917), and the Northern Marianas (after 1975). The Supreme Court has cited the *Insular Cases* as recently as 1978, 1980, and 1999. Given the implication of the *Insular Cases* that not only does the U.S. Constitution not necessarily apply to U.S. territories (for that had been true of the contiguous continen-

tal territories as well), but that it may never fully apply to some areas and persons coming under U.S. sovereignty, the *Insular Cases* may well represent one of Bruce Ackerman's "constitutional moments": those decisions effectively amended the Constitution by writing imperialism into the document, a "structural amendment" subsequently ratified by the American public in the election of William McKinley over Williams Jennings Bryan in 1900.

Yet whereas U.S. imperialism was a central issue of the 1900 presidential campaign and the *Insular Cases* were, at the last turn of the century, the most controversial set of cases in Supreme Court history since *Dred Scott v. Sandford* (60 U.S. [19 Howard] 393 [1857]), the constitutionality and politics of the U.S. territories have received virtually no attention from leading politicians, academics, jurists, or journalists at the present turn of the century (*see* Burnett and Marshall, Weiner, Thomas, Rivera Ramos, Levinson, Neuman, Trías Monge, and Torruella).

A third point mentioned by several contributors is the salience of race. The reason for the distinction made between Puerto Rico and the other territories acquired after the Spanish-American War (Guam, the Philippines), on the one hand, and the stateside territories (and Alaska and Hawaii), on the other hand, was the widespread acceptance of white racial superiority. A majority of the justices of the Supreme Court of the early 1900s, prominent members of Congress and other politicians, leading journalists, and academics believed in Anglo-American racial superiority and, therefore, in their justified political dominance.

This turn-of-the-century emphasis on racial difference is consistent with the Court's earlier rulings in *Plessy v. Ferguson*, 163 U.S. 537 (1896) and on Chinese exclusion (*e.g.*, *Chae Chan Ping v. U.S.*, 130 U.S. 581 [1889]). As the target of racial politics, Puerto Rico shares its experience with the U.S. government's treatment of American Indians, African Americans, the Mexicans living in the 1848 Mexican cession, Asian immigrants to the United States in the late nineteenth and early twentieth centuries, and, arguably, Washington, D.C. and its majority population of African Americans, among others. Each of these groups had or has received but "partial membership" in the United States (*see* Burnett and Marshall, Weiner, Thomas, Perea, Tushnet, and Smith).

Puerto Rico is thus hardly alone in its liminal position, "belonging to, but not part of the United States." Although Puerto Rico has an old and distinct culture (it is a "nation" with respect to language and cultural identity)

and is a commonwealth (unlike the other territories, with the exception of the Northern Marianas), other territories have rich histories and cultures (e.g., Guam, American Samoa) and several of the states are nominally commonwealths (e.g., Massachusetts, Kentucky, Pennsylvania, and Virginia). The challenges that Puerto Rico poses to the Constitution, Congress, and democratic theory are also, then, those posed by the other U.S. territories. But Puerto Rico's proximity and population (with 3.8 of the 4 million inhabitants of the U.S. territories and with another two million Puerto Ricans residing stateside) make it the logical focal point for the fundamental questions of constitutional government, identity, and federalism raised by the existence of the U.S. territories (see Burnett and Marshall, Weiner, Rivera Ramos, Perea, Neuman, Tushnet, and Smith).

A fourth point that runs through the chapters – and there are other points that might be underscored, to be sure – is the sense of injustice, frustration, and even moral outrage expressed by many contributors over how the Supreme Court, Congress, the White House, the Department of Interior, and academics have treated Puerto Rico and the unresolved constitutional and political issues of its dependent status. It is hard to argue that the political and legal treatment of Puerto Rico and the other U.S. territories are consistent with the principles of self-determination and limited government contained in the Declaration of Independence, the U.S. Constitution, and the Bill of Rights. Not only did American political and intellectual elites create Puerto Rico's unequal and subordinate position, but these inequalities and injustices have been allowed to persist (see Cabranes, Weiner, Thomas, Levinson, Perea, Trías Monge, Aponte Toro, and Smith).

Although some of the scholarship in *Foreign in a Domestic Sense* is foreshadowed by earlier work by José Cabranes, Juan Torruella, José Trías Monge, Arnold Leibowitz, Raymond Carr, and Gordon Lewis, among others, the editors and the publisher perform a great service by collecting in one place such a rich collection of essays from not only from specialists on Puerto Rico and the U.S. territories (e.g., Cabranes, Statham, Trías Monge, Torruella, Aponte Toro, Rivera Ramos, and Ricardo Oquendo), but also those of other scholars (e.g., Neuman, Levinson, Tushnet, Smith) and former political officials (i.e., Marshall, Thornburgh) who are known for work other than that on Puerto Rico, the *Insular Cases*, or territorial issues. More, several chapters (such as Juan Perea's overview of the racism intrinsic to U.S. territorial expansion and Gerald Neuman's exploration of the limits to the U.S. Constitution as it applies to territorial inhabi-

tants), address topics that could themselves be expanded into book-length projects.

In sum, *Foreign in a Domestic Sense* is a valuable, extremely useful volume that should inform many about the constitutional and political issues of Puerto Rico's position as a U.S. territory. Not only do the *Insular Cases*, the status of Puerto Rico, and U.S. territorial history deserve a wider audience in law schools, as Sanford Levinson writes, but they should also to be included as staples of introductory courses in U.S. government and American studies. Unfortunately, Puerto Rico and the other territories have been nearly invisible to U.S. citizens of the states, a situation that this volume could well help to ameliorate.

Foreign in a Domestic Sense does leave some key issues underexplored (which may be unavoidable, given that it is an edited volume, the product of an academic conference). Reading *Foreign in a Domestic Sense* as a person trained in political science, I found several topics touched on or implied by the contributors that merit further examination.

One is the current cost of colonialism. How does Puerto Rico's status as a colony affect, say, its quality of life (e.g., the U.S. Navy's continued use of Vieques as a military training site), its economic well-being (e.g., Puerto Rico, under the U.S. dollar, being more expensive to non-American tourists and investors, than if it had its own currency), or its environmental quality (e.g., the regulations and conditions under which corporations operate on the island)? *Foreign in a Domestic Sense* contains little on the actual political or economic ingredients of contemporary colonialism in Puerto Rico.

A second area for further research is the politics of Puerto Rico's political future, whether one of statehood, an "enhanced commonwealth" (an "asymmetrical federalism" closer to Quebec's relationship with the rest of Canada), or national independence. Ángel Ricardo Oquendo and Richard Thornburgh both address the political divisions in Puerto Rico over its political future, and Ricardo Oquendo points out that if Puerto Rico were a state, it would have more representatives than half the existing states and would receive more aid per person than any other state under current formulas. And several contributors note that it is up to Congress to take the lead in the determination of Puerto Rico's future (see Burnett and Marshall, Aponte, Álvarez González, Ricardo Oquendo, Thornburgh, and Smith). Yet the reader learns little about what Puerto Rican politicians and leading interests have to gain or lose through statehood, common-

wealth status, or independence – apart from the \$10 billion in annual U.S. government aid. More important, research also must address the congressional politics of the admission of Puerto Rico as a state, a continuation of the status quo, or a retrocession of sovereignty to Puerto Rico, especially since what happens in Washington will no doubt be dispositive.

A third issue suggested by the discussions of Puerto Rico's future is the importance of the decision rules used to determine Puerto Rico's standing. Who sets the timing, frames the choices, and drafts the phrasing of plebiscites on Puerto Ricans' future (even assuming that Congress would agree to a binding plebiscite)? It matters a great deal whether the choice is put as a trichotomous choice (statehood, commonwealth, or independence), or as a series of dichotomous votes (between the status quo or change, and then, if a majority opts for change, between statehood or an enhanced commonwealth). For as election studies reveal, the dynamics of a three-way race

with three viable candidates or options are quite distinct from those a series of two-person or two-option competitions. The plebiscite in the Northern Marianas held in 1975 that successfully led to its affiliation with the United States as the Commonwealth of the Northern Mariana Islands (CNMI) took the form of twofold choice, for instance: a choice either for or against the Covenant for the establishment of the CNMI.

That *Foreign in a Domestic Sense* provokes such further inquiry is a measure of the symposium's success. Christina Duffy Burnett, Burke Marshall, and Duke University Press have provided an important and helpful service to students of the Constitution, American political development, and the political system of the present-day United States. That some of the contributors disagree with one another, and that these essays could well spur further work along several different avenues of study are signs of the complexity of the topic and of the vitality and value of this fine book's endeavor.

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