

Michigan Journal of Race and Law

Volume 26
Special Issue

2021

No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation

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Recommended Citation

Guy-Uriel Charles & Luis Fuentes-Rohwer, *No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation*, 26 MICH. J. RACE & L. 133 (2021).

Available at: <https://repository.law.umich.edu/mjrl/vol26/iss0/8>

<https://doi.org/10.36643/mjrl.26.sp.no>

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MICHIGAN LAW ON RACE & LAW

MICHIGAN LAW REVIEW

SPECIAL ISSUE

WINTER 2021

No Voice, No Exit, But Loyalty? Puerto Rico and Constitutional Obligation

Guy-Uriel Charles & Luis Fuentes-Rohwer

The Michigan Law Review is honored to have supported Professors Charles and Fuentes-Rohwer's Essay on the subjugated status of Puerto Rico as an "unincorporated territory." This Essay contextualizes Puerto Rico not as an anomalous colonial vestige but as fundamentally a part of the United States' ongoing commitment to racial and economic domination. We are thrilled to highlight this work, which indicts our constitutional complacency with the second-class status of Puerto Rican citizens and demands a national commitment to self-determination for Puerto Rico.

Special thank you to the selection committee members:

Casey D'Alesandro, Christina Geith, Renee Griffin, Mollie Krent & Keagan Potts



MICHIGAN LAW REVIEW

Vol. 119

Winter 2021

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NO VOICE, NO EXIT, BUT LOYALTY?
PUERTO RICO AND CONSTITUTIONAL OBLIGATION

*Guy-Uriel Charles** & *Luis Fuentes-Rohwer***

INTRODUCTION

“Colonialism hurts” is the opening line of a book review penned in the pages of the *Harvard Law Review* by the distinguished Second Circuit jurist Jose Cabranes.¹ Cabranes, who was born in Puerto Rico, was reviewing a book by his fellow jurist and Second Circuit colleague, Juan Torruella. Torruella, equally distinguished as Cabranes and also born in Puerto Rico, wrote a book lamenting the second-class status of American citizens living on the island of Puerto Rico. Summarizing Torruella’s argument, Cabranes writes,

since 1898, when Puerto Rico (along with the Philippines) was ceded by Spain to the United States, the island and its people have lived under colonialism professed or camouflaged—ruled, to one degree or another, by a government in Washington in which they play virtually no role and consigned to a separate and inferior position within the American constitutional system.²

Torruella equated the legal status of Puerto Rican citizens living on the island to that of African Americans living under Jim Crow segregation, “separate and unequal.”³ Puerto Rico is not a state but an unincorporated territory, subject to oversight by Congress. Speaking for himself, Cabranes remarked that the people of Puerto Rico “are still subject to the laws and regulations adopted by the political branches of the national government before which they appear only as supplicants; and that na-

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1. José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 450 (1986) (book review).

2. *Id.* at 452.

3. *Id.* at 463.

tional government retains virtually unlimited discretion to determine whether or how the island will fit into national policy.”⁴

As citizens of the United States, Puerto Ricans are subject to the Constitution and laws of the United States yet do not have a voice in federal elections. More problematically, they do not have ultimate control over their domestic affairs. Consider the financial situation of Puerto Rico. Puerto Rico is in the midst of a dire financial crisis. The debt load has reached historic levels, and the Puerto Rican government cannot service it. Industries left the island as soon as Congress ended their favorable tax status in 2006.⁵ Emigration has increased post-Hurricane Maria. In the face of these challenges, there is little the government of Puerto Rico can do. It cannot declare bankruptcy under Chapter 9 of the federal bankruptcy code, because the law does not explicitly apply to Puerto Rico.⁶ It also cannot enact its own debt-restructuring statutes, because federal law preempts Puerto Rico’s Recovery Act.⁷ Puerto Rico is on an economic death spiral, and the only thing it can do is wait for the federal government to provide a solution. Enter the PROMESA Act,⁸ the most recent example of the status of Puerto Ricans as second-class citizens.

The most important feature of the Act, and the one at the center of the most recent constitutional controversy over the status of the island, created a Financial Management and Oversight Board. This is a seven-member board appointed by the president without Senate confirmation, of which six members are chosen from a list approved by the congressional leaders. The Act explicitly states that the purpose of the Board is “to provide a method for a covered territory to achieve fiscal responsibility and access to the capital markets.”⁹ Among its many features, the Act authorizes the Board “to file for bankruptcy on behalf of Puerto Rico or its instrumentalities”;¹⁰ to require the governor of Puerto Rico to submit to the Board her budget and monthly or quarterly reports, as the Board deems necessary to do its work;¹¹ to manage and modify local laws and Puerto Rico’s budget to “achieve fiscal responsibility and access to the

4. *Id.* at 461.

5. See Small Business Job Protection Act of 1996, Pub. L. No. 104-188, sec. 1601, § 936(j), 110 Stat. 1755, 1827.

6. See 11 U.S.C. §§ 109(c), 101(40), (52).

7. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016).

8. 48 U.S.C. §§ 2101–2241.

9. *Id.* § 2121(a).

10. *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020) (interpreting § 2164(a)).

11. § 2121(d)(1)(B).

capital markets”;¹² and, in doing this work, to conduct investigations and gather evidence.¹³

Creditors challenged the constitutionality of the Board. Specifically, they argued that Board members were “Officers of the United States” and may only join the Board with the advice and consent of the Senate as required by the Appointments Clause. In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment*, the Supreme Court agreed that the Appointments Clause applies to all “‘Officers of the United States,’ even when those officers exercise power in or related to Puerto Rico.”¹⁴ The question in the case, and what to the Court was a difficult question, was whether board members were “Officers of the United States” requiring Senate confirmation.¹⁵ The Court acknowledged that “the Board possesses considerable power—including the authority to substitute its own judgment for the considered judgment of the Governor and other elected officials.”¹⁶ And yet, the Court upheld the constitutionality of the board, concluding that “this power primarily concerns local matters.”¹⁷

We leave it to others to decide whether the Court’s constitutional analysis persuades them as a matter of law or policy. In this brief Essay, we want to return to the concern articulated by Judges Cabranes and Torruella, the second-class and colonial status of Puerto Rico. We want to explore a question that scholars seldom ask in this context, a question that is implicit in the worries articulated by Cabranes and Torruella, and important to critical race theorists who think about the role of law in maintaining structural subordination.¹⁸ Our inquiry is wrestling with how our constitutional system, which is committed to the principles of individual liberty and self-government, can reconcile itself with the current status of Puerto Rico, in which the people have very little control over their domestic affairs. We often wonder how our Constitution and jurisprudence have reconciled our nation’s fundamental commitments with the reality of racial inequality and subordination. The status of Puerto Rico presents a contemporary exploration of those concerns. Through Puerto Rico, we can see how law and the constitutional structure simply ignores structural subordination.

12. §§ 2141–2147.

13. § 2141.

14. 140 S. Ct. at 1658.

15. *Aurelius Inv.*, 140 S. Ct. at 1654.

16. *Id.* at 1662.

17. *Id.*

18. See, e.g., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xxv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

In his classic book, *Exit, Voice, and Loyalty: Responses to Declines in Firms, Organizations, and States*, the economist Albert Hirschman articulated a frame that has come to preoccupy constitutional theory.¹⁹ To reframe and broaden an inquiry articulated by one constitutional scholar, much of constitutional theory is fundamentally occupied with a single question: What does democratic constitutionalism owe its subjects?²⁰ Hirschman's framework supplies a ready answer for students of democracy: voice, primarily; exit, to a lesser extent; and loyalty, to an ever lesser extent. Hirschman's fundamental inquiry is motivated by an arresting observation and declaration. Hirschman notes: "Firms and other organizations are conceived to be permanently and randomly subject to decline and decay . . . no matter how well the institutional framework within which they function is designed."²¹ Put differently and translated into the context of democratic governance—which is also an object of Hirschman's concerns—democratic institutions will invariably decay, by which Hirschman seems to mean that they will gradually and increasingly work less well for their intended beneficiaries.²² Of interest to Hirschman are the options available to individuals—consumers, voters, members of a club—for affecting change within an institution—firm, organization, or government—when the performance of the institution deteriorates. As Hirschman put it, "it is likely that the very process of decline activates certain counterforces."²³ In Hirschman's framework, those "counterforces" are voice or exit, mediated by loyalty.

Under Hirschman's approach, if people are unhappy with their political systems—and recall that Hirschman predicts that people will be unhappy with their political systems because deterioration or decline, which leads to unhappiness, is "an ever-present force constantly on the attack"—they can register their unhappiness by exercising either their voice or their option to exit.²⁴ Hirschman's approach presupposes the availability of either voice or exit. When exit is not an option, voice is the only mechanism of registering dissent. When voice is not an option, exit is the only mechanism for expressing dissatisfaction. Loyalty—a person's affection for the enterprise—is ultimately a function of the availabil-

19. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

20. Heather K. Gerken, Lecture, *Exit, Voice, and Disloyalty*, 62 DUKE L.J. 1349, 1349 (2013) ("[M]uch of constitutional theory is preoccupied with a single question: What does a democracy owe its minorities?").

21. HIRSCHMAN, *supra* note 19, at 15.

22. Hirschman defines decay as a "gradual loss of rationality, efficiency, and surplus-producing energy." *Id.*

23. *Id.*

24. *Id.* at 15.

ity and effectiveness of voice.²⁵ A dissatisfied person will remain loyal so long as they believe that they (or someone who represents their views) have influence to effect change.

Democratic systems, democratic theory, and constitutional theory have placed a great deal of attention on the voice option because the exit option is nearly nonexistent and if available significantly impractical. But what happens when a political subject has neither voice nor exit? What happens when a political subject has very little agency to affect change? How does constitutional theory and constitutional law respond?

These questions go to the heart of the status of Puerto Rico under U.S. law. Why is Puerto Rico bound under a constitutional framework within which it has very little voice and no real exit options? How does constitutional theory justify this state of affairs? Puerto Rico—along with all existing U.S. territories—thus offers an intriguing puzzle as well as a treasure trove for democratic theorists and students of the U.S. Constitution. For the reality is inconceivable yet no less true: to be a citizen of Puerto Rico is to be a happy slave, as the condition is understood and deployed as a trope of classical liberalism.²⁶ Citizens of Puerto Rico have no right to participation and have very little political autonomy, which affects their material well-being. Yet, they are bound by a document that promises freedom and self-governance.

We examine these important questions in three Parts. Part I offers a brief history of Puerto Rico under U.S. rule. Part II considers the implications of this status. This is the question of constitutional authority and obligation. This is a crucial point. We do not take a view on the status question as seen and lived by the people of Puerto Rico. Whether the island achieves statehood, independence, or continues under its present status, however, the political subordination of the island must end. Part III concludes with a brief look at the “Puerto Rico Self-Determination Act of 2020,” introduced in the House by Representatives Velázquez and Ocasio-Cortez.

I. A BRIEF HISTORY OF PUERTO RICO

When General Nelson A. Miles led the U.S. invasion of Puerto Rico, landing in the southwestern city of Guánica on July 25, 1898, he found little resistance. The U.S. Army secured the island within a month, and on December 10 of that year Spain and the United States signed the Treaty of Paris, ending hostilities between the two nations. For the tidy sum of twenty million dollars, Spain relinquished sovereignty of Cuba

25. *Id.* at 77–78.

26. See generally DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* (1989).

and ceded to the United States the islands of Guam and Puerto Rico, both of which continue to be under U.S. control to this day.²⁷ Of particular interest to us is Article IX of the Treaty, which explained that “[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”²⁸ Three statutes bear on this question.

The first is the Organic Act of 1900, known as the Foraker Act, and which established a civilian government for the island.²⁹ The Act was notable for the things it did not include. For example, it did not include a Bill of Rights for the island, nor did it extend U.S. citizenship to island residents. Instead, it created the new status of “citizens of [Puerto] Rico.”³⁰ The Act also did not settle the question of travel to and from the United States. One year later, the Supreme Court took up the question whether the Constitution allowed the United States to become an imperial power. This was a question imbued by the racism of its time.³¹ Long-standing precedent could not have been clearer: a territory “is acquired to become a State; and not to be held as a colony and governed by Congress with absolute authority.”³² Ironically, Chief Justice Taney explained in *Dred Scott* that “[a] power . . . in the General Government to obtain and hold colonies and dependent territories, over which they might legislate without restriction, would be inconsistent with its own existence in its present form.”³³ But rather than face the logic of this argument head on, the Supreme Court did the next best thing: the Court either distinguished the cases³⁴ or else ignored the argument altogether.³⁵ In the *Insular Cases*,³⁶ the Court ultimately drew a line on the concept of incorpora-

27. Treaty of Peace, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754, 1756.

28. *Id.* at 1759.

29. Foraker Act, ch. 191, 31 Stat. 77 (1900).

30. *Id.* at 79.

31. Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JURÍDICA U. P.R. 225, 284-291 (1996) (discussing racism, manifest destiny, social Darwinism, and the construction of the “other” that appeared in the *Insular Cases* and other cases from that time period).

32. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 447 (1857).

33. *Id.* at 448.

34. *Downes v. Bidwell*, 182 U.S. 244, 274 (1901) (plurality opinion).

35. In his dissent, Justice Harlan argued that “[t]he idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies . . . is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.” *Id.* at 380 (Harlan, J., dissenting).

36. The *Insular Cases* decided several issues concerning the status of newly acquired Puerto Rico. *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes*, 182 U.S. 244; *Huus v. N.Y. & Porto Rico Steamship Co.*, 182 U.S. 392 (1901).

tion. The Constitution applied to the territories qua states only after Congress had chosen to incorporate the given territory into the United States.³⁷ Before that moment, that is, so long as territories remain unincorporated, Congress has “power to locally govern at discretion.”³⁸ But Congress did not have limitless power over unincorporated territories. Some constitutional principles, those that “are the basis of all free government[s],”³⁹ would still apply.

The second relevant statute is the Jones Act of 1917, which collectively naturalized all Puerto Rican citizens living on the island.⁴⁰ This was a crucial moment in the relationship between the United States and Puerto Rico. Over a decade before, the Court concluded that those living on the island “were constituted a body politic under the name of The People of Porto Rico.”⁴¹ But nothing had changed; this was a status between an “alien” under the immigration laws and formal U.S. citizenship.⁴² The Foraker Act only formalized the status of non-citizen national begun by the Treaty of Paris. Incorporation was key, and recent precedents about the incorporations of Alaska and Hawaii strongly suggested that citizenship was the determinative signal from Congress about its intentions to incorporate a territory.⁴³ If so, the Jones Act might have been that signal for Puerto Rico. But five years later, in *Balzac v. Porto Rico*,⁴⁴ a unanimous Supreme Court concluded that the Jones Act was not clear on the question of incorporation and Congress would not have taken this “important step” by “mere inference.”⁴⁵ *Balzac* thus extended the colonial project begun by the *Insular Cases*. Citizenship for the people of Puerto Rico meant only the right to travel to and from the United States.⁴⁶

The third statute is the Puerto Rico Federal Relations Act of 1950,⁴⁷ which authorized the drafting by the people of Puerto Rico of their own constitution. With a few amendments, the U.S. Congress ratified the proposal by the constitutional convention of Puerto Rico on July

37. *Downes*, 182 U.S. at 287–88 (White, J., concurring).

38. *Id.* at 290.

39. *Id.* at 290–91.

40. Jones Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 8 U.S.C. § 1402).

41. *Gonzalez v. Williams*, 192 U.S. 1, 11 (1904).

42. *Id.*

43. See *Rasmussen v. United States*, 197 U.S. 516, 522 (1905); *Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903) (concluding that Newlands Resolution does not require full application of the Constitution to Hawaii, since it is only an annexed territory, not yet incorporated, and the rights at issue are not fundamental but procedural).

44. 258 U.S. 298 (1922).

45. *Balzac*, 258 U.S. at 306.

46. See *id.* at 308.

47. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, 64 Stat. 319.

25, 1952. Might this be the moment when Congress incorporated the island? In a word, no. The law had the potential to transform the relationship between Puerto Rico and the United States as one grounded on consensual norms. According to Governor Luis Muñoz Marín, for example, “the principle that the relationship is from now on one of consent through free agreement, wipes out all trace of colonialism.”⁴⁸ Yet Congress clearly felt otherwise. Time and again, members of Congress expressed the view that Public Law 600 and the enactment of a Puerto Rican Constitution did not alter the prior relationship between Puerto Rico and the United States.⁴⁹ Further, Congress had to ultimately approve the Constitution itself and reserved the right to object and ultimately eliminate any provisions it disapproved.⁵⁰ Most damningly, Congress could even revoke the Constitution of Puerto Rico unilaterally;⁵¹ as Luis Muñoz Marín himself conceded during a congressional hearing in 1950, “if the people of Puerto Rico should go crazy, Congress can always get around and legislate again.”⁵² The Court agreed, writing years later that Puerto Rico was not yet incorporated but more “statelike” after the establishment of commonwealth status in 1952.⁵³ To this day, Puerto Rico continues to be an unincorporated territory, subject to the plenary powers of Congress.

II. CONSTITUTIONAL OBLIGATION AND PUERTO RICO

Puerto Rico’s loss of sovereignty is undeniable. Consider the application of the death penalty to the island. The Puerto Rico Constitution unambiguously declares that “[t]he death penalty shall not exist.”⁵⁴ In contrast, the Federal Death Penalty Act of 1994 authorizes the death pen-

48. JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 115 (1997) (citing a letter from Governor Muñoz Marín to President Truman while transmitting the new constitution); see also ALFREDO MONTALVO-BARBOT, *POLITICAL CONFLICT AND CONSTITUTIONAL CHANGE IN PUERTO RICO, 1898–1952*, at 143 (1997) (contending that “[i]n general, the presentation of the Puerto Rican people as passive agents in the constitutional transformation of the island, an argument advanced by gradualists and traditional colonialist studies, is analytically and empirically simplistic and questionable”).

49. See José Trías Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 *REV. JURÍDICA U. P.R.* 1, 10 (1999); TRÍAS MONGE, *supra* note 48, at 129.

50. See TRÍAS MONGE, *supra* note 48, at 114–18.

51. See *id.*

52. *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the H. Comm. on Pub. Lands*, 81st Cong. 33 (1950) (statement of Governor Luis Muñoz Marín).

53. See *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1976).

54. P.R. CONST. art. II, § 7.

alty across the United States for numerous offenses.⁵⁵ Is Puerto Rico part of the United States for purposes of the Death Penalty Act? Congress provided an answer with section 734 of the Puerto Rican Federal Relations Act, adopted in 1950. Under the Act, “[t]he statutory laws of the United States *not locally inapplicable* . . . shall have the same force and effect in Puerto Rico as in the United States.”⁵⁶ If a federal law is locally inapplicable, in other words, it has no force in Puerto Rico. In *United States v. Acosta-Martinez*,⁵⁷ the First Circuit held that the death penalty applies to Puerto Rico.

This is not an easy question.⁵⁸ As a legal matter, the district court in *Acosta-Martinez* in fact concluded that the Federal Death Penalty Act “is locally inapplicable within the meaning of section 9 of the PRFRA.”⁵⁹ The court so concluded because the Death Penalty Act was not explicitly applied to Puerto Rico, and also because “Puerto Rico’s culture, traditions and values are repugnant to the death penalty.”⁶⁰ The court also noted, on substantive due process grounds, that “[i]t shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment.”⁶¹

In a short opinion, the First Circuit bluntly reversed. As the panel explained, the meaning of the phrase “locally inapplicable” is a matter of congressional intent.⁶² Commentators agree. This is essentially a “blank check” for Congress to rule on island affairs as it wishes.⁶³ The panel further explained that the default rule is that a federal law applies to Puerto Rico under section 734. The panel concluded that Congress was clear in its intention to apply the death penalty in Puerto Rico.⁶⁴ And as to the due process claim, the court breezily concluded that “[i]t cannot shock the conscience of the court to apply to Puerto Rico, as intended by Congress, a federal penalty for a federal crime which Congress has ap-

55. 18 U.S.C. §§ 3591–3598.

56. 48 U.S.C. § 734 (emphasis added).

57. 252 F.3d 13 (1st Cir. 2001).

58. See generally Ricardo Alfonso, *The Imposition of the Death Penalty in Puerto Rico: A Human Rights Crisis in the Path Towards Self-Determination*, 76 REV. JURÍDICA U. P.R. 1077 (2007); Elizabeth Vicens, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350 (2005).

59. *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 321 (D. P.R. 2000).

60. *Id.* (emphasis omitted).

61. *Id.* at 326–27 (emphasis omitted).

62. *Acosta-Martinez*, 252 F.3d at 18.

63. See Rafael Pérez-Bachs, *The Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, Remarks at the First Circuit Judicial Conference (Nov. 1985), in 110 F.R.D. 449, 485, 487 (1986).

64. *Acosta-Martinez*, 252 F.3d at 18–20.

plied to the fifty states.”⁶⁵ The argument in this case was thus political, the court explained, not legal.

The irony is inescapable. The panel asks a disenfranchised citizenry to seek solutions through the very political process that denies their full citizenship. As Judge Torruella put it in a related case,

When this status of second-class citizenship is added to the also judicially-established rule that grants Congress plenary powers over the territories and their inhabitants, i.e., that recognizes in Congress practically unfettered authority over the territories and their inhabitants, one has to ask what *effective* political process is the lead opinion suggesting be turned to by Appellants to resolve the constitutional issues raised by this case?⁶⁶

Judge Torruella’s question gets us to the heart of our project. Why does federal law apply to Puerto Rico? More pointedly, how is section 734 a legitimate exercise of congressional authority? This is not an easy question, though it is largely ignored. Put more forcefully, under what theory of legal or constitutional obligation may federal laws control the actions of Puerto Rico?⁶⁷

Consider the question as applied to one of the fifty states. The state of North Carolina, for example, was one of the original signatories to the U.S. Constitution. Moving forward, its congressional delegation could “pull, haul and trade”⁶⁸ with other representatives for the benefit of not only North Carolina but the United States generally. To be sure, North Carolina would not win every congressional debate; but what North Carolina could not do is say it had no voice in the process. And in the end, North Carolina could always invoke the protections of the Tenth Amendment.

This is, in a nutshell, the story of the rise and fall of the Voting Rights Act of 1965. Debates in Congress were heated, and Senator Ervin expressed the views of the state of North Carolina clearly and forcefully.⁶⁹ In the end, the state became a partially covered jurisdiction, so its laws

65. *Id.* at 21.

66. *Igartúa v. United States*, 626 F.3d 592, 614 (1st Cir. 2010) (Torruella, J., concurring in part and dissenting in part) (footnote omitted).

67. See T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 28 (1994) (“A deeper puzzle remains, however. The *Insular Cases* concerned constitutional limits on federal powers. How is it, then, that the Constitution applies to acts of the Commonwealth government?” (emphasis omitted)).

68. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

69. *Voting Rights: Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 27–29 (1965).

were subject to the Act's preclearance requirement. The critics were outraged, analogizing the states subject to the coverage requirement as "conquered provinces."⁷⁰ But until the next debate, they could not complain of an unfair process or a lack of voice. They lost. And a few years ago, though a majority of North Carolina's congressional delegation agreed to extend the coverage requirement,⁷¹ the U.S. Supreme Court struck down the coverage formula under the Tenth Amendment,⁷² which references the powers reserved to the states at the Founding.⁷³

Compare this brief description to similar federal laws that applied to Puerto Rico. Though the Puerto Rican Constitution forbids wiretapping, federal law authorizes it, and so wiretapping is legal on the island.⁷⁴ Though the Puerto Rican Constitution explicitly forbids the death penalty, federal law prescribes it for specific offenses, so local criminal defendants may in fact be subject to the death penalty.⁷⁵ And though the elderly, the blind, and the handicapped are entitled to federal funds under the Supplemental Security Income program of Social Security so long as they live in one of the fifty states, they are not similarly entitled if they live in Puerto Rico. This is because Congress defined "the United States" as "the 50 States and the District of Columbia." Congress did not intend to include Puerto Rico under its statutory definition of the "United States." Making matters worse, a person may receive benefits when living within the statutorily defined states yet lose them as soon as they move to Puerto Rico.⁷⁶

Under what theory of constitutional obligation are residents of Puerto Rico bound by these laws? Commentators approach this question from the opposite end: Where does the United States derive its power over foreign affairs? Though the power over foreign affairs is not explicitly granted in the Constitution, the Supreme Court ratified the doctrine of implied powers in the late Nineteenth Century,⁷⁷ in decisions about noncitizens,⁷⁸ American Indians,⁷⁹ and the territories.⁸⁰ These cases relied

70. See *South Carolina v. Katzenbach*, 383 U.S. 301, 360 (1966) (Black, J., concurring and dissenting).

71. *Roll Call 374 | Bill Number: H.R. 9*, CLERK U.S. HOUSE OF REPRESENTATIVES (July 13, 2006, 5:38 PM), <https://clerk.house.gov/Votes/2006374> [<https://perma.cc/F334-96UN>].

72. *Shelby County v. Holder*, 570 U.S. 529 (2013).

73. U.S. CONST. amend. X.

74. *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985).

75. *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001).

76. *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

77. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 7 (2002).

78. See, e.g., *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892).

on concepts of sovereignty and a “new vision of the national government as a complete sovereign, possessing all the powers enjoyed by authoritarian European states in its external relations.”⁸¹ But of course, this was a racist, nativist vision, and the subjects of these cases were the classic others, “non-citizens and who were racially, culturally, and religiously distinct from the nation’s Anglo-Saxon, Christian elites.”⁸² The doctrine of implied powers in foreign affairs thus grew within the silences and interstices of our constitutional structure in order to accommodate the nation-building, expansionist impulses of the late nineteenth century. So much is clear.

What is less clear is why the people of Puerto Rico must acquiesce to their colonial condition. Why acquiesce to plenary power, arbitrary rule, and total disenfranchisement? One answer posits that the people of Puerto Rico must acquiesce to federal rule and its concomitant laws as a moral imperative. John Rawls explains, for example, that “we are to comply with and to do our share in just institutions when they exist and apply to us.”⁸³ So stated, the answer immediately falls short as applied to Puerto Rico. This is a theory that demands acquiescence from *just* institutions. Such a theory cannot possibly posit an argument to justify colonialism.

Another answer, on teleological grounds,⁸⁴ is that Puerto Rico greatly benefits from its relationship with the United States. For example, and as the Supreme Court explained in *Balzac v. Porto Rico*,⁸⁵ U.S. citizenship placed the people of Puerto Rico “as individuals on an exact equality with citizens from the American homeland”; it “secure[d] them more certain protection” against the rest of the world; and it placed the rights of U.S. citizenship a mere plane ride away, if they chose to move “into the United States proper.”⁸⁶ Further, the people of Puerto Rico receive many financial benefits from its relationship with the United States,

79. See, e.g., *United States v. Kagama*, 118 U.S. 375 (1886); *Stephens v. Cherokee Nation*, 174 U.S. 445 (1899); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902).

80. See, e.g., *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1 (1890); *Downes v. Bidwell*, 182 U.S. 244 (1901).

81. *Cleveland*, *supra* note 77, at 12.

82. *Id.* at 11.

83. JOHN RAWLS, *A THEORY OF JUSTICE* 334 (photo. reprt. 2005) (1971).

84. These are arguments about ends (i.e., telos), about costs and benefits, and about the purposes of our obligations or their likely consequences. See R.M. Hare, *Political Obligation*, in *SOCIAL ENDS AND POLITICAL MEANS* 1 (Ted Honderich ed., 1976).

85. 258 U.S. 298 (1922).

86. *Balzac*, 258 U.S. at 311.

such as Medicare, Medicaid, SNAP, and SSI.⁸⁷ The island has also benefited from internal improvements.⁸⁸ Island residents receive these benefits even though they do not pay federal income taxes.

The economic picture is not quite as tidy, however. To begin, island residents do not pay federal income taxes, true, but they pay a host of other taxes, including “payroll taxes, social security taxes, business taxes, gift taxes, [and] estate taxes.”⁸⁹ Also, the island is subject to the Merchant Marine Act of 1920 (i.e., the Jones Act), which requires goods and passengers moving from one U.S. port to another to be on U.S. ships. The Act also requires that those ships be built, owned, and operated by U.S. citizens.⁹⁰ The economic impact of the Act on Puerto Rico and its citizenry is severe.⁹¹ This has been a complicated relationship from the beginning; “[w]ithin the first 10 years of the U.S. occupation of Puerto Rico,” explains historian Lillian Guerra, “U.S. sugar interests had pretty much taken over, and the Puerto Rican coffee class has been displaced entirely.”⁹² To this day, Puerto Rico is “still a country that is dominated by U.S. investors . . . [a]nd . . . most U.S. companies pay virtually no taxes to the Puerto Rican state.”⁹³

On costs and benefits alone, then, it is hardly clear that the people of Puerto Rico are the winners. As Judge Cabranes put it, Puerto Rico has paid a very steep price for its relationship with the United States:

87. See Jo Craven McGinty, *Statehood for Puerto Ricans: Billions More in U.S. Programs—And in Taxes*, WALL ST. J. (Nov. 4, 2017, 12:27 PM), <https://www.wsj.com/articles/statehood-for-puerto-ricans-billions-more-in-u-s-programs-and-in-taxes-1509714000> [<https://perma.cc/S8XE-39TD>].

88. See José A. Cabranes, U.S. Dist. Judge for the Dist. of Conn., Puerto Rico and the Constitution, Remarks at the First Circuit Judicial Conference (Nov. 1985), in 110 F.R.D. 449, 475, 479 (1986).

89. See Alexia Fernández Campbell, *Puerto Rico Pays Taxes. The US Is Obligated to Help It Just as Much as Texas and Florida*, VOX (Oct. 4, 2017, 9:50 AM), <https://www.vox.com/policy-and-politics/2017/10/4/16385658/puerto-rico-taxes-hurricane> [<https://perma.cc/PNE5-BKWF>]; see also Nelson A. Denis, *Taxing Puerto Rico to Death*, ORLANDO SENTINEL (Jan. 10, 2018), <https://www.orlandosentinel.com/opinion/os-ed-taxing-puerto-rico-to-death-20180110-story.html> [<https://perma.cc/52VB-G6SQ>] (“Puerto Ricans on the island are the most heavily taxed of all U.S. citizens.”).

90. Merchant Marine Act of 1920, 46 U.S.C. § 50101.

91. Nelson A. Denis, Opinion, *The Jones Act: The Law Strangling Puerto Rico*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/hurricane-puerto-rico-jones-act.html> [<https://perma.cc/B74Z-EANS>] (explaining that the Act “is strangling the island’s economy”); see Keli’i Akina & Andy Blom, Opinion, *Aloha, Puerto Rico*, WALL ST. J. (June 5, 2016, 5:49 PM), <https://www.wsj.com/articles/aloha-puerto-rico-1465163389> [<https://perma.cc/3UXT-HELFL>].

92. Becky Little, *Puerto Rico’s Complicated History with the United States*, HISTORY (Sept. 22, 2017) (updated Sep. 15, 2020), <https://www.history.com/news/puerto-ricos-complicated-history-with-the-united-states> [<https://perma.cc/R6GM-L6WA>].

93. *Id.*

“political subordination and a deep, abiding sense of dependency and powerlessness.”⁹⁴ Teleological arguments cannot possibly be the source of Puerto Rico’s constitutional obligations.

A third argument is firmly rooted in democratic theory and American constitutional principles. This is consent theory, which argues that the people of Puerto Rico consented to their present status.⁹⁵ The consent may be explicit, dating back to 1952, when Puerto Rico enacted its own constitution under congressional authority vested by Public Law 600.⁹⁶ There is much to say for this view. Both the Constitution of Puerto Rico and Public Law 600 label the relationship between the United States and Puerto Rico as a “compact.”⁹⁷ Also, many courts and commentators refer to the relationship as a “compact.”⁹⁸ As if to leave no doubts, President Truman described the relationship as “based on mutual consent and esteem.”⁹⁹

The consent may also be implicit,¹⁰⁰ rooted in the fact that the people of Puerto Rico readily acquiesce to their political condition. There are no marches, no large-scale demonstrations, and, to be sure, the peo-

94. Cabranes, *supra* note 88.

95. See Trías Monge, *supra* note 49, at 27 (explaining that “only consent can supply an adequate basis for the institution of government”). For a similar inquiry as applied to American Indians in U.S. history, see Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751 (2017).

96. Puerto Rico Federal Relations Act of 1950, Pub. L. No. 81-600, § 2, 64 Stat. 319, 319 (codified as amended at 48 U.S.C. § 731(c)).

97. Public Law 600 states: “[T]his Act is now adopted in the nature of a compact” *Id.* § 1, 64 Stat. at 319 (providing for the organization of a constitutional government by the people of Puerto Rico). Article I of the Constitution of Puerto Rico states that the political power of the Commonwealth of Puerto Rico “shall be exercised . . . within the terms of the compact agreed upon between the people of Puerto Rico and the United States of America.” P.R. CONST. art. I, § 1.

98. See Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 671 (1974); Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 593–94 (1976); United States v. Quinones, 758 F.2d 40, 42–43 (1st Cir. 1985); RAYMOND CARR, PUERTO RICO: A COLONIAL EXPERIMENT 77–78 (1984) (arguing that the relationship between the United States and Puerto Rico is based on a compact as a result of the 1952 referendum and adoption of the Puerto Rican constitution); Rafael Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COLEGIO DE ABOGADOS P.R. 207 (1959); Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 REV. JURÍDICA U. INTERAMERICANA P.R. 1 (1982) (contending that the Supreme Court has accepted the “compact” reading); Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1, 5, 9–16 (1953).

99. JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 158 (1985) (quoting statement of President Truman, July 3, 1952).

100. See Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1686 (2016) (“The democratic authority of the Constitution is grounded in the people’s implicit consent to the legal and political arrangements it affirms.”).

ple of Puerto Rico choose to stay as members, however subjugated they may be, of the American political community. Also, island residents have renewed their commitment to the status quo through six nonbinding plebiscites (or at the very least, have shown great ambivalence toward resolving the status question).¹⁰¹ Finally, exit offers a final resolution; by choosing to stay, the people of Puerto Rico implicitly consent to their status.

These arguments also fall short. We need an argument to legitimize political obligation under plenary powers and political powerlessness. We need an argument, that is, to legitimize colonialism.¹⁰² Consent theory is not that argument. Descriptively, we happily concede that the people of Puerto Rico were not “passive agents in the constitutional transformation of the island.”¹⁰³ But that only shows that the people of Puerto Rico agreed to a political condition that renders them subservient to the arbitrary will of another. This is, at best, “colonialism with the consent of the governed.”¹⁰⁴ These are not grounds upon which political obligation may be established.¹⁰⁵

101. Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 39 (1998); see John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J.F. 403 (2007), <https://www.yalelawjournal.org/forum/the-constitution-is-clear-only-states-vote-in-congress> [<https://perma.cc/SW7M-ZD33>] (“Puerto Rico’s referenda, in which the island’s citizens have voted against statehood and in favor of commonwealth status, suggest that the values of democracy may be best served by honoring that outcome and retaining commonwealth status.”).

102. See TORRUELLA, *supra* note 99; Cabranes, *supra* note 1 (referring to status as colonialism); see also JAMES EDWARD KERR, THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM 119 (1982) (“The establishment of commonwealth status perpetrated the myth that Puerto Ricans had exercised the right to self-determination. But that was not the case. With the acceptance of the new status, Puerto Rico was not offered statehood, yet it was no longer a colony in the sense that it had been.”); Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 515–16 (1992) (describing Puerto Rico’s colonial status). But see David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, in 110 F.R.D. 449, 452, 465 (1986) (“In my opinion there is a compact, in the nature of an understanding based on considerations of political morality, limited to the Constitution of Puerto Rico and the provisions of Acts 600 and 447 which relate to the internal affairs of the Island.”).

103. MONTALVO-BARBOT, *supra* note 48, at 143 (“In general, the presentation of the Puerto Rican people as passive agents in the constitutional transformation of the island, an argument advanced by gradualist and traditional colonialist studies, is analytically and empirically simplistic and questionable.”); Helfeld, *supra* note 102, at 458.

104. Cabranes, *supra* note 88, at 483 n.26 (explaining that “the phrase ‘colonialism with the consent of the governed’ is a familiar one in Puerto Rico’s politics”); see Triás Monge, *supra* note 49; Cabranes, *supra* note 1, at 463 (“Colonialism with the consent of the governed is a painful fact of life for all politically conscious Puerto Ricans, including those who a generation ago hoped to establish the Commonwealth of Puerto Rico as a

CONCLUSION

The central question in the debate over the status of Puerto Rico is also a question few bother to ask: Why do laws enacted by a foreign body bind the people of Puerto Rico? Put a different way, under what theory of constitutional authority and obligation are the people of Puerto Rico duty-bound to obey the U.S. Constitution? Are the people of Puerto Rico agents with real voice and exit options vis-à-vis the American constitutional structure? These are not easy questions with ready answers. Traditional theories of consent only get us so far.

Think first about the history of Puerto Rico post-1898, and specifically about the process by which the island became an American territory, its residents American citizens. In 1898, in the aftermath of that “splendid little war,”¹⁰⁶ Spain relinquished Puerto Rico to the United States, along with Guam and the Philippines.¹⁰⁷ On the eve of World War I, the United States enacted the Jones Act of 1917 and conferred citizenship upon the people of Puerto Rico.¹⁰⁸ A crucial fact is that both of these historical occurrences entailed little effort on the part of Puerto Rico or its citizens; they were not active agents engaged in acts of self-determination but mere war bounty, a relinquished territory subject to the commands of another. They did not engage in the deliberative enterprise and subsequent decisionmaking fit for agents active in their pursuits of happiness, or whatever else they wished to pursue. Rather, their pre-

‘middle road to freedom,’ assertedly to avoid the economic risks of independence and the cultural ‘assimilation’ of statehood.”).

105. See *United States v. Lopez Andino*, 831 F.2d 1164, 1172 (1st Cir. 1987) (Torruella, J., concurring); Cabranes, *supra* note 1, at 481; David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JURÍDICA U. P.R. 255, 307 (1952) (“Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico.”); Trias Monge, *supra* note 49, at 27 (“The subjection of a people to the arbitrary will of another, the exercise of plenary power over dependent territory, is not permissible.”); see also *id.* at 28 (“Under the principles of liberty and equality no plenary powers can be exercised by one people over another, even with their general consent.”).

106. The words were written by John Hay, then United States ambassador to England, in a letter to Colonel Theodore Roosevelt. See FRANK FREIDEL, *THE SPLENDID LITTLE WAR* 3 (1958).

107. The Philippine islands were sold for twenty million dollars. *The World of 1898: The Spanish-American War*, LIB. CONG: HISP. DIV., <https://www.loc.gov/tr/hispanic/1898/intro.html> [<https://perma.cc/XH8J-HC6X>].

108. Jones Act, Pub. L. No. 64-368, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 8 U.S.C. § 1402).

sent political and constitutional status simply happened to them, as they were transferred to the United States as part of the spoils of war.¹⁰⁹

Think also about everything you think you know about the law of democracy and democratic theory more generally. This is the stuff of fifth-grade civics: the right to vote is reserved for citizens;¹¹⁰ voting is a “fundamental political right, because [it is] preservative of all rights”;¹¹¹ and citizenship “is a precious heritage, as well as an inestimable acquisition.”¹¹² These axioms should apply fully to citizens of Puerto Rico: birth on the island confers American citizenship and all the rights, fundamental or otherwise, that attach to that status. But they don’t. The status of Puerto Rico and its citizenry offers a shameful illustration of political process failure and the shortcomings of American democracy. Though citizens at birth,¹¹³ the people of Puerto Rico have no direct voice in national elections and are subject to the plenary powers of Congress. Unquestionably, the present constitutional and political status of Puerto Rico is indefensible on grounds of democratic theory and incompatible with American constitutional values.

Consider what political theorists tell us about why citizens must obey the Constitution. The easiest justification came soon after ratification, when citizens may be said to have directly consented to the Constitution as fundamental law. The justification becomes more complex as time passes and new generations replace old.¹¹⁴ The justification is harder still, perhaps untenable, as applied to Puerto Rico. Think for example about Puerto Rico’s massive debt burden. In response, the Puerto Rican legislature enacted a debt-restructuring plan. The U.S. Supreme Court struck down the plan, however, on the view that Puerto Rico was a state

109. This is the basic distinction, Don Herzog argues, between actions by a free agent and a subordinate subject. See HERZOG, *supra* note 26, at 223–25.

110. See *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973) (“This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause.”); Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259 (1992); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394 (1993); Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1094–97 (1977).

111. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”).

112. *United States v. Wong Kim Ark*, 169 U.S. 649, 727 (1898) (Fuller, C.J., dissenting).

113. Though even what this means is unclear.

114. See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998) (exploring why “Americans of today should be bound by the decisions of people” of the past).

under federal bankruptcy law and thus preempted from enacting its own plan.¹¹⁵ This is a federal law that the people of Puerto Rico had no hand in enacting. Under what legal theory is Puerto Rico bound to obey this or any other federal law? Similarly, and more importantly, under what theory of obligation is Puerto Rico bound by the U.S. Constitution?

Representatives Nydia Velázquez and Alexandria Ocasio-Cortez have introduced the Puerto Rico Self-Determination Act. The proposal directs the legislature of Puerto Rico to call a Status Convention staffed with delegates elected by the people of Puerto Rico.¹¹⁶ This Convention would work toward a long-term solution to the status of Puerto Rico, whether statehood, independence, the status of free association as it exists today, or something else. The product of the convention would be put to the people of Puerto Rico in a referendum and presented to Congress. “The key,” as Representatives Velázquez and Ocasio-Cortez wrote, “is that this framework would be developed by Puerto Ricans and for Puerto Ricans, not dictated to them like so many previous policies.”¹¹⁷ The aim is to provide the people of Puerto Rico with a true exit (or entry) option. The Puerto Rico Self-Determination Act is an important and needed first step in the relationship between Puerto Rico and the United States.

The people of Puerto Rico exist in a para-constitutional space as an unincorporated territory. They are U.S. citizens at birth, yet do not have the same rights under the Constitution as citizens in the contiguous United States. They are subject to laws they did not take any part in enacting and live under a Constitution to which they did not consent. Basic principles of democratic theory demand more, as do theories of constitutional obligation. This is an issue that constitutional scholars and constitutional law ought to take up with ever increasing urgency.

115. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1942–43 (2016).

116. Puerto Rico Self-Determination Act, H.R. 8113, 116th Cong. § 3 (2020).

117. Nydia Velázquez & Alexandria Ocasio-Cortez, *Puerto Rico, Not Congress, Must Determine Its Future. Our Bill Enables It to Do So*, NBC NEWS: THINK (Aug. 25, 2020, 11:48 AM), <https://www.nbcnews.com/think/opinion/puerto-rico-not-congress-must-determine-its-future-our-bill-ncna1238032> [<https://perma.cc/V9LD-3WCP>] (emphasis omitted).