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A Note on the Territorial Government and Incorporation Bills for Puerto Rico Introduced in Congress, 1898–2018

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ABSTRACT

Following the Spanish-American War of 1898, the United States invented a new tradition of territorial expansionism with a corresponding constitutional doctrine to rule Puerto Rico and other unincorporated territories. For more than a century, the United States has relied on this racist constitutional interpretation to legitimate the separate and unequal rule of Puerto Rico. Drawing on an analysis of the Congressional Research Index for all legislative sessions between 1898 and 2018, this note describes all the territorial government and incorporation bills introduced in Congress throughout this period. Although upward of 134 status bills for Puerto Rico were introduced, and in some cases debated, in Congress, only eleven provide for the creation of a territorial government or the incorporation of Puerto Rico. All but one of these bills were introduced prior to the enactment of the Puerto Rican Constitution of 1952. For more than a century, Congress has refused to enact territorial legislation that expressly incorporates Puerto Rico and repudiates the racist doctrine of territorial incorporation. [Key Words: Puerto Rico, U.S. Congress, Territorial Incorporation, Puerto Rico Status]

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In recent years, Puerto Rico's territorial status has received some renewed, albeit ephemeral attention in the mainland United States and around the world. The island's fiscal crisis and the plethora of political responses, including Congress's reliance on a fiscal oversight board to manage local partisan clientelism received worldwide attention. Likewise, the federal government's response to the devastation created by Hurricane Maria left some wondering if Puerto Rico was just another island in the middle of the ocean. Central to these debates is Puerto Rico's unincorporated territorial status and the implications of this status for Puerto Ricans and other United States citizens residing in the island. Under prevailing Supreme Court interpretations, because Puerto Rico is an unincorporated territory, it is constitutional to enact discriminatory legislation for the island (*Harris v. Santiago-Rosario* 1980, 446 U.S. 651). Stated differently, it is constitutional for Congress, and the federal government more generally, to rule Puerto Rico as a separate and unequal possession of the United States empire so long as the island remains an unincorporated territory.

Following the Spanish-American War of 1898, the United States invented a new territorial law and policy to rule annexed territories primarily inhabited by non-Anglo-Saxon populations. Central to the new expansionist tradition was the invention of the unincorporated territorial status with a corresponding constitutional doctrine, also known as the doctrine of territorial incorporation. The doctrine of territorial incorporation enabled the federal government to rule unincorporated territories as separate and unequal possessions belonging to the United States. Unincorporated territories retained their status until Congress enacted legislation that either explicitly incorporated or made the territory a part of the United States or changed the territories status. The United States has government Puerto Rico as an unincorporated territory for more than a century. Throughout this period, Congress has refused to debate and/or enact any territorial incorporation legislation.

This note provides an overview of all federal territorial government and incorporation bills introduced in Congress between 1898 and 2018. With the exception of one bill introduced in the House of Representatives in 1993 at the behest of the United Nations, calling for a consultation on whether Puerto Rico should be incorporated, all bills providing for either the creation of a territorial government for Puerto Rico or the territorial incorporation of the island were introduced prior to 1952. This note is limited to providing an overview or description of the doctrine of territorial incorporation used to govern Puerto Rico and the territorial government and incorporation bills introduced in Congress between 1898 and 2018. This note is divided into three parts. Part I provides an basic overview of the prevailing U.S. territorial acquisition laws and policies in 1898. Part II explains the legal arguments defining the contours of the doctrine of territorial incorporation. Part III provides a description of all territorial government and incorporation bills introduced in Congress between the annexation of Puerto Rico and the 2018.

Part I: Prevailing Territorial Doctrines in 1898

Scholars generally agree that in 1898, debates over the acquisition of territories were divided in two camps, namely the anti-imperialist or colonialist and the imperialist (Torruella 1988, 24–32; Sparrow 2006, 44–55). Initial legal and political debates over the annexation of the Spanish ultramarine colonies in the aftermath of the War of 1898 were framed on whether past precedents would be applied to annexed territories, which were primarily populated by non-Anglo-Saxon populations. As I have explained in more detail elsewhere (Venator-Santiago 2015), proponents of the anti-imperialist interpretation argued that established constitutional precedents bound the United States to colonize the new territories and eventually admit them as new states of the Union. In contrasts, imperialists argued for the mere strategic occupation of the new territories. Although the debates among advocates of each camp were fairly plural, it is possible to identify a consensus on several questions that can help establish a clearer distinction between both camps, including opinions about the intent of the acquisition, the constitutional source of power, and the status of the acquired territory.[1]

However, as most scholars who have studied this history will note, while the U.S. Constitution contains a Statehood Admissions Clause (Art. IV, §3, cl. 1), it does not spell out any process whereby a territory will be organized into a state that could be admitted into the Union

My contention is that United States colonialism was premised on the *annexation* of territories that could be settled by citizens and subsequently organized into future states that could be admitted into the Union on an equal footing with the founding thirteen states.[2] All territories annexed prior to 1898 were subsequently organized and admitted into thirty-seven states (Farrand 1896; Grupo 1984; Sheridan 1985). However, as most scholars who have studied this history will note, while the U.S. Constitution contains a Statehood Admissions Clause (Art. IV, §3, cl. 1), it does not spell out any process whereby a territory will be organized into a state that could be admitted into the Union. Notwithstanding, Congress originally enacted the *Northwest Ordinance of 1789* (1 Stat. 50), spelling out a procedure whereby a territory could undergo various stages of political organization and once sufficiently populated (60,000 inhabitants), it could petition for statehood. Yet, as Max Farrand argued, Congress began to abandon this procedure in 1836 (1896, 38). Alternatively, it is possible to argue that while early territories followed some the *Northwest Ordinance's* plan of organization, the actual admissions process was more complex and political. To be sure, as Peter B. Sheridan notes, different territories followed different procedures for admission to statehood:

Seventeen territories, for example, gained statehood without enabling acts. Four other states (Kentucky, Maine, Vermont, and West Virginia) were admitted by simple congressional acts of admission without undergoing a preliminary stage of territorial organization; all four areas had been parts of thither States before admission. California and Texas similarly were not organized territories before admission. California had been administered by the American Army, and Texas had been an independent republic before it was annexed. In seven cases (Tennessee, Michigan, Iowa, California, Oregon, Kansas, and Alaska), the United States Congress was presented by the respective "States" with "Senators" and "Representatives" from these areas before statehood was granted. This procedure, known as the "Tennessee Plan," was first adopted in 1796, when a constitution was drafted and representatives were elected, all without any authorization from Congress. (1985, 2–3)[3]

The reason for this mixed experience, Barry R. Weingast (1998) argues, is that historically, the statehood admissions process has been fraught with a wide array of ideological, partisan, and political interests in Congress. Decisions to admit new states have been guided by a range of other political debates over the impact of adding a new state on the apportionment of congressional seats as well as policy debates of the period. However, the points that I want to emphasize are simple. However, the point that I want to emphasize is that nowhere in this procedural histories is there a qualification distinguishing between incorporated and unincorporated territories.

United States colonialism is primarily anchored on three constitutional sources. Following the annexation of a territory, Congress is empowered to govern the territory under the terms of the so-called Territories or Property Clause (U.S. Const. art. IV, §3, cl. 2). The Admissions Clause (U.S. Const. art. IV, §3, cl. 1) authorizes Congress to admit a new state. A pre-condition for admission, however, is that a future state must possess a Republican form of government (U.S. Const. art. IV, §4). Although the federal government can draw from other constitutional sources of power during the initial acquisition of the territory, once it has been annexed, the Constitution establishes that territories are essentially congressional constructs governed under the authority of the latter clauses. Moreover, while the constitutional text recognizes three types of spaces, namely states, districts, and territories, it does not highlight any difference between incorporated or unincorporated territories.

Prior to 1898, the colonialist tradition treated territories as a constitutional part of the United States. Chief Justice John Marshall summarized the key premise of U.S. colonialism in *Loughborough v. Blake:*

Does the term designate the whole, or any particular portion of the American empire? Certainly, this question can admit but one answer. It is the name given to our great republic, which is composed of States *and territories*. The district of Columbia, or the territory west of Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our constitution, that uniformity in the imposition of imposts, duties, and excises, should be observed in the one, than in the other. (1820, 18 U.S. 317, 319—emphasis added)

The latter passage affirms two key points. First, the Court did not recognize a substantive difference in the status of districts and territories. Second, all annexed territories were treated as a part of the United States for constitutional purposes (*American Insurance v. Canter* 1828, 542).

In contrast, the imperialist tradition was premised on the occupation of territories for economic or military strategic interests. For example, the legal history of the Guano Islands unequivocally demonstrates the how Congress visualized the occupation of territories for the sole purpose of commercial gain (*Jones v. United States* 1890, 137 U.S. 202; Skaggs 1994). Likewise, the history of U.S. military campaigns contains ample evidence of how the federal government sought to occupy territory for strategic purposes. Yet, what is important to emphasize is that with the one possible exemption of the acquisition of the Kingdom of Hawai'i, creating new states was not a driving impetus in the occupation of territories.

Alternatively, imperialists drew on various constitutional sources of power. For example, rather than invoking the Territories Clause, imperialists could draw on the Commerce Clause (U.S. Const., art. I, §8, cl. 3) as a constitutional source of authority to legitimate commercial expansionism. Likewise, imperialists often situated their power on the Commander-in-Chief Clause (U.S. Const. art. II, §2, cl. 1), a clause that empowered the president to use military force to occupy a sovereign territory or a part thereof. The point is that the federal government did not invoke the Territories Clause as a source of power to legitimate imperialist occupations.

Historically, occupied territories have been treated as sovereign places located outside of the United States. For example, following the British occupation of Maine, the in *U.S. v. Rice* the Court established that the port of Castine remained a foreign territory for tariff purposes while under the British occupation (1819, 17 U.S. 246, 254). Likewise, in *Fleming v. Page* the Court affirmed the power of the U.S. government to treat the Port of Tampico, while under U.S. occupation during the Mexican-American War of 1848 as a foreign port for domestic or constitutional purposes (1850, 50 U.S. 603). And in the case of the North's occupation of the South, the Court also affirmed in *New Orleans v. The Steamship Company* the principle that the Port of New Orleans could be ruled as an occupied territory, even after the end of the Civil War (1874, 87 U.S. 387). Again, the main point is that the United States treated occupied territories as foreign possessions located outside of the United States.

Although the case of Native Americans requires a separate discussion beyond the scope of this note, and may be an example of a different type of expansionism, I treat the relevant U.S. law and policy as a form of imperialism. To be sure, unlike the colonial territories, historically the federal government has recognized degrees or semblances of tribal sovereignty **(***Cherokee Nation v. Georgia* 1831, 30 U.S. 1; Aleinikoff 2002). Likewise, the federal government has never invoked the Territories Clause as a source of authority over tribes of Native American nations. Instead, it has invoked a wide array of constitutional sources, including the Commerce Clause, to legitimate the occupation of tribal lands. More importantly, although the federal government has treated tribal

lands as a "geographical" part of the United States, it has never described tribal lands as a constitutional part of the nation (Deloria Jr. and Wilkins 1999).

In sum, it is possible to discern three clear contrasts between United States colonialist and imperialist traditions of territorial expansionism. First, while the intent of colonialist expansionism was to annex new territories that could be organized into new states of the Union, the imperialist tradition sought to occupy territories for strategic interests. Second, whereas the colonialist tradition anchored its source of constitutional power on the Federalist provisions of the Constitution, namely the Third and Fourth Sections of Article 4, imperialists looked to other sources of executive power and congressional power. To be sure, the federal government did not invoke the Territories Clause to legitimate any laws and policies addressing the occupation of sovereign territories. Third, whereas annexed territories were treated as a constitutional part of the United States empire, occupied territories were situated outside of the polity. The question for many was what to do with annexed territories that were primarily inhabited by those who believed in the white supremacist ideologies of the period's Anglo-American exceptionalism. The solution was to invent a new or "Third View" (Lowell 1899) of territorial expansionism that enabled the federal government to cherry-pick, reject, or combine past precedents that could be used to rule the newly annexed territories. The corresponding constitutional interpretation has since been described as the doctrine of territorial incorporation.

Part II: Contemporary Theories of Territorial Incorporation: Three Views

Presently, it is possible to discern three theories of territorial incorporation. The prevailing theory can be described as a legal doctrine or body of opinions whose substance and contours were defined by the Supreme Court's rulings in the *Insular Cases*. The Court's interpretation argues that Congress has never enacted explicit legislation providing for the territorial incorporation of Puerto Rico; and therefore, the island has remained an unincorporated territory since 1901. In recent years, Judge Gustavo A. Gelpí (2017) has argued that, over time, both the Supreme Court and Congress have treated Puerto Rico like a state. This theory suggests that, over time, both the Court and Congress have implicitly or tacitly incorporated Puerto Rico. More recently, I have argued that while Puerto Rico remains an unincorporated territory, Congress has consistently enacted legislation that selectively treats the island as an incorporated territory. My argument, however, is different to that of Judge Gelpí because I argue that Congress' actions are part of an antinomy that informs prevailing U.S. territorial law and policy. Let me explain.

Between 1898 and 1901, United States law and policymakers invented the third tradition of territorial expansionism, sometimes described as the doctrine of territorial incorporation (Burnett and Marshall 2001; Rivera-Ramos 2007; Sparrow 2006), or the doctrine of separate and unequal (Torruella 1988), to govern Puerto Rico and the other Spanish ultramarine territories annexed by the United States in the aftermath of the Spanish-American War. As I suggested before, the new territorial tradi-

tion of expansionism and corresponding constitutional doctrine both selectively departed and combined elements from the colonialist and anti-imperialist precedents. My contention is that the contours of the new territorial doctrine were introduced during the initial annexation process, normalized by Congress with the *Foraker Act of 1900* (31 Stat. 77), and institutionalized by the Supreme Court in the *Insular Cases of 1901*. The Supreme Court subsequently modified the doctrine of territorial incorporation in *Balzac v. People of Porto Rico* (1922, 258 U.S. 298). In order to understand the relevance of the territorial incorporation legislation, it is important to understand the parameters established by these legal debates.

Unlike prior treaties of territorial annexation, the Treaty of Paris did not provide for or promised to collectively naturalize the inhabitants of Puerto Rico.

The United States military formally occupied Puerto Rico on July 25, 1898, and subsequently annexed Puerto Rico, Guam and the Philippines on April 11, 1899 under the terms of the *Treaty of Paris of 1898* (1899, 30 Stat. 1754). Whereas Spain declared Cuba's independence, it ceded Puerto Rico and Guam and sold the Philippines to the United States. However, Article 9 established the core parameters of the subsequent status of the inhabitants of Puerto Rico. Unlike prior treaties of territorial annexation, the *Treaty of Paris* did not provide for or promised to collectively naturalize the inhabitants of Puerto Rico (Van Dyne 1904, 143; Gettys 1934, 145; López Baralt 1991, 108–10). Instead, the first clause of Article 9 invented a local nationality that barred island-born Spanish citizens residing in Puerto Rico from either retaining their citizenship or acquiring a U.S. citizenship. Puerto Ricans were ascribed an anomalous legal status. The second clause of Article 9 established that Congress would be responsible for defining the future civil and political rights of Puerto Ricans. The exclusion of the inhabitants of Puerto Rico enabled subsequent law and policymakers to invent a new territorial status.

Simultaneously, the President established a two-year military dictatorship tasked with establishing local public institutions that would facilitate the island's control (Trias Monge 1991). There is a general consensus that Brigadier General George V. Davis, the last of the U.S. military dictators appointed to rule the island, was responsible for creating the core public institutions to govern Puerto Rico. In his last report as governor of Puerto Rico, Brigadier-General Davis summarized the military's role in shaping the new territorial status within the emerging U.S. global empire:

The scope of these orders was very wide. Almost every branch of administration-political, civil, financial, and judicial-was affected by their provisions. It may be that the military governors exceeded their authority when they changed the codes, the provisions of which were not in conflict with the political character, institutions, and Constitution of the United States; but in the absence of instructions to the contrary, it

> **was conceived to be the privilege and duty of the military commanders to make use of such means with a view to adapting the system of local laws and administration to the one which, judging from precedents, Congress might be expected to enact for the island, thus preparing the latter for a territorial régime when Congress should be ready to authorize it.** ***It has been pointed out that the course adopted is understood to have been, tacitly at least, approved by Congress, for with two slight exceptions, specified in the [Foraker Act of 1900], every order promulgated by the military governors has been confirmed by Congressional enactment, has become part of the supreme law of the land, and will so remain until abrogated or changed by Congress or by the legislative assembly of the island.*** **(H.R. 1902, Doc. No. 56-2, 47—emphasis added)**

General Davis also noted that unlike prior cases of territorial annexation, Congress had not enacted legislation changing Puerto Rico's territorial status since the United States acquired Puerto Rico. Until Congress enacted legislation providing for the territorial "incorporation" of Puerto Rico within "the American Union," General Davis concluded, the island should be governed as a "dependency" of the United States (1900, 75–6). Governing Puerto Rico as a "dependency" would enable Congress to selectively rule Puerto Rico as a foreign possession for the purposes of collecting import duties on merchandize trafficked in and out of the island (1900, 73). In sum, General Davis recommended treating Puerto Rico as a foreign possession or dependency under the United States sovereignty.

A year later, Congress created a civil government for Puerto Rico under the terms of the *Foraker Act of 1900*. Unlike prior organic or territorial legislation, the *Foraker Act* selectively treated Puerto Rico as a foreign territorial possession for domestic and constitutional purposes. Specifically, the Third Section of the act extended the *Dingley Tariff of 1897* (30 Stat. 151) and imposed a temporary 15 percent tariff on merchandize trafficked between the island and the mainland. The intent of the *Foraker* tariff, Representative Sereno E. Payne (R-NY) argued during the corresponding congressional debates, was to generate local revenues to subsidize the construction of local infrastructure projects proposed by General Davis (i.e.. schools, roads, etc.) (33 Cong. Rec. 1908, 1942). These revenues were especially important because Hurricane San Ciriaco had recently devastated the island's infrastructure. In the corresponding congressional debates, Senator John C. Spooner (R-WI) defended this provision by arguing that "Territory belonging to the United States, as I think Puerto Rico and the Philippine Archipelago do, becomes a part of the United States in the international sense, while not being a part of the United States in the *constitutional sense*" (33 Cong. Rec. 3608, 3629). This interpretation was especially important because the prevailing interpretation of the Uniformity Clause of the Constitution (U.S. Const., art. 1, §8, cl. 1) barred the imposition of a tariff on U.S. soil. Both the tariff and the corresponding interpretation became the foundation of the subsequent Supreme Court's doctrine of territorial incorporation.

As I noted before, soon thereafter, in a series of rulings generally known as the *Insular Cases*, the Supreme Court developed a new constitutional interpretation or

doctrine of the status of territories that affirmed the emerging insular or territorial law and policy. The ensuing interpretation departed from prior colonialist and imperialist precedents. To be sure, whereas annexed colonial territories were treated as a part of the U.S. polity, occupied territories were generally situated outside of the United States. The core elements of the new doctrine of territorial incorporation were first outlined by Justice Edward D. White's concurring opinion in *Downes v. Bidwell* (1901, 182 U.S. 244). In *Downes* a plural majority of the Court (5-4) affirmed the constitutionality of the *Foraker* tariff and the power of Congress to enact legislation that applied or withheld constitutional provisions to Puerto Rico. Central to Justice White's interpretation is the legal construction of a distinction between incorporated and unincorporated territories. Incorporated territories, Justice White argued, were those destined to become states of the Union or "part of the American family" (1901, 339). In contrast, unincorporated territories did not possess "the privilege of statehood" (1901, 336). It followed, Justice White further reasoned, unincorporated territories could be ruled as "foreign to the United States in a domestic sense" (1901, 341). Stated differently, unincorporated territories could be treated as possessions that belonged to, but were not a part of, the United States *until* they were incorporated. Again, disregarding a serious analysis of the colonialist history, Justice White concluded that only incorporated territories could become states of the Union.

In addition, Justice White adopted a new interpretation of the applicability of the Constitution to the territories. Again, whereas by 1898 both the Court and Congress had concluded that annexed colonial territories were a part of the United States for constitutional purposes and therefore the constitutional provisions not locally inapplicable extended *ex propio vigore* or on their own force, occupied territories were outside of the U.S. and therefore constitutional provisions did not apply or Congress could enact legislation extending some constitutional provisions not locally inapplicable. Justice White's doctrine argued that only fundamental rights applied to Puerto Rico. Additional rights and constitutional provisions not locally inapplicable could be applied or withheld to the island via jurisprudence or in some instances through legislation. Justice White rejected the notions that either the Constitution applied *ex propio vigore* or not at all to unincorporated territories like Puerto Rico.

It is important to note, however, that the Supreme Court continued to shape the contours of the ensuing doctrine of territorial incorporation over the years. In 1922, the Court modified a key premise of Justice White's interpretation in *Balzac v. People of Porto Rico*. In *Downes*, Justice White argued that Congress possessed the power to enact legislation that expressly or *implicitly* incorporated Puerto Rico and other unincorporated territories more generally (182 U.S. 244, 312). Presumably, Congress could enact legislation expressly incorporating or changing Puerto Rico's territorial status or it could enact legislation that implicitly treated Puerto Rico as an incorporated territory. To be sure, as Efrén Rivera Ramos has noted, writing for the majority, Chief Justice White, established in 1905 in Rasmussen v. United States (197 U.S. 51) that Congress' enactment of legislation providing for the collective naturalization of

the inhabitants of a territory could be interpreted as an implicit form of territorial incorporation (84). Drawing on the precedent established in *Rasmussen*, following the collective naturalization of Puerto Ricans under the terms of the *Jones Act of 1917* (39 Stat. 951), local judges assumed that Puerto Rico had been implicitly incorporated. A year later, the Supreme Court, however, rejected this interpretation *People of Porto Rico v. Muratti* and *People of Porto Rico v. Tapia* (1918, 245 U.S. 639) without providing any explanation. In *Balzac*, Chief Justice William H. Taft modified Chief Justice White's interpretation by establishing that "incorporation is not to be assumed without express declaration, *or an implication so strong as to exclude any other view*"(258 U.S. 298, 306). Chief Justice Taft's modification required a clear declaration by Congress that Puerto Rico was incorporated. Again, as noted before, Congress has never enacted legislation providing for the explicit incorporation of Puerto Rico. To this extent, Puerto Rico remains an unincorporated territory.

As I noted above, a second interpretation offered by Judge Gelpí and Gregorio Igartúa (Lloréns Vélez 2017) contends that for all intents and purposes the United States has incorporated Puerto Rico. In Judge Gelpí's words:

> **...over the years, Congress has chiseled Puerto Rico into a de facto state. From a judicial perspective, both at the local and federal levels, today Puerto Rico is identical to every State in that it has its local system of trial and appellate courts, and at the same time a parallel system of federal courts. (2017, 139)**

Elsewhere he argues that most federal laws, civil and criminal, apply to Puerto Rico just as if the island were a state (2017, 189). Because Puerto Rico has, at times, been treated like a state, it follows that the island has been implicitly or tacitly incorporated. Of course, in recent years both Congress and the Supreme Court have respectively rejected this argument with the PROMESA legislation and rulings such as *Puerto Rico v. Sanchez Valle* (2016, 579 U.S.). Instead, both Congress and the Supreme Court have reaffirmed Puerto Rico's unincorporated territorial status.

Like Judge Gelpí, I agree that overtime Congress has selectively enacted legislation that treats Puerto Rico as a state and as an incorporated territory and the Supreme Court has applied most constitutional provisions not locally inapplicable. However, I also argue that Congress' enactment of laws that treat Puerto Rico as a state and/or an incorporated territory, without explicitly enacting legislation that incorporates the island, is an example of the antinomies that inform U.S. territorial law and policy. I use the term antinomy to describe two competing and coexisting legal logics. On the one hand, as I noted before, the Supreme Court has established that Puerto Rico is an unincorporated territory until Congress enacts legislation that explicitly incorporates the island. To this extent Puerto Rico remains a foreign territorial possession in a domestic or constitutional sense. On the other hand, Congress, invoking its constitutionally enumerated power under the Territories Clause, has also enacted birthright legislation that treats Puerto Rico as a part of the United

States for the sole purpose of extending birthright or *jus soli* citizenship to the island (Venator-Santiago 2018). In a sense, both the Court and Congress have corresponding constitutional powers to rule and enact relevant, albeit contradictory, legislation. My contention, however, is that the prevailing U.S. territorial law and policy tolerates this and other types of contradictions or antinomies. Just because Congress enacts legislation that selectively treats the island as an incorporated territory does not mean that Puerto Rico's territorial status has changed.

Just because Congress enacts legislation that selectively treats the island as an incorporated territory does not mean that Puerto Rico's territorial status has changed.

To sum up, between 1898 and 1901, the U.S. government established that Puerto Rico was an unincorporated territory and has not changed the island's constitutional status since. Unlike, incorporated territories, unincorporated territories are not meant to become states of the Union. Although Congress has enacted legislation that treats Puerto Rico like a state and/or an incorporated territory, Congress has never enacted legislation that explicitly changed Puerto Rico's territorial status. Nor has the Supreme Court ruled that Puerto Rico is an incorporated territory. To this extent, Puerto Rico remains an unincorporated territory at the time of this writing.

Part III: Puerto Rico's Territorial Incorporation Legislation

Drawing on a reading of the Congressional Record Index, I have identified upward of 134 status and plebiscitary bills for Puerto Rico introduced, and in some cases debated, in Congress between 1898 and 2018. These bills included an array of status options for Puerto Rico, as well as an array of procedures to change the island's political status. Yet, only ten bills sought to provide a territorial government for Puerto Rico and one sought to discuss the question of the island's territorial status. Ten of these bills were introduced in Congress prior to Puerto Rico's adoption of a local constitution in 1952. Only one bill was introduced after 1952 and before 2018. More importantly, only five bills provided for the territorial incorporation of Puerto Rico. None of the eleven bills were debated outside of their respective committees.

Federal lawmakers introduced two bills addressing the question of Puerto Rico's territorial status during the *Foraker Act's* debates or during the 56th Congress. The first bill, *H.R. 5466*, was introduced in the House Committee on Insular Affairs by Representative John Fletcher Lacey (R-IA) on January 8, 1900. Although this bill was part of a broader debate over the *Foraker Act*, there is no evidence that it received much support. Unlike other bills, *H.R. 5466* treated Puerto Rico as a district rather than a territory. Central to Representative Lacey's bill was a continuation of the military's local laws and public policies (§11). This bill created a barebones civil government for Puerto Rico subordinated to the federal government. However, this bill provided for a territo-

rial delegate (§21) with the same powers as other territorial delegates. Likewise, the bill contained a provision (§22) that extended all United States tariff and internal revenue laws to Puerto Rico, effectively treating the island as a part of the United States.

It is interesting to note that Representative Lacey's bill was more consistent with the Supreme Court's opinion in *Loughborough* than with the prevailing academic interpretations of the period. As I noted above, in *Loughborough* the Supreme Court established that districts (e.g., Washington, D.C.) were equivalent to territories for constitutional purposes. To this extent, describing Puerto Rico as a district would have been tantamount to treating Puerto Rico as a colonial territory. Representative Lacey's bill also treated Puerto Rico as a "dependency" until Congress enacted legislation changing the status of the island (§11). Here Farrand's argument is helpful. Farrand, a well-known legal historian at the time, invoked a historical reading of the notion of the district to describe a territorial status located somewhere in-between a foreign possession and an incorporated territory. Drawing on a reading of the history of the districts of Louisiana and Alaska, Farrand argued that the *Foraker Act* created a different and inferior status for Puerto Rico (1900, 681). The question is whether Representative Lacey understood or was even familiar with Farrand's argument. At present I can only highlight the tension present in the language of Representative Lacey's bill, which at the end of the day did not receive significant support.

On January 22, 1900, Representative Robert Lee Henry (D-TX) introduced a second bill via the House Committee of Insular Affairs, *H.R. 7020,* expressly treating Puerto Rico as a territory. The bill sought to create an organized "territorial government" with corresponding institutions in Puerto Rico (§2). Like virtually all other territorial bills, *H.R. 7020* also extended all parts of the constitution that were not locally inapplicable. This bill was introduced in the House, but died in Committee. Representative Henry was a progressive Democrat, and this bill represented an anti-imperialist or colonialist alternative to the *Foraker Act*. In other words, Representative Henry's bill sought to treat Puerto Rico as a territorial part of the United States in line with established colonialist precedents.

On December 2, 1901, during the 57th Congress, following the Supreme Court's rulings in the *Insular Cases*, Representative Edgar D. Crumpacker (R-IN) introduced a joint resolution in the House Committee on Insular Affairs providing for the territorial incorporation of Puerto Rico into the United States. This is the first bill explicitly providing for the territorial incorporation of Puerto Rico. Representative Crumpacker's resolution, *H.J. Res. 5*, provided "(t)hat the island of Porto Rico [sic] be, and is hereby, incorporated into and made a part of the United States; and all laws locally applicable and not in conflict with Acts passed for the special government thereof are hereby extended to said island." For Representative Crumpacker, territorial incorporation meant treating Puerto Rico as a constitutional part of the United States.

Almost a decade later, during the 63rd Congress, Senator Willard Saulsbury Jr. (D-DE) introduced *S. 5845* in the Senate Committee on Pacific Islands, providing for the creation of a territorial government for Puerto Rico. The bill did not contain lan-

Table 1: Federal Territorial Incorporation Legislation for Puerto Rico, 1898-2018

Congress	Year	Bill/Law	Sponsor	Sponsoring Political Party	Committee	Congressional Action	Type of Legislation	Status
56th	8 January 1900	H.R. 5466	Representative John F. Lacey (R-IA)	Republican	House Committe on Insular Affairs	Introduced in the House Died in Committee	Organic Act	District
	22 January 1900	H.R. 7020	Representative Robert L. Henry (D-TX)	Democrat	House Committe on Insular Affairs	Introduced in the House Died in Committee	Organic Act	Territorial Government
57th	2 December 1901	H.J. Res. 5	Representative Edgar D. Crumpacker (R-IN)	Republican	House Committe on Insular Affairs	Introduced in the House Died in Committee	Joint Resolution	Territorial Incorporation Act
63th	13 June 1914	S. 5845	Senator Willard Saulsbury Jr. (D-DE)	Democrat	Senate Committee on Pacific Islands and Puerto Rico	Introduced in the House Died in Committee	Organic Act	Territorial Government (§4)
64th	7 December 1915	S. 26	Senator Willard Saulsbury Jr. (D-DE)	Democrat	Senate Committee on Pacific Islands and Puerto Rico	Introduced in the House Died in Committee	Organic Act	Territorial Government (§4)
66th	10 July 1919	H.J. Res. 144	Representative Leonidas C. Dyer (R-MO)	Republican	House Committe on Insular Affairs	Introduced in the House Died in Committee	Join Resolution/ Referendum	1. Independence; 2. Territorial Government; 3. Status quo.
67th	16 January 1922	H.R. 9934	Representative John I. Nolan (R-CA)	Republican	Senate Committee on Pacific Islands and Puerto Rico	Introduced in the House Died in Committee	Organic Act	Territorial Incorporation Act (§2)
75th	6 January 1937	H.R. 1992	Resident Commissioner Santiago Iglesias-Pantín (PR-S/C)	Socialist/ Coalition	House Committe on Insular Affairs	Introduced in the House	Organic Act	Territorial Incorporation Act (§2)
76th	3 January 1939	H.R. 147	Resident Commissioner Santiago Iglesias-Pantín (PR-S/C)	Socialist/ Coalition	House Committe on Insular Affairs	Introduced in the House Died in Committee	Organic Act	Territorial Incorporation Act (§2)
76th	12 January 1940	H.R. 9361	Resident Commissioner Bolivar Pagán (PR-S/C)	Socialist/ Coalition	House Committe on Insular Affairs	Introduced in the House Died in Committee	Organic Act	Recognized Puerto Rico as a Territory and requested a greater degree of home rule prior to statehood
103th	22 November 1993	H.R. 3715	Representative Don E. Young (R-AK)	Republican	House Committe on Natural Resources	Referred to Committee on Natural Resources Died in Committee	Organic Act	Territorial Incorporation Act

guage providing for the "incorporation" of Puerto Rico. Instead, *S. 5845* sought to create a territorial government along the lines of the pre-1898 colonial territories. The bill provided for the extension of all constitutional provisions not locally inapplicable (§5) and treated the Puerto Rican territory as a part of the United States for internal revenue laws (§7), as well as for tariffs and duties (§8). Senator Saulsbury's bill treated Puerto Rico as a part of the United States and like an incorporated territory. A year later, on December 7, 1915, and during the 64th Congress, Senator Saulsbury introduced *S. 26*, another version of the latter bill in the Senate Committee on Pacific Islands and Porto Rico [sic]. Both bills died in committee.

On July 10, 1919, during the 66th Congress, Representative Leonidas C. Dyer (R-MO) introduced *H. J. Res.* 144 in the House Committee on Insular Affairs, providing for an island- wide referendum or plebiscite on the political status of Puerto Rico. Unlike prior bills, Representative Dyer's resolution called for an electoral event that gave local voters a choice among three status options, namely independence, a territorial form of government, or the status quo. It is interesting to emphasize that the resolution/referendum did not contain a statehood option or any reference to a future statehood for Puerto Rico.

On January 16, 1922, during the 67th Congress, Representative John I. Nolan (R-CA) introduced *H. R. 9934,* a territorial incorporation bill, in the House Committee on Insular Affairs. This bill was designed to amend the *Jones Act of 1917* by incorporating the island into the United States. The bill contained two core provisions. The first established an "incorporated Territorial government" in Puerto Rico (§2). The second recognized that the Constitution and other U.S. laws that were not locally inapplicable would "have the same force and effect within" Puerto Rico (§4). Again, territorial incorporation meant that Puerto Rico would become a part of the United States for constitutional purposes.

On January 6, 1937, during the 75th Congress, Puerto Rican Resident Commissioner Santiago Iglesias-Pantín (C-PR) introduced *H.R. 1992,* also a territorial incorporation bill, in the House Committee on Insular Affairs. Like *H. R. 9934*, Resident Commissioner Iglesias-Pantín's territorial incorporation bill, *H. R. 1992* sought to amend the *Jones Act of 1917* and contained two fundamental provisions, one creating an incorporated territorial government for Puerto Rico, (§2) and another extending constitutional provisions not locally inapplicable to the island (§4). This was the first territorial incorporation bill introduced by a Puerto Rican Resident Commissioner. Although the legislative record on this bill is fairly scant, Resident Commissioner Iglesias-Pantín advocated statehood for Puerto Rico, and based on legislative record of other bills he introduced in Congress, it is safe to state that the intent of *H.R. 1992* was to cement a pathway for Puerto Rico to achieve statehood. On January 3, 1939, during the 76th Congress, Resident Commissioner Iglesias-Pantín introduced in the House *H.R. 147*, another version of his previous territorial incorporation bill. Both of his bills died in committee.

On April 12, 1940, during the 76th Congress, Puerto Rican Resident Commissioner Bolívar Pagán Lucca (C-PR) introduced *H. R. 9361* in the House Committee on Insular Affairs. Unlike all prior territorial bills, *H. R. 9361* recognized Puerto Rico as a

territory and requested a greater degree of "home rule" that could enable Puerto Ricans to develop a statehood constitution (Preamble). The text of the bill consisted on a series of amendments, primarily of the *Jones Act of 1917*, that sought to treat Puerto Rico as a constitutional part of the United States. The bill was conceived as a bridge to the future statehood of Puerto Rico.

First, between 1898 and 2018, it is possible to identify upward of 134 political status bills introduced, and in some cases debated, in Congress.

Although Congress has debated an array of status bills for Puerto Rico since the enactment of the 1952 Puerto Rican Constitution, between 1952 and 2018, federal lawmakers only discussed one territorial incorporation bill. To be sure, on November 22, 1993, during the 103rd Congress, Representative Don Young (R-AK) introduced *H.R. 3715* in the House Committee on Natural Resources, a measure that authorized consultations for the development of Articles of Incorporation for territories in the United States. Representative Young's bill responded to the United Nations' call for the eradication of colonialism through a process of self-determination. According to the bill, "a territory may be considered decolonized once incorporated into an administering power consistent with a freely expressed act of self-determination of the of the territory" [Sec. 1(a)(1)(C)]. Unlike prior bills of territorial incorporation, which were designed to address Puerto Rico's constitutional status, Representative Young's bill sought to allay the U.N. demands to decolonize Puerto Rico and the other U.S. territorial possessions.[4]

To sum up, I want to highlight seven possible findings. First, between 1898 and 2018, it is possible to identify upward of 134 political status bills introduced, and in some cases debated, in Congress. Of these bills, only eleven contain language explicitly addressing the territorial status of Puerto Rico and only four (five if counting *H. R. 3715*) explicitly call for the territorial incorporation of Puerto Rico. Most bills introduced and/or debated in Congress call for the resolution of Puerto Rico's political status beyond a territorial stage. Second, only the bills introduced by Puerto Rican Resident Commissioners explicitly describe the island's territorial incorporation as a precursor to statehood. Third, with the exception of *H. R. 3715*, which calls for "consultations," all bills were introduced prior to 1952 or the creation of the Puerto Rican Constitution, which conferred a greater degree of local administrative autonomy on the island's residents. Fourth, all bills died in committee, suggesting that Congress has never taken seriously the possibility of "incorporating" Puerto Rico. Fifth, more (5) Republican lawmakers supported some sort of territorial status for Puerto Rico than Democrats (3). Sixth, with the exception of two bills, all bills were introduced in the House of Representatives. Of course, Puerto Rico does not have a seat in the Senate, and it is more likely that the island's Resident Commissioner, who is seated in the House, can influence more members of the House of Representatives. Finally, central to most of the ter-

ritorial bills discussed above was a concern with extending all constitutional provisions that are not locally inapplicable to Puerto Rico, including the tariff, duties, and internal revenue provisions of the Constitution. For most lawmakers, treating Puerto Rico as a territory meant making the island a part of the United States.

Conclusion

In sum, I want to offer two concluding remarks and a suggestion for further research. As I repeatedly note above, Puerto Rico's separate and unequal status is contingent on its unincorporated territorial status. Clearly, Congress has no intention of incorporating Puerto Rico or changing its territorial status. If anything, it is possible to argue that Congress prefers to retain the flexibility to rule Puerto Rico without being bound or limited by a more democratic application of the Constitution. Likewise, while incorporating Puerto Rico would address the anti-democratic relationship between Puerto Rico and the U.S., there appears to be a consensus interpretation suggesting that incorporating Puerto Rico would bind Congress to eventually grant Puerto Rico statehood. Likewise, the prevailing consensus argues that once Puerto Rico is incorporated, it becomes a permanent part of the United States and Congress would not be able to grant Puerto Ricans independence should they prefer this status option in the future. Unfortunately, for more than a century, Congress has refused to enact binding legislation, enabling Puerto Ricans to choose a status option.

In addition, a common feature of all territorial government bills is a recognition that constitutional provisions that are not locally inapplicable should be extended to Puerto Rico. Stated differently, territorial government and incorporation bills addressed the inequalities created by the island's unincorporated territorial status and the corresponding doctrine of territorial incorporation. For more than a century, progressive/liberals, conservatives, libertarians and socialists, as well as democrats and republicans, have refused to extend the constitution to Puerto Rico in a democratic and egalitarian manner. Simultaneously, the Supreme Court continues to find ways to defer to Congress. If, after more than a century, Congress continues to worry about the question of a permanent relationship between the island and the States, perhaps a simpler solution would be to enact legislation extending all constitutional provisions that are not locally inapplicable to Puerto Rico. At least this type of legislation could begin to repudiated the racist doctrine of territorial incorporation that has defined the separate and unequal status of Puerto Rico within the U.S. empire.

Finally, this note is meant to provide an overview of the legislative initiatives seeking to address the question of Congress' efforts, or lack thereof, to enact legislation that explicitly incorporates Puerto Rico into the U.S. empire. I am interested in providing a structural overview of the problem. A more interesting project could focus on the available papers of the authors of the bills discussed in this note and provide substantive explanations of why they chose the political positions that they did. Perhaps a more histobiographical interpretation of the territorial government and incorporation bills for Puerto Rico could reveal some new insight about the logics of U.S. empire.

NOTES

[1] My analysis of the differences between the colonialist, imperialist and global empire (Third View) traditions of territorial expansionism include other categories of comparison such as the questions of the extension of citizenship and civil rights to acquired territories. However, for purposes of this note, I will limit my discussion to the three issues raised above.

[2] Although I see some continuities in my argument with prevailing settler colonialist research, my focus is on the structural dimensions of colonialism and the role that constitutional law plays in shaping he contours of the U.S. nation-state building process, here understood as an expression of global expansionism. For a discussion of differences between the settler colonialism and the colonialism scholarship, see generally Lorenzo Veracini's text titled *Settler Colonialism* (2010).

[3] It is important to note that Hawai'i was a sovereign monarchy when annexed by the United States in 1899.

[4] It is important to note that Representative Young was an active participant in the 1989-1991 failed plebiscitary debates for Puerto Rico. To this extent, *H.R. 3715* should also be read against this backdrop.

REFERENCES

Aleinikoff, T. Alexander. 2002. *Semblances of Sovereignty, The Constitution, the State, and American Citizenship*. Cambridge, MA: Harvard University Press.

American Insurance v. Canter. 1828. 26 U.S. 511.

Balzac v. People of Porto Rico. 1922. 258 U.S. 298.

Burnett, Christina Duffy and Burke Marshall, eds. 2001. *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution*. Durham, NC: Duke University Press.

Coudert, Frederic R. 1926. The Evolution of the Doctrine of Territorial Incorporation. *Columbia Law Review* 26, 823–50.

Deloria Jr., Vine and David E. Wilkins. 1999. *Tribes, Treaties & Constitutional Tribulations*. Austin: University of Texas Press.

Dingley Act. 1897. Ch. 11, 30 Stat. 151.

Downes v. Bidwell. 1901. 182 U.S. 244.

Farrand, Max. 1896 *The Legislation of Congress for the Government of the Organized Territories of the United States, 1789-1895*. Newark: Wm. A. Baker.

_____. 1900. Territory and District. *The American Historical Review* 5(4), 676–81.

Fleming v. Page. 1850. 50 U.S. 603.

Foraker Act. 1900. Ch. 191, 31 Stat. 77.

Gelpí, Gustavo A. 2017. *The Constitutional Evolution of Puerto Rico and Other U.S. Territories (1898-Present)*. San Juan: Inter American University of Puerto Rico.

Gettys, Luella. 1934. *The Law of Citizenship in the United States*. Chicago: The University of Chicago Press.

Grupo de Investigadores Puertorriqueños. 1984. *Breakthrough From Colonialism: An Interdisciplinary Study of Statehood. 2 vols.* Río Piedras: Editorial de la Universidad de Puerto Rico.

Incorporating Porto Rico into the United States. 1901. H. J. Res. 5, 57th Cong.

Jones v. United States. 1890. 137 U.S. 202.

Jones Act. 1917. Pub. L. No. 64-368, 39 Stat. 951.

Lloréns Vélez, Eva. 2017. Is Puerto Rico on a Path to Incorporation? *Caribbean Business* 13

February. Accessed 20 January 2018. <http://caribbeanbusiness.com/is-puerto-rico-on-a-path-to-incorporation/>.

López Baralt, José. 1999. *The Policy of the United States Towards its Territories with Special Reference to Puerto Rico*. Río Piedras: Editorial de la Universidad de Puerto Rico.

Loughborough v. Blake. 1820. 18 U.S. 317.

Lowell, Abbott Lawrence. 1899. The Status of Our New Possessions – A Third View. *Harvard law Review* 13, 155–76.

Nationality Act. 1940. Pub. L. No. 76-853, 54 Stat. 1137.

New Orleans v. The Steamship Company. 1874. 87 U.S. 387.

Northwest Ordinance. 1789. Ch. 8, 1 Stat. 50.

People of Porto Rico v. Muratti and People of Porto Rico v. Tapia. 1918. 235 U.S. 639.

Providing for an Advisory Referendum by the People of Porto Rico as to the Form of Government They Desire. 1919. H.J.Res. 144, 66th Cong.

Puerto Rico v. Sanchez Valle. 2016. 579 U.S. ___.

Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). 2016. Pub. L. No. 114-187, 130 Stat. 549.

Remarks by Representative Payne of New York. 1900. Speaking on behalf of the *Foraker Act,* on 19 February, 33 Cong. Rec. 1908, 1942.

Remarks by Senator Spooner of Wisconsin. 1900. Speaking on behalf of the *Foraker Act,* on 2 April, 33 Cong. Rec. 3608, 3629.

Rivera Ramos, Efrén. 2007. *American Colonialism in Puerto Rico: The Judicial and Social Legacy.* Princeton, NJ: Markus Wiener Publishers.

Sheridan, Peter B. 1985. Admission of States Into the Union After the Original Thirteen: A Brief History and Analysis of the Statehood Process. CRS 85-765Gov. Washington, DC: Government Printing Office.

Skaggs, Jimmy M. 1994. *The Great Guano Rush, Entrepreneurs and American Oversees Expansion.* New York: St. Martin's Press.

Sparrow, Bartholomew H. 2006. *The Insular Cases and the Emergence of the American Empire.* Lawrence: University Press of Kansas.

To Improve the Form of Government of Puerto Rico, Granting a Greater Degree of Home Rule Under the Jurisdiction an Sovereignty of the United States of America; To Amend to that effect an Act entitled "An Act to Provide a Civil Government for Puerto Rico, and for Other Purposes." 1940. Approved 2 March 1917, H.R. 9361, 76th Cong.

To Make Porto Rico an Incorporated Territory of the United States. 1922. H.R. 9934, 67th Cong.

To Make Porto Rico an Incorporated Territory of the United States. 1937. H.R. 1992, 75th Cong.

To Make Porto Rico an Incorporated Territory of the United States. 1939. H.R. 147, 76th Cong.

To Provide a Civil Government for the District of Puerto Rico, and for Other Purposes. 1900. H.R. 5486, 56th Cong.

To Provide Consultations for the Development of Articles of Incorporation for Territories of The United States. 1993. H.R. 3715, 103rd Cong.

To Provide a Government for the Territory of Puerto Rico. 1900. H.R. 7020, 56th Cong.

To Provide a Government for the Territory of Porto Rico. 1914. S. 5845, 63th Cong.

To Provide a Government for the Territory of Porto Rico. 1915. S. 26, 64th Cong.

Torruella, Juan R. 1988. *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*. Río Piedras: Editorial de la Universidad de Puerto Rico.

Treaty of Paris. 1899. 30 Stat. 1754.

Trías Monge, José. 1991. *El choque de dos culturas juridicas en Puerto Rico, el caso de la responsabilidad civil extracontractual*. Austin, TX: Equity Publishing Company.

UNITED STATES CONGRESS. HOUSE OF REPRESENTATIVES. 1902. ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1900, PART 13: REPORT OF THE MILITARY GOVERNOR OF PORTO RICO ON CIVIL AFFAIRS, H.R. Doc. No. 56-2 (2nd Sess.).

UNITED STATES WAR DEPARTMENT, BUREAU OF INSULAR AFFAIRS. 1900. REPORT OF BRIG. GEN. GEO. W. DAVIS, U.S.V. ON CIVIL AFFAIRS OF PUERTO RICO, 1899. WASHINGTON: GOVERNMENT PRINTING OFFICE.

U.S. v. Rice. 1819. 17 U.S. 246.

Van Dyne, Frederick. 1904. *Citizenship of the United States*. New York: The Lawyer's Cooperative Publishing Co.

Venator-Santiago, Charles R. 2015. *Puerto Rico and the Origins of U.S. Global Empire: The Disembodied Shade*. London: Routledge.

_____. 2018. Puerto Rico y las antinomias de la ciudadanía de Estados Unidos *80grados* 31 May. Accessed 19 January 2019. <http://www.80grados.net/puerto-rico-y-las-antinomias-de-la-ciudadania-de-estados-unidos/>.

Veracini, Lorenzo. 2010. *Settler Colonialism: A Theoretical Overview.* New York: Palgrave/McMillan.

Weingast, Barry R. 1998. Political Stability and Civil War: Institutions, Commitments and American Democracy. In *Analytic Narratives,* eds. Robert H. Bates et al. 148–93. Princeton, NJ: Princeton University Press.