COMMONWEALTH STATUS AND THE FEDERAL COURTS

ARTICLE

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INTRODUCTION

SINCE 1952, COMMONWEALTH STATUS HAS BEEN THE CONSTITUTIONAL ARrangement governing the relationship between the United States and the people of Puerto Rico. Under the Constitution, the Judicial branch is the one entrusted by Article III to interpret the Constitution, laws, and treaties of the United States.[1] It is, therefore, important to review the courts' interpretation of the Commonwealth status in order to determine its history, nature, and future.

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1 In City of Boerne v. Flores, 521 U.S. 507 (1997), the Supreme Court reviewed the Judiciary's role in interpreting the Constitution. It essentially held that:

> Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. [Religious Freedom Restoration Act of 1993] was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.

Id. at 535-36. *See also* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 50 (1988) ("if Congress does not purport to alter the governing procedural and substantive law, Congress cannot force its interpretation of that law upon the federal courts in particular cases").

I. LEGISLATIVE BACKGROUND

Puerto Rico has a unique status within the American federal system.[2] The island first came under United States sovereignty through the 1898 Treaty of Paris, which ended the Spanish-American War. The initial U.S. military government established in 1898 evolved into a civilian government after the passage of the Foraker Act in 1900.[3] This involved limited democratic mechanisms and, until 1948, a governor appointed by the President. The Supreme Court constructed the judicial framework for Puerto Rico's initial relationship with the United States in a series of cases decided between 1900 and the 1920's collectively referred to as the Insular Cases.[4] These cases analyzed which constitutional rights applied to newly acquired territories; in other words, the degree to which the Constitution followed the flag. With the exception of *Balzac*, most of the cases focused on economic matters, and not civil rights. However, the Insular Cases did set forth a system distinguishing the rights and privileges conferred to United States citizens in Puerto Rico from those in the States, under the theory that Puerto Rico, along with the Philippines and Guam, was an *unincorporated territory*.[5] This unique relationship continued even after the Jones Act granted United States citizenship to all citizens of Puerto Rico in 1917.[6] In the wake of the Insular Cases, Puerto Rico was considered an unincorporated territory subject to the plenary power of Congress.[7]

The legislative history of the relationship between Puerto Rico and the United States leading up to the establishment of the Commonwealth on July 25, 1952, has been recounted on numerous occasions,[8] and thus there is no need to rehash

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2 "We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history . . . ." Examining Bd. v. Flores de Otero, 426 U.S. 572, 594 (1976).

3 Foraker Act, ch. 191, 31 Stat. 77-86 (1900).

4 *Cf.* Balzac v. Porto Rico, 258 U.S. 298 (1922); Dorr v. United States, 195 U.S. 138 (1904); Downes v. Bidwell, 182 U.S. 244 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901). In Torres v. Puerto Rico, 442 U.S. 465, 475-76 (1979), Justice Brennan (concurring) suggests that the Insular Cases represent the views of an earlier age.

5 *Balzac*, 258 U.S. at 305.

6 Jones Act, ch. 145, 39 Stat. 951-968 (1917) (current version Puerto Rico Federal Relations Act, 48 U.S.C. §§ 732-876 (2003)). *See also Balzac*, 258 U.S. at 305-08.

7 For a review of the *Insular Cases* which created the status of *unincorporated territory*, see Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. UPR 225 (1996); *see also* Juan A. Torruella, *The Insular Cases, The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283 (2007).

8 *See, e.g.,* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 671-74 (1974); U.S. v. López-Andino, 831 F.2d 1164, 1168 (1st Cir. 1987); U.S. v. Quiñones, 758 F.2d 40, 41-42 (1st Cir. 1985); Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 39-41 (1st Cir. 1981); Moreno Rios v. United States, 256 F.2d 68, 69-70 (1st Cir. 1958); Figueroa v. Puerto Rico, 232 F.2d 615, 617 (1st Cir. 1956); Mora v. Mejías, 115 F. Supp. 610 (D.P.R. 1953).

it here.[9] Still, a few facts are worth reiterating. On July 3, 1950, Congress, "[f]ully recognizing the principle of government by consent," adopted Public Law 600, "in the nature of a compact," to empower the people of Puerto Rico to organize "a government pursuant to a constitution of their own adoption."[10] In accordance with its terms, Public Law 600 was submitted to, and accepted by, the people of Puerto Rico in a referendum held on June 4, 1951,[11] upon which a constitutional convention was called by the Legislature of Puerto Rico to draft a constitution.[12] A constitution was adopted by the people of Puerto Rico in a referendum held on March 3, 1952,[13] and subsequently transmitted, via the President, to Congress for approval. The Constitution was approved by Congress as a compact on July 3, 1952, conditional upon certain modifications.[14] With the acceptance of Congress's conditions, the constitution was ultimately approved by the people of Puerto Rico,[15] "the compact became effective, and Puerto Rico assumed 'Commonwealth' status."[16]

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9 *See* The Report of the U.S.-Puerto Rico Commission on the Status of Puerto Rico, which was created by Congress on February 20, 1964 (Pub. L. No. 88-271, 78 Stat. 17), and which included members of Congress.

10 An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico, 48 U.S.C. § 731(b) (2003).

11 Law No. 27 of August 30, 1950, § 3(b), 1951 P.R. Laws 98, 100. Public Law 600 was accepted by 76.5% of the votes cast. *See also* 3 JOSE TRÍAS MONGE, HISTORIA CONSTITUCIONAL DE PUERTO RICO 62 (1982).

12 *See* Law No. 1 of July 3, 1951, 1951 P.R. Laws 2-71. Initially, Congress's only requirements as to the content of the Commonwealth constitution were that it provide a republican form of government and that it include a *bill of rights*. *See* Pub. L. No. 600, § 2, 64 Stat. 319, 319 (1950), (codified as amended at 48 U.S.C. § 731(c)). Subsequently, however, Congress conditioned the approval of the proposed constitution to various modifications, which were accepted by Puerto Rico.

13 The Constitution was approved by 80% of the qualified voters who participated in the referendum. *See* 3 TRÍAS MONGE, *supra* note 11, at 270.

14 *See* Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico, Pub. L. No. 447, 82d Congress, 66 Stat. 327 (1952).

15 *See* Constituent Convention Res. No. 34 of July 10, 1952, in P.R. LAWS ANN. tit. 1, at 144-46 (1982). Congress's conditions, as incorporated into the Constitution, were subsequently approved by the people of Puerto Rico in the general elections of 1952. *See* Proclamation of January 29, 1953, by Luis Muñoz Marín, Governor, Administrative Bulletin No. 30 (Jan. 29, 1953), in P.R. LAWS ANN. tit. 1, at 147.

16 Examining Board v. Flores de Otero, 426 U.S. 572, 593-94 (1976). The compact between the people of Puerto Rico and the United States has been repeatedly recognized by the Supreme Court and the First Circuit Court of Appeals. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 672 (1974) (noting that the Commonwealth "is a political entity created by [Public Law 600] and with the consent of the people of Puerto Rico and joined with the United States of America under the terms of the compact") (citing Mora v. Mejías, 206 F.2d 377, 387) (1st Cir. 1953)); U.S. v. Quiñones, 758 F.2d 40, 42 (1st Cir. 1985); Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 40 (1st Cir. 1981); Caribtow Corp. v. Occupational Safety and Health Review Com'n, 493 F.2d 1064, 1065 (1st Cir. 1974); Dario-Sánchez v. United States, 256 F.2d 73, 74 (1st Cir. 1958); *Moreno-Rios*, 256 F.2d 68, 70 (1st Cir. 1958); Figueroa v. Puerto Rico, 232 F.2d 615, 617 (1st Cir. 1956); Mora v. Mejías, 206 F.2d 377, 387 (1st Cir. 1953). The decisions of the First Circuit regarding the status of

At the international level, on November 27, 1953, the General Assembly of the United Nations recognized, among other things, that "the people of the Commonwealth of Puerto Rico, by expressing their will in a free and democratic way, have achieved a new constitutional status,"[17] and further expressed the opinion that "the Association of the Commonwealth of Puerto Rico with the United States of America has been established as a mutually agreed association."[18] Thus, the General Assembly deemed it appropriate that the United States cease transmission of information concerning Puerto Rico under Article 73(e) of the U.N. Charter.[19]

The United States' position before the United Nations in this regard is of special importance. As such, the following statement is of particular interest:

> The Federal Relations Act . . . has continued the provisions of political and economic union which the people of Puerto Rico have wished to maintain. In this sense the relationships between Puerto Rico and the United States have not changed. It would be wrong, however, to hold that because this is so and has been so declared in Congress, the creation of the Commonwealth of Puerto Rico does not signify a fundamental change in the status of Puerto Rico. The previous status of Puerto Rico was that of a territory subject to the full authority of the Congress of the United States in all governmental matters. The previous constitution of Puerto Rico was in fact a law of the Congress of the United States, which we called an Organic Act. Only Congress could amend the Organic Act of Puerto Rico. The present status of Puerto Rico is that of a people with a constitution of their own adoption, *stemming from their own authority*, which only they can alter or amend. The relationships previously established also by a law of the Congress, which only Congress could amend, have now become provisions of *a compact of a bilateral nature whose terms may be changed only by common consent*.[20]

II. PHILOSOPHICAL AND DEMOCRATIC PRINCIPLES UNDERLYING THE COMMONWEALTH STATUS

The keystone and legitimacy of Commonwealth status is the principle of the consent of the governed. It was so stated by Congress in laying the foundations upon which Puerto Rico's new status was to be built: "fully recognizing the prin-

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Puerto Rico are to be accorded great weight because of its expertise on Puerto Rican law. U.S. v. Laboy-Torres, 553 F.3d. 715, 719 n.3 (3d Cir. 2009).

17 G.A. Res. 748 (VIII), ¶ 2, U.N. GAOR, 8th Sess., 459th plen. mtg., U.N. Doc. A/RES/748(VIII) (Nov. 27, 1953).

18 *Id.* ¶ 3.

19 *Id.* ¶¶ 6-7.

20 Frances P. Bolton & James P. Richards, *Report of the Eighth Session of the General Assembly of the United Nations* 241 (1954) (printed for the use of the Committee on Foreign Affairs, 83rd Cong., 2d Sess., Washington, D.C., U.S. Government Printing Office).

ciple of government by consent,"[21] Congress declared in 1950, "this act [Public Law 600] is now adopted *in the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."[22] At first glance, Public Law 600 may be read merely as having furthered the right of the Puerto Rican people to constitute themselves, as a polity, according to their own design; that is, to establish a local government. A finer reading of its provisions, however, shows that Public Law 600 was not so narrow in scope; it also set forth the basis for a new relationship between the people of Puerto Rico and the United States.[23] Public Law 600 did not come fully into force until its acceptance by the Puerto Rican people in an island-wide referendum. This acceptance also signified that Puerto Ricans, for the first time, consented, through Section 9 of the Puerto Rico Federal Relations Act (hereinafter Federal Relations Act),[24] to be governed by federal laws not locally inapplicable, even though the citizens of Puerto Rico did not have, and still do not have, any participation in the enactment of such laws.[25] This provision in Section 9 is sometimes referred to as the *generic consent* given by Puerto Rico to the unencumbered applicability of federal laws.

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21 48 U.S.C. § 731(b) (2003).

22 *Id.* (emphasis added). This is how the delegates of the Constituent Convention viewed it, and eventually set it forth in the preamble to the Commonwealth Constitution:

> We, the people of Puerto Rico, in order to organize ourselves politically on a fully democratic basis, to promote the general welfare, and to secure for ourselves and our posterity the complete enjoyment of human rights, placing our trust in Almighty God, do ordain and establish this Constitution for the commonwealth which, *in the exercise of our natural rights*, we now create *within our union with the United States of America*.

P.R. CONST. pmbl. (emphasis added).

23 *See* Mora v. Mejías, 115 F. Supp. 610 (D.P.R. 1953). In its Report, the *Ad Hoc Advisory Group on Puerto Rico*, which was appointed by President Nixon and which included members of Congress, described Commonwealth status as follows:

> The Commonwealth relationship between Puerto Rico and the United States was established through bilateral agreement between the people of Puerto Rico and the Congress of the United States. Through Congressional enactment of Public Law 600, 81st Congress, 1950, section 4 of which constitutes the Puerto Rican Federal Relations Act, and through the acceptance of that law, in referendum, by the Puerto Rican electorate, and further through the adoption of a constitution of their own choosing, a new form of Federal association, in the nature of a compact, was created between the United States and Puerto Rico. The crucial aspect of this process was its mutual acceptance by the electorate of Puerto Rico and by the Congress of the United States.

REPORT OF THE AD HOC ADVISORY GROUP ON PUERTO RICO 1 (1975).

24 Puerto Rico Federal Relations Act § 9, 48 U.S.C. § 734 (2003).

25 Puerto Ricans residing in Puerto Rico do not vote for the President of the United States, nor do they elect senators or representatives to the United States Congress, except for a non-voting Resident Commissioner for Puerto Rico who sits in the House of Representatives. The Resident Commissioner can vote in the Congressional committees to which he is assigned, but he cannot cast a final vote on legislation proposed in the House. *See* Rules of the House of Representatives, Rule XII.

Of course, the principle that government derives its legitimacy from the consent of the governed was nothing new at the time Commonwealth status was brought forth in the 1950's. It can be traced in part to the Lockean[26] view of government held by America's Founders in the Declaration of Independence as one of a few, yet fundamental, self-evident truths: "That to secure . . . [certain unalienable] Rights [among which are life and liberty], *Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .*"[27] Thus, according to the Founders' view, the rights to *life and liberty*, enjoyed equally by all, precede government; they are not derived from it, but obtained at birth.[28] It is for the protection of these rights, among others, that a people consent, out of their own free will, to the institution of government. This moral reasoning provided the republic's foundation. In the words of Justice Chase:

> The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power, they will decide what are the proper objects of it . . . . An act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power, on which it is founded.[29]

The United States Constitution, conceived in great measure in the spirit of the Declaration of Independence, is but a logical extension of the principle of

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26 "The liberty of man in society is to be under no other legislative power but that established by consent in the commonwealth; nor under any dominion of any will or restraint of any law, but what that legislative shall enact according to the trust put in it." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (AN ESSAY CONCERNING THE TRUE, ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT) 13 (J.W. Gough ed., 1956) (1689).

27 THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776) (emphasis added).

28 "All Men are created equal . . . endowed by their Creator with certain unalienable rights." *Id*.

29 Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798). It has been noted that:

> Today the justices of the Supreme Court will apply strict forms of review under the due process clauses and the *equal protection clause* to any governmental actions which limit the exercise of *fundamental constitutional rights*. These are rights which the Court recognizes as having *a value so essential to individual liberty* in our society that they justify the justices reviewing the acts of other branches of government in a manner quite similar to the substantive due process approach of the pre-1937 period. Little more can be said to accurately describe the nature of a fundamental right, because fundamental rights analysis is simple no more than the modern recognition of the natural law concepts first espoused by Justice Chase in *Calder v. Bull*.

2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7, 427-28 (2d ed. 1992) (emphasis added).

government by consent: "We the People of the United States, in Order to . . . secure the Blessings of Liberty . . . do ordain and establish this Constitution for the United States of America."[30] Thus, "our system of government rests on one overriding principle: All power stems from the consent of the people."[31] It is the people who "empower the governmental institutions of the United States."[32]

But "the notion of popular sovereignty [not only] undergirds the [Federal] Constitution,"[33] it is also embodied in the Commonwealth Constitution approved by Congress, both in the Preamble ("We [the people of Puerto Rico] understand that the democratic system of government is one in which the will of the people is the source of public power . . . ."),[34] and in Article I ("[t]he Commonwealth's political power emanates from the people and shall be exercised in accordance with their will, within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.").[35] Moreover, in approving the Constitution of the Commonwealth, the Constituent Convention expressed that upon the Constitution becoming effective, the people of Puerto Rico would be "organized in 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 of America*."[36]

The nature of the relationship between the people of Puerto Rico and the United States, as premised upon the principle of consent, was also recognized by the United Nations in 1953, when the General Assembly determined that the United States could cease transmitting information concerning Puerto Rico under Article 73(e) of the Charter.[37]

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30 U.S. CONST. pmbl.

31 U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting, joined by Rehnquist, C.J., and O' Connor and Scalia, JJ.).

32 *Id.* at 849.

33 *Id.*

34 P.R. CONST. pmbl.

35 P.R. CONST. art. I.

36 Res. No. 23 of February 4, 1952, in 4 DIARIO DE SESIONES DE LA CONVENCIÓN CONSTITUYENTE DE PUERTO RICO: 1951 Y 1952, at 2410 (Lexis-Nexis of Puerto Rico 2003) (emphasis added) (translation ours).

37 *See* G.A. Res. 748 (VIII), ¶ 3, U.N. GAOR, 8th Sess., 459th plen. mtg., U.N. Doc. A/RES/748(VIII) (Nov. 27, 1953) (expressing the opinion that "the Association of the Commonwealth of Puerto Rico with the United States of America has been established *as a mutually agreed association*").

III. POSITION OF THE COURTS

From the onset, the new Commonwealth status spurred litigation concerning its nature and the applicability of federal law to Puerto Rico.[38] Section 9 of the Federal Relations Act, which in pertinent part provides that "the statutory laws of the United States *not locally inapplicable* . . . shall have the same force and effect in Puerto Rico as in the United States,"[39] gained increased significance.[40] Since then, Section 9 has been applied in some cases to hold federal statutes inapplicable to intra-Commonwealth activities.[41] And in *Guerrido v. Alcoa Steamship Co.*,[42] the First Circuit reaffirmed its prior holding in *Lastra v. New York & Porto Rico S.S. Co.*,[43] that under Section 8 of the Federal Relations Act,[44] federal maritime law is *locally inapplicable* to Puerto Rico.[45] Moreover, Puerto

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38 Even today, almost fifty years later, such litigation is not altogether uncommon. *See, e.g.*, TAG/ICIB Services, Inc. v. Pan American Grain Co., Inc., 215 F.3d 172 (1st Cir. 2000) (determining that the Interstate Commerce Commission Termination Act of 1995 applies to Puerto Rico); Jusino Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34 (1st Cir. 2000) (holding that Puerto Rico, like the fifty states, is immune from federal damages actions brought by individuals under the Fair Labor Standards Act); Dávila-Pérez v. Lockheed Martin Corp., 202 F.3d 464, 469 (1st Cir. 2001) (holding that Puerto Rico is still a territory for purposes of the Defense Base Act); U.S. v. Acosta-Martínez, 252 F.3d 13 (1st Cir. 2001) (holding the Federal Death Penalty Act of 1994 applicable to Puerto Rico). But although "the legal relationship between Puerto Rico and the United States is far from clear and fraught with controversy," U.S. v. López-Andino, 831 F.2d 1164, 1168 (1st Cir. 1987), it is not to be doubted that such relationship "has no parallel" in American constitutional history. Examining Board v. Flores de Otero, 426 U.S. 512, 596 (1976).

39 48 U.S.C. § 734 (2003) (emphasis added).

40 In the context of Puerto Rican-Federal relations, the *not locally inapplicable* provision relates back to the first Organic Act of 1900, commonly referred to as the Foraker Act, ch. 191, 31 Stat. 77 (1900) (repealed 1917). However, the phrase has a much earlier origin, dating back to Henry Clay's Report of the Committee of Thirteen, the proposed Compromise of 1850, concerning slavery in New Mexico and other territories. *See* Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 44 (1st Cir. 1981). Although Puerto Rico does not enjoy voting representation in the United States Congress, there are several fiscal exceptions that distinguish the Commonwealth from the States of the Union. For example, customs revenues are covered into the Commonwealth Treasury. Accordingly, Puerto Rico does not always receive full benefits from federally funded programs, such as Medicaid, Food Stamps, the Aid to Families with Dependent Children program, and the Supplemental Security Income (SSI) program. Harris v. Rosario, 446 U.S. 651, 653 (1980); *see also* Califano v. Gautier Torres, 435 U.S. 1, 4 (1978).

41 *See* Liquilux Gas Services of Ponce, P.R. v. Tropical Gas Co., 303 F. Supp. 414, 418-21 (D.P.R. 1969) (Robinson-Patman Act); Trigo Bros. Packaging Corp. v. Davis, 159 F. Supp. 841 (D.P.R. 1958) (Federal Alcohol Administration Act), vacated on other grounds, 266 F.2d 174 (1st Cir. 1959); United States v. Figueroa-Ríos, 140 F. Supp. 376, 381-82 (D.P.R. 1956) (Federal Firearms Act).

42 Guerrido v. Alcoa Steamship Co., 234 F.2d 349 (1st Cir. 1956).

43 Lastra v. New York & Porto Rico S.S. Co., 2 F.2d 812 (1st Cir. 1924).

44 48 U.S.C. § 749 (2003).

45 In Lastra v. New York & Porto Rico S.S. Co., 2 F.2d 812 (1st Cir. 1924), the First Circuit held that the rules of the admiralty and maritime law of the United States apply to Puerto Rico's navigable waters only to the extent that they are not locally inapplicable, either because they were not designed

Rico enjoys broad fiscal autonomy, as the internal revenue laws of the United States are not applicable in the Commonwealth.[46] Still, most federal legislation considered by the courts –including both pre and post 1952 legislation– has been held applicable to Puerto Rico.[47] Perhaps it need not have been so, for after all, as Judge (now Justice) Breyer stated in *Córdova*, "the phrase ['not locally inapplicable' contained in Section 9] reflects at least some intent that not only developing social and economic conditions but also emerging territorial self-government could render general federal law inapplicable."[48]

As a federal judge I had the opportunity to explore the relationship of the Commonwealth within the federal constitutional framework. What follows in the next pages is my analysis in *United States v. Vega Figueroa*,[49] considering the

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to apply to Puerto Rican waters, or because they have been rendered inapplicable by inconsistent Puerto Rican legislation. *See also* Pérez de la Cruz v. Crowley Towing & Transport Co., 807 F.2d 1084 (1st Cir. 1986); Lusson v. Carter, 704 F.2d 646 (1st Cir. 1983); García v. Friesecke, 597 F.2d 284 (1st Cir. 1979), cert. denied, 444 U.S. 940 (1979); Mojica v. Puerto Rico Lighterage Co., 492 F.2d 904 (1st Cir. 1974); Alcoa Steamship Co. v. Pérez Rodríguez, 376 F.2d 35 (1st Cir. 1967), cert. denied, 389 U.S. 905 (1967); Fonseca v. Prann, 282 F.2d 153 (1st Cir. 1960); Reeser v. Crowley Towing & Transport Co., Inc., 937 F. Supp. 144 (D.P.R. 1996); Tag Services v. Sedeco, 570 F.3d 60 (1st Cir. 2009).

46 Puerto Rico Federal Relations Act § 9, 48 U.S.C. § 734 (2003). As aptly noted by Chief Judge Magruder: "The people of Puerto Rico were thus not to be taxed for the support of the general government in Washington so it could not be said that there was taxation without representation." Calvert Magruder, *The Commonwealth of Puerto Rico*, 15 U. PITT. L. REV. 1, 7 (1953).

47 *See, e.g.,* TAG/ICIB Services, Inc. v. Pan American Grain Co., Inc., 215 F.3d 172, 177-78 (1st Cir. 2000) (Interstate Commerce Commission Termination Act); U.S. v. Rivera Torres, 826 F.2d 151, 154 (1st Cir. 1987) (Clean Water Act); U.S. v. Quiñones, 758 F.2d 40, 43 (1st Cir. 1985) (Omnibus Crime Control and Safe Streets Act); U.S. v. Tursi, 655 F.2d 26, 27 (1st Cir. 1981) (Youth Corrections Act); National Labor Relations Board v. Security Nat'l Life Ins. Co., 494 F.2d 336, 338 (1st Cir. 1974) (National Labor Relations Act); Caribtow Corp. v. Occupational Safety and Health Review Com'n, 493 F.2d 1064, 1068 (1st Cir. 1974) (Occupational Safety and Health Act); Moreno-Ríos v. U.S., 256 F.2d 68, 73 (1st Cir. 1958) (Narcotic Drugs Import and Export Act); Hodgson v. Unión de Empleados de los Supermercados Pueblo, 371 F. Supp. 56, 61 (D.P.R. 1974) (Labor-Management Reporting and Disclosure Act).

48 Córdova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A., 649 F.2d 36, 44 n.38 (1st Cir. 1981). *See also* U.S. v. Figueroa-Ríos, 40 F. Supp. 376, 381 (D.P.R. 1956) (noting that, after the establishment of the Commonwealth, section 9 acquired new *vitality*); Liquilux Gas Services of Ponce, P.R. v. Tropical Gas Co., 303 F. Supp. 414, 418-21 (D.P.R. 1969) (same). The events culminating in the establishment of the Commonwealth, together with the coming into effect of its own Constitution, are commonly depicted as a further step along the road toward increased self-governance. *See, e.g., Córdova & Simonpietri Ins. Agency Inc.*, 649 F.2d at 40 ("The theme that consistently runs throughout the legislative history of Puerto Rico's attainment of Commonwealth status is that Commonwealth represents the fulfillment of a process of increasing self-government over local affairs by the people of Puerto Rico."). While the attainment of a fuller measure of self-government over local affairs is not to be negated as a result of the change to Commonwealth status, the key to understanding the nature of such change should rather be the principle of consent. *See* Jose Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REV. JUR. UPR 1, 28 (1999) ("The change did not alone consist in the obtainment of self-government, but particularly in the fact that such consent became the basis of the relationship [with the federal government].") (emphasis added). It is on this basis that Section 9 should be interpreted and applied.

49 United States v. Vega Figueroa, 984 F. Supp. 71 (D.P.R. 1997).

constitutional changes that Commonwealth status created in the relationship between the United States and Puerto Rico.

Since 1953, it is well settled law in the First Circuit that, with the advent of Commonwealth status 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.[50] Thereafter, the authority exercised by the federal government emanated from the compact entered into between the people of Puerto Rico and the Congress of the United States. As Judge Magruder stated in *Mora v. Mejías*,[51] referring to the new Commonwealth: "It is a political entity created by the act and with the consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact."[52]

In 1956, Judge Magruder addressed the issue once again, in a case in which the contention was that there was only one sovereignty in Puerto Rico; that of the federal government. His response is best captured in the following paragraph:

> The answer to appellant's contention is that the Constitution of the Commonwealth is not just another Organic Act of the Congress. We find no reason to impute to the Congress the perpetration of such a monumental hoax. Public Law 600 offered to the people of Puerto Rico a 'compact' under which, if the people

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50 Mora v. Torres, 113 F. Supp. 309 (D.P.R. 1953); Mora v. Mejías, 206 F.2d 377 (1st Cir. 1953); Mora v. Mejías, 115 F. Supp. 610 (D.P.R. 1953); Cosentino v. ILA, 126 F. Supp. 420 (D.P.R. 1954); Carrión v. González, 125 F. Supp. 819 (D.P.R. 1954); Mitchell v. Rubio, 139 F. Supp. 379 (D.P.R. 1956); U.S. v. Figueroa-Ríos, 140 F. Supp. 376 (D.P.R. 1956); Figueroa v. Pueblo, 232 F.2d 615 (1st Cir. 1956); Moreno Ríos v. U.S., 256 F.2d 68 (1st Cir. 1958); Sánchez v. U.S., 256 F.2d 73 (1st Cir. 1958); Alcoa Steamship Co. v. Pérez, 295 F. Supp. 187 (D.P.R. 1968), aff'd, 424 F.2d 433 (1st Cir. 1970); United States v. Feliciano Grafals, 309 F. Supp. 1292 (D.P.R. 1970); Hodgson v. Unión De Empleados de Los Supermercados Pueblo, 371 F. Supp. 56 (D.P.R. 1974); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); Examining Bd. of Engineers v. Flores de Otero, 426 U.S. 572 (1976); First Federal Savings and Loan Association of Puerto Rico v. Ruiz de Jesús, 644 F.2d 910 (1st Cir. 1981); Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A,, 649 F.2d 36 (1st Cir. 1981); Rodríguez v. Popular Democratic Party, 457 U.S. 1 (1982); U.S. v. Quiñones, 758 F.2d 40 (1st Cir. 1985); U.S. v. López-Andino, 831 F.2d 1164 (1st Cir. 1987); U.S. v. Vega-Figueroa, 984 F. Supp. 71 (D.P.R. 1997).

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

52 *Id.* at 385. The Supreme Court of Puerto Rico has also held that under the Commonwealth status the people of Puerto Rico obtained recognition of a full measure of self-government in local affairs and became an autonomous body politic associated with the United States by means of a compact. In Pueblo v. Figueroa, 77 D.P.R. 188 (1954), Chief Justice Snyder stated that:

> The subsequent role of Congress did not result in making the Constitution a federal law. Rather . . . 'pursuant to congressional authority . . . the Constitution was approved by the people and accepted by Congress in 1952.' It follows that our Constitution is a local Constitution and not a federal law.

Id. See also RCA v. Govt. of the Capital, 91 D.P.R. 416 (1964); Pueblo v. Castro-García, 120 D.P.R. 740 (1988); Ramírez de Ferrer v. Mari Bras, 144 D.P.R. 141 (1997).

> accepted it, as they did, they were authorized to 'organize a government pursuant to a constitution of their adoption.'[53]

The United States Supreme Court has not remained silent on the question of Puerto Rico's status. The Court first addressed the subject in the 1974 case of *Calero Toledo v. Pearson Yacht Leasing Co.*,[54] where, citing Judge Magruder's holding in *Mora v. Mejías* with approval, Justice Brennan, writing for the majority, acknowledged that:

> By 1950 . . . pressures for greater autonomy led to [the] congressional enactment of Pub. L. 600, 64 Stat. 319, which offered the people of Puerto Rico a compact whereby they might establish a government under their own Constitution. Puerto Rico accepted the compact and on July 3, 1952, Congress approved, with minor amendments, a Constitution adopted by the Puerto Rico populace.[55]

Two years later, in 1976, the Supreme Court in *Examining Board v. Flores de Otero,*[56] and citing *Calero-Toledo*, stated that "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 . . . ."[57] It then went on to recognize: "We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history . . . ."[58] And in *Rodríguez v. Popular Democratic Party*, the Court stated that at the same time,

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53 Figueroa v. Pueblo, 232 F.2d 615, 620 (1st Cir. 1956) (emphasis added).

54 Calero Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

55 *Id.* at 671.

56 Examining Board v. Flores de Otero, 426 U.S. 572 (1976).

57 *Id.* at 594 (citing *Calero Toledo,* 416 U.S. at 583).

58 *Flores de Otero*, 426 U.S. at 596. For more information regarding the status of Puerto Rico, *see* JOSE TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997); ARNOLD LEIBOWITZ, DEFINING STATUS – A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985); Arnold Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219 (1967); Magruder, *The Commonwealth Status of Puerto Rico*, *supra* note 46; Pedro Muñoz-Amato, *Congressional Conservatism and Puerto Rican Democracy in the Commonwealth Relationship*, 21 REV. JUR. UPR 321 (1952); Jorge Morales-Yordan, *The Constitutional and International Status of the Commonwealth of Puerto Rico*, 18 REV. COL. ABOG. 5 (1957); Helen Silving, *In the Nature of a Compact*, 20 REV. COL. ABOG. 159 (1960); Rafael Hernández-Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COL. ABOG. 207 (1959); Júan M. García-Passalacqua, *The Legality of the Associated Statehood of Puerto Rico*, 4 REV. JUR. UIPR 287 (1962); Ruben Rodríguez Antongiorgi, *Review of Federal Decisions on the Applicability of United States Laws in Puerto Rico Subsequent to the Establishment of the Commonwealth of Puerto Rico,* 26 REV. JUR. UPR 321 (1957); Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce*, 43 REV. JUR. UPR 259 (1974); T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002); JOSÉ JULIÁN ÁLVAREZ GONZÁLEZ, DERECHO CONSTITUCIONAL DE PUERTO RICO Y RELACIONES CONSTITUCIONALES CON LOS ESTADOS UNIDOS (2009).

Puerto Rico, like a state, is an autonomous political entity "sovereign over matters not ruled by the Constitution."[59]

It is important to note that the contention that Puerto Rico is an unincorporated territory of the United States and that no dual sovereignty exists between the United States and the Commonwealth has for the past sixteen years been the subject of an uninterrupted and consistent line of First Circuit case law.[60] In *First Fed. S & L Assoc. of P.R. v. Ruiz de Jesús*,[61] for example, Judge Campbell held that "Puerto Rico's territorial status ended, of course, in 1952. Thereafter it has been a Commonwealth with a particular status as framed in the Puerto Rico Federal Relations Act."[62] In *Córdova*, Judge (now Justice) Breyer described Commonwealth status as follows:

> In sum, Puerto Rico's status changed from that of a mere territory to the unique status of Commonwealth. And the federal government's relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rico Constitutions, Public Law 600, the Puerto Rico Federal Relations Act and the rights of the people of Puerto Rico as United States citizens. As the Supreme Court has written, 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 a state of the union. *Examining Board of Engineers vs Flores,* 426 U.S. 572, 594 (1976) . . . .[63]

Subsequently, in 1985, Judge Bownes addressed the issue in *U.S. v. Quiñones*, where he stated that:

> [I]n 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. Under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally, and the government of Puerto Rico is no longer a federal government agency exercising delegated power . . . .
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> . . . .

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59 Rodríguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982).

60 As mentioned before, in U.S. v. Laboy-Torres, 553 F.3d. 715, 719 n.3 (3d Cir. 2009), retired Justice Sandra Day O'Connor, sitting with the Third Circuit, stated: "Of course, we are not bound by the decisions of the First Circuit [when dealing with matters regarding Puerto Rico]. However, in light of that court's appellate jurisdiction over cases from the District of Puerto Rico, and its resultant expertise with Puerto Rican law, we accord its decisions on that subject great weight." *Id.*

61 First Fed. S & L Assoc. of P.R. v. Ruíz de Jesús, 644 F.2d 910 (1st Cir. 1981).

62 *Id. at* 911.

63 Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 39-41 (1st Cir. 1981).

> Under its Commonwealth status, Puerto Rico, like a state, is an autonomous political entity, sovereign over matters not ruled by the Constitution. *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 8 (1982) (quoting Mora v. Mejías, 115 F.Supp. 610 (D.P.R. 1953)).[64]

In a case that expressly upholds dual sovereignty, Judge Bownes in *United States v. López-Andino* held that:

> Although the legal relationship between Puerto Rico and the United States is far from clear and fraught with controversy, it is established that Puerto Rico is to be treated as a state for purposes of the *Double Jeopardy Clause*. In 1950 Congress enacted legislation so that the people of Puerto Rico may organize a government pursuant to a Constitution of their own adoption. Puerto Rican Federal Relations Act, Pub. L. No. 600, 64 Stat. 319 (1950). The purpose of the Federal Relations Act 'was to accord to Puerto Rico that degree of autonomy and independence normally associated with the States of the Union.' *Examining Board of Engineers v. Flores*, 426 U.S. 572, 594, 49 L. Ed. 2d 65, 96 S. Ct. 2264 (1976). 'Puerto Rico, like a state, is an autonomous political entity . . .' *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 8, 72 L. Ed. 2d 628, 102 S. Ct. 2194 (1982).[65]

Finally, in *Igartúa v. United States*,[66] Chief Judge Boudin, quoted U.N. Resolution 748 to the effect that the compact represents a negotiated relationship within which, "the people of the Commonwealth of Puerto Rico have effectively exercised their right to self determination."[67]

Opponents of Commonwealth refer to the case of *Harris v. Rosario*[68] as authority for their proposition that Puerto Rico continues to be an unincorporated territory. *Harris*, decided by the Supreme Court in a short *per curiam* opinion,

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64 U.S. v. Quiñones, 758 F.2d 40, 42 (1st Cir. 1985). It should be noted that the Supreme Court of Puerto Rico has also recognized and held that the dual sovereignty doctrine has applied to Puerto Rico since the adoption of its Constitution in 1952. *See* Pueblo v. Castro-Garcia, 120 D.P.R. 740 (1988). In Ramírez de Ferrer v. Mari Bras, 144 D.P.R. 141, 160 (1997), the Supreme Court of Puerto Rico stated:

> [I]n Pueblo v. Castro García, we clearly explained that the decision of the United States Supreme Court in Harris v. Rosario, 446 U.S. 651 (1980), did not weigh in any way against other rulings of that Court that expressly recognized Puerto Rico's sovereignty to govern its internal matters. This was so, we said, because the fact that, under the territorial clause of the United States Constitution, Congress may adopt laws to regulate certain matters in Puerto Rico --which is what was precisely resolved in *Harris*-- did not mean that the Commonwealth did not have sovereign power over other self-government matters.

Id. (translation ours).

65 U.S. v. López-Andino, 831 F.2d 1164, 1168 (1st Cir. 1987); *see also* United States v. Vega Figueroa, 984 F. Supp. 71 (D.P.R. 1997).

66 Igartúa v. United States, 417 F.3d 145 (1st Cir. 2005).

67 *Id.* at 149 n.5 (quoting G.A. Res. 748 (VIII), ¶ 2, U.N. GAOR, 8th Sess., 459th plen. mtg., U.N. Doc. A/RES/748(VIII) (Nov. 27, 1953)) (internal quotations omitted).

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

dealt with the question of whether it was constitutional for an act of Congress to deny Puerto Rico residents benefits under a federal welfare program which would have otherwise been available to those U.S. citizens if they had resided on the mainland.[69] To justify this unequal treatment between residents of Puerto Rico and those of the several states, the Court, in its brief discussion, made reference to the Territorial Clause of the U.S. Constitution, and held that Congress "may treat Puerto Rico differently from states so long as there is a rational basis for its actions."[70] The Court did not, however, hold –or even suggest– that Puerto Rico was an unincorporated territory. The holding of the Court in *Harris* was limited to the fact that Congress can treat the Commonwealth of Puerto Rico differently from the fifty states for the purposes of an entitlement program.[71]

The fact that the Court in passing referred to the Territorial Clause of the Constitution, as the source of its power to treat Puerto Rico differently from States, does not mean that the Commonwealth is constitutionally a *territory* of the United States, although in a geographic sense, the island continues to be territory of the United States. Nor does it mean that after 1952, Congress continued to have plenary and untrammeled power over Puerto Rico.

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69 Puerto Ricans were granted United States citizenship in 1917 when the U.S. Congress enacted the Jones Act, ch. 145, 39 Stat. 951 (1917) (current version Puerto Rico Federal Relations Act, 48 U.S.C. §§ 732-876 (2003)). For a history of the granting of U.S. citizenship to Puerto Rico, *see* JOSÉ CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE (1979). In 1952, Congress enacted the Immigration and Nationality Act (I.N.A.), 8 U.S.C. §§ 1101-1537 (2009). Section 1101(a)(38) of the Act states that "the term 'United States,' . . . means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 8 U.S.C. § 1101(a)(38) (2009). It thus included people born in Puerto Rico as being "born in the United States." *Id.*

70 *Harris,* 446 U.S. at 651-52. Justice Marshall dissenting stated: "Ultimately this case raises the serious issue of the relationship of Puerto Rico, and the United States citizens who reside there, to the Constitution. An issue of this magnitude deserves far more careful attention than it has received in *Califano v. Torres* and in the present case." *Id.* at 656 (Marshall, J., dissenting). The Supreme Court first addressed this issue in a brief, *per curiam* opinion in Califano v. Gautier Torres, 435 U.S. 1 (1978), where it held that Congress could provide lower Social Security benefits to the residents of Puerto Rico.

71 In Ramírez de Ferrer v. Mari Bras, 144 D.P.R. 141, 160 (1997), the Supreme Court of Puerto Rico again referred to *Harris*:

> To sum up, our deliberate pronouncements in People v. Figueroa, in R.C.A. v. Gov´t. of the Capital, and in People v. Castro García, regarding the nature, origin, and scope of the public authority of the Commonwealth of Puerto Rico, *constitute the pertinent constitutional norms* doctrinally established by this Court on this matter, *which prevail in this country, regardless of personal political preferences, until the current constitutional regime is changed or modified through legitimate means*. As we have pointed out, those three rulings reflect the normative view on this matter reiterated by the highest federal court for two decades, in related cases. They also reflect the myriad judicial pronouncements made by other federal courts since 1953. Although there are a few isolated decisions a *contrario sensu*, for more than forty years, in dozens of opinions, most federal trial and appellate courts that have passed upon related matters have recognized the Commonwealth's exclusive sphere of governmental authority.

Id. (emphasis added) (translation ours).

The Commonwealth is "an autonomous political entity sovereign over matters not ruled by the Constitution."[72] However, Puerto Rico continues under the common national sovereignty of the United States just as the States of the Union are constitutionally under such sovereignty.[73]

In sum, the holding in *Harris*–that Puerto Rico is not a state for certain constitutional purposes–is nothing more than a self-evident proposition. The Supreme Court in *Harris* recognized the long established doctrine that there are differences between the way that federal laws apply to Puerto Rico and the way they apply to the fifty states. Moreover, in all the cases after *Harris*, in which the Supreme Court has been confronted with an issue regarding the constitutional nature of the Commonwealth of Puerto Rico, the Court has in effect validated the existence of the compact, as well as the non-territorial nature of the Commonwealth.[74] Furthermore, the First Circuit has not interpreted *Harris*–which was decided in 1980–as in any way changing the well-settled law regarding the constitutional nature of the Commonwealth of Puerto Rico.[75]

Although Congress may have other constitutional sources of power for delineating Puerto Rico's status, such as the treaty making power,[76] this does not detract from the fact that the Territorial Clause continues to be the principal source of federal power over non-state areas. The authority of Congress under

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72 Rodríguez v. Popular Democratic Party, 457 U.S. 1, 8 (1982).

73 U.S. v. Vega-Figueroa, 984 F.Supp. 71 (D.P.R. 1997).

74 *See, e.g.*, *Rodríguez,* 457 U.S. at 8, where the Supreme Court held that "Puerto Rico, like a state, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution.'" *See also* Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 339 (1986) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), with approval).

75 *See* Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A., 649 F.2d 36, 39-41 (1st Cir. 1981); U.S. v. Quiñones, 758 F.2d 40, 40 (1st Cir. 1985); U.S. v. López-Andino, 831 F.2d 1164, 1168 (1st Cir. 1987), all of which were decided after *Harris*. In United States v. Sánchez*,* 992 F.2d 1143 (11th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994), adopting judge Torruella's concurring opinion in *López Andino*, the Eleventh Circuit essentially held that Puerto Rico was still constitutionally a territory, and not a separate sovereign. In so doing, that case –which is not binding and does not constitute precedent for the First Circuit– completely disregarded the long line of decisions which the First Circuit has rendered since 1953, and which the Supreme Court has issued since 1974, regarding the constitutional status of the Commonwealth of Puerto Rico. Both the Third Circuit and the Federal Circuit have followed the First Circuit's line of cases. *See, e.g.,* U.S. v. Laboy-Torres, 553 F.3d. 715, 719 n. 3 (3d Cir. 2009); Romero v. United States, 38 F.3d 1204, 1208 (Fed. Cir. 1994) (holding "On July 3, 1952, Congress approved the proposed Constitution of the Commonwealth of Puerto Rico, which thenceforth changed Puerto Rico's status from that of an unincorporated territory to the unique one of Commonwealth. . . . The change to Commonwealth carried with it 'significant changes in Puerto Rico's governmental structure' and its relationship with the United States.") (citing *Calero-Toledo*, 416 U.S. at 672). To the extent that it viewed Puerto Rico as a territory without sovereignty, *Sánchez* is an isolated case and does not modify the long-held and well-settled doctrine regarding the constitutional nature of the Commonwealth of Puerto Rico.

76 Article IX of the treaty of Paris provided that "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress." Treaty of Paris of 1898, U.S.-Spain, art. 11, Dec. 10, 1898, 20 Stat. 1754, 1759 (1899).

the Territorial Clause has been held to be very broad and only subject to certain basic constitutional limitations.[77] It is precisely because of this broad grant of constitutional power, that Congress has wide latitude in exercising such power.[78]

While Congress has broad power to govern the non-state areas, it need not exercise that power itself. Congress can delegate to the inhabitants of non-state areas full power of self-government and autonomy similar to that of the States and has done so since the beginning of the Republic. It can also dispose of the territory and relinquish all sovereignty as it did in the case of the Philippines.[79] If it can relinquish all sovereignty, it stands to reason that it can also enter into a series of intermediate stages of empowerment[80] through which non-state areas can continue to be associated with the Federal Government; can be granted and exercise sovereignty over local affairs; and can remain under the umbrella of national sovereignty.[81]

Congress certainly exercised the latter form of power when it entered into a compact with the people of Puerto Rico in 1952, and allowed Puerto Ricans to

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77 Murphy v. Ramsey, 114 U.S. 15 (1885); De Lima v. Bidwell, 182 U.S. 1 (1901); Balzac v. People of Porto Rico, 258 U.S. 298 (1922).

78 The power of Congress under the Territorial Clause is so broad that it can purchase territory outright such as Louisiana, Florida, Alaska and the Virgin Islands; or acquire it through war such as the Philippines, Puerto Rico and Guam were acquired from Spain in 1898. Utilizing that same broad power, the Congress can govern the acquired territory either as dependencies, such as were Louisiana and Florida initially; or organized territories such as those destined for eventual statehood; or unincorporated territories such as the Philippines, Guam, the Virgin Islands, and, prior to 1952, Puerto Rico.

79 In U.S. v. Lara, 541 U.S. 193, 203 (2004), Justice Breyer, for the Court, stated:

> Congress' statutory goal–to modify the degree of autonomy enjoyed by a dependent sovereign that is not a State–is not an unusual legislative objective. The political branches, drawing upon analogous constitutional authority, have made adjustments to the autonomous status of other such dependent entities–sometimes making far more radical adjustments than those at issue here. . . . Puerto Rico–Act of July 3, 1950, 64 Stat 319 ("[T]his Act is now adopted in the nature of a compact so that people of Puerto Rico may organize a government pursuant to a constitution of their own adoption"); P. R. CONST., art. I, § 1 ('Estado Libre Asociado de Puerto Rico'); *see also* [*Córdova*, 649 F.2d at 39-41] (describing various adjustments to Puerto Rican autonomy through congressional legislation since 1898).

Id.

80 "The greater power includes the lesser power" is a long-established maxim. Perhaps the most influential exponent of this maxim was Justice Holmes, who began expounding the doctrine while still at the Supreme Court of Massachusetts. *See, e.g.*, McAuliffe v. City of New Bedford, 29 N.E. 517 (Mass. 1892); Commonwealth v. Davis, 39 N.E. 113 (Mass. 1895). For a recent application of the maxim by the United States Supreme Court, see Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 345-46, (1986) ("In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling . . . .").

81 Examples are the Commonwealth of the Philippines created in 1934, and the Commonwealth of the Northern Marianas established through a covenant adopted by mutual consent in 1975.

exercise popular sovereignty within the sphere of their own Constitution.[82] Through this compact, Congress expressly recognized the principle of mutuality and relinquished its plenary powers over areas of local sovereignty. Ever since then, a dual sovereignty relationship has been established, whereby the Federal Government exercises its sovereignty within its reserved sphere of power, and the Commonwealth government, acting not unlike a state government, exercises its sovereignty within the sphere expressly determined by its own Constitution.[83]

Any expectations that, after the creation of Commonwealth status, the *locally inapplicable* provision would form the basis for the federal judiciary to expand home rule, as contemplated by Justice Breyer in *Córdova*, have not been fulfilled, not even partially.[84] Justice Breyer and other jurists believed that Section 9[85] could form the basis for the federal courts to sculpt the application of federal law in Puerto Rico, taking into consideration the geographical, cultural, historical, and economic differences between the Puerto Rican archipelago and the mainland.[86] However, a review of First Circuit decisions applying federal law shows that, on the contrary, rulings during recent years have resulted in the so called *default rule*, whereby "federal laws are presumed to apply to Puerto Rican conduct if there is no specific exclusion in the statute."[87] In light of this, it is hard to envision how Section 9 and the *locally inapplicable* rule, could in the future foster greater local autonomy, or development of self-government.[88]

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82 The existence of local sovereignty is clearly reflected in the Preamble to the Constitution of Puerto Rico, approved by Congress in 1953:

> We understand that the democratic system of government is one in which *the will of the people is the source of public power,* the political order is subordinate to the rights of man, and the free participation of the citizen in collective decisions is assured; . . . . The Commonwealth of Puerto Rico is hereby constituted. *Its political power emanates from the people and shall be exercised in accordance with their will,* within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.

Joint Resolution Approving the Constitution of the Commonwealth of Puerto Rico, Pub. L. No. 447, 66 Stat. 327, 82d Congress (1953) (emphasis added).

83 *See* U.S. v. Vega-Figueroa, 984 F. Supp. 71, 78 (D.P.R. 1997).

84 Córdova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A,, 649 F.2d 36, 44 n.34 (1st Cir. 1981).

85 48 U.S.C. § 734 (2009).

86 Examples of some other like-minded jurists are Judge Calvert Magruder, Chief Justice José Trías Monge, Judge Hiram Cancio, Justice Jaime Fuster, Justice Lino Saldaña, and former Governor and law professor Rafael Hernández Colón. *See also* U.S. v. Acosta-Martinez, 106 F. Supp. 2d 311 (D.P.R. 2000).

87 U.S. v. Laboy-Torres, 553 F.3d. 715, 719 n.3 (3d Cir. 2009) (citing U.S. v. Acosta-Martínez, 252 F.3d 13, 18 (1st Cir. 2001) (stating "that the default rule for questions under the Puerto Rican Federal Relations Act is that, as a general matter, a federal statute does apply to Puerto Rico . . . .")).

88 In recent years there has been a growing disenchantment with Commonwealth status, even among its original founders, largely due to the widening sphere of federal authority which has developed without effective local participation, as well as the concomitant reduction in the sphere of Commonwealth authority. *See* TRÍAS MONGE, *supra* note 58. In U.S. v. Acosta-Martínez, 252 F.3d 13

In summary, it appears that one can derive the following conclusions regarding Commonwealth status from a review of the Supreme Court and First Circuit decisions: 1) Commonwealth status is the mutually agreed upon constitutional relationship between Puerto Rico and the United States; 2) it is based on a compact entered into by mutual consent, and embodying the principle of consent of the governed; 3) Congress does not possess plenary power over Puerto Rico, because it "relinquished control over the local affairs of the Island and granted Puerto Rico a measure of autonomy comparable to that possessed by the states . . .";[89] 4) for practical purposes, federal laws apply to Puerto Rico, as in a state of the Union, unless specifically excluded.

CONCLUSION

Over a half-century after the Commonwealth was established, the principle of the consent of the governed, in the case of Puerto Rican-Federal relations, has been *substantially eroded*, largely due to the *widening* sphere of federal authority, which has expanded without local participation, and with the concomitant *reduction* of Commonwealth authority. At the time the Commonwealth was established, the application of federal laws was not so widespread. But the Great Society legislation of the 1960's marked a take-off point for a sustained increase in federal legislation applicable not only to the states, but to Puerto Rico as well.

During the last four decades, the Commonwealth leadership has embarked, together with federal government officials, in efforts to revise the terms of the compact[90] and address the democratic deficiency[91] created by the unilateral ap-

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(1st Cir. 2001), the First Circuit held that the federal death penalty applies to the island despite the fact that it was not specifically mentioned in the statute and the death penalty is prohibited in the Commonwealth's constitution, which the Congress and the people of Puerto Rico jointly ratified in 1952. Accordingly, the case has become the epitome of wholesale incorporation of the default principle and the apparent abandonment by the First Circuit of any home rule considerations, even in fundamental questions, such as the death penalty.

89 Examining Bd. v. Flores de Otero, 426 U.S. 572, 596 (1976).

90 It must be noted that in approving the Commonwealth Constitution, the people of Puerto Rico expressly reserved:

> *[T]he right to propose and to accept modifications* in the terms of its relations with the United States of America, in order that these relations . . . [would] at all times be the expression of an agreement freely entered into between the people of Puerto Rico and the United States of America.

Res. No. 23 of February 4, 1952, in 4 DIARIO DE SESIONES, *supra* note 36 (emphasis added) (translation ours). In 1953, moreover, the General Assembly of the United Nations expressed its assurance that:

> [I]n accordance with the spirit of the present resolution, the ideals embodied in the Charter of the United Nations, the traditions of the people of the United States of America and the political advancement attained by the people of Puerto Rico, due regard will be paid to the will of both the Puerto Rican and American peoples in the conduct of their relations under their present legal statute, *and also in the eventuality that either of the parties to the mutually agreed association may desire any change in the terms of this association*.

plication of federal law to Puerto Rico without the participation of its people.[92] Puerto Rico has formally requested changes in the terms of its association with the United States *on at least ten occasions to no avail*; in the end, Congress has turned a deaf ear on all.[93] In light of this, the principle of *consent of the governed*,

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G.A. Res. 748 (VIII), ¶ 9, U.N. GAOR, 8th Sess., 459th plen. mtg., U.N. Doc. A/RES/748(VIII) (Nov. 27, 1953) (emphasis added).

91 As Dr. David M. Helfeld, leading constitutionalist and former dean of the University of Puerto Rico School of Law, has noted:

> From the perspective of democratic theory, the principal defect in the constitutional relations between Puerto Rico and the United States can be traced to Section 9 which authorizes Congress to legislate unilaterally for Puerto Rico. As I see it, Puerto Rico can live indefinitely with the idea that it has given its consent to be bound by the fundamental rights of the Constitution, but ought not to continue accepting as a permanent condition of constitutional relations Congress' unilateral authority to legislate as defined in Section 9.

David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 452, 467-68 (1986) (footnote omitted).

92 As expressed by former Chief Justice of the Supreme Court of Puerto Rico, Jose Trías Monge:

> Section 9 of the Federal Relations Act provides that all federal laws not locally inapplicable shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws. The people of Puerto Rico do not participate in the making of such laws, nor their application is made subject to their specific consent . . . . Under the compact Puerto Rico indeed achieved a very large measure of self-government, but it fell short of decolonization, which is why so many decades were spent by the Commonwealth leadership in efforts to revise the terms of Puerto Rico's relationship with the United States. It is true that the people of Puerto Rico consented to the application of section 9, but such generic consent to the application of all laws, present or future is hardly liberating in nature.

Trías Monge, *supra* note 48, at 23-24.

93 The following is a brief chronology of the efforts to revise the terms of the United States-Puerto Rico relationship:

- 1959 Fernós-Murray Bill H.R. 5926, 86th Cong. (1959); S. 2022, 86th Cong. (1959), to revise the compact and replace the PRFRA with the Articles of Permanent Association
- 1963 Aspinall Bill, H.R. 5945, 88th Cong. (1963), to establish a Commission to draft a proposed compact of permanent union between the people of the United States and the people of Puerto Rico
- 1964 Pub. L. No. 88-271, 78 Stat. 17 (1964), to establish a United States-Puerto Rico Commission of the Status of Puerto Rico
- 1966 Report of the United States-Puerto Rico Commission of the Status of Puerto Rico transmitted to the President and Congress on August 5, 1966
- 1967 Status Plebiscite in which improved Commonwealth Status received 60% of the vote (no action taken by the Congress to implement the choice)
- 1971 Report of the Ad Hoc Advisory Group on the Presidential Vote for Puerto Rico transmitted to the President and Congress on August 18, 1971
- 1975 H.R. 11200-1, 94th Cong. (1975) to approve the Compact of Permanent Union between Puerto Rico and the United States (drafted by the Advisory Group named by the President and the Governor of Puerto Rico on October 1, 1975)

which formed the basis of the relationship, has been put into question due to Congress's lack of response to repeated requests by Puerto Rico to modify its status. Accordingly, the generic consent given by the people of Puerto Rico in 1952 to the applicability of federal laws through Section 9 of the Federal Relations Act may be no longer valid.

Although the final determination of the status of Puerto Rico is a political question for the Congress and the people of Puerto Rico to decide, the applicability of federal laws, under the present constitutional arrangement, without participation by Puerto Rico could be interpreted as a violation of Due Process. The wholesale application of federal laws to the Commonwealth, coupled with the gradual erosion during the last fifty years of the principle of government by consent, has come to the point where, in the case of unilaterally applying federal laws, it clashes with the principle of liberty enshrined in the Declaration of Independence and the Constitution of the United States, thereby violating the substantive due process rights of the American citizens of Puerto Rico. It also does violence to the principle of the consent of the governed underlying the Federal Constitution and the relationship between the people of Puerto Rico and the United States --- this is a principle "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[94] and, hence, goes to the heart of what Justice Benjamin Cardozo came to regard as the "scheme of ordered liberty."[95] In retrospect, the federal courts have shied away from becoming the fora where the people of Puerto Rico could turn to in order to garner greater home rule; in no small measure due to the judiciary's reticence to liberally construe Section 9.

It is time for both parties-namely, the people of Puerto Rico and the political branches in Washington, D.C.-to urgently review the relationship in order to provide for greater participation and a more specific mechanism of consent by the people of Puerto Rico to the applicability of federal laws in the Commonwealth. Such mechanisms have existed in the past,[96] and have been suggested on

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1989 S. 712, 101st Cong. (1989) to provide for a Referendum on the Political Status of Puerto Rico

1993 Status Plebiscite, in which improved Commonwealth Status obtained a majority of 46.5% of the votes (no action taken by Congress to implement the choice)

1996 Young Bill H.R. 856, 105th Cong. (1996) (which would have become the United States-Puerto Rico Political Status Act)

1998 Status Plebiscite, in which the protest vote ("None of the Above") won with 50.3%.

94 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

95 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

96 For example, Section 49b(3) of the Organic Act of Puerto Rico, 48 U.S.C. 734 (2003), as amended in 1947, provided that "the President of the United States may, from time to time, after hearing, promulgate Executive orders expressly excepting Puerto Rico from the application of any Federal law, not expressly declared by Congress to be applicable to Puerto Rico, which as contemplated by Section 9 of this act is inapplicable by reason of local conditions." President Truman Created a Commis-

various occasions by competent bodies.[97] Without addressing this issue promptly, in a fair and democratic way, the legitimacy of Commonwealth status will continue to be vulnerable and subject to questioning from all sides.

sion to make recommendations regarding which federal laws should not apply to Puerto Rico. *See* Exec. Order 10,004 (1948). Unfortunately, Section 49b(3) of the Organic Act did not survive as part of the Federal Relations Act in 1952.

97 The Ad Hoc Advisory Group on Puerto Rico recommended the following:

> The provisions on the applicability of Federal laws recommended by the Advisory Group recognize the economic, social and political development of the people of Puerto Rico. The proposed Compact provides that existing Federal laws will continue to apply to Puerto Rico, and that future statutes will apply only if Puerto Rico is specifically included. Additionally, the Compact provides for a special mechanism through which Puerto Rico may present objections and request exemption from non-essential legislation when, in the judgment of the Governor or of the Resident Commissioner, if extended to Puerto Rico, such legislation would adversely and unnecessarily affect the interests of the Free Associated State. Such objections are to be presented to the appropriate committee or committees of Congress, which must then determine whether or not the extension of the proposed legislation is essential to the interests of the United States and compatible with the Compact. If the respective committee or committees by vote express agreement with the objections, Puerto Rico will be held exempt.

COMPACT OF PERMANENT UNION BETWEEN PUERTO RICO AND THE UNITED STATES: REPORT OF THE AD HOC ADVISORY GROUP ON PUERTO RICO 29-32 (October, 1975).