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RACE, SPACE, AND THE PUERTO RICAN CITIZENSHIP

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On April 12, 1900, the Congress of the United States enacted the *Foraker Act of 1900,*[1] which replaced the governing military regime in Puerto Rico with a civil form of governance.[2] Section VII of this act created a Puerto Rican citizenship for the residents of the island.[3] This citizenship was reaffirmed by the United States Supreme Court in 1904 by its ruling in *Gonzales v. Williams.*[4] The Puerto Rican citizenship was again reaffirmed on November 18, 1997, by the Puerto Rican Supreme Court through its ruling in *Miriam J. Ramírez de Ferrer v. Juan Mari Brás.*[5] Mari Brás, however, through his renouncing of U.S. Citizenship, sought to redefine Section VII as a source of law that recognized a Puerto Rican nationality separate from that of the United States.[6]

Rogers M. Smith contends that U.S. "justices were apparently willing for Puerto Ricans, like other peoples of color, to be designated 'American' so long as what that meant in terms of citizenship status remained unclear."[7] Smith's argument suggests that the Puerto Rican citizenship is a direct result of the racist ideologies of the moment. In this paper I would like to analyze this argument by arguing that the Puerto Rican citizenship is directly linked to a status of space that was in turn created by racist ideologies. In other words, while it is evident that there is a relationship between the Puerto Rican citizenship and the racial ideologies of the progressive era, this relationship is mediated by a spatial configuration.

The Puerto Rican spatial configuration that I am alluding to can be understood as a liminal condition. This notion of a liminal condition is informed by a reading of Michel Foucault's notion of the liminal, which he uses to explain the status of the madman at the dawn of the Renais-

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1. 31 Stat. 77 (1900).
2. *Id.*
3. *Id.* at § VII.
4. 192 U.S. 1, 7 (1904).
5. Supreme Court of Puerto Rico, No. CT-96-14 (November 18, 1997).
6. *Id.*
7. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 438 (1997).

sance.[8] Explaining how madmen were generally placed on ships and ferried away from the city, Foucault argues that

> The madman's voyage is at once a rigorous division and an absolute Passage. In one sense, it simply develops, across a half-real, half-imaginary geography, the madman's *liminal* position on the horizon of medieval concern – a position symbolized and made real at the same time by the madman's privilege of being *confined* within the city *gates*: his exclusion must enclose him; if he cannot and must not have another *prison* than the *threshold* itself, he is kept at the point of passage. He is put in the interior of the exterior, and inversely. A highly symbolic position, which will doubtless remain his until our own day, if we are willing to admit that what was formerly a visible fortress of order has now become the castle of our conscience.[9]

In the context of Puerto Rico, this argument would suggest that the Puerto Rican space is located on the horizon or the juridical line separating the foreign from the domestic. The political expression of this juridical status could suggest that Puerto Rico is somewhere in between colonial and territorial status. My contention in this paper is that this ambiguous condition facilitated the creation of a Puerto Rican citizenship that could be distinguished from an Anglo-American citizenship and an alien status. Moreover, this ambiguous condition served as a prison for the Puerto Rican citizen, preventing him from becoming either an Anglo-American citizen or a citizen of a sovereign nation-state. It also resulted in a status that was not entitled to the constitutional protections and civil liberties guaranteed to the U.S. citizen and the alien.

I. ANTECEDENTS

Smith contends that citizenship during the Progressive Era could be understood within a four-tiered hierarchical structure, which included the following:

> [F]irst, the excluded status of people denied entry to and subject to the expulsion from the U.S., generally owing to their ethnic or ideological traits; second, colonial subjectship, reserved chiefly for territorial inhabitants declared racially ineligible for citizenship; third, second class citizenship, usually understood as required by impartial grants of formal citizenship to races not capable of exercising it, and as the proper status for women; and fourth full citizenship, including voting rights.[10]

In principle, the Puerto Rican citizenship could be located somewhere between the second and third tiers. This argument, however, does not

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8. *See* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON 11 (1965).

9. *Id.*

10. SMITH, *supra* note 7, at 429.

account for the juridical creation of the Puerto Rican citizenship. In addition, it is unclear whether Smith's conception of citizenship can exist independent of a national imagining. Smith's notion of the relationship of the citizen to the nation does not account for a liminal spatial status, with liminal citizens, within the nation.[11]

In my opinion, there are at least two constitutional precedents that could be used to explain the Puerto Rican citizenship paradigm. The first can be traced to the early founding of the U.S. and located in the debates regarding the Federalist enactment of the Alien and Sedition Acts of 1798.[12] Under the climate of these laws, it is possible to locate two juridical conceptions of citizenship, namely a State and a Federal citizenship. Certainly the Supreme Court's early rulings on its jurisdiction over cases arising between "citizens of different states" under article III[13] suggests some possible parallels to the question at hand.[14] The problem, however, is that in these early cases states continued to claim a level of sovereignty that threatened the possibility of a federal government. In the case of Puerto Rico, the territory posed no threat to the Union, and because of its territorial condition, it could not make a claim to share in power with other states. Moreover, it would seem that the 14th Amendment created a national conception of citizenship that would have precluded a Puerto Rican citizenship.[15]

A second possible precedent could be located in the experience of indigenous peoples in the United States. Certainly the notion of the Domestic Dependent Nation[16] and/or the juridical concept of the "alien nation"[17] are quite similar to the subsequent unincorporated status of Puerto Rico. Moreover, indigenous people were construed as an alien race living under the tutelage of the federal government.[18] The problem with establishing a direct parallel with the indigenous experience is that Puerto Rico was treated as a territory, albeit unincorporated, whereas Indian territories were considered domestic dependent nations. In other words, while Puerto Rico could eventually become a state of the Union, domestic dependent nations were precluded from becoming anything more than

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11. It is interesting to note that even after Puerto Ricans became citizens of the United States, the Supreme Court decided that the Bill of Rights applied differently to citizens residing on the island, but once they became residents of the continental U.S., their entitlements would be restored. *See* Balzac v. Porto Rico, 258 U.S. 298, 306-07 (1922).

12. *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, VOLUME I: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 44-48 (2d ed. 1991).

13. U.S. CONST. art. III, § 2, cl. 1.

14. *See, e.g.*, Turner v. Bank of North America, 4 U.S. 8, 10 (1799); Mossman v. Higginson, 4 U.S. 12, 14 (1800).

15. *See* DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS, VOLUME II: CIVIL RIGHTS AND CIVIL LIBERTIES 293-94 (3d ed. 1997).

16. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

17. Elk v. Wilkins, 112 U.S. 94, 99 (1884).

18. *See generally*, Worcester v. Georgia, 31 U.S. 515 (1832).

an occupied territory. In addition, it is evident that lawmakers recognized the existing Spanish civil law tradition in Puerto Rico as a "civilized" form of law.[19]

A. *Treaty of Paris of 1898*

The Spanish-Cuban-American War of 1898 marked a paradigmatic shift in U.S. territorial policy. To be sure, Scott B. Cook summarizes the forces shaping this historical moment as follows:

> [B]y the 1890s continental expansion had reached its limit, dramatized by the occupation of the immense area bordered by Canada, Mexico, and the Pacific Ocean and cemented by the final elimination of American resistance at Wounded Knee (1890). In 1893 the historian Frederick Jackson Turner pronounced the American frontier closed. It had, he claimed, defined the American experience but it would no longer do so. With British Canada and independent Mexico un-obtainable without a costly war and international censure, some Americans turned an anxious and hopeful gaze on overseas territories as the next beneficiaries of America's great democratic and capitalist experiment.[20]

With the conquest of Puerto Rico, the Philippines, and Cuba, the U.S. moved from an "expansionist" territorial policy to an "imperialist" foreign policy.[21] Puerto Rico was formally conquered and ceded to the United States on July 25, 1898, under the tenets of the *Treaty of Paris of 1898.*[22] Although the validity of this treaty is questionable, the *Treaty of Paris* has been recognized as the first juridical text to establish the hegemonic relationship of the United States over Puerto Rico.[23]

For the purpose of this paper, I will focus my discussion on Article IX of this treaty, which addressed the questions of citizenship, space, and civil rights on the island. Article IX can be divided into three provisions. The first provision outlines the rights of the Spanish subjects in Puerto Rico and reads as follows:

> Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom (sic), retaining in either event all their rights of property, including the rights to sell or dispose of such property or of its proceeds; and they shall have the

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19. *See* O'BRIEN, *supra* note 12, at 46.

20. SCOTT B. COOK, COLONIAL ENCOUNTERS IN THE AGE OF HIGH IMPERIALISM 93-94 (1996).

21. *See generally* ERNEST N. PAOLINO, THE FOUNDATIONS OF THE AMERICAN EMPIRE, WILLIAM HENRY SEWARD AND U.S. FOREIGN POLICY (1973).

22. 30 Stat. 1754, 1755, Art. II (1898).

23. *See id.* at 1754. This is an issue subject to significant jurisprudential debate given that the *Carta Autonómica* of 1897 required that Puerto Ricans participate in any decision-making process that impacted the island on an international level. Puerto Ricans were not part of the discussions surrounding Spain's cession of the island to the U.S.

> right to carry on their industry, commerce, and professions being subject in respect thereof to such laws as are applicable to other foreigners.[24]

This provision recognizes a distinction between the Spanish peninsular (born on the Spanish peninsula) and the Spanish Creole (born on the island).[25] This distinction is critical. First, from a historical point of view, we should note that the Spanish concept of race was generally associated with the individual's birthplace and his or her *Casta*.[26] Presumably, Spanish Creoles born in Puerto Rico were inferior to the Spanish Peninsulars with regard to the Spanish social hierarchy. Secondly, by recognizing a birthright distinction in this treaty, the Spanish clearly established that Puerto Ricans were not equals, thus undermining the *1897 Charter of Autonomy*.[27]

The second provision directly addresses the allegiance and nationality of the residents of Puerto Rico.[28] Under this provision, Spanish subjects not born in the peninsula could retain allegiance to Spain by declaring their loyalty in a local court. Otherwise, they would become nationals of Puerto Rico.[29] The creation of a Puerto Rican nationality enabled the U.S. to eventually justify not naturalizing the island residents because they possessed a separate national identity. This policy led to the creation of an ambiguous status somewhere between an alien and a national owing allegiance to the United States. José López Baralt contends that this is a departure from a previous policy of extending citizenship rights to the residents of newly acquired territories.[30] He suggests that this departure can be attributed to the lack of desire of the U.S. to naturalize Filipinos, as well as "the numerous uncivilized tribes" and Chinese inhabiting the archipelago.[31]

The concluding portion of Article IX stated that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."[32] Congress, however, neglected to pass any legislation until 1900.[33] Thus, between 1898 and 1900, Puerto Rico was governed by a succession of military gover-

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24. 30 Stat. 1754, 1759, Art. IX (1898).

25. *See* JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 19-20 (1979).

26. The etymological meanings of the concept of *Casta* refer to social class, lineage, and animal breed. It is a classification system that was instituted in Spain during the "Re-Conquest" and the fifteenth century Inquisition.

27. *See* REECE B. BOTHWELL, TRANSFONDO CONSTITUCIONAL DE PUERTO RICO, PRIMERA PARTE: 1887-1914 57 (1971).

28. *See id.*

29. 30 Stat. 1754, 1759, Art. IX (1898).

30. *See* JOSÉ LÓPEZ BARALT, THE POLICY OF THE UNITED STATES TOWARDS ITS TERRITORIES WITH SPECIAL REFERENCE TO PUERTO RICO 211-12 (1999).

31. *Id.*

32. 30 Stat. 1754, 1759 Art. IX (1898).

33. *See* LÓPEZ BARALT, supra note 30, at 192-93.

nors under the direct authority of the President of the United States. López Baralt suggests that in the absence of any Congressional legislation the President could retain the power to decide how to govern the island as Commander-in-Chief, assuming of course that he was engaged in restoring peace and order.[34]

More importantly, this provision transferred authority to the Congress, including the power to establish local courts of law on the island. Eventually, the Puerto Rican legal system was re-developed by Congress with the advice of these military governors.[35] The goal was to create a legal system that was consistent with an Anglo-Saxon legal tradition.

In sum, the *Treaty of Paris of 1898* became the foundation of the jurisprudence that would define the contours of the subsequent juridical relationship between the United States and Puerto Rico, and a key document in the creation of a Puerto Rican citizenship. First, the *cession* of the island created an ambiguous tutelary status subject to U.S. Congressional governance. Second, the *cession* established a Puerto Rican national subject that was distinct from the Spanish or the Anglo-American citizen. This latter power enabled lawmakers to create an ambiguous juridical/political status for Puerto Rico, clearly outside of the confines of traditional territorial policies.

B. *The Military Regime and General Davis*

After the signing of the *Treaty of Paris,* President McKinley placed a succession of military governors on the island whose main goal was "to keep order, protect life and property, and get things ready for the establishment of a civil government in substitution of itself."[36] The legal source of their power was outlined in the *General Order 101.*[37] More importantly, the military governors were further charged with establishing a legal regime and making recommendations to the federal government through special reports.[38] These, in turn, informed lawmakers in their policy-making initiatives. As one might suspect, these reports captured the racial prejudices that the generals used to understand the Puerto Rican demography.

Trías Monge contends that Brigadier General George W. Davis was instrumental in the development of a Puerto Rican legal system that could be integrated to the U.S. Anglo-Saxon legal system.[39] While Davis thought that the existing legal system in Puerto Rico was "un-American and strange," he was confident that this "strangeness" would disappear

34. *SeeId.* at 194.
35. JOSÉ TRÍAS MONGE, EL SISTEMA JUDICIAL DE PUERTO RICO (1988).
36. LÓPEZ BARALT, *supra* note 30, at 189.
37. H.R. DOC. NO. 1484, at 2177 (1909).
38. *Id.*
39. *See* TRÍAS MONGE, *supra* note 35, at 50-53.

one by one and "ultimately a much more complete harmony of the Puerto Rican with the American system of procedure will come into being."[40] This recognition of the civil code, albeit strange, eventually enabled lawmakers to make a general distinction between Puerto Rico and other territories, ascribing to the island an unprecedented level of judicial sovereignty.

In addition to grappling with the island's legal system, Davis finds himself trying to figure out how to "racialize" the Puerto Rican. Ultimately, Davis constructs a sort of Puerto Rican racial alterity.[41] The famous "Indian hunter" described the population of the island in the following manner:

> The last census, that of 1897, showed that the pure-blood negroes have numbered but 73,824 out of 899,394, while of the same total there were 242,000 mulattoes. Combining the full and mixed bloods, and designating them as colored (the term by which they are known in the States), it would appear that the pure white are in a considerable majority; and comparing both totals with the statistics of the year 1847 it would seem that in that decennial period the numbers of these denominated above as colored are not increasing in numbers, but instead have actually decreased.[42]

As this statement suggests, the Puerto Rican did not fit Davis' imagining of an internal *Other* (black American), an external *Other* (Spaniard), nor the *Self* (White Anglo-Saxon). This was further evidenced in his melancholic complaint that "between the negro and the peon there is no visible difference. It is hard to believe that the pale, sallow, and often emaciated beings are the descendants of the conquistadores who carried the flag of Spain to nearly all of South America, and to one-third of North America."[43]

Thus at this early moment of conquest we can further discern the racialization of a Puerto Rican race in an ambiguous way, and to a certain extent, in a status of alterity. In attempting to racialize the Puerto Rican, Davis finds a white Puerto Rican that does not have the status of the Anglo-Saxon, and a black/peon Puerto Rican that is not like the American Negro. What is clear, however, is that while the White/Caucasian Puerto Rican acquires an alterity status more akin to the Anglo-Saxon, but never an equal, the black and the "peon" are represented in marginalized ways akin to the American Negro. Together with the description of the existing legal system, these descriptions enable

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40. George W. Davis, *Report of Brig. Gen. Geo. W. Davis, U.S.V., on Civil Affairs of Puerto Rico, 1899* at 26-27 (1900) [hereinafter Davis Report].

41. TZVETAN TODOROV, THE CONQUEST OF AMERICA: THE QUESTION OF THE OTHER (Richard Howard Trans.) (1982).

42. Davis Report, *supra* note 40, at 16.

43. *Id.* at 18.

Congressional lawmakers to legitimize the creation of a distinct Puerto Rican juridical space and its distinct Puerto Rican citizen.

C. *The Foraker Act of 1900*

The *Foraker Act* effectively ended the military regime's governance and created a civil government for the island in 1900 under the direct hegemony of the United States. López Baralt notes that the *Foraker Act* lays out three distinct political provisions, namely "the creation of a Puerto Rican citizenship, the profferof American protection for the island's citizenry, and the constitution of a body politic by these citizens."[44] He further notes that

> This creation of a special body politic, and the creation by express declaration of citizenship of the territory, were departures from the former territorial practice of Congress. One is tempted to ask what was the objective of Congress in making these provisions. We do not know of any need that they fulfilled. On the contrary, it would seem that they are misleading. Generally speaking, in public law, citizenship and sovereignty are reciprocal and inseparable. The inhabitants of the Islands were made citizens, - but of what? Of a body politic therein created which undoubtedly was not sovereign in any international sense.[45]

Citing Senator Foraker, Bothwell contends that the objective of the *Foraker Act* was to annex Puerto Rico and place it in a tutorial condition geared towards eventual statehood.[46] This, however, resulted in the creation of an ambiguous liminal status that was tempered by both a colonial condition and a territorial tradition. In fact, Puerto Rico acquired both colonial attributes as well as territorial entitlements. Puerto Rico acquired a foreign character for domestic purposes, yet it was located at the margins of a U.S. imperial border.

The Puerto Rican citizenship gave material expression to this ambiguous status. Section VII of the General Provisions created a Puerto Rican citizenship that required national loyalty while simultaneously denying its bearer the basic protections of the U.S. Bill of Rights.[47] The language of the text is clear:

> That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have been elected to preserve their allegiance to the Crown of Spain.[48]

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44. LÓPEZ BARALT, *supra* note 30, at 208.
45. *Id.*
46. BOTHWELL, *supra* note 27, at 42.
47. 31 Stat. § 7 (1901).
48. *Id.*

Thus, the Puerto Rican citizen acquired the responsibilities of U.S. citizenship with no protections or entitlements. Senator Foraker would later argue that Puerto Ricans were "in a worse situation than aliens, for aliens may become naturalized citizens of the United States and Puerto Ricans can not."[49] To be sure, Bothwell notes that under the immigration laws of the period, one had to renounce his or her foreign citizenship in order to acquire a U.S. citizenship. Puerto Ricans, however, were unable to renounce their citizenship because it was not a foreign citizenship. Thus, Puerto Ricans were unable to become U.S. citizens, and the Puerto Rican citizenship in turn lacked any type of international recognition on account of its domestic nature.[50] Puerto Ricans became juridical prisoners at the gates of the empire.

II. INSULAR CASES

As I suggested earlier, my argument is further institutionalized by the Supreme Court in a series of rulings beginning in 1901 known as the *Insular Cases*.[51] Constitutional historian David P. Currie has described the rulings rendered in 1901 as the "most interesting and controversial decisions about the Bill of Rights during the Fuller era . . .."[52] John W. Burgess in turn once described these as "the most momentous, next to that of domestic slavery."[53] These decisions have defined both the status of Puerto Rico and its subsequent relationship to the United States. For the purposes of this paper, I will only focus on a discussion of three issues that can help contextualize my overall argument, namely the doc-

49. 36 Cong. Rec. 2894 (1903), cited in CABRANES, *supra* note 25, at 57 n. 243.

50. BOTHWELL, *supra* note 27, at 55.

51. *See* Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225-328 (1996) (contending that the following cases can generally be understood within the rubric of three sets of cases during three historical periods). In general Rivera Ramos suggests that the first set of cases, decided in 1901, encompasses the following: De Lima v. Bidwell, 182 U.S. 1 (1901); Goetze v. US, 182 U.S. 221 (1901); Grossman v. U.S., 182 U.S. 221 (1901); Dooley v. U.S., 182 US 222 (1901); Armstrong v. U.S., 182 U.S. 243 (1901); Downes v. Bidwell, 182 US 244 (1901); Huus v. New York and Porto Rico Steamship Company, 182 U.S. 392 (1901); Dooley v. U.S., 183 U.S. 151 (1901); and The Diamond Rings, 183 U.S. 176 (1901). Rivera Ramos further locates the second set of cases between 1903 to 1914, and he includes the following decisions: Haw. v. Mankichi, 190 U.S. 197 (103); González v. Williams, 192 U.S. 1 (1904); Kepner v. U.S., 195 U.S. 100 (1904); Dorr v. U.S., 195 U.S. 138 (1904); Mendozana v. U.S., 195 U.S. 158 (1904); Rasmussen v. U.S., 197 U.S. 516 (1905); Trono v. U.S., 199 U.S. 521 (1905); Grafton v. U.S., 206 U.S. 333 (1907); Kent v. Porto Rico, 207 U.S. 113 (1907); Kopel v. Bingham, 211 U.S. 468 (1909); Dowdell v. U.S., 221 U.S. 325 (1911); Ochoa v. Hernández, 230 U.S. 139 (1913); and Ocampo v. U.S., 234 U.S. 91 (1914). Rivera Ramos further suggests that Balzac v. Porto Rico, 258 U.S. 298 (1922) consolidates the development of the Insular Cases. I would suggest, however, that there are subsequent decisions, such as U.S. v. Verdugo-Urquidez, 494 U.S. 259 (1990), that could be read as a fourth stage of development of the Insular Cases doctrine.

52. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986 59 (1990).

53. John W. Burgess, *The Decisions of the Supreme Court in the Insular Cases*, 16 POL. SCI. Q. 3: 486-504, 486 (1901).

trine of un-incorporation, the distinction between belonging and being a part of the United States, and the reaffirmation of a Puerto Rican citizenship. In my opinion, the contours of the resulting U.S.—Puerto Rico relationship were contingent upon a conceptualization of an inferior Puerto Rican race.

Seven of the nine *Insular Cases* decided in 1901 addressed legal questions regarding the status of Puerto Rico. In *De Lima*, the Court's first ruling, the justices addressed the question of whether D.A. De Lima and Co. could recover duties exacted by the Customs Office in New York from certain importations of sugar emanating out of Puerto Rico during 1899.[54] In this case, the petitioner argued that the exactions made under the *Tariff Act of 1897* did not apply to Puerto Rico because the island had ceased to be a foreign country, as defined by the Act, after the signing of the *Treaty of Paris of 1898*.[55] Petitioners further argued that Puerto Rico had become a territory of the United States and therefore any imposition of taxes and excises on the island, not applicable to other parts of the Union, would constitute a violation of the Uniformity Clause of the Constitution.[56] The U.S. Attorney General countered that the Uniformity Clause applied to States and not to territories.[57] Moreover, as Efrén Rivera Ramos succinctly notes, the Solicitor General further contended that

> (a) the act of cession did not make the territory, ipso facto, a part of the United States, but merely a possession; (b) newly acquired territory becomes a part of the United States only if Congress so determines; (c) the power of Congress over those territories that have not become a part of the United States is "plenary," "absolute," "full and complete," subject only to fundamental limitations imposed by the Constitution, as defined by the Courts.[58]

The majority rejected the theory that presupposed that a

> territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic territory; that insurrections may be suppressed, wars carried on, revenues collected, taxes imposed; in short, that everything may be done which a government can do within its own boundaries, and yet the territory may still remain a foreign country.[59]

However, the Court did acknowledge that "nonaction [sic] of Congress may occasion a temporary inconvenience; but it does not follow that

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54. *See* 182 U.S. at 44.
55. *See id.* at 45.
56. *See id.* at 46.
57. *See id.* at 47.
58. Rivera Ramos, *supra* note 51, at 243.
59. *De Lima*, 182 U.S. at 198.

courts of justice are authorized to remedy it by inverting the ordinary meaning of words."[60]

The Court concluded, "Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that duties were illegally exacted, and that the plaintiffs are entitled to recover them back."[61] The dissent, however, sought to locate the Puerto Rican in the same juridical status as the "uncivilized" Indian.[62] By rethinking the Puerto Rican case within the context of an uncivilized and savage paradigm, the justices could situate Puerto Rico somewhere in between a foreign and domestic status.

By the time that the Court rendered its opinion in the fifth *Insular Case*, Puerto Rico had acquired a new status and a new doctrine was born. In *Downes,* the Court ruled on the validity of a tariff tax imposed on imports from Puerto Rico after the passage of the *Foraker Act* in 1900.[63] Justice Brown concluded that

> If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action. We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States . . . .[64]

As this citation suggests, Puerto Rico and the "alien race" that inhabited the island had now become a possession belonging to, but not a part of, the Anglo-Saxon empire.

In a concurring opinion, Justice White introduced a new doctrine of "un-incorporation" that created a new status akin to the domestic dependent nation. The Court concluded that neither the *Treaty of Paris* nor the *Foraker Act* had incorporated Puerto Rico into the Union; therefore, the island could be treated in a different manner than that in which States, territories, and possessions were treated. This status, in turn, provided the justices with an excuse for treating the "alien race" residing in the island differently than other U.S. citizens, especially since the island's inhabitants were not entitled to the protection of the Bill of

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60. *Id.*
61. *Id.* at 199.
62. *See id.* at 219.
63. *See id.* at 249-50.
64. *Downes*, 182 U.S. at 287.

Rights.[65] Surely, the Court reasoned, the responsibilities of the Bill of Rights could not be entrusted upon an uncivilized people. To be sure, incorporation, argued White, would require that Puerto Ricans become U.S. citizens, and Congress had not drafted a bill supporting the collective naturalization of the islanders.[66] Thus, if Congress wished to incorporate Puerto Rico and its inhabitants into the United States, then it could draft a bill and ratify it, or so the logic went.

The Court's subsequent reaffirmation of the *Foraker* citizenship is further illustrative of the law's creation of an anomalous category informed by a racial paradigm. Take for example the ruling in *González*, which addressed the detention of Isabela González on August 24, 1902 upon her arrival to New York.[67] She was detained by the Immigration Commissioner and was prevented from entering the country because she was an "alien immigrant."[68] The Commissioner sought to bar her entry into the U.S. under the provisions of the *Alien Immigration Act of 1891*.[69] In a unanimous decision, the Court concluded that since González was a native resident of Puerto Rico during the passage of the *Treaty of Paris* she was not considered an alien immigrant within the meaning of the act in question.[70] Moreover, the *González* ruling suggests, that the Court could continue to regulate the movement of bodies, namely Chinese, and "certain classes of aliens or alien immigrants," into and out of the nation.[71] To be sure, the Court argued that

> We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic laws of whose domicil was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, -are not 'aliens,' and upon their arrival by water at the ports of our mainland are not 'alien immigrants,' within the intent and meaning of the act of 1891.[72]

The decision established a new juridical status located between a U.S. citizenship and a foreign national. Puerto Ricans, although not aliens in the sense of the "Chinese laborers" were not Anglo-Saxons either, and thus not able to become citizens. The result was a separate and unequal status that would be in place until World War I and in particular, until the

65. *See id.* at 314.
66. *Id.*, at 315.
67. *See González*, 192 U.S. at 7.
68. *Id.*
69. *See id.*
70. *Id.* at 12.
71. *Id.* at 13.
72. *Id.*

passage of the *Jones Act of 1917* which provided for the collective naturalization of the Puerto Rican people.

CONCLUDING REMARKS

By way of conclusion, I suggest that the Puerto Rican citizenship is not necessarily a direct result of racist law making. At present, it is unclear to me whether racist policy makers could have justified the creation of a separate and distinct Puerto Rican citizenship, using race as a determinative criteria. This is not to say that race is not a factor in the invention and subsequent institutionalization of a Puerto Rican citizenship. Rather my contention is that lawmakers had to construct a distinct juridical space in which to locate the Puerto Rican citizenship. In this sense, Anglo-Saxon racist ideologies informed the invention of a *liminal* juridical space, which in turn could legitimize a corresponding Puerto Rican citizenship. In other words, the status of the Puerto Rican space became a precondition of the construction of a Puerto Rican citizenship.