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Two Puerto Rican Senators Stay Home

José R. Coleman Tió proposes that Congress grant Puerto Rico equal representation in the House of Representatives through simple legislation.¹ Although Puerto Rico has been subject to U.S. sovereignty since 1898 and Puerto Ricans have been U.S. citizens since 1917, they cannot vote in federal elections—not for Congressmen, not for Senators, not for the President of the United States. This is because Puerto Rico is not a state: the Constitution provides that “[t]he House of Representatives shall be composed of Members chosen . . . by the People of the several *States*.”² But Coleman does not see this constitutional provision as an obstacle: pointing to H.R. 5388,³ a bill that would provide equal representation in the House for the District of Columbia, Coleman contends that the arguments in favor of such treatment for the District would be even stronger for Puerto Rico.

Coleman’s goal is laudable: federal representation for Puerto Rico would be an excellent thing. But Coleman’s proposal is not the way to get there. As a constitutional matter, the proposal is highly questionable. As a normative matter, it’s a bad idea.

The fatal flaw in Coleman’s argument lies in its essential premise: namely, that it makes sense to enact a temporary fix to what he calls the island’s “democratic deficit”⁴ pending a permanent solution to the more fundamental problem of Puerto Rico’s colonial status: its unequal and subordinate constitutional position within the American union. As Coleman puts it, “the search for grand, permanent solutions to Puerto Rico’s status may have dampened the search for pragmatic, short-term alternatives,” and he argues

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1. José R. Coleman Tió, Comment, *Six Puerto Rican Congressmen Go to Washington*, 116 *YALE L.J.* 1389 (2007).
 2. U.S. CONST. art. I, § 2, cl. 1 (emphasis added).
 3. 109th Cong. (2006).
 4. Coleman, *supra* note 1, at 1390.

that what Puerto Rico needs now is an “innovative and flexible” arrangement.⁵ But this reasoning overlooks an inconvenient reality: Puerto Rico’s so-called democratic deficit is itself the product of numerous “pragmatic short-term alternatives”—implemented in 1901, 1917, 1922, 1952, and so on—that have repeatedly postponed a real solution to Puerto Rico’s status problem. Pragmatic short-term alternatives have always been the bane of Puerto Rico’s colonial existence. Indeed, if you think about it, modern colonialism is the ultimate pragmatic short-term alternative: always “innovative,” always “flexible,” and always in place only temporarily—until the colonial subjects are “ready” for equality (that is, until papa is ready to let them have it). Puerto Rico has been trapped in a series of pragmatic short-term alternatives for more than a century. The last thing it needs is another one.

THE CONSTITUTIONAL ISSUES

Coleman makes three constitutional arguments in support of his claim that Puerto Rico deserves House representation even more the District does. First, he notes that the Founders withheld representation from the District permanently, but from the territories only temporarily. True: but this is because—as Coleman acknowledges—the Founders intended territories to be territories only temporarily. To argue that the Constitution contemplates representation for the territory of Puerto Rico because other territories have eventually gained representation is to skip a crucial step: other territories gained representation because they became states.

Second, Coleman observes that the District does not resemble a state, whereas Puerto Rico—with its own constitution, governor, and legislature—does. True again: but under Supreme Court jurisprudence, the District is part of the United States as a constitutional matter, whereas Puerto Rico, an “unincorporated” territory, has been described by the Court as “belonging” to, but not a part of, the United States.⁶ As a result, the District is a permanent (albeit anomalous) part of the Union, whereas Puerto Rico retains the right to independence. Doesn’t it make more sense to give representation to a jurisdiction whose fate is tied to that of the rest of the nation than to one that retains the right to leave?

Third, Coleman reasons that the Twenty-third Amendment (which gave the District representation in the Electoral College) suggests that an amendment would be required to give the District representation in the House, whereas Puerto Rico would not need an amendment. But the Twenty-third

5. *Id.* at 1389, 1399.

6. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Brown, J.).

Amendment suggests no such thing. That the District achieved inclusion in the Electoral College through a constitutional amendment is beyond question. That a constitutional amendment was required is by no means clear. Moreover, if an amendment was required, it was required for a reason that would apply to Puerto Rico: because Article II of the Constitution gives only states representation in the Electoral College.

THE NORMATIVE ISSUES

Coleman makes three normative arguments and addresses a potential normative objection. First, he argues that his proposal would address Puerto Rico's "democratic deficit" in an innovative manner. Surely it would, and I am emphatically in favor of addressing Puerto Rico's democratic deficit. But whether the solution is innovative concerns me a great deal less than whether it is effective. At times, the best solution is the most predictable one. As I argue below, this is one of those times.

Second, Coleman speculates that the proposal would break the political stalemate in Puerto Rico, giving statehood supporters and advocates of "commonwealth" status something to agree on: voting rights. But I seriously doubt it. Statehooders have always been the strongest advocates of federal representation: the right to vote, more than anything else, is what statehood is all about. But this proposal goes both too far and not far enough. It does not go far enough because it would only alleviate the problem, not eliminate it: Puerto Ricans would still lack two Senators and the presidential vote. Yet it goes too far because even partial representation would weaken the argument that Puerto Rico remains a colony, offering Congress yet another excuse to ignore the underlying problem. Moreover, as Coleman correctly observes, such legislation would be repealable, rendering the voting rights of Puerto Ricans, like so much else, a matter of congressional grace. Sure, congressional repeal might be highly unlikely once the bill was enacted and Puerto Rico's elected representatives began making their rounds on Capitol Hill. But who wants to leave voting rights—and partial ones at that—to congressional sufferance?

Third, Coleman suggests that Puerto Rico's current status as an "unincorporated" territory should not preclude voting rights legislation, because this status "grants Congress *more* legislative power" over Puerto Rico than over the states.⁷ Coleman has in mind Congress's plenary power over Puerto Rico under the Territory Clause⁸: in his view, this power allows Congress to do idiosyncratic and novel things—like extend voting rights

7. Coleman, *supra* note 1, at 1398.

8. U.S. CONST. art. IV, § 3, cl. 2.

beyond the states. But now I'm confused. Should Puerto Rico get representation because it is *more* like a state (as Coleman argues in his constitutional section) or because it is *less* like a state (as he argues here)? I am not sure I buy either claim, but I am sure that Congress's possession of "more legislative power" over Puerto Rico in some general sense resolves nothing. What Congress can do in any given circumstance does not depend on the "amount" of power it possesses (as if power were some sort of measurable dry good), but rather on the action in question, the relevant circumstances, and the applicable constitutional provisions. Even if Congress has plenary power over Puerto Rico, this does not trump the fact that the structural clauses of the Constitution limit voting representation in the federal government to the states.

Finally, Coleman responds to a potential objection to his proposal—namely, that Puerto Ricans do not deserve representation because they do not pay federal income taxes, whereas D.C. residents do—by pointing out that Puerto Ricans contribute to the U.S. Treasury and serve in the U.S. military. Coleman might have added that Puerto Rico already pays a price for its lower federal tax burden in the form of reduced federal benefits, as it receives only a fraction of what it would be entitled to as a state. Moreover, Puerto Ricans make up for this reduction in federal funding with heavy local taxes.

Even so, Coleman faces an uphill battle on the tax question—the sound bite will always be that D.C. residents pay taxes and Puerto Rico residents do not—and so he turns to a constitutional argument, pointing out that the right to vote is not contingent on the payment of any tax. This is true, and it is as it should be. But let's return to the normative issue for a moment. Is it really a good idea to give Puerto Ricans equal representation while maintaining their exemption from federal income taxes? This makes voting rights yet another federal handout—another big fat favor handed down from on high by Congress to its lowly colonial subjects. Have we not had our fill of the benevolent empire? In my view, if Puerto Ricans are to remain U.S. citizens, they should have complete equality with their fellow U.S. citizens—an equality of both rights *and* responsibilities.

THE REAL ISSUE

Let's return to Coleman's essential premise: that what Puerto Rico needs now is a short-term fix for its problem of disfranchisement, pending a permanent solution to its more fundamental status problem. As I noted above, Coleman believes that "the search for grand, permanent solutions" has obstructed "the search for pragmatic, short-term alternatives," and he extols

the benefits of an “innovative and flexible” approach.⁹ I would argue the opposite. When it comes to Puerto Rico’s status, experimentation with temporary fixes has repeatedly short-circuited the effort to achieve a lasting solution. I suggest we give innovation and flexibility a break, and try something grand and permanent for a change.

Whenever I hear anyone talk about the benefits of innovative and flexible arrangements for Puerto Rico, I reach for my wallet. When in 1901 the Supreme Court declared in *Downes v. Bidwell* that Puerto Rico was an unincorporated territory, this was as innovative and flexible as the Court’s territorial jurisprudence had ever been.¹⁰ When the Court in its 1922 decision *Balzac v. Porto Rico* announced that despite acquiring U.S. citizenship in 1917, Puerto Ricans still lived in an unincorporated territory,¹¹ it took innovation and flexibility to a whole new level. When Congress permitted Puerto Ricans to adopt their own constitution in 1952—while at the same time continuing to deny them statehood and the voting rights that come with it—the new arrangement was hailed worldwide as a model of innovation and flexibility. The federal government has tweaked and twisted, adjusted and accommodated, fussed and fidgeted its way around complete equality for Puerto Rico for more than one hundred years. *Basta*.

I propose we try something traditional. If Coleman is right that the most glaring injustice of Puerto Rico’s status is its lack of equal representation—and he is unquestionably right about that—then I suggest we solve the problem the way our forebears did: with statehood. Statehood would not only ensure equal representation in the House for Puerto Rico, it would guarantee two Senators and the presidential vote. Why settle for less?

What’s more, if you really can’t suppress your appetite for innovation and flexibility, Puerto Rican statehood may yet belong on your plate. After all, as opponents of statehood love to point out, most Puerto Ricans think of themselves as a nation with a distinct history and culture, and most speak Spanish as their only or primary language. What could be more innovative and flexible than to make room, in the American union of *equal* states, for a place with a distinct history, culture, and language? Instead of continuing to dissipate our creative energies on a search for ever more unusual ways to postpone complete equality for Puerto Rico, I propose we apply our imaginations to the achievement of Puerto Rican statehood—and the true equality that statehood entails.

9. Coleman, *supra* note 1, at 1389, 1399.

10. 182 U.S. 244 (1901).

11. 258 U.S. 298 (1922).

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