I. Introduction

In 1950, after fifty-two years of a colonial government on the Island of Puerto Rico,\(^2\) and well into the destruction of Puerto Rico’s local economy,\(^3\) Congress passed Public Law 600.\(^4\) This law provided for the organization of a local government pursuant to a constitution of Puerto Rican islanders\(^5\) own adoption. However, the creation of a local Puerto Rican Constitution under the new “Commonwealth”\(^6\) status soon caused substantial litigation with regard to the application of federal law to Puerto Rico.\(^7\)

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\(^1\) This article only briefly tackles the effects of the unincorporated territory from the perspective of practical jurisprudence. It does not discuss the ways in which an unincorporated territory, such as Puerto Rico, is abhorrent to substantive and procedural due process.

\(^2\) The Foraker Act established a limited civilian government on the island, whose chief executive officer and cabinet were appointed by the President of the United States. Foraker Act, ch. 191, 31 Stat. 77, 81 (1900).


\(^5\) I use the phrase Puerto Rican islanders in order to differentiate between Puerto Ricans on the island who assume a “second class citizenship,” and those who emigrate to the mainland United States, who enjoy the full privileges of United States citizenship. See Hiram Marcos Arnaud, Note, Are the Courts Dividing Puerto Ricans?: How the Lack of Voting Rights and Judicial Interpretation of the Constitution Distorts Puerto Rican Identity and Creates Two Classes of Puerto Rican American Citizens, 22 CORNELL J.L. & PUB. POL’Y 701, 710-26 (2013) (describing the various ways in which islanders and mainland Puerto Ricans have different legal rights).


One source of confusion is the language of the Puerto Rican Federal Relations Act (PRFRA). 8 Section 9 of the PRFRA provides 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 . . .”9 As a result of this language, litigation ensued concerning the determination of when a federal law was "not locally inapplicable" in Puerto Rico. Courts needed to resolve whether or not Congress decides which laws are applicable to Puerto Rico and what happens when there is a conflict between Puerto Rican local law and federal law. Judicial treatment of this question makes it clear that the biggest issue underlying the problem of federal law applicability in Puerto Rico is the role Puerto Rico plays within the federalist structure of the United States of America. Due to federal laws and a local constitution that differs from that of the fifty states, 10 problems arise that go beyond basic federalism. This work argues that it is time for the United States government to reevaluate whether or not Puerto Rico is an incorporated territory. Incorporation would facilitate the application of federal law on the island, thus allowing the island to escape from the United States' colonial grasp. 11

II. The Unincorporated and the Incorporated

In 1917, all Puerto Rican islanders became United States citizens through the Jones Act. 12 In the ordinary course of the manifest destiny machine, 13 Congress’s grant of citizenship to the residents of a territory usually resulted in incorporation of that territory into the Union. 14 Incorporation meant that although the land was a legal territory, the United States Constitution and laws applied to it with full force, just like a state. The Constitution did not apply with full force in unincorporated territories. 15 Puerto Rico, however, was an exception to the manifest destiny trend of incorporation upon a grant of citizenship. In a chain of early twentieth century decisions termed the Insular Cases, the Supreme Court ruled that the island was not an incorporated territory,

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8 64 Stat. 319 (1950).
10 See infra Part II.
15 See id. at 316-328.
even though islanders were citizens of the United States. The issue emerged as to when and how the United States Constitution applied to unincorporated territories. When it came to the United States Constitution, the Court decided to apply the “fundamental rights” theory to Puerto Rico, although it did not always do so consistently. This unfortunately did not solve all the issues; the fact that Puerto Rico had been turned into a Commonwealth of the United States in 1952 left the island in an “enigmatic condition.” This enigmatic condition continued because although courts knew what sections of the United States Constitution applied to Puerto Rico, courts were not entirely sure when federal laws applied to Puerto Rico. The courts soon decided that the application of federal laws needed to navigate through the treacherous, and narrow, spaces in between the PRFRA and congressional intent. The Federal Death Penalty Act and its application in Puerto Rico, for example, illustrates this subject.

III. Application of the Puerto Rican Federal Relations Act to the Death Penalty

On July 17, 2000, the District of Puerto Rico held that the Federal Death Penalty Act (FDPA) did not apply to Puerto Rico. Among its reasons, the Court stated that the FDPA was locally inapplicable “within the purview of section 9 of the Puerto Rican Federal Relations Act.” The court reasoned that the Federal Death Penalty Act of 1994 “is not specifically made extensive to the Commonwealth of Puerto Rico,” arriving at this conclusion based on the lack of congressional intent within the text of the Federal

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16 See the Insular Cases, holding that Puerto Rico is an “unincorporated territory.” The Insular Cases are: Balzac v. Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197, (1903); Downes v. Bidwell, 182 U.S. 244 (1901); Dooley v. United States, 182 U.S. 222 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901). For a general discussion of the Insular Cases, see generally Torruella, supra note 14 (describing the history behind the Insular Cases and their ideological underpinnings).

17 The issues in the earlier Insular Cases concerned the application of federal law concerning commercial operations in Puerto Rico. See Torruella, supra note 14, at 300.

18 The fundamental rights theory is the idea that only the “fundamental rights” of the United States constitution apply to unincorporated territories. The courts determine what a fundamental right is. See Arnaud, supra note 5, at 706 (noting that “Unlike incorporated territories, [u]nincorporated territories are not intended for statehood and are only subject to fundamental parts of the [United States] Constitution.” (citing Lisa Napoli, The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico, 18 B.C. THIRD WORLD L.J. 159, 171 (1998))).

19 Downes, 182 U.S. 244 at 268 (describing that the “fundamental limitations” in favor of personal rights which are formulated in the Constitution apply to Puerto Rico). It is interesting that the Court reached this conclusion in a case concerning a business man attempting to recover duties paid to the collector of the Port of New York. Id. at 347 (Fuller J., dissenting).

20 Balzac, 258 U.S. at 307-09 (holding that Puerto Ricans do not have the right to trial by jury).

21 De La Rosa v. United States, 229 F.3d 80, 87 (1st Cir. 2000) (Torruella, J., concurring).


24 Id. at 318.

25 The idea of looking towards congressional intent when courts conduct statutory interpretation stems from the traditional analysis and application of federal law to United States territories during continental
Death Penalty Act. On appeal, however, the Circuit Court of Appeals for the First Circuit reversed. The Court reasoned that the FDPA was locally applicable because the text of the underlying criminal statutes in the case explicitly applied to Puerto Rico; as such, the punishment derived from the FDPA necessarily applied as well. However, this reasoning ran contrary to many prior decisions dealing with congressional intent and the PRFRA. Although well reasoned, the circuit court’s decision does not comport with the congressional intent rule as articulated by previous courts, and only creates confusing jurisprudence. In prior cases, courts looked only at the congressional intent for the specific law in question in order to determine whether to apply that law to Puerto Rico. Here, however, the First Circuit applied the congressional intent of the underlying criminal statutes and not the congressional intent in the text of the FDPA—the specific law in question. The Supreme Court had the opportunity to speak on the matter and apply a bright-line standard. However, they declined to hear the case.

Under the First Circuit decision, the federal government can execute a Puerto Rican islander under the federal law even though there is no direct congressional intent within the text of the FDPA for the death penalty’s application to Puerto Rico. The congressional intent found by the First Circuit was by no means direct—the court derived the intent from the statutes of the underlying offenses. In previous cases, the court applied direct congressional intent only from the text of the statute in question. Congress could resolve this confusion by incorporating Puerto Rico into the United States. Through incorporation, both federal laws and the federal constitution would


27 United States v. Acosta-Martinez, 252 F.3d 13, 19 (1st Cir. 2001) (noting that since the underlying offenses in the case applied directly to Puerto Rico, so does the punishment).

28 See United States v. Rivera Torres, 826 F.2d 151, 154 (1st Cir. 1987) (noting that Congressional intent as to what “navigable waters” are was key in determining the applicability of the Clean Water Act in Puerto Rico); see also United States v. Santiago, Case No. 10-333 (GAG), 2014 U.S. Dist. LEXIS 19073, at *3 (noting that there was “no doubt” in the Congressional intent behind 42 U.S.C. § 14141 application to Puerto Rico); Feliciano v. United States, 297 F. Supp. 1356, 1361 (D.P.R. 1968) (noting that there was a retention and intent of congressional power to legislate in regard to Puerto Rican waters according to the statute at hand); Huss v. New York & Porto Rico S.S. Co., 182 U.S. 392, 396 (1901) (making a textual analysis of the statute at hand in order to discern if Congress intended the statute’s application to Puerto Rico).

29 Acosta-Martinez, 252 F.3d at 19 (“the legal issue for the court is still one of what Congress intended”). It is interesting that the very court that struck down the Congressional intent argument invoked the rule concerning Congressional intent. It appears that the First Circuit incorrectly applied the Congressional intent standard.

30 It is unfortunate that the Supreme Court did not voice an opinion in regards to the Congressional Intent needed. Acosta-Martinez, 252 F.3d 13 (1st Cir. 2001), cert. denied, 535 U.S. 906 (2002).

31 Acosta-Martinez, 106 F. Supp. 2d at 318.
apply with the same force that they do to states. This would remove any confusion in the courts as to the showing of congressional intent, and would put an end to what Judge Torruella calls “political apartheid.”

IV. Conclusion

By labeling Puerto Rico as an unincorporated territory, the Supreme Court created a dysfunctional system that makes it necessary for parties to litigate whether or not a federal law applies to Puerto Rico when Congress does not specifically mention the island in the text of a federal law. Even in the complete absence of an explicit reference to Puerto Rico in the statutory text, the First Circuit decided that the FDPA applies with full force in Puerto Rico. Whatever the original ideological underpinnings were that set off the initial storm of the incorporation doctrine, it has undoubtedly complicated the U.S.-Puerto Rican jurisprudential balance. The Supreme Court can quash this complication by reanalyzing the forces behind the doctrine of incorporation, which affects millions of people and creates judicial confusion in courts and on the island. Either the Supreme Court, by overruling the Insular Cases which labeled Puerto Rico as an unincorporated territory, or Congress, by creating new, explicit legislation, should incorporate Puerto Rico into the United States in order to put a stop to unnecessary litigation over the question of whether or not a federal law applies with full force in Puerto Rico.

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32 See Rasmussen v. United States, 197 U.S. 516, 516 (1905) (noting that since Alaska was incorporated into the United States, the constitutional right to trial by jury applied); c.f. Balzac v. Porto Rico, 258 U.S. 298, 307-09 (holding that Puerto Ricans do not have the right to trial by jury because Puerto Rico was not incorporated).
33 Torruella, supra note 14, at 286.
34 Acosta-Martinez, 252 F.3d at 19.
35 3.6 million Puerto Rican islanders lay at the mercy of a faulty Congressional Intent doctrine. One which allows them to be put to death for committing a crime, without explicit intent from Congress to do so.