

Michigan Law Review

Volume 119 | Issue 6

2021

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Christina D. Ponsa-Kraus
Columbia Law School

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Recommended Citation

Christina D. Ponsa-Kraus, *A Perfectly Empty Gift*, 119 MICH. L. REV. 1223 (2021).
Available at: <https://repository.law.umich.edu/mlr/vol119/iss6/10>

<https://doi.org/10.36644/mlr.119.6.perfectly>

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A PERFECTLY EMPTY GIFT

Christina D. Ponsa-Kraus*

Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire. By Sam Erman. Cambridge: Cambridge University Press. 2019. Pp. xv, 275. Cloth, \$49.99; paper, \$29.99.

INTRODUCTION

“Almost citizens.” What does that even mean? It’s like being “kind of pregnant,” isn’t it? In other words, nonsense. Citizenship isn’t an “almost” kind of thing. It’s all or nothing. Unless, I suppose, the word “almost” is used in a simple temporal sense—as in, “Our naturalization ceremony is tomorrow. We’re almost citizens! Yay!” There, the phrase “almost citizens” makes sense. Otherwise not. Right?

Wrong. “Almost citizens,” in a sense as ambiguous as it sounds, is what *Almost Citizens: Puerto Rico, the U.S. Constitution, and Empire* is about. “Almost citizens” describes what Puerto Ricans were from 1898, when the United States annexed the island, until 1917, when Congress collectively naturalized its people by statute.¹ “Almost citizens,” in a different but equally ambiguous sense, captures what the people of Puerto Rico somehow remained even after they became U.S. citizens in 1917. And “almost citizens” arguably defines what they still are today.²

Sam Erman’s³ superb book explains why and how the U.S. citizenship of Puerto Ricans became an ambiguous sort-of citizenship: a citizenship that guarantees neither full belonging nor equality and raises more questions than it answers. Beyond “why” and “how,” Erman convincingly captures *what it was like*, telling the painful story of Puerto Rico’s long struggle for citizenship through the lives of several Puerto Rican individuals you’ve never heard of but should have—and now, thanks to Erman, will have: lawyer and

* George Welwood Murray Professor of Legal History, Columbia Law School.

1. Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris]; Puerto Rican Federal Relations (Jones) Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (current version at 8 U.S.C. § 1402).

2. Others who have written on the subject have similarly attempted to capture the ambiguity of Puerto Ricans’ citizenship status in their titles. *E.g.*, ROBERT C. MCGREEVEY, *BORDERLINE CITIZENS: THE UNITED STATES, PUERTO RICO, AND THE POLITICS OF COLONIAL MIGRATION* (2018); LORRIN THOMAS, *PUERTO RICAN CITIZEN: HISTORY AND POLITICAL IDENTITY IN TWENTIETH-CENTURY NEW YORK CITY* (2010); Christina Duffy Burnett [Ponsa-Kraus], “*They Say I Am Not an American . . .*”: *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT’L L. 659 (2008).

3. Professor of Law, University of Southern California Gould School of Law.

statesman Federico Degetau y González, typesetter/journalist/activist Domingo Collazo, and labor leader Santiago Iglesias.⁴ Each of these men dedicated himself with passion and commitment to the attainment of U.S. citizenship for Puerto Ricans after the island's annexation in 1898. Each of them worked tirelessly, year after year, to achieve for himself and his fellow islanders a citizenship that all Puerto Ricans should have been able to take for granted the moment the United States claimed their island as its own. Each brought to the struggle an understanding of the meaning and promise of citizenship that was tried, tested, and transformed by an unrelenting cycle of incremental gains and repeated setbacks in the face of federal resistance. By the time they succeeded, citizenship—the U.S. citizenship that the United States proved willing to grant Puerto Ricans in 1917—had become, as one of the island's federally appointed governors put it, a “perfectly empty gift” (p. 101).⁵

Several figures of lesser and greater renown play secondary but significant roles in Erman's account. One is Collazo's niece Isabel Gonzalez,⁶ who traveled by steamship from Puerto Rico to New York in 1902, was detained at Ellis Island, and filed a habeas corpus petition challenging her detention. Gonzalez's habeas petition took the question of Puerto Ricans' citizenship status to the Supreme Court, which resolved her claim with a frustratingly confusing decision.⁷ Another is Samuel Gompers, whose early opposition to empire gave way to a reluctant embrace as Iglesias persuaded him to throw the support of the American Federation of Labor (AFL) behind efforts to organize workers in Puerto Rico.⁸ Several U.S. presidents make relatively brief appearances, but their power is palpable and consequential. Elihu Root shows up too, bringing his lawyerly skills to bear on the problem of empire as he tinkers with legal intricacies of imperial governance. Ditto Felix Frankfurter, then a law officer at the Bureau of Insular Affairs (the name given to what was effectively the United States' colonial office).⁹

4. The least known of the three, Domingo Collazo—not a household name even in Puerto Rico—receives further attention in another recent book. See JESSE HOFFNUNG-GARSKOF, *RACIAL MIGRATIONS: NEW YORK CITY AND THE REVOLUTIONARY POLITICS OF THE SPANISH CARIBBEAN* 272 (2019).

5. Erman here quotes Regis Post, governor of Puerto Rico from 1907 to 1909, who used this phrase as part of his argument in favor of granting U.S. citizenship to Puerto Ricans.

6. Although the name González today is spelled with an accent, Isabel Gonzalez did not use one, as one can see in the image of a letter she wrote to Degetau on page 91 of *Almost Citizens*. Hence Erman's decision to omit it.

7. Gonzalez's story is the subject of chapter 4, “‘American Aliens’: Isabel Gonzalez, Domingo Collazo, Federico Degetau, and the Supreme Court, 1902–1905.” The chapter expands upon Erman's excellent article, Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898 to 1905*, *J. AM. ETHNIC HIST.*, Summer 2008, at 5.

8. See chapters 3, 5, and 6.

9. Root appears in chapters 2, 3, 5, and 6; Frankfurter, in chapter 6.

As this roster suggests, Erman's account of constitutional meaning making unfolds through numerous overlapping lives and across multiple intersecting arenas where law is made, shaped, and contested: in the courts, on a steamship traveling along the eastern seaboard, in the halls of Congress, in letters to the editor, at the White House, in a variety of administrative offices, and on the streets.

Erman describes citizenship as "occup[ying] a powerful middle ground between officialdom and the populace," and by focusing on a struggle over citizenship, *Almost Citizens* thoroughly succeeds in its "key goal" of "illuminat[ing] how modestly situated individuals, powerful actors, and large structural forces all interacted to bring about historical change" (p. 4). The change is how the inhabitants of Spain's former colony of Puerto Rico became U.S. citizens—which is to say, how the post-Civil War Reconstruction Constitution, with its promise of "near-universal citizenship, expanded rights, and eventual statehood" (p. 2), gave way to an imperial Constitution, delivering none of these things and designed instead for imperial expansion leading to colonial governance.

As Erman explains, the Civil War and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments yielded the Reconstruction Constitution, which promised citizenship, rights, and statehood to Americans living under U.S. sovereignty. During the three decades following the Civil War, the promises of the Reconstruction Constitution served as a deterrent to further territorial expansion. The reason they did was racism: white Americans had little appetite for extending these promises to the nonwhite inhabitants of any further territories the United States might annex. But by the end of the nineteenth century, the ground began to shift. Domestically, the Reconstruction Constitution increasingly came under assault as a legally sanctioned system of racial oppression and white supremacy replaced slavery. Abroad, the federal government's desire and ability to project its power grew stronger (pp. 2–4).

In 1898, the United States annexed Hawai'i, followed by Puerto Rico, Guam, and the Philippines.¹⁰ While Hawai'i followed the same path as earlier U.S. territories, a different fate awaited the other new territories, which were inhabited by people whom white Americans perceived as nonwhite—and therefore, in the prejudiced view of the time, incapable of self-government. With respect to them, the federal government chose to "sacrifice the Reconstruction Constitution on the altar of empire" (p. 21). What took shape in its stead was a constitution for empire—one that betrayed the promises of the Reconstruction Constitution by prying citizenship apart from equal rights and eventual statehood while further annealing it to race.¹¹

Although *Almost Citizens* focuses on the two decades between the annexation of Puerto Rico in 1898 and the collective naturalization of its people in 1917, Erman builds his argument by situating those two decades in a

10. See chapters 1 and 2.

11. Pp. 4–5 ("[R]ace was all but annealed to citizenship . . .").

slightly longer time frame. *Almost Citizens* begins in the Reconstruction era and concludes five years after the grant of citizenship, with a gesture in the Afterword toward the century that followed¹²—during which, despite the grant of citizenship, Puerto Rico remained what it is to this day: a colony of the United States, or as the late chief justice of the Supreme Court of Puerto Rico, José Triás Monge, put it, the “oldest colony in the world.”¹³ As Erman shows, Puerto Rico’s unending colonial subordination under U.S. sovereignty has its roots in the constitutional transformation that occurred during those first two decades of the twentieth century.

The book’s many strengths include three that I will highlight in this review. It skillfully brings to light for a wider audience the stories of three individuals Erman aptly describes as “remarkable Puerto Ricans” (p. 4). It subtly examines the complex racial politics of empire. And it seamlessly integrates Puerto Rico into the broader domain of U.S. history—so seamlessly, really, that one risks undermining the accomplishment by pointing it out. The book’s central overarching theme is that legal ambiguity defines, sustains, and perpetuates U.S. imperialism. The observation holds true throughout U.S. history, as Erman shows by occasionally drawing parallels between the federal government’s treatment of Puerto Rico and the other territories annexed in 1898 and its treatment of African Americans, Native Americans, immigrants, and women.¹⁴ Throughout, the book captures the pain and frustration of demanding and being repeatedly denied what any people should be able to take for granted: the dignity that comes with equal citizenship. It is a crushing experience—one Puerto Ricans had already endured for at least a century under Spain before they found themselves in a nightmarish *déjà vu* experience under the United States. This, too, I wish to highlight in this review: the brutal truth that Puerto Rico has been a colony for too damn long.

As for weaknesses, in my opinion Erman’s book doesn’t have any worth mentioning, but I will do my duty as a reviewer and say that the Conclusion might have been styled a chapter seven and a slightly expanded version of the Afterword would have made a fine conclusion.

In what follows, I situate those first two decades of the twentieth century on which Erman focuses in an even longer time frame, hoping to convey the relentless endlessness of Puerto Rico’s colonial condition. Part I looks back at Puerto Rico’s nineteenth-century struggle for equal representation and local self-government under Spain. Part II looks at the period between 1898 and 1917, the central subject of *Almost Citizens*, focusing in particular on Erman’s thoughtful treatment of the complex racial dynamics of the struggle for citizenship. Part III looks beyond 1917 to the present, explaining what it means to say that Puerto Ricans remained “almost citizens” even after they became U.S. citizens.

12. See pp. 9–10, 158–59; Afterword, p. 160.

13. Afterword, p. 161 (quoting JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997)).

14. See, e.g., p. 1.

I. "PRACTICED COLONIALS"¹⁵

By the time U.S. troops landed on the shores of the southern Puerto Rican town of Guánica in the summer of 1898, the island had been a colony of Spain for four hundred years, and its political leaders had been actively struggling to achieve equal representation and increased self-government for the better part of a century.¹⁶ Spain had granted, then withdrawn, representation in the Spanish *Cortes*, or legislature, several times since the early nineteenth century and had conferred a robust form of autonomy upon the island mere months before the U.S. invasion brought Spanish sovereignty to a sudden end. Demoralized, Puerto Ricans political leaders accepted, if not outright welcomed, the U.S. invasion, believing it would lead to a stint as a U.S. territory with some degree of home rule followed by the island's admission into the union as an equal state. Little did they imagine that they were about to embark on a second century of struggle for equality—their fifth as a colony.¹⁷

Puerto Rico's struggle for equality and self-government under Spain dated at least as far back as Napoleon's occupation of most of the Iberian Peninsula from 1808 to 1814. After imprisoning Spanish monarch Ferdinand VII and installing his brother Joseph Bonaparte as king of this new domain, Napoleon convened a constitutional assembly, which produced the Constitution of Bayonne. The assembly included delegates from Spain's colonies in the Americas and the Philippines, which was a departure from tradition: the Spanish *Cortes*, the legislative body that met periodically when convened by the king, had never included colonial representatives.¹⁸

Spain's resistance government met in the southern city of Cádiz, convening a competing constitutional assembly in the form of a session of the *Cortes*. Now they, too, invited delegates from Spain's colonies in the Americas. Known as the "American" delegates to the *Cortes de Cádiz*, they learned immediately upon their arrival that even with representation, equality would remain elusive.¹⁹ Granted a fraction of the seats to which they should have been entitled based on their population, they demanded equal representa-

15. P. 34 ("These practiced colonials studied their new imperial masters."). The following Part is based on my more detailed account of Puerto Rico's nineteenth-century struggle for equality and autonomy and the sources cited there, see Christina Duffy Ponsa [Ponsa-Kraus], *When Statehood Was Autonomy*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 1–28 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015), and on Erman's own account of Puerto Rico's relations with Spain in the last third of the nineteenth century, pp. 16–21.

16. See Ponsa [Ponsa-Kraus], *supra* note 15, at 8–25.

17. See generally FRANCISCO A. SCARANO, *PUERTO RICO: CINCO SIGLOS DE HISTORIA* (1993) (providing a survey of Puerto Rican history from Spanish colonization to the late twentieth century).

18. Ponsa [Ponsa-Kraus], *supra* note 15, at 8.

19. See MARIE LAURE RIEU-MILLÁN, *LOS DIPUTADOS AMERICANOS EN LAS CORTES DE CÁDIZ: IGUALDAD O INDEPENDENCIA* 12–13 (1990); MARÍA TERESA BERRUEZO, *LA PARTICIPACIÓN AMERICANA EN LAS CORTES DE CÁDIZ, 1810-1814*, at 29 (1986).

tion. But they succeeded only in persuading the *Cortes* to issue a statement declaring equality “in principle,” while expressly postponing it in fact.²⁰

The *Cortes de Cádiz* produced Spain’s first written constitution, the Constitution of 1812, but the experiment proved short lived and was immediately followed by the Spanish-American wars of independence.²¹ Within a decade, Spain had lost its empire across the Atlantic, retaining only Cuba and Puerto Rico in the Caribbean (and Guam and the Philippines in the Pacific). In the decades that followed, as Spain adopted and repealed several constitutions, an alternative understanding of equality for the colonies arose. The Constitution of 1837 denied them representation in the *Cortes* but included a provision stating that they would be governed under a regime of “special laws.”²² Puerto Rican political leaders did not object to special laws. Their own requests for reforms suited to the island’s particular circumstances—including slavery, which existed in both Puerto Rico and Cuba but not on the Iberian Peninsula—had coexisted with their demands for equal representation since the constitutional convention in Cádiz.²³ But in another instance of declaring principles without applying them, no special laws were forthcoming—not under the Constitution of 1837, nor that of 1845, nor that of 1869, nor that of 1876.²⁴

The Constitution of 1869 did bring with it the return of colonial representation in the *Cortes*, and this is where Erman’s brief survey of Puerto Rico’s history leading up to U.S. annexation begins (pp. 16–21). As he explains, 1868 saw the beginning of a decade-long uprising against Spanish rule in Cuba and a quickly suppressed revolt in Puerto Rico; in Spain, a “Glorious Revolution” led to the adoption of the new liberal constitution the following year. The new Spanish regime broadened the franchise in Puerto Rico, whose native-born liberals formed the island’s first political party, the *Partido Liberal*, in 1870. Spanish-born *peninsulares* (as in, born on the Iberian Peninsula) responded by forming the competing *Partido Incondicional*, so named for its unconditional support for Spanish rule on the island, in whatever form the Spanish government chose (pp. 16–17).

Representation ushered in further reforms. Support for the abolition of slavery had been growing in Puerto Rico; Puerto Rico’s delegate to the *Cortes*, the leading liberal politician Román Baldorioty de Castro, argued for its immediate abolition, which occurred in 1873. Radical labor ideologies began to circulate on the island and Puerto Rican workers began to organize. A broader franchise and representation in the *Cortes* gave the liberal creole

20. Ponsa [Ponsa-Kraus], *supra* note 15, at 9–10.

21. The short-lived text did, however, have a long-lived legacy, both in Spain and in the Americas. See M.C. MIROW, *LATIN AMERICAN CONSTITUTIONS: THE CONSTITUTION OF CÁDIZ AND ITS LEGACY IN SPANISH AMERICA* (2015).

22. Ponsa [Ponsa-Kraus], *supra* note 15, at 10.

23. See *id.* at 11; CHRISTOPHER SCHMIDT-NOWARA, *EMPIRE AND ANTISLAVERY: SPAIN, CUBA, AND PUERTO RICO, 1833–1874*, at 15 (1999).

24. Ponsa [Ponsa-Kraus], *supra* note 15, at 11–12.

(*criollo*) class—long excluded from political power—a brief taste of both home rule and participation in the Spanish government (pp. 16–18).

“Politically active Puerto Ricans pursued overlapping constitutional strategies,” Erman writes:

Many favored a program of assimilation, by which they meant full equality between Puerto Ricans and other Spaniards, and between Puerto Rico and other provinces. They wanted Spaniards born or residing in Puerto Rico to enjoy the same access to office, national representation, local democracy, and individual rights as *peninsulares* resident in the metropole. Others favored autonomy—broad self-governance subject only to lightly exercised Spanish sovereignty. National independence appealed to a third group. Still others imagined a workers’ revolution on behalf of the backbone of the island’s economy: its desperately poor, unorganized, disfranchised agricultural laborers. (p. 18)

The dominant currents on the island were—and would remain—the first two, which I have referred to with the shorthand of “equality” and “autonomy.”²⁵ But eventually these overlapping constitutional strategies became competing political goals, leading to a rift between two factions of the *criollo* liberal elite.²⁶

Before that occurred, however, reaction in Spain led to a military coup in 1874 and the replacement of the Spanish Republic with a constitutional monarchy. Over the next decade, the disillusioned *criollos* all but gave up hope of attaining equal status as a Spanish province and focused their efforts instead on the goal of special laws, or what came to be associated with the term “autonomy.” Formalizing the term, the *Partido Liberal* reorganized in 1887 as the *Partido Autonomista*. Led by Baldorioty, from its inception the party consisted of two camps, one favoring moderate reforms and the other more radical ones.²⁷ Meanwhile, workers and artisans operated outside the party altogether (pp. 18–19).

To Spanish authorities, they all looked like radicals. A brutal crackdown in 1887 had the unintended effect of prompting *criollo* political leaders to approach workers and artisans in an effort to create a cross-class, cross-racial alliance—“*[la] gran familia*”:

The kinship metaphor required no explicit mention of race. It thus side-stepped *criollos*’ tenuous claims to pure Spanish whiteness. It also discouraged racially chauvinistic *criollos* from explicit, and offensive, assertions of racial superiority. Conversely, the family imagery highlighted the Liberales’ genuine cross-race and cross-class ties of affection and admiration. They offered working men promises of liberal citizenship with access to suffrage, freedom of the press, and jury participation. (p. 20)

25. See *supra* text accompanying notes 17–18. Support for independence would always be in the minority, both before and after 1898. See Ponsa [Ponsa-Kraus], *supra* note 15, at 4.

26. Ponsa [Ponsa-Kraus], *supra* note 15, at 21–22.

27. See *id.* at 12–14.

In this passage, Erman begins carefully to capture the complex racial dynamics of empire, here in the context of Spanish colonial rule. As a class of political leaders whose own whiteness was subject to question, *criollos* variously accepted, embraced, rejected, and attempted to transcend racial hierarchy as they sought empowerment for themselves and decolonization for their island.

The *criollos'* vision of a *gran familia* echoed José Martí's call for an anti-Spanish cross-racial alliance in Cuba, but whereas Martí founded the *Partido Revolucionario Cubano* in 1892 and Cubans took up arms against Spain once again in 1895, Puerto Rican *criollos* remained loyal to Spain, seeking equality and autonomy, never independence.²⁸ In the words of the *Partido Autonomista*, they sought decentralization to "the maximum degree compatible with Spanish unity."²⁹

The rift that emerged between the two Puerto Rican autonomist factions concerned the compromises it would take to achieve that goal. Puerto Rico's autonomists understood that they must form an alliance with a Spanish political party, since only a mainland party, once in power, could grant the desired reforms. One faction was led by Degetau and José Celso Barbosa, a medical doctor and Puerto Rico's most prominent man of color. They believed that autonomy and a republican form of government went hand in hand and that Puerto Rico's autonomists therefore must form an alliance with a party that supported republicanism. The other faction, led by journalist and politician Luis Muñoz Rivera, believed that they must form an alliance with a party actually likely to come into power, which meant one of the two monarchical parties. Degetau and Barbosa insisted that autonomy would fall short of the ideal without adherence to republican principles. But Muñoz Rivera insisted that autonomists must focus single-mindedly on achieving power for native-born Puerto Ricans, and only then need they worry about what form their government should take.³⁰

Muñoz Rivera's pragmatic strategy was mindful of Spanish political realities. According to an arrangement called the *turno pacífico* (peaceful turn taking), which had been in place in Spain since the 1874 coup, one of the two leading monarchical parties would hold power until both agreed to dissolve the government, at which time the *Cortes* would take a vote of no confidence, the monarchy would select a new *jefe de gobierno* (head of government) from the other party and issue a decree dissolving the *Cortes*, and elections would be held. The elections were fixed and would reliably yield a victory for the party whose turn it was to govern.³¹

Pragmatism prevailed over principle when in 1897—on the eve of the United States' intervention in Cuba's war with Spain—Muñoz Rivera negoti-

28. P. 20; Ponsa [Ponsa-Kraus], *supra* note 15, at 8–25.

29. LIDIO CRUZ MONCLOVA, BALDORIOTY DE CASTRO: SU VIDA - SUS IDEAS 105 (1966) ("control local . . . hasta el mayor grado compatible con la unidad nacional española").

30. Ponsa [Ponsa-Kraus], *supra* note 15, at 14–25.

31. *Id.* at 15–16.

ated a pact with the leader of one of the monarchical parties, Práxedes Mateo Sagasta. October of that year brought the assassination of Sagasta's rival Antonio Cánovas del Castillo, and when Sagasta came into power, Spain finally granted Puerto Rico and Cuba the "special laws" it had been promising for many decades, in the form of a "charter of autonomy" for each island.³²

In Cuba, it was too little, too late—the island's war for independence raged on. In Puerto Rico, it was not too little—indeed, the Charter surprised everyone by granting the island greater autonomy than even the more radically inclined autonomists had sought—but there, too, it was too late. On February 9, 1898, a provisional autonomist cabinet took office. Elections for the local legislature followed, and its opening session was scheduled for April 25—the same day the United States declared war on Spain. The session was rescheduled for July 17 and began on that date. On July 25, U.S. forces landed in Puerto Rico, putting an end to Puerto Rico's fledgling autonomist government.³³

"Practiced colonials" indeed.

II. RECONSTRUCTED EMPIRE

Henry Cabot Lodge celebrated the war with Spain in 1898 as a long-awaited moment of sectional reconciliation, when North and South finally put behind them the divisions of the Civil War and Reconstruction and came together as one nation to defeat a common enemy. "For thirty years," he wrote:

the people of the United States had been binding up the wounds and trying to efface the scars of their great and terrible Civil War. They knew that they had done much, they felt that the old passions had softened and were dying. The war came, and in the twinkling of an eye, in a flash of burning, living light, they suddenly saw that the long task was done, that the land was really one again without rent or seam, and men rejoiced mightily in their hearts with this knowledge which the new war had brought.³⁴

Thus, Lodge framed the United States' embrace of imperialism in 1898 as a new national beginning. The twilight of Civil War and Reconstruction became the dawn of a new imperial era in American history: empire as simultaneously epilogue and preface.

But enough about Henry Cabot Lodge, who was onto something here, but who had considerably less insight into the war's consequences for the colonies at whose expense reconciliation came. Erman sets the stage with a

32. *Id.* at 23.

33. See TRÍAS MONGE, *supra* note 13, at 26.

34. HENRY CABOT LODGE, THE WAR WITH SPAIN 233–34 (New York, Harper & Bros. 1899). For a historian's assessment of this interpretation of 1898, see John Oldfield, *Remembering the Maine: The United States, 1898 and Sectional Reconciliation*, in THE CRISIS OF 1898: COLONIAL REDISTRIBUTION AND NATIONALIST MOBILIZATION 45, 45 (Angel Smith & Emma Dávila-Cox eds., 1999) (partially quoting the passage above). See also DAVID W. BLIGHT, RACE AND REUNION: THE CIVIL WAR IN AMERICAN MEMORY 351–54 (2001).

brief survey of post-Civil War U.S. history, from the “white-supremacist on-slaught” (p. 10) that followed the war to the Supreme Court’s endorsement of Jim Crow segregation and black disfranchisement on the eve of the clash between Spain’s declining global empire and the United States’ emerging one (pp. 1–4). Domestically, sectional reconciliation came at the expense of African Americans, and as Erman notes, large bodies of work have examined the domestic legacy of Reconstruction and the “long half-life of the post-Civil War settlement” (p. 3). *Almost Citizens* instead looks at a neglected chapter of that history, exploring the transformation from Reconstruction Constitution to imperial Constitution through the lives and experiences of leaders, spokespersons, and activists from one of the colonies affected: Degetau, Collazo, Iglesias. As Erman ably demonstrates, there is nothing peripheral about the colonial periphery.

A. “*Blessings of Enlightened Civilization*”³⁵

The U.S. turn to empire had a unifying effect in Puerto Rico too—but only for an instant. Immediately following the island’s annexation by the United States, the two factions reorganized into two separate political parties—the *Partido Republicano* led by Barbosa and Degetau and the *Partido Federal* under Muñoz Rivera—but both parties formally declared their support for the same goal: Puerto Rico’s admission into the Union as a state.³⁶

Congress’s practice in the U.S. territories since the Founding had been to “organize” them by conferring a measure of home rule through an organic act and then, eventually, to admit them into statehood.³⁷ While statehood took longer for some territories than for others, the pattern was long established.³⁸ The autonomists expected the same treatment—and as Erman notes, U.S. officials initially confirmed their expectations with “lofty and vague U.S. promises,” such as those made by General Nelson A. Miles, who on the occasion of landing on Puerto Rican shores declared that the United States had come to “bestow” upon Puerto Ricans “the immunities and blessings of the liberal institutions of our Government” and the “blessings of enlightened civilization.”³⁹ Had it been true, the autonomists might have remained united.

35. The phrase comes from a proclamation issued by General Nelson A. Miles immediately after U.S. troops landed in Puerto Rico. See *infra* note 39 and accompanying text.

36. 1 BOLÍVAR PAGÁN, HISTORIA DE LOS PARTIDOS POLÍTICOS PUERTORRIQUEÑOS (1898 - 1956), at 35 (1972) (article two of the platform of the *Partido Republicano*); *id.* at 50 (articles four and five of the platform of the *Partido Federal*).

37. See MAX FARRAND, THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES, 1789-1895 (Newark, W.A. Baker 1896).

38. *Id.* at 55.

39. Erman quotes the last clause of the portion of the proclamation quoted here, along with a request that Puerto Ricans refrain from “armed resistance.” P. 27. For the full proclamation, see Letter from Nelson A. Miles, Major-General, Commanding U.S. Army, to the Inhabit-

But in 1898, the United States reversed the order of “divide and conquer”: first it conquered Puerto Rico, then it divided Puerto Ricans. The new beginning quickly looked like a dead end. And it would have been, too, had Puerto Ricans let it. But they did not. Even as the rift between the autonomist factions reemerged, they remained indefatigable, picking up the struggle for citizenship where they had left off under Spain and carrying it on under the United States.

The first hint of what was to come appeared in the treaty of peace, in which Spain ceded control over Cuba and sovereignty over Puerto Rico, the Philippines, and Guam.⁴⁰ The treaty deviated from past U.S. practice by omitting the language that prior treaties of annexation had included promising citizenship to the inhabitants of annexed territories.⁴¹ The treaty of peace with Spain in 1898 withheld the promise of citizenship and offered instead an assurance as indefinite as Spain’s repeatedly unfulfilled promises of “special laws.”⁴² As Article IX of the treaty put it, “[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.”⁴³ When Congress got around to “determining” their status over a year later, it produced yet another form of procrastination. The organic act for Puerto Rico, known as the Foraker Act, omitted mention of U.S. citizenship altogether and instead labeled the inhabitants of Puerto Rico “citizens of Porto Rico.”⁴⁴ No one knew what that meant.⁴⁵

How could the United States annex Puerto Rico without making Puerto Ricans U.S. citizens? Those who pinned their hopes for an answer on the Supreme Court were in for a bitter disappointment. In 1901, the Court handed down the first several decisions in what would come to be known as the *In-sular Cases*.⁴⁶ The leading case, *Downes v. Bidwell*, concerned whether the

ants of Porto Rico (July 28, 1898), in ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1898, at 41 (Washington, Gov’t Printing Off. 1898).

40. Treaty of Paris, *supra* note 1.

41. See, e.g., Treaty Between the United States of America and the French Republic, Fr.-U.S., Apr. 30, 1803, 8 Stat. 200.

42. See *supra* notes 22–24 and accompanying text.

43. Treaty of Paris, *supra* note 1, at 1759.

44. Organic (Foraker) Act of 1900, ch. 191, §§ 1–3, 6–9, 31 Stat. 77, 79 (1900) (codified as amended in scattered sections of 48 U.S.C.).

45. Erman explains that the resistance to granting citizenship to Puerto Ricans was based at least in part on an even greater resistance to granting it to Filipinos combined with a desire to avoid creating a precedent in Puerto Rico. See pp. 27–34, 42–43.

46. The issue of exactly which cases belong in the series has been the subject of some dispute, but everyone agrees that it begins with nine decisions handed down in 1901 and that the most important one was *Downes v. Bidwell*, 182 U.S. 244 (1901). See generally KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 59–91 (2009); BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE (2006); EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM

Uniformity Clause, which requires that duties, imposts, and excises be uniform “throughout the United States,” prohibited Congress from imposing duties on goods shipped from Puerto Rico to the mainland; if Puerto Rico were part of the United States, then it would.⁴⁷ The Court outdid Congress, issuing a decision that made ambiguity the constitutional cornerstone of the U.S. empire’s legal edifice: according to *Downes*, the territories annexed in 1898 “belong[ed] to the United States, but [were] not a part of the United States.”⁴⁸ As a result, the duties did not violate the Uniformity Clause.⁴⁹ A concurrence that would later command the assent of a unanimous Court explained that Congress had not “incorporated” the new territories into the United States.⁵⁰ They were, in a famously inscrutable formulation, “foreign to the United States in a domestic sense.”⁵¹

As for whether other constitutional provisions applied in what came to be known as the “unincorporated” territories,⁵² the same concurrence explained that “there may . . . be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution,” but declined to offer a comprehensive list.⁵³ Instead, it left the question of what rights counted as “fundamental” in these territories to be answered on a case-by-case basis. Subsequent cases held that federal grand jury and jury trial provisions did not apply.⁵⁴ While other rights did apply,

IN PUERTO RICO (2001); TRÍAS MONGE, *supra* note 13; JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985).

47. 182 U.S. at 248–49; U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”).

48. *Downes*, 182 U.S. at 287.

49. *Id.* at 277–84.

50. *Id.* at 299–300, 339–42 (White, J., concurring), *cited with approval in Balzac v. Porto Rico*, 258 U.S. 298, 305–11 (1922).

51. *Downes*, 182 U.S. at 341 (White, J., concurring).

52. The Court first used the term “unincorporated” with respect to U.S. territories in *Rasmussen v. United States*, 197 U.S. 516, 525 (1905). Today, the unincorporated U.S. territories include Puerto Rico, the U.S. Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa. For a basic introduction to the current “unincorporated” U.S. territories, see U.S. GEN. ACCT. OFF., GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION 7–8 (1997).

53. *Downes*, 182 U.S. at 291 (White, J., concurring). Justice Brown’s opinion for the Court, which reasoned that the “United States” did not include any territories at all, made similar statements. It listed as examples the prohibitions on titles of nobility, bills of attainder, and ex post facto laws and suggested that the religion and speech clauses might also apply. *See id.* at 277 (Brown, J., opinion of the Court). No other Justice joined Justice Brown’s reasoning.

54. *See Balzac*, 258 U.S. at 304–11 (finding Sixth Amendment right to a jury trial inapplicable in Puerto Rico); *Ocampo v. United States*, 234 U.S. 91 (1914) (finding Fifth Amendment right to indictment by grand jury inapplicable in the Philippines); *Dorr v. United States*, 195 U.S. 138 (1904) (finding Sixth Amendment right to a jury trial inapplicable in the Philippines); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding Fifth Amendment right to indict-

their precise scope and content in the unincorporated territories remains to this day the subject of confusion and debate.⁵⁵

By now, the rift between the autonomists was complete. Their fragile coalition shattered, the autonomists' overlapping constitutional goals once more became competing constitutional strategies. Degetau would remain a proponent of formal equality through Puerto Rico's admission into statehood.⁵⁶ Collazo would set his sights on home rule, eventually aligning himself with a political party that would waver in its allegiance between autonomy and independence.⁵⁷ Still working primarily outside the island's political party system, Iglesias would pursue a shifting understanding of citizenship in the service of his overriding goal of bettering the lives of workers.⁵⁸

Nevertheless, they shared a common goal: U.S. citizenship for Puerto Ricans. They persevered even as the differences in principle and strategy that had emerged under Spain reemerged under the United States, even as their struggle continued longer than any of them had imagined it would, and even as the meaning of citizenship itself evolved.⁵⁹

B. "Divergent Choices"

Degetau, Collazo, and Iglesias differed in more intangible but no less important ways. They brought to their struggle for citizenship different understandings of the relationship between law and politics, different ways of managing the racial politics of empire, and different reactions to the resistance they faced among federal officials. And each brought his distinctive personality and particular sensibilities to the struggle as well. Erman subtly explores these differences, sensitive to the reality that a full understanding of what citizenship means lies not merely in a definition but in the details of lived experience—including, as important as anything else, the experiences of those denied it.

ment by grand jury and Sixth Amendment right to jury trial inapplicable in Hawai'i while it was unincorporated territory in 1898–1900 and applicable thereafter).

55. See Christina Duffy Burnett [Ponsa-Kraus], *A Convenient Constitution? Extraterritoriality after Boumediene*, 109 COLUM. L. REV. 973 (2009); see generally sources cited *supra* note 46.

56. P. 48; see also 1 PAGÁN, *supra* note 36, at 39–240 (recounting the history of Puerto Rico's political parties during the period in which the *Partido Republicano* was one of them).

57. See pp. 105–06; 1 PAGÁN, *supra* note 36, at 39–339 (recounting the history of Puerto Rico's political parties during the period in which the *Partido Unionista* was one of them).

58. P. 35. Iglesias did found a political party, the *Partido Obrero Socialista*, in 1899, but he also founded a labor organization, the *Federación Regional de Trabajadores de Puerto Rico*, and focused his efforts on the latter. In 1916, on the eve of the grant of U.S. citizenship to Puerto Ricans, he refounded the party as the *Partido Socialista*. See 1 PAGÁN, *supra* note 36, at 165–70.

59. With characteristic insight, Erman used the plural "meanings" for the title of his earlier article on Isabel Gonzalez's case (revised and expanded into chapter 4 here). See Erman, *supra* note 7.

Federico Degetau y González “was a towering and ‘highly diplomatic’ figure of ‘brilliant attainments,’ ‘splendid physique[,] and engaging presence’” (p. 47). Elected Puerto Rico’s nonvoting “delegate” to the U.S. House of Representatives in 1900, he made quite an impression in and out of Washington. “In portraits seen round the nation, Degetau symbolically swept aside portents of annexation as racial apocalypse. He was a handsome and well-heeled white gentleman in the brooding Romantic mold” (p. 47). Confident that Puerto Ricans deserved equal citizenship and full self-government through statehood, he was “relentless” in seeking these goals (p. 47). He “promoted and tried to embody Puerto Rican civilization wherever possible—before the press, at academic gatherings, in courts, and in Congress,” as well as before “bureaucrats” (p. 47).

The words “tried to embody” reflect a considered choice. Degetau used his own whiteness strategically, trying to persuade U.S. officials to overcome their racist attitudes toward Puerto Ricans not only with arguments, but also by presenting himself to them as a model Puerto Rican (pp. 55–66). Upon arriving on the mainland to take up the position of nonvoting delegate from Puerto Rico in the U.S. House of Representatives, Degetau was surprised to learn that “racial bias among mainlanders against Puerto Ricans was deep, widespread, and persistent. He told colleagues that it was ‘much more negative than the worst ideas we had heard or imagined’” (pp. 55–56). Confronting this reality, he “made the ‘great work of correcting this mistaken impression’ a ‘foremost duty’” (p. 56). In this sense, he tried to serve not merely as “the” representative of his people—which of course he was, officially, as the nonvoting delegate from Puerto Rico—but also as *representative* of his people: evidence, himself, of Puerto Rican whiteness.

Degetau was a victim of his own success: his persuasiveness, buttressed by his whiteness, repeatedly brought partial victories but never a resolution of the citizenship status of Puerto Ricans.⁶⁰ For example, he applied for a passport knowing that federal law provided that passports would be issued only to U.S. citizens and thinking that if he obtained one, it would help him build his case that annexation had automatically conferred citizenship. He won the battle but not the war: the State Department granted him the passport, but the document failed to identify the bearer as “a citizen of the United States” (p. 60). In another effort, he challenged an import duty imposed on paintings shipped from France by a Puerto Rican artist, prompting the Attorney General Philander Knox to concede that Puerto Rican artists were indeed “American” artists but to qualify the statement with the further observation that “it is clearly not inconceivable for a man to be an American artist . . . and yet not a citizen of the United States” (p. 61).

Domingo Collazo navigated a delicate racial dynamic even before U.S. annexation, occupying a middle ground between a predominantly white political elite and Puerto Rico’s more “racially diverse ‘third-class’ masses”

60. I explore this feature of Degetau’s efforts in more detail in Burnett [Ponsa-Kraus], *supra* note 2.

(p. 24). While U.S. officials would later categorize him as white, Collazo was a printer, a calling usually associated with African heritage, and he “could not overcome the elitism . . . of [the] Autonomistas,” leading him in 1889 to join “a growing flow of Cuban and Puerto Rican workers bound for the United States” (p. 24). From New York, he aided the Cuban revolutionary effort—which eventually turned out to mean, among other things, aiding the U.S. invasion of Puerto Rico (pp. 24–26).

Like all Puerto Ricans, Collazo soon learned that his faith in the liberating potential of U.S. annexation had been misplaced, yet he did not relent in his efforts to achieve equal citizenship. An early strategy that must have seemed likely to succeed, and must therefore have proved all the more bitterly disappointing, originated with the arrival of his niece Isabel Gonzalez on Ellis Island.⁶¹ Denied admission into the United States on the ground that she was an “alien” likely to become a “public charge” (the terms in use in immigration statutes both then and now)⁶², she filed a habeas corpus petition arguing that she could not even be detained, let alone excluded, because Puerto Rico’s annexation had made her a citizen of the United States.⁶³ Gonzalez’s challenge brought her and her uncle into collaboration with Degetau, who submitted an amicus brief in support of her petition when it came before the U.S. Supreme Court (pp. 76–78, 83–85).

Gonzalez’s attorney was the international lawyer Frederic R. Coudert, who had argued on behalf of the plaintiffs in *Downes* (p. 74). With his eye firmly fixed on the goal of winning the case for his client, Coudert argued for a “highly discounted form” of citizenship, reminding the Court that women and people of color were citizens, too, yet they did not enjoy rights equal to those of white males (p. 81). In other words, he tried to make the idea of U.S. citizenship for Puerto Ricans palatable to the Court by stripping it of content (pp. 81–83). Gonzalez lost. And won. Really both, which means neither. Serving up a feast of confusion with a dash of misspelling, the Court held in *Gonzales v. Williams* that Puerto Ricans could not be treated as aliens under the immigration laws then in force but declined to decide whether they were U.S. citizens.⁶⁴ Instead, it borrowed the Attorney General’s description of them as “Americans” but not necessarily citizens (pp. 80, 86–87).

61. Pp. 75–76. No relation to Degetau y González. On the absence of an accent in her name, see *supra* note 6. On her story, see also Veta Schlimgen, *The Invention of “Noncitizen American Nationality” and the Meanings of Colonial Subjecthood in the United States*, 89 PAC. HIST. REV. 317 (2020); Edgardo Meléndez, *Citizenship and the Alien Exclusion in the Insular Cases: Puerto Ricans in the Periphery of American Empire*, CENTRO J., Spring 2013, at 106; Burnett [Ponsa-Kraus], *supra* note 2; and Erman, *supra* note 7.

62. Then, Immigration Act of 1891, ch. 551, 26 Stat. 1084 (1891); now, 8 U.S.C. § 1182(a)(4).

63. P. 77. Erman’s account, attentive to the varied settings in which constitutional meaning making occurs, describes the efforts she and her family made to persuade the administrative authorities to admit her before she turned to the courts.

64. *Gonzales v. Williams*, 192 U.S. 1, 12–15 (1904). (Never mind the accent, see *supra* note 6: the Supreme Court couldn’t even get the letters in her name right.)

The Court's "strategic silence . . . created a vacuum to be filled by bureaucratic and legislative decisions and discretion" (p. 87). Trapped in that vacuum, Puerto Ricans continued their struggle. Degetau showed his formidable faith in law as he kept right on raising the issue, though the next time he had the opportunity to make the argument for the U.S. citizenship of Puerto Ricans to a panel of judges, he found himself trying "to make citizenship more attractive to them by taking up Coudert's proposal that the Court recognize islanders as holding a basically inconsequential form of citizenship" (p. 95). Pointing to the example of "minors and married women," he too now argued "that political privileges are not essential to citizenship" (p. 95). And he won. Or lost. Or both, which means neither. The court in that case ruled for Degetau's client but did so with a workaround that again avoided the question of citizenship altogether (p. 95).

Faith in law was not what drove Santiago Iglesias, who from the start put his efforts into activism. "Where Degetau kept faith with law, Iglesias treated law as a potential weapon in a fight that was, essentially, political and economic. He sought leverage over federal officials, not common cause with them" (p. 71). Activism suited him; in the words of Samuel Gompers, whom he successfully courted as an ally, Iglesias "could 'easily persuade anyone with his intelligence, earnestness, and force of character'" (p. 123).

Iglesias' understanding of citizenship evolved through his successes and failures. At one point, he sought what Erman describes as a "dependent" citizenship, focusing his efforts on "benevolent federal administrators [who] would protect workers from local elites and educate them into self-sufficiency" (p. 121). But when forced to reckon with the "limits of his strategy," he turned to a more assertive form of citizenship, "defending a right to strike" through which "workers would build self-confidence, forge social networks, accrue experience for future strikes, gain doctrinal ground, improve their working conditions, and mitigate immediate setbacks by grounding them in a longer-term project of legal and social change" (p. 135). Yet despite his unflagging efforts on behalf of Puerto Rican workers—and his marriage to a Puerto Rican woman of color, Justa Bocanegra—Iglesias himself on occasion resorted to arguments partaking of the same racist attitudes that drove resistance to U.S. citizenship for the people of Puerto Rico.

For instance, he "objected to immigrants of dubious racial stock enjoying clearer paths to naturalization than Puerto Ricans," thus "tacitly endors[ing] the same notions of racial inferiority that others just as easily applied to Puerto Ricans." (p. 122). And of course his alliance with Gompers required him to turn a blind eye to Gompers' own racism, along with that of the AFL, which vilified Asian Americans, resisted immigration and empire on racist grounds, and allowed its affiliates to discriminate against African Americans (p. 67).

In short, rather than challenge American racism, these Puerto Ricans worked with it and within it, even as they strove to transcend it.

C. Strange Bedfellows

Perverse as the Iglesias-Gompers alliance was when it came to matters of race, its perversity pales (so to speak) compared to that of the alliance Collazo attempted to form when he found his faith in law not merely shaken but broken by the Court's decision in *Gonzales v. Williams*. Dejected by the failure of "bureaucracies and especially courts to follow legal principles," Collazo turned away from law, "abandon[ing] his test cases for electoral politics" (p. 96).

Embarking on a political strategy, "the avowed antiracist sought to step onto the national political stage without succumbing to the racism that characterized the players he found there," Erman writes. And then: "He failed" (p. 105). In Puerto Rico, he joined forces with Degetau's nemesis Muñoz Rivera and his former *Partido Federal* (p. 80), now renamed the *Partido Unionista* in a reference to its goal of uniting Puerto Ricans across the political spectrum in support of home rule regardless of their preference with respect to the island's ultimate status (p. 94). On the mainland, both Muñoz Rivera and Collazo courted Southern Democrats, on the theory that their hostility toward the Northern military occupation of the South during the Reconstruction era would make them the mainland political party most likely to support Puerto Rican demands for autonomy (pp. 107–09). For Collazo at least, these alliances required no small compromise: "The [*Unionistas*] all but endorsed racial hierarchy. The [Southern Democrats] were suspicious of Puerto Ricans' claims to whiteness" (p. 105).

It is here that Erman most seamlessly and strikingly integrates Puerto Rican and U.S. history. Collazo found himself working with strange bedfellows, though whether the *Unionistas* and the Southern Democrats were all that strange to each other is less clear. The *Unionistas* "refashioned themselves into a legitimate, temporarily displaced and oppressed political class of whites, ready and able to govern a local population of color" and sought "to exploit the Democratic Party's vociferous opposition to Reconstruction and its celebration of the ensuing Redemption" (p. 108). Muñoz Rivera liberally transplanted Southern antifederal rhetoric to the Puerto Rican context: "'We study history and see . . . the scandals of the South repeated' in the 'similarity between the *carpet-baggers* of the South and the *carpet-baggers* of Puerto Rico'" (p. 108).

It is nothing short of jarring to read a Puerto Rican political leader using such imagery. As Erman puts it in his characteristically measured tone, it was "a risky analogy" (p. 109). In this respect, Collazo himself must have found the alliance with the *Unionistas* difficult and that with Southern Democrats even more challenging. He "struggled to infuse *Unionistas*' analogies with antiracism, but the attempt proved nearly incoherent" (p. 109). Still, he found a way to deploy his own frequent references to carpetbaggers while attempting to temper them with the "[l]ess convincing" argument that "[William Jennings] Bryan, the Democrats, and the South did not disdain Puerto Ricans and revered Abraham Lincoln as the 'true redeemer'" (p. 109).

Southern Democrats not disdaining Puerto Rico and revering Lincoln as the true redeemer? Nonsense. Then again, was it any more nonsensical than the incoherent notion, made constitutional law by the Supreme Court, that Puerto Rico was “foreign to the United States in a domestic sense”?⁶⁵ Or the equally nonsensical notion that Puerto Ricans were “Americans,” but not necessarily U.S. citizens?⁶⁶ It bears noting that while these particular formulations used more diplomatic language, they were no less racist. As Degetau had discovered to his dismay, in the United States, “racial disparagement of Puerto Ricans was bipartisan” (p. 112).

Erman’s discussion of the efforts of Degetau, Iglesias, and Collazo to navigate the complex racial dynamics of empire thoughtfully navigates its own middle ground between an interpretation of their words and deeds as strategic racism and an interpretation of them as their own form of racism. One is left with the understanding that each of these men, in his own way, accepted and exploited racial hierarchy, but did so in the service of a goal he believed would benefit Puerto Ricans of every race.

What could they have accomplished otherwise? And yet, in the end, what exactly did they accomplish?

III. CITIZENS IN SUSPENSE

By the time Congress collectively naturalized Puerto Ricans in the Jones Act of 1917, “[t]he citizenship that U.S. officials deemed too symbolically important to extend Puerto Ricans from 1899 to 1901 had come to be seen . . . as so hollow it was an insult” (pp. 134–35). The Jones Act made Puerto Ricans citizens, but persisted in the denial of home rule and federal representation.⁶⁷ When the question of how the grant of U.S. citizenship had affected the constitutional status of Puerto Rico came before the Supreme Court in 1922, the Court managed to produce an answer that was both simple and confusing: not at all. In *Balzac v. Porto Rico*, “the justices rejected the Reconstruction Constitution” (p. 158) (and, while they were at it, reminded everyone that the federal government still could not be bothered to spell Puerto Rico’s name correctly).⁶⁸ Had U.S. citizenship conferred full constitutional rights upon Puerto Ricans? No, it had not—which in *Balzac* meant

65. *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

66. *Gonzales*, 192 U.S. at 12–15.

67. Pp. 41, 134–35. The Act did provide for an elected upper house of the legislature (the lower house had been elected since 1900), but Puerto Rico’s governors would continue to be appointed by the President of the United States. Also, the Act failed to provide for citizenship by birth in Puerto Rico: Congress did not provide for that until 1934. See Act of June 27, 1934, ch. 845, 48 Stat. 1245 (1934) (repealed 1940) (granting citizenship to persons born in Puerto Rico after April 11, 1899, the date the Treaty of Paris was ratified). Between 1917 and 1934, persons born in Puerto Rico acquired citizenship derivatively. U.S. DEP’T OF STATE, 8 FOREIGN AFFAIRS MANUAL § 302.6 (2020), <https://fam.state.gov/FAM/08FAM/08FAM030206.html> [<https://perma.cc/6KUA-HUAX>].

68. 258 U.S. 298 (1922). Congress finally restored the correct spelling in 1932. See Act of May 17, 1932, ch. 189, 47 Stat. 158 (codified at 48 U.S.C. § 731a).

that federal jury trial rights still did not apply there.⁶⁹ Had U.S. citizenship put Puerto Rico on the path toward eventual statehood? No, not that either.⁷⁰ Thus, even with citizenship, Puerto Rico's status remained oppressively ambiguous yet unequivocally subordinate. Puerto Ricans, though finally U.S. citizens, remained *almost citizens*.

To be sure, Puerto Ricans who moved to the mainland would now be entitled to the rights of U.S. citizens under federal and state statutes.⁷¹ And it has been argued plausibly that the grant of citizenship implied the permanence of Puerto Rico's relationship with the United States, though in light of the fact that it came without either full constitutional rights or statehood, what was permanent, if anything, was Puerto Rico's colonial status.⁷² Moreover, as Erman observes, *Balzac* muddied even the message of permanence by insisting that statehood was not the only status to which annexation by the United States could eventually lead.⁷³ As usual, Puerto Rico's fate remained uncertain. All anyone knew for sure was that the United States had decided to continue to hold Puerto Rico at arm's length, neither integrating it into the United States nor letting it go. The Reconstruction Constitution had given way to an imperial Constitution.

It has been ninety-eight years since *Balzac* held that the collective naturalization of Puerto Ricans left Puerto Rico's constitutional status intact. Subsequent developments have neither eliminated the legal ambiguity that governs the island's relations with the United States nor relieved it of the burden of being a colony.

Between 1947 and 1952, Puerto Rico did attain home rule.⁷⁴ Congress appointed a Puerto Rican Governor for the first time in 1947 and allowed Puerto Ricans to start electing their own Governors in 1948.⁷⁵ Then, in a process that unfolded between 1950 and 1952, Puerto Ricans adopted their own Constitution, which Congress approved.⁷⁶ Yet even then, Puerto Rico's status remained different, subordinate, and ambiguous. Whereas in prior territories, the adoption of a constitution approved by Congress had always led to a territory's admission into statehood, in Puerto Rico, it led instead to the island's transition into an unprecedented and unique arrangement: still neither a state nor an independent country, it became instead the "Com-

69. *Balzac*, 258 U.S. at 304–11.

70. *Id.* at 311.

71. *Id.* at 308.

72. See JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS (1979) (on the implication of permanence); José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, FOREIGN POL'Y, Winter 1978–1979, at 66 (on colonial status).

73. P. 159; *Balzac*, 258 U.S. at 311.

74. See TRÍAS MONGE, *supra* note 13, at 107–18.

75. *Id.* at 99–106; Crawford-Butler Elected Governor Act, ch. 490, 61 Stat. 770 (1947).

76. TRÍAS MONGE, *supra* note 13, at 107–18.

monwealth of Puerto Rico.”⁷⁷ In other words, instead of admitting Puerto Rico into statehood, Congress made Puerto Rico an *almost state*.

Ever since, Puerto Ricans have debated what exactly happened between 1950 and 1952.⁷⁸ The debate concerns both what Puerto Rico is and what it should be. The 1950 federal law authorizing Puerto Rico to initiate a constitution-making process described itself as “in the nature of a compact.”⁷⁹ The phrase is so ambiguous that it is difficult to interpret it as anything other than a deliberate attempt to obfuscate. Some Puerto Ricans cite this language (emphasizing the term “compact”) to argue that between 1950 and 1952 Puerto Rico became a separate sovereign and entered into a *sui generis* mutually binding bilateral union with the United States.⁸⁰ They favor decolonization through an improved or “enhanced” version of the current commonwealth status. Others cite the same language (emphasizing the qualifying words “in the nature of”) to argue that Puerto Rico remains a nonsovereign U.S. territory and that Congress retains the power under the Territory Clause to alter or withdraw Puerto Rico’s self-government.⁸¹ Most of this group favors decolonization through statehood: they agree that a mutually binding bilateral compact with the United States would be desirable, but they believe that the only way to have one is for the island to become a state of the Union.⁸²

If these competing positions sound familiar, that is because they are. As always, Puerto Ricans are divided between autonomy and equality (while a small minority favors independence, and another minority favors reform outside the framework of the political parties).⁸³ The late nineteenth-century rift, which briefly disappeared when autonomists across the board embraced statehood as an attainable form of autonomy, reemerged when the United States created a legally ambiguous status for Puerto Rico between 1898 and 1901—and reemerged once again when the United States replaced that am-

77. *Id.* at 114.

78. See Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101 (2020).

79. Puerto Rican Federal Relations Act, ch. 446, 64 Stat. 319 (1950) (codified as amended at 48 U.S.C. §§ 731b–731e).

80. E.g., Salvador E. Casellas, *Commonwealth Status and the Federal Courts*, 80 REV. JURÍDICA U. P.R. 945, 954 (2011).

81. E.g., Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of “Territorial Federalism,”* 131 HARV. L. REV. F. 65, 77–89 (2018).

82. For a detailed explanation of the status options by an outsider to the debate, see NANCY MORRIS, *PUERTO RICO: CULTURE, POLITICS, AND IDENTITY* (1995). For a detailed discussion of the status debate with a focus on the compact issue, see Ponsa-Kraus, *supra* note 78.

83. See *supra* note 82. For an exchange on the question of whether Puerto Ricans should continue trying to resolve the status problem at all, see Carlos Pabón, *The Political Status of Puerto Rico: A Nonsense Dilemma*, in NONE OF THE ABOVE: PUERTO RICANS IN THE GLOBAL ERA 65 (Frances Negrón-Muntaner ed., 2007), arguing they should not, and Christina Duffy Burnett [Ponsa-Kraus], “None of the Above” Means More of the Same: Why Solving Puerto Rico’s Status Problem Matters, in NONE OF THE ABOVE, *supra*, at 73–83, arguing they should.

biguous status with yet another between 1950 and 1952.⁸⁴ Once again, what was clear was that the United States would not give Puerto Rico a status equal to that of other territories, or promise it statehood; but it would not let it go, either. The United States persists in holding on to Puerto Rico but keeping it at arm's length, while perpetuating the legal ambiguity upon which the island's colonial status was built. It is not easy to achieve consensus on what you should become if you cannot even agree on what you are.

Citizenship remains central to the debate over Puerto Rico's status, and what Erman describes holds true today: Puerto Ricans share a nearly unanimous desire to keep their U.S. citizenship, and they reject an unequal version of it. But their uncertainty persists as to what, exactly, it means.⁸⁵

Puerto Ricans even remain uncertain as to whether their U.S. citizenship, such as it is, could be taken away.⁸⁶ Recall that the *Gonzales* case declined to decide whether the Citizenship Clause applies to unincorporated territories.⁸⁷ The Supreme Court has not revisited the issue, and since persons born in Puerto Rico are U.S. citizens by federal statute, the question has arisen whether Congress could collectively denaturalize them.⁸⁸ The likely answer is that even when the source of citizenship is statutory—as is the case not only for the unincorporated territories but for any person born in a foreign country of one or two U.S. citizen parents—the Due Process Clause protects U.S. citizens from denaturalization.⁸⁹ But the Court has not confirmed that the same would apply to the U.S. citizens of an unincorporated territory, which can be concerning given the federal government's long history of improvisation with respect to their legal status. Moreover, the Due Process Clause does not prevent Congress from eliminating citizenship by birth in Puerto Rico prospectively. Lacking the power to answer the question definitively, the opposing sides in Puerto Rico's status debate argue endlessly over whether, like a mutually binding bilateral compact, guaranteed U.S. citizenship requires statehood.⁹⁰

84. See *supra* Section II.A.

85. See MORRIS, *supra* note 82, at 107–13.

86. See Lisa María Pérez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1031–33 (2008).

87. *Gonzales v. Williams*, 192 U.S. 1, 12 (1904).

88. 8 U.S.C. § 1402; see Pérez, *supra* note 86, at 1031–34, 1067–80.

89. See Pérez, *supra* note 86, at 1067–80.

90. Pérez discusses *Efron ex rel. Efron v. United States*, 1 F. Supp. 2d 1468 (S.D. Fla. 1998), a case in which Puerto Rican-born Jennifer Efrón attempted to naturalize in order to obtain constitutional instead of statutory citizenship and thereby safeguard its permanence. She (or to be more accurate, her parents; she was a minor) was concerned she would lose her citizenship if a bill then being considered in the U.S. House of Representatives to provide for a process of self-determination were somehow to lead to a status change that would result in collective denaturalization. The court dismissed her claims as unripe, and in the end the bill passed in the House but died in the Senate. But as Pérez points out, it was not just that particular situation but the weakness and uncertainty of her citizenship that Efrón wished to cure. Pérez, *supra* note 86, at 1031–35.

Is it not time, nearly a century and a quarter after the annexation of Puerto Rico, for a clear answer to these questions? Does a binding union require statehood or not? Does the Citizenship Clause apply in the unincorporated territories or not? As of this writing, litigation is underway that could finally yield an answer to the latter.⁹¹ But it should not take litigation to answer a question that it was the obvious purpose of the Citizenship Clause to answer, definitively and forever, for each and every person born within the United States' sovereign domain.

And yet, as Erman's *Almost Citizens* shows, even an affirmative answer would guarantee the inhabitants of the territories a U.S. citizenship devoid of full constitutional rights and equal representation. They would remain, even then, almost citizens.

CONCLUSION

"We are U.S. citizens, but we don't feel we are Americans."⁹² When former pro-commonwealth governor of Puerto Rico Aníbal Acevedo Vilá spoke these words several years ago, he substantially overstated the case, for the "we" to whom he referred represents many Puerto Ricans but nowhere near all of them. Many other Puerto Ricans support statehood, and they do not share the conflicted feeling expressed by Acevedo Vilá.⁹³ They feel Puerto Rican and American at the same time. As one of them myself, I can assure you it feels just fine.

But it is not at all surprising that Puerto Ricans remain divided on this too, and that many of them embrace U.S. citizenship but do not see themselves as American. As the former Governor's statement makes plain, the legacy of the Supreme Court's imperial improvisation in *Gonzales* is alive and well. There, recall, the Court explained that it was "clearly not inconceivable for a man to be an American . . . and yet not be a citizen of the Unit-

91. The litigation concerns whether the Citizenship Clause applies in American Samoa and, by implication, the other unincorporated territories. So far, the D.C. Circuit answered in the negative, *Tuaua v. United States*, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2461 (2016), but a federal district court in Utah answered in the affirmative, a decision now on appeal, *Fitisemanu v. United States*, 426 F. Supp. 3d 1155 (D. Utah 2019), *argued*, No. 20-4019 (10th Cir. Sept. 23, 2020). See also Christina Duffy Ponsa [Ponsa-Kraus], Opinion, *Are American Samoans American?*, N.Y. TIMES (June 8, 2016), <https://www.nytimes.com/2016/06/08/opinion/are-american-samoans-american.html> [<https://perma.cc/N9EZ-TE58>].

92. Susan Milligan, *Puerto Ricans Are Americans, but They Don't Get All the Benefits*, U.S. NEWS & WORLD REP. (June 8, 2018, 6:00 AM), <https://www.usnews.com/news/the-report/articles/2018-06-08/Puerto-ricans-are-americans-but-they-dont-get-all-the-benefits> [<https://perma.cc/3MUC-5M7X>] (quoting former governor of Puerto Rico Anibal Acevedo Vilá).

93. The most recent official measure of Puerto Rican status preferences, a referendum held on the island on November 3, 2020, yielded a 52.52% majority for statehood. See *Plebiscite: Island Wide Results*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO (Jan. 28, 2021, 2:48 PM), https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#en/default/PLEBISCITO_Resumen.xml [<https://perma.cc/NFL8-9R32>].

ed States.”⁹⁴ Now, many Puerto Ricans believe it is clearly not inconceivable for a person to be a citizen of the United States and yet not be an American.

But there is nothing clear about it. As we have seen, the Court’s muddled reasoning in *Gonzales* echoed that of the Attorney General, who himself had extemporized in the wake of the Supreme Court’s neither-here-nor-there description of the unincorporated territories as “foreign in a domestic sense,” which itself had simply picked up on the cue Congress provided by labeling Puerto Ricans “citizens of Porto Rico,” which in turn was how Congress “determined” the “civil rights and political status of the native inhabitants of the territories hereby ceded” after the Treaty of Paris failed to do so—that is, by not actually determining anything.

As *Almost Citizens* compellingly demonstrates, the United States has subjected the U.S. citizens of Puerto Rico to ambiguity at every turn, with painful and lasting consequences. We saw the consequences at the outset when, confronted with the confounding developments that followed the island’s annexation, the fragile coalition of autonomists fell apart. We saw them again when a worn-down Degetau found himself agreeing with Coudert that the only way to win citizenship for Puerto Ricans was to argue for an inconsequential version of it. We saw them yet again when a desperate Collazo found himself trying to achieve home rule by forming an alliance with, of all people, white supremacist Southern Democrats. And again when Iglesias, himself an immigrant to Puerto Rico, found himself adopting the anti-immigrant arguments of the AFL. And again between 1950 and 1952, when Congress played around with the idea of an ambiguous sort-of compact for Puerto Rico, either unaware or unconcerned that for the people of a colony, empire is not a game. And all over again whenever a Puerto Rican decides it is not inconceivable to be a U.S. citizen yet not an American.

This is the trap empire set. As Erman puts it with characteristic wisdom, elegance, and accuracy: “Truly, ambiguity has been the handmaiden of empire” (p. 158).

94. *Gonzales v. Williams*, 192 U.S. 1, 14–15 (1904) (quoting the attorney general).

