THE COMMONWEALTH OF PUERTO RICO: TRYING TO GAIN DIGNITY AND MAINTAIN CULTURE

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I. INTRODUCTION

With the exception of independence for the Philippines, the United States has assumed integration—Statehood—as the ultimate goal for its territories. The Commonwealth of Puerto Rico, however, has received legal recognition as a distinct status relationship, different from that of either a State or territory, in the United States. This relationship was the precedent relied upon in the case of the Commonwealth of the Northern Marianas and by the Associated States established within the Trust Territory of the Pacific Islands. It is also the precedent to which Guam, the Virgin Islands and, to a lesser degree, American Samoa are looking in evaluating the potential benefit of various status alternatives. The significance of the Commonwealth and its potential in the United States federal system is critical as the debate intensifies between Statehood and Commonwealth partisans in Puerto Rico. This article describes the boundaries and the potential of the Commonwealth as well as the challenges it creates for the United States federal structure. It also delineates the issues involved in the status choices now before the United States and Puerto Rico: Statehood versus Commonwealth.

II. HISTORY OF THE UNITED STATES-PUERTO RICO RELATIONS

Puerto Rico's modern history began in 1508 when the Spanish established a small outpost at Caparra across the bay from modern San Juan. The Commonwealth of Puerto Rico is com-

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1 Columbus stopped briefly in Puerto Rico in 1508 and named the island San Juan Bautista. See generally A. Morales Carrion, Historia Del Pueblo De Puerto Rico: Desde Sus Origenes Hasta El Siglo (1968).
posed of four small islands (Puerto Rico, Vieques, Culebra, and Mona) located in the Caribbean, about 1,100 miles southeast of Florida. The largest, Puerto Rico, is 100 miles long (east to west) and thirty-five miles wide (north to south).

Puerto Rico is one of the most densely populated areas in the United States, containing more than three million people, most of whom speak Spanish as their native tongue. Not surprisingly, a strong sense of cultural unity exists. The significance to be given the Puerto Rican sense of cultural distinctiveness has been a major issue affecting local Puerto Rican politics and status relations with the United States.

A. The Cultural Issue

As with virtually all of North and South America, Puerto Rico is the product of the confluence of three societies: Indians, African blacks, and European whites.

1. The Taino Indian Heritage

At the time of the Spanish settlements, Puerto Rico was inhabited by Taino Indians, an Arawack people that moved northward along the chain of West Indian Isles to Puerto Rico from the South American continent. Estimates of their original number vary widely, from as low as 30,000 to as many as 600,000. However, conquest in battle, intermarriage, and enslavement precipitated the rapid dilution of the distinctive Indian race. Puerto Rican cultural historians have identified vestiges of the Taino culture in various aspects of Puerto Rican life (place names, architectural forms, food and music) and all status partisans in Puerto Rico pay obeisance to their historical presence. However, the tradition is spent as a cultural force important to the evolution of Puerto Rican institutions or to Puerto Rico's relationships with the States and its Caribbean neighbors.


3 M. BALLESTEROS & L. GOMEZ ACEVEDO, INDIGENOUS CULTURES OF PUERTO RICO 175 (1975).


2. The African Heritage

Spain's initial interest in Puerto Rico was prompted by tales of huge gold deposits. After the few mines were depleted, Spanish rulers turned to agriculture, introducing a plantation economy based on the cultivation of sugar cane and coffee by slave labor. Spain introduced slavery into Puerto Rico in 1510, but because of the limited development of commercial agriculture during the first three centuries of Spanish rule, it played a minor role in Puerto Rico's insular development. The practice of manumission, long established in Spain itself, served to increase the number of free blacks in Puerto Rico during periods of commercial decline.

At the beginning of the nineteenth century, when the program of commercial agricultural exploitation began in earnest, the free black population was very large, exceeding by many thousands the number of slaves. This situation, combined with a growing mixed ethnic population, prevented blacks in Puerto Rico from forming a separate sociocultural element, despite Spanish attempts to segregate the races. Continued intermarriage has not eliminated color as a factor in Puerto Rican life, but has relieved its impact so that color discrimination is not as pronounced in Puerto Rico as in the United States. Many Independentista and Commonwealth partisans consider racial discrimination in the States as the great divider between the two societies, although the available evidence suggests that black Puerto Ricans generally favor closer ties with the States and Statehood for the island.

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7 Slavery was abolished in Puerto Rico in 1873. For the definitive history of slavery in Puerto Rico, available only in Spanish, see L. DIAZ SOLER, HISTORIA DE LA ESCLAVITUD DE PUERTO RICO (1953).


9 Under the Cedula de Gracias of 1815, the property clause granted white immigrants twice the amount of land for cultivation granted to Negro or "mixed" immigrants. In 1833, Negroes were banned from military service and in 1848, following a series of abortive slave revolts, the Governor-General invoked the Black Code (Codigo Negro), which subjected free blacks and slaves to judgment by court martial. Id. at 496.

10 By 1899, the proportion of Negroes was only 25%, decreasing to 20% in 1930, 15% in 1950, and 7% in 1965. Sagrera noted that "[h]ere the problem of race does not exist. This problem is being solved by the evolution of the Negro race. Here the Negro race has been fusing with other races and the Negro is disappearing. The evolution will continue and the problem will be resolved." M. SAGRERA, supra note 2, at 52.

11 "Color discrimination in general is a subtle and minor theme in Puerto Rican life." M. TUMIN & A. FELDMAN, SOCIAL CLASS AND SOCIAL CHANGE IN PUERTO RICO 239 (1971).

12 M. SAGRERA, supra note 2, at 32.
During most of the twentieth century, African culture has been
ignored or belittled by Puerto Rican intellectuals. In recent
tears, the cultural recognition of African roots of Puerto Rico has
increased. However, the issue of merging the African cultural
past with the predominant Spanish emphasis of the island while
maintaining a distinctive African role is still unresolved.

3. The Spanish Heritage

Regardless of the recognition given to the African roots of
many Puerto Ricans, the major cultural issue with respect to the
United States concerns the retention of the island's Spanish
heritage. During the nineteenth century, a large population in-
crease in Puerto Rico, from approximately 150,000 people in 1800
to a million by the end of the century, resulted largely from the
influx of Spanish royalists fleeing revolutions throughout Central
and South America. The emigration shifted the balance in Puerto
Rico between the black and Indian populations and the Spanish
population in favor of the Spanish. Although the immediate im-
 pact was in the political arena, the long-range impact was cultural.

Growth in political awareness coincided with growth in popula-
tion and Puerto Ricans insisted upon increased participation in
the virtually totalitarian government. The struggle for greater
political participation is reflected in the Grito de Lares of 1868, a
brief, unsuccessful rebellion against the Spanish-appointed gover-
nor. Attempts to achieve self-government intensified in the years
following the rebellion. In 1897, under the guidance of Luis Munoz
Rivera, Puerto Rico negotiated a Charter of Autonomy with the
Spanish Crown. Although the Charter is viewed as a major
triumph in the struggle for autonomy, the appointed governor
was empowered to veto legislation and suppress civil rights in

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13 "When they talk about 'race', it means that of the Spanish, the race of the discover-
ers ... and this and nothing else we boast about in Puerto Rican poetry." CRUZ, NARCISSUS
DISCOVERS HIS ANCESTORS (1975). See also SOTO, DICTIONARY OF REGIONALISMS OF PUERTO
RICAN POETRY (1961). Similarly, René Marques, in his famous introduction to the first collec-
tion of Puerto Rican short stories, CUENTOS PUERTORRIQUENOS DE HOY (1959), ignores the
African influence on Puerto Rican literary tradition.

14 Thus, Pedreira, in his classic work INSULARISMO (1930), ascribes the indecisive, non-
heroic traits of the Puerto Rican to his African background and the intellectual force and
vigor to the Spanish heritage.

1899 are 155, 428 and 953, 243 respectively.

This struggle produced the heroes of modern Puerto Rico, and was a factor in the formation of attitudes causing Puerto Rico to view itself as an island within the Spanish cultural sphere. The struggle for autonomy reached its climax in the "Generation of 1930," which set forth a strong statement of the need to protect the people of Puerto Rico from cultural extinction by reaffirming their Spanish roots.

The nature of Puerto Rico's identity is subject to considerable speculation and analysis, but at its core is a feeling of Puerto Rican nationalism, the feeling that "the island is a socio-cultural entity . . . that it functions as a unit and has problems which must be solved in insular terms." The Spanish language is the most obvious embodiment of unity and cultural strength. One Puerto Rican commentator observed that "[o]n the future development of the Spanish language rests the future of the people of Puerto Rico . . . if, perhaps, the language is in danger it is because so is the national personality." Although attempts to characterize Puerto Rico's cultural identity in greater detail necessarily vary, the characterization consciously relates to Spanish and European values. Whatever their vision of the long-term goal for the
island, all parties in Puerto Rico agree to the necessity of preserving the Spanish cultural identity against the challenge of technological change, the United States value system, and the English language.

One's perception of the nature and dynamics of Puerto Rican culture relates closely to one's view of the appropriate United States-Puerto Rico relationship. Independence partisans maintain that Puerto Ricans possess all the attributes of a nation: a defined territory, a relatively homogeneous population, a common language, a common set of values and behavior patterns, and a common history. The culture, perforce, is a national culture, and

of the world, with social values put above scientific values; a double sexual standard with a very strong emphasis on female chastity and a belief in the natural inferiority of women; a much-elaborated set of values dealing with maleness and male authority (machismo); a reliance on shame, rather than guilt, as a source of social control, and a dependence on the opinions of others in forming and maintaining one's opinion of oneself, accompanied by a strong gregariousness and dislike of solitude and of loneliness; and a dependence on others, expressed in docility, the inability to make difficult decisions, and the unwillingness to handle problems by directly confronting them.

Id.

The issue of Catholic values rarely has been discussed although the interest that Puerto Rico exhibits concerning aid to parochial schools and resistance to the enforcement of the Supreme Court abortion decision reflects those concerns. See Ortiz v. Hernandez Colon, 385 F. Supp. 111 (D.P.R. 1974). There is a growing Protestant population estimated at 700,000, which approximates the number of Catholic churchgoers. Liden, Protestants in Puerto Rico No Longer a Silent Minority, San Juan Star, Dec. 19, 1978, at 1.

23 The importance of maintaining the integrity of the Spanish language in Puerto Rico was emphasized by Jaime Benitez, a Commonwealth supporter who was Resident Commissioner from 1972-1976, in the Social Cultural Hearings, supra note 18, at 354-55.

24 The role the English language plays in United States life, and its official and practical importance are discussed in A. Leibowitz, The Official Character of Language in the United States (1979, National Institute of Education); see also Leibowitz, English Literacy: Legal Sanction for Discrimination, 45 Notre Dame Law. 7 (1969).

25 See J. Silen, Hacia Una Vision Positiva del Puertorriquena (1972); H. Wells, The Modernization of Puerto Rico: A Political Study of Changing Values and Institutions 188-89 (1969); A. Pedreira, supra note 19, at 162. For the contemporary generation, the issue has been formulated in terms of the social and economic transformation of Puerto Rico. Those who contend that Puerto Rico has bartered its identity for material well-being view the industrialization of Puerto Rico as a thinly-disguised, massive engulfment by the United States of the Spanish culture. Others argue that Puerto Rico's fundamental character remains intact, and that what is taken for "Americanization" is the "modernization" craved by every less developed country in the world. It is also asserted that what has been destroyed in Puerto Rico is an outdated, agricultural community on which a host of traditional values were based, and that those traditional values have been replaced by a modern set of values without damaging the fundamental character of Puerto Rican culture. Some observers, while admitting strong United States influence, also discern the creation of a positive new culture in Puerto Rico, which combines the most vigorous features of the cultures of the two communities.
advocates of independence urge that its corresponding political status should be that of a sovereign national entity in order to achieve its highest and most creative capability. Commonwealth partisans view the Puerto Rican identity as based not only on the nation/state, but also as part of a new federal and regional relationship, capable of retaining distinctiveness while engaging the United States and other cultural worlds. Status as a Commonwealth or Associated State, it is argued, would perpetuate the mutually enriching interchange of cultural traits without loss of identity. Proponents of Statehood maintain that American federalism is sufficiently flexible not only to allow but also to welcome the admission of a culturally distinctive Puerto Rico as a State. They cite Hawaii particularly, not only because it is non-contiguous, but also due to its largely non-Anglo-Saxon cultural and ethnic background. Statehood advocates, such as Governor Romero Barcelo, cite federal constitutional protections for the States in such matters as education, marital relations, public morality, health, and welfare to show the potential for States to retain cultural distinctiveness.

B. Relationship with the United States

Spanish colonialism in Puerto Rico came to an abrupt halt on July 25, 1898, when as a consequence of the Spanish-American War, United States troops landed at Guanica on Puerto Rico's south coast. Spain subsequently ceded Puerto Rico to the United States. The Treaty of Paris provided that the civil rights and political status of the native inhabitants of the territory would be determined by the United States Congress.²⁶ Even under Spanish rule, the United States was the major market for the Puerto Rican economy and there was considerable optimism at the transfer. Some, like the Puerto Rican Federal Party, anticipated that the island would become a territory and that full Statehood would follow promptly. Others, such as the Puerto Rican Autonomist Party, envisioned greater autonomy for Puerto Rico, building upon the island's recent triumph in its status struggle with Spain. Puerto Ricans generally expected the initial self-governing role under United States sovereignty to be greater than that obtained from Spain under the Charter of Autonomy. Much of the bitterness of the following years resulted from the failure of the federal government to fulfill these expectations. For example,

President McKinley’s Puerto Rican policy, which was incorporated in the Foraker Act of 1900, established a civil government in which the key roles would be given to Americans appointed by the President.\textsuperscript{27}

United States language policy was even more disappointing. At the outset, the federal government did not regard the problem of language in Puerto Rico as particularly difficult. Since education under the Spanish was limited to a small elite and because many in Puerto Rico were eager for Statehood, it was assumed that English would be integrated easily, and that it would become the operative language of the island.\textsuperscript{28} With this attitude prevailing, the issue of whether English was to be the language of instruction in the school system did not appear significant. No clear demarcation was made between the use of English as the language of instruction\textsuperscript{29} and other methods of encouraging the shift of the populace to English. Although Congress may have been insensitive to Puerto Rico’s desires, it was, nevertheless, proceeding within the United States historical experience. The approach was similar to the action taken to organize governments in new territories of the continental United States and to prepare newly-settled areas for Statehood.\textsuperscript{30} The imposition of English as the language of instruction in the Puerto Rican school system, on an island in which very few people knew the language, had within it the arrogance inherent in imperialism as well as the recognition that language differences might impede Statehood.\textsuperscript{31}

The legal power of the federal government with respect to the territories was tested in the courts during this period. For the first time—Hawaii also had just been acquired—the United States was governing territories that were geographically separated from the mainland and inhabited by people culturally and racially

\textsuperscript{27} The Foraker Act of 1900, ch. 191, §§ 1-41, 31 Stat. 77 (current version in scattered sections of 11, 48 U.S.C. (1976)). The Act provided for a Governor appointed by the President, an 11-person Executive Council (with a majority being Statesiders), 35 elected Puerto Ricans in the House of Delegates (whose laws were subject to Congressional veto), and an elected Resident Commissioner who spoke for Puerto Rico in the United States House of Representatives but who had no vote there. \textit{Id.}

\textsuperscript{28} \textit{[1904]} GOVERNOR OF PUERTO RICO FOURTH ANN. REP. 13.

\textsuperscript{29} \textit{[1903]} U.S. COMMISSION OF EDUCATION IN PUERTO RICO ANN. REP. 21 (1903).


\textsuperscript{31} For educational requirements in other territories and in the United States, see A. Leibowitz, \textit{Educational Policy and Political Acceptance: The Imposition of English as the Language of Instruction in American Schools} (1970, Center for Applied Linguistics).
distinct from that of the continental United States. The legal debate centered upon basic questions. For example, does the Constitution follow the flag? Does the Constitution protect the residents of Puerto Rico by limiting federal, executive, and Congressional action? However, what was at issue was whether the usual pattern of territorial evolution leading toward Statehood (as set forth in the Northwest Ordinance) would be changed.

The Insular Cases created the distinction between an unincorporated and incorporated territory. The Constitution was held to apply fully to incorporated territories, but only those fundamental rights essential to the citizens of the United States were provided to unincorporated territories. The various decisions in the Insular Cases permitted virtually unlimited Congressional power over unincorporated territories, without the evolutionary guidelines of the Northwest Ordinance. Puerto Rico was an unincorporated territory dependent upon Congressional action to decide when its territorial status would change and under what circumstances the Constitution would apply. In a concurring opinion, Justice White wrote that "[i]t must follow... that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter... the American family." This judicial action, confirming the executive and legislative approach, embittered the island's populace. The broadly-based Union Party, which held power from 1904 to 1934, made continuous demands for a plebiscite on alternative ultimate status preferences to remove the status initiative from exclusive United States control. Independence sentiment grew as Congress ignored these demands and the United States-appointed governors became increasingly unresponsive. Puerto Rico found itself contending, as it had under the Spanish, for greater control over its own affairs and for a legal limitation on

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32 DeLima v. Bidwell, 182 U.S. 1 (1900); Downes v. Bidwell, 182 U.S. 244 (1900); Armstrong v. United States, 182 U.S. 243 (1900); Dooley v. United States, 182 U.S. 222 (1900) [hereinafter cited as the Insular Cases].


federal power. The federal government resisted these efforts and the confrontation continued. 35

III. THE ORGANIC ACT OF 1917: THE GRANT OF U.S. CITIZENSHIP

A. The Jones Act

The election of Woodrow Wilson, combined with Democratic majorities in both Houses of Congress, led to the passage of the Revised Organic Act of 1917 (the Jones Act). 36 It included provisions for a bill of rights for Puerto Rico, a collective conferral of citizenship, and a locally-elected Senate of nineteen members. Under the Act, the majority of the department heads and the island magistrates were to be appointed—with the advice and consent of the new Senate—by the Governor. This formal transfer of power from Congress and the federal government to the local officials was limited since the Governor, the Attorney General, the Commissioner of Education, and the Auditor were to be appointed by the President, as were the members of the Puerto Rican Supreme Court. 37

B. United States Citizenship

The greatest debate concerned the "grant" of citizenship. The Treaty of Paris of 1899 and the Foraker Act of 1900 specifically withheld U.S. citizenship from Puerto Ricans, 38 although it is moot whether persons born in Puerto Rico were citizens under the Constitution regardless of Congressional action. 39 Under the Foraker Act, the inhabitants of Puerto Rico, with certain minor exceptions, became citizens of Puerto Rico, as did their children. The Jones Act of 1917 conferred U.S. citizenship upon all citizens of

37 Id. The immediate result of the Jones Act was that the federally-appointed Governors were opposed by the Puerto Rican legislature. Every year the Governor had to veto a large number of bills, many of which were passed merely for political effect without any hope or expectation that they would become law.
38 Treaty of Paris, supra note 26, at art. IX.
39 See United States v. Wong Kim Ark, 169 U.S. 649 (1898). The question was raised but avoided by the Supreme Court when it held that an inhabitant of Puerto Rico was not an alien for the purpose of immigration laws in force at that time. Gonzalez v. Williams, 192 U.S. 1 (1904). See also Elk v. Wilkins, 112 U.S. 94 (1884).
Puerto Rico. This imposition of citizenship, a turning point in United States-Puerto Rico relations, transpired although Puerto Rican feelings at the time were divided on the issue. The Republican Party of Puerto Rico and the labor movement both favored Statehood and were ardent supporters of American citizenship. Their views were transmitted to the Congress. However, these groups constituted a minority in insular politics. The majority Unionist Party of Puerto Rico favored increased autonomy and expressed a preference for the designation of "citizens of Puerto Rico." They claimed that a substantial number of their fellow citizens would reject American citizenship if it were offered. Independence partisans today continue to note the omission of an option. The fact that citizenship coincided with World War I and that the new citizens were immediately eligible for conscription is also cited. Although it was believed in some quarters, particularly among pro-Statehood Puerto Ricans, that the grant of citizenship implied incorporation of Puerto Rico into the Union as a territory, as it had for Alaska, the United States Supreme Court in *Balzac v. Puerto Rico* held otherwise, once


*53 Cong. Rec.* 7472 (1916). During the floor debate, Resident Commissioner Munoz Rivera expressed this point, and suggested that a plebiscite be held to determine whether Puerto Ricans desired American citizenship. *Id.*


258 U.S. 298 (1922). Chief Justice Taft's majority opinion continued the approach he had adopted as President, noting the cultural and racial difference in Puerto Rico in explaining why the island had not been incorporated despite the grant of citizenship. Examples of this attitude are evident in the following passages: "We need not dwell on another consideration which requires us not lightly to infer, from acts thus easily explained on other grounds, an intention to incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people." *Id.* at 311.

But Alaska was a very different case from that of Porto Rico. It was an enormous
again separating Puerto Rico from the evolutionary pattern of other territories.

The significance to be accorded the grant of citizenship has never been resolved. The unilateral conferral of citizenship was considered important by both Puerto Rico and the United States; in Puerto Rico as an act of legal consequence, but in the United States Congress as primarily one of psychological significance. Despite the grant of citizenship, Congress continued to treat United States citizens in Puerto Rico as aliens for a variety of purposes. In the key areas of political and economic participation, citizenship was of no consequence. In recent years, Puerto Rico has sought unsuccessfully to give effect to the grant of citizenship in these areas through the judiciary.

In the area of political participation, the United States Court of Appeals for the First Circuit affirmed that Stateside political standards—one person-one vote—applied in a city council election in Puerto Rico under the equal protection clause of the Fourteenth Amendment. The Court of Appeals examined Puerto Rico's Commonwealth status at some length, noting "its sovereign status and functional independence from Congressional control." But the court held that Commonwealth status required special protection of the Commonwealth's citizens against unwarranted and otherwise insufficiently checked governmental action. The court concluded:

We yield to no one in our regard for the Supreme Court of Puerto Rico, but at the same time, if citizens of the several states may call for an initial decision in the district court without deferring to the courts of their local state, we must wonder how we could conscientiously hold that under 28 U.S.C. § 1343 United States citizens resident in Puerto Rico are any less entitled.

A similar issue arose with respect to the rights of citizens of Puerto Rico to vote in presidential elections. The United States District Court in Puerto Rico held that until Statehood, or until a constitutional amendment is approved that extends the presiden-

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territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents.

Id. at 309.


* Id. at 1082.

* Id.
tional vote to Puerto Rico, there is no substantial constitutional question. In short, citizenship brought with it federal judicial scrutiny of local legislative bodies, but not participation in the national legislative or executive branches.

Citizens of Puerto Rico also raised the question of economic participation in various federal programs. There is no consistent pattern for this assistance; in some cases Puerto Rico is treated as a State, in others it is afforded special treatment, almost always to its disadvantage. Discrimination is effected by excluding Puerto Rico and other off-shore areas from government programs or by including them within the program but applying the formula for distribution in a different fashion than that applied for States.

The standard method used is the "set-aside," a separate and distinct allocation formula. From the total amount appropriated for a particular program, a statutorily determined percentage, usually two or three percent, is set aside for allocation among the outlying areas according to their respective needs. The set-aside procedure originally was established in the National School Lunch

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51 Computation of total federal benefits is difficult because of problems of definition and the differing operation of federal programs. The United States-Puerto Rico Commission on the Status of Puerto Rico calculated that Puerto Rico received total grants-in-aid and transfer payments of $92.9 million in fiscal year 1964, which would have been increased by $85.5 million if Puerto Rico were a State. The Status Commission computed the net flow of federal funds to Puerto Rico at $313 million, which would have been reduced to $226.9 million if it were a state. UNITED STATES-PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO, STATUS OF PUERTO RICO 87-89 (Tables B-2 & B-3) (1966) [hereinafter cited as STATUS COMMISSION REPORT]. The major factor in these total flow figures is the federal tax exemption. See also Hearings on H.R. 9234 Before a Special Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 86th Cong. 1st Sess. 429-36 (1959) (Statement of Luis A. Ferre), and Hearings on Puerto Rico Before the Subcomm. on Territorial and Insular Affairs of the House Comm. on Interior and Insular Affairs, 86th Cong., 1st Sess. 148-56 (Statement of Dr. Arthur E. Burns); 264-66 (Comments of Dr. Rafael de Jesus Toro). Recent analyses have been less thorough and have focused on the federal grant-in-aid programs. See Andic, Economic and Fiscal Implications of the Presidential Vote; and Capalli, The Potential Impact of the Presidential Vote on Puerto Rico's Participation in Federal Aid Programs, in SIX SPECIAL STUDIES REQUESTED FOR THE AD HOC ADVISORY GROUP ON THE PRESIDENTIAL VOTE FOR PUERTO RICO (1971). The first comprehensive review of Puerto Rico participation in federal programs was R. CAPALLI, FEDERAL AID TO PUERTO RICO (1970). For a more current analysis of the federal programs, see the detailed examination by the Institute of International Law and Economic Development (IILED) of federal programs in Puerto Rico submitted to the Department of Commerce for the Inter-Agency Study Group on Puerto Rico. (3 Vols. 1978). See also A. BAKER, ECONOMIC CONSEQUENCES OF A CHANGE FROM COMMONWEALTH TO STATESIDE TREATMENT (Office of Commonwealth of Puerto Rico, 1976); and Report of the HEW Under-Secretary's Advisory Group to Puerto Rico (1976).
Act of 1946. The basic unfairness involved in the set-aside procedure is that the need the program seeks to meet often ceases to be the key operating variable when the program moves from the States to the off-shore areas. Rather, political power or its absence appears to be the sole determinant of need.

In the early days of the Commonwealth, Puerto Rico accepted differential treatment because the funds were less significant in both relative and absolute terms and because the policy coincided with the Commonwealth's desire to be treated specially. As the funds increased, the Commonwealth could not afford the distinction. Since 1970, both Commonwealth and Statehood advocates have sought equal treatment for Puerto Rico in federal grant participation.

United States citizens from the States challenged the economic discrimination when, after arriving in Puerto Rico from New York, their payments under Supplemental Security Income (SSI—assistance to the aged, blind, and disabled) were reduced severely. The Supreme Court, per curiam in Califano v. Torres, upheld the statute against the argument that it infringed upon the federal right to travel. In 1980, in Harris v. Rosario, the Court, again per curiam, upheld the discrimination in the Aid to Families with Dependent Children program against an equal protection.


53 IILED, supra note 51. However, despite the unequal treatment, federal funds constituted over 32% of Puerto Rico's recurrent receipts in the years 1970-1977. In both 1976 and 1977, net federal expenditures, exceeded 30% of the Commonwealth's gross product. In 1976, net federal transfer payments supplied almost 16% of personal income on the island. Data for 1970-1972, comparing Puerto Rico to selected States, suggest that the per capita tax dollars available to the Commonwealth from all sources (local revenues plus federal transfers) are lower than those available to the poorer states of the Union, somewhat less than Alabama or Arkansas and substantially below those available to Mississippi. At the same time, Puerto Rico's own tax effort is higher than the combined state and local tax effort of these States, 15.7% of total personal income compared to 10% for Mississippi, and 8% for Alabama and Arkansas. The data were gathered by the HEW Undersecretary's Advisory Group on Puerto Rico (1976).


55 446 U.S. 651 (1980).
challenge. The Court in Califano v. Torres distinguished Shapiro v. Thompson and Memorial Hospital v. Maricopa County, which had set aside State residency requirements as a condition of receiving welfare and medical benefits, on the ground that since Puerto Rican citizens receive less benefits than Statesiders, to permit plaintiffs to prevail would require that they be accorded special benefits over the island residents. Ironically, the Court dismissed the equal protection argument in Califano v. Torres on the ground that the Commonwealth of Puerto Rico status "has no parallel in history." In Rosario, the Court held that under the Territorial Clause Congress "may treat Puerto Rico differently from States so long as there is a rational basis for its actions."

The logic is difficult to follow. The consequence of ruling for the plaintiffs would be that all residents of Puerto Rico would be accorded equal treatment. To argue that plaintiffs should lose so that residents of Puerto Rico could continue to be discriminated against by the United States is simply to reiterate the conclusion. The holding "justified" the Congressional action on the basis that Puerto Rican residents do not pay taxes, that the cost to the federal treasury would be great, and that inclusion in the SSI program might seriously disrupt the Puerto Rican economy (presumably by acting as a disincentive to work). Because federal law establishes Puerto Rico's tax status, the argument in favor of the Congressional action on this ground is circular. Congress can, by the Court's reasoning, discriminate against territorial citizens by passing legislation relating to their income tax payments. No State citizen would be subjected to the question of whether inclusion of its State's citizens would be costly to the treasury. Citizens eligible for SSI are by definition not big taxpayers and whether these payments act as a disincentive to work and are therefore potentially disruptive to the State's economy is an issue most relevant at the federal level.

The Rosario decision may be contrasted with the Court's language in Foley v. Connelie, with respect to discrimination

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* 435 U.S. 1, 3 (1978).
* U.S. CONST. art. IV, § 3, cl. 2. "Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory . . . belonging to the United States." For a treatment of the history of the Territorial Clause, see Liebowitz, supra note 30, at 454.
* 446 U.S. 651, 652 (1980).
THE COMMONWEALTH OF PUERTO RICO

against aliens. "The Court has treated certain restrictions (welfare assistance) on aliens with 'heightened judicial solicitude' . . . a treatment deemed necessary since aliens . . . have no direct voice in the political process." The Court appears to be limiting its judicial solicitude when citizens rather than aliens are involved, although these citizens of the territories, like the aliens, do not have a direct voice in the political process. Furthermore, the "compelling state interest" test required in certain equal protection cases was not even discussed in *Rosario*. Instead, the "rational basis" test was used. Justice Marshall dissented in both *Califano v. Torres* and *Rosario*, somewhat timidly questioning the desirability of permitting Congress to treat territorial residents in this fashion, but without suggesting the importance of the citizenship grant. He desired closer scrutiny of the distinction, a premise that accepts discrimination against territorial citizens under certain circumstances.

The grant of citizenship in 1917 also complicated the federal government's attitude toward the use of the vernacular, Spanish, in Puerto Rico. In 1916, the Commissioner of Education softened the requirement that English be the exclusive language of instruction in the school system. Although this new policy was adopted in part because of the practical difficulty of obtaining American teachers, the relaxation of the English language instruction requirement took place at the time the United States was becoming less certain of Puerto Rico's ultimate future.

IV. THE 1930s: GROWING NATIONALISM AND INTEREST IN INDEPENDENCE

A. *Economic Problems*

Despite political uncertainty and frustration on the island, there was significant economic progress until the late 1920s, when two hurricanes and the Depression brought a virtual economic collapse. The 1930s were terrible years; starvation and unemployment abounded. The economic conditions brought with them an upsurge of nationalism among members of Puerto Rico's political and intellectual elite. Cultural nationalism coincided with the revitalization of the Nationalist Party. In the 1932 election, the Nationalist Party received less than 12,000 votes for the Senator-at-large position (only three percent of the total vote), and the rest

* Id. at 294.
of the ticket received considerably less. Following the election debacle, the Party resorted to terrorism and sabotage. As a response, in 1936, Senator Millard Tydings, with the covert support of the Roosevelt Administration, submitted a bill providing for independence in four years, with tariffs rising twenty-five percent each year. The bill was designed to stem the independence movement by forcing nationalist partisans to face harsh economic reality. The Tydings bill, and the subsequent Dorfman Report, with its bleak prophecy of Puerto Rico's economic condition, had the desired effect. Luis Muñoz-Marín and other Puerto Rican leaders reappraised the independence alternative and gave priority to the economic problems of Puerto Rico.

B. The Language Issue

The language question was also nearing a climax during this period. The issue was focused increasingly upon English as the medium of instruction. The rise of the militant Puerto Rican Nationalist Party and the strong advocacy in Puerto Rico for independence converted the question of whether the island would accept the imposition of English as the language of instruction into an issue of sovereign prerogative. President Roosevelt addressed the problem, terming the grant of citizenship an obligation to learn English.

There . . . is no desire or purpose to diminish the enjoyment or the usefulness of the rich Spanish cultural legacy of the people of Puerto Rico. What is necessary, however, is that the American citizens of Puerto Rico should profit from their unique geographical situation and the unique historical circumstance which has brought to them the blessings of American citizenship by becoming bilingual. But bilingualism will be achieved by the forthcoming generation of Puerto Ricans only if the teaching of English throughout the insular educational system is entered into at once with vigor, purposefulness and devotion, and with the understanding that English is the official language of our country.

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65 Per capita income was $118 a year; farm work—the main source of employment—paid as low as $.06 an hour. The labor class—construction workers—earned $.22 an hour. Seven out of ten persons were still illiterate and the life expectancy was only 46 years.
Congress took a similar position, despite adverse testimony by Dr. José Gallardo, the Commissioner of Education.\footnote{Hearings of the Senate Subcommittee Investigating Economic and Social Conditions in Puerto Rico, 78th Cong., 1st Sess., Pt. I, 230-31 (1943). See also Gallardo's testimony to the same effect before the Bell Committee. Hearings of the House Committee Investigating Political, Economic and Social Conditions in Puerto Rico, 78th Cong., 1st Sess., 734-35 (1943).}

The Popular Democratic Party (PDP), founded by Luis Munoz-Marin in 1938, campaigned and gained power in 1940 on the slogan that "status was not an issue" and that the question should be set aside temporarily to address pressing economic problems.\footnote{The rise of the Popular Democratic Party has been chronicled many times. A good review in English is R. Anderson, Party Politics in Puerto Rico (1965). See also K. Farr, Personalism and Party Politics: Institutionalization of the Popular Democratic Party of Puerto Rico (1973), which discusses the party after Munoz-Marin departed. C. Goodsell, Administration of a Revolution (1965) discusses the people around Munoz during the early period.} The PDP sought to transform the island from an agricultural to an industrial society by increasing private investment from outside the island. This was to be accomplished through an industrial tax exemption program, which went into effect in 1947. Other inducements included the Fair Labor Standards Act, which permitted, \emph{inter alia}, Puerto Rican industries to pay lower wages than the States under certain circumstances, Government Development Bank low interest loans, and special marketing studies.\footnote{The history of Puerto Rico's economic development is set forth in Chapter 1 of the IIL-ED study, \textit{supra} note 51, and H. Wells, The Modernization of Puerto Rico (1969).}

Although the PDP had campaigned on a platform that pledged to put aside status politics, upon accession to office it undertook new initiatives to increase autonomy. The emphasis on local autonomy permitted the PDP to resolve quickly the formal aspect of the language issue in the school system. In 1946, the Puerto Rican legislature passed a bill providing that Spanish should be the language of instruction in the public schools and that the teaching of English as a subject should be compulsory in all the public schools. The bill was vetoed by Acting Governor Manuel A. Perez, an executive branch appointee, and passed over his veto. Under the procedure then operative, the bill then went to the President. In vetoing the bill, President Truman expressly linked language to ultimate political status and stated:

\begin{quote}
I have not considered the merits of the pedagogical program which the bill would introduce into the insular public school system. I base my disapproval, instead, on the untimeliness of
\end{quote}
the measure and my feeling that the issue of Puerto Rican political status would be confused and its solution delayed by the adoption just now of a new language policy. Important as the language question may be, I regard the reaching of a permanent and satisfactory solution to political status as of greater importance, and I cannot permit a measure to stand which, in my opinion, would jeopardize that solution.70

In 1948, Puerto Rico elected its first governor and the issue was resolved in favor of Spanish as the medium of instruction. One observer noted that "Spanish will be the vehicle of instruction in the high school. This change, which responds to a long-felt need, extends indefinitely the use of the vernacular as the teaching means until the last year of high school."71 Gradually, English was reduced to the same status as any other principal subject in the curriculum.72

Although the issue of language policy being imposed from without is no longer present, the issue of the role of English in the school system73 still has political overtones in Puerto Rico. The 1966 Report of the United States-Puerto Rico Commission on the Status of Puerto Rico74 addressed the question and suggested the possibility of Statehood with only a modest cultural accommodation:

Statehood would necessarily involve a cultural and language accommodation to the rest of the federated States of the Union. The Commission does not see this as an insurmountable barrier, nor does this require the surrender of the Spanish language nor the abandonment of a rich cultural heritage. Nevertheless, the Commission expects that a decision for Statehood would denote a desire of the Puerto Rican people to share as well as contribute to the cultural heritage of the American people, to be an integral part of the American Nation as well as a State in the Federal Union.75

71 Bou, Significant Factors in the Development of Education in Puerto Rico, in SELECTED BACKGROUND STUDIES, supra note 19, at 168.
72 Hull, The English Problem, SAN JUAN REV. (June 1965).
73 Increased English Study Being Considered, San Juan Star, April 27, 1978, at 3.
74 STATUS COMMISSION REPORT, supra note 51.
75 Id. at 15. Senator Henry Jackson specifically dissented on this point to underline the language difference in relation to Statehood:

The people of Puerto Rico represent an old and rich culture. We welcome diversity; therefore, the distinctive culture of Puerto Rico presents no bar as such to Statehood. The unity of our Federal-State structure, however, requires a common tongue. We do not have to look far to see what has happened in certain countries that have failed to adhere to this fundamental practice. Surely, at a time when we
Subsequent federal bilingual education legislation supported this view. The 1978 amendments to the Bilingual Education Acts included a special provision with respect to children in Puerto Rico. The 1974 Amendment permitted the Commonwealth of Puerto Rico, like local governments in the continental United States, to improve the English proficiency of children residing in Puerto Rico. Following passage of the 1978 amendments, Puerto Rico was permitted to address in Spanish the needs of students with limited English proficiency.

As Statehood has become more seriously considered, the specific language accommodations have focused upon official bodies as well as educational institutions. The debate has centered upon the use of Spanish in the federal district court, and the availability in English of Puerto Rico Supreme Court opinions, and Puerto Rican legislation. The Supreme Court of Puerto Rico has held that "the means of expression of our people is Spanish," despite the Puerto Rican law providing that English and Spanish shall be used indiscriminately. At present, this issue is far from resolved.

V. THE ESTABLISHMENT OF COMMONWEALTH

At the initiative of the Popular Democratic Party in 1950, the United States Congress passed Public Law 600, which authorized the island to draft its own constitution, to be approved by the people of Puerto Rico and by Congress. In addition, the law repealed...
portions of the Jones Act of 1917, and renamed the remainder the Puerto Rican Federal Relations Act. During the course of approving the Constitution, which established the Commonwealth of Puerto Rico, violence broke out in Puerto Rico and in the United States. From October 30 to November 6, 1950, twenty-eight persons were killed and 419 wounded on various parts of the island. On November 1, an attempt was made to assassinate President Truman. If establishment of the Commonwealth was a compromise between Statehood and independence, it was not a compromise easily effected.

With the establishment of Commonwealth in the early 1950s, Puerto Rico acquired the type of local governmental autonomy associated with the States in the United States federal structure. Presently, Puerto Rico has its own Constitution, pursuant to which it elects the Governor and legislature; appoints judges, cabinet officials, and lesser officials in the executive branch; sets its own educational policies; determines its own budget; and amends its own civil and criminal codes. Nonetheless, Commonwealth partisans argue that more than local self-government was achieved by the 1950 legislation and that a legal entity was created with a unique status in American law. It is asserted that a Commonwealth, as an internationally recognized non-colonial State, would limit federal authority and permit an international presence. The Commonwealth, at its stage of maximum development, is conceived as a "permanent union between the United States and Puerto Rico on the basis of common citizenship, common defense, common currency, free market, and a common loyalty to the value of democracy," with the federal government retaining specifically defined powers "essential to the Union." Most important, in this view, is that a Commonwealth is not a "territory" covered by the "territorial clause" of the Constitution, neither quite obviously is it a State. Rather, Commonwealth is 

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84 The word "commonwealth" is the official translation of "estado libre asociado," which translated literally means "free associated state." P.R. LAWS ANN. vol. 1, res. 22 (1952). The English translation was the subject of considerable debate in the Constitutional Convention, but the word "Commonwealth" was adopted with only two dissenting votes. Diario de Sessiones de La Convencion Constituyente de Puerto Rico 883 (1958).


86 The compact argument is presented convincingly by the former Governor of Puerto Rico, Hernandez Colon, in The Commonwealth of Puerto Rico: Territory or State? 19 REV.
The preamble of Public Law 600 states that while "[f]ully recognizing the principle of government by consent this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." The people of Puerto Rico approved the law. Locally elected delegates drafted a constitution, which was ratified in a special referendum by the people of Puerto Rico. It was then submitted to Congress, which indicated its approval by the passage of Public Law 447. Subsequently, the United States advised the United Nations that it would no longer report with respect to Puerto Rico under article 73(e) of the United Nations


88 The care with which the Puerto Rican Constitution was drafted can be seen in ESCUELA DE ADMINISTRACION PUBLICA, LA NUEVA CONSTITUCION DE PUERTO RICO (1954). The debates are reported in P.R. Legislative Assembly, DIARIO DE SESIONES, PROCEDIMIENTOS Y DEBATES DE LA CONVENCION CONSTITUYENTE, 1951-52, (4 vols. 1954). For an analysis of the constitution, see Gutierrez, Franquil, & Wells, The Commonwealth Constitution, 285 ANNALS 33 (1953).


Whereas the Act entitled 'An act to provide for the organization of a constitutional government by the people of Puerto Rico,' approved July 3, 1950, was adopted by the Congress as a compact with the people of Puerto Rico, to become operative upon its approval by the people of Puerto Rico . . . (emphasis added).

The preamble further states "Public Law 600, Eighty-first Congress, adopted in the nature of a compact . . ." Id. (emphasis added).
Charter, since Puerto Rico was now a self-governing territory. One observer noted:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and the Puerto Rican people. A compact, as you know, is far stronger than a treaty. A compact usually cannot be denounced by either party unless it has the permission of the other.

Thus, it is argued that the language of the statutes and subsequent executive actions indicate that a "compact" was intended. In addition, the procedure set up by Public Law 600—a referendum, the drafting of the Constitution, another referendum in Puerto Rico, and subsequent approval by Congress—is similar to the procedure followed when an obligation not unilaterally revocable by the federal government is entered into by the federal government with a territory, such as when territories become States or, as in the case of the Philippines, become independent.

From the outset the non-Commonwealth parties in Puerto Rico,

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90 See part VII infra. The United Nations Charter, article 73 provides:
Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end ... (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

U.N. CHARTER, art. 73(e).

91 Memorandum by the Government of the United States of America concerning the Cessation of Transmission of Information under Article 73(e) of the Charter with Regard to the Commonwealth of Puerto Rico. Annex II, U.N. Doc. A/A.C. 35/L.121, at 8 (1953). The characterization of the status of Puerto Rico was as follows:
[C]ongress has agreed that Puerto Rico shall have, under that Constitution, freedom from control or interference by the Congress in respect of internal government and administration, subject only to compliance with applicable provisions of the Federal Constitution, the Puerto Rican Federal Relations Act and the acts of Congress authorizing and approving the Constitution, as may be interpreted by judicial decision. Those laws which directed or authorized interference with matters of local government by the Federal Government have been repealed.

Id.

seeking either Statehood or independence as the final status, questioned the concept of Commonwealth. They argued that although Congress may delegate powers to a territorial government, the broad powers granted to Congress under the Territorial Clause of the Constitution and the implied powers of the national government remain and may be exercised should the need arise. Further, they cite the legislative history of Public Law 600 to challenge the compact and Commonwealth concepts.

A. Legislative History of Public Law 600

The legislation passed in 1950 and 1952 was in three stages: (1) passage by the United States Congress of Public Law 600; (2) referendum in Puerto Rico on Public Law 600, the election of delegates to a Constitutional Convention, the drafting of a constitution, and the approval of the constitution by popular vote; and (3) approval of the constitution by the United States Congress in Public Law 447. For purposes of this analysis, the Congressional history is treated as a whole and the Puerto Rican debates as a separate part of the legislative history. Some conclusions with respect to this history are then offered.

1. Discussion in the United States Congress

The primary supporters of the legislation, Governor Munoz-Marin and Resident Commissioner Fernos Isern of Puerto Rico, did not suggest that Congress was making an irrevocable decision with respect to the status of Puerto Rico. Instead, they implied that Congress could change the law if a different status were deemed preferable at a later date. Consider, for example, the following statement by Isern:

As already pointed out, H.R. 7674 would not change the status of the island of Puerto Rico relative to the United States. It would not commit the United States for or against any specific future form of political formula for the people of Puerto Rico. It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.34

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Governor Munoz-Marin made similar statements, including:

You know, of course, that if the people of Puerto Rico should go crazy, Congress can always get around and legislate again. But I am confident that the Puerto Ricans will not do that, and invite congressional legislation that would take back something that was given to the people of Puerto Rico as good United States citizens.  

Similarly, the executive branch in its comments on the bill suggested no change in Congressional power with respect to Puerto Rico. The following observation was made by the Secretary of the Interior:

It is important at the outset to avoid any misunderstanding as to the nature and general scope of the proposed legislation. Let me say that enactment of S. 3336 will in no way commit the Congress to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status. The bill merely authorizes the people of Puerto Rico to adopt their own constitution and to organize a local government which, under the terms of S. 3336, would be required to be republican in form and contain the fundamental civil guaranties of a bill of rights . . . . The bill under consideration would not change Puerto Rico's political, social, and economic relationship to the United States.

The following comment was included in both the House and the Senate Committee Reports on the bill:

The bill under consideration would not change Puerto Rico's fundamental, political, social and economic relationship to the United States. . . . This bill does not commit the Congress, either expressly or by implication, to the enactment of statehood legislation for Puerto Rico in the future. Nor will it in any way preclude a future determination by the Congress of Puerto Rico's ultimate political status.

Proponents of the Bill suggested that Puerto Rico was gaining increased self-government similar to home rule but that no new or
permanent change of status was effected by Public Law 600. The Bill passed the Senate without a recorded dissent and passed the House with only one dissenting vote. Representative Vito Marcantonio, an ardent independence advocate, was the only congressman who raised the question of whether Congress had the power to grant the degree of self-government envisioned by Public Law 600.

After the referendum in Puerto Rico on Public Law 600 and the subsequent drafting and approval of the constitution by Puerto Rico, Congress was called upon to approve the constitution. Uncertainties as to the meaning of the new legislation and of the establishment of the Commonwealth were raised in a dialogue between Senator Malone and Chairman O'Mahoney of the Senate Committee on Interior and Insular Affairs. Once again, the ultimate authority of the Congress was affirmed. The Chairman stated that:

So far as the Constitution of Puerto Rico adheres to the principles of this law, law 600, of the Eighty-first Congress, and concerns itself with local affairs, the Congress of the United States in approving the constitution agrees that authority of the people in their local affairs within the domain and within the scope of Public Law 600 is complete and that Congress will not interfere, but if the people of Puerto Rico should step outside, if an attempt should be made to change the Constitution and deal with these matters outside the scope of the grant, I think that the authority of the Congress of the United States, under the Constitution, could not be impaired or reduced.

At one point, Representative Meader offered an amendment that would have clarified the revocable nature of the act. The amendment declared "that nothing herein contained shall be construed as an irrevocable delegation, transfer or release of the power of the Congress granted by Article IV, section 3, of the Constitution of the United States." In offering his amendment, Meader explained:

This seems to be the consensus of the legal opinion I was able to assemble within the limited period I had; namely, that the ap-

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96 CONG. REC. 9594 (1950).
97 Id. at 96-93.
99 98 CONG. REC. 6183 (1952).
proval of the Puerto Rican Constitution does not constitute an irrevocable delegation of the authority of the Congress under article IV, section 3, of the United States Constitution. My amendment simply and plainly says exactly that, and would eliminate the doubt. If the prevailing legal opinion . . . is correct, I think the amendment should be adopted. If that opinion is not correct and we are doing something more, it seems to me that in fairness to the people of Puerto Rico we ought to spell out clearly the legal powers of this new governmental unit called a Commonwealth.\textsuperscript{102}

The amendment was rejected,\textsuperscript{103} but it is not clear whether it was opposed for technical reasons or because it was thought unnecessary. No one, however, opposed it on the grounds that Congress was making an irrevocable delegation of its constitutional power over territories.

The constitution was approved by Congress conditioned upon three changes. Congress demanded (1) deletion of a provision patterned after the United Nations Universal Declaration of Human Rights recognizing the right to work, the right to an adequate standard of living, and social protection in old age or sickness; (2) addition of a provision assuring continuation of private elementary schools; and (3) addition of a provision requiring that any amendment to the constitution be consistent with the United States Constitution, the Puerto Rican Federal Relations Act, and Public Law 600. This last amendment emasculated the original Senate proposal for Congressional approval of any amendment to the Puerto Rican Constitution.\textsuperscript{104} All three changes were made by Puerto Rico and approved by the Puerto Rican Constitutional Convention.\textsuperscript{105}

2. The Debates in Puerto Rico

The Puerto Rican Constitutional Convention met from September 17, 1951 through July 10, 1952.\textsuperscript{106} As in the United States Congress, the two main issues around which the discussion revolved were the effect of Public Law 600 on the status of Puerto Rico, and the continued applicability to Puerto Rico of the Territorial Clause of the United States Constitution.

\textsuperscript{102} Id.
\textsuperscript{103} Id. at 6186.
\textsuperscript{104} Id. at 7924.
\textsuperscript{105} Res. 34, July 10, 1952.
\textsuperscript{106} Excerpts in this section are unofficial translations taken from the DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTES DE PUERTO RICO (1961 ed.) (4 vols.) [hereinafter cited as DIARIO].
The Populares were silent as to the details of the juridical situation that would occur with the adoption of the Puerto Rican Constitution. What was clear from their point of view was that a compact had been entered into which would limit Congressional power in a fashion similar to the way the Tenth Amendment limits national power over a State of the Union. Governor Munoz-Marin stated that:

"It is undoubtedly so, nor should there be doubt, that all traces of colonialism have disappeared in Puerto Rico because this is a union by compact. It is a union on the basis of the principle of mutual consent and there can be nothing which goes beyond the validity of a compact freely agreed upon between peoples, nor can there be anything greater than the free consent of a people to a form of government and to a form of relation with another people or with other peoples. It is in that sense, fellow-members of the Constitutional Convention, that we have said that the people of Puerto Rico have reached the highest possible level of political equality, and of political dignity. . . ."

The problem concerning the effect of Public Law 600 arose in connection with article VI, section 18 (originally section 10) of the Puerto Rican Constitution, which repeated almost verbatim a portion of section 10 of the Puerto Rican Federal Relations Act. The section states that criminal cases in the courts of the Commonwealth shall be conducted in the name and by the authority of "The People of Puerto Rico," until otherwise provided by law.

If one assumed that the Puerto Rican Federal Relations Act could be changed only with the consent of Puerto Rico (that a compact existed and that it included the Puerto Rican Federal Relations Act) there was no problem. If, however, the contrary was assumed (that Congress could change the Puerto Rican Federal Relations Act without the consent of Puerto Rico), the Commonwealth Constitutional provision could raise problems. The Puerto Rican Constitutional Convention participants were alert to the implications of the provision as indicated in the following statement:

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108 Statement of Governor Munoz-Marin, 4 DIARIO, supra note 106, at 2470.
109 Courts sympathetic to the "compact" notion have asserted the primacy of the Constitutional provision over the Federal Relations Act in dicta but have avoided a direct holding to that effect. See Moreno Rios v. United States, 256 F.2d 68 (1st Cir. 1958); and RCA Communications v. Government of the Capitol, 91 P.R.R. 404 (1964).
Mr. President, I ask that section 10 be eliminated because it is a terrain forbidden to us. It is already a part of the Puerto Rican Federal Relations Act. We cannot legislate concerning this, much less repeat the same provisions contained in the Federal Relations Act, without creating confusion and establishing a dualism within our Constitution between the Federal Relations Act and the Constitution which we adopt here. If the Puerto Rican Federal Relations Act already provides the same thing provided in section 10, I do not see why there is a need to repeat it. I believe it is unnecessary and I ask that it be eliminated.10

However, the section 10 Constitutional provision was retained, despite its uncertain parameters.

Perhaps the most noteworthy difference in the two legislative histories is the emphasis on citizenship. In the Puerto Rican Constitutional Convention, citizenship was emphasized along with its attendant powers. Consider, for example, the following statement:

It has been said that the Congress of the United States has power even to sell Puerto Rico because, considering Puerto Rico as a possession or a territory, it is legally qualified to get rid of it as it wishes, by virtue of the provisions of Art. IV Sec. 3, Cl. 2 of the national Constitution, which has been known as the Territorial Clause. I, as an American citizen... protest this statement that places the Congress of the United States at a level which it does not deserve, with a prestige it has not earned, with a valuation of human rights that is not possible to be held by us without offending the dignity of that Congress and of that people. We are not animals, we are not a thing. We are American citizens and the Congress of the United States, without degrading the citizenship, could never sell Puerto Rico, nor take action which would tend to go backwards in the progressive development of its internal, and later international life, regarding the solution of its political status.11

The United States Congress ignored the citizenship issue.

From the legislative history, it may be concluded that there was an irrevocable grant of authority in local affairs with no delegation of authority to resolve the ultimate status question. The matter is by no means clear, although many congressmen thought they were doing just that.12 The following statements were made during floor debate:

10 Statement of Mr. Iriarte, 3 DIARIO, supra note 106, at 2126.
11 Statement of Antonio Reyes Delgado, 2 DIARIO, supra note 106, at 440.
12 See text accompanying note 100 supra.
Mr. Bartlett. No one need have any apprehensions about a grant of undue powers under this act to the people of Puerto Rico. Congress retains all essential powers set forth under our constitutional system, and it will be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island.113

Mr. Javits. This bill does restrict, and let us have that very clear, the people of Puerto Rico to a constitution which is within the limitations of the Organic Act for Puerto Rico. Their fundamental status is unchanged. They undoubtedly will get more powers by a constitution under this act and they get them by their own designation, but their fundamental status is unchanged.114

A lengthy interchange between Representatives Meader and Bentsen illuminates both the ambiguity of the legislative history and the propriety of the interpretation of that history suggested herein.

Mr. Meader. I am concerned about the legal status of this so-called commonwealth once the Congress passes the resolution before us. I am concerned whether or not the Congress thereby will be making an irrevocable delegation of its authority under article IV, section 3, clause 2 of our Constitution. Will it be beyond the power of Congress to review any legislation adopted under this constitution as it now can do? If the Congress passes a law that is in conflict with a law adopted under this constitution by Puerto Rico, will the law passed by the United States Congress supersede that of the Puerto Rican Legislature?

Mr. Bentsen. I think the gentleman has raised an excellent point. I will try to answer it, if I may. To me it would do no more in delegating away authority than we delegate away to a State, and I think that is something that we should approach, although we do not give them as complete autonomy as the State; that we will still have every control over Puerto Rico that we have over a State, and still they will not have reached full State status in that they do not have full representation in Congress and in addition they must operate under the Federal Relations Act.

Mr. Meader. That is exactly what concerns me. I am more concerned now than before because the answer the gentleman gave would seem to be that the Congress, by passing this resolution, would have made an irrevocable delegation of authority to Puerto Rico, similar to that granted when we admit a State into the Union.

113 96 Cong. Rec. 9595 (1950) (emphasis added).
114 Id. at 9585.
Mr. Bentsen. Yes. In my interpretation I think we are doing that.\textsuperscript{115}

Representative Bentsen’s reply is the strongest direct statement that Congress was making an irrevocable delegation of its territorial power. Its importance rests in the fact that it was not an isolated opinion.

The view expressed in this article reconciles the Puerto Rican and Congressional legislative histories, while permitting a limitation on Congressional power in territories that have not acquired Commonwealth status. The compact, as set forth by the PDP, became the critical underpinning of the Commonwealth status. It was a confirmation of the moral validity of the United States-Puerto Rico relationship and basic to the concept of a mutual relationship. It created an equality in fact and in law, which would raise the Commonwealth, regardless of its precise legal consequences, to a dignity not encompassed in a territorial status. At a minimum, its implication was that henceforth status evolution was a joint determination and not a unilateral decision of the Congress. Even this minimal interpretation of the Commonwealth was questioned, although as a matter of political fact it was only reflective of the actual circumstances. The change from territory to Commonwealth was bilateral, requiring Puerto Rican support. In fact, no action of major import had been taken by the Congress since 1917 (the grant of citizenship) on any territory without requiring a corresponding popular act of acquiescence by the territorial legislature or by the territorial electorate directly. Although the threat of unilateral Congressional action in status matters may be deemed by Congress to be worthy of protection, it appears to be of theoretical rather than practical value.

The official Commonwealth position is that the scope of the compact embraces both the Puerto Rican Constitution and the Puerto Rican Federal Relations Act. The argument is that this was defined in Public Law 600, which was accepted by the Puerto Rican people. The compact may be considered a commitment not to change Puerto Rico’s status without mutual consent combined with a grant of home rule,\textsuperscript{116} the boundaries of which are limited to the matters covered by the Puerto Rican Constitution.

\textsuperscript{115} 98 CONG. REC. 6170 (1952) (emphasis added).

\textsuperscript{116} A recent district court case seems to have taken the same position. See United States v. Ortiz Perez, 465 F. Supp. 1284, (D.P.R. 1979) (holding anti-wiretapping provisions of Puerto Rico Constitution applicable in local courts but superseded by the Federal Omnibus Crime Control Act).
The United States-Puerto Rico Commission on the Status of Puerto Rico, which was charged with studying "all factors ... which may have a bearing on the present and future relationship between the U.S. and Puerto Rico,"\(^\text{117}\) confirmed the validity of Commonwealth without determining the compact issue. Its report concluded that:

> [A]ll three forms of political status—the Commonwealth, Statehood, and Independence—are vital and confer upon the people of Puerto Rico equal dignity with equality of status and of national citizenship . . . . All three status alternatives . . . are within the power of the people of Puerto Rico and Congress to establish under the Constitution . . . . With respect to questions raised on the subject of the compact, the Supreme Court of the United States is, of course, the ultimate interpreter of the Constitution and it has not declared itself on these questions. The weight of legal scholarship sustains the innovative power of the Federal Government to create a new form of association—including a binding association—in accordance with the desires of the people of Puerto Rico. It is clear that the Government entered into a solemn agreement with the Puerto Rican people in 1952 and that the agreement, referred to in the legislation as the compact, bears permanent legal consequences . . . .\(^\text{118}\)

The Status Commission's recommendation for a status referendum on the three alternatives was followed. In 1967, the people of Puerto Rico went to the polls and supported the status of Commonwealth.\(^\text{119}\)

Congressional practice has been to ignore the compact in relation to federal legislation, regardless of the impact on the Puerto Rican Federal Relations Act. Thus, Congress has changed the jurisdiction of the United States District Court in Puerto Rico, modified the increase on Puerto Rican indebtedness, and changed a host of tax and tariff regulations without requiring or acknowledging the need for Puerto Rican consent.

**B. Judicial Commentary**

The initial cases that examined the issue of compact arose in local courts soon after the establishment of the Commonwealth

\(^{118}\) STATUS COMMISSION REPORT, supra note 51, at 5-13. But see views of Sen. Jackson, id. at 21. 
\(^{119}\) The returns showed 60.41% supported "perfected" Commonwealth and 38.98% supported Statehood. Independence partisans generally boycotted the election, although some leaders did participate. The independence option received 0.6% of the vote. Puerto Rico Vote Strongly Favors a Commonwealth, New York Times, July 24, 1967, at 1, col. 1.
and were influenced by the contemporary desire to sustain the validity of the Commonwealth. These decisions clearly establish that Puerto Rico is no longer a territory but has gained, with its Commonwealth status, a new dignity. However, the legal effect of this status has been difficult to determine.\textsuperscript{120}

Recent Supreme Court decisions have followed a similar approach, initially with some hesitancy later with increased firmness. In \textit{Calero-Toledo v. Pearson Yacht Leasing Company},\textsuperscript{121} the first Supreme Court case decided on the merits since the formation of Commonwealth, the Pearson Yacht Leasing Co. attempted to prevent application of a Puerto Rican forfeiture statute by arguing that it was an unconstitutional taking of property without due process of law. The Puerto Rican Federal District Court, consisting of three judges,\textsuperscript{122} agreed. An appeal was taken directly to the Supreme Court of the United States under the terms of the statute. Under the Three Judge Court Act, three judges are required to hear a case if the petitioner is requesting the federal court not to enforce a \textit{State} statute because it is unconstitutional. At issue was whether Puerto Rican statutes were "State" statutes requiring a three judge court to decide their constitutionality. Earlier cases interpreting the law in Hawaii prior to Statehood and in Puerto Rico prior to Commonwealth had held that the word "State" did not include a territory. The Supreme Court held that Commonwealth status had changed this situation and that there was sufficient sovereignty and local control in the Commonwealth to require a three-judge district court. The case sustained the Commonwealth argument that something of legal significance happened in 1950-52, but left open the issue of whether Puerto Rico is covered by other federal statutes if "State" is mentioned. The Court indicated that Public Law 600 "offered the people of Puerto Rico a Compact whereby they might establish a government under their own constitution."\textsuperscript{123} Assuming the Court was being cautious, it was indicating the existence of a compact encompassed by the local constitution.

The case of \textit{Examining Board of Engineers, Architects and Surveyors v. Flores de Otero}\textsuperscript{124} clarified the Court's thinking. The

\textsuperscript{120} Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953); Mora v. Torres, 113 F. Supp. 309 (D.P.R. 1953). See also Colon-Rosich v. Puerto Rico, 256 F.2d 393 (1st Cir. 1958).
\textsuperscript{122} 363 F. Supp. 1337 (D.P.R. 1973).
\textsuperscript{123} 416 U.S. 663, at 671.
\textsuperscript{124} 426 U.S. 572 (1976).
case reaffirmed what had been hinted at; namely, that there was a compact and its extent was to be found within the Puerto Rico Constitution. *Flores de Otero* involved a challenge to a Puerto Rican statute that restricted the licensing of civil engineers to United States citizens. The Court reviewed, at considerable length, the history of federal legislation with respect to Puerto Rico. In discussing the 1950 legislation, it reaffirmed the compact argument. The decision referred to the legislation as being offered in the "nature of a compact" to "the people of Puerto Rico." It noted the proposed constitution for Puerto Rico and specifically discussed the Congressional approval of the document and its requirement that any amendment or revision of the document be consistent with the applicable provisions of the Constitution of the United States. Then, in critical language, the Court enunciated the consequences of this arrangement: "The condition was accepted, the compact became effective, and Puerto Rico assumed 'Commonwealth' status. This resulted in the repeal of numerous provisions of the Organic Act of 1917."

Two points should be noted here. The compact is valid, although its extent and significance is unclear. Further, Commonwealth is a specific status different from a territory. To assure that the language, "assumed Commonwealth status," was given its appropriate significance, the Court emphatically reaffirmed it later in the opinion: "We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history...."

The effect of this unparalleled relationship was unclear. In fact, the decision attached no significance to the factors of Commonwealth and compact. The Court followed traditional standards to declare unconstitutional the local government statute and to uphold jurisdiction in the Federal District Court in Puerto Rico.

The recent Supreme Court cases of *Califano v. Torres* (upholding lower SSI payments to United States citizens residing in Puerto Rico than to those residing in the States) and *Torres v. Puerto Rico* (declaring unconstitutional a Puerto Rico statute

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125 Id. at 593.
126 Id.
127 Id. at 593-94.
128 Id. at 596.
permitting a search without probable cause of baggage entering Puerto Rico) continued to pay obeisance to the Commonwealth concept without according Puerto Rico any legal benefit as a result. In *Califano v. Torres*, the concept of Commonwealth status, "without parallel in our history," was used to dismiss the equal protection argument. In *Torres v. Puerto Rico*, neither Commonwealth status nor geographical insularity was held to distinguish Puerto Rico from a State. The Court stated:

Puerto Rico then asks us to recognize an "intermediate border" between the Commonwealth and the rest of the United States. In support of this proposal it points to its unique political status, and to the fact that its borders as an island are in fact international borders with respect to all countries except the United States. Finally, Puerto Rico urges that because of the seriousness of the problems created by an influx of weapons and narcotics, it should have the same freedom to search persons crossing its "intermediate border" as does the United States with respect to incoming international travellers. . . . Puerto Rico has no sovereign authority to prohibit entry into its territory, as with all international ports of entry border and customs control for Puerto Rico are conducted by federal officers. Congress has provided by statute that Puerto Rico must accord to all citizens of the United States the privileges and immunities of its own residents. . . . In an event, Puerto Rico's law enforcement needs are indistinguishable from those of many states. Puerto Rico is not unique because it is an island. . . .

Another recent Supreme Court case discussed previously, *Harris v. Rosario*, disregarded the establishment of the Commonwealth. Puerto Rico was not treated as a State but rather, as in *Califano v. Torres*, as similar to a territory. Significantly, while reaffirming Congressional power under the Territorial Clause, the Court, for the first time, did not mention Commonwealth. Even when mentioning Puerto Rico, the word Commonwealth was not included. It is hoped that the Supreme Court was not intending a new view of Commonwealth status.

The idea of a compact establishing a relationship different from that of a territory was implemented and utilized in connection with the negotiations for union put forth by the Trust Territory of the Pacific Islands and negotiated by the Department of State. In

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131 435 U.S. at 3 n.4.
132 442 U.S. at 472-74.
133 446 U.S. 651 (1980).
that situation, the United States entered into a bilateral relationship with the Northern Marianas, which, by its terms, required mutual consent before certain of its provisions could be changed. For the remainder of the Trust Territory of the Pacific Islands, a Compact of Free Association was offered, which again was of binding character with respect to a number of its provisions.\(^\text{134}\)

Commonwealth partisans in Puerto Rico similarly have attempted to clarify the content of the relationship and its consequences on specific federal laws.\(^\text{135}\) The Ad Hoc Advisory Group for Puerto Rico, composed of an equal number of Puerto Ricans and Stateside representatives,\(^\text{136}\) drafted a proposed compact between Puerto Rico and the United States.\(^\text{137}\) The proposed compact focused


\(^{135}\) In 1959, the Commonwealth introduced comprehensive legislation in both Houses of Congress, S. 2023 and H.R. 5926, to clarify the Commonwealth role in the U.S. federal structure. After hearings on S. 2023 were held late in the Spring of 1959 by the Senate Committee on Interior and Insular Affairs, a substitute measure was introduced by Senator Murray, the Chairman of the Committee, and Dr. Fernos-Isern, the Resident Commissioner of Puerto Rico. These later bills (S. 2708 and H.R. 9234) were modifications of the original bills, having taken into consideration legislative and executive branch comment on the bills as first introduced. Extensive hearings were held in Puerto Rico on these later bills, but none were reported out of the Senate or House Committees. 105 Cong. Rec. 1023, 1292 (1959). The Commonwealth proposed in the Fernos-Murray Bill that federal laws apply in Puerto Rico (1) to the extent that they could be applied if Puerto Rico were a State, (2) "insofar as they are consistent with this compact and are otherwise applicable," and (3) if they specifically mention the Commonwealth of Puerto Rico. The latter version of the bill modified this position. The requirement that federal law be consistent with the "compact" was changed so that only the internal revenue and tariff laws were excluded from the bounds of federal legislative authority. But most importantly, an interesting bifurcation was made between legislation enacted pursuant to federal powers which apply to a State and legislation enacted pursuant to "other powers" (the territorial clause). In the former case, the legislation would apply without the requirement of legislative concurrence; in the latter, Puerto Rican acceptance would be required. H.R. 5926, 86th Cong., 1st Sess. art. IX (1959); H.R. 9234, 86th Cong. 2d Sess. art. IX (1959).

\(^{136}\) The Ad Hoc Advisory Group for Puerto Rico was co-chaired by former Gov. Luis Munoz-Marín and Sen. Marlow Cook.

specifically on the ability of Puerto Rico to restrict the application of federal law to assure the jurisdiction of Puerto Rico in areas distinctly within its geographic confines, including the territorial seas adjacent to Puerto Rico. It attempted to limit the federal government's freedom of action with respect to Puerto Rico in a number of areas, either by requiring consultation (international trade, immigration into Puerto Rico, security and common defense) or by granting authority to the islands over matters previously under federal control (control over ecology and environmental affairs). The proposed compact included a number of statements suggesting that Puerto Rico had a role in the international community and constituted "an autonomous body organized by their own free and sovereign will." International representation consistent with the functions of the United States as determined by the United States and the Governor of Puerto Rico was to be permitted on a case-by-case basis. The Supreme Court was to be the final arbiter of matters justiciable under the compact. Furthermore, various restrictions on district court jurisdiction were imposed, likening it to that of the island court.

The proposed compact was introduced in the House of Representatives and the Senate in 1975. Although hearings were held in both Houses, the proposal went no further. Subsequently, President Ford, who had been silent as to the compact, issued a statement favoring Statehood for Puerto Rico and put forth implementing legislation, which suggested a receptivity toward Statehood never before indicated at the White House level. In 1978, the Carter Administration supported a new status referendum in 1981 for Puerto Rico and Congress, for the first

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138 Proposed Compact, supra note 137, at § 1.
139 Id. §§ 6(f), 16, 4.
140 Id. § 13.
141 Id. § 1.
142 Id. § 2(c).
143 Id. § 2(b)(4).
144 Id. § 15.
time, indicated a willingness to abide by such a status referendum, including the option of Statehood. The judiciary began to suggest a limitation on the unincorporated versus incorporated territory distinction, which had been the basis of the Commonwealth's flexibility. This limitation is indicated in the following language:

Whatever the validity of the old cases, *Downes v. Bidwell*, *Dorr v. United States*, and *Balzac v. Porto Rico*, in the particular historical context in which they were decided, [they] are clearly not authority for questioning the application of the Fourth Amendment—or any other provision of the Bill of Rights—to the Commonwealth of Puerto Rico in the 1970's. As Mr. Justice Black declared in *Reid v. Covert*: 'Neither the cases nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.'

It can be concluded that Commonwealth status and the compact argument has gained some modest support in the various branches of the government. However, the long range impact and support within the federal government is largely dependent on political attitudes in Puerto Rico. The end of the hegemony of the Commonwealth Popular Democratic Party signalled an unclear direction in Puerto Rico.

VI. THE APPLICABILITY OF FEDERAL LAW

Commonwealth advocates have sought general exceptions to federal law for the purposes of preserving the island's national identity and limiting federal power. The Commonwealth's Proposed Compact of 1975 would have required the specific mention of the Free Associated State of Puerto Rico in any federal law before it may be applied to Puerto Rico; further, the compact required, in case of an objection by the Governor or Resident Commissioner, a finding by Congress that the law in question was "essential to the interests of the United States" and "compatible
with the . . . compact." The Puerto Rican effort to obtain this general exception reflected the lack of Congressional recognition in practice of the Commonwealth or the compact. It also reflected the lack of significance given to the local condition exception in section 9 of the Puerto Rican Federal Relations Act, which states that "[the] statutory laws of the United States not locally applicable, except as hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws. . . ." This phrase, or its equivalent, has been in every initial Congressional act governing a territory, including the District of Columbia, since the act establishing a government for the territory of Wisconsin. The phrase, first applied to the Puerto Rican situation in the Foraker Act of 1900, was important because not all provisions of the Constitution were made applicable to Puerto Rico. Congress justified the omission by pointing to similar omissions in previous territorial legislation. With respect to federal statutory law, the section became relatively unimportant, as it was interpreted as referring only to statutes of general application in which Puerto Rico was not mentioned specifically. One court stated that "section 9 has no application to acts expressly applicable to District Courts of the United States. It only has reference to general acts that are without special application, but are broad

153 Proposed Compact, supra note 137, at § 11(b).
155 Id. § 734. The phrase "not locally applicable" is a grammarian's nightmare, but its intent, that federal law applies unless local conditions are such that it should not apply, has never been questioned (emphasis added).
156 SENATE COMM. ON PACIFIC ISLANDS AND PUERTO RICO, TEMPORARY CIVIL GOVERNMENT FOR PUERTO RICO, S. REP. No. 249, 56th Cong., 1st Sess. 6 (1900).
157 The Wisconsin Act's language was: "[T]he laws of the United States are hereby extended over, and shall be in force in, said Territory, so far as the same, or any provisions thereof may be applicable." Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 15.
158 Compare the language in the Organic Act for the Territory of New Mexico: "[T]he Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States." Act of Sept. 9, 1850, ch. 49, § 17, 9 Stat. 452.
159 See S. REP. No. 249, supra note 156, at 3-7. Dr. Jose Trias Monge, the Chief Justice of the Puerto Rico Supreme Court and a leading expert in United States-Puerto Rican relations, is reported to have noted the desire of Congress by this section to extend federal law to newly acquired territories where an absence of law exists. Since Puerto Rico had a Code of Laws in 1900, he argued that its inclusion in the Foraker Act was unnecessary. Rodriguez-Antongiorgi, Review of Federal Decisions on the Applicability of United States Laws in Puerto Rico Subsequent to the Establishment of the Commonwealth of Puerto Rico, 26 REV. JUR. U.P.R. 321 (1957).
enough to apply to the possessions, and in their purport are properly applicable thereto.\textsuperscript{160}

In any event, the section was applied infrequently because courts divined legislative intent easily. Prior to Commonwealth the word "possessions" or "territory" included Puerto Rico, although the word "State" did not. The Elective Governor Act of 1947 attempted to render the exemption more meaningful by giving the executive branch power to apply the section 9 exception where it was not specifically mentioned.\textsuperscript{161} Thereafter, the President appointed a nine-person Advisory Commission on the Relation of Federal Laws to Puerto Rico,\textsuperscript{162} composed of leading lawyers and judges from the States and Puerto Rico. The Commission concluded that the situation did not require that the President exercise his power to exempt Puerto Rico from the terms of a particular federal law, although it did call attention to three specific federal laws—the Coastwise Shipping Laws, the Labor-Management Relations Act of 1947, and the Fair Labor Standards Act—which in its view warranted further investigation.\textsuperscript{163} Public Law 600, as introduced, contained a provision permitting the President, if local conditions warranted, to except Puerto Rico from any federal law not expressly made applicable to it.\textsuperscript{164} But Public Law 600, as finally passed, did not contain this Presidential authority.

With the advent of Commonwealth, section 9 of the Puerto Rican Federal Relations Act gained importance, as it was employed to question the applicability of federal law in a variety of situations, even where Puerto Rico was mentioned specifically in the statute or where the statute previously had applied to Puerto Rico. The precursors of the section 9 exception were formulated when communications were limited and Congress was relatively uninformed as to the needs of frontier territories. The

\textsuperscript{161} Act of Aug. 5, 1947, ch. 490, 61 Stat. 772 (repealed 1950). The law provided:

The President of the United States may, from time to time, . . . promulgate executive orders expressly excepting Puerto Rico from the application of any Federal law, not expressly declared by Congress to be applicable to Puerto Rico, which as contemplated by section 9 of this Act is inapplicable by reason of local conditions. . . .

\textit{Id.} § 6(3).
\textsuperscript{162} Exec. Order No. 10,005, 3 C.F.R. 822 (1948).
\textsuperscript{164} S. 3336, 81st Cong., 2d Sess. § 5, 96 CONG. REC. 8321 (1950).
institutions in the territories were primitive and quite different from those in the rest of the United States. Under the circumstances, territorial exceptions from federal legislation were frequently necessary. Today, communications are much improved and Congressional awareness of Puerto Rico's problems is more acute. As a result, there has been very limited judicial exception to federal law. Courts have expressed fear that cavalier application of section 9 would result in "chaos." The judiciary has failed to apply a federal statute to Puerto Rico in only one case since 1952.

If the general exceptions to federal law have been infrequent, special treatment under federal law has not been. Many issues now arise in connection with this special treatment, both where Puerto Rico alone has been treated specially and where it has been joined by other non-State areas for special treatment. Criteria for the Congressional special treatment are non-existent and decisions have resulted from a series of special political or economic circumstances. In view of the difficult situation, Congress has considered a new Commission on the Applicability of Federal Law to Insular Areas, which would include Hawaii, in addition to non-State areas.

The special treatment of Puerto Rico is reviewed herein in the context emphasized previously: cultural preservation and economic and political participation.

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167 The proposed inclusion of Hawaii indicates that geography as well as status are important variables.
A. Cultural Preservation

1. Jurisdiction of Federal Courts

All major institutions in Puerto Rico, both federal and local, experienced the strain and tension involved in the status debate and Commonwealth development. The role of the federal court in Puerto Rico has been challenged because historically it has been treated differently from federal courts in the States and differently from territorial courts within the United States experience.\(^{168}\) Central to the question was the fact that, at the time of United States acquisition of Puerto Rico, Puerto Rico had a functioning legal system generally following Spanish civil law enforced through a local court system conducted in Spanish. The United States, in addition to attempting to impose the English language upon the populace, introduced a number of federal laws and, eventually, the Anglo-American common law.\(^{169}\)

To enforce these new laws the Federal District Court of Puerto Rico was established. Not surprisingly, it was required to conduct proceedings in English. To Puerto Rico politicians at the time and to many modern scholars, establishment of the federal district court was an imposition of United States law and cultural values.\(^{170}\) Although Puerto Rican politicians urged the court’s abolition at the outset, its jurisdiction was extended and the selection of judges changed from election to appointment, arguably to meet the perceived needs of Stateside contractors in Puerto Rico. Such developments reinforced the island’s hostility to the court’s

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\(^{169}\) Report of the Commission to Revise and Compile the Laws of Puerto Rico (1901). This commission was created in the Foraker Act, ch. 191, § 40, 31 Stat. 86 (1900).

\(^{170}\) The leading legal historian in Puerto Rico has expressed the view that the establishment of the federal district court and the Puerto Rican law schools were key acts of cultural imperialism. See Delgado Cintron, El Tribunal Federal como Factor de Transculturacion en Puerto Rico, 3 REV. DE DERECHO HUMANOS 112 (1973) and Delgado Cintron, Las Escuelas de Derecho de Puerto Rico 1790-1916, 41 REV. JUR. DE U.P.R. 7 (1972). See also G. De Granda Gutierrez, supra note 21.
presence. Currently, jurisdiction and status of the United States District Court in San Juan is similar to federal district courts on the mainland. Appeals from this court are akin to those of any other district court, i.e., to the United States Court of Appeals for the First Circuit and then by certiorari or appeal to the Supreme Court. Appeals from the Supreme Court of Puerto Rico, like those from the highest State courts, are to the Supreme Court of the United States.

In other respects, the United States judiciary and Congress have been sensitive to local autonomy. There are modest distinctions, for example, in connection with jurisdiction, favorable to local autonomy. No suit restraining the assessment or collection of a tax imposed under the laws of Puerto Rico may be maintained in a federal court, although in a comparable situation in the States the enjoining of a State tax is barred only if there is a plain, speedy, and efficient remedy in the State court. Similarly, although the Supreme Court has the power to formulate criminal rules for all federal trial and appellate courts, and for the Supreme Court of Puerto Rico, in the exercise of its discretion, the United States Supreme Court has never applied the power to the Puerto Rican Supreme Court.

Sensitivity to local autonomy is best seen in the evolution of federal court deference to local court construction of local law. This deference was applied to Puerto Rico in 1914 in strong terms. Nonetheless, the First Circuit continued to reverse the Supreme Court of Puerto Rico in a large number of cases on the

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171 Delgado Cintron, El Tribunal Federal como Factor de Transculturacion en Puerto Rico, supra note 170, at 123-25.
172 Miranda v. United States, 255 F. 2d 9 (1st Cir. 1958); see also Americana of Puerto Rico, Inc. v. Kaplus, 240 F. Supp. 854 (D.N.J. 1965); and Beresford, Commonwealth Status and the Federal District Court of Puerto Rico, supra note 168.
177 The principle was first enunciated in Sweeney v. Lomme, 89 U.S. (22 Wall) 208, 213 (1874).
basis of a different interpretation of local law.\textsuperscript{179} As a result, in 1940, in Bonet v. Texas Co. of Puerto Rico, Inc.,\textsuperscript{180} Justice Douglas stated the rule even more strongly:

For over sixty years this Court has consistently recognized the deference due interpretations of local law by such local courts unless they appeared to be clearly wrong. . . . We now repeat once more that admonition. . . . To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. . . . \textit{For to justify reversal in such cases, the error must be inescapably wrong; the decision must be patently erroneous.}\textsuperscript{181}

Chief Judge Calvin Magruder of the First Circuit subsequently suggested a graceful departure from this type of review. He contended that Congress, in approving the Commonwealth constitution, impliedly withdrew federal court jurisdiction over local questions.\textsuperscript{182}

The greatest source of dispute over the role of the federal district court is the requirement that its proceedings and judicial process be conducted in English. The language requirement was first imposed in the Foraker Act of 1900\textsuperscript{183} and is now viewed as a vestige of the explicit attempt to Americanize the island.\textsuperscript{184} Within the status politics of the island, the issue has a high degree of symbolic significance.\textsuperscript{185} Both Statehood advocates and Commonwealth partisans have argued for the elimination of the requirement, although federal judges in Puerto Rico and the United States have resisted.\textsuperscript{186} The Court Interpreters Act of 1978 provid-

\textsuperscript{179} Prior to 1964, the First Circuit reviewed opinions of the Supreme Court of Puerto Rico. Following the enactment of 28 U.S.C. § 1258 (1966), the decisions of the Supreme Court of Puerto Rico, like those of any State supreme court, are reviewable only by the United States Supreme Court.

\textsuperscript{180} 308 U.S. 463 (1940).

\textsuperscript{181} Id. at 470-71 (emphasis added).

\textsuperscript{182} Marquez v. Aviles, 252 F. 2d 715 (1st Cir.), cert. denied, 356 U.S. 952 (1958).


\textsuperscript{185} Delgado Cintron, \textit{El Tribunal Federal como Factor de Transculturacion en Puerto Rico}, supra note 170.

\textsuperscript{186} Turner, \textit{Corrada Again Tries to Bring Spanish to Federal Courts}, San Juan Star, Mar. 16, 1979, at 6.
ed for bilingual interpreters where a party or witness "speaks only or primarily a language other than the English language."\(^{187}\) This broad statute, applying throughout the United States, meets the Puerto Rican need in part, although it did not permit, as Puerto Rico had urged,\(^{188}\) the filing of pleadings in either language or the conduct of the trial in Spanish unless the court decided that it would be more convenient in a particular case to require English.\(^{189}\) In 1980, the House acquiesced to Puerto Rican wishes and agreed to the use of Spanish in specific cases.\(^{190}\) However, the Senate required the use of English exclusively if Puerto Rico's status were changed to Statehood.\(^{191}\) In recent years, the Puerto Rican legal community, particularly its Commonwealth and independence partisans, have supported the development of a Puerto Rican legal system emphasizing the Spanish heritage.\(^{192}\) The role of the federal district court, therefore, is likely to be a continuing issue.

2. **International Personality of the Commonwealth**

Commonwealth supporters have continuously sought an international presence for Puerto Rico in order to obtain international and United States recognition of their status, a broader forum for their views, and as a means to emphasize the island's distinctive character.\(^{193}\)

Commonwealth advocates have pressed for participation by Puerto Rico in the United Nations associated agencies such as the Economic Commission on Latin America; regional organizations such as the Caribbean Development Bank; and industrial con-

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\(^{188}\) Resident Commissioner Benitez introduced a separate section with respect to the district court on the island, which failed to be reported out of the Committee. H.R. 10129, 95th Cong., 1st Sess. (1977).

\(^{189}\) See Proposed Compact, supra note 137, at § 15(b). The requirement of an English speaking jury in the federal court has also been challenged without success. Pala, *Suit on English Requisite for Jurors Dismissed*, San Juan Star, Mar. 17, 1979, at 3.


\(^{191}\) See part IV, § B supra.

\(^{192}\) TRIAS MONGE, EL SISTEMA JUDICIAL DE PUERTO RICO (1978); see generally Garcia-Cruz v. El Mundo (0-78-210) (P.R. 1979) (Rigau, concurring).

\(^{193}\) Despite the ban of article 1, section 10, States have been permitted to enter into compacts with other States and foreign governments without Congressional consent. Virginia v. Tennessee, 148 U.S. 503, 518 (1893). See also McHenry County v. Brady, 37 N.D. 69, 163 N.W. 540 (1917). Frankfurter & Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 749 (1925), lists eleven interstate agreements made without Congressional consent, some expressly approved by the Supreme Court.
ferences on trade. Scholars and advocates, citing cases excepting Puerto Rico and the Philippines from the compact clause of the Constitution have noted the possibilities of an international role both under United Nations practice and United States Constitutional doctrine. A number of Associated States have been permitted, and even encouraged, to join various United Nations international organizations such as the ILO and the Economic and Social Commission on Asia and the Pacific (ESCAP). Nevertheless, there has been consistent resistance in the executive branch, particularly in the State Department, on various grounds that for the purposes of the compact clause Puerto Rico should be considered a State. The following typifies this viewpoint: "[It is] easy to imagine the anarchy that would result within the Federal system if states were allowed to contract external ties without the consent or supervision of the Federal government. There is no reason why Puerto Rico or any state should be exempt from this consideration." The Philippines precedent is dismissed on the ground that Commonwealth in that instance was a transition to independence.

The long-term Puerto Rican interest in the Caribbean was accommodated to some degree by permitting Puerto Rican membership in the Caribbean Development Bank. The procedure adopted for such permission was a lengthy one, including special Congressional action and a requirement that the President transmit to the Caribbean Development Bank an instrument stating that Puerto Rico has the authority to conclude an agreement of accession. Nonetheless, the language requires approval of any agreement by the United States Secretary of State. The Caribbean Development Bank has not as yet permitted Puerto Rico membership. Perhaps, the refusal is based on Puerto Rico's nonindependent role, although cultural and racial differences may be factors as well.

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B. Economic and Political Participation

1. Economic Participation

Of all United States off-shore, non-State areas, Puerto Rico has taken the largest economic strides since World War II. The dimensions of the Puerto Rican economic “miracle” are indicated by the statistics on aggregate income. Between 1947 and 1974, Gross Domestic Product (GDP) rose from $500 million to nearly eight billion dollars, or at a compounded rate of slightly over ten percent per year. Even with an adjustment for inflation, real GDP increased at a rate of seven percent per annum, or at a real per capita trend rate of about five percent per year. By any standards of international comparison, such an achievement is spectacular. Despite tremendous improvements in the standard of living, however, economic problems remain. Most disturbing is the island’s continuing high unemployment rate. The rate consistently has been about ten percent despite considerable migration of Puerto Rican workers to the United States mainland. During the recession period from 1973-1976, unemployment soared to over twenty percent.

A key to Puerto Rico’s development is the special relationship of the island to the mainland. In many critical areas, the possibilities for development are both limited and enhanced by the relationship. Within Puerto Rico, the Commonwealth status has been rationalized in large measure on the basis of economic benefit; to wit, the series of federal laws extending special treatment to Puerto Rico. This “fiscal autonomy” embraces the tax exemption, the exception to the full-scale application of the United States minimum wage laws, and Puerto Rico’s position within the common market of the United States. This combination, which formed the key economic framework for the industrialization of Puerto Rico from 1944 to 1968, is still present, but increasingly is subject to official questioning and reconsideration.

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199 But see Cabranes, Puerto Rico: Out of the Colonial Closet, 33 FOREIGN POLY 66 (Winter 1978-79), which points out that these key economic elements predated Commonwealth. He argues that Commonwealth did not cause the economic miracle but was its benefactor. Id. at 81.

Puerto Rico's tax status has been a key federal benefit. Since 1900, Puerto Rico has been treated specially for the purposes of United States taxation. Section 14 of the Foraker Act of 1900, which except for its last phrase is also section 9 of the Puerto Rican Federal Relations Act, provides as follows:

That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws, which, in view of the provisions of section three, shall not have force and effect in Puerto Rico.\(^\text{201}\)

The section 3 reference related to the provision that Puerto Rican manufactured goods entering the United States would incur duties and tax equal to the internal revenue tax imposed on similar articles in the United States. The funds so collected would be returned to the Puerto Rican Treasury.\(^\text{202}\) A provision equivalent to section 3 is included in the current Internal Revenue Code.\(^\text{203}\) The original purpose of the exception to the internal revenue laws was to protect United States manufacturers against Puerto Rican manufactured items, as well as to finance Puerto Rican government expenditures.\(^\text{204}\) Furthermore, the exception arose prior to the income tax, when the internal revenue laws encompassed only various excise taxes\(^\text{205}\) and a special wartime

\(^{201}\) Ch. 191, § 14, 31 Stat. 80 (1900) (emphasis added).

\(^{202}\) Exactly what is to be returned to Puerto Rico has been the subject of recent litigation. Puerto Rico and the Virgin Islands brought action against the United States seeking the return of gasoline revenues retained by the United States which were derived from a tax of $.04 per gallon imposed by the United States on initial sale of gasoline in the United States by a producer or importer. The court of appeals reversed the district court and held that the statute covered "equalization" taxes and that the gasoline tax was not an equalization tax since it was a tax on "sale" not "manufacture." Puerto Rico v. Blumenthal, 642 F.2d 622 (D.C. Cir., Oct. 17, 1980), rev'g No. 75-1035, (D.D.C., Oct. 10, 1978), cert. denied, 101 S.Ct. 2315 (1981). The reasoning of the appellate court is, as the court itself explicitly admitted, extremely complex and driven, and appears at times, to be goal-oriented rather than confined to an analytical examination. Thus, the court (1) extends the reach of the statute to absurd lengths to find "ambiguity"; (2) gives considerable weight to the administrative interpretation by the party in interest and; (3) focuses on form rather than substance to distinguish between excise taxes on liquor and the tax on gasoline.

\(^{203}\) I.R.C. § 7652(a).

\(^{204}\) Expectations were that tariffs would generate $2,000,000 and internal revenue taxes approximately $1,000,000. S. REP. No. 240, 56th Cong., 1st Sess. 8 (1900).

\(^{205}\) Between 1868 and 1913, excise taxes on liquor and tobacco accounted for approximately 90% of total revenue collections. S. SURREY & W. WARREN, CASES AND MATERIALS ON FEDERAL INCOME TAXATION 4 (1960).
levy. The section granting the exception, however, has been carried forward and reenacted with minor changes in succeeding years, although there were no longer any duties levied on Puerto Rican goods entering the States and the internal revenue laws included the income tax.

In 1921, the federal income tax laws were amended to treat possession income specially by deferring any tax on income from such sources until that income was received in the States. This amendment arose partly as a result of the general desire not to tax foreign source income in order to enable domestic companies to compete more readily abroad and partly because of the refusal of a number of domestic companies doing business in the Philippines to pay taxes to the United States government after having paid taxes to the government of the Philippines. Beginning in 1948, Puerto Rico coupled this federal tax benefit with its own tax exemption program, Operation Bootstrap, in order to attract new industries to the island.

In recent years, the federal government and Puerto Rico have made major changes in the tax treatment of corporations doing business in Puerto Rico, although the general principle of tax benefit as a result of doing business on the island has remained. The Federal Tax Reform Act of 1976 replaced Internal Revenue Code section 931 with a new section 936 which, instead of excluding Puerto Rican source income for tax purposes, provides an automatic tax credit on island income. Because dividends distributed to United States parent companies are less subject to tax under section 936 than under section 931, Puerto Rico passed its own tollgate tax levying a ten percent tax on dividends paid by

206 The gross receipts tax lasted from 1898 until 1902. Id. at 8.
207 Revenue Act of 1921, ch. 136, §§ 260, 262, 42 Stat. 227 (codified at I.R.C. §§ 932,933). It should be noted that, in 1954, section 260 was amended so that the “section shall have no application in the case of a citizen of Puerto Rico.” I.R.C. § 932.
209 See 61 CONG. REC. 5874-75, 5884-85 (1921) (remarks of Sen. Snoot); 61 CONG. REC. 649 (1921) (remarks of Sen. Townsend); 61 CONG. REC. 6998 (1921) (remarks of Sen. McCumber).
211 I.R.C. § 936. A comparison of the statutory provisions under section 931 and section 936 is found in DEPT OF COMMERCE, II ECONOMIC STUDY OF PUERTO RICO 76 (Dec. 1979). See also The Operation and Affect of the Possessions’ Corporation System of Taxation, in [1979] DEPT TREAS. SECOND ANN. REP.
Puerto Rican derived earnings.\textsuperscript{212} The section 936 program, as it now stands, still permits Puerto Rico to attract United States-based private industry to the island on the basis of tax incentives. What section 936 indicates, however, is the threat of major changes, including the removal of the tax exemption at federal initiative, contrary to Puerto Rican wishes.\textsuperscript{213} In 1978, Puerto Rico amended its own tax laws to provide a substantial, rather than total, exemption, a modest employment incentive, and a tax conversion system designed to encourage change from the "pre-existing" to the "new" incentives program.\textsuperscript{214} Nonetheless, assuming that the taxpayer will derive income from Puerto Rico, the interaction of federal and Puerto Rican tax laws still provides substantial tax benefits.

To recapitulate, the taxation exemption was established unilaterally by the Congress as an administrative convenience and in response to Stateside constituent pressures. Until 1940, it was not particularly significant, although its retention is currently an integral part of Puerto Rican policy because of its use as an industrial incentive. Even Statehood advocates envision its continuance for a considerable period of time.\textsuperscript{215} However, the structure of the exemption is unusual. There are many technical decisions such as when intercorporate transfers are taxable, which frequently are determined by the Internal Revenue Service in relation to areas quite removed from Puerto Rico. Furthermore, the precise benefits of the exemption vary considerably depending upon the total tax and the interpretation of a number of economic transactions.\textsuperscript{216}

The tax structure is also contrary to the principle of United


\textsuperscript{213} [1978] DEP'T TREAS. ANN. REP. 12.

\textsuperscript{214} CRB Signature Ends ERA, San Juan Star, at 1, col. 1; see also \textit{Puerto Rico Economic Development Administration, Summary of the New Industrial Incentives Program} (1978).

\textsuperscript{215} Governor Romero-Barcelo has stated that even after Statehood he would expect Puerto Rico to have some special tax treatment for approximately 20 years. Romero-Barcelo, \textit{Puerto Rico, USA: The Case for Statehood}, 59 FOREIGN AFFAIRS 60 (Fall 1980).

States citizenship. For the purpose of taxation, a Puerto Rican is
treated as an alien and the Puerto Rican geographic area as
foreign ground. This, of course, is consistent with the United
States attitude toward economic participation by Puerto Rican
citizens, but quite inconsistent with the grant of citizenship itself.
A preferable analysis of the Puerto Rican tax exemption is to
view it as an industrial incentive to a particular area. Structurally,
the exemption should be conceived as separate from source in-
come rules based on investment in foreign areas. The fact is that
Puerto Rico is not alien ground and its citizens are not aliens.
Although it may be bureaucratically convenient to treat Puerto
Rico in this fashion within the Internal Revenue Code, the result
is to torture the island's political character even further.

The discriminatory treatment of Puerto Rican citizens and
Puerto Rico under various federal programs elevates the tax ex-
emption issue to one of major debate in the federal government.
In many quarters, including the Supreme Court, the rationale
for the unequal treatment has been the fact that Puerto Rico does
not pay taxes. Although the question of economic participation as
a requisite of United States citizenship has not been the position
of the Supreme Court, it seems that if citizenship status is to be
meaningful, it must involve equal treatment with United States
citizens where individual entitlement programs are involved. The
test in these programs is not contribution but need and, in
general, those who have contributed least financially receive, or
should receive, the larger benefits. Tax payment is simply irrele-
vant. Participation should be, like conscription, part of the
benefits or obligations of citizenship.

The general issue of Puerto Rico's contribution to the federal
treasury arose in connection with the proposed compact. It was
suggested by Munoz-Marin that a contribution by Puerto Rico as a
 corporate entity, rather than a payment of taxes by individual
citizens of Puerto Rico, is preferable. He stated:

[S]ince residents of Puerto Rico pay no taxes, except marginally,
into the Federal general fund, this is a lack that must be cor-
rected. I have been reminding my people since the founding of
the Commonwealth that this fact must at some time be faced. I
had thought that the new Compact would give the opportunity
for instrumenting this by an agreed-to formula for initiating and
increasing payments from Puerto Rico to the United States

through appropriations by the Legislature of Puerto Rico in the exercise of its traditional and well-rooted fiscal autonomy. I regret that the United States side of the Ad Hoc Committee expressed doubts about the general proposal. I appreciate the nature of those doubts: the United States taxes citizens, it does not exact tribute from bodies-politic. But if it taxed Puerto Ricans in Puerto Rico without voting representation in the tax-legislating body, it would not only be violating a basic principle of the American Revolution, but would be destroying Puerto Rico's fiscal autonomy, without which progress already achieved would not have happened, could now be destroyed, and future development would be tragically thwarted. 218

The conclusion Munoz-Marín reached was to establish a special fund, which would make payments to the United States as a function of the federal grants Puerto Rico receives.

However, others had equally strong beliefs on the issue of taxes. Various congressmen believed that because citizenship is individual, taxation should also be on an individual basis. Thus, Senator Buckley, in a separate statement on the proposed compact, stated:

I do not believe that the non-taxpaying residents of a largely autonomous Puerto Rico should have an automatic right to share on an equal basis in all the benefits to which the taxpaying residents of the fifty states may be entitled by virtue of programs enacted by the representatives elected from the fifty states to the Congress. I doubt the permanency of any relationship in which Puerto Rico is spared the burdens of participation in the larger American enterprise while remaining entitled to its benefits. 219

The point in time when Puerto Rico should pay and the method of making the payment are two issues that need to be addressed. The poverty of Puerto Rico has resulted in Puerto Rican officials suggesting delay in payment until Puerto Rico's per capita income is equal to, or some percentage of, the poorest State of the Union. This is appropriate only if "corporate entity" rather than individual payments are envisioned. The approach should be taxation on individuals; payments made by United States citizens in Puerto Rico on their individual income. Corporations attracted by the industrial incentive could, perhaps, be treated differently.

218 Report of the Ad Hoc Advisory Group, supra note 137, at 54.
b. **The Fair Labor Standards Act**

Other aspects of the economic regulatory formula bear little relationship to status goals, but result from legislative pressures, economic need, or historical accident. Both Commonwealth and Statehood partisans adopted positions for equal treatment with States or for unique treatment based on economic advantage. Both Commonwealth and Statehood partisans desire to be treated equally with States in federal grant-in-aid programs, and want special trade and energy treatment.\(^{220}\)

The Fair Labor Standards Act (FLSA),\(^{221}\) which sets minimum wages, formerly contained special provisions\(^ {222}\) permitting some employers in Puerto Rico to pay less than the minimum wage. As a result, average hourly earnings in manufacturing in Puerto Rico for 1975 were $2.65 an hour, only fifty-six percent of the mainland figure.\(^{223}\) When the FLSA was enacted in 1938,\(^ {224}\) it was fully applicable to Puerto Rico.\(^ {225}\) Since the minimum wage established by that law (twenty-five cents an hour with phased increases to thirty and forty cents an hour within seven years) generally was below the prevailing wages in the United States, the effect on the

\(^{220}\) The selection of topics discussed in the text is arbitrary. Others topics of importance on which Commonwealth and Statehood advocates agree are: the desire to be removed from the Coastwise Shipping laws, environmental regulations, and extension of Puerto Rican boundaries under the Submerged Lands Act. Environmental protection and maritime regulation are subject to federal decisionmaking without Puerto Rican input. Nevertheless, Puerto Rico frequently has been granted special exceptions and benefits. The issue is related in some detail to the three areas noted in *Institute of International Law and Economic Development, 3 Economic Effects of Federal Program Policies in Puerto Rico* ch. 4, (1978). The issue of submerged land is also discussed in Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights*, 88 *Yale L.J.* 825 (1979).

mainland was not disruptive. In Puerto Rico, however, where the prevailing wage scale in the needlework trade was about four cents an hour and in manufacturing about half the newly-established minimum, there were immediate repercussions. Needlework exports, for example, declined from twenty million dollars in 1937 to five million dollars in 1940. As a result, in 1940, by a separate amendment to the Fair Labor Standards Act, Puerto Rico was excepted from the minimum wage established for the Stateside laborer. Instead, a special committee was appointed to set wages for Puerto Rico and the Virgin Islands.

The 1961 amendments to FLSA treated the Puerto Rican and Stateside minimum wages more closely. In the 1961 law, the same percentage increases that were applied to Stateside minimum wages were required for covered industries in Puerto Rico. However, the Secretary of Labor could appoint review committees empowered to except a particular industry from the automatic percentage increases. Puerto Rico argued that as a developing economy it was unable to pay the wages paid in the United States. The eastern textile industry and labor unions, on the other hand, feared unemployment and loss of industry from Puerto Rico's low cost competition. The final arrangement was a compromise. The theory behind the 1961 Act was that maintaining the same relative wage scales prevented Puerto Rico from gaining competitive advantage without being unduly harmful to the island's economy. Furthermore, the review committee procedure could act as a safety valve if automatic percentage increases would result in undue hardship for certain industries.

Subsequent amendments to FLSA followed the 1961 practice of providing for automatic increases in the prevailing wage scale in Puerto Rico, while retaining the possibility of exceptions via the

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review committee procedure. Coverage has been extended increasingly and wages are approaching parity with the Stateside wage. The industry committee approach, although officially supported by the Popular Democratic Party, has been attacked by labor groups in Puerto Rico and in the States as being unduly conservative and as a means to delay increases in the minimum wage. These groups urge automatic percentage increases with no exceptions. Others, however, emphasizing Puerto Rico's different economic circumstances and the ability of the Commonwealth government to regulate wages, urge the complete removal of Puerto Rico from the coverage of FLSA. In 1977, Congress, under domestic union pressure, mandated the minimum wage for all covered industries in Puerto Rico by 1981. The newly-elected Puerto Rico government also supported such a change, arguing the need for Puerto Rico to stimulate high wage industries and to be less dependent upon low wage, labor intensive industries such as textiles and apparel.

c. Tariffs and Trade

Trade has played a crucial role in the development of Puerto Rico. With a relatively small population and a low income base, Puerto Rico has little opportunity in its internal markets to develop economies of scale in production and in competition. Trade is also a developmental imperative for an area with a small resource base. Furthermore, active trade provides the classic

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234 The Secretary of Labor must accept the wage levels established by the industry committees. The Secretary is directed to publish the industry committee's recommendations in the Federal Register and to provide for their entering into effect fifteen days after publication. 29 U.S.C. § 208(d) (1976). The wage determination must have been reached in accordance with the prescribed regulations governing the operation of the industry committees. 29 C.F.R. §§ 511.1-19 (1966). But see Bonita, Inc. v. Wirtz, F.2d 208 (D.C. Cir. 1966).
235 See Puerto Rico Labor Hearings, supra note 226, at 1739 (statements of Val Wertheimer and Lazare Teper). For statistics on the operation of the review committee procedure, see id. at 1881-84 (Tables 1A, 1B, & 2).
238 The importance of Puerto Rico's trade relationship with the United States is examined in INSTITUTE OF INTERNATIONAL LAW & ECONOMIC DEVELOPMENT, 2 PUERTO RICO INDUSTRIAL SECTOR STUDY ch. 9 (1978).
beneﬁts of comparative advantage (the island receiving goods that would have a high cost of internal production in return for goods that it can produce comparatively cheaply), in addition to serving as a transmitter of technology and as a very useful antimonopoly function. Not surprisingly, Puerto Rico’s external sector represents a large portion of total production. The island has been importing about forty-ﬁve to ﬁfty-ﬁve percent of GDP,229 compared, for example, to a recent ﬁgure of about eight percent for the United States. Most of Puerto Rico’s trade is with the United States, with about eighty to ninety percent of the imports coming from the mainland and roughly ninety-five percent of the exports being shipped there.260 Section 3 of the Foraker Act of 1900, which is continued in force by section 58 of the Puerto Rican Federal Relations Act, places Puerto Rico within the United States common market, in contrast to the other territories.241 United States-Puerto Rico trade has been almost completely unrestricted; the only major exception is a quota limiting imports of sugar from the island.242

In 1959, the Fernos-Murray Bill originally provided for no tariff or quantitative restriction on any Puerto Rican manufactured goods shipped to the United States, “other than those that could be placed on commerce if Puerto Rico were a State of the Union and subject to the provisions of Section 8 of Article I of the Constitution of the United States [the uniformity clause].”243 The Department of Agriculture objected, desiring the right to impose restrictions in the future on Puerto Rican processed goods.244 The uniformity clause, of course, was declared inapplicable to Puerto Rico in the landmark Insular Cases.245

Section 2 of the Foraker Act of 1900, which also retains validity as a result of section 58 of the Puerto Rican Federal Relations

245 Insular Cases, supra note 32.
Act, provides that the same tariff rates be imposed on all imports from foreign markets entering the States or Puerto Rico.\footnote{48 U.S.C. \textsection 739 (1976).}

However, following the hurricane of September 13, 1928, "the coffee industry suffered losses estimated at seventy-five percent, and one fourth of the rural population of Porto Rico was reduced to a condition of misery. . . ."\footnote{J. Res. No. 59, adopted by the Legislature of Puerto Rico, and approved by the Governor on May 5, 1930, \textit{I P.R. LAWS ANN. HISTORICAL DOCUMENTS} 742, \textit{reprinted} in \textit{Puerto Rico Brokerage Co. v. United States}, 76 F.2d 605, 606 (C.C.P.A. 1935), \textit{aff\'g} 71 F.2d 469 (C.C.P.A. 1934), \textit{cert. denied}, 298 U.S. 671 (1936).} In response, the Farm Credit Administration organized coffee cooperatives to which it was prepared to extend loans. However, these cooperatives were faced with low-priced Brazilian imports, which would have prevented the rebuilding of the industry. Congress, therefore, in June 1930, empowered the legislature of Puerto Rico to set a duty on coffee imports entering Puerto Rico, although no such duty was to be imposed on imports into the States.\footnote{19 U.S.C. \textsection 1319 (1976).} Pursuant to this authorization, the Puerto Rican legislature enacted a duty of ten cents per pound "on all coffee imported into Puerto Rico."\footnote{J. Res. No. 59, \textit{supra} note 247.} The Collector of Customs attempted to collect these duties on coffee imported from the States to Puerto Rico, but the duties were declared invalid on the basis of section 3 of the Foraker Act, which provides for duty free transit between Puerto Rico and the United States.\footnote{Puerto Rico Brokerage Co. \textit{v. United States}, 71 F.2d 469 (C.C.P.A. 1934).} The court, noting that the Puerto Rican resolution was passed one month prior to the authorizing language in the Tariff Act of 1930, stated: "The Joint Resolution was void for want of constitutional power to adopt it, and it was not validated by a subsequent amendment to the Organic Act which did not ratify and confirm it, but merely authorized the enactment of such legislation."

Subsequent to this decision, Congress, on June 18, 1934, declared that "the taxes and duties imposed . . . by Joint Resolution Numbered 59 . . . are legalized and ratified. . . ."\footnote{\textit{Id.} at 472.} The Court of Customs and Patent Appeals suggested that Congress, by this legislation, had indeed empowered the Puerto Rican legislature to impose taxes and duties on coffee coming from the States to Puerto Rico, but that the Puerto Rican Joint Resolution in referring to "coffee imported into Puerto Rico" was using the word "imports"
in its constitutional sense and thereby was limiting its duties to coffee entering from foreign ports. Thus, present federal law requires that the same tariff rates be imposed on all imports from foreign countries entering the States or Puerto Rico with the single exception of coffee. Coffee may be imported duty free into the United States, where very little coffee is grown, but a tariff, the rate of which is determined by the Puerto Rican legislature, is imposed on imports into Puerto Rico, where a significant amount of coffee is produced.

On the general question of tariffs, there has been some concern in Puerto Rico that the different economic positions of the Commonwealth and the United States could lead to broad tariff reductions harmful to Puerto Rico. Puerto Rico's competitors—largely underdeveloped and developing countries—are current or potential producers of the same products that now characterize Puerto Rican production. Duty reductions proffered by the developed nations and the United States will likely only bring these countries' products, produced at markedly lower labor costs, directly into competition with Puerto Rican goods in the American market. On the other hand, concessions that the developed countries are seeking from these areas are largely for the capital goods that American industries are prepared to serve but which Puerto Rico cannot, since it is a capital goods importer. Thus, the concessions sought by developed nations such as the United States will not, except in rare instances, benefit Puerto Rico. Puerto Rico,


In 1965, the Senate adopted an amendment to the Tariff Schedules Technical Amendments Act giving the Secretary of the Treasury the power to set a different rate of duty for particleboard entering Puerto Rico. Amend. nos. 12, 6 to H.R. 7969, 89th Cong., 1st Sess., 111 CONG. REC. 24,053 (1965). This was dropped in conference. H.R. REP. No. 979, 89th Cong., 1st Sess. (1965).

Hawaii produces small quantities of coffee.

The Puerto Rican Secretary of Agriculture and Commerce assists in this regard. P.R. LAWS ANN. 1979 tit. 13, § 2201. The Congressional delegation has been held valid since Commonwealth, but the redelegation by the Puerto Rican legislature was overturned in Pan American Standard Brands, Inc. v. United States, 177 F. Supp. 769 (U.S. Cust. Ct. 1959). The Puerto Rican legislature subsequently redelegated part of its power to the Puerto Rican executive in a more restricted fashion. P.R. LAWS ANN. tit. 13, § 2201 (1979). This redelegation has not been tested in the courts.

therefore, wishes to divorce its own situation as much as possible from that of the States, whose particular trade and tariff needs are different.

In the Fernos-Murray Bill, the Commonwealth requested that the President be required to exclude Puerto Rico from any trade agreement upon request of the Commonwealth “unless he finds that the general interest of the United States requires that Puerto Rico be included.” Although this did not pass, Puerto Rico has always obtained some special benefit in connection with United States trade negotiations. After a recent round of trade negotiations, which envisioned imports from the Caribbean into the United States, Puerto Rico, along with the Virgin Islands, obtained a legal amendment granting compensatory amounts where there were “[c]oncession-related revenue losses [accruing] to the United States possessions.”

Oil import controls highlight the special Puerto Rico economic situation arising from trade arrangements. In 1957, the United States instituted a voluntary oil import program, which was made mandatory in 1959. Under this program, quotas are imposed on the amount of crude oil and other oils that are imported into the mainland. Because shipments between Puerto Rico and the United States are not regulated and to prevent transshipments in violation of the program, the Presidential Proclamation places limits on oil imported into Puerto Rico from foreign sources. An illustrative case concerns the Phillips Petroleum Company, which had indicated an interest in establishing a large petrochemical complex in Puerto Rico. With the Commonwealth government’s endorsement, Phillips requested that it be permitted to import an additional 50,000 barrels of hydrocarbon feedstock (unfinished oils) a day into Puerto Rico. Despite considerable opposition by other oil companies, the Secretary of Interior on May 14, 1965, after scrutinizing the terms of the Phillips investment, granted permission for a period of ten years from the start-up of the plant. The competitive advantage gained by Phillips was les-

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261 Id.
The Commonwealth of Puerto Rico

sened considerably as a result of the subsequent revisions of the oil import quota regulations. Under the revisions, the Secretary of Interior is authorized to grant allocations for imports of crude oil "as feedstocks for facilities" if the objectives of the oil import program are not impaired and it will "promote substantial expansion of employment in Puerto Rico through industrial development."

Importation rights were an important issue in the federal relationship in the 1960s and early 1970s. Following the OPEC oil price increases in 1973, the extent and type of federal regulation was the critical element revolving around allocations and entitlements. Prior to 1973, imported petroleum and petroleum products were substantially cheaper than domestically-produced counterparts on the mainland. After the OPEC price increase the situation was reversed. Foreign crude oil and petrochemical feedstocks became much more expensive than those of the United States, where the prices of natural gas (used in mainland petrochemical production) and crude oil were subject to controls. Although a system of entitlements was enacted, aimed at equalizing the price of crude oil through cost-sharing payments between those refiners with access to the cheaper, controlled domestic oil and those that relied more on expensive foreign petroleum, Puerto Rico no longer had the cost advantage it once enjoyed. Further, entitlement payments were only for crude oil; expensive imported petrochemical feedstocks were not covered in the basic program (although recently entitlements have been granted for naptha, an important petrochemical input).

The question of how Puerto Rico would fit into the United States allocation scheme for petroleum products has also been an important question in light of the OPEC ascendance. When the rationing base period was set nationally at the 1972 levels of consumption, Puerto Rico was given special treatment in that it obtained, in March 1974, allocations based on its 1973 levels. It was pointed out that while the United States is only forty-five percent dependent on oil for its energy, over ninety-nine percent of Puerto Rico's energy is petroleum based. In addition, with Puerto Rican economic growth and industrialization proceeding so rapidly, the island's energy consumption is increasing at a rate of twelve per-

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264 Id. § 15(c)(1).
cent a year as opposed to less than five percent per year on the mainland. These factors lead to the conclusion that an equal sharing of the burdens of the oil shortage should lead to Puerto Rico receiving proportionally less of a petroleum cutback than a typical State with a lower economic growth rate to support and less oil dependence.

The island also gained considerable control over its internal allocation of petroleum products. As the regulations were initially drafted, all Category I needs (such as "residential, commercial, educational, and other space heating," "medical purposes," "emergency purposes," "transportation services," excluding tourism, and "energy production," excluding public utilities) were to be satisfied before any Category II needs (electric utility, industrial and manufacturing, and other uses) were met. Since about sixty percent of Puerto Rico's middle distillates were already going to the mainland in 1972, Puerto Rico could have lost all its vital fuels, as unfilled Category I needs continued to grow, unless the exception were granted.266

Energy legislation epitomizes the Puerto Rico economic difficulty. The legislation is caught up in a broader issue and even where special treatment is accorded to Puerto Rico, the island benefits in relation to others. If its condition should change so that the island's relative position changes vis-a-vis the mainland, it may face serious economic consequences. "Fiscal autonomy" in a situation such as this is political mythology, even if the economic problems warrant a special exception.

2. Political Participation

The other side of the economic question is political representation. As early as 1905, commentators noted that the principle of no taxation without representation was being violated in the territories.267 Although in Puerto Rico such is not the case because taxation is not imposed, the relationship between the tax structure, economic structure, and political participation is contradictory.268 As noted above, the rights to vote for executive officials or to be represented in the Congress are not necessary consequences.

267 See generally W. Willoughby, Territories and Dependencies of the United States (1905).
268 Puerto Rico has been alert to its anomalous status. See, e.g., Memorandum from Government and General Research Division to the Honorable Jorge Luis Cordova-Diaz, Resident Commissioner of Puerto Rico, Study of the Concept of No Taxation Without Representation (Dec. 2, 1969).
of citizenship.269 Puerto Rico is underrepresented in the Congress and has no vote in Congress or in presidential elections. At present, Puerto Rico is represented in the United States Congress by a Resident Commissioner elected every four years pursuant to Puerto Rican law. The Resident Commissioner is paid the same as a congressman, and receives the same stationery allowance and franking privileges. His role in Congress is determined by the House rules, under which he may be a member of only three House Committees, although he may introduce bills and speak on the House floor. He may not vote, but may obtain seniority for committee posts.270 The Proposed Compact put forth by the Commonwealth partisans in 1975 would have broadened Puerto Rico's representation by requiring representation from the island both in the Senate and House of Representatives with "all the rights and privileges . . . as are compatible with the Constitution of the United States."271

In the jockeying for position among the Commonwealth and Statehood advocates in Puerto Rico, those supporting Statehood have urged the presidential vote for Puerto Rico. In addition, a joint United States—Puerto Rico Ad Hoc Committee on the presidential vote unanimously made such a recommendation.272 Commonwealth advocates did not reject this approach but simply suggested that it was not an issue of major importance. In fact, a general amendment extending the vote for President to all territorial citizens would be consistent with United States citizenship, even if not required under existing precedents. At any rate, Puerto Rico has gained some political stature in the presidential arena, as its share of the delegates for the Democratic and Republican conventions increased significantly under revised party rules.

VII. THE INTERNATIONAL CONTEXT

A. Scope of Article 73 of the United Nations Charter

Although Congress and the Supreme Court have avoided referring to the international issues surrounding Puerto Rico, the

269 Sanchez v. United States, 376 F. Supp. 239 (D.P.R., 1974).
270 In case of a vacancy due to death or resignation, the Puerto Rican Federal Relations Act sets forth the procedure: the Governor may appoint another person "with the advice and consent of the senate." 48 U.S.C. § 892 (1976). The Fernos-Murray Bill of 1959 suggested that the procedure to fill the vacancy be left to Puerto Rican law. H.R. 5926, 86th Cong., 1st Sess., art. XI (c) (1959).
271 Proposed Compact, supra note 137, at § 10(a).
272 Report of Ad Hoc Advisory Group, supra note 137, at 160.
executive branch has been aware of the questions. Article 73 of the United Nations Charter requires colonial powers administering non-self-governing territories to report "statistical and other information of a technical nature relating to economic, social and educational conditions in the territories" and "to promote . . . the well-being of the inhabitants . . . and to develop self-government." The Charter does not define self-government or give any specific indication concerning those nations and territories to which the article was meant to apply. Nonetheless, seven United Nations members—Australia, Belgium, France, the Netherlands, New Zealand, the United Kingdom, and the United States—voluntarily declared that they were administering seventy-four non-self-governing territories and, pursuant to article 73(e), began transmitting the required information.

In the United Nations, there have been numerous discussions and several General Assembly resolutions concerning the extent of the coverage of article 73. However, it has been impossible to arrive at a consensus concerning the meaning of self-government. Some members expressed the concern that by 1952 reports were no longer being submitted on fifteen of the seventy-four territories on the original list, since these territories had, the administering nations said, achieved the "full measure" of self-government required by the Charter. The concern that administering nations would ignore requirements of article 73 by self-serving statements as to the self-governing status of their territories prompted the General Assembly to establish in 1949 (over the objections of the administering nations) an Ad Hoc Committee on Information which, in 1952, gave rise to a series of recommendations and a list of factors to be considered in connection with the requirement of self-government.

The factors to be considered were those indicative of the attainment of independence, those indicative of the attainment of other systems of self-government (now no longer relevant), and those showing free association of a territory with all or any part of its metropole or other country. The third category included (a) general factors (political advancement, opinion of the population, performance of governmental functions, etc.), (b) special factors relating to an association of the territory with all or any part of its metropole or other country, and (c) the consent of the territory's inhabitants. In the United Nations, there have been numerous discussions and several General Assembly resolutions concerning the extent of the coverage of article 73. However, it has been impossible to arrive at a consensus concerning the meaning of self-government. Some members expressed the concern that by 1952 reports were no longer being submitted on fifteen of the seventy-four territories on the original list, since these territories had, the administering nations said, achieved the "full measure" of self-government required by the Charter. The concern that administering nations would ignore requirements of article 73 by self-serving statements as to the self-governing status of their territories prompted the General Assembly to establish in 1949 (over the objections of the administering nations) an Ad Hoc Committee on Information which, in 1952, gave rise to a series of recommendations and a list of factors to be considered in connection with the requirement of self-government.

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274 U.N. Charter art. 73(e). See note 90 supra.

275 Id. art. 73(d).

geographic considerations, ethnic and cultural considerations), (b) the legal or constitutional nature of the association, (c) considerations with respect to the status of the territory (legislative representation, citizenship of the territory's inhabitants, and eligibility of officials from the territory to enter public offices of the central authority), and (d) internal constitutional conditions (universal suffrage; free, periodic elections characterized by an absence of undue influence; scope of territorial legislative rights of the inhabitants; and method of choosing local officials). The weight accorded the inclusion or omission of any one of these was not stated. The United States suggested that Puerto Rico fell into category three as a result of its status as a Commonwealth and, therefore, that the United States would cease to transmit further information under article 73(e).

B. United Nations Discussion

The competence of the General Assembly to judge the actions of developed countries divided the United Nations membership. The United States, other administering States, and a very small group of non-administering nations asserted that only the administering nations were competent to determine when a non-self-governing territory had acquired the "full measure of self-government." The basic argument was that if they were competent to determine in the first instance which territories should be placed on the list as non-self-governing, they were also competent to determine when that condition had ceased. Furthermore, some members believed that the administering state might stop sending the reports before the "full measure of self-government" was reached because article 73(e) spoke only of information relating to economic, social, and educational conditions in the territories. Since the achievement of self-government usually came about in steps, there might come a time when a territory controlled its own economic, social, and educational institutions, even if it had not attained full self-government politically.

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78 Upon joining the United Nations in 1955, Portugal and Spain declared their territories an integral part of the State and, therefore, not subject to the reporting requirement. The United Nations, on its own authority, put both nations' territories on the list requiring reports, and acted similarly in the case of Southern Rhodesia in 1962.
79 Compare the 1952 General Assembly resolution which stated: "For a Territory to be deemed self-governing in economic, social, or educational affairs, it is essential that its peo-
The non-administering members, to the contrary, argued that the administering States had entered into a bilateral obligation from which they could not free themselves unilaterally. It was asserted that transmissions could not cease until conditions set by the article had been satisfied and, furthermore, that the General Assembly was competent to examine each case to determine whether the "full measure of self-government" had been attained by the territory. As to the degree of self-government required, many States considered it erroneous to look to article 73(e) in isolation, which spoke of economic, social, and educational issues and not of "political" ones. Such States believed that all of article 73 must be considered, in addition to other documents such as the Declaration of Human Rights. In no case, it was argued, should the reports cease when the territory had not yet acquired political as well as economic, social, and educational self-government; sovereignty was indivisible. It was argued further that there could be no true self-government without independence, and that any association was suspect. Still others insisted that association with the administering State based upon the territory's self-government was impossible unless it had been preceded by independence.\(^{280}\)

The United States government memorandum advising Secretary-General Trygve Lie of the cessation of information under article 73(e) emphasized the Commonwealth status and the Constitution of Puerto Rico, as indicated in the following passage:

In 1948 the people of Puerto Rico had held a national election in which was debated the issue of what kind of government they should have. Alternatives supported by opposing political parties had been that Puerto Rico should become a state in the Federal Union of the United States, an independent State, or a pie shall have attained a full measure of self-government." G.A. Res. 648 (VII) (4), 7 U.N. GAOR, Supp. (No. 20A) 34, U.N. Doc. A/2361 (1952). This was reaffirmed in the 1953 recommendations.

\(^{280}\) The resolution recommended by the Ad Hoc Committee on Factors stated: the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality.

commonwealth associated with the United States. By an over-
whelming vote, the people of Puerto Rico had chosen the latter
solution.

Subsequently, the Resident Commissioner, Mr. Fernos-Isern,
had caused legislation to be introduced in the United States
Congress, the result of which had been the adoption by the Con-
gress of Public Law 600, authorizing the people of Puerto Rico
to draft and adopt their own constitution. A constitutional con-
vention had then been convened in Puerto Rico and in due
course the new Constitution had been ratified by the Congress
of the United States and by the Puerto Rican people, again by
an overwhelming majority.

A fundamental feature of the new Constitution was that it
was in the nature of a compact between the United States Cong-
gress and the Puerto Rican people. The United States district
court for Puerto Rico, which was a Federal court, had ruled that
neither the Congress of the United States nor the people of
Puerto Rico could unilaterally amend Public Law 600 or the
Puerto Rican Federal Relations Act without the consent and ap-
proval of the other party. That decision had been upheld in the
United States circuit court of appeals.\(^\text{281}\)

The debate on the issue was quite extensive. In view of the fact
that the criteria for a self-governing territory were unclear, by
emphasizing certain factors in the association, the delegates were
able to support a variety of conclusions. Most delegates who
believed that Puerto Rico was self-governing emphasized the
referendum, the free choice given Puerto Rico to enter into the
association,\(^\text{282}\) and the mutuality principle of the compact.\(^\text{283}\) Others—the Commonwealth and metropole countries—refused to
review the judgment of the United States but urged that the
General Assembly “note” the decision of the United States no
longer to report under article 73(e) with respect to Puerto Rico.\(^\text{284}\)


4/SR. 349 (1953); remarks of the Panamanian delegate, id. at 241; remarks of the Canadian
delegate, id. at 242; remarks of the Brazilian delegate, id. at 245-47; remarks of the Per-
vian delegate, id. at 248; remarks of the Iranian delegate, id. at 249; remarks of the Costa
Rican delegate, id. at 251; remarks of the Haitian delegate, id. at 254; remarks of the Bolivian
delegate, id., at 259; remarks of the Venezuelan delegation, id. at 261; remarks of the
Chinese delegates, id. at 261; remarks of the Israeli delegates, id. at 252.

\(^{283}\) Remarks of the Panamanian delegate, id. at 241; remarks of the Brazilian delegate, id.
at 245-47; remarks of the delegate from Ecuador, id. at 227-31.

\(^{284}\) Remarks of the Belgian delegate, id. at 254; remarks of the delegate from the
Netherlands, id. at 259; remarks of the New Zealand delegate, id. at 260; remarks of the
delagate from the United Kingdom, id. at 261.
Some of these delegates also limited their decision to the economic, social, and educational criteria mentioned in article 73(e), and on these criteria they concurred in the United States position.\textsuperscript{285}

The delegates voting in favor of continued reporting stressed the limited choice afforded in the referendum on Public Law 600 and the powers retained by the United States over Puerto Rican affairs. Many delegations were concerned by the absence of the possibility of independence as an alternative in the referendum submitted to the Puerto Rican people in 1950.\textsuperscript{286} This omission was emphasized when the right of secession was brought forward by the Committee on Factors.\textsuperscript{287} Other delegates believed that the United States control over foreign affairs and defense,\textsuperscript{288} the absence of a compact,\textsuperscript{289} the economic dependence of Puerto Rico,\textsuperscript{290} and the lack of a vote by the Resident Commissioner in Congress, and the fact that Congress could pass laws substantially affecting Puerto Rico\textsuperscript{291} meant that Puerto Rico was non-self-governing.\textsuperscript{292}

The vote taken by roll call draft Resolution VII\textsuperscript{293} was twenty-six in favor of the United States position, sixteen against, and eighteen abstentions.\textsuperscript{294} The United States considered the issue settled with that vote. However, the question of Puerto Rico’s status has persisted at the United Nations. Since 1972, the Committee on Decolonization, with the support of independence par-

\textsuperscript{285} Remarks of the Canadian delegate, id. at 242; remarks of the Costa Rican delegate, id. at 259; remarks of the Swedish delegate, id. at 259.
\textsuperscript{286} Remarks of the Yugoslavian delegate, id. at 236-37; remarks of the Egyptian delegate, id. at 258; remarks of the Lebanese delegate, id. at 261; remarks of the Indonesian delegate, id. at 240.
\textsuperscript{287} Remarks of the Polish delegate, id. at 242; compare the remarks of the Canadian delegate, id. at 242.
\textsuperscript{288} Remarks of the delegate of the Ukraine, id. at 233-34; remarks of the Indian delegate, id. at 235-36; remarks of the Burmese delegate; id. at 237; remarks of the Honduran delegate, id. at 239; remarks of the Argentine delegate, id. at 251.
\textsuperscript{289} Remarks of the Yugoslavian delegate, id. at 236-37; remarks of the Czechoslovakian delegate, id. at 237-38; remarks of the Honduran delegate, id. at 239; remarks of the Indonesian delegate, id. at 240; remarks of the Iraqi delegate, id. at 257.
\textsuperscript{290} Remarks of the Egyptian delegate, id. at 258.
\textsuperscript{291} Remarks of the Mexican delegate, id. at 222-24; remarks of the delegate of the Ukraine, id. at 233-34; remarks of the Indian delegate, id. at 253; remarks of the Indonesian delegate, id. at 240.
\textsuperscript{292} It is interesting to note that only the Indonesian and Czechoslovakian delegates analyzed extensively the relationship in terms of the factors that had just been approved by the Fourth Committee. Id. at 237-38, 240.
tisans in Puerto Rico, has discussed the Puerto Rican situation. The United States refused to recognize the United Nations action following the 1952 action. Nonetheless, the Carter Administration was receptive to United Nations supervision of United States territorial jurisdiction generally. Although the official United States position is that Puerto Rico is no longer under United Nations purview, the United States permitted United Nations teams to visit United States territories for the first time (Virgin Islands and Guam) and supported a new referendum on Puerto Rico's status in 1981. President Carter pledged: "Should the Government of Puerto Rico decide to hold a referendum, I will support, and urge the Congress to support, whatever decision the people of Puerto Rico reach."

In 1978, a full debate before the United Nations Committee on Decolonization on the Puerto Rican "question" culminated with the suggestion that only independence or Commonwealth—not Statehood—were possible status choices, and that selection was to be made only after severance of all ties with the United States. The position was contrary to previous United Nations positions where integration was an acceptable alternative and prior severance was not required. The resolution, strongly supported by Cuba, the Soviet Union, and other Communist regimes, passed the Committee with ten aye votes and twelve abstentions but was not sent to the General Assembly. Recent action of the United Nations indicates that the case of Puerto Rico will continue to be the subject of Decolonization Committee and General Assembly discussion.

Although the United States Congress has appeared to be unconcerned with United Nations comment, it recently passed a resolution "reaffirming the commitment of Congress to the right of the people of Puerto Rico to determine their own political future." The resolution constitutes the strongest statement to date of Congressional willingness to accept Statehood or independence for Puerto Rico. Senator Moynihan noted that the resolution "implies a duty on the part of Congress to negotiate in good faith with the Commonwealth of Puerto Rico to attempt to accommodate the wishes of the people of Puerto Rico."

298 Id. at S11,373.
VIII. CONCLUSION

The concept of the Commonwealth of Puerto Rico in the United States political system was initiated at a time when there was broad political consensus in Puerto Rico as to the desirability of Commonwealth and strong support within the United States for the innovative aspect of this new form of government. Since then, the consensus in Puerto Rico has broken. It appeared, until recently, that a new consensus in Puerto Rico was emerging in support of Statehood. The Congress, President Carter, and President Reagan and Vice President Bush in their primary campaigns supported the possibility. And, as indicated above, Congress was not unwilling to support Puerto Rican desires. However, the November 1980 elections reversed—or at least slowed—this direction. Governor Carlos Romero Barcelo, a strong supporter of Statehood, was reelected, but just barely, and the Commonwealth Party captured one house of the legislature. As a result, Governor Romero Barcelo has announced a delay of the 1981 planned status referendum. The divided political posture has prevented not only Statehood in Puerto Rico, but also has stymied growth and direction for the Commonwealth concept as well.

The federal government appears equally uncertain as to how much support should be given to the Commonwealth concept. The negotiation of the covenant to establish a Commonwealth of the Northern Marianas means that the novelty is no longer present. The United States, faced with other “Commonwealths” arising out of the Trust Territory negotiations, has been cautious in allowing exceptions to federal law based on this status, although it has permitted specific negotiated exceptions. The Supreme Court has taken a stronger role in recent years. In dicta, it has supported Commonwealth as a legally recognized status of potentially great importance, but its holdings have treated Commonwealth as no different from a territory. Lower courts in the States have been equally chary in defining the Commonwealth concept. On the other hand, the judiciary in Puerto Rico, both federal and local, strongly supported the concept, most recently by extending the environmental protection laws to prevent the transfer of Haitian refugees to Puerto Rico.

As economic issues have become more important, Puerto Rico has tended to be treated, frequently at its own request, more like a State by the Congress and the executive branch. Probably, both Statehood and Commonwealth concepts will depend for their economic participation and regulatory exemption on some finan-
cial participation or lessening of the tax exemption status. In large measure, the direction of the Commonwealth will depend upon the political consensus within Puerto Rico and whether cultural preservation is linked to non-Statehood questions alone. It may also depend on whether the cultural issue becomes less significant than the economic pressures on Puerto Rico. Regardless of which course of government the Puerto Rican people choose in the future, legal, political, and cultural change appears inevitable.