

# THE DISTRIBUTION OF CONSTITUTIONAL AND STATUTORY POWERS BETWEEN PUERTO RICO AND THE UNITED STATES

## SEMINAR

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THE PURPOSE OF THIS SEMINAR IS TO DETERMINE WHETHER PUERTO RICO has sufficient legal powers to resolve effectively its manifold economic and social problems.<sup>1</sup> The hypothesis of the Seminar is that it does. To test the validity of the hypothesis, the student members of the Seminar have undertaken research projects to determine whether Puerto Rico under its present political status has sufficient legal powers to deal effectively with a range of critical economic and social problems. In addition to researching and assessing the viability of particular proposed innovative measures to promote economic growth, the Seminar articles which are being published in this number of the *Revista Jurídica* also include articles to promote a clear and realistic understanding to replace prevailing modes of thought which regularly subvert the capacity for affirmative analysis and remedial solutions. All being said, the Seminar produced six studies of publishable quality, five follow this introduction and one is en route to be published.<sup>2</sup> The question for the reader to decide is whether they serve to validate the Seminar's hypothesis that Puerto Rico has sufficient legal powers to solve its economic and social problems.

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<sup>1</sup> This is the fifth in a series of seminars which I have directed on important questions of law and policy that impact the quality of life of the People of Puerto Rico: The Right to Privacy, Narcotics and the Law, Problems of Delay in the Judicial Process, and Law and the Aged. In this fifth effort, the Seminar has had the good fortune to have as its Co-Director Professor Antonio García Padilla.

<sup>2</sup> The study yet to be published is written by Emiliano Trigo Fritz, a third year law student. Emiliano Trigo Fritz, *If You Build It, They Will Come: Creating a Latin American Financial Center in an American Overseas Territory* (May 30, 2010) (unpublished paper, University of Puerto Rico School of Law) (on file with author). In my opinion, it persuasively makes the case that Puerto Rico has all the legal power needed to establish a foreign and domestic financial center. Reference is made to the study, even before its publication, because it serves to illustrate how the Seminar encourages creative thinking in the field of public policies which can contribute to Puerto Rico's economic development.

## I. MULTIDIMENSIONAL ANALYSIS IN SUPPORT OF THE SEMINAR'S HYPOTHESIS

The primary premise on which the hypothesis depends for its validity is that only through multidimensional analysis can full understanding be achieved of the extent of Puerto Rico's legal powers and whether they are sufficient to solve its economic and social problems. This type of analysis requires taking into account all relevant factors. The starting point is the text of the relevant documents which include the Federal Constitution, Public Law 600, Public Law 447, the Federal-Puerto Rican Relations Act, the Constitution of Puerto Rico, the record of The Constituent Constitutional Assembly and all the pertinent federal and Puerto Rican Jurisprudence which serves to define the distribution of legal powers.

However, that is only the starting point of a multidimensional analysis. It is also essential to take into account such factors as historical context, economic trends, institutional developments, changing political attitudes, demographic trends, unwritten principles related to how formal textual federal powers have been consistently exercised, or even whether they are exercised at all, the role of powerful political and judicial actors and, most important of all, of overriding significance, is that the relations between the two governmental entities are not static but are subject to an evolving process.

The validity of the catalogue of the constituent elements of multidimensional analysis can only be appreciated when tested in the real world. This allows to determine how, over time, the scope of the legal powers of the Government of Puerto Rico has been exercised and concurrently the extent to which its power has been limited by the fundamental individual rights guaranteed by the Federal Constitution. Concrete examples best illustrate what is meant by multidimensional analysis. *Downes v. Bidwell* and its aftermath provide excellent exemplary material.<sup>3</sup> In that case, the Supreme Court, out of whole cloth, created the doctrine of Unincorporated Territory in which Justice White held that not all the provisions of the Federal Constitution are applicable to the Unincorporated Territory of Puerto Rico and one such inapplicable clause was the Constitutional requirement that all federal taxes and imposts be "uniform throughout the United States."<sup>4</sup> He therefore found constitutional the discriminatory impost in the Foraker Act on goods produced in Puerto Rico and entering the United States market, as well as goods from the United States, entering the Puerto Rican market: Congress had a free hand to discriminate in a way it lacked power to do in the case of goods shipped by boat from Florida to New York.

Left to be decided in the future was the question of which clauses of the Federal Constitution were applicable, and which inapplicable, when Congress

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<sup>3</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>4</sup> U.S. CONST. art. I, §8.

legislated for Puerto Rico. This troubled Justice Brown, who in his opinion stressed that Congress did not have unlimited power over the people of Puerto Rico and that federal legislation could not violate what he termed “certain natural rights enforced in the Constitution by prohibitions against interference with them. . . .”<sup>5</sup> He then went on to enumerate a number of the fundamental personal rights included in the Bill of Rights to illustrate his caveat that Congress did not have unlimited legislative power over the people of Puerto Rico.

*Downes* has continued to be cited as a valid precedent by the Supreme Court<sup>6</sup> and the doctrine of Unincorporated Territory survives to the present day, but what has been its changing significance over the more than one hundred years? The Supreme Court had authorized Congress to enact discriminatory taxes against the interests of Puerto Rico, but the power to discriminate actually includes three tax options: against, in favor, or equal treatment. Congress, in different contexts, has in fact chosen to adopt all three options. Thus, the negative discriminatory provision in the Foraker Act lasted less than one year. Thereafter, free trade has existed with no impost of any kind being levied on goods produced in Puerto Rico when entering the American market, and vice versa. This constitutes a prime example of the equal treatment option which, after more than one hundred years, it’s fair to characterize as permanent. It is not free trade as it might exist under a treaty between nations, but rather that Puerto Rico has the same free access to the national economy which all the states have and their economic actors in turn have free access to Puerto Rico’s market. This free access became permanent when it was effectively and fully integrated into the national economy and the Congress established the consistent policy of covering it under almost all national regulatory legislation.

The discriminatory option favoring Puerto Rico was adopted by Congress in 1917 in Section 9 of the Jones Act. This section provides that with the exception of particular statutes, which it determines will be inapplicable, “[t]he 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 . . .*”<sup>7</sup> In the same section there is a second discrimination enacted to favor Puerto Rico: “hereafter all taxes collected under the internal revenue laws of the United States on articles produced in Puerto Rico and transported to the United States . . . shall be covered into the Treasury of Puerto Rico.”<sup>8</sup> Concretely this has meant that the federal tax on Puerto Rican rum entering the American market is returned to be utilized by the Government of Puerto Rico, which is clearly not the case of whiskey produced in Kentucky.

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<sup>5</sup> *Downes*, 182 U.S. at 282.

<sup>6</sup> See *Harris v. Rosario*, 446 U.S. 651 (1980); *Califano v. Torres*, 435 U.S. 1 (1978).

<sup>7</sup> Jones Act, ch. 145 § 9, 39 Stat. 951, 954 (1917) (current version Puerto Rico Federal Relations Act § 9, 48 U.S.C. § 734 (2006)) (emphasis added).

<sup>8</sup> *Id.*

The consequences of these two favorable discriminatory federal tax policies have been to enhance the power of the Government of Puerto Rico to generate tax revenues at rates far higher than is fiscally feasible in the case of a state and, to create tax policies that promote economic development more effectively than is within the options open to a state. When a state enacts its tax laws, it must take into account what its taxpayers are obliged to pay under the federal income tax law. That is a consideration which Puerto Rican legislators do not have to take into account when taxing its own citizens.<sup>9</sup> They have a range of discretionary tax power which extends from imposing higher rates than is open to a state to a variety of tax benefits and exemptions to promote economic development which is not within the constitutional power of a state to grant. To what extent has the Government of Puerto Rico exploited its greater autonomy to adopt tax policies which promote sustainable economic growth? That is one of the critical questions on the agenda of the Seminar. Two of the Seminar's studies deal directly with this question and demonstrates how much more can be accomplished in favor of Puerto Rico than has been true in the past.<sup>10</sup>

The doctrine of Unincorporated Territory lives on in terms of the inapplicability of the constitutional clause which requires uniformity of federal taxation throughout the United States. As implemented originally it disfavored Puerto Rico. As implemented since passage of the Jones Act it has favored Puerto Rico in terms of how its autonomy over taxes enhances the effective exercise of its legal powers to a greater extent than a state of the Union.

Two questions on this theme remain to be addressed both of which can be answered summarily. First, what is the life expectancy of the inapplicability of the Uniformity Clause? The short answer is that it should last as long as there is no fundamental change in Puerto Rico's political status and how long that may be, neither myself nor any of the students in the Seminar may have a way of predicting the answer.

Second, outside of the Uniformity Clause, is there any other clause in the Federal Constitution which has been, or is likely to be considered inapplicable to Puerto Rico in ways which can have the capacity to impact negatively on the effectiveness of its legal powers? In my opinion, there is only one: the discretionary power which the Congress has to discriminate in the allotment of federal funds to Puerto Rico, as determined by the Supreme Court in the *Califano* and *Harris* cases.<sup>11</sup> But capacity does not tell the entire story. What has been the

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<sup>9</sup> This is not entirely the case. For example, federal employees in Puerto Rico are required to comply with federal income tax laws.

<sup>10</sup> See Carlos R. Baralt Suárez, *Promoting Knowledge-Based Economy Activities Through Personal Income Tax Incentives*, 80 REV. JUR UPR 583 (2011); Trigo Fritz, *supra* note 2.

<sup>11</sup> *Harris*, 446 U.S. 651; *Califano*, 435 U.S. 1. In both cases, the Court held that to pass constitutional muster it was sufficient that Congress had a *rational basis* to discriminate in the allocation of funds to Puerto Rico. It would have been closer to the truth of the matter if the Court had simply said that it was a matter of Congressional discretionary authority.

trend since *Califano* and *Harris*? In how many federal programs involving allocation of federal funds has the principle of equal treatment for Puerto Rico been followed? In how many has it not been followed and with what consequences? These questions, among others, involving federal funds, are addressed in the article by Alexis Tejada Marte.<sup>12</sup>

*Unincorporated Territory* is one of a number of terms and expressions that tend to dominate discourse on the distribution of powers which results in the common failure to understand the full picture and its salient elements. *Incorporated* is the most salient term to describe how Puerto Rico fits within the network of federal economic regulations and federal social, educational and medical policies. Almost all of which are applicable to the Commonwealth.<sup>13</sup> *Incorporated* is also the most accurate descriptive term to apply to how Congress through Public Law 600 and by statute has made applicable to Puerto Rico the principles in Article IV of the Federal Constitution, which serve to promote comity in the interrelations of the states and their respective citizens. So it is that the new constitutional government of Puerto Rico was required to be “republican” in nature, the interstate privileges and immunities of citizens of the United States “shall be respected to the same extent as though Puerto Rico were a State of the Union”, and to fully enforce the interstate principles of full faith and credit and extradition.<sup>14</sup> A third example of incorporation is the limitation on Puerto Rico’s power to tax goods entering its market in Section 3 of the Relations Act: “Provided, [t]hat no discrimination be made between the articles imported from the United States or foreign countries and similar articles produced or manufactured in Puerto Rico.”<sup>15</sup>

With respect to the applicability of federal fundamental individual rights and the scope of federal and state power to govern their respective jurisdictions, in the case of Puerto Rico the appropriate descriptive term is not incorporation

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<sup>12</sup> Alexis Zabdiel Tejada Marte, *Los fondos federales en Puerto Rico: un affair con los Estados Unidos*, 80 REV. JUR. UPR 493 (2011).

<sup>13</sup> Section 9 of the Relations Act states that the Congress may determine when a federal law is to be considered *locally inapplicable*, but this has almost become a dead letter. The overwhelming tendency has been for the Congress to cover Puerto Rico to the same extent as in the case of State of the Union. That summarizes the legislative record over the past 50 years. 48 U.S.C. § 734.

<sup>14</sup> Republican form of government and a Bill of Rights were the conditions for approval textually identified by the Congress in Public Law 600. Pub. L. No. 81-600, 64 Stat. 314 (1950) (codified in scattered sections of 48 U.S.C.) Interstate Privileges and Immunities was first a federal statute and later incorporated in Section 2 of the Federal Relations Act, 48 U.S.C. § 737, while Full Faith and Credit, 28 U.S.C. § 1738 (2006), and Interstate Extradition, 18 U.S.C. § 3182 (2006), principles are to be found in federal statutes. Both statutes have been in force for so many years that they should be considered established federal policy.

<sup>15</sup> 48 U.S.C. § 741a. This limitation on Puerto Rico’s taxing power simply enunciates one of the types of discrimination which is prohibited to state governments by the precedents which make up the doctrine of The Dormant Commerce Clause. For a case in which the doctrine was applied to a Puerto Rican tax measure, see *Trailer Marine Transport Corp. v. Rivera Vázquez*, 977 F.2d 1 (1st Cir. 1992).

but rather integration. Mention was made earlier of the two conditions for approving the Constitution of Puerto Rico: Republican Form of Government and a Bill of Rights. The third condition required that the Puerto Rican Constitution “conforms with the applicable provisions with this Act and of the Constitution of the United States.”<sup>16</sup> Thus all Puerto Rican officials at a certain level, the Governor and other high ranking executive officials, the elected members of the Legislative Assembly and all appointed judges, prior to entering their respective offices, take the oath to uphold the Constitution of the United States.<sup>17</sup>

In a series of decisions beginning in 1974, the Supreme Court has made clear that the fundamental personal rights guaranteed in the Federal Constitution are applicable to Puerto Rico to the same extent as limits the exercise of power by the states.<sup>18</sup> This means that if a state can adopt a particular course of action without violating the fundamental personal rights of the Federal Constitution, Puerto Rico can so act and, of course, vice versa. The scope of Puerto Rico’s governmental powers *vis à vis* federal fundamental personal rights is a two-sided coin: on one side are the guaranteed personal rights and on the other, restrictions on the powers of the government. Why federally guaranteed personal rights take precedence over conflicting state or Puerto Rican governmental actions, follows from the Supremacy Clause in Article VI of the Federal Constitution.

The Supremacy Clause also binds state and Puerto Rican actions outside the sphere of individual personal rights. For example, in matters of economic regulations that conflict with federal statutes. The applicability of the Supremacy Clause has been explicitly recognized by the Supreme Court with respect to a Puerto Rican statutory economic regulation.<sup>19</sup> What is significant in terms of distribution of powers is how the federal courts have acted, in the first instance in the jurisprudence of the United States Court of Appeals for the First Circuit, followed by supporting confirmation by the Federal Supreme Court. The net result has been to accord Puerto Rico the same authority and limitations over its internal governmental affairs as a state of the Union.<sup>20</sup> But the scope of this au-

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<sup>16</sup> 64 Stat. 314 (codified in scattered sections 48 U.S.C.).

<sup>17</sup> See P.R. CONST. art. VI, § 16.

<sup>18</sup> That is the essential significance of such cases as *Puerto Rico v. Branstad*, 483 U.S. 219 (1987); *Torres v. Puerto Rico*, 442 U.S. 465 (1979); *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The holding in the first case is based on a federal statute, but the statute has its roots in Article IV, Section 2 of the Constitution. U.S. CONST art. IV, § 2.

<sup>19</sup> See *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988).

<sup>20</sup> Consider, for example, *Trailer Marine Transport Corp. v. Rivera Vázquez*, 977 F.2d 1 (1st Cir. 1992) (Judge Boudin stating that “Puerto Rico is subject to the constraints of the dormant Commerce Clause in the same fashion as the states.”); *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987), (Judge Bownes holding that “[t]he offenses for which appellants were prosecuted in superior court were against the Commonwealth, which for double jeopardy purposes is treated as a state. Therefore the fifth amendment did not prohibit the federal prosecution.”); *United States v. Quiñones*, 758 F.2d

thority, plus the tax autonomy advantage Puerto Rico enjoys, does not tell the full story.

As emphasized earlier, multidimensional analysis of the distribution of powers between Puerto Rico and the United States requires that more be taken into account than the formal constitutional text, statutes and jurisprudential principles. Mention has been made earlier concerning unwritten practices which have all the force of long enduring principles and which can be counted as the equivalent of reliable judicial precedents. Thus, the Territorial Clause in Article IV of the Constitution is always characterized as granting plenary power to the Congress, yet it is well understood that Congress will not use its Territorial power to revoke any law enacted by the Puerto Rican Legislature. In fact Congress has abstained from so acting both before and after the establishment of Commonwealth status. Over one hundred years of consistent abstention represents a reliable though unwritten principle, the equivalent of a rock solid precedent. On the other hand, on the question of the source of Congress' power to legislate for Puerto Rico, reference is now usually made to Section 9 of the Relations Act, or at times to the Commerce Clause, and hardly ever to the Territorial Clause.

A number of additional examples illustrate the multidimensional analysis which is required for full understanding of how the distribution of powers functions in the real world. Consider, for example, the Constitutional power of the President to appoint federal judges and officials. Prior to 1952, the President regularly appointed judges who came from the mainland. After that date, all of them have been Puerto Rican attorneys. How the appointing process works is not to be found in any written text, but it clearly reflects a wise political judgment that will almost certainly continue to be followed. Although not with the same degree of consistency, but clearly reflecting a dominant trend, the same process can be seen functioning in the appointment of Puerto Ricans to direct the offices of federal agencies on the Island.

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40 (1st Cir. 1985) (Judge Bownes holding that "in 1952 Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided in the Federal Constitution. The authority exercised by the federal government emanated thereafter from the compact itself." It also states that "[w]hile the creation of the Commonwealth granted Puerto Rico authority over its own local affairs, Congress maintains similar powers over Puerto Rico as it possess over the federal states."); *Mora v. Mejías*, 206 F.2d 377 (1st Cir. 1953) (Judge Magruder holding that "the Commonwealth of Puerto Rico is to be deemed a 'State' within the meaning of [28 USC § 2281] . . .", dealing with the conditions that call for a three judge court); *Córdova & Simonpietri Ins. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981) (Judge Breyer holding that the Sherman Act no longer applied with intra territorial effect in Puerto Rico after the initiation of Commonwealth status, but rather with the same effect as applied to a state). The Supreme Court adopted years later the rationale of some of the cases mentioned before. For example, in *Calero-Toledo*, 416 U.S. 663, the Supreme Court embraced Judge Magruder's holding in *Mora*, while the scope of the Commonwealth's powers was very succinctly enunciated in *Flores de Otero*, 426 U.S. 572, where the court stated that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy normally associated with States of the Union", and as well, to assure that it would be bound by the limitations on its powers by the same fundamental individual rights which are binding on the states.

This brings us to the question of *language* as it affects the distribution of power. The struggle over which language would be dominant in Puerto Rico was a long one, but in the end Spanish has largely prevailed. Section 42 of the Federal Relations Act, repeating the words in the Jones Act, states that “[a]ll pleadings and proceedings in the District Court of the United States for Puerto Rico shall be conducted in English language.”<sup>21</sup> However, since 1952 the reality is more complex than the text of Section 42 implies. The reality is that almost all oral communication between judges, their staff, employees of the Court, attorneys who practice in the District Court and the public in general are in Spanish, assuming that they are Puerto Rican in origin, with the exception of Court proceedings which are required to be in English. The same requirement applies to the documents that constitute the written record. A visit to any of the federal agencies or services will confirm the same model: oral communication in Spanish, and the use of English in all official written records.

The combination of the appointment and employment of Puerto Ricans to federal positions and the readiness to accommodate to the Spanish language has served to establish an amicable functioning of the distribution of powers between the two jurisdictions, and one of mutual respect, even as the balance changes over time. It also serves to promote a fully incorporation of Puerto Rico into the national system of law and government.

Contributing to that same end, more palpably and powerfully, has been the combination of demographics and the role of political parties. Neither of these two influences is to be found in the text of any official legal document, yet their impact on the distribution of powers, in terms of enhancing Puerto Rico’s power, is plain enough for those with eyes to see the reality of the changing balance of power. Today, more than half the people of Puerto Rican origin reside in different areas of the mainland United States. They have elected three Congressional Representatives who not only serve their interests, but who also consider part of their responsibilities to serve the interests of Puerto Rico. In addition, in several states there is a population of Puerto Rican origin of sufficient strength to cause their Senators to support legislative decisions that favor Puerto Rico.

To that should be added the influence of the Hispanic population in the United States, an influence which continues to grow as its numbers increase and the influence of the Hispanic Caucus in which Puerto Rico’s interests are fully recognized and promoted both in the Congress and most especially within the Democratic Party. There have been, of course, Puerto Rican political leaders who have been active members and leaders within the Republican Party, as it has functioned here and on the mainland, and who have had varying degrees of influence affecting Puerto Rican interests. A precise and comprehensive analysis of the power which has accrued to Puerto Rico through the participation of its political leaders in both national political parties does not exist, at least not in the form of a public publication. Nonetheless, there can be no doubt that over time

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21 Puerto Rico Federal Relations Act § 42, 48 U.S.C. § 864 (2006).



the power of Puerto Rico to influence national policies in its favor has grown and that tendency has been abetted through participation in political party process.

The most tangible proof of the truth of that conclusion is to be found in the flow of federal funds directly to underwrite the administration of the Government of Puerto Rico<sup>22</sup> and to make economically viable a whole range of federal entitlement programs, in both instances with growing impact.<sup>23</sup> Both types of programs not only are powerful forces in the process of incorporation, but also are the type of ties which have a binding and stabilizing effect on the relations resulting from the ongoing functioning of the distribution of powers. That effect gathers strength over time. Consider for example, the impact of the increasing proportion of the population of retirement age and its reliance on Social Security, Medicare, Drug Benefits and Medicaid, as that reliance serves to stabilize relations between Puerto Rico and the United States.<sup>24</sup>

## II. PREVAILING MINDSETS

The mindset which prevails in the Seminar is that the most insightful understanding of the distribution of powers between Puerto Rico and the United States can be achieved through a multidimensional analysis. That is not the mindset that prevails outside the confines of the Seminar.<sup>25</sup> The contrary is the case. The mindsets that are revealed in the positions adopted by the spokesman and writers on behalf of the conflicting proponents in the ideological debate on political status and related themes are almost always unidimensional, that is, each favored status position almost entirely stresses facts and arguments which supports its position and simply ignores facts or arguments which might weaken reaching its preferred goal. In their publications there is not to be found acceptance of two basic findings of the Seminar: that Puerto Rico has the same powers over its internal affairs as a State of the Union and that the extent of

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<sup>22</sup> Twenty per cent (20%) of the Government's budget for fiscal year 2009-2010 came from federal funding and an additional seven per cent (7%) from the American Recovery and Reinvestment Act. See OFICINA DE GERENCIA Y PRESUPUESTO, RESUMEN DEL PRESUPUESTO: RECURSOS CONSOLIDADOS DEL GOBIERNO DE PUERTO RICO (2009), available at [http://www.presupuesto.gobierno.pr/PresupuestosAnteriores/af2009\\_2010/Tomo\\_1/resumenpresupuesto/I\\_Recurso\\_Consolidados\\_AF2010\\_Final.pdf](http://www.presupuesto.gobierno.pr/PresupuestosAnteriores/af2009_2010/Tomo_1/resumenpresupuesto/I_Recurso_Consolidados_AF2010_Final.pdf).

<sup>23</sup> Tejada Marte, *supra* note 12.

<sup>24</sup> For an analysis of how these three federal programs function, plus the implementation of ERISA, see Luz C. Molinelli González, *Is Our Healthcare System Good Enough to Take Care of Our Elderly? An Epidemiological and Legal Approach to Aging and the Benefits of Social Security, Medicare, Medicaid, and ERISA in Puerto Rico*, 79 REV. JUR. UPR 125 (2010).

<sup>25</sup> I know of no multidimensional analysis on the distribution of powers between Puerto Rico and the United States, outside of my presentation to the First Circuit Judicial Conference more than twenty-five years ago. See 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).

those powers is sufficient for it to effectively resolve most of its manifold economic and social problems.

That is evident in the positions adopted by the three principal political parties on what is required for Puerto Rico to achieve fully the goals which each party espouses. So it is that for the New Progressive Party only statehood and full political incorporation of Puerto Rico into the United States, resulting in voting for the President and electing two senators and six representatives to the Congress, can assure full political dignity, equality of political rights, the security associated with the status of becoming a permanent State of the Union and, consequently, the capacity to resolve the Island's economic problems.

For the Independence Party of Puerto Rico there is only one option: in order to solve its innumerable problems, Puerto Rico must secure complete independence from the United States by acquiring full sovereignty and by establishing the Republic of Puerto Rico. The Party's message since its founding has been consistent: the failure of Puerto Rico to cope effectively with its economic and social problems has its root cause in the limited governmental powers which it can exercise as a consequence of its colonial relationship with the United States. As in the case of the statehood party, its message has no space for facts or arguments which might have a weakening effect. Both the statehood and independence messages are powerfully persuasive, but only to their respective adherents.

In the case of the Popular Democratic Party, the party responsible for the creation of the existing status of *Estado Libre Asociado*, the situation is more complicated. There is unity among its leaders in terms of the dissatisfaction with the way in which the distribution of powers has worked out in practice, but there is one wing of the Party which is more forceful in insisting that Puerto Rico must acquire greater autonomy to deal effectively with its problems. It is not clear what precise changes are being advocated. At the heart of the dissatisfaction is the generic consent given by the People of Puerto Rico in Section 9 of the Relations Act, consent to the unilateral power of Congress to include Puerto Rico in national legislation, without affording Puerto Rico any say in the matter.<sup>26</sup> Aggravating the dissatisfaction is the fact that all efforts to move the Congress to consider and adopt modifications in the terms of Section 9 have failed. The net result is a deep sense of frustration.

That sense of frustration permeates the entire discourse on political status. A recent example is the book published by Ángel Collado Schwarz: *Successful Sovereignities: Six Models for the Economic Development of Puerto Rico*.<sup>27</sup> The thesis of the book is that Puerto Rico can develop the type of economy needed for a successful development if it has the sovereign powers which are lacking under the present distribution of powers with the United States. He illustrates his thesis with the examples of six nations which he considers significantly comparable

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<sup>26</sup> 48 U.S.C. § 734.

<sup>27</sup> ÁNGEL COLLADO SCHWARZ, *SOBERANÍAS EXITOSAS: SEIS MODELOS PARA EL DESARROLLO ECONÓMICO DE PUERTO RICO* (2009).

to Puerto Rico with respect to certain key factors and whose successes he concludes can be duplicated, only if it can acquire sovereign power. The book's message has also been used as the basis for launching a new political party which is in the process of satisfying the Electoral Law's requirements for being included on the ballot for the elections to be held in 2012. One of the Seminar's articles undertakes a thorough evaluation of the book's thesis.<sup>28</sup>

All of the mindsets thus far considered share one common trait: each one tends to inhibit efforts to design programs and projects to promote economic development on the ground that they are fated to fail because of the lack of effective powers of implementation. The same type of thinking is used to explain and excuse projects which fail. Collectively, the separate strands of this negative thinking tend to undermine the self-confidence of the society's most creative minds because it breeds a sense of powerlessness. A final example is that it is commonly said as an obvious and indisputable truth that the Resident Commissioner cannot vote on laws approved in the Congress and that he is therefore ineffectual in his efforts to promote Puerto Rico's interests. Whether the common understanding of the ineffectiveness of the Resident Commissioner accurately reflects the historical record of the performance of the office, is systematically considered in the Seminar's paper by Bárbara M. Sabat Lafontaine.<sup>29</sup>

### III. THE SEMINAR'S RECORD OF PERFORMANCE

In my opinion, the five articles thus far published, plus Trigo Fritz' study on the feasibility of a Latin American Financial Center, demonstrate the soundness of multidimensional analysis in terms of achieving comprehensive understanding of particular components of the ongoing functioning of the distribution of powers between the United States and Puerto Rico. Two of the articles unquestionably expose the errors in the usual mindsets in the discourse related to the functioning of the distribution of powers. Two articles dealing with ongoing governmental programs serve to confirm the Seminar's thesis that Puerto Rico has all the powers of a state to govern its internal affairs and two others demonstrate convincingly how those powers can be fully exercised to create innovative solutions to promote Puerto Rico's economy.

Clarity of thinking, in my view, deserves priority and therefore let us consider first how Juan Pablo Carro's article demolishes as untrue Ángel Collado Schwarz' thesis that acquiring sovereignty is the indispensable key for Puerto Rico to effectively create the kind of economy to compete successfully in the

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<sup>28</sup> See Juan Pablo Carro, *Deconstructing Sovereignty: the Validity of the Status-Driven Mindset as Seen through Sobernías exitosas: seis modelos para el desarrollo económico de Puerto Rico* by Ángel Collado Schwarz, 80 REV. JUR. UPR 439 (2011).

<sup>29</sup> Bárbara M. Sabat Lafontaine, *Washington Politics Puerto Rican Style: the Role of the Resident Commissioner in USA-Puerto Rico Relations*, 80 REV. JUR. UPR 461 (2011).

global marketplace.<sup>30</sup> His thesis relies on the successful record of six countries – Singapore, New Zealand, Israel, Ireland, Slovenia and Estonia– all of which have sovereignty, have elements in their makeup comparable to Puerto Rico and who have fashioned greater successful economic policies traceable to their sovereign powers which he asserts that are not viable for Puerto Rico because of its lack of sovereignty. Carro analyzes the economic policies of each of the six countries and demonstrates that in the case of most of those policies Puerto Rico has the power to emulate them without having sovereignty.

Of equal significance, he underscores critically important factors contributing to the success of these countries such as the quality of their political leaders, the readiness to realistically confront serious problems and to seek solutions through national consensus. The most obvious point of all is that sovereignty is no universal panacea: consider how the overwhelming number of sovereign nations in the world is living under economic and social conditions far inferior to those enjoyed by the people of Puerto Rico. It should also be noted that Ireland's sovereignty did not ensure it against the bad judgment of its leaders which has resulted in its present disastrous economic condition.

The value of clear understanding is also well served in Sabat Lafontaine's article on the effectiveness of the office of the Resident Commissioner as the representative of the people of Puerto Rico.<sup>31</sup> The conventional opinion disparages his effectiveness because he lacks the power to vote on the laws approved or rejected by the Congress. But what does the historical record show? Her article demonstrates convincingly through the record over the past twenty years that Resident Commissioners have been able to wield appreciable influence in the day-to-day functioning of the Congress and to obtain for Puerto Rico a significant degree of fairness in attending to its economic and social interests. The most impressive recent instance was how Resident Commissioner Pierluisi was able to gain access to President Obama in a meeting held with the Hispanic Caucus in which he convinced the President to include Puerto Rico in the coverage of the new Federal Health Act. In contrast, all legislative proposals that have been sponsored by the Resident Commissioners to politically change the present Commonwealth status have failed.<sup>32</sup> As has been stated in other contexts, the extent of the effectiveness of the Resident Commissioner cannot be realistically appreciated, in the context of the distribution of powers, by reliance solely on the textual analysis of official documents.

In a brief space, Tejeda Marte's article contributes to a comprehensive understanding of how over time federal funds have impacted the actual functioning of the distribution of powers and with what blend of positive, negative and ques-

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30 Carro, *supra* note 28.

31 Sabat Lafontaine, *supra* note 29.

32 *Id.*

tionable effects.<sup>33</sup> Especially informative and insightful is his treatment of the following themes: the classification of federal funding, the historical record, unequal treatment in the assignment of funds in certain programs, the tendencies over time, the magnitude and importance of federal funds to Puerto Rico, the roles played by the Resident Commissioner, the Puerto Rico Federal Affairs Administration and the Planning Board, how federal funding functions in a sample of social welfare programs, how some of the latter programs may serve as disincentives to seek and accept employment opportunities, and how federal funding, since it almost always is accompanied by conditions, impacts how Puerto Rican agencies carry out their mission, a process which Tejeda Marte characterized as *cooperative federalism*.<sup>34</sup>

From the perspective of the Seminar, two of these themes are of special interest. First, there is what Tejeda Marte denominates as *cooperative federalism*. In my opinion the term *cooperative* does not fully convey the process and outcome of the process. As I see it, the dominant party in awarding the funds is almost always the federal agency and the Puerto Rico recipient agency has little or no negotiating influence with regard to the conditions which must be implemented. The heart of the matter, and this is fully appreciated by Tejeda Marte, is whether the federal conditions are compatible with resolving the particular problems of Puerto Rico. It is easy to say yes when federal funds make possible the more effective solution of a local problem. When the contrary is the case, it takes clear-eyed judgment and firmness of character to say: no thank you.

Having acknowledged that problem, in no way it detracts from the overall significance of the second theme: that the growing magnitude of federal funding has resulted in the full-fledged incorporation of Puerto Rico into the federal legal system. In my view, the statistics are simply awesome: from all sources, the Island received \$434.4 million in 1965; by 1991 the amount had grown to \$8.14 billion and in 2008 it had reached \$17.95 billion and to the latter figure there should be added \$6.3 billion in a grant under the American Recovery and Reinvestment Act.<sup>35</sup>

In many discussions on federal funding, there is a tendency to refer to them in pejorative terms. The funds are characterized as creating an undesirable dependency on the part of both of the government and the people and, therefore, to the weakening of their moral fiber to resolve their problems without outside assistance. Fortunately, that type of thinking does not prevent either government officials or citizen beneficiaries from accepting federal monies, although it may have the undesirable and needless effects of creating guilt feelings and bad conscience.

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33 Tejeda Marte, *supra* 12.

34 *Id.*

35 For Tejeda Marte's analysis of the statistics, see *id.*

The question addressed in the article authored by Tzeitel Andino Caballero<sup>36</sup> is how the policy for public education should be shaped in Puerto Rico to successfully compete in the modern world marketplace. First, she demonstrates that Puerto Rico had all the legal powers necessary to create a system of public education capable of preparing the type of employees which were predominately needed for the manufacturing jobs during the period 1950-1975: unskilled positions which required a modicum of literacy. Her article then sets out the kind of educational policy which the government has to establish for Puerto Rico if it is to compete effectively in the world's present and foreseeable economy. Her recommendations for the required educational policy are reduced to seven points. The first four are:

- (1) reforms in the curriculum to develop the skills which are required by the knowledge economy, including literacy, mathematics and foreign languages; (2) standardized tests to measure the efficacy of implementation; (3) increase the number of middle schools and high schools; and (4) expand the physical capacity of public university education so that it can receive the needed number of qualified high school applicants.<sup>37</sup>

The fifth recommendation is a program to attract and prepare highly competent teachers and to reward them with salaries commensurate with their competence. The sixth is the availability of economic support from Puerto Rico's budgetary resources in combination with the availability of federal funds. And the seventh is the feasibility of negotiating acceptable conditions, in terms of Puerto Rico's needs, with the federal Department of Education.

Andino's article demonstrates conclusively that each of the seven points required to make the needed changes in public educational policy can be implemented within Puerto Rico's existing legal powers. That was the case in the 1950's and it is equally the case at this time. In so doing, her article serves to validate the Seminar's hypothesis: with its present powers Puerto Rico has the legal capacity to solve most of its economic and social problems.

One of the principal purposes of the Seminar is to promote creative thinking in the search for ideas to promote sustained economic development. The article by Carlos R. Baralt Suárez, *Promoting Knowledge-Based Activities Through Personal Income Tax Incentives*, fully achieves that purpose.<sup>38</sup> He demonstrates the necessity of creating the educational system required to achieve a knowledge-based economy which in turn will make feasible research ideas, innovation and technological creativity. The environment in which those goals can be realized is through his proposal for the creation of *The Puerto Rican Knowledge Corridor* as

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<sup>36</sup> Tzeitel Andino Caballero, *Innovando una Educación Cincuentona*, 80 REV. JUR. UPR 529 (2011) (loosely translated, the title of the article would read: *Innovating the Education Established in the Nineteen Fifties*).

<sup>37</sup> *Id.* at 575-76 (translation supplied).

<sup>38</sup> Baralt Suárez, *supra* note 10.

the instrument for making viable the promise of the Puerto Rico Science, Technology, and Research Trust Act of 2004.<sup>39</sup>

To achieve full viability, Baralt Suárez lists out a series of measures that could be implemented, the most important of which is to use Puerto Rico's control over tax policy to offer complete exemption from personal income taxation to persons capable of making substantial contributions to research and development, who will carry on their work within a cluster of like-minded professionals. And to demonstrate that his proposed solution is doable, he looks to the experience of successful stateside undertakings in this field and shows how Puerto Rico can offer more advantageous conditions through its possession of greater tax autonomy. In the process, Baralt Suárez validates one of the Seminar's basic principles: if a state has the legal power to do it, Puerto Rico has similar power to do it and if recourse to its greater tax autonomy would be appropriate, Puerto Rico's program can be designed to successfully achieve it.<sup>40</sup>

The final article to be considered, *Creating a Latin American Financial Center in an American Overseas Territory*, authored by Emiliano Trigo Fritz,<sup>41</sup> also serves to validate the Seminar's hypothesis that Puerto Rico has sufficient legal powers to undertake innovative projects to promote economic development. The heart of the challenge are the actions which must be taken to fully implement the potential for creating an International Banking Entity, as authorized in the International Banking Center Regulatory Act.<sup>42</sup> Once again it is clear that legal power is simply the starting point. For this particular law, as in the case of Baralt Suarez' policy proposals, full implementation requires the development of a supporting institutional structure in combination with the adoption of the necessary tax incentives. Trigo Fritz recognizes that this project is somewhat more complicated because its implementation also requires a number of cooperative measures by the federal authorities, but argues persuasively that the necessary cooperation can be achieved.

Trigo Fritz' article serves as the prototype for studies which Seminar members may undertake in future semesters to determine the viability of other projects which have the potential for establishing centers in Puerto Rico that can offer international services to nations in area of the Caribbean. I close with recognition of the importance to the work of the Seminar of the recently pub-

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<sup>39</sup> Puerto Rico Science, Technology, and Research Trust Act, Pub. L. No. 214, P.R. LAWS ANN. tit. 23, §§ 695-695i (2006 & Supp. 2010).

<sup>40</sup> To demonstrate that its tax incentives can be more attractive, Baralt Suárez contrasts Puerto Rico's clear cut tax advantages over the federal income tax research scientists have to pay, even if they are exempted from having to pay state income taxes, in the case of four states with tax policies favoring R & D: New Jersey, California, North Carolina and Massachusetts. See Baralt Suárez, *supra* note 10.

<sup>41</sup> Trigo Fritz, *supra* note 2.

<sup>42</sup> International Banking Center Act, Pub. L. No. 52, P.R. LAWS ANN. tit. 7 §§ 232-232x (2006 & Supp. 2010).

lished REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS.<sup>43</sup> The sections dealing with recommendations for achieving more efficacious governmental interrelations and building competitive industries, serve to expand substantially the agenda of the Seminar's future studies.

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<sup>43</sup> CECILIA MUÑOZ ET AL., PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS (2011), *available at* <http://www.senadopr.us/Comunicados%20de%20Prensa/REPORTE%20PR%20TASK%20FORCE%20MARCH%202011.pdf>.