

**UNDERSTANDING UNITED STATES-PUERTO RICO
CONSTITUTIONAL AND STATUTORY RELATIONS THROUGH
MULTIDIMENSIONAL ANALYSIS**

ARTICLE

DAVID M. HELFELD*

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* Former Dean and Professor Emeritus, University of Puerto Rico School of Law. I wish to acknowledge the assistance of Alberto J. E. Añeses Negrón, my student research Assistant. His research assistance in the preparation of this article is especially appreciated because it was provided during the period in which I was recovering from serious surgery.

INTRODUCTION

In 1985 I presented a paper in the Proceedings Of The First Circuit Judicial Conference entitled *How Much Of The United States Constitution And Statutes Are Applicable To The Commonwealth Of Puerto Rico?*¹ At the outset of the paper the confused state of the dialogue in this field is described:

Here in Puerto Rico we tend to discuss United States-Puerto Rico Constitutional relations as if such terms as “Territory”, “Unincorporated Territory”, “State”, the “Presidency”, “Congressional Powers, and “Fundamental Rights” have immutably fixed meanings. So it is that one jurist will assert that Puerto Rico was unincorporated in 1901 and still remains an unincorporated territory to today, while a second will claim that since 1952 Puerto Rico has the constitutional status of a Commonwealth in free association with the United States, and a third will insist that colony is the only appropriate term to apply to Puerto Rico during the entire period of its relations with the United States. Disagreements of this kind can be traced to the unresolved debate over political status and the tendency for each status position- Commonwealth, Statehood and Independence- to select and to accept only those realities which favor their political ideals. The result is selective, unidimensional and insulated thinking in which the proponents talk past each other rather than to each other.

In 2013, almost thirty years later, the confused state of the dialogue remains unaltered, although there have been some changes in terminology, and how and by whom employed. Take the term *colony*, for example. It was formerly applied to Commonwealth (hereafter referred to by its acronym in Spanish, ELA, for Estado Libre Asociado) only by leaders favoring independence for Puerto Rico. Gradually, Statehood leaders began to use the term and now regularly denigrate ELA as a colony. In more recent years even some leaders of ELA have come to criticize it as a colony.² The most probable explanation, in the latter case, for why this change in terminology is occurring, is the frustration of many ELA supporters over the many failed efforts to secure enhanced powers for ELA in the terms of its *compact* with the United States.³ Common expressions that are regularly presented as desirable changes are *ELA with sovereignty* and *ELA no longer subordinate to the Territorial Clause of the Constitution*, but are not articulated

¹ David M. Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico*, 110 F.R.D. 449, 452-75 (1985).

² A notable example is former Chief Justice Trías Monge, one of the founding fathers of the Commonwealth and its Constitution. See JOSÉ TRIÁS MONGE, *LAS PENAS DE LA COLONIA MÁS ANTIGUA DEL MUNDO* (2000); JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIAL OF THE OLDEST COLONY IN THE WORLD* (1997).

³ The many efforts at securing changes in the terms of the present relations are detailed in Judge Casella's opinion in *U.S. v. Acosta Martínez*, 106 F. Supp. 2d 311 (D.P.R. 2000). See *Acosta Martínez* footnote 44 which collects nine unsuccessful efforts during the period 1959-1993 to enhance the powers Puerto Rico has under the status of ELA. *Id.* at 324 n. 44.

precisely on how such changes would work out in practice or, indeed, their constitutional or political feasibility from the perspective of the federal government.

The most recent examples contributing to confusion in the public dialogue on political status are the conflicting expressions dealing with the status referendum held November 6, 2012, and the significance of the results, by leaders across the political party spectrum.⁴ The following are the voting results of the referendum: 53.97% rejected the “present form of territorial status”; 46.03% favored its retention; Statehood received 834,191, or 61.16% of the votes cast; Sovereign Free Associated State received 454,768, or 33.34% of the votes cast; Independence received 74,895, or 5.49% of the votes cast and there were 580,918 blank votes, or 26.02 percent of the total votes cast.⁵ Each interested political status position adopted an interpretation of the referendum results favorable to its position and contrary to that of its rivals.

Governor Fortuño and Resident Commissioner Pierluisi claimed that a majority clearly favored Statehood and that they would present the results to Congress and the President and ask for action to implement the results.⁶ To the contrary, Governor Elect García Padilla stated that the referendum was *unfair*, that it didn’t provide clear results and wrote a letter to the President asking him to reject them because of their ambiguity.⁷ For weeks there was spirited debate among commentators and numerous opinion leaders and no consensus was reached.⁸ With the passage of time public interest dimmed and other issues claimed the interest of the public. In my opinion it is highly unlikely that the results of this particular referendum will have any concrete impact in changing

4 See Ley para disponer la celebración de una consulta sobre el estatus político de Puerto Rico, Ley Núm. 283 de 28 de diciembre de 2011, 16 LPRÁ §972-972(r) (2009 & Supl. 2012). The law uses the term *plebiscite*: more precisely it is a non-binding referendum on Congress, entirely sponsored by the Legislature of Puerto Rico, with the support of the Independence Party and rejected by the Popular Democratic Party. The referendum provides for two votes, first, do the voters “agree with maintaining the current political territorial status of Puerto Rico.” *Id.* Statement of Motives (supplied translation). The second choice was: “[r]egardless of your answer to the first question, answer which of the following non-territorial options do you prefer. . . Statehood. . . Independence. . . Sovereign Commonwealth.” *Id.* § 972(b) (supplied translation). In effect, this means that those who vote yes are required to state their second choice, while those who vote no will only be stating their preference for a single favored choice.

5 Comisión Estatal de Elecciones, *Opciones no territoriales - resultados isla*, http://div1.ceepur.org/REYDI_Escrutinio/index.html#es/default/OPCIONES_NO_TERRITORIALES_ISLA.xml (last updated Dec. 29, 2012, 4:59PM).

6 See Ben Fox & Danica Coto, *Puerto Rico Vote Endorses Statehood with Asterisk*, YAHOO! NEWS, (Nov. 7, 2012), <http://news.yahoo.com/puerto-rico-vote-endorses-statehood-asterisk-205404726.html>.

7 See Letter from Alejandro García Padilla, Governor of P.R., to Barack Obama, U.S. Pres. (Nov. 9, 2012), available at <http://es.scribd.com/doc/113173819/Carta-Garcia-Padilla-a-Obama-Plebiscito>.

8 See, e.g., Sara Del Valle Hernández, *Intenso debate sobre triunfo de la estadidad*, EL NUEVO DÍA, Nov. 8, 2012, <http://www.elnuevodia.com/intensodebatesobretrunfodelaestadidad-1380677.html>.

the status of Puerto Rico.⁹ In contrast, the referendum and its results have contributed an additional component of confusion to the debate over political status.

I. MULTIDIMENSIONAL ANALYSIS

In my presentation to the First Circuit 1985 Conference, having demonstrated the state of confusion based on one-dimensional analysis, I advocated adoption of multidimensional analysis as the method that would achieve the maximum possible understanding of the constitutional and statutory relations between the ELA of Puerto Rico and the United States. I posed and responded to the following five critically key questions to test the efficacy of multidimensional analysis:

1. Where does Puerto Rico fit within the constitutional system of the United States?
2. What are the powers of Congress and how have they been exercised over Puerto Rico.
3. Is there a compact between Puerto Rico and the United States, and assuming there is, what is its content and constitutional significance?
4. How has federalism functioned in the case of Puerto Rico?
5. What conclusions can be distilled from the constitutional relations between Puerto Rico and the United States?¹⁰

In the final parts of this article the answers to the five questions will be asked again and updated to include new developments. Also it will include a question not directly addressed in the 1985 paper, but of the utmost significance for Puerto Rico and its people: under its present constitutional arrangements, evaluated multidimensionally, does the ELA of Puerto Rico have sufficient legal powers to resolve its manifold social and economic problems?

Prior to a series of tests of the effectiveness of multidimensional analysis, it is essential to clarify its principal elements. First, though multidimensional analysis starts with the relevant textual material, it does not assume static meaning. For example, what the Justices of the Supreme Court determine the meaning to be of a constitutional provision is what it means, but not necessarily for all time. We know from historical experience how doctrinal principles can be modified, even totally reversed, and, as well, even lose all significant influence. Second, Congress and the President also exercise constitutional powers and how they do it has changed over time in ways that have impacted Puerto Rico. The process is dynamic and the significance of the relations requires periodic assessment.

⁹ See, e.g., *El Congreso no hará caso a los resultados del plebiscito*, EL NUEVO DÍA, Nov. 9, 2012, 2:11AM, <http://www.elnuevodia.com/elcongresonoharacasalosresultadosdelplebiscito-1381852.html>. This was the opinion of many political commentators.

¹⁰ David M. Helfeld, *How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 449, 453 (1985).

Third, it is essential to identify principles of political morality and institutional principles, neither of which may be explicitly written into the text, but which can be relied on as dependable as a rock solid judicial precedent. Fourth, the interaction between law and the impact of political parties must be taken into account if fuller depth of understanding is to be achieved. Fifth, nor should analysis be limited to the institutional. The role of gifted and creative individuals, on both sides of the relationship, and what they have contributed, requires recognition and analysis. Sixth, the reference to both sides of the relationship needs to be stressed because it is usually assumed that only the exercise of federal initiatives have resulted in change. What ELA of Puerto Rico has created in the exercise of the powers it does have should be recognized as an essential part of the relations between the parties.

These six elements in multidimensional analysis are its essential elements, but are not necessarily all operative in consideration of a particular question. Nor is the process limited to recourse to the six elements. It is open to any additional principle, which is relevant and promotes understanding. What follows are four studies which serve to demonstrate once again why multidimensional analysis should be adopted and which are then followed by bringing up to date the responses to the questions posed in the 1985 paper. The first three studies encompass developments in legal relations between the United States and Puerto Rico until 1952 and the fourth study encompasses developments in the shaping of ELA since 1952.

II. THREE STUDIES TESTING MULTIDIMENSIONAL ANALYSIS

The case studies chosen are the 1898 Treaty of Paris,¹¹ the doctrine of unincorporated territory as enunciated in Justice White's opinion in *Downes v. Bidwell*¹² and the Territorial Clause of the Constitution.¹³ At the outset, it is essential to place the three legal subjects within the context of their particular time: the end of the nineteenth and the beginning of the twentieth century. It was a period of imperialist hubris in which European nations rivaled each other in expanding their overseas empires.

By the end of the nineteenth century American political leaders, particularly those heading the Republican Party, favored the development of an American colonial empire. Theodore Roosevelt was the prototype of such advocacy. He not only advocated, he glorified in his participation in the Spanish American War in which he led a military force he had organized. The defeat of Spain resulted in

¹¹ Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, 30 Stat. 1754.

¹² *Downes v. Bidwell*, 182 U.S. 244 (1901).

¹³ U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

the United States acquiring the Spanish colonies of Puerto Rico and the Philippines.

A. The Period: 1898-1952

The acquisition by war was formalized in the terms of the 1898 Treaty of Paris. From the present perspective what is notable about that time was that powerful European countries considered it to be entirely legitimate to acquire territories and whole peoples by force of war and to exploit the colonized peoples for the economic benefit of the dominant nation. To be sure, imperialism was always cloaked as bringing the benefits of western civilization to backward peoples. In the case of the United States, Major-General Nelson A. Miles, Commander of the occupation forces, informed the inhabitants of Puerto Rico: "This is not a war of devastation, but one to give to all within the control of the military and naval forces the advantage and blessings of enlightened civilization."¹⁴

There is one distinctive provision in the Treaty which sets it apart: Article III provides that the "United States will pay to Spain the sum of twenty million dollars." It was not the usual practice for the victors to pay for conquered territory. The United States followed the same practice when by treaty in 1917 it purchased from Denmark the Virgin Islands for the sum of twenty-five million dollars. Interestingly enough the treaty was approved by a referendum of Denmark's citizens. As colonized people, the natives of the Virgin Islands had no say in the matter.¹⁵ This was equally true in the case of the people of Puerto Rico in 1898, as is made clear in the Treaty in the last paragraph of Article IX: The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress. Taking these words literally, there were to be no limits on Congressional power to govern Puerto Rico and there is nothing in the historical record to indicate that the American ambassadors who drafted the treaty meant the scope of Congressional power to be understood other than literally.

That, certainly, is how Congress understood the scope of its power to govern Puerto Rico, as is evident in the first Organic Act, the Foraker Act of 1901, which followed about a year and a half of military government.¹⁶ Predominant governing powers over Puerto Rico were exercised by the President and his appointed officials, including the Governor; the Justices of the Supreme Court were appointed by the President and lower court judges by the Governor. And in the Legislature, only the lower House consisted of popularly elected representatives.

¹⁴ PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 50 (Marcos Ramírez Lavandero ed., 3rd ed. 1988).

¹⁵ Danish National Archives, *A Brief History of the Danish West Indies, 1666-1917*, http://www.virgin-islands-history.dk/eng/vi_hist.asp (last visited Mar. 26, 2013).

¹⁶ Act of Mar. 2, 1901, ch. 812, 31 Stat. 953. A preliminary version was approved earlier, on May of 1900. See Act of Apr. 12, 1900, ch. 191, 31 Stat. 77.

Clearly, at this point in time Congress was not ready to delegate more than a bare minimum of its territorial power to Puerto Rico. That is apparent if a comparison is made with the powers granted to all prior territorial governments, which almost always included a Bill of Rights and granted American citizenship to the inhabitants.¹⁷

Passage of the Foraker Act in effect confirmed Congress' full agreement with Article IX of the Treaty of Paris on the scope of its discretionary powers to govern Puerto Rico. The Supreme Court on its part went further to enhance Congressional powers by in effect creating a second Territorial Clause, less limited by constitutionally guaranteed rights than is the original Territorial Clause which can only be implemented consistent with Constitutional limitations on Congress' legislative powers. A closely divided and fragmented Court created the doctrine of *Unincorporated Territory* in *Downes v. Bidwell*,¹⁸ which, twenty-one years later, was adopted unanimously by the Court in *Balzac v. Porto Rico*.¹⁹ In *Downes* the Court held that the Foraker Act could impose discriminatory duties on Puerto Rico's products entering the United States market by ship, while allowing the same type of products shipped by boat from one state port to another state port to enter duty free, and to do so without violating the Constitution's requirement that federal taxes be "uniform throughout the United States."²⁰

Henceforth, in effect there were to be two Territorial Clauses. In the second, not explicitly written into the text as the Unincorporated Territorial Clause, Congress could constitutionally ignore the Uniformity Clause because Puerto Rico was not an integral part of the United States and therefore the requirement of uniformity in federal taxes was not a Constitutional provision *applicable* when Congress legislated for Puerto Rico. In his explanation, Justice White rivaled Cantinflas:

[W]hile in an international sense Puerto Rico was not a foreign country, since it was subject to the sovereignty of the United States, it was foreign to the United

¹⁷ See CHARLES R. VENATOR SANTIAGO, *CONSTITUTIONAL INTERPRETATION AND NATION BUILDING: THE TERRITORIAL CLAUSE AND THE FORAKER ACT, 1787-1900*, 42-48 (University of Massachusetts at Amherst ed., 2002).

¹⁸ *Downes v. Bidwell*, 182 U.S. 244 (1901). Justice White didn't actually create the doctrine. More accurately, he copied from the published law review articles of a number of prominent jurists without acknowledging his intellectual debt. See *FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* (Christina Duffy Barnett & Burke Marshall eds. 2001); see also James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899).

¹⁹ *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

²⁰ U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have the Power To collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."). It should also be noted that the Constitution is especially protective of interstate maritime shipping. U.S. CONST. art. I, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State be obliged to enter, clear, or pay Duties in another.").

States in a domestic sense because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.²¹

There was an ironic outcome to this newly minted doctrine: if Congress could constitutionally discriminate in imposing taxes on Puerto Rico, it could decide equally without violating the Constitution to discriminate preferentially in favor of the Island and its people, or opt for a policy of equal treatment. In short, Congress had unfettered discretion. In less than a year, the Foraker discriminatory tax was repealed and Congress has long since settled on a policy of exempting Puerto Rico from the internal revenue laws, with the exception of employees of the federal government.²²

What stayed uncertain for decades was a clear distinction between the applicable provisions of the Constitution, which Congress was bound to respect when it legislated for Puerto, and which were inapplicable. From the limited voice of only Justice Brown in *Downes*, who insisted that certain fundamental rights limited Congress' powers over Puerto Rico, by 1922 in the case of *Balzac v. Puerto Rico*, movement was discernible toward declaring applicable at least certain personal constitutional rights.²³ The precise clarification of which fundamental personal rights in the Constitution limit the scope of the powers of the government of Puerto Rico are fully considered later in this paper.²⁴

Unchanged was the undisputed continuance of the underlying principle of Article IX of the Treaty of Paris that Congress had complete discretionary power when legislating for Puerto Rico, discretionary power which was exercised unilaterally. It was the Congress which unilaterally decided, with the Constitutional approval of the Supreme Court in *Balzac*, that the Sixth Amendment's right to trial by jury was inapplicable and that the Bill of Rights in the Jones Act of 1917 need not include the Sixth Amendment's right to trial by jury, but left unchanged the continued inapplicability of federal tax uniformity and the delegation to the Island of elements of federal Admiralty jurisdiction.²⁵ Nor did the people of Puerto Rico have any say in the grant of United States citizenship or the insular-national balance of governmental powers adopted in the Jones Act. There were now to be a popularly elected legislature consisting of a House of Representatives and a Senate, but overriding control remained in the hands of

²¹ *Downes*, 182 U.S. at 341-42.

²² See 26 U.S.C. § 933 (2006).

²³ In *Balzac* the Sixth Amendment's right to trial by jury in criminal trials was held inapplicable to cases tried in Puerto Rico's courts; in contrast, freedom of speech, guaranteed by the First Amendment was found to be applicable as a limitation on the scope of Congressional powers.

²⁴ See *infra* Part IV(A).

²⁵ Admiralty is exclusively federal jurisdiction, but can be delegated to Puerto Rico to the extent deemed appropriate by Congress when it chooses to treat Puerto Rico as unincorporated territory. See *Fonseca v. Prann*, 282 F.2d 153 (1st Cir. 1960), *cert. denied sub nom. Flores v. Prann*, 365 U.S. 860 (1961). In the case of jury trial, if Puerto Rico had been treated as incorporated, that right would have been applicable. In contrast, it was declared applicable in the case of *Rasmussen v. United States*, 197 U.S. 506 (1905), because Alaska was held to be incorporated territory to which the Bill of Rights was completely applicable.

the President and his appointees who exclusively made up the executive and judicial branches.

The insistence on reserving control is manifest in the power retained by the Congress in Section 34, going even beyond the Governor's and the President's veto power over legislation: All laws enacted by the Legislature of Puerto Rico shall be reported to the Congress of the United States . . . which hereby reserves the power and authority to annul the same.

Simply reading this text one has the impression that laws approved by the Legislature of Puerto Rico would be subject to regular oversight by Congress. What significance should be attributed to the fact that Congress has never annulled any Puerto Rican law, either before ELA, or thereafter to the present? That has been the case even with respect to Puerto Rican laws which Congress would not enact as national laws. In light of Congress' consistent adherence to the principle of nonintervention in Puerto Rico's legislation, was it not a principle which the Island's lawmakers could count on increasingly over the passage of years up to 1952, and even more so after the creation of ELA? Since then has not the principle of Congressional nonintervention become almost a reliable certainty, even though there is no explicit written text to that effect?²⁶ I would submit that both questions should be answered in the affirmative.

However, Congress' consistent record of nonintervention in Puerto Rico's legislation is not the full picture. In 1952, in the process of approving the Constitution of Puerto Rico, Congress demonstrated attitudes of paternalism and outright lack of respect for the judgments of Puerto Rico's Constitutional Convention, imposing Congressional amendments, including a permanent limitation on the scope of the power to approve amendments. This it did although Puerto Rico submitted its proposed Constitution in complete conformity with the prerequisite conditions of Law 600: it contained a Bill of Rights, a Republican form of government and was fully compatible with the Constitution of the United States.²⁷

For the purposes of multidimensional analysis, what is of fundamental significance are two questions: whether the dominant paternalistic attitudes demonstrated by Congress in 1952 have continued to prevail and since that date how in fact has Congress dealt with Puerto Rico, in contrast with the Presidency, the Supreme Court and the First Circuit Court of Appeals.²⁸

In order to fully appreciate Congress' post 1952 legislative policy toward Puerto Rico, it is essential consider how Congress legislated up to the creation of

²⁶ The argument can be made, persuasively in my opinion, that in implementing the terms of Public Law 600, "in the nature of a compact," Congress implicitly accepted that there would be no oversight of Puerto Rican laws. Act of July 3, 1950, ch. 446, 64 Stat. 319. What makes the argument persuasive is that in over sixty years since the inception of ELA, there is no recorded instance of Congressional intervention; indeed, there is not even a recorded effort by a single member of Congress to initiate any intervention.

²⁷ For comprehensive treatment of the Congressional history of Public Law 600, see *infra* Part III.

²⁸ Both questions are addressed fully. See *infra* Part III.

ELA. Exercising its powers based on the trilogy of the Treaty of Paris, the doctrine of Unincorporated Territory and the Territorial Clause, what does the legislative record demonstrate prior to 1952? Without question the dominant trend was to incorporate the Island into the national legal system: almost all federal laws and administrative governance covered Puerto Rico, at times as if it were a state of the union, but more often with intra territorial effect.²⁹ That is not to say that in every piece of legislation Congress spelled out the constitutional principles for its actions. It was simply understood that Congress had almost complete discretion with the possible limitation that the Supreme Court might find that it acted in conflict with a constitutional provision found to be applicable to Puerto Rico and its people.

Though for the most part Puerto Rico was treated as if it were a territory under the Territorial Clause, whenever Congress judged it appropriate, it would receive differential treatment. This was in some instances to Puerto Rico's advantage, as in the case of exemption from the federal income tax, and sometimes to its economic detriment as in the law which severely restricted the amount of fully refined sugar that could be shipped to the continental market place.³⁰ In sum, Congress' legislative governance toward Puerto Rico can be summed up as one of pragmatism, or more precisely from the pragmatic perspective of Congress.

Congressional pragmatism meant that while it was sound policy to incorporate Puerto Rico into the national legal system, it was equally essential to assure that the comity provisions of Article IV of the Constitution were fully implemented. That was to assure good relations between the Island and the States of the Union. Hence by specific statutes Congress applied to Puerto Rico the full faith and credit³¹ and extradition clauses³² and later on the privileges and immunities clause,³³ which was thereafter specifically included as an Article in the 1952

²⁹ This was usually spelled out in the section of the statute dealing with definitions. If the term *territory* was treated separately, the coverage intended was intra-territorial, if *state* was defined as including territories, coverage of the two would be identical. The first legislative approach was most common prior to 1952, while the second was almost universally adopted thereafter.

³⁰ The Supreme Court found the quotas on refined sugar to be constitutional in the case of *Secretary of Agriculture v. Central Roig*, 338 U.S. 604 (1950).

³¹ 28 U.S.C.A. § 1738 (West 2013). The Constitutional Clause reads: "[f]ull Faith and Credit will be given in each State to the public Acts, Records and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

³² 18 U.S.C.A. § 3182 (West 2013). The Constitution provides:

A Person charged in any State with Treason, Felony or other Crime, who shall flee from Justice, and be found in another State, shall on the Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. CONST. art. IV, § 2, cl. 2.

³³ *Id.* at cl. 1 ("The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens of the several States.").

Puerto Rico Federal Relations Act.³⁴ It should also be noted that one of the conditions for establishing ELA was the requirement that the Puerto Rico Constitution establish a Republican form of government, which is guaranteed to the states in Article IV, Section 4. There is a certain irony that Congress used the Territorial Clause to incorporate Puerto Rico as the equivalent of a state under the terms of Article IV.

A fundamentally and complementary significant strand of Congressional pragmatism was the judgment that gradual power to govern its own affairs should be transferred from federal authority to democratically elected Puerto Rican governmental officials. Thirty years after the Jones Act, which had authorized a popularly elected Puerto Rican legislature, Congress passed the Elective Governor Act of 1947.³⁵ This shift in power from Washington to Puerto Rico was by far the most consequential transfer of power until that date and, in terms of governmental power, continues to be most consequential to the present.³⁶

Noteworthy is the fact that even at that late date Congress was not prepared to move completely to a complete transfer of federal power over the Island's local governance. The felt need for continued oversight was evident in the paternalistic retention of a number of Presidential appointment powers,³⁷ as was retention of the power of the First Circuit Court of Appeals to review the decisions of the Supreme Court of Puerto Rico.³⁸ The felt need was diminishing, however, because of what was happening in the larger world: the end of World War II, the establishment of the United Nations and the leadership of the United States in its establishment and in its anti colonial principles.

Account also must be taken of the struggle on the part of Puerto Rico and its leaders to gain control over their own government. Puerto Rico was far from passive during the pre-1952 period in asserting its claim to govern matters which were considered vital interests. A good example is the struggle over the language to be used in the system of public education and the limits of federal power to impose a solution adopted in Washington. Puerto Rico's Legislature passed a law making Spanish the language of instruction in public schools. Governor Tugwell vetoed this law, but was promptly overridden by the Legislature. The Governor

³⁴ Puerto Rican Federal Relations Act, ch. 446, 64 Stat. 319 (1950):

The rights, privileges and immunities of citizens of the United States shall be respected in Puerto Rico to the same extent as though Puerto Rico were a State of the Union and subject to the provisions of paragraph 1 of section 2 of Article IV of the Constitution of the United States.

Id.

³⁵ 48 U.S.C.A. §§ 771-793 (repealed 1950) (West 2013).

³⁶ That is my conclusion based on the significance of the few concrete federal powers which remained to be transferred to Puerto Rico in the establishment of ELA: the Governor would henceforth appoint judges to the Supreme Court of Puerto Rico, as he would to the position of Comptroller. Between 1947 and 1952, these positions – Supreme Court judges and the Comptroller – continued to be appointed by the President. *Id.* §§ 786, 861 (repealed 1950).

³⁷ See generally *id.* §§ 771-861 (repealed 1950).

³⁸ Act of February 13, 1925, ch. 229, 43 Stat. 936 (repealed 1948).

then notified the President with his recommendation that he also veto the law. This the President did and, under the terms of the Jones Act, his veto was final. In 1948, the case reached the Supreme Court of Puerto Rico, which confirmed the revocation of the language law by Presidential veto.³⁹ On this vital interest the federal power prevailed momentarily but soon lost all influence.⁴⁰

B. The Legislative History of Public Law 600

It is important to understand the legislative history of Public Law 600 from the perspective of what transpired in Congress for at least two reasons. To begin, there is the question of why that history has been largely forgotten and has played almost no role in the post-1952 development of ELA.

The second reason is that the legislative record is rich in data related to Congressional intention and attitudes from which we can appreciate what the legislators thought they were accomplishing. This will be spelled out in essential detail to provide a summary of Congressional intent and the range of underlying attitudes.⁴¹ Thereafter, in succeeding segments, how ELA has actually developed will be analyzed to demonstrate that its Congressional legislative history has been a largely irrelevant factor. Why has that been the historical reality, why has the legislative record been ignored and largely forgotten, are questions which need to be addressed, if we are to fully understand why ELA has developed as it has.

First to be considered is a bare summary of how ELA became law. In 1951 the 81st Congress enacted Public Law 600, "in the nature of a compact,"⁴² authorizing the people of Puerto Rico to make a series of fateful decisions. The first was a popular referendum to determine if a majority favored the proposed allocation of power between the Island and Washington: Congress to remain supreme over national affairs, while the Government of Puerto Rico would exercise full control over matters of local concern. If there was a majority in favor of Public Law 600, the Legislature was empowered to provide for a convention to draft a Constitution to be the charter of government over all matters within the jurisdiction of the newly created insular government. Congress only specified two limitations on the convention's draftsmen: the constitution shall provide a republican form of government and shall include a bill of rights. These two conditions were fully satisfied by the convention which duly transmitted the document to the President for review, as required by Public Law 600. President Truman approved the

³⁹ Parrilla v. Martín Comisionado, 68 DPR 90 (1948).

⁴⁰ Once Puerto Rico elected its own Governor, it could then decide as it saw fit all educational policies affecting its public schools. This was even more the case once the Constitution of ELA went into effect in 1952.

⁴¹ The summary of intent and attitudes which follow are excerpted from the detailed analysis in David Helfeld, *Congressional Intent and Attitude Toward Public Law 600 And The Constitution Of The Commonwealth Of Puerto Rico*, 21 REV. JUR. UPR 255 (1952).

⁴² Puerto Rican Federal Relations Act, Pub. L. No. 112-209, ch. 446, 61 Stat. 319 (1950).

Constitution finding that it “conforms with the applicable provisions of this Act and of the Constitution of the United States.”⁴³

The final step required before the Constitution could become effective was approval by the Congress. In 1952, Congress objected to two provisions in the Bill of Rights of the proposed ELA Constitution. It approved the Constitution conditioned on acceptance by the Constitutional Convention of Puerto Rico of a permanent elimination of Section 20 in the Bill of Rights, dealing with certain social and economic rights, approval by the People of Puerto Rico, and by an amendment consisting of modifications to Section 5, to insure the parental right to educate children in nonpublic schools and, in a second amendment to the amending article of the Constitution prohibiting any future amendment which would have the effect of nullifying the first two imposed conditions. On acceptance of the Congressional conditions, the Constitution of Puerto Rico became effective.

This spare summary statement needs to be supplemented by the answers to two questions. First, what was the source of the idea of a law that was “in the nature of a compact”?⁴⁴ A second question, which moved me to a detailed study of the legislative history, is how to explain the Congressional modifications as conditions of approval of the convention’s proposed Constitution? The first question can be answered fairly quickly; the second requires extensive and detailed analysis.

After the 1947 Elective Governor Act, Governor Muñoz Marín who was also the leader of the P.P.D. (Partido Popular Democrático), the Island’s dominant political party, was convinced that it was time to establish a formal political status in which legal form and actual scope of power would be in realistic accord. As he viewed it, that was not the case in 1950: in legal form, Puerto Rico was a Territory being governed under the unlimited discretionary powers of the Congress, when in reality the people of Puerto Rico were being governed by their own elected government in almost all matters of intra insular concern, much like a State of the Union.

The Governor and Resident Commissioner tested the formula ELA adopted of the distribution of powers in public speeches and writings and decided it was the best option open at that time because of the conviction that the other options, statehood and independence, were economically unfeasible and would remain so for the unpredictable future. The formula finally proposed consisted of the terms of the defined division of powers, approved both by the people of Puerto Rico on one side and the President and Congress on the other, in the nature of a compact, the implication being that it could be changed only by mutual consent, resulting in a popularly approved constitution, with a Bill of Rights compatible with the applicable provisions of the Constitution of the United

⁴³ Public Law 447, 82nd Congress, Chapter 567-Second Session, H.J Res. 430, 66 Stat. 320.

⁴⁴ The genesis is to be found in the writings of Governor Tugwell and was further developed and tested in public speeches by Governor Muñoz Marín and Resident Commissioner Fernós-Isern.

States, hence providing for a Bill of Rights and a Republican form of Government.

In the context of the years following the end of World War II, the Charter of the United Nations and the breakup of colonial empires, what explains the very limited petition that Puerto Rico was presenting to Congress for a change in the existing distribution of powers? And it should be stressed that it was a petition and not a demand that Puerto Rico was making. Especially significant too was the failure to mention the Island's lack of effective participation in the making and implementation of Presidential and Congressional policies, which adversely affect Puerto Rico's economic interests. In the entire legislative record not a word is expressed about the negative impact on the Island's commerce by having to comply with the Cabotage laws,⁴⁵ for example, or the law severely restricting Puerto Rico's quota of fully refined sugar.⁴⁶

The Puerto Rican proponents of Public Law 600 who participated in the legislative hearings all sought to calm the fears and doubts about whether Puerto Rico could be trusted to faithfully keep its side of the compact and, in addition, sought to reassure Congress that it was not permanently surrendering any of its constitutional powers. In their opinion, what was being sought was the most that could be successfully sought at that time. Hence the great caution in the strategy of their advocacy. As the following pages relate, this strategy almost failed completely and, in the end, barely succeeded.

At every stage of the legislative process the spokesmen for Puerto Rico in the hearings – Governor Muñoz Marín, Resident Commissioner Fernós-Isern, Chancellor Jaime Benítez and Judge Cecil Snyder – all sought to reassure Congressmen that, in adopting Law 600 and approving the proposed Constitution, Congress was not permanently surrendering any of its Constitutional and legal powers over the Island. For example, in the House Committee hearings on Law 600, in response to a question on the scope of Congress' power to approve the proposed Constitution, the Governor reassured Committee members: "If Congress feels that there is anything wrong with it, then they do not have to approve it when it gets up here."⁴⁷

In a subsequent hearing, when asked what recourse would Congress have if after approving the Constitution Puerto Rico would enact a completely new document not approved by Congress, the Governor responded: "You know, of

⁴⁵ Jones Act, ch. 145, 39 Stat. 951 (1917). In the fiscal year 2000 the Merchant Marine Act of 1920 cost Puerto Rico \$426,000,000.00 more than if the Jones Act was not applied. See Jeffry Valentin-Mari & José I. Alameda-Lozada, *Economic Impact of the Jones Act in Puerto Rico* (US General Accounting Office, Working Paper April 26, 2012), http://easywebpr.com/josealameda/articulos2012/economic_impact_of_cabotage_laws_at_jones_act_v_4_final_revised.pdf.

⁴⁶ Under the law the major part of the Island's sugar production was required to be shipped to the U.S. market in its raw unrefined state to be refined in stateside refineries. The quota system enacted by the Secretary of Agriculture was upheld as constitutional in *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604 (1950).

⁴⁷ Helfeld, *supra* note 41, at 262 n. 31.

course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given to the people of Puerto Rico as good United States citizens.”⁴⁸

Resident Commissioner Fernós-Isern gave further reassurance: “the roads to the courts would always be open to anybody who found that an amendment to the constitution went beyond the framework laid down by the Congress; and, secondly, the authority of the United States, of the Congress, to legislate in case of need would always be there.”⁴⁹

Supreme Court Judge Snyder summed it up succinctly: “Under it there is no change of sovereignty. The economic and legal relationships between Puerto Rico and the United States remain intact.”⁵⁰

This too was the position assumed by the Secretary of the Interior⁵¹ and by all Executive Branch officials at every stage in the legislative process. When asked in Senate Committee hearings if Congress would retain the power to annul acts of the Legislature of Puerto Rico, Mr. Silverman, Chief Legal Counsel for the Office of Territories, responded:

I would say that there would be the power. There is nothing that can remove any bit of power that is in the Congress of the United States.”⁵² And the Committee Chairman, Senator O’Mahoney, took the same position unequivocally: “the Constitution of the United States gives the Congress complete control and nothing in the Puerto Rican Constitution could affect or amend or alter that right.”⁵³

While there was almost unanimity in both the House and Senate that Congress was not permanently divesting itself of any of its powers under the Territorial Clause, there was a range of attitudes on how much of the proposed constitution should be approved. From the record of the hearings and debates, there can be distilled at least four attitudinal categories of Congressmen:⁵⁴

1. There was a minority of Representatives and Senators which can be characterized as the friendly democrats in the sense that they respected the judgment of the Constitutional Convention and its vote of approval by the majority of the Puerto Rican people. If they had had the votes, they would have followed the lead of the President and would have approved the Constitution intact, with no changes.
2. At the other extreme, also a minority, were the Senators and Representatives who were very jealous in guarding Congressional power, and were

⁴⁸ *Id.* at 265.

⁴⁹ *Id.* (quoting Governor Luis Muñoz Marín, Hearings on H.R. 7674 and S. 3336 Before the H. Comm. on Public Lands, 81st Cong. 17-34 (1950)).

⁵⁰ *Id.* at 267 n. 51.

⁵¹ *Id.* at 267 n. 50.

⁵² *Id.* at 282.

⁵³ *Id.* at 281.

⁵⁴ Only a distillation is presented. The manifold individual expressions are fully reported throughout the article previously cited. *See id.*

highly paternalistic in their attitudes toward Puerto Rico. They believed that the scope of their approval power should be exercised freely, amending the Constitution in ways they deemed for the good of Puerto Rico.

3 and 4. Between these extremes were two groups which, taken together, expressed views that had the most influence in garnering the necessary votes to bring Public Law 600 to successful fruition. One group was close to the friendly democrats: its members were well disposed toward Puerto Rico, but with a moderate strain of paternalism. In contrast, the other group was somewhat more suspicious and somewhat more paternalistic in its expressions. Members of both groups did not approve of Section 20 of the Bill of Rights, which they considered to be socialistic and to which for reason of principle they could not give their approval. In the case of Section 20, paternalism was the decisive attitudinal factor in its excision as a condition of approval.

The elimination of Section 20 as a condition of approval had to do entirely with paternalistic and ideological considerations and nothing to do with merit. Chancellor Benítez explained, but to no avail, that Section 20 represented social and economic aspiration that would be implemented in the future depending on Puerto Rico's achieving the necessary economic development.⁵⁵ The lack of all merit was even clearer in the Congressional condition requiring that Section 5 of the Bill of Rights guarantee the right of parents to send their children to private and religious schools. That is because the right of parents to determine the education of their children was and had been for almost thirty years one of the fundamental constitutional rights in the federal constitution and without doubt one of the fundamental federal constitutional rights applicable to Puerto Rico.⁵⁶ There is nothing in the record to explain why the Congress required the modification of Section 5 as a condition of approval. In effect, it was a demonstration of Congress' dominant superior power.

There was one condition of approval, in the Senate, which if it had not been sharply modified in the agreements reached in the Conference Committee, it would have resulted in the failure of the parties to produce a compact consisting of the ELA Constitution and the Puerto Rico Federal Relations Act. The condition, proposed by Senator Johnson in the debate on the floor and approved by the Senate, states "That no amendment to the Constitution of the Commonwealth of Puerto Rico shall be effective until approved by the congress of the United States."⁵⁷

The Constitutional Convention of Puerto Rico could not possibly have accepted this amendment because it was incompatible with a genuine Constitution

⁵⁵ *Id.* at 276. It should be noted that the House Rules Committee made the elimination of Section 20 a condition for the Constitution to come to debate and a vote on the floor of the House. *See also id.* at 271-72.

⁵⁶ *See* *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

⁵⁷ Helfeld, *supra* note 41, at 299.

to have the power of amendment subjected to a final authority other than its own Legislature and people. The Conference Committee wisely recognized this to be the case and drafted a compromise the Convention could accept, the conditions of eliminating Section 20, modifying Section 5, and assuring the permanence of the two conditions by appropriate language in the Constitution's amendment article. At that final stage in the process, interestingly enough, Congress acted tactfully and bilaterally. It could have simply imposed the conditions of approval and treated the entire process as exclusively statutory in nature. Rather, Congress chose to give effect to the fact that Law 600 was also in the nature of a compact and proposed the conditions for acceptance or rejection by the Constitutional Convention and, thereafter, by vote of the people of Puerto Rico. Though this was an element of humiliation for the Convention, it accepted the conditions, recognizing that in no way was it limiting any of the powers needed for effective governance. Thus, ELA and its Constitution took effect on July 25, 1952.

More than sixty years have passed and not once has ELA been charged or criticized by either Congress or the President with failing to abide by the terms of Public Laws 600 and 447 which embody the terms of the *compact*. Possible non-compliance on the part of Puerto Rico was precisely the concern expressed over and over again in the House and the Senate. How Representatives and Senators conducted themselves during this period testifies to the risks of endowing democratically elected legislators with imperial unlimited powers over "a discrete and insular minority"⁵⁸ which has inadequate power to defend itself.

III. SHAPING THE MEANING OF ELA AFTER 1952

We turn now to an analysis of why the legislative history which resulted in ELA and the Constitution of Puerto Rico – the Congressional expressions reflecting intent and attitude – has played no role in shaping the meaning of ELA and its relations with the United States over the past sixty years, and that has been true from almost the very beginning. A good starting point to contrast Congressional thinking in the record of the legislative history of ELA with the meaning of ELA as it has taken shape over the past six decades is this short summary at the ending of my 1952 article:

Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of Constitutional law, the compact between Puerto Rico and Congress may be unilaterally

⁵⁸ The quoted words and the thought are by Justice Stone in *U.S. v. Carolene Products, Co.*, 304 U.S. 144, 152 (1938).

altered by Congress. The compact is not a contract in a commercial sense. It expresses a method it chose to use in place of direct legislation.⁵⁹

My summary accurately summed up Congressional thinking, but lost all effective significance in defining the meaning of ELA due to three developments. First, the Executive Branch opted to adopt the understanding of the government of Puerto Rico with respect to the process which had created ELA and the Constitution of Puerto Rico. Second, the First Circuit Court of Appeals, and thereafter the Supreme Court created doctrine that was not grounded on Congress' legislative history, but was rather fully compatible with the position of the Presidential Branch; and third, subsequent Congresses acted in ways consistent with the actions of the President and the courts. The three developments are discussed seriatim.

A. *Presidential and Executive Actions*

Shortly after the inception of ELA, the United States requested in the United Nations to be relieved of the duty of having to annually transmit information on Puerto Rico on the ground that it was no longer a "Non-self-Governing Territory". This culminated in UN General Assembly Resolution 748 (VIII), which determined that Puerto Rico had achieved a new constitutional status, upon the basis of a mutually agreed association with the United States, 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 and ended with the joint commitment that in the eventuality that either of the parties to the mutually agreed association may desire any change in the terms of this association, "due regard will be paid to the will of both the Puerto Rican and American peoples".⁶⁰

Noteworthy are the extremes to which the United States went in pressing its argument. In making the case for his government, Mr. Mason Sears, the United States representative to the United Nations Committee on Information from Non-Self-Governing Territories, delivered this pronouncement:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact. A compact, as you know, is stronger than a treaty. A treaty can usually be denounced by either party, whereas a compact cannot be denounced by either party, unless it has the permission of the other.⁶¹

⁵⁹ See Helfeld, *supra* note 41, at 307. The analysis then recognizes that constitutional theory is one framework of thought and political reality is another. It is altogether unlikely Congress would exercise its powers fulsomely in the manner described.

⁶⁰ See PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *supra* note 14, at 614-15.

⁶¹ Quoted by Judge Ruiz Nazario in *Mora v. Mejías*, 115 F.Supp. 610 (D.P.R. 1953) (citation omitted). This purely invented legal principle must have startled Committee members who were conversant with International law.

In a memorandum submitted by the United States in support of UN Resolution 748 VIII, no language is quoted that expressed Congressional understanding of the powers being retained. Rather, what was submitted was entirely from the perspective of the Puerto Rican Constitutional Convention. The memorandum ends quoting from a resolution adopted by the Convention:

When the Constitution takes effect, the people of Puerto Rico shall thereupon be organized into a commonwealth established within the terms of the compact entered into by mutual consent which is the basis of our union with the United States.

Thus we attain the goal of complete self-government, the last vestige of colonialism having disappeared in the principle of Compact, and we enter into new developments in democratic civilization.⁶²

In effect, the Executive Branch substituted the Constitutional Convention's understanding of what was being accomplished by the new status and constitution for that of the intent and attitude of the Congress. This understanding was reaffirmed by President Kennedy in 1961 in a Memorandum to all departments, agencies and officials of the executive branch of the Government⁶³ and also in an interchange of letters between the President and Governor Muñoz Marín.⁶⁴ This is clearly the position of President Obama as demonstrated by the President's Task Force Report of 2011.⁶⁵

B. Judicial Status Statecraft On Behalf of ELA: The First Circuit Court of Appeals

Joining the executive branch, quickly after the establishment of ELA and the new constitution, action was taken at the level of the judiciary. This took the form of judicial and non-judicial action. On April 23, 1953, Chief Judge Calvert Magruder of the First Circuit of Appeals delivered an address to the Pittsburgh School of Law entitled "The Commonwealth Status of Puerto Rico."⁶⁶ The timing and content of his words gave every indication the he was acting in concert with the Executive Branch's actions in the United Nations and in a number of his comments he expanded the scope of his support for Commonwealth Status. He did note my analysis of legislative intent and attitude, but then swept it aside with the remark: "But it may perhaps not be conclusive, and would not be the

⁶² *Id.* at 616 n. 48, 624. The quoted language is from Resolution 23 of the Constitutional Convention.

⁶³ See PUERTO RICO FEDERAL AFFAIRS ADMINISTRATION, *supra* note 14 at 568-69.

⁶⁴ *Id.* at 570-73.

⁶⁵ See *Report by the President's Task Force on Puerto Rico's Status* (2011), http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf.

⁶⁶ The address was published some months later. See Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953).

first time in history, that the Congress did not realize at the time the full significance of what it was doing.”⁶⁷

Throughout his speech he joined forces with the thinking advanced in the U.N. by the American Ambassador and adopted as the only interpretation of Puerto Rico’s Constitutional Government the views expressed in the Constitutional Convention, quoting extensively from the record of the Convention. Judge Magruder spoke of “vested rights which Congress cannot constitutionally take away” and implied that “such rights placed the Constitution of Puerto Rico and the provisions of the Puerto Rico Federal Relations Act beyond the unilateral power of Congress to alter.”⁶⁸ In effect, though his title was that of federal judge, he was acting as an advocate, recommending how best to develop federal-Puerto Rican relations in the future. In that vein he recommended that all national laws which had been implemented with intra territorial effect should now be reinterpreted by the courts to have the same jurisdictional scope as within a state of the union and suggested that Congress should repeal the law which empowered the First Circuit of Appeals to review decisions of the Supreme Court of Puerto Rico.⁶⁹

Magruder’s actions as a judge were entirely consistent with his views as a political advocate. In July of 1953, three months after his Pittsburgh speech, he decided the case of *Mora v. Mejías*,⁷⁰ which he used to further advance his ideas for how ELA should be shaped. Not content with upholding the denial of injunction on the basis of established jurisprudence, Judge Magruder, in dictum, suggested that in a future similar case the petition for injunction may have to require a three Judge Federal Court. Why?

If the constitution of the Commonwealth of Puerto Rico is really a ‘constitution’-as the Congress says that it is and not just an Organic Act approved and enacted by the Congress, then the question is whether the Commonwealth of Puerto Rico is to be deemed ‘sovereign over matters not ruled by the Constitution of the United States and thus a “State” within the policy of 28 U.S.C. 2281, which enactment in prescribing a three-judge federal district court, expresses a ‘deference to state legislative action beyond that required for the laws of a territory’ whose local affairs are subject to congressional regulation.⁷¹

This was the beginning of a jurisprudential process to analogize ELA to a State of the Union, for the next two decades at the level of the First Circuit, and case law doctrine that thereafter was adopted by the Supreme Court of the United States. It is truly impressive how Judge Magruder was able to influence the shaping of ELA’s development by convincing his fellow judges, who under his

⁶⁷ *Id.* at 16.

⁶⁸ *Id.* at 14-18.

⁶⁹ *Id.* at 18-19. Both recommendations were subsequently adopted and are discussed in this article.

⁷⁰ *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953).

⁷¹ *Id.* 387-88.

leadership produced the jurisprudential principles that finally persuaded the Supreme Court. In varying degrees, all but one of the judges of the First Circuit adopted Magruder's position that the status of ELA required it to be treated as if it were a State of the Union. Judge Torruella is the only member of the court who dissents and who insists on the continued vitality of the legislative record made on Public Law 600 and the Constitution of Puerto Rico, i.e., that no change on the Island's territorial status had taken place. That continues to be Torruella's position.⁷²

On the other side, as noted, all judges of the First Circuit, in varying degrees, have adopted Magruder's vision of ELA's status. A good example is Justice Breyer's judicial opinions and writings when he was serving in the First Circuit. *Cordova & Simonpietri Insurance Agency, Inc. v. Chase Manhattan Bank*,⁷³ illustrates the process of confirming Judge Magruder's vision of Commonwealth status. Breyer found that the Sherman Act no longer applied to Puerto Rico with intra territorial effect because its status had changed from that of a Territory to that of a Commonwealth. The issue, as he crafted it, was "whether the Sherman Act's framers, if aware of Puerto Rico's current constitutional status, would have intended to treat it as 'state' or 'territory', under the Act."⁷⁴ He had no difficulty in imagining the mind of the Congress in favor of applying the Act to Puerto Rico as if it were a state. Imagining how past Congresses would have dealt with ELA, if it had existed at their time, was a framework used in numerous cases to conclude that they would legislate for it as if it were a state. This type of imaginative reasoning could only be proved wrong if a present-day Congress would deny the court's imagined intent, but that never has happened. Hence, what was functionally a process of amending federal laws to conform to the new status of ELA, has now been effectively implemented.

With respect to reviewing ELA's laws in diversity cases, Judge Breyer stressed that we do not criticize the Commonwealth Supreme Court or *correct* its determinations of Commonwealth law. Rather we try to make the same decision the Commonwealth Court would make in the circumstances. This change from "seeking to correct" to seeking to replicate" is one of great importance."⁷⁵ The purpose of the change was evident: to assure the dignity of ELA's status in its relations within the federal legal system. As stated, the imaginative process used

⁷² For Judge Torruella's critique of the Insular Cases, see JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1988). In his opinion, the Supreme Court, in *Harris v. Rosario*, 446 U.S. 651 (1980), reaffirmed Congress' post-1952 plenary power over Puerto Rico under the Territorial Clause. See *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987) (Torruella, J., concurring). In this judgment, he does not mention Supreme Court opinions which have accepted that Puerto Rico should be treated as if it were a state of the union.

⁷³ *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36 (1st Cir. 1981) (unanimous decision).

⁷⁴ *Id.* at 39.

⁷⁵ See Stephen Breyer, *The Relationship Between the Federal Courts and the Puerto Rico Legal System*, 53 REV. JUR. UPR 307, 309 (1984). In this article, Justice Breyer categorically states that "the Commonwealth is not a 'territory' of the United States." *Id.* at 316.

in *Cordova & Simonpietri* to determine Congressional intent has been followed fairly consistently. Consider, for example, a case decided twenty years later, *Luis Jusino Mercado v. Commonwealth of Puerto Rico*.⁷⁶ Judge Selya authored the opinion, which, joined by Judges Coffin and Lipez, holds that “Puerto Rico, like the fifty states, is immune from federal damage actions brought by individuals under the FLSA.”⁷⁷ Their *ratio decidendi* was expected: “it is inconceivable to us that Congress would have chosen to invoke the Territorial Clause to impose the FLSA on Puerto Rico had it known that it could not impose a similar burden on the Fifty States.”⁷⁸

In a third context, not involving an imaginative determination of Congressional intent, but rather involving judicial creativity, the First Circuit in an opinion by Judge Boudin, decided that a Supreme Court doctrine, the Commerce Clause in its Dormant State, applied to ELA. The Court concluded that Puerto Rico had fully achieved economic integration into the national economy and autonomous powers equivalent to that of a state and therefore should be bound by the same Commerce Clause rules that are applied to the states. The opinion stated: “[w]hatever the ultimate source of its authority or its exact constitutional status, Puerto Rico today certainly has sufficient actual autonomy to justify treating it as a public entity distinct from Congress and subject to the dormant Commerce Clause doctrine.”⁷⁹

In support of its holding, the opinion quoted the Supreme Court in *Examining Board v. Flores de Otero*: “the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union.”⁸⁰ What has been achieved can be described as *statecraft through the judicial process*. The Judges of the First Circuit created the doctrinal principles that treated ELA as having the same autonomy and powers over its internal affairs as if it were a State of the Union and the Supreme Court responded affirmatively by adopting this reasoning. To cite one example: in *Mora v. Mejías*,⁸¹ Chief Judge Magruder suggested that after the creation of ELA challenges to the constitutionality of Puerto Rican laws should not be heard by a single judge of the federal district court, but rather by a three judge panel. Twenty-one years later, Associate Justice Brennan, speaking for the Court in *Calero-Toledo v. Pearson Yacht*, adopted this suggestion, agreeing that Commonwealth status required that it be treated with the same respect and deference as if it were a State of the Union.⁸²

⁷⁶ *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34 (1st Cir. 2000).

⁷⁷ *Id.* at 36.

⁷⁸ *Id.* at 44.

⁷⁹ *Trailer Marine Transport Corp. v. Carmen M. Rivera Vazquez*, 977 F.2d 1, 8 (1st Cir. 1992).

⁸⁰ *Examining Bd. of Engineers v. Flores de Otero*, 426 U.S. 572, 594 (1976).

⁸¹ *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953).

⁸² *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Actually, four years earlier, the Supreme Court signaled in *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970), that it would henceforth treat Puerto Rico's new status as analogous to a state of the union. In reversing the First Circuit, it held that abstention was to be the correct response by lower federal courts when there was a consti-

B. The Supreme Court: Judicial Status Statecraft On Behalf of Puerto Rico

It was in *Calero-Toledo v. Pearson Yacht* that the Supreme Court finally began the process, case-by-case, to determine which of the fundamental rights in the federal Constitution were applicable to Puerto Rico. Within twelve years it became clear that the same fundamental rights that applied to the states, also applied to Puerto Rico and the recognized *state powers* were equally enjoyed by ELA. The entire jurisprudential record can be summed up in a single principle: if a state cannot do it constitutionally, neither can ELA; and vice versa.⁸³ What the Supreme Court has accomplished is, predominantly, *statecraft*. The *statecraft* has an element of ambiguity due to the fact that the Court has never clarified whether it was acting under the authority of the Fourteenth Amendment or the Fifth Amendment of the Bill of Rights.⁸⁴ Functionally, what the Court did was build on Presidential policy, the *jurisprudential statecraft* of the First Circuit and on Congressional legislation after 1952 – which is dealt with following this section – and then added some *statecraft* of its own.

In appraising the significance of *Calero v. Pearson Yacht*, what is usually stressed is that Puerto Rico, in the act of legislating, is bound by the limits of due process, as would be every State, and a challenge to the constitutionality of a Puerto Rican statute before a federal court of first instance requires a three judge panel. What is usually overlooked is the fact that the Court upheld the constitutionality of the Puerto Rican law being challenged and concluded that it was not a violation of due process for Puerto Rico to confiscate a yacht in which the police had found marijuana. The lessees were carrying drugs in violation of the lease agreement and *Pearson Yacht* was innocent in the sense that it had no knowledge of the breach in the agreement. Justice Douglas decided that *Pearson Yacht*, an innocent party, had been victim of confiscation without due process. But his was only a dissenting opinion. The majority opinion, by Justice Brennan, upheld the confiscatory provisions of the Puerto Rican statute and concluded that there had been no violation of due process.

The decision had the effect of enhancing the scope of Puerto Rico's legislative powers to provide for confiscation of vehicles even when their owners were personally innocent of wrongdoing, if the action was considered an effective

tutional challenge to a Puerto Rican statute, which had yet to be interpreted by the Supreme Court of Puerto Rico. In short, the same deference was to be shown to Puerto Rico exactly as it would be in the same circumstances in the case of any state statute.

⁸³ This principle was firmly established in the period 1974-1986 and how it evolved is set out in the six cases in the text that follows.

⁸⁴ In *Calero-Toledo*, 416 U.S. at 668 n. 5 (1974), Justice Brennan stated, but did not clarify the precise source of constitutional authority for holding the right to due process applicable to Puerto Rico: “[u]nconstitutionality of the statutes was alleged under both the Fifth and Fourteenth Amendments. The District Court deemed it unnecessary to determine which Amendment applied to Puerto Rico [. . .] and we agree. . . . [T]here cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States.” (citations omitted).

weapon in dealing with drug trafficking. What probably most influenced the Court's decision was the fact the Puerto Rico's law followed federal and numerous other state laws. Hence, a decision declaring Puerto Rico's policy of confiscation a violation of due process would have resulted in a constitutional *death penalty* for the federal and state law equivalents.

In contrast to *Pearson Yacht*, the scope of Puerto Rico's legislative powers was diminished in *Examining Bd. v. Flores de Otero*⁸⁵ and the fundamental rights of people were enhanced, specifically those of non-citizens legally admitted in the United States. Puerto Rico's limitation for the licensing of Civil Engineers for U.S. citizens exclusively was held contrary to equal protection, without identifying the specific applicable provision of the Constitution. It was not empowered to protect Puerto Rican Civil Engineers in the competition for scarce job opportunities from noncitizen professionals. Further protecting non-citizens from discriminatory treatment, the Court determined that Puerto Rico should be treated as a State for purposes under section 1343(3) of the Civil Rights law, permitting the aggrieved noncitizen to bring her case to the Federal District Court. As Justice Blackmun explained, the fact that Congress "granted Puerto Rico a measure of autonomy comparable to that possessed by the States, the need for protection of federal rights was not thereby lessened."⁸⁶ He recognized that a compact had been made and one of its components is the full enforcement of federal fundamental rights.

In *Torres v. Com. of Puerto Rico*, Chief Justice Burger adopted the same position with respect to another fundamental right: the right against unreasonable searches and seizures. As measure to fight the increase of firearms and illegal drugs being brought to the Island, the Puerto Rican Legislature approved a statute authorizing law enforcement officials to search persons and baggage based on mere suspicion, without satisfying the probable cause requisite. This the Court declared unconstitutional.⁸⁷ The decision's result is to enhance privacy rights of all persons within Puerto Rico's jurisdiction and, at the same time, deny to it an instrument that might strengthen efforts to deal with the importation of illegal firearms and drugs. Again, this limitation on legislative powers, and enforcement of constitutional rights, applies equally to Puerto Rico precisely as it does for other States of the Union.

A test of the consistency of the new constitutional theory of how Puerto Rico should be treated for the purpose of determining the scope of its powers resulted positive in *Alfred L. Snapp, Inc. v. Puerto Rico*.⁸⁸ The issue was whether Puerto Rico had standing to sue on behalf of Puerto Rican workers to work as farm laborers in the continental United States to vindicate their rights under federal labor protective legislation. The Court held "a state does have an interest, independent of the benefits that might accrue to any particular individual, in secur-

85 *Examining Bd. of Engineers*, 426 U.S. 572.

86 *Id.* at 597.

87 *Torres v. Com. of Puerto Rico*, 442 U.S. 465 (1979).

88 *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592 (1982).

ing that the benefits of the federal system are not denied to its general population.” And it concluded that Puerto Rico had the same interest and therefore the same standing as a state of the union.

The fundamental basis for justifying conceding the autonomy to Puerto Rico equivalent to that of state is clearly spelled out in *Rodríguez v. Popular Democratic Party*: whether the Legislature of Puerto Rico could constitutionally “vest in a political party the power to fill an interim vacancy in the Puerto Rican Legislature?”⁸⁹ The Court responded in the affirmative on the basis of two principles. First, it “is clear that the voting rights of Puerto Rican citizens are constitutionally protected to the same extent as those of all other citizens of the United States” and; second, “[a]t the same time, Puerto Rico, like a state, is an autonomous political entity ‘sovereign over matters not ruled by the constitution’.”⁹⁰ The tipping point was the substantial deference which should be shown to the “methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth electoral system”.⁹¹

Of all the cases considered thus far, *Posadas de Puerto Rico Assoc. v. Tourism of Puerto Rico* is perhaps the decision that most deferred to the scope of Puerto Rico’s legislative power, as against a constitutional challenge. The Tourism Company prohibited casino operators from advertising in Puerto Rico, but authorized advertising in the media outside the Island. The evident purpose in the prohibition was to *protect* people living on the Island from any publicity which might stimulate their tendency to gamble at local casinos. The regulation was challenged on the ground that it violated the commercial free speech of its members under the constitutional criteria enunciated in *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*.⁹²

Affirming the decision of the Supreme Court of Puerto Rico, Justice Rehnquist, speaking for the Court, held that the regulation does not facially violate the First Amendment or the due process or equal protection guarantees of the Constitution. Four Justices dissented. Justice Brennan concluded that it was unconstitutional for Puerto Rico to suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity. For Justice Stevens the regulation was an obvious form of prior restraint. This case could easily have been decided either way. Its significance is that there were five votes that tipped the balance in favor of legislative police power over First Amendment interests.

The case of *Puerto Rico v. Branstad* should also be considered.⁹³ Speaking for the Court, Justice Marshall overruled a precedent dating back to 1861 and held that the Court had the power to order a state governor to comply with the extradition request of the Governor of Puerto Rico. In doing so the Court made it

⁸⁹ *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 72 (1982).

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

⁹³ *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

plain that for purposes of enforcing national extradition principles, Puerto Rico's Governor was on the same footing as any other state governor.⁹⁴

How consistent has the Supreme Court been with respect to the doctrine of treating Puerto Rico as if it were a state, obliged to comply with all federal constitutional rights and entitled to exercise the same powers over internal affairs like any other state?

*Califano v. Torres*⁹⁵ and *Harris v. Rosario*⁹⁶ are usually cited to demonstrate that the Supreme Court has been inconsistent. That, in fact, is not the case. In *Califano*, the Court upheld the constitutionality of the Supplemental Security Income provisions of Social Security, which provided aid to qualified, blind and disabled persons and completely excluded persons residing in Puerto Rico. Under the Territorial Clause, Congress was empowered to exclude Puerto Rico from this program's benefits if it had a rational basis for the discrimination. There was a similar holding and justification in *Harris*, which upheld Congress' exclusion of aid to families with dependent children residing in Puerto Rico. Here, too, the discrimination was found to be rational and not a violation of the equal protection clause.

Both cases have to do with congressional powers and nothing to do with the scope of ELA's legislative powers or whether ELA is covered by the same constitutional guarantees as any State of the Union. This is not to say that both cases do not merit criticism for in effect handing Congress a blank check in deciding how much of federal entitlement programs would be approved to benefit the people of Puerto Rico. And, it should be noted; there was no need to explicitly revive the Insular Cases and the Territorial Clause. That is because Section 9 of the Puerto Rico Federal Relations Act authorized Congress to determine that a federal law will not apply equally to Puerto Rico. In short, Congress' prerogative to include Puerto Rico in national legislation, or to exclude it, is an integral part of the *compact*.⁹⁷ As noted earlier, Congress has exercised that power sparingly, but to this day there continue to be a small number of entitlement programs in which Puerto Rico does not receive an equal share.⁹⁸

C. Congressional Actions Bringing ELA to Fruition After 1952

To finish the trilogy of influences that have shaped ELA's development, we turn to Congressional actions since 1952. In the years following 1952, the intent and attitudes manifested in the legislative record on Public Law 600 and ELA

⁹⁴ The Court left open whether the decision was grounded on the Extradition Clause of Article IV of the Constitution or the Extradition Act. Either way extradition would proceed.

⁹⁵ *Califano v. Gautier Torres*, 435 U.S. 1 (1978).

⁹⁶ *Harris v. Rosario*, 446 U.S. 651 (1980).

⁹⁷ For my critique of *Califano*, 435 U.S., see David M. Helfeld, *supra* note 1, at 461-63.

⁹⁸ For thorough analysis of the extent to which Puerto Rico is treated unequally in the distribution of federal funds, see Alexis Z. Tejada Marte, *Los fondos federales en Puerto Rico: un Affair con los Estados Unidos*, 80 REV. JUR. UPR 493 (2011).

Constitution almost lost all force and influence and that is apparent in Congress' post-1952 actions. Those actions were basically in line with the positions taken by the Executive and Judicial Branches. Certain changes in the compact were accomplished through bilateral process. For example, the public debt limitations in Section 3 of the Federal Relations Act were eliminated, subject to referendum approval by the people of Puerto Rico.⁹⁹

Other changes were effectuated to eliminate processes reflecting territorial status and inconsistency with the analogy to a state of the union. Two examples are particularly noteworthy: the law that had remained in effect after 1952, under which Judges of the Supreme Court of Puerto Rico could be assigned to hear and decide cases in the Federal District Court and the law which authorized the First Circuit Court of Appeals to review the decisions of the Supreme Court of Puerto Rico. The first was repealed in 1966 when the District Court became a full fledged Article III Court¹⁰⁰ and the second law was repealed also in 1966,¹⁰¹ thus eliminating contradictions with the analogy to a state. The same readiness to clarify was forthcoming when doubts were expressed concerning whether Puerto Rican citizens had access to diversity jurisdiction of the Federal District Courts.¹⁰² The overall intent was clear: it was national policy to establish the same relations between Puerto Rico and the Federal Judicial system which defined the system in relation to the states of the union.

The significance of eliminating the reviewing authority of the First Circuit cannot be overstressed. That is because henceforth only the federal Supreme Court would have jurisdiction to review the decisions of the Supreme Court of Puerto Rico and, functionally, that would mean that many years might pass without there being any case heard and decided coming from Puerto Rico to the U.S. Supreme Court. The Court's reviewing authority over the States and Puerto Rico is largely discretionary and the number of cases decided is very limited. The last time a decision of the Supreme Court of Puerto Rico was reviewed and decided was in 1993 in *El Vocero de P.R. v. ELA*.¹⁰³ Thus, for all practical purposes,

⁹⁹ H.R.J. Res. 124, 87th Cong. (1961).

¹⁰⁰ Act of Sept. 12, 1966, Pub. L. No. 89-571, 80 Stat. 764. Prior to the statute making the Federal District Court in Puerto Rico a full fledged article III Court, both the Federal District Court and the Supreme Court of Puerto Rico were considered Territorial and hence extensions of the federal government. Therefore, a Puerto Rican Supreme Court Justice could serve occasionally in the territorial Federal District Court. With the change in its Constitutional Status to that of an article III Court, thereafter the Supreme Court of Puerto Rico could be treated as having the same status as that of any state supreme Court. Federal and state judges only exercise judicial authority within their respective jurisdictions. That was reinforced when the Congress provided that judicial review by the Supreme Court would be limited and would follow essentially the same principles as in the case of all state supreme courts. *See also* 28 U.S.C. § 8 (2006).

¹⁰¹ Act of Aug. 30, 1961, Pub. L. No. 87-189, 75 Stat. 417. The First Circuit was replaced by providing that the Supreme Court of the United States would henceforth review the decisions of the Supreme Court of Puerto Rico. As noted, the scope of reviewing authority was essentially the same as for a state, thus maintaining the analogy to a state of the union. *Id.*

¹⁰² Access was fully assured in 1956. *See* Act of Jul. 26, 1956, Pub. L. No. 84-808, 70 Stat. 658.

¹⁰³ *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147 (1993).

the Supreme Court of Puerto Rico is only minimally subject to federal judicial review.

D. Summation: The Treaty of Paris, Unincorporated Territory and the Territorial Clause

Summation in the captioned title should not be taken to mean that all relevant components in a multidimensional analysis have been taken into account to determine the meaning of the three captioned terms, only a sufficient number of the most important to reach confident conclusions. There are at least five other important questions that have to do with the possibilities of change in Puerto Rico-Federal relations that have not been treated, and however summarily, should be covered: (1) demographics, more than half of the Puerto Rican people live in the continental United States;¹⁰⁴ (2) the role of the Resident Commissioner, Puerto Rican Congressmen and their participation in the Hispanic Caucus;¹⁰⁵ (3) the potential benefits which could accrue from the recommendations in the 2011 Report of the President's Task Force on Puerto Rico's Status;¹⁰⁶ (4) identification of additional legal powers that ELA needs in order to govern effectively and (5) reasons, largely unexpressed, for Congress' resistance to changes in the terms of the existing status.

Each of these questions merit full-fledged consideration in their own right. A summary appraisal of their impact on political and legal relations between ELA and the United States will be presented in the next part of this article.

Taking into account the multidimensional factors thus far considered, what meaning should be given to the three captioned subjects? In our time, the Treaty of Paris is simply a document in the history of United States-Puerto Rico relations, and has no weight whatsoever in influencing those relations; at least since 1952. It is an example of how powerful countries took control of weaker nations and governed them as they saw fit. For a period of time Article IX of the Treaty truly reflected the unlimited discretionary power Congress wielded over Puerto Rico: The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

Presently, and for an appreciable period in the past, Article IX has been dead letter, totally without effect. With respect to Civil Rights, it is the Supreme Court that has replaced Congress and it has determined over the years that all funda-

¹⁰⁴ According to the US Census, 3.7 million Puerto Ricans live in the island, while 4.6 live in the continental United States. See United States Census Bureau, *The Hispanic Population 2010*, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf>; United States Census Bureau, *2010 Census Interactive Population Search*, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=72> (last visited 23 de mayo de 2013).

¹⁰⁵ See Bárbara M. Sabat, *Washington Politics Puerto Rican Style: the Role of the Resident Commissioner in USA-Puerto Rico Relations*, 80 REV. JUR. UPR 461 (2011).

¹⁰⁶ See *Report by the President's Task Force on Puerto Rico's Status* (2011), http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf.

mental constitutional rights applicable to the states and their people are equally applicable to Puerto Rico and its people.¹⁰⁷

Nor is the determination of Puerto Rico's political status subject to unilateral determination of Congress. That conclusion relies on solid evidence: the positions taken by the U.S. in the United Nations on the status of Puerto Rico since 1952, Supreme Court cases recognizing that relations between Puerto Rico and the United States are in the nature of a compact and, after all Congress has done since 1952 to recognize the bilateral nature of the compact, it is altogether improbable that it would reverse course. At one point in the past, Congress, with support of the President, did unilaterally decide the political status of the Philippine Islands; i.e., that they would go their own way as independent nation. Congress has long since lost that unilateral prerogative in the case of Puerto Rico. That was implicit in the U.N. Assembly Resolution 748 (VIII) in 1953 and there has been no indication of any change in that position by any President since. Again, retreat from that position is altogether improbable. Even more improbable is that the Treaty of Paris would be resuscitated to legitimize a reversal in established national policy.

Unlike the Treaty of Paris, the doctrine of *unincorporated territory* is not altogether dead law. As a constitutional doctrine it continues to function with limited scope, but with important consequences for Puerto Rico. When the Supreme Court established it in 1901, there was uncertainty about how to deal with Puerto Rico. Thereafter, the uncertainty began to give way and Congress gradually increased the scope of the Island's self-government and to incorporate it into the nation's legal system. By 1961 that process had been thoroughly completed. Since then, in a functional sense, Puerto Rico is almost fully incorporated into the United States legal and economic system.¹⁰⁸ The exceptions are few, principally with respect to programs involving federal funds.¹⁰⁹

The single function of overriding importance that the *unincorporated territory* doctrine continues to perform is that it authorizes Congress to ignore the Constitutional command that federal taxes must be uniform throughout the United States. In the exercise of that discretionary authority, Congress has exempted Puerto Rico from national internal revenue laws since 1917 in the Jones Act. This has been of enormous benefit to Puerto Rico in two ways: it has permitted its government to tax its citizens at higher rates than state governments which have to take into account that their citizens are obliged to pay both federal and state taxes; and it has made possible tax exemption programs to attract

¹⁰⁷ The jurisprudential process by which this was accomplished is summed up below. *See infra* Parts III.

¹⁰⁸ That can be readily verified by systematically looking into United States Code Annotated: almost all national laws cover Puerto Rico with the same coverage as if it were a state; the major part of its trade relations are with entities in the continental United States; and the Island is as much an integrated part of the American national marketplace as are the states of the union.

¹⁰⁹ *See* Tejada Marte, *supra* note 98.

outside investments in its economic development to a far greater degree than is feasible in the case of any other state.¹¹⁰

Any precipitous revoking of federal tax exemptions would be devastating to Puerto Rico's capacity to provide the budgetary support required to sustain its manifold programs of social, economic and educational services and policies. Change would be feasible only on the basis of a long-term adjustment plan. At this moment, the results of the status referendum held in November of 2012 do not augur realistic possibilities of change in political status.¹¹¹ What does demand change is how, in public and political discourse, Puerto Rico continues to be referred to as *unincorporated territory*. For a clearer and more accurate understanding of relations between the Island and the United States it is important to recognize that Puerto Rico is almost fully incorporated into the legal and economic systems of the United States.

There remains to be assessed the significance of the Territorial power in this time and in the foreseeable future. We know from our study of how it has been exercised, that Congress has acted almost entirely in one direction: by successive grants of governmental authority, culminating in the status of ELA and, finally, in a series of acts to assure that the analogous comparison was completed. Puerto Rico has achieved the autonomous self-government of a State of the Union. Causing pervasive confusion, there is still a great deal of discourse about the Territorial Power, usually in the form of political rhetoric about how it is emasculating Puerto Rico's power to effectively resolve the Island's social and economic problems. The question of whether ELA has sufficient powers to deal effectively with its social and economic problems is considered in the last part of this article.¹¹²

The truth is that the Territorial Clause has been largely quiescent and, for the last fifty years,¹¹³ the legal foundation for congressional legislation made applicable to Puerto Rico has been the compact: Section 9 of the Puerto Rico-Federal Relations Act, "[t]hat the statutory laws of the United States . . . shall have the same force and effect in Puerto Rico as in the United States . . . except the internal revenue laws."¹¹⁴ The words left out are important depending on contextual timeliness: not locally inapplicable, except as hereinbefore or hereinafter otherwise provided. At the time of the Jones Act, the apparent intent of Congress was to incorporate in Section 9 the discretionary authority of the Territorial Clause; *covering* Puerto Rico as if were a state, but retaining discretionary authority to make exceptions as seen fit. The difference in the significance of Section 9 after ELA is that it was no longer imposed unilaterally but was now in

110 See 26 U.S.C. § 933 (2006). See also Carlos R. Baralt Suárez, *Promoting Knowledge – Based Economy Activities through Personal Income Tax Incentives*, 80 REV. JUR. UPR 583 (2011).

111 See the analysis of the referendum, *supra* note 4.

112 See *infra* Part V.

113 The last time the Supreme Court referred to the Territorial Clause as authorizes the Congress to legislate for Puerto Rico was in 1980 in *Harris v. Rosario*, 446 U.S. 651 (1980).

114 48 U.S.C. § 739 (2006).

force through the *compact*, by mutual consent. Puerto Rico had given generic consent to national legislation that Congress made applicable to the Island. As noted earlier, the First Circuit Court of Appeals has consistently interpreted the intent of Congress to no longer legislate for Puerto Rico with intra territorial effect.

We know that Public Law 600 was drafted in Puerto Rico and the question must be asked, why did political leaders accept generic consent to Congress' apparently unlimited legislative determinations? Previously it was suggested that the terms of the proposed compact were as far as Puerto Rico's leaders believed they could go and receive congressional approval. With respect to Section 9, it is reasonable to assume that the generic consent accepted reflected a calculated risk that Congress would continue its trend of including Puerto Rico in national legislation with coverage equal to that of all other states. Indeed, the expectation was that, in time, the established practice would be reinforced and become unquestioned policy. As noted earlier, analogizing ELA to any state has become unquestioned practice, both with respect to the scope of federal law as well to the scope of the Island's control over internal affairs.¹¹⁵ What has given the analogy a firm dependability is that all three branches of the federal government have collaborated in its making and in its secure continuance. As noted earlier, the analogy is not perfect: there still remain a small number of federally funded programs in which Puerto Rico continues to be treated with discrimination and differently than the states.¹¹⁶

Understanding that Article IX of the Treaty of Paris is dead letter, that the operational scope of the doctrine of unincorporated territory is limited to ELA's fiscal autonomy, that the functional significance of Section 9 of the Relations Act and the quiescence of the Territorial Clause¹¹⁷ are ongoing and reliable, has important benefits. It frees the mind to think clearly about the scope and substance of possible changes in ELA's relations with the federal government; the subject considered at the closing of this article.

IV. HAVE THE ANSWERS TO THE KEY QUESTIONS CHANGED SINCE THE 1985 FIRST CIRCUIT JUDICIAL CONFERENCE?

The short answer is tripartite. First, there are findings and principles that remain unchanged and dependable, then there are matters which merit further depth of analysis or there have been new developments to be noted. Finally, there is new important material which was mistakenly ignored or has come into being after the 1985 Judicial Conference. The 1985 questions and their present-day responses as well as the new materials follow.

¹¹⁵ See Judicial Statecraft on Behalf of ELA, *infra* Part III.B.

¹¹⁶ See Baralt, *supra* note 110.

¹¹⁷ The term quiescence appropriately describes the dormant state of the Territorial Clause which will come to life in the future as the constitutional source of congressional authority to mutually agree with Puerto Rico on any possible future change in the Island's political status.

A. Concerning Fundamental Personal Rights, where does Puerto Rico fit within the Constitutional System of the United States?

With respect to the fundamental constitutional rights applicable to the states, the 1985 conclusion continues to be indisputably firm and reliable today: the same rights apply to Puerto Rico. More precisely put, those same rights protect all persons living in Puerto Rico, as they do to persons in the continental United States, from violations to federal constitutional rights by state governments. And this is an ongoing process: whenever the U.S. Supreme Court creates a new fundamental right binding on a state, it becomes equally binding to all states and, without question, to Puerto Rico.¹¹⁸ Not made clear in 1985 is an important principle: as in the case of the states, ELA, under its own constitution, is free to extend to its citizens more ample rights than it is bound to respect under the federal Constitution.¹¹⁹ The dual system of personal constitutional rights and its interaction has been functioning effectively for the last forty years, so much so that the system has become unquestioned and taken for granted.

B. What are the Powers of Congress and how have they been Exercised over Puerto Rico?

In 1985 this required a comprehensive and mixed answer because it covered Congressional laws over an eighty-five year span and during that period pragmatism was the dominant approach that resulted in a range of inconsistent policies. As noted earlier in the article, that changed after ELA came into being in 1952. In effect, Congress has completed the process of divesting itself of the exercise of its Territorial power over the internal affairs of the Island, assuring to the newly created status of ELA the autonomy to govern itself much like the governing scope of a state. In my judgment, the potential to recur to the exercise of Territorial powers is in a state of deep slumber and has been replaced by the terms of Section 9 of the Relations Act.

Under Section 9 the statutory laws of the United States . . . all have the same force and effect as in the United States. The words not quoted refer to the discretionary power to make any national statute locally inapplicable which Congress regularly exercised during its pragmatic phase and which, at present, is rarely the case. Similarly, during the pragmatic period it regularly exercised its discretion

¹¹⁸ It is fair to conclude *without question* and *equally binding*, on the basis of the cases analyzed *see infra* Part. III(B). The impact on Puerto Rico is illustrated in the case of *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court declared the Texas sodomy law unconstitutional as a violation of the personal right to privacy. The Supreme Court of Puerto Rico had been avoiding passing judgment on the Island's sodomy law. *See* JOSÉ JULIÁN ÁLVAREZ GONZÁLEZ, DERECHO CONSTITUCIONAL DE PUERTO RICO 728-731 (2009). Once decided *Lawrence* had the effect of constitutionally nullifying similar state laws and, as well, Puerto Rico's law of sodomy.

¹¹⁹ *See, e.g.,* *Arroyo v. Rattan Specialties, Inc.*, 117 DPR 35 (1986) in which the Supreme Court established the constitutional right of privacy between private parties.

to cover Puerto Rico in particular legislation with intra territorial effect and not with the same force and effect as in the United States.

The other exceptions have to do with the exemption that favors Puerto Rican taxpayers from having to pay federal income taxes and by the grant of the return to the Island's Treasury Department of the federal tax on Puerto Rican rum entering the American marketplace. Both exceptions enhance the budgetary strength of ELA, which makes possible more ample funds for its economic and social policies and, as well, assures greater fiscal autonomy than in the case of a State. How secure are these exemptions? Not once since the inception of ELA has there been a move in Congress to question the federal income tax exception to Puerto Rico. In my opinion, ELA can rely on its continuance as long as the per capita income of Puerto Ricans remains well below that of the poorest state of the union.¹²⁰

The return of duties collected on Puerto Rican rum entering the continental United States is not secure to the same degree. In 1984, Congress raised the rum tax and restricted the return of the taxes collected on Puerto Rican rum to \$10.50 per gallon. ELA did not challenge the authority to do so as a violation of the *compact*.¹²¹ This particular action by Congress was in reaction to what some Congressmen felt were policies by Puerto Rico to unfairly expand the scope of rum collection claims.¹²² Outside of denying ELA the increase in the \$10.50 per gallon allotment, that allotment has been returned regularly since 1984 and there have not been any indication that Congress is considering a change in policy. It would be fair to conclude that the return of the rum tax is minimally less secure than the exemption from the federal income tax.

My 1985 presentation did criticize the exercise of Congressional legislative power over Puerto Rico on grounds of democratic principle. ELA has no voting representation in Congress. A similar criticism applies to the executive powers of the President over Puerto Rico. Whether that democratic deficiency has in fact adversely affected ELA's effort to solve its economic and social problems was not considered. It has been considered partially in this article and needs to be considered fully as an essential component of comprehensive multidisciplinary analysis.

¹²⁰ Mississippi, which is the State with the lowest per capita income in the United States, had an estimated per capita income of \$19,977.00 in 2010. In contrast, Puerto Rico had a per capita income of \$10,355.00 in the same year. See U.S. Census Bureau, *Selected Economy Characteristics, 2006-2010 American Community Survey 5-Year Estimates*, <http://www.ci.snohomish.wa.us/PDFs/CensusData/2010/American%20Community%20Survey%2020062010/Selected%20Economic%20Characteristics%202006-2010%20American%20Community%20Survey.pdf>.

¹²¹ For an account of Congressional action and ELA's acceptance, see Helfeld, *supra* note 1, at 466-67.

¹²² See Act of July 18, 1984, Pub. Law 98-369, 98 Stat. 1172 (1984).

C. Is there a compact between Puerto Rico and the United States and, if there is, what is its content and constitutional meaning?

In my 1985 presentation, after giving all the arguments on both sides of the captioned question, this was my answer: "In my opinion there is a compact, in the nature of an understanding based on considerations of political morality, limited to the Constitution of Puerto Rico and the provisions of Acts 600 and 447 which relate to the internal affairs of the Island."¹²³ That was an insufficient answer then, one that gave undue weight to the dominant thinking of Congress, which approved Public Law 600 and later conditioned its approval of the ELA's Constitution, and is far from the comprehensive answer which is merited at this time. It should also be noted that political morality gives the impression that the ties that bind the parties are not very strong in the case of the United States. This is an impression that could easily be reached by giving significant weight to the different components of Congressional thinking with respect to ELA during its legislative history. The present multidimensional analysis, as developed thus far, clearly requires far more comprehensive and nuanced responses.

First, we have over sixty years of the compact to evaluate and in all that time there has not been a single act by any of the three branches of the federal government that put in doubt the fact that there is, indeed, a compact. Second, as noted earlier, all three federal branches since 1952 have taken affirmative steps to create and support what can be termed a new type of status that federal judges have termed "Commonwealth" status which, as we know, consists of elements analogous to the status of a state and other components which are unique to ELA. Third, this particular compact has been markedly successful in the sense that neither party has violated its terms, not once, at least in terms of an alleged breach of contract. Fourth, when ELA's status has been questioned in federal cases, the First Circuit and the Supreme Court have interpreted the terms of the compact favorably to ELA's claims, with the exception of claims for equal treatment related to federal funds.¹²⁴ Fifth, there is no evidence that these facts of record have any likelihood of changing in the foreseeable future. If there is to be change in ELA's status the initiative will have to come from Puerto Rico. There is no foreseeable likelihood of a fully fledged initiative coming from the United States for the purpose of seriously altering the distribution of the present formal legal powers between the two parties to the compact.¹²⁵

In my opinion, the terms of the compact, which cannot be altered except by mutual agreement, consist of the ELA Constitution, Public Law 600 and Public Law 447, which relates to the internal governance of the Island. A traditional constitutional theorist would dispute my categorical conclusion, but if there are

¹²³ See Helfeld, *supra* note 1, at 465.

¹²⁴ See analysis of the *Califano* and *Harris* cases, see Helfeld, *supra* note 1, at 461-63.

¹²⁵ See *supra* text accompanying note 4 and *infra* notes 143-45 on the President's Task Force report. Also see *infra* Part V for an initiative that President Obama has taken in the Budget for Fiscal Year 2013-2014.

no violations that put it to the test, then the issue becomes one of fruitless debate. It is far more sensible to inquire why a purposeful breach of compact is unlikely. Again, there is the moral factor, in this case the simple premise that both parties are honorable actors and will honor their contractual commitments, especially commitments grounded on democratic process on the Puerto Rican side and on the other side, Presidential and Congressional approval as representatives of the American people. In addition, for a dishonorable breach of said compact, in the form of a naked exercise of power by Congress, a terrible price would have to be paid in the eyes of the world. The United States would be seen as violating its commitments to the United Nations. There would have to be some purpose of overriding importance for the United States to act with such dishonor. The fact is that these are imaginary nightmarish scenarios, not worth the time that we tend to spend on them. The fact is that the United States has no perceivable interest in changing the status quo. Why would it choose to create unnecessary difficulties?

That does not appear to be case on the Puerto Rican side of the compact. On the Puerto Rican side dissatisfaction with the present political status is regularly voiced by leaders of the principal political parties, as well as by groups that have lesser electoral support. Periodically there have been initiatives to change in the formal terms of the compact; none has achieved success.¹²⁶ Why have the terms of ELA's status have remained unchanged since 1961, requires a comprehensive, in depth, analysis in a separate article. Suffice it to say the premise of this article is that ELA status, in its textual terms, will remain substantially unchanged for a lengthy and unpredictable time. The premise rests on the absence of evidence of foreseeable possibility of significance change in the terms of the formal legal power.

Finally, on the question of the terms of the compact, the argument can be made that, as it has functioned, it contains a number of unwritten elements that over the years have reflected reliable institutionalized practices and thus can be, and should be, considered integral provisions of the compact. The accommodations made in language and culture to ELA in the Federal District Court is a good example of reliable institutionalized practices which can be considered unwritten but integral parts of the compact. Prior to 1952, the President appointed attorneys from the mainland as District Court Judges; after ELA he has appointed only bilingual Puerto Rican attorneys. Almost all employees of the District Court are Puerto Ricans. The language heard in the Court most of the time is Spanish, including in chambers meetings between attorneys and judges. Only trial proceedings, court rulings, judgments and litigation documents are in English. This same language accommodations is to be found in the United States Attorney's office and, as well, in most federal agencies and programs on the Island. One additional example of accommodation and deference to Puerto Rican national

126 See *U.S. v. Acosta Martínez*, 106 F. Supp. 2d 311 (D.P.R. 2000).

pride has its own unique significance: acceptance by the United States of separate participation of the Island's team in the Olympic Games.¹²⁷

D. Has the logic of American federalism been applied to Puerto Rico and what are its effects?

That key elements of American federalism are reflected in the compact and are patently clear. First and foremost there is the same distribution of powers as exists between the federal and state governments, which was finally accomplished by 1961. That distribution is determined in final instance by the Supreme Court, and this may change with time. So it is that if the Court constricts Congress' power to regulate commerce¹²⁸ or does so on grounds of structural federalism¹²⁹ and thus expands state's powers, or vice versa, the same outcome would apply to ELA. That, of course, is a prediction based on the presumption that to do otherwise Congress would have to reverse a course of action of over 60 years, a course that has well served the nation and Puerto Rico.

Second, as fully delineated earlier, equally with the states ELA's powers are limited by the array of fundamental rights in the federal Constitution and its citizens are protected by those rights, exactly as in the case of every other state of the union. Third, ELA is bound by the content of the comity provisions of Article IV of the Constitution, precisely to the same extent as the states. That is accomplished through federal statutes, but functionally the results are the same. The test is when there is a breach of compliance or there is a threat of noncompliance. As noted earlier, two extradition cases illustrate effective compliance. When the governor of Iowa refused to extradite a Puerto Rican fugitive, his error was promptly corrected by the federal Supreme Court;¹³⁰ the same result took place when ELA's Supreme Court reversed a trial court's refusal to extradite a fugitive wanted by Pennsylvania's system of justice.¹³¹

As considered earlier, there are two provisions in ELA's relations with the federal government that are incompatible with federalism. The first is the exemption from federal income tax, as well as the return of the impost collected on rum, which are not available to the states. This favorable discriminatory fiscal

¹²⁷ The International Olympic Committee in its 42nd session recognized Puerto Rico as a member in 1948. See COPUR: COMITÉ OLÍMPICO DE PUERTO RICO, <http://www.copur.pr/copur> (last visited April 3, 2013). It should be understood that full treatment of all the institutionalized unwritten terms of the compact would require an entire article.

¹²⁸ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995) for examples of modern limitations on the Commerce Clause Power when there is a clash with traditional state police powers.

¹²⁹ For two cases illustrating modern federalism limits on Article I powers, see *Printz v. United States*, 521 U.S. 898 (1997) and *New York v. United States*, 505 U.S. 144 (1992).

¹³⁰ *Puerto Rico v. Branstad*, 483 U.S. 219 (1987).

¹³¹ *Pueblo de Puerto Rico v. Martínez Cruz*, 167 DPR 741 (2006). The lower courts sought to condition the extradition on a guaranteed commitment by Pennsylvania not to impose the death penalty. The Supreme Court of Puerto Rico correctly held that such conditioning was inconsistent with federal constitutional extradition doctrine.

treatment cannot be justified in federalist terms. It can be justified, in my opinion, by Puerto Rico's special economic circumstances and by the legitimate national policy of assisting it to reach at least the level of the poorest state of the union.¹³² Also inconsistent with federalist principles or democratic theory is the fact that Puerto Rico does not have Congressional and Presidential voting rights, nor any formal say in the making of national policies that affect its interests. To my knowledge, there has not been any precise study about the effect of this to Puerto Rico's interests.¹³³

E. Summing up in 1985 and In Our Time

At the end of my presentation to the Judicial Conference there is this final comment:

The two principal forums in which Puerto Rico will have to defend its political, social and economic interests are the Presidency and the Congress. Each forum has its institutional idiosyncrasies which will have to be mastered if effective advocacy is to be achieved. In the absence of voting rights, Puerto Rico must rely on arguments based on mutual interests, rationality, political morality and patriotism. It must also resort to lobbying, to forming alliances with groups and entities with which it shares interests and objectives and, most important of all, to developing effective participation in national political parties. In final analysis, Puerto Rico cannot escape political reality. It must recognize that the constitutional system of the United States includes a powerful dimension of partisan politics, and it must act on that recognition.

In our time, the accumulated richness of the material requires a more detailed response.

1. In Our Time

Over the past forty years I have directed a Law School seminar on Constitutional Relations Between Puerto Rico and the United States. Over the last years the emphasis has been on the distribution of powers between the two jurisdictions. Recently Dean Emeritus Antonio García Padilla has joined me as co-director. The seminar has been an ongoing search for truth and understating as it relates to ELA-USA constitutional and statutory relations and has found that multidimensional research and analysis is the most effective method for reaching those ends. The seminar has also been testing the hypothesis that ELA status provides Puerto Rico with the legal powers it needs to deal effectively with its most serious social and economic problems. In seminars having to do with the internal affairs of the Island the same hypothesis has been tested and the results

¹³² See Act of July 18, 1984, Pub. Law 98-369, 98 Stat. 1172 (1984).

¹³³ No studies were found that sought to determine whether having Congressional representation and the Presidential vote would be of net value to Puerto Rico.

in both types of seminars have been the same: ELA does have the legal powers to undertake effective public policies over its own internal affairs.¹³⁴

Nonetheless, dissatisfaction has been, and continues to be expressed by ELA supporters who claim the need for additional powers to effectively resolve the Island's serious economic and social problems, as well as the curtailing of federal powers and policies which negatively affect Puerto Rico. The issue raised by ELA's supporters merits serious investigation and study. Whether remedial action would be justified depends on the evidence of need. There is one clear-cut case of federal policy that does affect Puerto Rico's economy negatively and that is the Jones Act of 1920 (Cabotage Laws).¹³⁵ Under the Jones Act, all goods transported by water between US ports are required to be carried by ships manufactured in the United States, owned by US citizens and have either US citizens or US residents as crew. The difference in costs of being obliged to use American made ships and American ship-crews and not being able to use far more economical foreign ships has resulted in higher prices to Puerto Rican consumers and in higher shipping costs for exports produced in the Island.¹³⁶ This has also been the experience of consumers and shippers of goods from Hawaii and Alaska.¹³⁷

If, as the record shows, neither Hawaii nor Alaska were able to obtain relief, in spite of having Congressmen and Senators advocating for the economic interests of their states, ELA's efforts to free its economy from having to use relatively expensive American shipping would be unlikely to succeed. That is because the interests in favor of the Cabotage Laws have proved to be more powerful than those of Hawaii's and Alaska's Congressional delegations¹³⁸ and the balance of political power would very likely be unchanged if Puerto Rico were a State with six representatives and two senators. It is a commonly believed *shibboleth* that with Congressional delegation and Presidential vote, Puerto Rico would have far greater political power to advance the interests of its people. That belief should

¹³⁴ See, for example, the issues of the law review dedicated to the legal problems of the aging, drug addicted and a collection of articles dealing with distribution of powers: David M. Helfeld, *Distribution of Constitutional and Statutory Powers Between Puerto Rico and the United States*, 80 REV. JUR. UPR 423 (2011); David M. Helfeld, *From the Research Seminar: On Ageing and the Law, Identifying Problems, Proposing Solutions*, 79 REV. JUR. UPR 33 (2010); David M. Helfeld, *Narcotics, Puerto Rico, Public Policy: In Search of Truth and Wisdom*, 75 REV. JUR. UPR 1029 (2006).

¹³⁵ Jones Act, ch. 145, 39 Stat. 951 (1917).

¹³⁶ Puerto Rican business interests have complained that Mexican products with which they compete in the American market have an unfair advantage because they ship their products via foreign more economically priced ships. See John F. Frittelli, *The Jones Act: An Overview*, Congressional Research Report RS 21566 (2003).

¹³⁷ *Id.* See also 39 Stat. 951.

¹³⁸ The defending interests of the Cabotage Laws are the American Shipyards, the Maritime Unions and, most powerfully the belief that it is necessary for national defense. See José I. Alameda Lozada, *Impacto de las Leyes de Cabotaje sobre el comercio interestatal entre Puerto Rico y los Estados Unidos y su posible efecto sobre el Puerto de Tránsito Las Américas* (2006), http://easywebpr.com/josealameda/articulos_2006_2010/impacto_de_las_leyes_de_cabotaje_alameda (last visited 23 de mayo de 2013).

be put to the test in order to determine what, in fact, the difference would be under Statehood as compared to experience under ELA.

A recent article published by a student member of my seminar on Constitutional and Statutory Relations reports her findings on how effectively are the Office of the Resident Commissioner and the Puerto Rico Federal Affairs Administration (P.R.F.A.A.) representing ELA in Washington.¹³⁹ The article raises the question to what extent does the democratic deficit actually harm Puerto Rico's economic and social interests. It does, without doubt, demonstrate the growing effectiveness of the Resident Commissioner over the past forty years, with the exception of their efforts to achieve change in political status. With respect to how effectively the Resident Commissioner and P.R.F.A.A. have been, more precise information is required. For example, it would be highly useful to have a detailed account of precisely in what social and economic federal policies and funding allotments does ELA suffer adverse discrimination compared to the states. This will require further study to add to the data that has already been accumulated.

As previously noted, a subject that has been neglected, but is in need of study and public discussion to clarify why all efforts to change ELA status have failed. My hypothesis is that, probably, those Congressmen knowledgeable about Puerto Rico feel that ELA is a fair arrangement. As they probably see it, under ELA Puerto Rico has the same legal powers to govern its internal affairs as do the other States and the lack of Congressional representation and Presidential vote is balanced by the exemption from income taxes. They are most unlikely to favorably view any formal and permanent amendments that would give Puerto Rico legal powers greater than their own states have. Whether my hypothesis is borne out can be tested by a careful analysis of the legislative history of the multiple failures to achieve change and, currently, by interviewing the principal Congressional actors in this field to gather their thoughts on political status change.

If my hypothesis proves sound, then stasis on this issue will prevail, probably for a long period of time. That would result in the formal compact – formal in the sense that any number of unwritten policies may be incorporated without showing up in the text, as has occurred in the past – but the formal text would remain unaltered indefinitely. In support of the prediction, account should be taken of the very strong forces on the side of protection of basic personal security interests. Each generation of Social Security and Medicare beneficiaries, to which should be added those under Medicaid, have an interest in not destabilizing these programs. These are people who would tend to support political leaders who would not endanger their security.

139 See Sabat, *supra* note 105. Most significantly for the large number of Puerto Ricans positively affected is the recounting of how the Resident Commissioner was able to make Puerto Rico's case for inclusion in Affordable Care Act (Obama Care) through the influence of the Hispanic Caucus in obtaining a meeting with the President. *Id.* at 487-88.

There is also the potent demographic factor at work. The 2010 Census revealed that more Puerto Ricans now live in the continental United States than on the Island: 4.6 to 3.7 millions.¹⁴⁰ One reason for this shrinking in population is that many islanders opt to migrate to the states. The most serious aspect involves the *brain drain* in which the Island's most capable and well-trained people migrate to the mainland, principally because of poor or insufficient job opportunities.¹⁴¹ From the perspective of Puerto Rico, to lose many of the youngest and best prepared is a tragedy. From their perspective, the existence and availability of opportunities offers a welcome escape from frustration. Puerto Rican migrants differ from those who are foreigners and whose intention is to settle permanently in the United States. Puerto Rican migrants are U.S. citizens who move back and forth freely between their Island and the mainland and who, most probably, have family in both places. This reality serves to strengthen the stability of the compact and the development of the unwritten and statutory practices that have been established under it. All the elements for long-term stability in terms of the formal provisions of the compact seem to be very much in place.

If stasis were to be the long-term fate of ELA's political status, that fate would also, most probably, encompass the possibilities of other traditional options: Statehood and Independence. In the case of Statehood, there are at least three requisites to satisfy. First, Congress would almost certainly require a super majority popular vote in order to favorably consider a petition for admission to the union. From Congress' perspective, it would regard large minority groups of dissenters favoring alternative statuses as making the case for an unacceptable instability. Second, making statehood work will require a long transition period, one that will be costly. That is because, as a state, Puerto Rico's people will have to pay federal income taxes and the loss of tax revenues will have to be replaced by transitional funds so that the state government can continue providing customary public services. The federal government has the constitutional authority to underwrite a transition, but surely it would not be moved to do so unless it was confident of the stability and firmness of a supermajority petition for statehood. Finally, there is the question of the clash of partisan politics. It is commonly believed, whether correctly or not, that Puerto Rican voters will favor the national Democratic Party, and that belief would strengthen the resistance of Republican Party Congressmen to a petition for statehood. Whether my reasons for predicting stasis are sound can only be tested with the passage of time, or if there is a serious petition for statehood and at that point in time there will be a record of how Congress deals with the issue.

Independence is clearly not a short-term option from the democratic perspective. In elections, independence regularly receives 5% or less of the popular vote. In my opinion, independence lives on in the hearts of many voters as an

¹⁴⁰ See United States Census Bureau, *2010 Census Interactive Population Search*, <http://www.census.gov/2010census/popmap/ipmtxt.php?fl=72> (last visited April 3, 2013).

¹⁴¹ *Examinan las causas de la emigración boricua hacia EE.UU.*, EL NUEVO DÍA, March 12, 2012, <http://www.elnuevodia.com/examinanlascausasdelaemigracionboricuahaciaee.uu.-1210804.html>.

ideal, but these voters deny their vote to independence because they doubt its practicality and do not wish to endanger the security they now enjoy. Whether at some time in the future there is to be a mass movement toward an independent republic is simply unknowable. That is, except for its faithful supporters: they have unqualified faith in the final triumph of their ideal.¹⁴²

Stasis, in the formal terms of the compact, need not and should not impede federal policies and projects that can support Puerto Rico's efforts to deal with its economic and social problems. That is the central message of the March 11, 2011 *Report by The President's Task Force On Puerto Rico*; the part not dealing with political status.¹⁴³ What is notable and promising about this latest Presidential Status Report is that it contains numerous economic recommendations and proposals in addition to an initial part dealing with political status.¹⁴⁴ The status part contains seven recommendations, none of which have been acted on thus far by either the President or Congress. Recommendation number 7, for example, states: "the President should support, and the Congress enact, self-executing legislation that specifies in advance for the people of Puerto Rico a set of acceptable status options that the United States is politically committed to fulfilling."¹⁴⁵ That recommendation was supposed to be implemented by the end of 2012. Almost two years have passed and there is no indication that any executive or congressional office is working on Recommendation 7, nor on any of the other six recommendations. I submit that this inaction will in all likelihood continue indefinitely, and if that should be the case, this would confirm my reasoning on the probable long-term continuation of the formal terms of ELA status.

The non-political part of the *Report* contains no less than twenty detailed economic recommendations,¹⁴⁶ nine recommendations for building competitive industries¹⁴⁷ and seven for projects related to Vieques.¹⁴⁸ If all, or a major part of what is proposed is fully implemented, it could well transform Puerto Rico from its present state of multiple crushing social and economic problems to one of a prosperous jurisdiction within the United States, a social order of high quality and fully capable of effectively dealing with its problems of governance. These suggestions and proposals are more than recommendations in the abstract. The Task Force offers to have all the relevant federal agencies participate in joint efforts with their Puerto Rican counterparts to collaborate in achieving particu-

¹⁴² Faith of this kind can last for hundreds of years as is demonstrated by the Scots who are contemplating a referendum on independence from the United Kingdom, the Catalonians from Spain and Quebec from Canada.

¹⁴³ See *President's Task Force on Puerto Rico's Status* (2011), http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf.

¹⁴⁴ *Id.* Task Force reports under both Presidents Bush and Clinton were limited to a discussion on possible political statuses open to the choice of the Puerto Rican people and the acceptable procedures that would be considered valid.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

larly recommended goals. Recommendation 1: “Capacity Building and Use of Federal Funds” is an example:

The Task Force also recommends that federal agencies that are engaged in partnerships with Puerto Rico collaborate on key strategies to strengthen the Island’s capacity to manage federal resources efficiently. These strategies should include (1) identifying and aggregating capacity within each agency to develop teams able to interact most effectively with partners in Puerto Rico;(2)building on existing agency resources aimed at how federal funds are being used in Puerto Rico;(3) increasing coordination in strategies and activities of federal agencies that provide grants on the Island to improve grantee performance and accountability; (4) forming interagency technical assistance teams consisting of officials from multiple agencies, including a mix of headquarters, field and regional staff with deep knowledge and expertise of the federal programs in Puerto Rico and (5) participating in a National Resource Bank that will align and aggregate public and private fund to provide access to a ‘one stop shop’ of national experts with wide-ranging expertise to provide holistic support in various areas.¹⁴⁹

These same forms of collaboration are offered in the nine recommendations for building competitive industries, which include the following:

1. Renewable Energy and Energy Efficiency Strategy for Puerto Rico
2. Integrated Bio-Refinery Project
3. Renewable Energy Tax Credits
4. Assessing Potential Enhanced Access for LMM International Airport
5. Travel and Tourism
6. National Export Initiative
7. Puerto de las Américas
8. Creating the Caribbean’s Health Science and Research Center
9. Updating Puerto Rico’s Gross Domestic Product Methodology to U.S. Standards

The seven recommendations on Vieques are wide in range and intended to resolve past problems and to secure Vieques’ people economic progress and a society that provides a first rate quality of life:

1. Superfund cleanup and job training
2. Sustainability Task Force comprehensive cleanup and Remediation at the closed military range
3. Solid Waste Strategy (for Puerto Rico extended to inclusive Vieques
4. Improve Health Care for residents of Vieques
5. Clean and Renewable Energy Options
6. Watershed Protection of Bioluminescent Bay
7. Green Hospitality Initiatives

The *Report* ends with the Task Force’s commitment to continue functioning, to hold summit meetings to evaluate progress on these issues and to serve as a

clearinghouse for newly developed recommendations and proposals. The last statement in the Executive Summary reiterates the intent and purpose of the Task Force to “continue the important work of ensuring that the Obama Administration is deeply engaged in the advancement of Puerto Rico for the long term.”¹⁵⁰

At the time of this article’s publication, Puerto Rico and its government are struggling to resolve pervasive, manifold and cumulative social and economic problems. These are among the most egregious problems: high levels of public debt and deficit, weakened credit in the municipal bond market, several public retirement systems in precarious actuarial condition, the principal public corporations heavily indebted and charging excessive rates, high unemployment levels, extremely low participation rate in the labor force, high crime rates, continuing losses of manufacturing jobs, a deficient public education system, the brain drain caused by lack of good opportunities for the young and talented people, etcetera. In my opinion, under these conditions the Government of Puerto Rico would be wise to accept the Task Force’s multiple offers of collaboration and to take all necessary measures to implement its various offers of support in consulting, planning and execution. In time, the resulting projects of collaboration could take on the dimensions and impact of an institutionalized government system. It would then be fair to claim that the system has become an unwritten but integral part of the compact between the two parties.

V. POSTSCRIPT: PRESIDENT OBAMA’S PLEBISCITE POLICY

After this article had been sent to the Law Review for publication, on April 10, 2013, President Obama submitted his proposed budget for the coming fiscal year. Among a number of budgetary proposals dealing with Puerto Rico there is an item calling for the expenditure of 2.5 millions to underwrite a political status plebiscite under the following conditions:

[A]nd \$2,500,000 for objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico’s future political status, which would be provided to the State Elections Commission of Puerto Rico: Provided, That funds provided for the plebiscite under the previous proviso shall not be obligated until 45 days after the Attorney General notifies the Committees on Appropriations that he approves of the expenditure plan from the Commission for voter education and plebiscite administration, including approval of the plebiscite ballot; Provided further, That the notification shall include a finding that the voter education materials, plebiscite ballot, and relat-

150 *Id.* at 12.

ed materials are not incompatible with the Constitution and laws and policies of the United States.¹⁵¹

What is speculative at this writing is whether the Congress will approve the appropriation recommended by the President with the conditions he proposes. My comments which follow are based on the premise that the Congress will approve the plebiscite proposal without alteration of its terms.

The first point to consider is the different treatment the President's plebiscite proposal had in Puerto Rico and in Washington, D.C. Here in Puerto Rico the proposal was headline news and was commented on by the Governor¹⁵² and other political leaders from all sides of the political status debate.¹⁵³ In contrast, neither the President nor administration officials issued any public statement on the matter. From Washington there was a failure to give the plebiscite proposal any great significance from the perspective of the executive branch. However, there were scattered comments from Congressmen who serve on committees which will pass on the proposal in the budget.¹⁵⁴

Two comments are in order with respect to the amount allotted "For objective, nonpartisan voter education¹⁵⁵ about, and a plebiscite on, options that would resolve Puerto Rico's future political status": 2.5 millions. First, the plebiscite proposal is included with others to be administered by the Justice Department. Its relative importance can be gauged by the proposed items immediately prior to the plebiscite proposal: \$10,000,000 is for an initiative to support evidence-based policing and \$5,000,000 is for an initiative to enhance prosecutorial decision-making. Second, 2.5 millions seems likely to prove very insufficient for carrying out the education and electoral requirements of the plebiscite proposal. That would certainly be the case if the present political status were to be explained in multidimensional terms, as it is in this article.

Third, for the 2.5 millions to be actually transferred to the Elections Commission, the Commission must submit to and receive the approval of the Attorney General of an "expenditure plan" for administering the education and electoral measures for implementing the plebiscite, including approval of the proposed ballot, all of which he is required to certify to the pertinent Congressional Committees, including his assurance in the certification that it "shall include a finding that the voter education materials, plebiscite ballot and related materials

¹⁵¹ Budget of the United States Government, *Fiscal Appendix 2014*, 735, <http://www.whitehouse.gov/site/default/files/omb/budget/fy2014/assets/appendix.pdf>.

¹⁵² For the detailed coverage by *El Nuevo Día*, see the April 5, 2013 issue, pages 4-5. The Governor's comments are reported at page 5.

¹⁵³ *Id.* at page 6.

¹⁵⁴ *Id.* See also additional commentary by interested Congressmen and Puerto Rican political leader and commentators, as reported in *El Nuevo Día*, April 12, 2013, at page 32.

¹⁵⁵ I refrain from extended commentary on whether this standard of fairness is achievable. To cite one issue which will have to be resolved: how is the present political status of Puerto Rico to be resolved objectively and in a nonpartisan manner when describing its status on the ballot, as a Territory or as its title in Spanish, as an *Estado Libre Asociado* and with what specific content?

are not incompatible with the Constitution and laws and policies of the United States". How are these requirements to be actually implemented?

In my opinion, the most feasible implementation option would call for a process of informal negotiation between a small number of officials representing the Governor and the Legislature on one side, and on the other, a group appointed by and representing the Attorney General. The two sides would meet to hammer out the elements of the acceptable parameters of an "expenditure plan" to be administered by the Elections Commission. The joint agreement of the two sides would not be binding, but the parameters would orient the Legislature and Governor of the choices which were realistically open and which would finally be enacted into legislation. On his side, the Attorney General would be morally bound to support the plebiscite proposed within the agreed on parameters and which in the last stage of the process would be implemented by the Elections Commission acting for Puerto Rico.

Imagining this process at work, it is the drafting of an acceptable ballot which is likely to be most contentious. There should not be great difficulty in defining Statehood, Independence, or Associated Statehood as defined by the United Nations. That was the case in the experience of implementing the 2012 plebiscite Referendum. In contrast, how Puerto Rico's present political status is defined, the status which it has had since 1952, was a deeply contentious issue in 2012. That is likely to again be the case under this proposed plebiscite. Is it to be defined on the ballot, as in the 2012 Referendum, as a Territorial status, or should it be defined in terms of "Estado Libre Asociado" as defined in the Compact, in the terms the Government of the United States informed the United Nations in 1952?

It requires no great imagination to anticipate the positions the three principal status parties will take on this question. There would even be more contention if the Estado Libre Asociado position insisted on language which would assure the possibility of further development of its formal legal powers.¹⁵⁶ Fierce contention is to be anticipated because how the present status is defined, all sides will assuredly believe, will significantly affect the number of votes it receives. But it is clear that the decisive determination which is to be made on the question of whether ELA's formal legal powers can be expanded, will not be made by the Puerto Rican side. It is clear from the President's plebiscite condi-

¹⁵⁶ In the position on status definition adopted by the General Assembly of the Popular Democratic Party, the terms of the 1952 Compact are to be amplified and "generic consent" would be replaced by "specific consent". There is reference to the concept that "Estado Libre Asociado Soberano seeks that Puerto Rico and the government of the United States agree on the specific terms defining the relation between them, with American citizenship as the binding element in the political association." ELA Soberano, Definición aprobada por la Asamblea General del PPD y contenida en el Programa de Gobierno 2008, available at <http://www.elasoberano.com/component/content/article/3-ultimanoticias/51-elasoberanoes>. Governor Alejandro García Padilla has indicated that is the status definition of the General Assembly which he will propose for the plebiscite ballot. Rebeca Banuchi, Gobierno de Puerto Rico permitirá que los federales actúen sobre el status, *El Nuevo Día*, April 14, 2013.

tions that the decisive determination will rest first with the Attorney General and thereafter with the Congress.

Finally the President's plebiscite proposal should be compared with the recommendation of his 2011 Task Force: "The President should support, and the Congress enact, self-executing legislation that specifies in advance for the people of Puerto Rico a set of acceptable status options that the United States is politically committed to fulfilling."¹⁵⁷ It is a reasonable assumption that the President did not follow the Task Force recommendation because he concluded that there was no chance of it being adopted by the Congress. Nonetheless, in light of his statements of support for status self determination,¹⁵⁸ he felt obliged to take some action to show his good faith and which might at least move the status process forward. For the reasons given in my analysis of why prior efforts have failed to resolve the issue of political status, in my judgment it is very unlikely that the President's status expectations will be realized.¹⁵⁹

¹⁵⁷ Recommendation #7, *supra* nota 145.

¹⁵⁸ See, BBC News, *Barack Obama pledges support in rare Puerto Rico visit*, (Jun 14, 2011) available at <http://www.bbc.co.uk/news/world-us-canada-13766781>.

¹⁵⁹ See the analysis on status stasis, *supra* pp. 50-53.