



AMERICAN  
CONSTITUTION  
SOCIETY

Issue Brief

March 2020

## The US Constitution Meets Democratic Theory: The Puzzling Cases of Puerto Rico and D.C.

Luis Fuentes-Rohwer and Guy-Uriel Charles

*The time has come at long last to end the unacceptable status of the District of Columbia as America's last colony.<sup>1</sup>*

*[T]hat Puerto Rico has a 'representative' in Congress without a vote is not only a pathetic parody of democracy within the halls of that most democratic of institutions, but also a poignant reminder that Puerto Rico is even more of a colony now than it was under Spain.<sup>2</sup>*

Some U.S. citizens live in the territorial United States yet cannot vote for federal representatives. This is not because they are minors or otherwise disqualified, but because they live in geographic locations that are not states. The U.S. Constitution conditions federal representation on the citizens' relationship with states as political units. Under Article I, members of the House of Representative are selected "by the People of the several states." Similarly, Article II directs "each state [to] appoint . . . a Number of Electors," who will then select the President and Vice-President of the United States. The Seventeenth Amendment, ratified over a century later, followed this approach; it provides that the Senate "shall be composed of two senators from each state, elected by the people thereof." It is clear from the constitutional language that U.S. citizenship is not enough to vote for national office; one must also be a citizen of a state.

This issue deeply affects both residents of the District of Columbia and Puerto Rico. Both D.C. and Puerto Rico are territories with significant populations<sup>3</sup> and while almost sixty percent of D.C.'s residents are people of color, the vast majority of Puerto Rico's citizens are ethnically

---

<sup>1</sup> *Kennedy Introduces Bill Urging Statehood for D.C.*, Wash. Post, Jan. 25, 1985.

<sup>2</sup> Juan R. Torruella, *Hacia Dónde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1519–20 (1998) (reviewing JOSÉ TRÍAS MONGE, *THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997)).

<sup>3</sup> The District boasts a population of more than 700,000 residents, almost as many residents as North Dakota and Alaska. See [CENSUS BUREAU, NAT'L & STATE POPULATION ESTIMATES, CENSUS.GOV](https://www.census.gov/data/tables/2018/natals/statepop.html) (Dec. 19, 2018) (N.D.: 760,000; Alaska: 737,000). If a state, the District would be one of the smallest in the Union, but it would have more residents than Vermont and Wyoming. *Id.* (Vt.: 626,000; Wyo.: 577,000). Puerto Rico has a population of well over 3 million people, which by population standards, would make the island the 30<sup>th</sup> largest state in the union. *Id.*

Latinx. These citizens are denied meaningful representation at the federal level because of where they live within the territorial United States.

Not only are American citizens in D.C. and Puerto Rico formally disenfranchised in national politics, but both jurisdictions are subject to congressional plenary powers. Congress may regulate their affairs subject to very few constitutional constraints. And indeed, it has--both Puerto Rico and D.C. have been subject at one time or another to a control board in order to address dire financial problems. The constitutional irony is inescapable: these citizens have no direct representation in the political bodies that have plenary power to directly impact their lives.

It is easy to view the status of D.C. and Puerto Rico as a function of the constitutional text; this is what the Constitution requires. However, to conclude that this is a straightforward constitutional question, easily resolved by a cursory look at the relevant constitutional language, is to miss what is significant about this debate. The status of D.C. and Puerto Rico under US law asks us to reflect upon the meaning of American citizenship. In so doing, we must reconcile our modern commitments to equality and representation with a narrower conception of political equality as enshrined in the Constitution. The constitutional text only begins to raise the necessary questions; it does not answer them.

To situate the inquiry, we first provide brief histories of Washington D.C. as the seat of government and Puerto Rico as an American colony in order to help us understand how we came to the present moment. We then turn to the question of statehood and examine the present status of both jurisdictions. Finally, we examine the political and partisan valence of the statehood debate and conclude that the debate presents a *partisan* question framed through a larger *constitutional* lens.

## I. Washington, D.C. and the Seat of Government Clause

Washington, D.C. became the nation's capital in 1790.<sup>4</sup> The original district covered one hundred square miles, of which Maryland ceded 69 square miles and 31 came from Virginia. In 1847, after Alexandria residents voted to leave, D.C. retroceded Virginia's contribution. Today, the District is 68 square miles, its population approximately 700,000 residents and expected to reach 850,000 by 2030. Forty-five percent of its population is African American, 11% Latinx, and 4% Asian.

As the seat of government, D.C. is subject to congressional authority and may not form part of an existing state. Article 1, section 8 of the Constitution explicitly states:

---

<sup>4</sup> The move to D.C. was the result of a compromise between Alexander Hamilton, who wished for the federal government to assume the states' war debts, and Thomas Jefferson, who worried about the growing influence and economic power of northern states. The Residence Act fixed the new capital along the Potomac River, with site selection left to President Washington. [Residence Act](#), 1 Stat. 130 (1790).

The Congress shall have Power To ...exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.<sup>5</sup>

The reason for this “indispensable necessity,” wrote James Madison in Federalist No. 43, was that Congress must have “complete authority” over the seat of government. Otherwise, “the public authority might be insulted and its proceedings interrupted with impunity.” The seat of government must remain independent from the states, otherwise the host state may exercise undue influence over it and over national affairs more generally. Madison had reason to worry. In 1783, veterans of the Revolutionary War forced the Continental Congress, then in Philadelphia, to evacuate to New Jersey as they demanded back pay. Modern critics similarly complain that D.C. statehood “would make the federal government dependent on an independent state . . . for everything from electrical power to water, sewers, snow removal, police and fire protection.”<sup>6</sup> Yet, these historical concerns seem anachronistic today. We clearly have less reason to worry, in light of historical practices: think about the Pentagon or the CIA in Virginia; the National Institutes of Health or the National Security Agency in Maryland; or any federal agency across the country not headquartered within D.C. The argument is now theoretical at best, formalistic at its core.

We explore two efforts to try to narrow the gap between our modern commitment to democracy and equality and a constitutional text that denies D.C. residents self-government.

### A. Home Rule

The Constitution grants to Congress sweeping authority to “exercise exclusive Legislation in all Cases whatsoever” over D.C. Perversely, even if on the whim of a single member, Congress can veto policies that super majorities in the District want.

It is difficult, perhaps impossible, to reconcile this state of affairs with basic tenets of democratic self-governance. Yet, reform efforts have generally failed. Between 1948 and 1966, for example, the US Senate passed six bills providing a modicum of self-rule for D.C., but each time the House District of Columbia Committee killed them. In 1967, the structure of D.C. government changed from a commissioner form of government to a mayoral format with a nine-member city council appointed by the President. Finally, in 1973, Congress enacted the District of Columbia Home Rule Act, a hopeful piece of legislation that continued to respond to the longstanding demands of D.C. residents. Importantly, the Act provided for an elected Mayor and a 13-member Council with the authority to enact local laws. The Act also authorized

---

<sup>5</sup> U.S. Const. art. I, § 8, cl. 17.

<sup>6</sup> Equality for the District of Columbia: Discussing the Implications of S. 132, the New Columbia Admission Act of 2013 Before the H. Comm. on Homeland Sec. and Governmental Affairs, 113th Cong. 99 (2014) (statement of Roger Pilon, Vice President, Legal Affairs and Chair, Const. Studies, Cato Inst.).

“Advisory Neighborhood Commissions,” local governmental councils that “may advise the District government on matters of public policy including decisions regarding planning, streets, recreation, social services programs, health, safety, and sanitation in that neighborhood council area.” D.C. residents approved the Act in a referendum the following year. Democracy, it appeared, had finally come to the District.

The 1973 committee report reflects the competing views about home rule for D.C. The majority argued that “[i]n a country such as ours where the tenets of democracy have reached full flower, it is an anomaly that the people of our nation's capital have virtually no voice in their own government.”<sup>7</sup> More specifically, “[t]axes are levied without their consent; officials are appointed without their approval, budget funds are allocated without reference to their needs and desires, and major governmental decisions concerning all aspects of their lives are made by officials elected from substantially different constituencies.”<sup>8</sup> In contrast, the minority complained that the proposed bill “is not a balanced home rule concept...., not an adherence to the constitutional provision that Congress shall have exclusive legislative authority in the District but an abdication of congressional authority...and an elevation of ‘home rule’ to the point where it exceeds that of any city in the United States.”<sup>9</sup> These competing views reflected the long-standing debate over home rule for D.C. A contemporary account of the Act noted that “[u]nderlying those arguments at times were the issues of race and politics. The predominantly black and heavily Democratic population of the District left many Republican and southern members of Congress lukewarm or opposed to a popularly elected local government.”<sup>10</sup> Issues of race and partisanship have been and continue to be, at best, just below the surface.

The grant of autonomy was less robust than it might first appear. We need only take a brief look at the very words of the law:

Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by article I, section 8, of the Constitution, the intent of Congress is to delegate certain legislative powers to the government of the District of Columbia: authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.<sup>11</sup>

---

<sup>7</sup> H.R. REP. NO. 93-482, at 50 (1973).

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

<sup>9</sup> *Id.* at 114.

<sup>10</sup> *Congress Grants Nation's Capital Limited Home Rule*, in CQ ALMANAC 1973, at 734 (29th ed. 1974) (last visited Nov. 13, 2019).

<sup>11</sup> District of Columbia Home Rule Act, Pub. L. No. 93-198, §102, 87 Stat. 774, 777 (1973).

On its face, this new governmental structure for the District looks like that of any other state or locality across the U.S. The Council can adopt its own laws, for example, and it can also approve the annual budget for D.C. as submitted by the Mayor. But the careful reader soon notices that whatever home rule is extended to D.C., Congress retains “ultimate legislative authority over the Nation’s Capital.” Congress delegates not all but “certain” legislative powers. In the end, Congress almost wishes it could do more, but the Constitution gets in the way of home rule. Congress is happy to unburden itself from legislating over “local District matters.”

It gets worse. Though Congress grants D.C. the authority to enact its own laws, new laws are subject to a thirty-day waiting period so Congress has time to review them. The District may not appoint its own judges,<sup>12</sup> nor does it have authority over the jurisdiction of its local courts.<sup>13</sup> Congress must approve D.C.’s annual budget. Congress also imposed specific limitations on the Council and its newly delegated authority, including: taxing the property of the United States or of any state; taxing the income of people who reside outside D.C.; supporting “any private undertaking” with public credit; or, *inter alia*, passing any law affecting the U.S. District Courts for D.C., or the duties of the U.S. Attorney or U.S. Marshall for the District. In case doubts remained, Congress made clear how far the Home Rule Act was willing to go:

Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

As Congress afforded “home rule” to D.C., in other words, it left no doubt that this grant of authority was conditional and limited. This was “home rule lite” at best. Examples of congressional interference with local affairs are many. Congress has voted to block D.C. from using local funds to cover abortion services through Medicaid; blocked a 1992 law that allowed gay and straight couples to register as domestic partners; blocked a needle exchange program; blocked the sale of medical marijuana;<sup>14</sup> and has sought to overturn D.C.’s gun control laws. In 1995, in response to budgetary mismanagement by District officials, Congress imposed a

---

<sup>12</sup> The District of Columbia Judicial Nomination Commission nominates judges and sends a list to the President of the United States, who then chooses judges from the list of nominees. The U.S. Senate confirms the chosen judges. *See* Judicial Nomination Commission, *JNC Application Process*, DC.GOV (last visited Nov. 13, 2019).

<sup>13</sup> *But see* District of Columbia Courts Home Rule Act, H.R. 2769, 116th Cong. (2019) (as introduced by Congresswoman Eleanor Holmes Norton (D-D.C.); would expand D.C. Council’s authority over the local courts).

<sup>14</sup> District voters passed an initiative in 2014 legalizing recreational marijuana use for persons 21 years old and older. D.C. Law 20-153.



Financial Responsibility Board on D.C. and prohibited the Council from “enact[ing] any act, resolution, or rule with respect” to it.<sup>15</sup> In 2016 alone, members of Congress tried to change or overturn 25 different local laws.<sup>16</sup>

## B. Enfranchisement

Before Maryland and Virginia ceded their land for the creation of a federal seat of government, residents in both jurisdictions voted in U.S. elections. Notably, they continued to vote for the ten years between the cession and the establishment of Washington, D.C. as the nation’s capital. Only as D.C. became the seat of government did its residents lose the right to vote for national office.

In the intervening years, the drive for full voting rights for D.C. residents “has moved in fits and starts.”<sup>17</sup> The debate began almost as soon as residents were stripped of their voting rights in 1800. In a series of articles published between 1801 and 1803, Augustus B. Woodward, a Jeffersonian lawyer-journalist writing under the pen name Epaminondas, complained that District residents paid taxes yet could not vote, the very argument made by those who fought for independence decades before.<sup>18</sup> The issue lay largely dormant until the early 20th Century, when myriad resolutions were introduced in Congress to enfranchise the District. They all failed.

Reformers began to achieve success in 1960, when Congress passed the Twenty-Third Amendment -- extending representation in the Electoral College to District voters -- and the requisite number of states ratified it the following year. In 1967, District voters gained the right to vote for their own school board. And in 1970, they could vote for a delegate to the U.S. House, a representative who lacks full voting privileges on the House floor yet votes in congressional committees. The march for voting rights in the District then took a huge step forward in 1978, when Congress passed a voting rights amendment that would have given District residents voting representation in Congress. However, the amendment expired after gaining support in only 16 of the required 38 states.<sup>19</sup> In 1980, District residents approved a state Constitution for the 51st state of New Columbia, under which District voters elect a shadow congressional delegation -- two Senators and one representatives -- for lobbying Congress on the statehood issue. To this day, Congress does not recognize the shadow delegation.

---

<sup>15</sup> District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8, 109 Stat. 97, 100 (codified at D.C. CODE § 47-391.1(a)).

<sup>16</sup> *2016 Attacks on D.C.’s Home Rule*, D.C.VOTE.ORG, (last visited Nov. 13, 2019).

<sup>17</sup> Stuart Auerbach, *D.C.: Chasing Full Voting Rights Since 1801*, WASH. POST, Aug. 23, 1978.

<sup>18</sup> See e.g., Augustus B. Woodward, Considerations on the Government of the Territory of Columbia, NAT’L INTELLIGENCER (Jan. 1, 1801).

<sup>19</sup> Joseph L. Rauh, Jr., *D.C. Voting Rights: What Went Wrong? The amendment died last week. Now, says a longtime advocate, statehood is the only game in town*, WASH. POST. (Aug. 25, 1985)

Reformers pressed on. District residents sued in federal court in 1998 seeking full congressional representation. They confronted Article I head on and its demand that House members be chosen "by the people of the several States."<sup>20</sup> The D.C. Circuit rejected all claims.<sup>21</sup> Subsequently, reformers brought their claims to Congress. Beginning in 2003, bills that would consider the District a state for voting purposes<sup>22</sup> or grant the District voting representation in the House<sup>23</sup> never made it out of committee. In 2007, a bill to expand the House to 227 members, awarding one seat to the District and one to Utah, passed in the House yet could not reach 60 votes in the Senate.<sup>24</sup> A similar bill in 2009 died after the introduction of an amendment to overturn the District's gun control laws.<sup>25</sup>

The argument against voting rights for District residents is difficult to reconcile with democratic theory, in which self-government is essential to democratic legitimacy and effectuated through periodic elections.<sup>26</sup> A registered voter in any of the fifty states loses their right to vote for Congressional representation as soon as they move to the District.<sup>27</sup> This is a categorical denial of a fundamental right, far more punitive than the one-year residence requirement struck down by the Supreme Court in *Dunn v. Blumstein*. Unfortunately for reformers, despite this unresolved tension with democratic theory, they have been unable to overcome the fundamental textual problem that the District is not considered a state for voting purposes.<sup>28</sup>

---

<sup>20</sup> *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd* 531 U.S. 941 (2000). Residents offered two theories of statehood for the District. They argued, first, that the District was a state for voting purposes; and second, that District residents could vote through their "residual" citizenship in Maryland. They also brought claims under the 14th Amendment and the Guarantee Clause.

<sup>21</sup> *Id.*

<sup>22</sup> The No Taxation Without Representation Act of 2003, H.R. 1285, 108th Cong. (2003).

<sup>23</sup> The District of Columbia Fair and Equal House Voting Rights Act of 2006, H.R. 5388, 109th Cong. (2006).

<sup>24</sup> The District of Columbia House Voting Rights Act of 2007, H.R. 1433, 110th Cong. (2007).

<sup>25</sup> See District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. (2009).

<sup>26</sup> See, e.g., Guy-Uriel E. Charles, *Democracy & Distortion*, 92 CORNELL L. REV. 601, 608 (2007). Some have tried to argue that D.C. is not without representation, even if indirect. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 46 (1987) ("it is difficult to seriously maintain that the residents of the District of Columbia have no voice in the national government. In fact, because of their proximity to the center of power, they have far more influence than the average American.") Yet, this theory of representation has been cold comfort to reformers. See Rauh, Jr., *supra* note 21 ("Heaven knows, no one has ever given a sensible reason to continue the District of Columbia's disenfranchisement. We are not too small an entity for representation in Congress (D.C. has more voters than six states). We are not too poverty-stricken to be represented (only one state pays a higher per-capita income tax). We are not too lacking in national patriotism to be represented (more D.C. citizens died in Vietnam than did those of 10 states).")

<sup>27</sup> *Id.*

<sup>28</sup> See Symposium, *Is There a Constitutional Right To Vote and Be Represented? The Case of the District of Columbia*, 48 AM. U.L. REV. 589, 662 (1999) ("Rather, the issue is that of text. Article I, Section Three,

## II. Puerto Rico and American Empire

The history of Puerto Rico as an American colony has many similarities with Washington, D.C., including the most prominent characteristics – home rule and disenfranchisement. Tellingly, both jurisdictions have been subject at one time or another to an unaccountable and unelected financial board. Also, both Puerto Rico and the District are inhabited by majority Black and Brown populations. And the modern democratic deficits seen in both places trace back to the constitutional text and the fact that neither D.C. nor Puerto Rico are considered “states” under Article I. To be sure, the status debate in Puerto Rico is slightly more complicated, in that it raises difficult questions of identity and belonging within a larger colonial empire. But those are questions for the people of Puerto Rico, not the US Congress.

### A. Of Citizenship, Incorporation, and the Status of the Island

The relationship between Puerto Rico and the U.S. began at the onset of the Spanish American War on April 25, 1898. Three months later, on July 25, General Nelson A. Miles led the U.S. invasion of Puerto Rico and found little resistance. The U.S. Army secured the island within a month, and on December 10 of that year, Spain and the U.S. agreed to the Treaty of Paris, ending hostilities. Spain ceded “Porto” Rico, Guam and the Philippines to the U.S. as spoils of victory.

The first action taken by the U.S. towards Puerto Rico was enacting the Foraker Act, which established a civil government for the island. The Act provided for a governor and an eleven-member executive council, both appointed by the president with the advice and consent of the Senate, and a thirty-five-member legislature. Further, the Act created a Supreme Court of Puerto Rico and provided for a nonvoting Resident Commissioner to represent the island. Notably, the Act did not extend American citizenship to the inhabitants of Puerto Rico, creating instead the new status of “citizens of Puerto Rico.” The Act also did not stipulate a Bill of Rights for the island, nor did it explicitly settle the question of travel to and from the U.S.

Congress showed its distrust of island officials and their capacity for self-rule in a number of ways. For example: the president and the Senate appointed most political functionaries, including the governor and judges, and the president retained the right to remove the governor at will; only five of the eleven members of the executive council must be born in Puerto Rico; Congress reserved the right to annul any law enacted by the Puerto Rican legislature at any time, and could legislate for the island even on local affairs; and litigants could appeal decisions by the Supreme Court of Puerto Rico to the U.S. Supreme Court. The people of Puerto Rico had no effective representation in the U.S. Congress or a vote in the Electoral College.

---

Article I, Section Four, Article V and the Twenty-third Amendment are not ‘ambiguous,’ . . . nor do I think it is a ‘pinched’ interpretation of these provision to say that, ‘States’ mean ‘States.’”) (statement of Judge Markman).



The following year, the U.S. Supreme Court decided a collection of cases that legitimized the nation's thirst for empire. In the "Insular Cases," the Court concluded that the U.S. may acquire territories across the globe and hold them as possessions short of statehood. Justice White's influential concurrence drew the constitutional line at the time of incorporation.<sup>29</sup> White described Puerto Rico as "foreign in a domestic sense," an unincorporated territory subject to the plenary powers of Congress. Incorporation would place the island on the path to statehood. A few years later, the Court concluded that the people of Puerto Rico were neither foreigners nor U.S. citizens, yet left open the question as to what exactly their status was.<sup>30</sup> As in the *Insular Cases*, the Court intentionally offered a vague response, providing the political branches the space within which to resolve this issue.

This was a difficult question, as exemplified by the twenty-one bills introduced in Congress from 1901 to 1917 that sought to confer American citizenship to the people of Puerto Rico. Presidents Roosevelt and Taft endorsed many of these proposals. In his first message to Congress, President Wilson specifically proposed "giving [Puerto Ricans] the ample and familiar rights and privileges accorded our own citizens in our territories." Finally, on March 2, 1917, President Wilson signed into law the Organic Act of 1917, also known as the Jones Act.<sup>31</sup>

According to noted historian José Trías Monge, the Jones Act "represented a modest step forward on the long road toward self-government."<sup>32</sup> The Act granted U.S. citizenship to Puerto Ricans and replaced the executive council established under the Foraker Act with an elective Senate. However, distrust of island affairs remained. For example, legislative actions were subject to a gubernatorial veto, and in the event of a legislative override, the president held final authority. Congress also retained the right to annul local laws and could go as far as to legislate for the island. The resulting regime, wrote Judge Torruella, subjected the people of Puerto Rico "to almost absolute central discretion."<sup>33</sup>

The examples of Alaska and Hawaii strongly suggested that by granting U.S. citizenship to the people of Puerto Rico, the island might finally be an incorporated territory. The Supreme Court agreed with the premise, in *Balzac v. Puerto Rico*, that "[i]ncorporation has always been a step, and an important one, leading to statehood."<sup>34</sup> But the Court further cautioned that it must "not lightly . . . infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our

---

<sup>29</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>30</sup> *Gonzales v. Williams*, 192 U.S. 1 (1904).

<sup>31</sup> Pub. L. No. 64-368, 39 Stat. 951.

<sup>32</sup> TRÍAS MONGE, *supra* note 2, at 75.

<sup>33</sup> JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 118 (1985).

<sup>34</sup> 258 U.S. 298, 311 (1922).

continental people.”<sup>35</sup> The Court concluded that the Jones Act would not suffice; if and when Congress decides to incorporate a territory, “it is reasonable to assume that . . . such a step . . . will be begun and taken by Congress deliberately, and with a clear declaration of purpose, and not left a matter of mere inference or construction.”<sup>36</sup> Congress must take such a momentous step as incorporation explicitly.

The relationship between Puerto Rico and the U.S. continued to evolve. In 1946, President Truman designated then-Commissioner Resident Jesús T. Piñero as the first Puerto Rican to serve as island governor. The following year, the Elective Governor Act allowed the people of Puerto Rico to elect their own governor. And in 1950, the U.S. Congress authorized the drafting of the Constitution of Puerto Rico, which the people of Puerto Rico submitted for congressional approval in 1952. This Constitution, which established the commonwealth of Puerto Rico as we know it today, used consensual terms to define the relationship between Puerto Rico and the U.S. A strong case could be made that this new relationship served to incorporate the island into the United States. The U.S. Supreme Court disagrees, as recently as three years ago.<sup>37</sup>

### B. Representation and Plenary Powers under the Constitution

The parallels to D.C. continue. First, residents of Puerto Rico cannot vote in federal elections.<sup>38</sup> As with D.C., the constitutional metric for federal representation is statehood. Article I is quite clear that the U.S. House is “composed of Members chosen . . . by the several States” and Puerto Rico is not a state.<sup>39</sup> This seemingly clear-cut rule has yielded absurd results for Puerto Ricans.

To take an extreme example: under federal law, states must permit “overseas voters” to register and vote using absentee procedures.<sup>40</sup> The statute defines an “overseas voter” as a person living “outside the United States” and eligible to vote in their last place of residence before leaving the U.S., or who would be qualified to vote “but for such residence” outside the U.S. This means

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

<sup>38</sup> See *Igartua - De la Rosa v. United States* (2005) (“Puerto Rico—like the District of Columbia, the Virgin Islands, and Guam—is not a “state” within the meaning of the Constitution. Puerto Rico was not one of the original 13 states who ratified the Constitution; nor has it been made a state, like the other 37 states added thereafter, pursuant to the process laid down in the Constitution. Nor has it been given electors of its own, as was the District of Columbia in the Twenty-Third Amendment.”) (internal citations omitted).

<sup>39</sup> To be sure, this speaks to the weak nature of the U.S. Constitution as a democratic project, a document for which the right to vote is not a feature but an afterthought. The US Constitution does not explicitly elevate the right to vote as “a fundamental political right, because preservative of all rights.” See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Rather than a universal right belonging to citizens, the right to vote is a negative right that states may regulate so long as they don’t run afoul of predetermined constitutional and statutory proscriptions, including race, gender, and age, among others. So much is true if not always appreciated.

<sup>40</sup> The Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986).

that an otherwise eligible Indiana voter who relocates to Haiti, for example, may request an absentee Indiana ballot by right under federal law. The same would not be true if the same person moved to Puerto Rico, D.C., or any of the other U.S. territories. This is because the statute defines the United States, “where used in the territorial sense,” to include not only the fifty states but also “the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.” To relocate to Puerto Rico, in other words, is not to move “outside of the United States” but to move outside of a recognized state as recognized under federal law. While Article I applies only to states, so that the people of Puerto Rico have no congressional representation, the federal absentee statute defines Puerto Rico as a state, so the statute bars those who move to the island from voting absentee. Orwell couldn’t have sketched it better.

Second, the island is subject to the plenary powers of Congress, which means that residents of Puerto Rico enjoy only those guarantees of the Bill of Rights deemed by the Court as fundamental. For a poignant example, consider the recent bankruptcy proceedings on the island.<sup>41</sup> In 2014, Puerto Rico enacted the Puerto Rico Corporation Debt Enforcement and Recovery Act in order to allow its public utilities to restructure their debt.<sup>42</sup> Two years later, the U.S. Supreme Court declared that Puerto Rico did not have the legal authority to do so.<sup>43</sup> Though the U.S. Bankruptcy Code had long defined Puerto Rico as a state, a 1984 amendment excluded the island “for the purpose of defining who may be a debtor under chapter 9.”<sup>44</sup> To the Court, Puerto Rico did not have the authority to offer its municipalities Chapter 9 relief. Yet the Court further explained that Puerto Rico remained “a state” under other provisions of the Code, including its pre-emption provisions. As Justice Sotomayor explained in her dissent, Puerto Rico was “left powerless and with no legal process to help its 3.5 million citizens.”

Two weeks later, President Obama signed into law the Puerto Rico Oversight, Management and Economic Stability Act, or PROMESA. The Act authorized the president to appoint a seven-member Financial Oversight and Management Board with control over the island’s budget and authority to restructure the island’s debt. Importantly, the PROMESA Board “has extensive powers to bind Puerto Rico’s government, and is not subject to Puerto Rican control or oversight.”<sup>45</sup> This is no small matter:

---

<sup>41</sup> Lara Merling, *Puerto Rico’s Peculiar Case: Bankruptcy of an Unincorporated Territory*, Center for Economic and Policy Research, Sept. 7, 2018.

<sup>42</sup> 2014 Laws P.R. p. 371.

<sup>43</sup> See *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016).

<sup>44</sup> Bankruptcy Amendments and Federal Judgeship Act, § 421(j)(6), 98 Stat. 368, now codified at 11 U.S.C. § 101(52).

<sup>45</sup> Developments in the Law — Ch. II: The International Place of Puerto Rico," 130 Harv. L. Rev. 1656, 1666 (2017) (citing Vann R. Newkirk II, *Congress’s Promise to Puerto Rico*, THE ATLANTIC (May 19, 2016)).

These are incredibly broad powers, cutting to the heart of governance. Yet the Board is also clearly a direct instrumentality of U.S. federal power — an instrumentality of the dominant state. Its members are appointed by the President, without the advice and consent of the U.S. Senate, mostly from a list of individuals submitted by majority and minority leaders in the U.S. Congress. The Puerto Rican governor can sit on the Board only ex officio, without voting rights. Puerto Rico’s former governor, Alejandro García Padilla, has said that the Oversight Board is “not consistent with . . . basic democratic principles.” The Board convenes, notably, in New York City.<sup>46</sup>

Some argue that the PROMESA Act is a “blatantly undemocratic, neoliberal project[.]”<sup>47</sup> Moreover, this debate is familiar to anyone acquainted with the history of Puerto Rico under U.S. rule. For some, the Act and subsequent actions by the PROMESA board are “just the latest twist in five hundred years of colonial rule.”<sup>48</sup>

To be sure, the people of Puerto Rico are U.S. citizens, but it is clear that the citizenship extended to them is of a kind different from U.S. citizenship generally. Puerto Rico is “foreign to the United States in a domestic sense,”<sup>49</sup> subject to the plenary powers of Congress. This is the end result of the incorporation doctrine, a doctrinal invention designed to accommodate the needs of its time. In the early 21st Century, it bears asking whether the imperialistic needs of the late 19th Century remain today.

### III. Understanding Statehood

One solution to the democratic deficits seen in Puerto Rico and D.C. would be to extend statehood to both territories. This would enable the residents of both jurisdictions to achieve full citizenship and equality immediately. Historically, three conditions have guided the admission of territories into the Union: a large population; a commitment to democratic principles; and the consent of territorial residents.<sup>50</sup> This was true of the territories under the Northwest Ordinance, for example; those territories were able to petition for statehood once their populations reached 60,000 residents, “on an equal footing with the original States in all respects whatever, and [were] at liberty to form a permanent constitution and State government.” This was also the path followed by the Tennessee territory. Once it reached 77,000 total residents, its governor called a constitutional convention, signed a state constitution within a month, elected two House members, selected two senators, and authorized four presidential electors. Two months

---

<sup>46</sup> *Id.* at 1668.

<sup>47</sup> Ed Morales, *The Technocratic Takeover*, JACOBIN, Sept. 13, 2016.

<sup>48</sup> *Id.* See Juan Gonzalez, *Puerto Rico’s \$123 Billion Bankruptcy is the Cost of U.S. Colonialism*, THE INTERCEPT, May 9, 2017.

<sup>49</sup> 182 U.S. 244 (1901).

<sup>50</sup> See *D.C. Statehood: Hearing on H.R. 51 Before the Subcomm. on Fiscal Affairs & Health of the H. Comm. on the District of Columbia*, 100th Cong. 228 (1987) (statement of Sen. Edward Kennedy).

later, after a brief yet heated congressional debate, Tennessee joined the Union as the 16th state. This was the first time a territory forced its way to statehood.

Statehood advocates for D.C. and Puerto Rico look to Tennessee as a model, where two of three historic conditions squarely apply. The District is home to 700,000 residents while Puerto Rico has approximately 3.2 million. On these numbers alone, and in the words of Representative Eleanor Holmes Norton, “the real question is, why shouldn’t D.C. [or Puerto Rico] be a state?”<sup>51</sup> Further, both D.C. and Puerto Rico are obviously committed to democratic principles. This is a fuzzy condition, to be sure, but one that both Puerto Rico and D.C. easily meet. Above all else, they both have representative institutions as elected by their own residents.

The third condition is a basic tenet of democratic theory: consent. Admission requires the consent of territorial residents and subsequent congressional ratification.<sup>52</sup> Washington, D.C. readily meets this final condition. In 2016, seventy-nine percent of District residents voted to become a state.<sup>53</sup> Following the Tennessee Plan, D.C. has elected a shadow delegation since 1990. The District could not be clearer in its intentions of wanting to join the Union. All that remains is for Congress to accept its wishes.<sup>54</sup>

Puerto Rico, however, is not as clear-cut. The status of Puerto Rico under U.S. law is the question at the heart of the island’s identity. There is no neutral position. Puerto Ricans are either for statehood (and the PNP party); commonwealth (and the PPD party); or independence (and the PIP party). These three positions define the politics on the island, and no one position commands a clear majority. Polls are equivocal, and the various plebiscites through the years on the status question underscore the divisions on the island. Ultimately, the status question should be a question for the people of Puerto Rico; that is, “Puerto Ricans should have the ultimate say in whether to be more closely associated with the United States.”<sup>55</sup>

Reformers and critics point to three issues to illustrate the deficiency of the status quo and the need for reform: continuing lack of representation despite taxation; the reality that both D.C.

---

<sup>51</sup> *Politics Podcast: Should Washington, D.C., Be the 51st State?*, FIVETHIRTYEIGHT (June 6, 2019).

<sup>52</sup> This was true for the Northwest Ordinance and the Tennessee Plan; California after the gold rush; and Arizona, which waited until 1912 to gain admission. This was also true for Alaska, acquired from Russia in 1867, incorporated in 1912 – after its gold rush doubled the population from 1890 to 1900 – and admitted to the United States in 1959.

<sup>53</sup> *General Election 2016—Certified Results*, D.C. Bd. Of Elections, DCBOE.ORG, (Nov. 18, 2016, 12:28 p.m.).

<sup>54</sup> Interestingly, though in no way determinative, national polls do not support the D.C. statehood movement. Jeffrey M. Jones, *Americans Reject D.C. Statehood*, GALLUP (July 15, 2019). We theorize in the last Part why D.C. statehood is yet to gain broader support.

<sup>55</sup> Joseph Blocher and Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT. L. 229, 235 (2018). Ironically, unlike Washington D.C., national polls on the mainland support statehood for Puerto Rico. Justin McCarthy, *Americans Continue to Support Puerto Rico Statehood*, GALLUP (July 18, 2019).



and Puerto Rico are already treated as states in a wide variety of circumstances outside of the political context, and the para-constitutional nature of both jurisdictions. We now consider each of these issues in turn.

### A. Of Taxation and Representation

The logic of James Otis’s pithy colonial-era phrase, “no taxation without representation,”<sup>56</sup> is unassailable: if a citizen is good enough to pay taxes, she is also worthy of the right to vote. D.C. explicitly invoked the historical argument almost twenty years ago when it inscribed the phrase on its license plates.<sup>57</sup> And here’s the rub: D.C. residents pay more federal taxes per capita than any other state, and it is not close.<sup>58</sup> It is true that the District gets back around \$4 for every dollar it sends to the federal government, but this return is mostly in the form of federal employees’ salaries.<sup>59</sup>

The case for full representation for Puerto Rico is similarly unassailable. The quick retort to criticisms about the status of Puerto Rico is that island residents do not pay federal taxes. So much is true: island residents do not pay federal *income* taxes for income from within the island. But residents of Puerto Rico pay every other tax known to the imagination, leading one commentator to suggest that “Puerto Ricans on the island are the most heavily taxed of all U.S. citizens.”<sup>60</sup> These taxes include: the FICA tax, which funds Social Security and Medicare; payroll, business, gift and estate taxes; import and export taxes; commodity taxes; unemployment insurance taxes; and self-employment (SECA) taxes. In 2016, as the island faced one of its worst financial crises, Puerto Rico contributed \$3.6 billion dollars to the U.S. Treasury.

Just as importantly, since island residents do not pay income taxes, they are not entitled to tax credits – such as the Earned Income Tax Credit and the Child Tax Credit – available to citizens on the mainland. Commentators miss this point too easily. The per capita income on the island in 2017 was \$12,081;<sup>61</sup> the median household income was \$19,343.<sup>62</sup> To make sense of these numbers, consider that the per capita income in the mainland U.S. was \$48,150;<sup>63</sup> the median

<sup>56</sup> *On this day: “No taxation without representation!”*, NAT’L CONST. CTR. (Oct. 7, 2019).

<sup>57</sup> Sewell Chan, *Message Gets Rolling: D.C. Government Enlists Residents’ Vehicles in Campaign for Congressional Representation*, WASH. POST, Nov. 5, 2000, at C01.

<sup>58</sup> *Tax Day 2017: Which State Sends Most Taxes to D.C.?*, FORTUNE (Apr. 16, 2017).

<sup>59</sup> Dyfed Loesche, *Washington D.C. Pays Most Per Capita Taxes in the United States*, STATISTA.COM (May 2, 2017); Rachel Kurzius, *D.C. Pays Way More than any State Per Capita in Federal Taxes*, DCIST (Apr. 17, 2017, 10:37 a.m.).

<sup>60</sup> Nelson A. Denis, *Taxing Puerto Rico to Death*, ORLANDO SENTINEL, Jan. 10, 2018.

<sup>61</sup> *Quick Facts: Puerto Rico*, CENSUS.GOV, (last visited Nov. 13, 2019). By comparison, Mississippi’s per capita income was \$22,500; West Virginia’s, \$24,774; Alabama’s, \$25,746. See *Quick Facts: West Virginia; Alabama; Louisiana; Mississippi*, (last visited Nov. 13, 2019).

<sup>62</sup> See GLORIA G. GUZMAN, U.S. CENSUS BUREAU, ACSBR/17-01, *HOUSEHOLD INCOME: 2017*; see also *Puerto Rico*, DATAUSA.IO, (last visited Nov. 13, 2019).

<sup>63</sup> Kimberly Amadeo, *Income Per Capita, with Calculations, Statistics, and Trends*, THE BALANCE (Oct. 4, 2019),

household income was \$61,372.<sup>64</sup> The state with the lowest median household income was West Virginia, at \$43,469. These numbers tell an arresting story. In the U.S., two-thirds of people who earn under \$30,000 a year do not pay income taxes.<sup>65</sup> Most residents of Puerto Rico would not pay federal income taxes, yet would benefit from federal tax credits. Put bluntly: “Low income workers in Puerto Rico might be better off if they had to file a U.S. tax return.”<sup>66</sup>

Whatever one thinks about the status of Puerto Rico generally, to focus on the non-payment of federal *income* taxes to justify the status of the island is, at best, a sleight of hand. At worst, it is perverse. Citizens of both D.C. and Puerto Rico pay a significant amount of taxes and have no federal representation to vote on how those taxes are determined or used.

## B. Quasi-statehood

In numerous constitutional and statutory contexts, both Puerto Rico and D.C. are treated as if states.<sup>67</sup> Consider, for example, diversity jurisdiction. Article III could not be clearer: it authorizes suits between citizens of different states. And yet, federal law defines state citizenship for the purposes of diversity jurisdiction to include the District and Puerto Rico.<sup>68</sup> The same is true of full faith and credit, the 11th Amendment, and much of federal bankruptcy law.<sup>69</sup> In fact, according to Representative Jamie Raskin, “[t]he District is treated presently as though it were a state for more than 500 purposes by the Congress of the United States. The most familiar tag line you see in any federal statute is, ‘For the purposes of this statute, state includes the District of Columbia.’”<sup>70</sup> The same is true of Puerto Rico.<sup>71</sup> So Raskin asks, “the question is not how can it be treated like a state in the case of voting representation, but why should it not be treated like a state for the purposes of voting representation when it is treated, and functions, like a state for almost every other purpose.”<sup>72</sup>

<sup>64</sup> *Income, Poverty and Health Insurance Coverage in the United States: 2017*, CENSUS.GOV (Sept. 12, 2018).

<sup>65</sup> Drew DeSilver, *A Closer Look at who Does (and Doesn't) pay U.S. Income Tax*, PEW RESEARCH: FACTTANK (Oct. 6, 2017).

<sup>66</sup> *Puerto Rico and Federal Income Tax*, PUERTO RICO REPORT (Jan. 4, 2019).

<sup>67</sup> See Viet D. Dinh & Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (Nov. 2004) (unpublished manuscript submitted to the H. Comm. on Gov't Reform, 108th Cong.); Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Gov't Reform, 108th Cong. 75-84 (2004) (testimony of Kenneth W. Starr, former Solicitor Gen. of the United States; former J., D.C. Cir.).

<sup>68</sup> 28 U.S.C.A. § 1332.

<sup>69</sup> One place when Puerto Rico is not treated like a state, perversely enough, is Chapter 9 of the bankruptcy code. See Pedro Pierluisi, *A Lifeline for Puerto Rico*, 34-AUG AM. BANKR. INST. J. 8 (2015).

<sup>70</sup> Symposium, *supra* note 33, at 641-42 (presentation of Jamie B. Raskin); see, e.g., 28 U.S.C.A. sec. 1332.

<sup>71</sup> See *Chapter One: Territorial Federalism*, 130 HARV. L. REV. 1632, 1636-37 (2017).

<sup>72</sup> *Id.* at 660.

Statehood opponents are unpersuaded. They assert that the argument put forth by Raskin and others, though straightforward, “is illusory;” the “relatively few” cases when Congress has defined the District and Puerto Rico as a state “generally involved irreconcilable conflicts between a literal meaning of the term state and the inherent rights of all American citizens under the Equal Protection Clause and other provisions.”<sup>73</sup> In other words, there are times when a literal interpretation of “state” must give way to the “inherent rights of all American citizens” under the Constitution. American citizens do not lose all their rights upon moving to D.C. To follow this logic to its conclusion, it must mean that voting is not an “inherent right” of American citizenship, since citizens lose it upon relocating to D.C. And yet, we are advised that “[t]he creation of the federal district removed one right of citizens – voting in Congress – in exchange for the status of being part of the Capitol City.”<sup>74</sup> Is this to say that voting is a right of citizenship, but not an inherent right? We can’t tell. With not a hint of irony, these arguments are packaged together in an essay entitled “too clever by half.”

### C. Para-constitutional spaces

The American constitutional system creates spaces that exist outside constitutional reach, where constitutional rights and protections apply differently, if they apply at all. There is no way around it. A citizen who enjoys the full panoply of rights while residing in Maryland, Virginia, or Alaska, for example, loses the right to vote for congressional representation and enjoys only a limited version of home rule as soon as they move to D.C. or Puerto Rico.

This is how to make sense of HR 51, the Washington, D.C. Admission Act, recently introduced in the House by Representative Holmes Norton. This bill would reduce the federal district to a much smaller area, to include “the principal Federal monuments, the White House, the Capitol Building, the United States Supreme Court Building, and the Federal executive, legislative, and judicial office buildings located adjacent to the Mall and the Capitol Building.”<sup>75</sup> The remaining area would become the 51<sup>st</sup> State—the State of Washington, Douglass Commonwealth.<sup>76</sup> Notably, to assuage historic concerns about the need for an independent federal district, the new state may not impose taxes on the lands or other property of the United States, unless Congress so permits.

---

<sup>73</sup> Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305, 352-53 (2008).

<sup>74</sup> *Id.* at 353.

<sup>75</sup> H.R. 51 (Jan. 3, 2019). The federal spaces around D.C. raise many complexities. The statutory definition of “Capitol Grounds,” for example, is both expansive yet virtually unknowable. See 40 USC § 5102; see also *Class v. United States*, 138 S. Ct. 798 (2018).

<sup>76</sup> 165 Cong. Rec. H7550 (daily ed. Sept. 9, 2019) (statement of Rep. Holmes Norton) (“The State will still be called Washington, D.C., but D.C. will stand for Douglass Commonwealth after the immortal Frederick Douglass, who championed equal rights for D.C. citizens.”)

This is a pragmatic solution to an apparent constitutional problem. Critics of earlier reforms underscored the “original purposes” behind the Constitution’s “seat of government” Clause:

(a) [T]o ensure that the national government could provide for its own security and not to have to appeal for assistance to local authorities; (b) to ensure that no state would be perceived as the first among equals by virtue of having within its boundaries the nation's capital; and (c) to avoid what George Mason described as a “provincial tincture” to the deliberations of the Congress -- in other words, to ensure that the national government was independent of the states just as the states were to be independent of the national government. Taken together, these demonstrated the “indispensable necessity” (in Madison's words) of a “seat of government” separate and distinct from the States.<sup>77</sup>

These are all sensible, even important arguments. HR 51 sidesteps them all. The “seat of government” Clause refers to an area for the District not to exceed 10 square miles. HR 51 simply reduces the District to an area closer to this limit, which the national government continues to control. Residents of the new state of Washington, Douglass Commonwealth would be eligible to vote as a consequence of residing in a state, as required by Article I, and the District would remain the seat of government, separate and distinct from this new state and all others. Madison would have no cause for complaint.

To the critics, a constitutional problem remains. The District is “constitutionally unique.”<sup>78</sup> It is the “seat of government,” as described in Article I, but it is also entitled to three Electoral College votes under the Twenty-Third Amendment. They contend that passage of HR 51 would require a further amendment to nullify the Twenty-Third Amendment. Otherwise, those few remaining residents of the District would control three Electoral College votes.

District supporters argue that upon passage of HR 51, the Twenty-Third Amendment would lay dormant, since electors are chosen “as the Congress may direct.”<sup>79</sup> Others assert that Congress could repeal the Amendment by simple legislation.<sup>80</sup> Alternatively, they contend, “[t]he Twenty-third Amendment is a floor, not a ceiling, and the Ninth Amendment makes clear that the enumeration of the right to vote in presidential elections may not be construed to deny or disparage the right to vote in congressional elections.” While HR 51 does not resolve the problem of D.C.’s para-constitutional status, it does attempt to significantly limit the number of people subjected to the inequities of living in such a space.

---

<sup>77</sup> Symposium, *supra* note 33, at 645-46.

<sup>78</sup> See Adam H. Kurland, *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation*, 60 GEO. WASH. L. REV. 475, 481 (1992).

<sup>79</sup> Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187–88 (1991).

<sup>80</sup> See Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U.L. REV. 311, 349 (1990).

Puerto Rico is also a para-constitutional space, but unlike D.C., this status receives constitutional sanction through an under-appreciated yet arresting interpretive irony. In *Dred Scott v. Sanford*, the U.S. Supreme Court held that African Americans could not be U.S. citizens. The Court also made clear that the U.S. Constitution did not sanction the acquisition of territories that would fall short of statehood. The Court's words couldn't be clearer: a territory "is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority."<sup>81</sup> The settlement of Reconstruction overturned *Dred Scott*, squarely and decisively. But overturning *Dred Scott* meant overturning all of it, including its anti-colonialist holding. As the Civil War forged a new definition of freedom under the Constitution, this new world allowed, even condoned, the subjection of people around the world to colonial status under a flag that exalted freedom as its highest aspiration.

Two cases exemplify the Court's approach towards Puerto Rico. The first is *Califano v. Torres*.<sup>82</sup> The plaintiff in *Califano* was a former resident of Connecticut who qualified for benefits under the Supplemental Security Income (SSI) program while residing in the mainland United States.<sup>83</sup> Upon moving to Puerto Rico, his benefits were discontinued.<sup>84</sup> This case was not a difficult application of the law; under the relevant language, beneficiaries could not apply for support under the program for any month they resided outside the "United States," and the statute defined "United States" as "the 50 states and the District of Columbia."<sup>85</sup> A three-judge district court declared the law unconstitutional,<sup>86</sup> but the U.S. Supreme Court reversed.<sup>87</sup> To hold otherwise, the Court offered, would grant those who just arrived in Puerto Rico "benefits superior to those enjoyed by other residents of Puerto Rico."<sup>88</sup>

The second is *Harris v. Rosario*.<sup>89</sup> The statute at issue in *Harris* was the Aid for Families with Dependent Children Act (AFDC). Unlike the SSI program, the AFDC program included island

---

<sup>81</sup> *Dred Scott v. Sanford*, 60 U.S. 393, 447 (1856).

<sup>82</sup> 435 U.S. 1 (1978).

<sup>83</sup> *Id.* at 2-3.

<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.* at 3.

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.* at 4. The Supreme Court offered three further reasons in support of the law: "First, because of the unique tax status of Puerto Rico, its residents do not contribute to the public treasury. Second, the cost of including Puerto Rico would be extremely great—an estimated \$300 million per year. Third, inclusion in the SSI program might seriously disrupt the Puerto Rican economy." The discerning reader will recognize that these are not factors traditionally used by the Court when deciding questions of constitutional law on the merits. Whether citizens of Puerto Rico pay federal taxes, or whether the cost of the benefits to those living in Puerto Rico would be too costly or disruptive, are questions for Congress to consider, not the Court. These considerations do not help decide whether the classification in question violates the equality principle under the Fourteenth Amendment.

<sup>89</sup> 446 U.S. 651 (1980).



residents among its beneficiaries, with the caveat that territorial residents received assistance at lower levels than those on the mainland.<sup>90</sup> As in *Califano*, the district court in *Harris* struck down the law under the Fifth Amendment’s equal protection clause.<sup>91</sup> The Supreme Court tersely reversed.<sup>92</sup> In addition to the economic reasons offered in *Califano*, the Court added in a telling footnote that leveling the benefits for residents of Puerto Rico would cost around \$30 million dollars a year, up to \$240 million dollars if applied across programs across the Social Security Act.<sup>93</sup> But these calculations should play no role when deciding a question of *constitutional* law. These cases are routine examples of the Court’s unwillingness to engage these difficult questions. We agree with Professor Alex Aleinikoff: “*Harris* is a startling and troubling example of the Court’s unwillingness to give any serious scrutiny – indeed, any serious thought – to congressional exercises of power over the territories.”<sup>94</sup>

The incorporation doctrine is a judicial creation designed to meet the needs of its time. Worse yet, the doctrine was invented by the same Court that had recently sanctioned the separate-but-equal doctrine, and for similar ends. Separate but equal formally ended half a century later in *Brown v. Board of Education*, yet the *Insular Cases* remain.<sup>95</sup> It is understandable for the justices to worry about its role in this area; anyone familiar with the para-constitutional status of Puerto Rico and the politics of the island knows that this is an area devoid of easy answers. The Court cannot settle this question on its own, nor should it try to do so. But at the very least, the Court should no longer sanction that which Congress has refused to address for generations.

#### IV. The Politics of Statehood

The statehood question for D.C. and Puerto Rico is at root a partisan question. In a recent interview, Senator Mitch McConnell left no doubt about this point. “They plan to make the District of Columbia a state — that’d give them two new Democratic senators — Puerto Rico a state, that would give them two more new Democratic senators [...] So this is full-bore socialism on the march in the House. And yeah, as long as I’m the majority leader of the Senate, none of that stuff is going anywhere.”<sup>96</sup>

The Senator is not breaking new ground. Back in 1990, Republican strategist Ed Rollins similarly explained that “[g]enerally, Republicans do not favor statehood [because] you’re going

---

<sup>90</sup> *Id.* at 651.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 651-52.

<sup>93</sup> *Id.* at 652 n.\*.

<sup>94</sup> T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 22 (1994).

<sup>95</sup> TORRUELLA, *supra* note 38, at 3-4.

<sup>96</sup> *Confusing Puerto Rico Statehood with Socialism*, PUERTO RICO REPORT (June 23, 2019) (“They plan to expand the Supreme Court.”)

to get two liberal Democrats [in the Senate] and keep getting them for the next 100 years.”<sup>97</sup> And a decade before that, the late Senator Kennedy argued that “opposition to congressional representation for the District [is] based on the conviction that it is ‘too liberal, too urban, too black, or too Democratic.’”<sup>98</sup> David Kairys tried to make sense of opposition to full citizenship to D.C. residents (and by implication, Puerto Rican residents) similarly: “This would likely shift the balance of power. There would likely be two more voices in the Senate on the liberal Democratic side--and likely a significant increase in the numbers of African American or minority Senators (since there have been so few to date)--and one more vote in the House, which is of course less significant.”<sup>99</sup> Some on the political left are finally heeding this message. They argue that the Democratic Party should no longer advance statehood as a moral issue but treat it for what it is: a question of partisan power.<sup>100</sup> Seeing statehood as a “partisan gift,” the party should push the issue through Congress at the first chance it gets. According to Neil Sroka, communications director for Democracy for America, “[t]he reality is, if the shoe were on the other foot . . . there’s not a doubt in my mind Republicans would have jammed statehood through decades ago.”<sup>101</sup>

History shows a way out of this present deadlock. For two hundred years, there has been a balancing in state admissions, and the composition of the Senate has been at the center of it.<sup>102</sup> This is the Missouri Compromise, when Massachusetts ceded the land that became the state of Maine in order to balance the admission of Missouri, a slave state. This is the admissions of slave and free states up to 1850. This is the admission of Hawaii, then expected to be a Republican state, and Alaska, expected to be a Democratic state. The problem today is that both D.C. and Puerto Rico are expected to elect Democratic candidates. On a strictly partisan basis, the conservative response is understandable but not entirely accurate. To be sure, D.C. is a consistently Democratic jurisdiction,<sup>103</sup> but Puerto Rico presents a more complicated story. For

---

<sup>97</sup> Ann Devroy & R.H. Melton, *President Opposes Statehood*, WASH. POST, Mar. 24, 1990, at A1; see Bailey Vogt, *D.C. Statehood to be Voted on in House for the First Time in a Quarter Century*, WASH. TIMES (March 5, 2019) (explaining that many Republicans have opposed statehood for D.C. because the area would likely elect only Democrats).

<sup>98</sup> Arlen J. Large, *Full Representation for D.C.?*, WALL ST. J., Aug. 30, 1978, at 14 (statement of Sen. Kennedy).

<sup>99</sup> Symposium, *supra* note 33, at 682; see Kurland, *supra* note 91, at 475 (“The issues surrounding statehood for the District of Columbia have become so intertwined with partisan politics that it is easy to dismiss all arguments as blatant partisan rhetoric.”).

<sup>100</sup> DAVID FARIS, *IT’S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS* (2018).

<sup>101</sup> Ben Paviour, *The 52-State Strategy: The Case for D.C.*, WASH. MONTHLY (July/Aug. 2018).

<sup>102</sup> See Nolan McCarty, Keith T. Poole, and Howard Rosenthal, *Congress and the Territorial Expansion of the United States* (July 4, 1999). Available at SSRN: <http://dx.doi.org/10.2139/ssrn.1154168>

<sup>103</sup> Since the Twenty-Third Amendment was enacted, no Republican presidential candidate has earned an elector from the District of Columbia. *Historical Timeline*, 270TOWIN.COM (last visited Feb. 21, 2020).

example, the elected Resident Commissioner in Washington, Jenniffer González-Colón, is both a Republican and a Trump supporter.<sup>104</sup> On the island, the President of the Puerto Rican Senate, Thomas Rivera Schatz, and the Speaker of the Puerto Rico House of Representatives, Johnny Méndez Núñez, are also Republicans. In 2018, 60 Puerto Rican officials signed a letter in support of then-Governor Rick Scott's successful U.S. Senate run in Florida.<sup>105</sup> If a state, it is not inconceivable that Puerto Rico would elect a Republican U.S. Senator. In fact, Republican presidents through the years, including President Trump in 2016, supported Puerto Rican statehood. In their official platform, the Republican Party also supports statehood for Puerto Rico.<sup>106</sup>

This debate boils down to our best guesses about which party benefits from extending statehood to new territories. Hence Senator McConnell's quip about statehood for Puerto Rico and D.C. as "full-bore socialism."<sup>107</sup> This is not a new critique; the practice of treating admission questions through the lens of political advantage dates back to the early 19th Century.<sup>108</sup> The issue then was slavery. The issue today, in a political environment under a Senate majority leader for whom the norms of the institution matter not at all, is everything.

## V. Conclusion

In a recent discussion, political commentator Nate Silver voiced skepticism over discussing the cases of Puerto Rico and D.C. statehood together, "because they are very different cases."<sup>109</sup> So much is true: D.C. is part of the contiguous United States, its land once owned by Maryland and Virginia. In contrast, Puerto Rico is a Caribbean island with a unique history, acquired by the U.S. as war bounty and located 100 miles off the coast of Florida. So yes, Puerto Rico and D.C. are different cases, both geographically and culturally. Notwithstanding these differences, they also have many similarities. Under both constitutional and territorial law, the U.S. government may treat both D.C. and Puerto Rico differently from all other states of the union. Thus, in equally important ways, the present status of D.C. and Puerto Rico raise the same basic questions of constitutional law, democratic theory and self-rule.

Representative Steny Hoyer stated in the same conversation, "[w]e are not a colonial power, we don't want to be a colonial power, we should not be a colonial power." If Representative Hoyer

---

<sup>104</sup> See Gabriel Pogrud, *Puerto Rico's Representative in Congress, a Trump Supporter, Rejects President's Death Toll Claim*, WASH. POST: POWERPOST (Sept. 13, 2018).

<sup>105</sup> *Nearly 60 Puerto Rican Officials Endorse Gov. Scott's Campaign For U.S. Senate*, RICKSCOTTFORFLORIDA.COM (Oct. 1, 2018).

<sup>106</sup> *Republican Party Platform Statement on Puerto Rico*, PR51ST.COM (last visited Feb. 21, 2020).

<sup>107</sup> Igor Derysh, *Mitch McConnell Calls Representation for D.C. and Puerto Rico "Full-bore Socialism,"* SALON, (June 19, 2019).

<sup>108</sup> Fairness towards Senator McConnell only goes so far. The platform of his own party supports statehood for Puerto Rico, though not for D.C. See *Republican Party Platform* at 30 ("We support the right of the United States citizens of Puerto Rico to be admitted to the Union as a fully sovereign state.").

<sup>109</sup> FIVETHIRTYEIGHT, *supra* note 58.

is making a normative argument, we agree that the U.S. should not be a colonial power. If, however, he is making a descriptive argument, he is decidedly wrong. The harsh reality is that the U.S. is exactly that; one cannot understand the status of Puerto Rico and the District outside of the colonial construct. The present treatment of territorial and “seat of government” residents is hard to square with our modern democratic commitments. The question is whether we can figure out how to square these commitments to representational and political equality with a constitutional text and structure designed for different times and with different normative values with respect to basic democratic issues. There is an easy answer, of course: statehood. We recognize that such an answer raises difficult historical and practical questions in the case of Puerto Rico, as island residents are deeply divided on the statehood issue. We do not take sides on that important and difficult debate. While statehood need not be the required solution, however, a solution is necessary.

## About the Authors

Luis Fuentes-Rohwer is a Professor of Law and the Class of 1950 Herman B. Wells Endowed Professor at the Indiana University Maurer School of Law. Fuentes-Rohwer teaches and writes in the areas of civil rights and legal history, with a particular emphasis on constitutional law and the Reconstruction Era. His scholarship focuses on the intersection of race and democratic theory, as reflected in the law of democracy in general and the Voting Rights Act in particular. He received a J.D. and a Ph.D from the University of Michigan and an LL.M. from Georgetown University Law School.

Guy-Uriel Charles is the Edward and Ellen Schwarzman Professor of Law and Senior Associate Dean for Faculty & Research at Duke Law School. Charles teaches and writes about constitutional law, election law, campaign finance, redistricting, politics, and race. From 2006-2008, he served as the interim co-dean at the University of Minnesota Law School. Charles clerked for the Hon. Damon J. Keith of the U.S. Court of Appeals for the Sixth Circuit. He received his J.D. from the University of Michigan Law School, where he was among a group of students who founded the *Michigan Journal of Race & Law* and served as the journal's first editor-in-chief.

Charles and Fuentes-Rohwer are co-authors of a forthcoming book on voting rights entitled *Race, Political Power, and American Democracy: Voting Rights Law and Policy for a Divided America* (forthcoming Cambridge University Press).

The authors would like to thank Jennifer Morgan and Ben Adams.

## About the American Constitution Society

The American Constitution Society (ACS) believes that law should be a force to improve the lives of all people. ACS works for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values. By bringing together powerful, relevant ideas and passionate, talented people, ACS makes a difference in the constitutional, legal and public policy debates that shape our democracy.