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The Tarnished Mirror: the Treaty of Paris (1898) in the Legal History of Puerto Rico

El espejo tiznado: el tratado de París (1898) en la historia jurídica de Puerto Rico

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Abstract Eng

The Treaty of Paris of 1898 ended a brief war but marked a turning point in Puerto Rico's legal and cultural history. In just over three months of conflict, Spain ceded Puerto Rico to the United States without the presence of the island's legitimate representatives and without their consent in the transfer of sovereignty. Under Article IX of the Treaty, the civil rights and political status of the Puerto Rican Nation were placed under the authority of the United States Congress, inaugurating a profound change in the legal system and a rupture with Puerto Rico's Spanish-Hispanic-Latino heritage. Since then, jurists and historians have debated the treaty's legitimacy, with some arguing for its nullity. This article revisits those debates and demonstrates how the events of 1898 reveal the complex interplay between law and power.

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Keywords: Treaty of Paris (1898); International Law; Constitutional Law; sovereignty; Puerto Rico

Abstract Esp

El Tratado de París de 1898 puso fin a una breve guerra, pero marcó un punto de inflexión en la historia jurídica y cultural de Puerto Rico. En poco más de tres meses de conflicto, España cedió Puerto Rico a los Estados Unidos sin la presencia de los representantes legítimos de la isla y sin su consentimiento en la transferencia de soberanía. En virtud del artículo IX del tratado, los derechos civiles y la condición política de la Nación Puertorriqueña quedaron bajo la autoridad del Congreso de los

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Estados Unidos, lo que supuso un profundo cambio en el sistema jurídico y una ruptura con la herencia hispano-latina de Puerto Rico. Desde entonces, juristas e historiadores han debatido la legitimidad del tratado, y algunos han defendido su nulidad. Este artículo revisa esos debates y demuestra cómo los acontecimientos de 1898 revelan la compleja interacción entre el derecho y el poder.

Palabras clave: Tratado de París (1898); derecho internacional; derecho constitucional; soberanía; Puerto Rico

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You shall no longer take things at second or third hand, nor look through the
eyes of the dead, nor feed on the specters in books,
You shall not look through my eyes either, nor take things from me,
You shall listen to all sides and filter them from your self

Song of Myself, Walt Whitman[1]

Y el "echón" que me desmienta
que se ande muy derecho
no sea en lo más estrecho
de un zaguán pague la afrenta.
Pues según alguien me cuenta:
dicen que la luna es una
sea del mar o sea montuna.
Y así le grito al villano:
yo sería borincano
aunque naciera en la luna.

Boricua en la luna, Juan Antonio Corretjer[2]

Dedicated to Joselin M.

1 Whitman, 1892.
2 Corretjer, 2000, p. 120.

Preface

This critical legal-historical research is grounded in extensive archival work and the examination of primary sources. The documentation reveals significant gaps in the official historiography of the Treaty of Paris of 1898 and its legal consequences. In particular, it confirms the observations of Rafael María de Labra (1840–1918), a prominent *diputado* in the Spanish *Cortes* and Cuban, who noted that the so-called *Libro Rojo*, Spain's official compendium of diplomatic correspondence on the treaty, was incomplete and selectively curated. Deliberate omissions distorted the historical record, obscuring the full scope of the treaty's negotiations and implications.

The study examined materials largely unstudied in prior literature, including ciphered telegrams, internal memoranda, and diplomatic notes excluded from the *Libro Rojo*, as well as French dispatches and Spanish parliamentary records. American sources consulted include the Public Papers of the Presidents (William McKinley), the Perfected Treaties between Spain and the United States, Records of the Department of State, and the Papers Relating to the Foreign Relations of the United States, housed in the National Archives in Washington, D.C.

Spanish archives further enriched the research, including the *Archivo de la Administración* in Alcalá de Henares, the *Archivo del Congreso de los Diputados* in Madrid, and the *Archivo General de Palacio* in Madrid. Taken together, these sources offer a fuller account of the legal and political factors that shaped the treaty's provisions and the broader framework that Puerto Rico came to inherit under successive Spanish and United States administrations, as later reflected in the jurisprudence of the United States Supreme Court in the so-called Insular Cases.

It is to be emphasized that this analysis is the product of fully independent scholarship, unaffiliated with any academic, political, research, or government organization or institute. The aim is not to deliver a definitive judgment on the treaty's legal validity under contemporary international or constitutional law, but to examine historical sources critically, present the evidence rigorously, and offer a framework for understanding the treaty's effects in the context of historical continuity and the evolving legal reality of Puerto Rico.

This research avoids any proximity to interpretations that seek to legitimize, encourage, or excuse violence. Its purpose is both juridical and historiographical and adheres to ethical principles, examining the structural role of law as an instrument of power while maintaining academic integrity, lawful reform, and the peaceful pursuit of historical and legal understanding. In this sense, by analyzing the interaction of law, diplomacy, and historical practice, this study provides a careful examination of the Treaty of Paris of 1898 and its long-term consequences for the Puerto Rican Nation. Readers are invited to engage critically with the sources, reflect on the legal and political structures that shaped Puerto Ricans' history, and consider how enduring norms develop through the interaction of authority, consent, and historical practice.

1. The Legal Context of Treaty and International Order

The Treaty of Paris, which was signed in December of 1898, appeared at first glance to be a relatively straightforward document. A single sentence, buried within its articles, would determine the fate of numerous communities, including those of Puerto Ricans, Chamorros, and Filipinos. The «civil rights and political status» of these communities were primarily left to the discretion of the United States Congress, rather than being guaranteed by treaty or grounded in universal constitutional principles. Initially regarded as a minor procedural element within Article IX, this clause later assumed a significant role in the structure of governance. It illustrates how legal frameworks can operate as subtle conduits of power. In contrast to the territories organized under the Northwest Ordinance of 1787, the new possessions were denied a guaranteed path to statehood or the equal protection of the Constitution. Puerto Rico, Guam, and the Philippines functioned as experimental sites where the Supreme Court, commencing with the co-called Insular Cases in 1901, conceptualized the category of the «unincorporated territory», which were characterized as «foreign in a domestic sense». These territories existed in a state of simultaneity within and beyond the constitutional order, subject to allegiance while experiencing a partial denial of full belonging. Hawaii, which was annexed in the same year, was placed on a different trajectory. It was incorporated by statute and thus destined for statehood. However, this only exacerbated the contrast.

It should be noted that the United States was not the sole nation engaged in the construction of these asymmetries. During the 19th century, the British transformed indigenous nations in Canada into «domestic subjects» and perfected this legal construction of indirect rule in India. Meanwhile, during the 19th century, the French codified hierarchy in law by incorporating Algeria as *départements*, a model later extended to Morocco under a protectorate system. A close examination of these cases revealed a consistent pattern, wherein colonialism was presented as if it were achieved through negotiation, domination was framed as administration, and subordination was justified through legal formalities. These patterns, as evidenced by the historical record, involved empires seeking to justify their hierarchical structures and consolidate their authority. This endeavor manifested in the shaping of legal and political frameworks that regulated colonial relations and maintained unequal power structures.

Illustr. 1[3]

[3] Bartholomew, 1898, *Cluck! cluk! cluk!,* Library of Congress Prints and Photographs Division, (DLC/PP-1957:R5.2)

1.1. *Political Strategies and Global Power Relations*

In what Hobsbawm has described as the age of empire, imperialism was primarily directed toward strategic locations where geopolitical and commercial influence could be maximized[4]. Within this framework, Puerto Rico's position in the Caribbean Sea, as the closest Spanish port to Europe, fortified with a sophisticated system of castles, roads, and harbors, rendered it a site of considerable strategic value, evidenced in battles against Britain and the Netherlands[5]. With the projected construction of a transoceanic canal in Panama, the island's importance increased further, both for international maritime commerce and for the defense of the Western Hemisphere, a fact the United States recognized and actively sought to secure.

By 1898, the United States began embarking on what can be described as the creation of a transoceanic empire, in accordance with visions articulated by American historians Frederick Jackson Turner and Alfred P. Mahan[6]. The expansion of U.S. global commerce and naval power demanded attention to both the Caribbean and Western Pacific, regions that could serve as early pillars of imperial reach[7]. Central to this expansionist endeavor was the principle of incorporating acquired territories into the American political and economic sphere[8]. Spain, fully aware of these ambitions, sought to navigate the treaty negotiations of 1898 (Annex I) with meticulous attention to legal and diplomatic formalities, even as it ceded Puerto Rico, Guam, and the Philippines to the United States, and relinquished sovereignty over Cuba. Nevertheless, in the aftermath of the cession, American nationalism encountered significant challenges in comprehending Puerto Rico's unique Hispanic-Latino cultural heritage and the national identity of Puerto Ricans. This complexity adversely impacted both the processes of assimilation and the development of policies.

The Spanish-American War of 1898 was precipitated by Cuba's long struggle for independence from Spain (1868-1878, 1879-

[4] Hobsbawm, 2010, Chapters 1 and 3.
[5] Rodríguez Beruff, 1991, p. 63.
[6] Turner, 1883 and Mahan, 1919, p. 87.
[7] McCoy and Scarano, 2009, p. 3.
[8] Rivera Ramos, 2007, pp. 133-137.

1880, 1895-1898), which increasingly involved U.S. intervention. From the perspective of Cuban patriots advocating for *Cuba libre*, the conflict was both a fight for national liberation and a geopolitical turning point. Due to its expansionist consequences, the Spanish-American War is one of the most analyzed and criticized wars in American history[9].

Consequently, during this period, the Paris Peace Treaty of 1898 elevated the historical right of conquest to the status of a central legal and political principle. Conventional historiography frequently asserts that President William McKinley was unaware of Spain's desire for peace prior to the invasion of Puerto Rico. Nevertheless, archival evidence indicates that he was thoroughly informed and strategically exploited delays in telegraphic communications and access to ciphered codes to expedite the invasion prior to the armistice, as formalized in the Peace Protocol of 1898[10] (Annex II). Thus, the timing of these actions reinforced the legal posture of conquest and shaped the interpretive framework through which the treaty and its consequences must be understood.

1.2. *Constitutional and Treaty Frameworks of Expansion*

Under the Treaty of Paris of 1898 (Annex I), the rights of Puerto Rico and Guam remained bound to U.S. sovereignty, while Cuba and the Philippines followed independent trajectories due to subsequent legislation. Article IX, second paragraph, expressly stated: «The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress». Eugenio Montero Ríos, president of the Spanish peace commission, publicly confirmed that Spain had not questioned the U.S. commitment[11]. Yet Rafael María de Labra, a Cuban and also *diputado* in the Spanish *Cortes*, observed with great insight that Article IX deprived local populations of any participatory voice in the settlement:

[9] Gould, 1982, p. 166.

[10] Library of Congress, 1961, *Dwight Braman to William McKinley*, July 22, 1898 and *Duke of Almodóvar to William McKinley*, July 22, 1898. See also López Baralt, p. 88.

[11] Library of Congress, 1961, *Ibid*.

> (...) the text of Art. 9 of the Treaty of Paris, was done without the intervention of the local population, depriving them of a plebiscite. The same Spanish government that under pressure from the US government, took Spanish citizenship from the inhabitants of our colonies not born in the Spanish Peninsula, in such a manner that if a Cuban or a Puerto Rican wanted to remain Spanish, under our current laws, they would have to do the same as a French or an Italian Citizen (....) And concerning the civil and political rights, it simply reads that the US Congress would resolve as it pleases. That is why the Spanish of "*ultramar*" are without any rights[12].

As historian Fernando Bayrón Toro has noted, Labra's deep knowledge of Spanish-Puerto Rican relations and of broader Spanish diplomatic affairs made him an authoritative commentator on these matters[13]. The U.S. Congress, exercising its discretion under Article IX, later enacted the Foraker Act (1900) and Jones Act (1917), granting U.S. citizenship and a measure of local governance to Puerto Rico, while also providing Guam a framework of territorial administration. By contrast, Congress chose the path of independence for the Philippines through the Tydings–McDuffie Act (1934) (Annex IV). These divergent trajectories established a legislative precedent for self-determination in ceded territories, albeit one wholly dependent on congressional initiative as an unincorporated territory.

Accordingly, the governance and civil rights of Puerto Ricans remain dependent on congressional will, highlighting the broader constitutional and legal structures through which the United States exercises authority over its territories.

Therefore, since its earliest constitutional development, treaties have occupied a central place in the legal architecture of the United States. Article III, Section 2, Clause 1 of the US Constitution extended the judicial power to: « (...) all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority (...) ». As Alexander Hamilton emphasized in The Federalist No. 22, treaties must be treated as part of the law of the land and interpreted through judicial determinations:

[12] Bayron Toro, 2005, pp. 99-100.
[13] Bayron Toro, 1998, pp. 181 and 183.

> Treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals must, like all other laws, be ascertained by judicial determinations[14].

This principle was soon affirmed in Supreme Court jurisprudence in Ware v. Hylton (1796), the Court held that treaties override conflicting state laws: « (...) treaties which were then made or should thereafter be made under the authority of the United States, should be the supreme law of the land (...)»[15]. In United States v. Schooner Peggy (1801), Chief Justice Marshall declared that: «the Constitution of the United States declares a treaty to be the supreme law of the land, of consequence its obligation on the courts of the United States must be admitted»[16].

Furthermore, since its earliest years, treaties have constituted a central element of the United States' fundamental law. In the specific context of territorial expansion, however, treaty-making was not an isolated instrument but operated within a broader constitutional framework that had been anticipated before the ratification of the U.S. Constitution (1788). The Northwest Ordinance of 1787[17], adopted under the Articles of Confederation (1781), established the guiding template: territories acquired by the United States were expected to pass through successive stages of self-government and ultimately accede to the union as states, Article 4, first paragraph of the Northwest Ordinance establishes:

> The said territory, and the States which may be formed therein, shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.

This framework provided the prevailing model throughout the nineteenth century. As the U.S. Supreme Court later articulated in Shively v. Bowlby (1894), territorial acquisition, whether by treaty, cession, or settlement, transferred title and dominion to the United States:

[14] Hamilton, Madison, and Jay, 2003, p. 104.
[15] *Ware v. Hylton*, 1776, p. 204.
[16] *United States v. Schooner Peggy,* 1801, p. 109.
[17] National Archives, 1789.

> Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory[18].

In contrast, the Treaty of Paris of 1898 marked a decisive turning point in this legal tradition. By transferring sovereignty over Puerto Rico, Guam, and the Philippines, it introduced a new constitutional dilemma: whether the full constitution applied to territories acquired by treaty but not destined for statehood. In Dorr v. United States (1904), the Court interpreted Article IX of the Treaty of Paris (1898) to confirm that Congress retained broad discretion over the governance of these possessions as:

> (...) clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly acquired possessions[19].

Thus, the so-called Insular Cases, beginning with Downes v. Bidwell (1901), formalized this rupture with the Northwest Ordinance model. In Downes, the Court held:

> We are therefore of 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 within the revenue clauses of the Constitution (...)[20].

This created the novel category of the «unincorporated territory». Whereas, incorporated territories, such as Alaska, acquired by treaty in 1867 (Annex III), were presumed to enjoy full constitutional coverage and eventual statehood, but unincorporated territories were subject only to fundamental rights unless Congress chose otherwise[21]. Supreme Court Justice Harlan, dissenting in Hawaii v. Mankichi (1903), presciently warned that this framework permitted Congress to operate outside ordinary constitutional constraints, effectively creating two systems of governance within the republic:

[18] *Shively v. Bowlby*, (1894), p. 57.
[19] *Dorr v. United States*, (1904), p. 143.
[20] *Downes v.* Bidwell, (1901), p. 287.
[21] *Ibid.*, (1901), pp. 279-280.

> It would mean that the will of Congress, not the Constitution, is the supreme law of the land for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest, or treaty and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution and under regulations that could not be applied to the organized territories of the United States and their inhabitants (...) It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States -- one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument[22].

As historian Christina Duffy has argued, the Insular Cases disrupted the inherited expectation of incorporation and statehood, replacing it with a judicially created doctrine that suspended that trajectory[23]. Yet this innovation was fully consistent with the Court's racial jurisprudence. In Dred Scott v. Sandford (1857), the Supreme Court declared that Black Americans, whether enslaved or free, could not be U.S. citizens, and further ruled that Congress lacked authority to prohibit slavery in the federal territories[24]. In Plessy v. Ferguson (1896), it entrenched segregation under the doctrine of «separate but equal», constitutionalizing dual regimes of rights within the state[25]. Although Plessy was later overturned by Brown v. Board of Education (1954), the logic of formal equality masking substantive inequality endured. As Ex-Federal Judge Juan R. Torruella noted, the Insular Cases replicated Plessy's core move by affording inferior constitutional status to colonial populations[26]. Professor Efrén Rivera Ramos has similarly emphasized how the doctrine of territorial incorporation translated racist exclusion into geographic subordination[27]. Other decisions reinforced the political branches' capacity to expand and hold territory without full constitutional transmission. In Jones v. United States (1890), interpreting the Guano Islands Act of 1856, the Court confirmed that

[22] *Hawaii v. Mankichi*, 1903, p. 240.
[23] Duffy, Burke, Joseph, and Rosenberg, 2001, p. 12.
[24] *Dred Scott v. Sandford*, 1857, pp. 404-405.
[25] *Plessy v. Ferguson*, 1896, p. 538.
[26] Torruella, 1988, pp. 263 and 267.
[27] Rivera Ramos, 2007, p. 13, 131, and 128.

Congress and the President could extend sovereignty over new territories «without geographical limitation», acts that the judiciary was bound to respect «without regard to its location»[28]. While the case dealt with uninhabited islands, its reasoning imbedded a doctrine of virtually unbounded territorial expansion, a premise that later enabled the Insular Cases to deny full constitutional incorporation to inhabited territories.

Accordingly, Article IX of the Treaty of Paris of 1898, when read in conjunction with the Supreme Court's decisions in the Insular Cases, established a constitutional regime under which the United States could acquire and govern territories without automatically extending the full *corpus* of constitutional protections to their inhabitants. Under this system, Congress was vested with constitutionally decisive authority to determine the political status and civil rights of territorial populations, thereby enabling the federal government to administer newly acquired possessions while retaining control over the timing and scope of constitutional application. Notwithstanding this development, the principle of incorporation remained a viable legal doctrine, demonstrating that the Constitution could, in theory, be applied in full to certain territories. Alaska, a noncontiguous territory acquired by treaty in 1867 (Annex III), and later Hawaii, likewise incorporated, exemplify the principle, showing that incorporation was neither limited to continental acquisitions nor restricted by geographic or temporal considerations.

Following 1898, however, incorporation ceased to be the presumptive outcome for newly acquired territories. In its subsequent jurisprudence, the Supreme Court articulated a bifurcated taxonomy: incorporated noncontinuous territories, exemplified by Alaska (1867) and Hawaii (1898/1900), were treated as fully subject to the Constitution, while unincorporated territories, such as Puerto Rico, Guam, and the Philippines, were guaranteed only fundamental rights unless Congress explicitly extended additional constitutional protections. This doctrinal framework thus reconciled the acquisition of overseas possessions with a flexible, Congress-centered approach to the constitutional status of their inhabitants. In a contemporary illustration, the most recent status plebiscites in

[28] *Jones v. United States*, 1890, pp. 212-213 and 224.

Puerto Rico revealed that a substantial majority of voters favored incorporation into the United States in the form of full federated statehood, yet Congress has neither acted nor demonstrated any intention to act, highlighting the continuing relevance of territorial incorporation as a constitutional and political concept[29].

Accordingly, this system of territorial governance under U.S. law established a durable framework of administration, grounded in congressional plenary power, where incorporation is neither automatic nor inevitable. It reveals the underlying logic of the structure, whereby the exercise of sovereignty limited the guarantees of fundamental rights. In the territories, including Puerto Rico, sovereignty does not derive from the people, as it does in the states, but is instead conferred and regulated by Congress, illustrating a distinct form of territorial authority. Puerto Ricans, like the residents of other U.S. territories, fall under this framework, which vests in Congress the primary power to define their political and civil condition, while leaving to its own discretion the extent and moment of constitutional application. This structure reflects its underlying logic, as federal authority over the territories is paired with only limited guarantees of fundamental rights, and constitutional protections in these areas depend on congressional action rather than popular sovereignty. To put in another way, as the US Supreme Court held in *Puerto Rico v. Sanchez Valle* (2016): «Congress conferred the authority to create the Puerto Rico Constitution»[30], making Congress the original source of power for territorial governance, including over Puerto Ricans[31].

1.3. *Legal Incorporation: Comparative Approaches*

The legal infrastructure of empire in the late nineteenth century reveals its full complexity only when analyzed in relation to multiple colonial geographies. Treaty practices and annexation laws

[29] In the 2024 Puerto Rico status plebiscite, of the 1,059,212 individuals who participated in the vote, 58.6% cast their ballots in favor of statehood, reflecting a clear majority preference among the electorate for incorporation of the territory as a fully federated state of the United States. See: https://ww2.ceepur.org/sites/ComisionEE/es-pr/Certificaciones/Certificación%20de%20resultados%20finales%20-%20Plebiscito%202024.pdf

[30] *Pueblo v. Sánchez Valle*, 2016, p. 68.

[31] Harvard Law Review, 2016, p. 147.

were not merely governmental mechanism instruments but juridical constructions designed to preserve hierarchies between metropolitan powers and subordinated societies. Rather than promoting legal parity, these frameworks validated conquest and unequal treaties as legitimate means of acquiring sovereignty over non-European peoples. As scholars of *Third World Approaches to International Law (*TWAIL) have argued, this was not a deviation from legal norms, it was their imperial function. In their foundational study, Antony Anghie and B. S. Chimni demonstrate how international legal doctrine openly endorsed the acquisition of territory through conquest and the imposition of unequal treaties, thereby institutionalizing legal stratification[32]. These mechanisms did not merely reflect imperial ideology, they actively shaped the legal terrain on which empires expanded and governed.

Within the British imperial world, this dynamic unfolded through a gradual reclassification of autonomous native governments. In Upper Canada during the 1830s, relationships once mediated through treaties that acknowledged tribal authority were redefined under the Crown's paternal protection. What had previously been a diplomatic engagement became a domestic arrangement. Native communities were no longer treated as sovereign actors but as subjects governed through prerogative power. This transformation is meticulously documented by P. G. McHugh, who shows how prerogative governance replaced negotiated recognition, consolidating imperial authority while erasing prior legal pluralism[33]. The shift was not merely semantic, it marked a legal reordering of sovereignty itself.

The United States, though operating under a different constitutional framework, developed a parallel strategy. Through the so-called Insular Cases, the US Supreme Court articulated a doctrine that allowed territories to be annexed without being fully incorporated. Puerto Rico was described as «a territory appurtenant and belonging to the United States, but not a part of the United States»[34], a formulation that enabled the extension of governance while withholding constitutional protections. This Supreme Court

[32] Anghie and Chimni, 2003, p. 80.
[33] McHugh, 2017, pp. 231-233.
[34] *Downes v. Bidwell*, 1910, p. 289.

opinion reinforced this ambiguity by casting such territories as «foreign in a domestic sense»[35]. Shaina Potts has examined this jurisprudence in detail, arguing that the Insular Cases established a legal geography of empire that relied on ambiguity to maintain control while deferring the obligations of full incorporation[36]. The result was a zone of partial rights, one that mirrored the British approach in its structure if not in its terminology.

Hawaii offers a particularly vivid illustration of this imperial technique. Annexed in 1898 and addressed in Hawaii v. Mankichi (1903), the islands were neither excluded from the constitutional framework nor granted equal status with the states. Instead, they were situated in an intermediate legal space that echoed the logic of the Insular Cases. Potts identifies this placement as part of a broader imperial strategy, one that relied on irregular legal geographies to maintain control through ambiguity rather than clarity. The legal status of Hawaii was thus not an exception but a deliberate construction, calibrated to sustain domination while deferring equality.

This technique was not confined to the Anglo-American sphere. Across colonial theatres; from British India to French Algeria and Morocco, and into the Spanish and American governance of the Philippines, legal codification served as a tool for territorial acquisition without juridical parity. Martti Koskenniemi has situated this transformation within the intellectual architecture of international law itself. In *The Gentle Civilizer of Nations*, he traces how late nineteenth-century jurists deployed the language of civilization to justify the subordination of non-European nations, embedding racial and cultural hierarchies into the very grammar of sovereignty[37]. This civilizational threshold operated as a juridical filter, allowing imperial powers to recognize sovereignty selectively and revoke it when convenient.

Likewise, Antony Anghie's analysis of British India reveals how treaties with princely states preserved the fiction of autonomy while consolidating imperial control[38]. The French experience in Al-

[35] *Ibid.*, p. 341.
[36] Potts, 2024, pp. 30-32 and 46-51.
[37] Koskenniemi, 2004, pp. 98-104.
[38] Anghie, 2012, pp. 115-121.

geria and Morocco followed a similar logic. As Luigi Nuzzo shows, colonial law constructed territorial categories that distinguished between incorporated departments and protectorates, producing layered sovereignties that mirrored the American doctrine of «foreign in a domestic sense»[39]. These arrangements were not exceptions but expressions of a shared imperial framework.

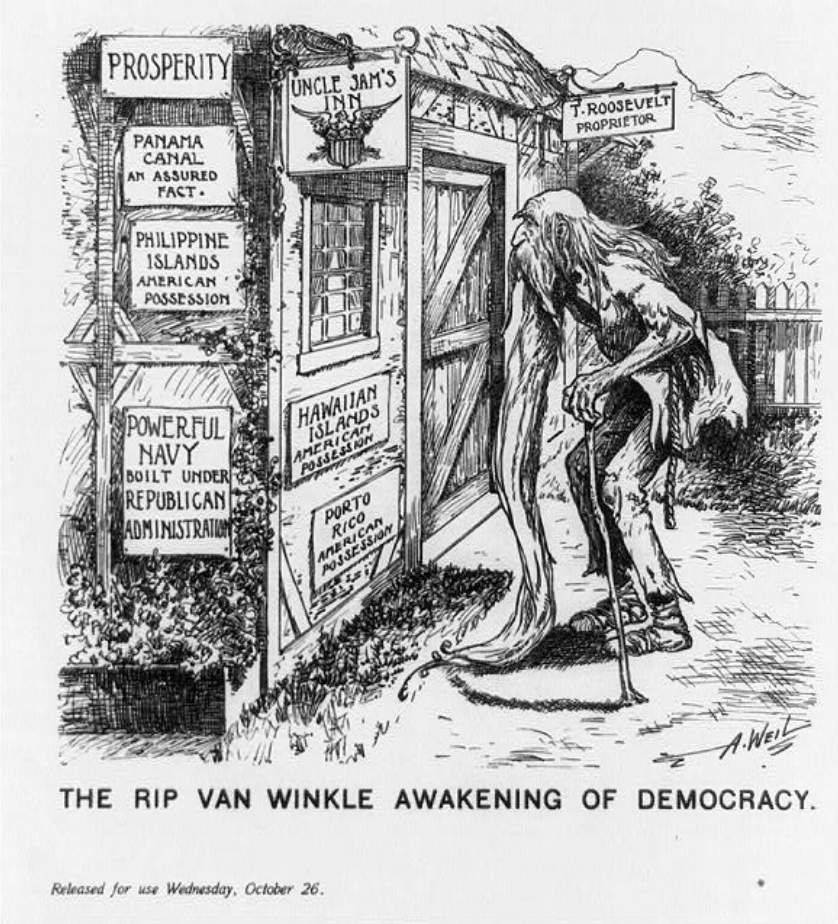
In like manner, the Philippines, following the Treaty of Paris of 1898 (Annex I), offers another instructive case. The United States assumed control over the archipelago but resisted full constitutional incorporation. As Lauren Benton and Lisa Ford argue in their chapter *Empire and Legal Universals*, American officials deployed hybrid legal regimes that combined military authority with selective forms of civil governance, echoing earlier Spanish practices while deferring questions of citizenship and rights[40]. Thus, the archipelago was governed as a juridical exception, a space where sovereignty was exercised but not fully recognized, and where legal ambiguity became a mode of rule.

Taken together, these examples reveal how the discriminatory codification of treaties operated as a legal instrument of empire. It enabled territorial cession without triggering the consequences of full incorporation. Earlier U.S. territorial practices, shaped by the Northwest Ordinance of 1787, treated incorporation as foundational. Territories such as Alaska were formally incorporated, meaning they were fully subject to the Constitution and governed as integral parts of the United States. However, the emergence of the «unincorporated territory», a category devised in the aftermath of interpreting the Treaty of Paris of 1898, marked a decisive break from this framework. It was not an American anomaly but part of a broader imperial logic that enabled expansion through asymmetry while maintaining the façade of legal universality.

In brief, viewed through this comparative lens, a theoretical synthesis begins to take shape. Late nineteenth-century international law did not merely accommodate empire, it actively structured it. The treaty form, refracted through the ideologies of civilization and sovereignty, functioned as a tool for producing legal stratification. Codified asymmetry was not a deviation from legal norms

[39] Nuzzo, 2017, pp. 276-281.
[40] Benton and Ford, 2017, pp. 117-193.

but their deliberate expression. The juridical space of empire was defined not by the absence of law but by its strategic deployment, carefully calibrated to sustain domination while deferring equality.



Illustr. 2[41]

2. Methodology

The Treaty of Paris of 1898 (Annex I) is more than a conventional diplomatic agreement. It represents a legal framework that contributed to redefining Puerto Rico's political and cultural status, while reflecting broader dynamics of power and historical transition. Law here functions as both mirror and mask, claiming

[41] Well, 1904, *The Rip Van Winkle Awakening of Democracy*, Library of Congress, LC-DIG-ppmsca-36755.

universality while reflecting the interests of empire, naturalizing hierarchies, and producing political subjects through its texts. Understanding these dynamics requires moving beyond the formal language of treaties to examine the historical, political, and ethical stakes embedded within legal instruments.

This study adopts a critical legal historical methodology to reveal these contradictions, drawing on Derrida, Foucault, Agamben, Benton, Bourdieu, and Badiou. Its purpose extends beyond the interpretation of legal texts. It aims to reveal the law as a space shaped by competing claims to authority, sovereignty, and historical meaning, where justice and power intersect and evolve over time. By situating treaties within their broader contexts, this approach explains how law actively shapes social reality, enforces imperial hierarchies, and opens possibilities for critical reflection and ethical engagement.

2.1. *Critical Approaches in Legal History*

This study adopts a critical legal-historical methodology grounded in deconstruction, drawing on the philosophical work of Jacques Derrida and its profound influence on contemporary legal theory[42]. Derrida's seminal lecture, *Force de loi: Le fondement mystique de l'autorité*, marks a pivotal moment in the emergence of the Critical Legal Studies movement in the United States, compelling legal scholars to interrogate the foundational concepts of law, authority, and justice. By doing so, Derrida invites legal scholars to consider legal texts not merely as instruments of governance or adjudication, but as arenas in which language, violence, and political power intersect and mutually constitute one another. His work emphasizes that law is not simply a neutral framework of rules, but a living, contested structure that embodies historical, political, and philosophical tensions. The significance of this approach becomes particularly apparent when analyzing treaties such as the Treaty of Paris of 1898 (Annex I), which cannot be understood as neutral or purely diplomatic instruments. Rather, they function as frameworks through which juridical authority is shaped and affirmed, sometimes obscuring the historical processes and power dynamics involved in their formation.

[42] Derrida, 1990, p. 924.

The Spanish-American War (1898) and its resulting treaty exemplify the ways in which legal instruments are simultaneously political, military, and juridical acts. These are not simply diplomatic agreements, but acts with intertwined political, military, and legal dimensions. They show that treaties are shaped not only by negotiation, but also by the evolving currents of history, ideology, and institution. While treaties are formally recognized as the supreme law of the land, as discussed in Section 1.2, it is critical to emphasize that many, including the Treaty of Paris of 1898, were negotiated under conditions of duress and ratified without the consent of the governed. Derrida's insights further reveal that the ceremonial imposition of peace functions paradoxically as a continuation of war by other means, transforming acts of coercion into legality while masking the violent foundations of juridical authority. In this sense, critical legal history involves both the deconstruction of legal texts and the recognition of their ethical and political significance, emphasizing that law is inseparable from power relations, historical context, and the consequences it produces in social life.

2.2. *Power, Sovereignty, and the Governance of Territory*

This methodological perspective is further enriched by Michel Foucault's analysis of power and knowledge, which illuminates the ways legal systems actively produce truth and shape social reality[43]. Law is not limited to the neutral adjudication of disputes; it also plays a role in shaping what is recognized as legitimate knowledge and who is acknowledged as a political subject. In colonial contexts, categories such as the «people of Porto Rico» function not simply as descriptors, but as discursive formations that contribute to the production of identity and the framing of juridical status. Foucault demonstrates that the historical rules and limits imposed by law are frequently mistaken for natural or rational constraints, when in fact they serve as mechanisms of exclusion, marginalization, and identity formation[44]. Acts of resistance may destabilize these structures, but Foucault warns that such efforts are often absorbed by law's self-sustaining logic, ensuring that al-

[43] Foucault, 1977, pp. 24-26.
[44] Pickett, 1996, p. 450.

ternative legal frameworks ultimately reproduce similar exclusionary effects[45]. Consequently, the purpose of critical legal historical analysis is not to replace the existing order with a more ideal or just one, but to expose the epistemic violence embedded in law's claims to universality and neutrality. Therefore, by revealing the constructed nature of legal categories and the power dynamics they encode, this methodology emphasizes the necessity of situating legal texts within their historical, political, and social contexts.

Within this interpretive context, Foucault's insights are complemented by the recognition that power in colonial contexts is not a marginal feature of social or legal systems but their very fabric[46]. Such power shapes the boundaries of permissible life, imagination, and selfhood. Within the colonial apparatus, it was justified by presumed cultural superiority and exercised through mechanisms aimed at controlling life itself. Giorgio Agamben's concept of *biopower* extends this analysis, showing how modern juridical orders transform *zoē*, bare life, into *bios*, a life regulated within political and legal frameworks[47]. Life becomes inseparable from law, and political subjectivity is produced by legal systems whose objective is to extend maximal control over human behavior. The fusion of juridical and *biopolitical power* renders the state of exception, a suspension of ordinary law, a permanent feature of governance, rather than a temporary anomaly. Agamben's distinction between *il diritto*, the abstract and totalizing claim of law's immanence, and *la legge*, its concrete statutory manifestations, illustrates how apparent fragmentation within law is ultimately recuperated within the overarching logic of juridical authority[48]. Therefore, colonial legal systems cannot be understood merely as mechanisms of governance; they operate to naturalize hierarchies and make political domination appear inevitable, rational, and justifiable.

Concurrently, Lauren Benton, a leading historian of law and empire, has demonstrated how colonial settings reveal the functioning of sovereignty. Drawing on Giorgio Agamben, she explains that empire made visible the sovereign's ability to operate

[45] Brigg, 2002, p. 426.
[46] *Ibid*., p. 423.
[47] Frost, 2020, p. 556.
[48] *Ibid*., p. 557.

both within and beyond the law, relying on the suspension of ordinary norms as a regular technique of governance[49]. At the same time, she warns that focusing exclusively on the paradigm of exception oversimplifies imperial sovereignty, which was also shaped by negotiation, plural jurisdictions, and uneven geographies of power[50].

Moreover, Benton develops this perspective in *From International Law to Imperial Constitutions*, where she places the U.S. doctrine of «unincorporated territories» in a wider imperial tradition of differential incorporation. In Downes v. Bidwell (1901), the Supreme Court defined Puerto Rico as a territory that belonged to the United States yet was not fully part of it. Benton shows how this reasoning echoed earlier models, particularly British India's divisible sovereignty, under which princely states retained fragments of authority under British paramountcy[51], mentioned in section 1.3. She also underlines that the United States had already experimented with such hybrid arrangements in American Indian law, where tribes were categorized as «domestic dependent nations» subject to shifting federal authority[52].

Whereas, this comparative framework sheds light on Spain's treatment of Puerto Rico and Cuba under the Autonomic Charter of 1897. Accordingly, the charter explicitly designated both islands as colonies, even as it granted them local assemblies and a degree of self-government[53]. It is important to mention that even though the Autonomy Charter was not approved by the Spanish Cortes, thus not formed as a law, as established in art. 18 of the Spanish Constitution of 1876: «The power to make laws resides in the Cortes with the King», elections in Puerto Rico were held and the population felt a strong sense of political progress[54].

[49] Benton, L., 2009, pp. 283-284.

[50] *Ibid*., p. 286-287.

[51] Benton, L., 2008, pp. 600-602.

[52] *Ibid*., p. 615.

[53] The colonial condition was expressly and strictly reaffirmed in the Autonomic Charter of 1897, as the term and concept are abundantly evident throughout its articles. One clear example is Article 43, first paragraph: «*It pertains to the governor general, as the supreme authority of the colony* and head of its administration: 1°. To ensure that the rights, faculties, and privileges recognized, or that may henceforth be recognized, *to the colonial administration are respected and safeguarded».*

[54] Gómez Biamón, J.R., 2024, 148.

Sovereignty, however, remained concentrated in Madrid, which retained decisive powers over external relations, legislation, and the suspension of local laws. The reception of the charter further demonstrated its colonial character: in Cuba, *Cuba libr*e rejected autonomy as an unacceptable compromise, while in Puerto Rico the great majority of eligible voters supported it as a pathway to greater self-rule granted under Spain. In Benton's terms, such arrangements were not a break with empire but rather another instance of differential incorporation, where autonomy functioned within a system of layered sovereignty. Puerto Rico's trajectory under both Spain and the United States thus illustrates the persistence of colonial rule through negotiated authority, plural legal regimes, and ambiguous territorial status.

2.3. *Law, Authority, and Institutional Realities*

To further elaborate, Pierre Bourdieu's theory of symbolic power deepens this understanding by emphasizing the performative capacity of legal discourse[55]. Law does not merely describe the world; it brings legal realities into being, structuring hierarchies and naturalizing distinctions that are socially constructed. Once institutionalized, these classifications shape both social experience and individual identity, particularly in colonial contexts. The renaming of Puerto Rico as «Porto Rico» in U.S. treaties and Supreme Court decisions, further analyzed in Section 3, exemplifies law's capacity to erase cultural specificity and assert control through bureaucratic and linguistic designation. This act was not a benign or incidental linguistic variation but a deliberate juridical and political intervention, signaling that the island and its inhabitants were subject to external tutelage rather than self-determination. Within this genealogy of critical thought, the Critical Legal Studies Movement of the 1970s emerged, drawing on the work of Derrida, Foucault, and Bourdieu to interrogate claims of legal neutrality and reveal the law's embeddedness in political, social, and economic hierarchies[56]. The Treaty of Paris of 1898 (Annex I) should be understood not merely as an artifact of juridical rea-

[55] Bourdieu, 1989, p. 14.
[56] *Ibid*., p. 17.

soning but as a historical document shaped by imperial authority, racial hierarchies, and the marginalization of colonial populations.

The methodological framework is further enriched by Alain Badiou's theory of the event, which highlights the transformative potential of radical rupture, and is supported by interdisciplinary approaches that deepen its analytical scope. Badiou distinguishes between law and the event itself, emphasizing that genuine transformation occurs only when an event reconfigures the coordinates of the existing legal order. Within this perspective, sovereigns can become legal subjects capable of instituting new frameworks, thereby disrupting preexisting norms. This distinction is particularly instructive in historical evaluation. Badiou unequivocally rejects National Socialism, condemning its ideology and actions as morally and politically abhorrent, and identifies it as a state of exception. Yet he maintains that it did not constitute a true philosophical event, because it remained confined within a legal structure even while enacting profoundly destructive policies[57].

To deepen this theoretical exploration, Badiou further clarifies the relationship between law and transformation through his analysis of negation, demonstrating how the logical structure of the world shapes the impact of events[58]. Within *intuitionistic* contexts, general laws largely persist, with only minor adjustments, reflecting incremental change within the system. In *paraconsistent* frameworks, what appears to be change is largely illusory, leaving the underlying structure fundamentally unaltered. It is only in classical worlds that transformation achieves genuine rupture, decisively challenging and transgressing the existing legal and social order in a manner consistent with radical, event-driven change[18]. In this sense, justice emerges not from the law itself but through its termination as the dismantling of existing legal structures exposes internal contradictions and creates space for new legal and ethical orders to arise[59]. This contrasts with Derrida, who emphasizes the exposure of internal aporias without advocating destruction. Badiou stresses that achieving justice may require

[57] Calcagno, 2016, p. 200.
[58] Badiou, 2002, p. 1883.
[59] Bruno, 2018, p. 1918.

dismantling law to confront its fictive coherence, whereas Derrida emphasizes interpretation and sustained critique[60].

By shifting focus away from idealized visions or violent ruptures, this methodology acknowledges the coercive foundations of legal orders while deliberately avoiding the romanticization of violence or the endorsement of utopian alternatives. Instead, it seeks to cultivate an ethical and interpretive sensibility that critically interrogates the presumed neutrality of law. In line with this democratic imperative, following Jürgen Habermas, the legitimacy of legal norms must be assessed not merely through formal procedures but through their capacity to sustain communicative action and democratic participation[61]. Legal orders that fail this test, particularly those structured by imperial conquest and sustained through exclusion, require continuous critique. Viewed in this light, the Treaty of Paris of 1898 emerges not as a neutral diplomatic instrument but as a performative legal act that institutionalized colonial hierarchies, produced political subjects through language, reinforced racialized and territorial distinctions, and entrenched mechanisms of domination, thereby shaping both the political imagination and the material realities of the territories and peoples subjected to its authority. Legal texts must therefore be examined not merely for their declarative content but for their practical effects, as they expose the enduring political and juridical tensions that continue to shape the lives of the Puerto Rican people. These tensions can be traced to the legal foundations laid by the Treaty of Paris of 1898, which established a framework that departed from democratic principles and continues to shape the conditions under which political participation and legal recognition are structured in Puerto Rico.

[60] Calcagno, *op.cit.*
[61] Habermas, 1988, 45.

Illustr. 3[62]

[62] Keppler, 1901, *July 4th. 1901*, Library of Congress Prints and Photographs Division, AP101.P7 1901 (Case X) [P&P]

3. Theories on the Validity of the Treaty of Paris (1898)

The Treaty of Paris of 1898 (Annex I) did more than redraw maps; it rewrote the lives and legal existence of an entire people. Puerto Rico, long a colony under Spanish rule, suddenly found itself transferred from one imperial power to another, its fate sealed in a document negotiated without its consent. Sovereignty is claimed over a population that, over the years, had enjoyed only minimal participation in governance. In examining the Treaty of Paris of 1898 within this context, one encounters a paradox wherein legality functions as the organizing framework for order, yet excludes substantive participation, thereby subjecting an entire population to enduring imperial structures.

For over a century, scholars, jurists, and activists have grappled with this paradox, debating whether the treaty was valid or null from the start, *ab initio*. The arguments traverse continents and centuries; from the first theorists invoking Spain's 1897 Autonomic Charter, to Pedro Albizu Campos's courtroom challenges, to contemporary critiques by constitutional scholars and historians. Each perspective exposes the treaty not as a settled legal fact, but as a living, contested site of power, law, and identity. In these debates, Puerto Rico's status is never abstract; it is the tangible intersection of law and lived experience. As one engages with these pages, the question arises sharply whether law, when functioning to uphold empire, can ever genuinely lay claim to justice.

3.1. *From Autonomy to Cession: Framing the Debate*

The question of the legal nullity of the Treaty of Paris of 1898 (Annex I) has generated a wide range of arguments ranging from early constitutionalist critiques to elaborate doctrinal constructions anchored in international law and jurisprudence. This section undertakes a systematic exposition of these theories, following the chronological order of their emergence, with particular emphasis on the juridical reflections of José López Baralt, and subsequently on the opposing theory developed by Pedro Albizu Campos.

To understand why so many scholars and legal experts have returned to this issue, it helps to see how the debate blends constitutional development inside the Spanish Empire with the emerging international legal order at the turn of the twentieth century.

The Treaty of Paris of 1898 did not happen in isolation. It reflected Spain's late imperial reforms, U.S. expansionism, and changing ideas about sovereignty, self-rule, and consent. Early writers approached nullity not as a rhetorical flourish but as a legal diagnosis. They argued that if Puerto Rico's status had been transformed by Spanish law before the treaty, then any later cession that ignored that transformation might be invalid from the outset. Later authors, working with more historical distance, tested those early intuitions against comparative cases, constitutional texts, and the structure of obligations under international law.

Building on the postwar legal discourse, the earliest articulated theory of the treaty's nullity emerged in the aftermath of the Spanish-American War. It was advanced by Federico Henríquez y Carvajal, a distinguished legal scholar and then-president of the Supreme Court of the Dominican Republic. In a letter dated October 12, 1898 addressed to Puerto Rican revolutionary Eugenio María de Hostos, Henríquez y Carvajal warned that Spain's reported intention to cede Puerto Rico during the Paris peace negotiations would violate Spanish law. Based on information likely received through telegraph from sources close to the talks, he argued that such a cession, if finalized, could render the Treaty of Paris (1898) null from the outset and strip subsequent U.S. actions in Puerto Rico of any legal foundation. According to Henríquez y Carvajal, the grant of autonomy conferred a degree of international personality upon Puerto Rico, thereby requiring that any international treaty concerning the island must be negotiated by duly appointed Puerto Rican plenipotentiaries and ratified by its local parliament (*Parlamento insular*). Spain's unilateral cession of Puerto Rico without such participation thus violated fundamental principles of both constitutional and international law[63].

What gave this claim its force was not merely moral appeal but a specific legal logic. If the Autonomic Charter (1897) recognized institutional self-government and a distinct political personality, then the international capacity to be bound, at least in matters affecting that internal order, could not be exercised by Spain alone. By that reasoning, the cession clause in the Treaty of Paris of 1898 attempted to transfer more than Spain was legally entitled to

[63] Delgado Cintrón, 2012, pp. 478-482.

transfer without Puerto Rico's own formal participation. The absence of Puerto Rican plenipotentiaries at the negotiating table, and the lack of ratification by the island's parliament, were not procedural oversights; they were signs that the wrong legal subject gave consent. In other words, the defect went to the heart of treaty´s validity because it concerned the legal personality of the consenting party.

Henríquez y Carvajal's line of argument was echoed, with greater elaboration, in Enrique López Díaz's *El liberalismo, o la razón cívica: Actitud americana. Situación puertorriqueña* (1908), which analyzed the legal dissonance between colonial liberalism and American expansionism. López Díaz revived the view that Puerto Rico had acquired a juridical status distinct from that of a mere colony and asserted that the Treaty of Paris of 1898 failed to extinguish Puerto Rican autonomy lawfully conferred under Spanish constitutional mechanisms[64]

López Díaz sharpened the distinction between rhetoric and legal effect. He acknowledged that autonomy within an empire can be limited, but he insisted that once a constitutional instrument grants internal organs the power to govern and to be consulted on changes to their status, any attempt to abolish that framework must follow the same constitutional logic that created it[65]. For him, the problem was not that empires cannot cede territory; rather, it was that Spain could not do so in a way that nullified Puerto Rico's newly recognized political personality without employing the charter's own procedures. The United States, as a third party to the internal Spanish arrangement, could not acquire greater rights than Spain possessed. Thus, from López Díaz's vantage point, the treaty's cession clause operated *ultra vires* with respect to Puerto Rico's internal constitution.

In stark contrast to these early theses, rooted in constitutional idealism, Puerto Rican attorney José López Baralt, writing in the mid-20th century, offered a structurally rigorous and historically anchored refutation of the nullity theory. His argumentation, developed in critical juxtaposition to comparisons drawn with other quasi-sovereign regions such as Finland under the Russian Em-

[64] Collado Schwarz, 2005, p. 101.
[65] Delgado Cintrón, 1988, p. 767.

pire, underscores the juridical discontinuity that defined Puerto Rico's status at the moment of cession. López Baralt concludes that unlike Finland, whose union with Russia was the result of a freely entered compact, Puerto Rico had never enjoyed any status resembling sovereign or semi-sovereign statehood[66]. Spain's domination of the island for nearly four centuries was, he asserts, colonial in nature, marked by autocratic governance and a consistent absence of bilateral compact. Lopez, cites to the point in his work that even the Autonomic Charter of 1897, while rhetorically significant, continued to refer to Puerto Rico as a colony (*colonia*), confirming its subordinate constitutional position within Spain[67].

Furthermore, López Baralt's analysis attends equally to the historical contingencies and the formal legal dimensions of the issue. He urges readers not to import models from other contexts, especially those, like Finland, that had clear constitutional compacts recognized by their imperial sovereigns, without first asking whether the same institutional predicates existed in Puerto Rico. If there was no bilateral compact defining Puerto Rico's rights *vis-à-vis* Spain, and if Spain retained the power to reshape internal arrangements unilaterally, then the Autonomic Charter's (1897) promises could be rescinded or superseded in ways inconsistent with the nullity thesis. For López Baralt, the designation of Cuba and Puerto Rico as colonies (*colonias*) in the charter is not a mere semantic choice; it reflects a constitutional hierarchy in which the metropolitan center refused to recognize either territory as a co-equal entity with the authority to veto external cession. In this regard, López Baralt proceeds to observe that any analogy to the Finnish constitutional model is not only doctrinally flawed but historically misleading. The Finnish claim to inviolability of its internal constitution arose against its suzerain, Russia, which had expressly promised to respect Finland's autonomous arrangements. Puerto Rico, on the other hand, would be asserting the inviolability of its Autonomic Charter of 1897 not against Spain but against a third party, the United States, which was not a party to the original grant of autonomy. The international legal structure underpinning the Puerto Rican claim therefore collapses under the absence of mu-

[66] López Baralt, 1937, pp. 86-87.
[67] *Ibid*.

tual consent and the lack of continuity of obligation between the old and new sovereigns. López Baralt concludes, with juridical restraint but intellectual precision, that the structural and historical divergences between the Puerto Rican and Finnish cases render the analogy doctrinally untenable and, by extension, the nullity thesis legally unsustainable. Professor Antonio Fernós, remarked that had José López Baralt's, Cornell University Law School, thesis been available in Puerto Rico during the 1940s, prior to the *Asamblea Constituyente* (1950), and throughout the pivotal decades of the 1950s and 1960s, the legal profession might have avoided the conceptual confusions that led many to abandon critical ideas and forfeit foundational historical projects, he observed:

> We would have grasped the true nature of the juridical entity in question—the legal concept itself, the epistemology underlying American constitutionalism, the logic and intellectual architecture of that constitutional tradition—instead of deferring uncritically to the imperial pronouncements of the U.S. Supreme Court[68].

Thus, this critique reframes the debate from one about thwarted autonomy to one about the limits of analogy and the nature of imperial constitutionalism. Where the nullity thesis relies on a presumed continuity of legal obligations across sovereign transitions, López Baralt counters that no such continuity existed. The United States, in his view, did not inherit any binding commitments toward Puerto Rico, and absent a direct legal relationship, the Autonomy Charter of 1897 could not impose obligations on the new sovereign as if it had been a party to the original grant. The result is a doctrinal gap that the nullity theory cannot bridge, unless one posits a stronger international personality for Puerto Rico than the historical record, in his view, cannot support.

Yet, despite López Baralt's influential critique, the nullity theory persisted and took on new vitality through the activism and courtroom rhetoric of Pedro Albizu Campos. As early as the 1930s, Albizu Campos developed and employed legal arguments against the Treaty of Paris of 1898 as part of a broader nationalist strategy to challenge United States sovereignty over Puerto

[68] Fernós López, 2000, p. 148.

Rico[69]. Albizu Campos, a Harvard graduate attorney and in that time president of the *Partido Nacionalista Puertorriqueño* laid the foundations of this strategy in the case of Luis Velázquez, where the defense contested the federal jurisdiction of an assault to a judge that occurred in the *Convento de los Dominicos*, then held as U.S. property, specifically the Puerto Rican Supreme Court. Whereas contesting the validity of the federal government's supersession of Puerto Rico´s jurisdiction in the matter. The case was highly politicized, elating to actions that the judge perceived as insults or disrespect to Judge Toro and accusations of aggressions against the dignity of Puerto Rican Nationality[70].

Specifically, Albizu Campos' forum choices and rhetorical style were strategic. By litigating in cases that touched symbolic institutions; courts, public spaces, and officials, he forced federal authority to justify itself in concrete settings. The nullity claim was not an abstract thesis for him but a strategic instrument to challenge jurisdiction, procedural authority, and the scope of federal criminal law. This case became an occasion to argue that, if the treaty lacked validity as to Puerto Rico, then U.S. courts and agencies could not lawfully exercise power over acts committed on the island, especially those implicating core questions of sovereignty and Puerto Rican national dignity. This tactic also aimed to cultivate a public record, making legal arguments accessible to broader audiences and thereby knitting together doctrinal points with a political movement.

Subsequently, Albizu Campos' jurisprudential campaign against the Treaty of Paris of 1898 found additional expression in the 1935 federal appeal brought before the Federal First Circuit Court and later elevated to the United States Supreme Court. In this context, he argued that the Treaty of Paris of 1898 and all consequent actions by the United States in Puerto Rico were null and void, on the grounds that Puerto Rico had enjoyed international status at the time of the treaty's signing and that Spain could not lawfully bind the island without its consent. This argument explicitly invoked Article II of the Additional articles of

[69] Delgado Cintrón, 2025, p. 417.
[70] *Ibid*.

the Autonomic Charter (1897)[71], which stipulated that the constitutional framework for Puerto Rico, once ratified by the Spanish *Cortes*, could only be amended by a law of the island's own parliament[72].

Importantly, two elements of Albizu's claim are especially important. First, he treats the Autonomic Charter (1897) as conferring not just internal self-government but an international dimension to Puerto Rico's legal personality, sufficient to require its own representation in any treaty that altered its status. Second, he interprets Article II of Additional Articles of the Autonomic Charter as an entrenchment clause, a *clausula intangibilis* that establishes Puerto Rico's internal constitution as amendable only through its own institutional mechanisms. From this, Albizu infers that Spain could not dismantle that framework unilaterally via an external treaty, and that the United States, acquiring rights only through that treaty, could claim no better title. The result is a chain of invalidity, since if the cession fails, U.S. acts premised on it have no legal foundation.

Essentially, the legal thesis of the nullity of the Treaty of Paris of 1898 as proposed by Pedro Albizu Campos proceeds from the foundational principle that any valid treaty ratified in the United States with another sovereign must involve, for its validity, all affected sovereigns; otherwise, it lacks legal effect with respect to the excluded party. Consequently, Albizu maintained that Puerto Rico had been recognized by Spain as a nation in juridical terms, possessing internal self-governance and treaty-regulated relations, and that any international agreement involving Puerto Rico, to be legally binding, required ratification by its Autonomous Parliament. He emphasized that the Treaty of Paris of 1898, particularly Article II which formalized the cession of Puerto Rico, was imposed under the conditions of an ultimatum during the Spanish-American War Cuban War. Furthermore, Albizu argued that because the Treaty of Paris of 1898 was neither negotiated with plenipotentiaries representing Puerto Rico nor ratified by its local

[71] Article II of the Additional Articles of the Autonomic Charter (1897) reads: «Once this constitution for the islands of Cuba and Puerto Rico has been approved by the Courts of the Kingdom, it may not be amended except by law and at the request of the insular Parliament».

[72] Fiol Matta, 2018.

legislative body, the treaty must be considered null *ab initio*, both in constitutional and international legal terms[73].

Taken together, these themes map a debate with two durable centers of gravity. On one side stand arguments that emphasize Puerto Rico's legal personality as recognized by the Autonomic Charter and the procedural demands that follow from that recognition; participation, consent, and ratification by the island's own institutions. On the other hand, critiques stress the absence of a true constitutional compact with Spain and the lack of a direct legal relationship between Puerto Rico and the United States, undermining any claim that the charter's protections could bind a successor power. The tension between these positions revolves around the same fundamental questions that shape much of colonial legal history, including what constitutes sovereignty, how partial autonomy is accommodated within it, and whether internal constitutional rules can exert binding force in the international sphere.

Consequently, the foundational legal theories surveyed herein do not constitute a unified jurisprudential school. Rather, they reflect evolving historical contingencies, methodological divergences, and shifting doctrines of sovereignty within Puerto Rico's territorial legal order. Nonetheless, they provided the groundwork for subsequent interpretive developments. While López Baralt provides the most rigorous refutation of the analogy-based nullity theories, particularly those reliant on Finland or other compact-based regimes, the passionate constitutionalism of Albizu Campos continues to resonate as a foundational moment in Puerto Rican legal nationalism. The resulting discourse is most productively understood as a dynamic field in which competing principles such as autonomy, incorporation, consent, and imperial discretion are continually tested against one another, rather than forming a singular, coherent orthodoxy.

Although the question of the nullity of the Treaty of Paris of 1898 has not yet been adjudicated in any court, and no formal constitutional claim has arisen in recent jurisprudence to test its legal foundations, a number of eminent Puerto Rican scholars and jurists have continued to develop and refine arguments in support of its invalidity. This growing body of work does not rely solely

[73] Gelpi, 2020.

on the historical and moral arguments advanced by early thinkers such as Pedro Albizu Campos or the doctrinal reconstructions of López Baralt, but rather expands upon them by introducing new constitutional, international, and comparative law perspectives. These authors present the Treaty of Paris of 1898 not only as a vestige of American expansionism but also as a legal rupture with U.S. constitutional principles and international norms, a view that will be further explored in the next section. In particular, they interrogate the persistence of non-incorporation, the elasticity of congressional power over territories, and the democratic deficits embedded in the so-called *Insular Cases'* framework.

3.2. *Autonomy, Validity, and the Reach of the Treaty*

This section builds on Albizu Campos's foundational synthesis of constitutional and international principles, and follows the chronological and conceptual evolution that led to subsequent doctrinal refinements. It moves from abstract models of sovereignty toward concrete critiques of incorporation, congressional discretion, and deficits in rights, as developed by Professor Rubén Berríos Martínez, former president of the *Partido Independista Puertorriqueño*, and by historian and former Federal Judge Juan Torruella. Furthermore, Gustavo Gelpí, currently serving as a U.S. Federal District Judge, demonstrates in his detailed study of Albizu Campos' legal legacy that this challenge was grounded in the clear principle that Puerto Rico constituted a nation with its own autonomous legal order, and that Spain lacked the competence to unilaterally alienate its sovereignty. In the appellate proceedings, mentioned in section 3.1, Albizu Campos argued *in limine* that the U.S. Supreme Court had no discretionary authority to uphold the Treaty of Paris of 1898 (Annex I) as valid in relation to Puerto Rico. He further argued, in his plea before the Puerto Rican Supreme Court, that the so-called validity of the treaty rested on what he characterized as judicial fictions crafted in the so-called *Insular cases* and that precedent existed for challenging the validity of international treaties in U.S. courts, such as the precedent set by the litigation surrounding the Panama Canal Treaty[74]. Extending this position,

[74] Gelpi, 2020.

Gelpí argues, that Albizu Campos framed the issue not as a mere political question but as a justiciable inquiry into the constitutional limits of treaty enforcement against a distinct people with a pre-existing legal order, thereby inviting the courts to scrutinize the provenance, representation, and domestic enforceability of the treaty *vis-à-vis* Puerto Rico.

Notably, Albizu Campos' plea to the Puerto Rico Supreme Court encapsulates the gravity and doctrinal coherence of his position:

> It appears that the Supreme Court of the United States has no discretion to grant the petition [of the People of Puerto Rico] and it must be dismissed. The Treaty of Paris by which the war between the mother country, Spain, and the United States of America was ended—ratified by the parties on April 11, 1899—is null and void in regard to Puerto Rico. The Supreme Court of the United States, as the final interpreter of the validity of treaties made by the United States with other powers, must confront the question of whether the said treaty may legally apply to a people who were not party to it, nor represented in its negotiation[75].

Therefore, Gelpí's analysis demonstrates that Albizu Campos' legal vision synthesized constitutional doctrine with international legal theory. He emphasized that, absent plenipotentiary participation and parliamentary ratification by Puerto Rican institutions, no treaty between Spain and the United States could extinguish the island's self-determined legal order. By centering representation and institutional consent, he converted a nineteenth-century imperial transfer into a twentieth-century constitutional problem, asserting that sovereignty claims lacking Puerto Rican authorization could not attain domestic legal validity[76]. In this sense, his argument anticipated later debates about self-determination, democratic legitimacy, and the non-transferability of sovereignty without the consent of the governed.

From a postcolonial standpoint, Rubén Berríos Martínez offers a compelling critique of the Treaty of Paris of 1898. He argues that the treaty marked a profound rupture with earlier U.S. territorial practice and inaugurated a new phase of imperial dominion, in which Puerto Rico's status was determined less by constitutional principle than by geopolitical subordination. For Berríos, the

[75] *Ibid*.
[76] *Ibid.*

treaty represents the juridical foundation of the American empire, enabling the acquisition of territories such as Puerto Rico, Guam, and the Philippines without a commensurate extension of rights or a defined path to integration[77]. He draws attention to the explicit debates within the U.S. Senate during the treaty's ratification, in which key figures openly articulated a desire to avoid the automatic incorporation of these territories into the union. According to Berríos, the Senate's intent was to maintain maximum flexibility in disposing of these new acquisitions. In doing so, the United States broke decisively with earlier territorial policies which, though not without inequity, had generally presumed eventual statehood, as discussed in Section 1.2. Berríos argues that Puerto Rico's continued ambiguous status, neither sovereign nor integrated, is a direct result of this exceptional departure[78].

Further developing this line of analysis, Juan R. Torruella, in his critical writings and judicial opinions, offers an assessment of the treaty's legal and constitutional implications. Torruella contends that the acquisition of Puerto Rico under the Treaty of Paris (1898) represents an extensive rejection of the principles supporting the U.S. constitutional order. According to Torruella, the treaty was the first in which the United States assumed indefinite sovereignty over a territory without integrating it into the constitutional framework, thereby institutionalizing a form of second-class citizenship. He writes:

> This approach broke all past precedents, and looked at European imperial dealings with the inhabitants of conquered lands, eventually permitting some sovereignty without granting any but the minimal right[79].

The precedent thus established allowed Congress to legislate over Puerto Rico in ways inconsistent with constitutional guarantees, violating the principle of equal protection and due process. In Torruella's view, the Insular Cases' doctrinal architecture operationalized this rupture by normalizing a bifurcated constitutionalism, under which core rights become contingent on political status rather than inherent to citizenship.

[77] Berrios Martínez, 2009-2010, p. 474
[78] *Ibid.,* p. 476.
[79] Torruella, 1997, p. 267.

Taken together, these strands delineate a coherent trajectory. Albizu's insistence on consent and representation reframes the Treaty of Paris (1898) as a problem of constitutional legitimacy. López Baralt's historical corrective cautions against overreaching analogies and reasserts the colonial baseline. Contemporary critiques by Berríos and Torruella show how non-incorporation hardened into a durable legal architecture of subordination. Read in sequence, these developments reveal not a closed debate but a cumulative reckoning. The autonomy recognized in 1897 could not be extinguished without Puerto Rican participation. The transfer of sovereignty by external compact created a legitimacy gap, which the courts addressed through the Insular Cases. The resulting regime maintained federal power largely unmoored from full constitutional accountability. This is why the nullity thesis persists, not as nostalgia, but as a live inquiry into whether a people's political identity can be reshaped without their assent and still claim validity under a constitutional order that prizes consent as its first principle.

3.3. *Constitutional Critiques in Comparative Perspective*

The constitutional implications of this colonial exception are examined in depth by Professor Juan Mari Brás, former president of both the *Movimiento Independentista Puertorriqueño* and the *Partido Socialista Puertorriqueño*, whose legal and political writings provide a rigorous critique of the treaty's validity. Mari Brás begins with the assertion that Puerto Ricans formed a distinct national community whose legal identity predates the Treaty of Paris of 1898 (Annex I). In his analysis, Puerto Rican nationalism rejected the cession of the island to the United States as an affront to the national will and a violation of the rights acquired under the Autonomic Charter of 1897. According to Mari Brás, «The citizenship of Puerto Rico was recognized by the United States Congress in Article 7 of the Foraker Act of 1900[80]» and arises not from U.S. be-

[80] Mari Brás, n/d. Article VII of the Foraker Act reads: «Sec. 7. 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 elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered

neficence but from the natural and international law that recognizes the right of peoples to self-determination[81]. He maintains that the cession of Puerto Rico as a war prize (*botín de guerra*), violated both international norms and the internal legal order of Spain, which had already granted autonomy to Puerto Rico and recognized its separate administrative and juridical status. The result is a dual illegitimacy claim, both externally, because a people cannot be transferred without consent, and internally, because Spain lacked authority to alienate an autonomously constituted political entity. Therefore, framing Puerto Rican citizenship as preexisting and national in character, as Mari Bras emphasized based on the preexisting citizenship of the Puerto Rican Nation, recasts subsequent U.S. measures as attempts to manage, rather than constitute, a people already endowed with juridical personality.

Moreover, Professor Mari Brás further examines Article IX of the Treaty of Paris of 1898, which defers to Congress the task of determining the civil rights and political status of Puerto Ricans. He argues that this delegation of power represents a breach of international law, insofar as it allowed one sovereign to determine the future of a people without their consent. Subsequently, Congress, through the Foraker Act (1900), created a unique Puerto Rican citizenship, which it later superseded with statutory U.S. citizenship through the Jones Act (1917). Yet this new status never fully displaced the national identity of Puerto Ricans, who, in Mari Brás's view, remain a distinct people under international law. The use of Congress's discretionary power in this context amounts to a usurpation of sovereignty and further highlights the treaty's fundamental illegitimacy, revealing the structural tension between constitutionalism premised on consent and imperial administration premised on plenary power[82].

Significantly, Mari Brás redirected the debate from treaty nullity to juridical recognition by extracting a distinct Puerto Rican Citizenship from the very statutory framework Congress erected

into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such».

[81] Mari Brás, n/d.

[82] *Ibid*.

after 1898. Mari Brás argued that Puerto Rican Citizenship had independent standing within U.S. law, rather than existing only as a derivative of federal nationality[83]. This move situated the Puerto Rican people as a legally cognizable community whose identity predated the cession, while tying that identity to a positive source in U.S. legislation that Congress itself had enacted.

Viewed this way, the Treaty of Paris (1898) functioned less as a void act than as the background event that triggered a domestic legislative regime through which Puerto Rican Citizenship could be articulated and defended. By accepting the treaty's existence yet declining to treat it as exhaustive of Puerto Rico's status, Mari Brás reoriented the doctrinal question. The key issue was not whether the cession was a legal nullity, but whether subsequent federal statutes recognized a distinct political community whose rights could be asserted on their own terms. In parallel, Juan Mari Brás redirected the inquiry from nullity to recognition by deriving a distinct Puerto Rican Citizenship from the Foraker Act's (1900) statutory scheme, as noted earlier. He read the act not as a mere administrative instrument but as an acknowledgment, within U.S. law of an already constituted a community, thereby situating Puerto Rican Citizenship as a positive legal status anchored both in a pre-1898 national community and in post-1898 federal legislation. On this account, the Treaty of Paris (1898) supplied the historical backdrop that prompted Congress to legislate; it did not exhaust the legal possibilities of Puerto Rican nationhood. This approach preserved the continuity of national personality while furnishing a domestic legal foothold from which claims could be asserted on their own terms.

In addition, another essential voice in this doctrinal tradition is Professor Fernando Bayrón Toro, who emphasizes the incompatibility of the Treaty of Paris (1898) with both the Spanish Constitution of 1876 and the Autonomic Charter of 1897. He asserts that Spain could not lawfully cede Puerto Rico after having recognized its autonomy. The charter, according to this interpretation, had effectively constitutionalized Puerto Rico's internal self-government; its cession without consultation or consent violated the

[83] *Ramírez v. Mari Brás* (1997).

legal structure of the Spanish monarchy itself[84]. The implication is clear, namely that the fate of Puerto Rico was decided in a context of diplomatic expediency, without regard to legal norms or the expressed will of its people[85].

Recent comparative and critical scholarship continue to enrich this discourse. Elizabeth Blocher, writing in 2017, highlights the treaty's enduring legal effects in creating a second-class form of U.S. citizenship for Puerto Ricans, in which residents of the territory possess formal citizenship yet enjoy fewer rights than citizens residing in the states. She observes that the deferral of civil and political rights to Congress per Article IX of the Treaty of Paris of 1898 resulted in a status of uncertainty, where Puerto Ricans became subject to federal laws without full representation or constitutional protections[86]. This intermediate status, she argues, would be intolerable if imposed upon any state of the union. Also, Nathaniel Issacharoff, writing in the aftermath of the Supreme Court decision in *Puerto Rico v. Sánchez Valle (2016)*[87], explores how the United States Supreme Court by a majority and concurring opinions rely on analogies to American Indian tribal sovereignty. Justice Thomas, in particular, invokes precedents such as *Oliphant v. Suquamish Indian Tribe* (1978) *and Worcester v. Georgia (1832)* to affirm that certain peoples within the U.S. system may retain aspects of internal sovereignty while lacking full federal status. Issacharoff notes the irony of applying a framework developed for indigenous tribes to the people of Puerto Rico, but concedes that the analogy highlights the juridical complexity, and subordination, of Puerto Rico's status[88].

Additionally, other scholars have proposed future-oriented legal remedies that would render the treaty obsolete. Rafael Cox Alomar, for instance, suggests that Congress could unilaterally revoke U.S. treaty obligations by recognizing Puerto Rico's sovereignty under international law and negotiating an exit from the framework imposed by the Treaty of Paris (1898)[89]. Such a move,

[84] Bayrón Toro, 1998, p. 178.
[85] *Ibid*., p. 186.
[86] Blocher, 2017-2019, pp. 126-127.
[87] *Puerto Rico v. Sánchez Valle,* 2016.
[88] Issacharoff, 2019, pp. 40–41.
[89] Cox Alomar, 2023.

he argues, would require both a redefinition of Puerto Rico's international legal status and an internal constitutional realignment of its governance structure. A more moderate approach, reflecting the ideas of Cox Alomar and others within the same intellectual tradition, was advanced by so-called *soberanista* political figures and commentators. This approach advocated the formal abrogation of the treaty by mutual agreement, thereby neutralizing its legal effect without resorting to litigation or judicial review.

In addition, historian Nieve Vázquez has recently edited and published an article arguing that the treaty was also invalid under Spanish law. According to her analysis, the Spanish Constitution of 1876 and the Autonomic Charter of 1897 rendered Puerto Rico an integral, self-governing part of Spain. The cession of such a territory, she argues, was not merely a political betrayal but a constitutional impossibility, hence was unconstitutional under the 1876 regimen[90]. Her analysis thus converges with the historical interpretations of Mari Brás and Bayrón Toro, who approach Puerto Rican legal and political history from a similarly critical perspective, in asserting that the cession violated Spanish legal norms, further undermining the treaty's legitimacy.

Moreover, at the Madrid conference *La proyección de España en el mundo*, attorney and Professor Rafael Maldonado de Guevara Delgado proposed a Reparative Spanish Nationality law for Puerto Ricans, arguing that their loss of Spanish Nationality in 1898, imposed externally and in breach of the 1876 Constitution and the 1897 Autonomic Charter, warrants differential treatment. Inspired by the Sephardic precedent, the plan would offer time-limited pathways compatible with U.S. Citizenship or a future independent Puerto Rico, adding Spanish Citizenship to Puerto Ricans. It includes routes for descendants' of 1898 nationals with basic civic and language requirements, plus a preferential track for those who have actively fostered Puerto Rico's Hispanic heritage[91]. In October 2025, the same proposal was presented at the *Primer Congreso Internacional "Puerto Rico y España: de la Ley de Sefardíes a la propuesta de nacionalidad española reparativa para Puerto Rico"*,

[90] Valázquez, 2024, p. 82.

[91] España Exterior, 2024, https://www.espanaexterior.com/el-especialista-rafael-maldonado-propone-una-ley-reparativa-de-acceso-a-la-nacionalidad-espanola-para-puerto-rico-similar-a-la-de-los-sefardies/.

held at the University of Puerto Rico, Bayamón Campus, where it received broad public support and generated considerable interest among scholars, civic leaders, and the general public[92].

Finally, sympathizers of U.S. President Donald Trump and some Puerto Ricans, many of whom favor independence, are circulating a theory that the White House could nullify the Treaty of Paris of 1898 by executive order, arguing that shifts in territories like Cuba and the Philippines and the Territorial Clause of the US Constitution enable a presidential proclamation of Puerto Rico's sovereignty, followed by congressional action. They maintain the president holds recognition powers and could initiate a transition without rewriting the treaty's text, while acknowledging that altering a treaty's content requires the Senate[93].

Ultimately, the 1898 Treaty of Paris remains a live reference point in Puerto Rican politics, shaping debates over the island's territorial status and U.S.–Puerto Rico relations. As uncertainty over Puerto Rico's status persists, arguments about the treaty's validity or possible nullity have gained new relevance in legal and political discourse. This renewed focus is a consequence of prolonged ambiguity about sovereignty, citizenship, and the limits of executive versus congressional authority. This trend underscores the increasing need to clarify the legal framework governing any transition in status for Puerto Rico, highlighting the complexities and uncertainties that arise when questions of sovereignty, citizenship, and constitutional authority intersect.

[92] El Nuevo Día, 2025, https://www.elnuevodia.com/noticias/locales/notas/propuesta-de-pasaporte-espanol-para-los-boricuas-genera-expectativa-y-respaldo-en-el-congreso-puerto-rico-y-espana/

[93] Cox Alomar, 2025, https://www.elnuevodia.com/opinion/punto-de-vista/fin-del-tratado-de-paris/

Illustr. 4[94]

4. Legal Analysis of the Treaty of Paris (1898)

The Treaty of Paris of 1898 is often presented as a simple legal transaction, a neat conclusion to the Spanish-American War. Yet beneath its formal text lies a complex web of power, sovereignty, and human consequence. This Section offers a legal analysis, an attempt not merely to recount events but to probe the principles and assumptions that shaped them. To read the treaty is to confront the uneasy tension between legality and legitimacy, between formal consent and lived reality.

Here the analysis is intentionally focused on four key dimensions: territorial acquisition, juridical resistance, the creation of colonial legal subjects, and comparative frameworks of empire. These points are examined not in isolation, but as facets of a broader question: how the treaty redefined the civil rights and po-

[94] Kurz and Allison, Library of Congress Prints and Photographs Division, LC-DIG-pga-01948.

litical status of the inhabitants of Puerto Rico and Guam. While the treaty touches on many other issues that merit investigation, this study concentrates on those aspects that continue to bind these U.S. Territories under its dispositions, exposing how legal categories forged in 1898 still shape contemporary debates over rights, citizenship, and sovereignty.

4.1. *Legal Acquisition and the Question of Conquest*

It is evident that during the Paris Peace Conference of 1898, the legal fate of the peoples of Puerto Rico, the Puerto Ricans and Guam, the Chamorros, was determined entirely in their absence and without any form of prior consent. To this day, both Puerto Rico and Guam remain unincorporated territories of the United States. The Cuban War of Independence had inflicted substantial human and economic losses, not only upon the Cuban population and Spanish authorities but also upon American investments in Cuba, which had become significant over the preceding decades. The strategic proximity of Cuba to the United States meant that the prolonged conflict inevitably drew the attention of the U.S. military and political leadership, culminating in direct intervention.

Prior to the outbreak of hostilities between Spain and the United States, Madrid had sought to secure its remaining colonial interests by promulgating the 1897 Autonomous Charter for Cuba and Puerto Rico, an effort intended to retain these territories under Spanish sovereignty. During the war, Spain, lacking a permanent diplomatic presence in Washington, relied on the French embassy to negotiate the preliminary peace protocol (Annex III). Even so, by the time the peace protocol was formalized, U.S. forces had already invaded Puerto Rico, asserting control with the apparent intent of securing cession by conquest and of subordinating Cuba to terms designed to relinquish Spanish sovereignty.

Therefore, in 1898, Spain, lacking a permanent diplomatic presence in Washington, consequently relied on the French embassy to negotiate the preliminary peace protocol[95]. This episode underscores the enduring influence of the right of conquest, a principle that, although rooted in the Middle Ages, continued to shape the

[95] Keen, 2017, p. 130.

legal and diplomatic resolution of territorial disputes. Originally, it had emerged in contexts where opposing parties engaged in combat, each convinced of the righteousness of their cause, leaving the outcome of their conflict and implicitly, divine judgment, to determine the legitimacy of territorial claims. By the late nineteenth century, the religious and martial dimensions of the doctrine had largely faded; nevertheless, the underlying idea that war could itself create or extinguish rights persisted, guiding states' strategies and diplomatic practices, as exemplified by Spain's recourse to intermediary diplomacy to secure recognition of peace and settlement. In modern legal terms, the right of conquest can be defined as the entitlement of the vanquisher, by virtue of military victory or conquest, to assert sovereignty over the conquered territory and its inhabitants[96]. For a conquest to have legal efficacy, it was traditionally necessary to establish a formal title, either through *debellatio*, whereby the conquered state was entirely defeated, or through a cession incorporated into a peace treaty[97]. However, within the broader framework of international law, the right of conquest has often been regarded as primitive or legally deficient[98]. Its very legitimacy depends upon the power asymmetry between states, which cannot be morally justified under principles of equality among nations[99].

Although numerous historical examples exist of territories seized through force or threat of war, states have generally sought to avoid openly employing such measures to expand their dominions[100]. Emer de Vattel, in 1758, condemned the reliance on conquest in international law, emphasizing that victory alone does not establish justice:

> And we must observe that war does not decide the question: victory only compels the vanquished to subscribe to the treaty which terminates the difference. It is an error, no less absurd than pernicious, to say that war is to decide the controversies between those who acknowledge no supe-

[96] Korman, 2003, pp. 7-8

[97] *Debellatio:* «The classical notion of debellation is of ancient lineage in international law. It provided that, upon the complete and total defeat of an adversary, the spoils of war included the territory and sovereignty of the vanquished belligerent», in Frauke Lachenmann, Rüdiger Wolfrum, 2017, p. 321.

[98] Korman, 2003, p. 9.

[99] *Ibid*., p. 10.

[100] *Ibid*., p. 56.

> rior judge, as in the case of nation. Victory usually favours the cause of strength and prudence, rather than that of right and justice[101].

By contrast, the United States has historically treated the right of conquest as foundational principle within jurisprudence, equating discovery with conquest and regarding the acquisition of territories as a legitimate exercise of sovereignty[102]. In Downes v. Bidwell (1901), one of the so-called Insular Cases, the U.S. Supreme Court acknowledged this principle when evaluating the rights of the Puerto Rican people following the Treaty of Paris of 1898:

> «It may not be doubted that, by the general principles of the law of nations, every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest»[103].

Similarly, in Mormon Church v. United States (1890), the Supreme Court reaffirmed that territorial acquisition through conquest, treaty, or cession is an incident of national sovereignty:

> The power to acquire territory, other than the territory northwest of the Ohio River (which belonged to the United States at the adoption of the Constitution), is derived from the treatymaking power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty[104].

Accordingly, international law, has an established fundamental distinction on how conquest alone does not *ipso facto* makes the conquering state the sovereign of the territory possessed through military force in war[105]. If the conqueror takes the territory and then makes the vanquished state cede the territory in a peace treaty, the mode of acquisition is not subjugation but cession[106]. Whereas, under current international law the validity of peace treaties ceding territory, done under pressure by the use of war

[101] De Vattel, 1844.
[102] Matthew McMahon, 1975, p. 59.
[103] *Downes v. Bidwell*, 1901, p. 301.
[104] *Mormon Church v. United States*, 1840, p. 42.
[105] Oppenheim and Roxburgh, 1974, p. 394.
[106] *Ibid.*

and force by the victor is questionable under Article 52 of the Vienna Convention on the Law of Treaties of 1969 that states that: «*A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of internal law embodied in the Charter of the United Nations*». This is based in part on the principle that legal rights cannot derive from an illegal situation *ex injuria jus non oritur*, as in the case of a military invasion to exercise the right of conquest, and this is the reason why the international community through legislation has prohibited wars of conquest.

During the Spanish-American War (1898), however, international law was not conspicuous in prohibiting the title of conquest either by unilateral annexation of the conquered territory or by its forced cession through a peace treaty, usually done out of fear of further devastation or total annihilation[107]. Nevertheless, even though it was not an established condition in the so-called law of nations during that period, there was a movement in international law favoring that, for the cession of a territory to be valid, the individuals domiciled in the ceded territory, subject to the hardships of losing their old citizenship, should at the very least have the plebiscite to consent to the cession[108].

From a legal perspective, peace treaties in international law are not presumed to be valid. Their legality and enforceability depend on the consent of the parties, the absence of coercion, and compliance with both customary and conventional rules. Consequently, the formal recognition of a treaty requires careful scrutiny, as courts and states alike must ensure that the agreement was concluded freely and in accordance with established legal norms.

However, an important counterpoint arises from the right of prescription, which serves as an exception to the legal principle of *ex injuria jus non oritur*. In this context, the passage of time and the establishment of factual control can, under certain conditions, confer legal legitimacy even on situations that initially originated from unlawful acts. Thus, the right of prescription is a traditionally held norm in international law by which a state acquires the title to territory on the ground of a long-held and uninterrupted possession, regardless of the validity and form that the original territory

[107] Korman, 2003, p. 17.
[108] Oppenheim and Roxburgh, *op. cit*., pp. 381-382.

was acquired, including if the territory was illegally acquired or by error[109]. Oppenheim defines prescription as:

> There is no doubt that, in the practice of the members of the family of nations, a state is considered to be the lawful owner even of those parts of its territory of which originally it took possession wrongfully and unlawfully, provided that such a length of time as is necessary to create the general conviction that the present condition of things is in conformity with international order. Such prescription cannot be compared with the usucapion of roman law, because the latter required bona fide possession, whereas the law of nations recognizes prescription both in cases where the state is in bona fide possession and in cases where it is not[110].

Therefore, international law should favor a test of time to establish whether an illegal treaty ceding territory is valid or not. In Maryland v. West Virginia (1909), the US Supreme court decided upon the state border between Maryland and West Virginia that is known as the Deakins Line, which was drawn using a meridian boundary in 1788. The court held that a boundary line which had been for a century should be maintained:

> The effect to be given to such facts as long continued possession gradually ripening into that condition which is in conformity with international order depends upon the merit of individual cases as they arise. 1 Oppenheim, International Law, § 243. In this case, we think a right in its nature prescriptive has arisen, practically undisturbed for many years, not to be overthrown without doing violence to principles of established right and justice equally binding upon states and individuals.[111]

Accordingly, arguments regarding the validity of the Treaty of Paris of 1898 should take into account that, whether the treaty is valid or not, under the right of prescription the United States has exercised *de facto* control over Puerto Rico for nearly 128 years, exercising their sovereignty. Furthermore, the Treaty of Paris of 1898 is continually cited as a source of law when referring to the cession of Puerto Rico in legislation, and in state and federal jurisprudence. This makes it difficult to challenge the legality of the treaty, even though the inhabitants of Puerto Rico did not consent to the cession at the time it was signed. Under this principle, the

[109] Korman, *op. cit*., p. 16.
[110] Oppenheim, Roxburgh, *op. cit.*
[111] *Maryland v. West Virginia* ,1909, p. 44.

consolidation of an originally irregular or defective title is possible over time, but such an effect is excluded where the legitimacy of the acquisition remains persistently challenged by the injured party or by the international community. Accordingly, even if the legality of the original cession were brought into question, the continuous exercise of sovereignty by the United States, together with the absence of sustained international challenge and Spain's acquiescence, has given rise to a legal condition with its own normative weight.

4.2. *Civil Law Traditions and Juridical Dissent*

The imposition of U.S. sovereignty also brought cultural and juridical transformation, changes that did not occur without conflict, the most notable arising from an attempt of transculturation met with cultural resistance[112]. As an example, in Puerto Rico, the original language of the population, Castilian Spanish, was systematically replaced by the authorities; however, these efforts ultimately failed due to the resilience of the Puerto Rican Nation. Also, it was subject to a change in their legal systems, with some remaining legal institutions of private law currently left in place. It is well established in international law the doctrine of vested rights, establishing that once a right was created in one place, its existence should be recognized everywhere. Specifically, in a ceded territory; once a right is acquired by individuals or legal entities and its founded and enforced there, the previous law is maintained in full vigor after the cession[113].

Furthermore, the United States Supreme Court, in an opinion authored by Chief Justice John Marshall, clarified that «a cession of territory is never understood to be cession of the property belonging to the inhabitants»[114]. This principle helps explain why Puerto Rico's private law, codified in its Civil Code, retains its Spanish and continental European origins. Notwithstanding the introduction of common law principles under United States sovereignty in constitutional, criminal, and procedural matters, Puerto Rico's ingrained

[112] The term *transculturation* was first used in Fernando Ortiz' 1940 book, Cuban Counterpoint: Tobacco and Sugar, 2003, p. 98.
[113] Verzijl, 1974, p. 74.
[114] *United States v. Perchman,* 1833, p. 87.

civil law heritage continues to structure private legal relations. The result is a genuinely mixed legal system, which Puerto Rican jurists describe as a *tradición civilista*, where the civil law framework of private relations frequently comes into conflict with the common law structures governing public authority and adjudication[115].

The persistence of the Civil Code in Puerto Rico must be understood as an act of juridical resistance in the face of U.S. legal impositions. After the change of sovereignty, as a consequence of the cession in the Treaty of Paris (1898) (Annex I), American authorities deliberately sought to dismantle the Spanish juridical order; between 1898 and 1902, three of the five existing Spanish codes were eliminated and replaced by American codes[116]. The codifying commission acted, as one contemporary, Luis Muñoz Rivera, described it: «with as much haste as irresponsibility»[117]. Introducing provisions from the Louisiana Civil Code that «clashed substantially with our traditional law and deeply rooted customs»[118]. This reflected the programmatic statement of Military Governor George W. Davis in 1900, who declared that Puerto Rican legal institutions should be remade « (...) to correspond with our own»[119]. Yet, the survival of the *tradición civilista* framework provided jurists with a doctrinal arsenal through which they could resist carpetbagging Americanization and affirm continuity with continental legal tradition.

Puerto Rican scholars and judges have long conceptualized this stance under the rubric of «the defense of Puerto Rican law[120]», a phrase that encapsulated both the safeguarding of civil law categories and the assertion of national identity. Ex-Puerto Rican Supreme Court Judge, José Trías Monge, summarized the issue as the unresolved task of:

> The creation for this country [Puerto Rico] of its own law, a law that responds primarily to the needs and aspirations of our people, as conceived by them, a law formed by Puerto Ricans or with their active participation and considered just by Puerto Ricans[121].

[115] Trías Monge, 1991, p. 401 and Delgado Cintrón, 1988, p. 45.
[116] Bernabé, 2014, p. 188.
[117] Cuevas Segarra, 1995, p, 343.
[118] Bernabé, *op.cit.*
[119] Silvestrini, 2003, p. 612.
[120] *Ibid*., p. 606.
[121] *Ibid.*

During his tenure as judge, the Puerto Rico Supreme Court insisted that common law could only be consulted «as comparative law»[122], reaffirming the civil law as the normative core of private law. In this sense, the Civil Code was not a mere survival but a deliberate affirmation of cultural and legal autonomy. Its endurance, culminating most recently in the 2020 Civil Code, which categorically reaffirms its continental European origin[123]. In this sense, Article 1 of the Puerto Rican Civil Code (2020) reads:

> This law shall be known as the Civil Code of Puerto Rico. Given its civil law origin, it shall be interpreted with attention to the techniques and methodology of civil law, in such a way that its character is safeguarded.

Henceforth, this *Corpus Juris* must be read as a counter-hegemonic gesture, the enduring insistence that Puerto Rican law belongs to Puerto Ricans, even within the limitations of U.S. authority. This resilience acquires further meaning when situated in the broader framework of the Treaty of Paris of 1898. By virtue of that treaty, Spain ceded Puerto Rico to the United States without consultation or participation of the island's inhabitants. As scholars have noted, the treaty operated as a paradigmatic act of imperial imposition, denying Puerto Ricans the capacity to define their own juridical destiny. Against this background, the survival and subsequent reform of the Civil Code have been consistently interpreted as a counterbalance to the dispossession embodied in the treaty. While the treaty attempted to erase Puerto Rico's juridical continuity by subjecting it to foreign sovereignty, the Civil Code became a focus of resistance, enabling the island's jurists to preserve, reinterpret, and adapt their continental legal tradition.

4.3. *Law, Sovereignty, and Puerto Rico's Status in U.S. Jurisprudence*

Although the United States Constitution does not address colonial possessions and the term gradually disappeared from American political discourse, legislation, and jurisprudence, replaced by designations such as overseas territories, many historians and legal

[122] Bernabé, 2014, p. 190.
[123] Esborraz, 2024, pp. 254-256

scholars argue that Puerto Rico continues to function as a colony under U.S. control[124]. Puerto Rican historian and Former Federal Judge, Juan Toruella, advocates this idea, as mentioned earlier in Section 3.2; notwithstanding, his analysis fails to take into account the role of Congress in perpetuating the so-called colonial condition by declining actively to incorporate Puerto Rico expressly and make it an offer for statehood, or in the alternative, provide for its eventual independence[125]. In this sense, the Supreme Court has legitimized the use of the term overseas territories by always treating the question as one distinguishing between incorporated and unincorporated territories[126]. Under these legal circumstance, Puerto Rico is considered an unincorporated territory. This legal and political status implies that the United States Congress may exercise so-called plenary powers over Puerto Rico. Accordingly, Congress holds exclusive legislative power over Puerto Rico, subject to the boundaries defined by fundamental individual rights as interpreted by the United States Supreme Court[127].

Traditionally, the Treaty of Paris of 1898 (Annex I), as examined in federal legislative texts, academic legal literature, and federal case law, aligns closely with the conclusions of José López Baralt's 1932 Cornell University thesis, *The Policy of the United States towards its Territories with Special Reference to Puerto Rico*, which is explored more fully in Section 3.1. Nevertheless, López's assertion that the United States never acquired territory by the right of conquest remains unpersuasive, as it rests on a narrow interpretation of international law that overlooks the historical and practical realities of territorial acquisition. His argument rests on the premise that, according to international law, all territorial acquisitions made by the United States following the war were the result of formal cessions established in peace treaties, intended as compensation for conflict. This position overlooks the broader historical and legal context in which conquest, negotiation, and treaty-making often intersected, and it fails to account for the ways in which the United States effectively exercised sovereign authority over newly

[124] Toruella, 1988, p. 263.
[125] Rivera Ramos, 2007, p. 131.
[126] *Ibid*., p. 128.
[127] *Ibid*., p. 13.

acquired territories independently of formal treaty provisions.[128]. In reality, the present-day states of California, Nevada, Utah, Arizona, New Mexico, Texas, and parts of Colorado and Wyoming were acquired following military victory over Mexico, while Florida was obtained from Spain only after U.S. military incursions had destabilized Spanish authority and forced diplomatic concessions. Thus, historical evidence demonstrates that the United States' territorial expansion cannot be understood solely as the product of formal treaty cessions, but must also be seen in the context of conquest and the exercise of *de facto* sovereign authority.

Furthermore, López Baralt distinguishes the Northwest Ordinance of 1787 from the Treaty of Paris of 1898 on the basis that Puerto Rico and the Philippines were inhabited by populations differing in language, race, and political ideals from the mainland United States, and that these territories lacked geographical contiguity[129]. This line of reasoning is problematic not only because it is inconsistent with the eventual incorporation of Hawaii and Alaska, both of which were noncontiguous. Thus, contradicting the incorporation of Hawaii and Alaska based on continental continuation[130]. Also, because it elevates ethnolinguistic, racial, and geographic factors to a determinative status unsupported by historical practice; for example, the admission of Louisiana, New Mexico, Alaska, Hawaii, California, Texas, Arizona, and Florida demonstrates that neither cultural heterogeneity, racial composition, nor the absence of territorial continuity has constituted an absolute barrier to integration. While racial considerations and geographic remoteness have at times been invoked, as in the case of the Philippines, acquired under the Treaty of Paris of 1898 but never incorporated. The historical record shows these were neither consistent nor decisive determinants. In the Philippine case, racialized arguments and distance were compounded by the outbreak of the Philippine–American War (1899–1902) and prevailing strategic calculations, which together shaped congressional reluctance. Racism has influenced American history, but it has not consistently determined which territories were excluded from statehood. De-

[128] López Baralt, 1999, p. 11.
[129] *Ibid.*, 28.
[130] Morales Carrión, 1990, p. 123.

cisions about incorporation have been shaped primarily by congressional intent, strategic interests, and the political priorities of the moment, rather than by strict requirements of cultural similarity, racial uniformity, or geographic proximity. Therefore, López Baralt's attempt to explain territorial exclusion based only on language, race, political ideals, or geography is unconvincing. The Insular Cases, by contrast, established a separate judicial framework for unincorporated territories like Puerto Rico and the Philippines, rather than reflecting a consistent legislative practice.

Ultimately, incorporation reflects only one dimension of territorial status. Equally significant are the ways in which the Puerto Rican Supreme Court has interpreted and shaped the boundaries of political membership within the territory, offering insight into how local jurisprudence navigates questions of identity, belonging, and authority. In Ramírez v. Mari Brás (1997)[131], mentioned in Section 3.3, the Puerto Rico Supreme Court recognized a distinct Puerto Rican Citizenship in positive law and held that Professor Juan Mari Brás, having formally renounced United States citizenship, remained a Puerto Rican citizen eligible to vote in local elections[132]. The court grounded that conclusion in Puerto Rico's constitutional and statutory law, read against the historical backdrop of Article IX's first paragraph of the 1898 Treaty of Paris, which contemplated that inhabitants of ceded territories would possess a local nationality even as Congress retained control over their ultimate political status. The point is not that law creates culture, but that it can recognize who belongs to a territorial community for purposes of constitutional belonging without needing to resolve the separate federal question of incorporation. This suggests that territorial status is shaped primarily by legal and political considerations, even though cultural factors may still play a role. The ju-

[131] In 1994, Puerto Rican attorney and law professor Juan Mari Brás renounced his United States Citizenship in the American Embassy of Venezuela, latter acknowledge by the United States State Department. One of the arguments sustained by Mari Brás was that Puerto Ricans, by virtue of the Treaty of Paris of 1898, had the citizenship of Puerto Rico before the United States imposed American Citizenship to all Puerto Ricans in 1917, without their consent. Afterwards, Mari Brás was refused to vote for the Puerto Rican governor and legislature, based in the Puerto Rican electoral law that only allows United States citizens voting rights. He then presented an appeal to the Puerto Rican Supreme Court, winning the case, and also, the court recognizing that Puerto Rican Citizens could be electors.

[132] *Ramírez v. Mari Brás*, 1997, p. 342.

dicial decision was based in part by Article IX, first paragraph of the Treaty of Paris of 1898, which states:

> 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, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration, they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

As previously explained, this ruling demonstrates how the Supreme Court of Puerto Rico relied on historical treaty provisions to affirm a form of local citizenship distinct from Federal nationality. By grounding its reasoning in domestic law and the transitional clauses of the Treaty of Paris of 1898, the court clarified that political membership within Puerto Rico can be legally recognized and protected at the territorial level, even without full incorporation into the United States.

Before the recognition of local citizenship, the Insular Cases introduced the «people of Porto Rico», an authoritative legal designation through which the United States imposed a distinct political and juridical identity on the territory. Though presented as a neutral classification, this performative judgment carried the weight of institutional power, shaping the terms of recognition and belonging in ways that could not easily be contested or refused. This leads to the misidentification of a historical community defined by a common language and culture. Thus, the Insular Cases are part of the construction of this new identity by the United States Supreme Court[133]. The use of the term «Porto Rico» was also used in the English versions of several treaties between Spain and the United States during the XIX Century, and during the peace negotiations of the Treaty of Paris of 1898 the term is frequently interchanged. Nevertheless, the creation of the subject through a

[133] Rivera Ramos, 2007, pp. 126-127.

process of reification is an instance of the performative power of law, constructed as defining an inferior people in need of tutelage, as explained by philosopher Pierre Bourdieu, mentioned earlier in Section 2.3. To better understand how legal institutions exercise power through language, Bourdieu offers a theoretical account of what he terms «symbolic violence», focusing on the performative nature of judicial judgments. In his view, the act of naming within a court decision is not merely descriptive or procedural but constitutive; it publicly imposes a classification that claims universal legitimacy and shapes how individuals and groups are socially recognized. As he explains:

> (...) In contrast, the judgment of a court, which decides conflicts or negotiations concerning persons or things by publicly proclaiming the truth about them, belongs in the final analysis of the class of acts of naming or of instituting. The judgment represents the quintessential form of authorized, public, official speech which is spoken in the name of and to everyone. These performative utterances, substantive- as opposed to procedural- decisions publicly formulated by authorized agents acting on behalf of the collectivity, are magical acts which succeed because they have the power to make themselves universally recognized (these judgments are model acts of categorization, katègoresthai, in Greek, meant to publicly accuse). They thus succeeded in creating a situation in which no one can refuse or ignore the point of view, the vision, which they impose[134].

In line with Bourdieu's account of institutional naming, the Insular Cases exemplify how judicial authority, drawing primarily on the Treaty of Paris of 1898, constructed the legal reality of Puerto Rico as an unincorporated territory, a designation that reconfigured its constitutional status through performative classification. Before the Insular Cases were decided, the unincorporated territory did not have any existence, as mentioned in Section 1.2. Nevertheless, soon after the pronouncement of the United States Supreme Court, it was brought into reality; in other words, it was brought into the people's mind in the form of categories of perception[135]. Hence, Bourdieu's conception of the force of law as constitutive of society lies in its capacity to produce a legal subject. Within the social understanding that underpins the ideological effectiveness of law, this force constructs subjects deemed capable of making le-

[134] Bourdieu, 1987, p. 838.
[135] Rivera Ramos, 2007, p. 125.

gal claims, while simultaneously positioning them as objects upon which power may be legitimately exercised.[136]. The aforementioned subjects, in American constitutional law, are, therefore, the inhabitants of the unincorporated territory. This being said, in American legal history, there are few cases where the rights of citizens are fundamentally affected in a manner that makes of them an inferior class of citizens, like in the Insular Cases[137]. This fact is, in great part, a consequence of controversies around the interpretation of the Treaty of Paris of 1898.

In addition, the so-called Insular Cases are also connected to the United States Supreme Court decision of Plessy v. Ferguson (1896), because they allowed for unequal treatment by the government of black American citizens, as shown in section 1.2. In Plessy, the Supreme Court affirmed racial segregation, creating the «separate but equal» doctrine that legally sanctioned discrimination against Black Americans. Here, the Court subjected Mr. Homer Plessy, a U.S. citizen of predominantly European descent, to racial discrimination by denying him the constitutional rights and protections guaranteed under the 14th Amendment:

> A citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven-eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to citizens of the United States of the white race by its Constitution and laws (...)[138].

Eventually, Plessy v. Ferguson (1896) was revoked by the United States Supreme Court's decision of Brown v. Board of Education (1954). Nevertheless, in the doctrine created by the Insular Cases, the legal doctrine of «separate but equal» still applies to Puerto Rico and all United States territories, as defined in Downes v. Bidwell (1901): « (...) as a territory appurtenant and belonging to the United States, but not part of the United States (...) ». In this sense, there is a clear doctrinal precedent from the Dred Scott v. Sandford (1857) case, were the United States Supreme Court struck down the authority of Congress to prohibit slavery in U.S.

[136] Bourdieu, *op. cit.*
[137] Toruella, 1988, p. 267.
[138] *Plessy v. Ferguson*, 163 U.S. 537 (1896), 538.

territories, holding that enslaved persons were constitutionally protected as private property. This decision effectively extended the reach of slavery into all federal territories, thereby increasing the political power of slaveholding states in Congress. More importantly for the course of U.S. territorial expansion, Dred Scott articulated a vision of constitutional authority that framed territorial governance within the broader logic of property rights and racial hierarchy. This precedent laid an ideological and jurisprudential foundation that would echo decades later in the Insular Cases (1901–1922), in which the Court upheld the subordination of newly acquired territories, such as Puerto Rico, by distinguishing between incorporated and «unincorporated territories». Thus, Dred Scott not only reinforced the constitutional entrenchment of slavery in pre-Civil War America, but also helped establish a legal framework that allowed for the selective application of constitutional rights in the context of America's territorial expansion.

Another Supreme Court decision that likely influenced the legal reasoning in the Insular Cases is Jones v. United States (1890), which interpreted the Guano Islands Act of 1856. In that case, the Court held that the power of expansion is without limitation the President, together with Congress, extends sovereignty over a particular territory, and that such actions must be respected by the judiciary regardless of the territory's location[139]. Also, in Shively v. Boulby (1894), the Court recognized that, under common law, the United States acquires title to territory through cession or treaty:

> At common law, the title and the dominion in lands flowed by the tide were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution to the United States.
> Upon the acquisition of a territory by the United States, whether by cession from one of the states, or by treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the benefit of the whole people and in trust for the several states to be ultimately created out of the territory[140].

[139] *Jones v. United States*, 1890, pp. 212-213 and 224.
[140] *Shively v. Boulby*, 1894, p. 57.

Having examined the legal framework that shaped U.S. authority over its territories, it is equally important to consider how these structures were perceived on the island itself and how Puerto Ricans have compared life under Spanish colonial rule with the present territorial status. In this sense, some in Puerto Rico believe that under Spanish colonial rule Puerto Ricans had more rights than under the current territorial status with the United States. Nevertheless, under Spanish rule, Puerto Ricans were distrustful of their local government and the laws wholly served the colonial regime on the island[141]. As López Baralt points out, it is hard to see how Puerto Rico acquired international status under the *Carta Autonómica* (1897) when local laws could be revoked by the central Spanish authorities with all competence and legal legitimacy to do so[142]. Nevertheless, the political theory of the nullity of the Treaty of Paris of 1898 was widely discussed in Puerto Rico by Pedro Albizu Campos, discussed in Section 3.1. The idea was that the *Carta Autonómica* (1897) created a political entity with legal rights that could not be taken away by the United States in the Treaty of Paris of 1898*143.* The issue was brought to the attention of United Courts of Appeal; First Circuit, and dismissed as:

> (...) superfluous, irrelevant and misleading: (...) that the Treaty of Paris, by terms of which was ceded to the United States, was and is void and of no legal effect whatsoever in Puerto Rico, and that all the acts of the Government of the United States and its officers, agents, or representatives, in Puerto Rico or with reference to Puerto Rico, from the date of the Treaty of Paris to the present date, have been performed without any legal authority or effect whatsoever (...)[144].

As a result, the appeal was ultimately dismissed by the United States Supreme Court. Nevertheless, many legal scholars in Puerto Rico regard debates over the nullity of the 1898 Treaty of Paris as largely academic and argue that the island's present political reality is rooted not in that century-old treaty but in the Puerto Rico Federal Relations Act and Public Law 600 of 1950[145]. These

[141] Rivera Ramos, 2007, pp. 54-55.
[142] López Baralt, 1999, pp. 151 and 153.
[143] Raymond Carr,1984, p. 21.
[144] *United States Court of Appeals (1st. Circuit),* 1936, p. 21.
[145] United States Code Title 48 § 731, *et.seq.*

measures authorized the drafting and adoption of the Constitution of the Commonwealth of Puerto Rico (1952) and in doing so formalized a territorial arrangement that, regardless of its origins in imperial transfer, continues to define the island's legal and political status to this day. For these scholars the decisive arena for determining Puerto Rico's future lies within this post-1950 framework rather than in the contested legacy of 1898.

4.4. *Comparative Perspectives and Legal Continuities*

From a comparative legal standpoint, the textual formulations of both the Alaska Treaty of 1867 (Annex III) and the Treaty of Paris of 1898 (Annex I) reveal a purposeful and coherent structure, indicative not of neutrality, but of an intentional design to legitimize and facilitate territorial acquisition. The continuity of discriminatory legal formulations, first applied to the «uncivilized native tribes» refereeing in discriminatory terms to the indigenous peoples of Alaska, and subsequently transposed, nearly verbatim, to the inhabitants of Puerto Rico, Guam, and the Philippines, reflects what Pierre Bourdieu might characterize as a form of «symbolic violence» exerted through juridical discourse, discussed in Sections 2.3 and 4.3[146]. In this context, law does not merely reflect the power dynamics of empire but becomes the very instrument through which power is naturalized and inequality entrenched. Legal language, far from neutral, functions as a performative act that both constructs and legitimizes hierarchical authority under the guise of constitutional order and governance.

The ciphered telegram of November 29 from the U.S. State Department to William Day, head of the American peace commission, is particularly instructive in this regard: As stated:

> The President wishes to know the opinion of the Commission as to inserting in treaty, provisions on the subject of citizenship of inhabitants of Philippines which will prevent extension of that right to Mongolian and others not actually subjects of Spain; also, whether you consider it advisable to provide, if possible, for recognition of the existence of uncivilized native tribes in the same manner as in Alaska treaty, perhaps leaving to Congress to deal with the status of inhabitants by legislative act.

[146] Bourdieu, *op. cit.*

The language employed here is not only strategic but reveals a premeditated intent to replicate the Alaskan precedent for the management of native populations. The exclusionary clause «uncivilized native tribes» appears again in Article III of the Alaska Purchase of 1867:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

It is this same juridical mechanism that was later embedded in Article IX, Paragraph 2, of the Treaty of Paris of 1898, carrying over with remarkable fidelity not only the structural formulation of the exclusionary clause but also its underlying imperial rationale. In doing so, it reproduced for Puerto Rico the very framework first applied to the Inupiat and other Indigenous peoples of Alaska under the 1867 cession, a framework deliberately crafted to differentiate and subordinate populations deemed «uncivilized» and to place them under a separate regime of federal control. The near-*verbatim* transfer of both language and intent ensured that, notwithstanding the geographic and cultural distance between the Arctic and the Caribbean, the same colonial rationale governed the determination of Puerto Ricans' political status within the United States.

What emerges, then, is a pattern of legal differentiation reflected in the treaty language negotiated in 1898, shaped by the American commissioners and, importantly, not formally contested by the Spanish delegation. While the latter showed signs of resistance in other matters, such as the Cuban debt and war indemnities, they remained conspicuously silent on the issue of civil rights for the native inhabitants of the ceded territories. As noted by Rafael M. de Labra in his denunciation of Article IX as an act of grave injustice, cited earlier, the absence of a plebiscite stripped the Puerto Rican population of its Spanish Citizenship under the coercive auspices of American political pressure. The attempted justification by reference to the Alaska Purchase (1867) only further confirms

the intentional replication of legal precedent to consolidate colonial control, even in defiance of the principles of popular consent.

In sum, these historical legal instruments reveal not only the expansion of American sovereignty, but also the creation of a legal framework in which the language of the law contributed to differentiating and subordinating certain groups. The jurisdictional reach of the United States was therefore established not only through military action or diplomatic negotiation, but also through the language of treaties, which allocated rights selectively and left significant populations subject to Congressional discretion. Within this legal-historical framework, the Insular Cases and the doctrines they articulated must be understood not as isolated judicial anomalies, but as a coherent extension of the legal construction established in the United States during the closing decades of the nineteenth century.

Illustr. 5[147]

[147] The Boston Globe, May 28, 1898, *Well, I hardly know which to take first!*, Library of Congress Prints and Photographs Division, LC-USZ62-91465.

5. Conclusion: Puerto Rico, Sovereignty, and the Legal Legacies of the Treaty of Paris (1898)

This legal historical analysis has situated the Treaty of Paris of 1898 (Annex I) as the decisive instrument that reconceived the Puerto Rican Nation's legal order. At the moment of cession the Puerto Rican people already existed as a distinct political community, recognized under the Spanish Constitution of 1876 and the *Carta Autonómica of 1897*. Nonetheless sovereignty was transferred without consultation or representation. The island moved from one imperial dominion to another as a colony, in keeping with nineteenth century practices that treated populations as objects of diplomacy rather than as subjects of self determination.

The juridical pivot of the transfer is Article IX of the Treaty of Paris (1898). That provision remains operative and places the «civil rights and political status» of the Puerto Rican Nation within the unilateral competence of the United States Congress. Nearly identical formulae appear in Article III of the Treaty of Cession of Alaska (Annex III), a fact insufficiently noted by historians and yet of decisive legal importance. Article III itself makes an explicit distinction between civilized inhabitants and «uncivilized native tribes», consigning the latter to congressional guardianship as wards presumed incapable of self government. The Puerto Rican Nation was thereafter placed in a comparable posture, but without any subsequent extension of full constitutional membership or a pathway to statehood. The parallel shows that the treaty text already codified a racist hierarchy that authorized discretionary exclusion.

The Supreme Court converted those treaty choices into constitutional doctrine. The Insular Cases, begun in 1901 and elaborated in subsequent opinions, drew doctrinal materials from American Indian law that conceived of «domestic dependent nations» and from legal rationales rooted in racial segregation exemplified by the doctrine of «separate but equal». By synthesizing these lines of authority the Court fashioned the category of the «unincorporated territory», a constitutional device permitting territorial governance without equal rights. What was a defect in the international instrument sovereign power assumed without consent was transformed into an internal constitutional regime that made a second class political status appear legally acceptable. Although

the legal doctrines that justified segregation have been repudiated elsewhere, the constitutional architecture erected in the Insular Cases has not been dismantled, and its logic continues to structure the island's political incapacity.

The practical consequences are plain and severe. Citizens of the Puerto Rican Nation on the island are United States Citizens who simultaneously hold a distinct Puerto Rican Citizenship that lacks sovereign effect, and yet they remain subject to federal law while being denied voting representation in the institutions that determine that law. They cannot vote for the president and they have no voting members in Congress. This arrangement is not accidental. It is the product of an ordered sequence of legal institutions that perpetuate colonial status: Article IX of the Treaty of Paris (1898); the Insular Cases and the doctrine they embodied; and the present territorial regime under congressional supremacy. Recent decisions of the United States Supreme Court, by reaffirming the continuing applicability of the Insular Cases to questions of federal power in the territories, have prolonged the constitutional condition that those precedents established.

Congressional and administrative design have deepened the democratic deficit. PROMESA and the Financial Oversight and Management Board exercise sweeping control over fiscal plans, budgets, and debt restructuring while operating without direct electoral legitimacy. The Board's interventions, the imposition of austerity measures, and recurrent governance scandals have aggravated economic decline and eroded public trust in representative institutions. Electoral politics on the island, though vigorous, have been unable to convert popular will into sovereign change. In the most recent gubernatorial election the *Partido Independentista Puertorriqueño* won 30.77 percent of the vote, a substantial democratic expression that nonetheless has no automatic transformative effect on the island's constitutional status because congress alone retains the authority to decide. The Philippines eventually obtained independence (Annex IV), closing its imperial chapter and thereby escaping the legal constraints of the Insular Cases.

At the same time, the Puerto Rican Nation has exhibited persistent cultural and juridical resilience. The civil law tradition inherited from Spain remains a pillar of doctrinal continuity and local legal identity. Puerto Rican jurists, institutions, and communities have

continually worked to protect legal coherence and communal values within a system that frequently seeks to absorb them into a different national and cultural model. This resilience is also cultural. Spanish language, literary traditions, religious practices, and modes of social life have endured despite explicit and implicit United States policies aimed at linguistic and cultural assimilation. Efforts to suppress the Hispanic cultural forms were part of assimilationist programs that treated cultural transformation as a precondition to political subordination. That the Puerto Rican Nation preserved its Hispanic culture and Latino heritage in the face of these pressures demonstrates the limits of administrative domination when confronted with a people anchored in its own identity.

This argument rests upon primary documentary evidence including treaties, archival drafts, legislative debates, administrative memoranda, and judicial opinions. These sources reveal two linked truths. First, the treaty regime codified a racial and political hierarchy at the moment of cession. Second, judicial and administrative practices later entrenched that hierarchy within United States constitutional law. The discrimination is not only doctrinal. It is textual. Their continued application is not a neutral technicality. It is a sustaining mechanism of colonial rule.

Comparative history sharpens the critique. Alaska and other territories were incorporated and achieved full constitutional membership. The Philippines achieved independence (Annex IV) and a definitive end to colonial governance. The Puerto Rican Nation alone was left in a condition of suspended sovereignty, a political status produced not by necessary law but by selected doctrines and political decisions. For the Puerto Rican Nation, a sovereign determination of status would afford institutional clarity and the democratic legitimacy that the present arrangement denies. Such a resolution need not adopt a predetermined form. It requires that the people whose existence and rights are at stake serve as the authors of their political future.

These defects originate in law and require a legal remedy. The constitutional order cannot credibly assert democratic legitimacy while tolerating a national community of citizens who are denied the political voice that democratic principles demand. Replacing the antiquated doctrines that sustain the current status and submitting the political future of the Puerto Rican Nation to a process

in which the nation itself determines its destiny are legal and moral necessities if the United States is to reconcile its constitutional commitments with its imperial past.

Illustr. 6[148]

While preparing this work, the author used an artificial intelligence tool on 09/15/2025 to improve the form and clarity of certain parts of the text. After using this tool, the author reviewed and edited the content as necessary and assumes full responsibility for the published text.

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For the appendices, see the file "José R. Gómez Biamón - Supplementary material."