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WHY PUERTO RICO DOES NOT NEED FURTHER EXPERIMENTATION WITH ITS FUTURE: A REPLY TO THE NOTION OF "TERRITORIAL FEDERALISM"

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WHY PUERTO RICO DOES NOT NEED
FURTHER EXPERIMENTATION WITH ITS FUTURE:
A REPLY TO THE NOTION
OF “TERRITORIAL FEDERALISM”

*Juan R. Torruella**

This Commentary attempts to refute the most recent academic proposal regarding the resolution of Puerto Rico’s status, a postulate which has been labeled “territorial federalism.”¹ The underlying premise of this rebuttal is that this “new” scheme is not only not new, but is in fact a repackaging of the same unequal colonial relationship that has been in place since American troops landed in Guánica in 1898. The subject of the Puerto Rico–United States relationship is a complicated one which can only be summarily analyzed in a commentary of this length. It is not only a legal issue but one that involves several other disciplines, of which history is an important component.

The Commentary is basically divided into what the author labels the four “experiments” in the colonial governance of Puerto Rico by the United States: the first² is the period of the Foraker Act of 1900,³ which covers 1900 to 1917; the second commences with the period of the Jones Act of 1917⁴ and reaches until the enactment of Public Law 600⁵ and the establishment of the so-called Commonwealth of Puerto Rico in 1952, the latter of which began the third period; the Commonwealth of Puerto Rico in theory continues during the present fourth period, which encompasses Puerto Rico’s financial crisis and Congress’s enactment of the PROMESA⁶ regime, whose impact on Puerto Rico and legal validity have yet to be determined.⁷ Ultimately, it is the author’s view that Puerto Rico’s colonial relationship to the United States throughout the

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¹ *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1632 (2017) [hereinafter *Developments*].

² The actual first period was that between August 1898 and the enactment of the Foraker Act in 1900, during which Puerto Rico was under military rule.

³ Ch. 191, 31 Stat. 77 (1900).

⁴ Ch. 145, 39 Stat. 951 (1917) (codified as amended in scattered sections of 48 U.S.C.).

⁵ Act of July 3, 1950, ch. 446, 64 Stat. 319.

⁶ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C.A. §§ 2101–2241 (West 2017)).

⁷ The author expresses no opinion regarding the same and nothing herein should be interpreted otherwise in this respect.

United States' various "experiments" with Puerto Rico and its people, although variously labeled for political purposes and constitutionally denominated an "unincorporated territory," has merely perpetuated the inherent inequality of the United States citizens who reside in Puerto Rico as compared to the rest of the nation, and is the major cause of the Island's economic crisis.

INTRODUCTION

If there is a silver lining to be found within the catastrophic impact of Hurricane María on the Island of Puerto Rico, it is that the barrage of news generated by that unfortunate event has served to inform the rest of the nation that Puerto Rico is a "part of the United States"⁸ and that its residents are "citizens of the United States."⁹ The disingenuous part of these statements is not only that the first is legally incorrect according to present constitutional dogma,¹⁰ but that the second disguises the true nature of the en masse citizenship granted to the inhabitants of Puerto Rico by Congress in 1917.¹¹ More important from my viewpoint is that notwithstanding the immediate positive effect that even this technically inaccurate news has had of calling attention to the Island's unquestionable plight, this information sidetracks attention from Puerto Rico's fundamental problem, one from which almost all others emanate: the need to seriously address and permanently resolve Puerto Rico's interminable colonial dilemma. This long-lasting condition,¹² which is harmful to both Puerto Rico and the United States as a nation, when added to María's destructive force, has contributed to many of the difficulties that have been encountered in the resolution of the immediate hurricane-related issues.¹³

⁸ This is a constitutionally inaccurate statement considering that the Supreme Court ruled in 1901 that Puerto Rico belongs to but is not a part of the United States. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) ("[T]he Island of Porto Rico [sic] is a territory appurtenant and belonging to the United States, but not a part of the United States.").

⁹ Jones Act § 5, 39 Stat. at 953; Nationality Act of 1940, ch. 876, § 202, 54 Stat. 1137, 1139 (repealed 1952); see also 8 U.S.C. § 1402 (2012).

¹⁰ See *supra* note 8.

¹¹ See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (holding that the right to a jury trial under the U.S. Constitution did not apply to unincorporated territories); Rogers M. Smith, *The Insular Cases, Differentiated Citizenship, and Territorial Statuses in the Twenty-First Century*, in *RECONSIDERING THE INSULAR CASES* 103, 115–18 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); Juan R. Torruella, *To Be or Not to Be: Puerto Ricans and Their Illusory U.S. Citizenship*, 29 *CENTRO J.* 108 (2017).

¹² See JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997); Juan R. Torruella, *¿Hacia dónde vas Puerto Rico?*, 107 *YALE L.J.* 1503 (1998) (reviewing MONGE, *supra*).

¹³ See, e.g., Office of the U.N. High Comm'r for Human Rights, *Puerto Rico: Human Rights Concerns Mount in Absence of Adequate Emergency Response* (Oct. 30, 2017), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22326&LangID=E> [https://

This is why I believe that the promotion of one more experiment regarding Puerto Rico's place within the constitutional and political polis of the United States, as is suggested in Chapter One of the *Harvard Law Review's Developments in the Law*, entitled *Territorial Federalism*,¹⁴ is not an acceptable solution to that pervasive issue. At this point in history, further experimentation by substituting one unequal framework for another, rather than one that puts Puerto Rico's citizens on equal footing with the rest of the nation, is no more acceptable than the concept of "separate but equal"¹⁵ — the constitutional remedy once considered valid in resolving racial discrimination and inequality that the Court struck down in *Brown v. Board of Education*.¹⁶ Continued conjectural exploration with new and untried governance formulas, 119 years after the annexation of Puerto Rico by the United States,¹⁷ 100 years since the granting of United States citizenship to its inhabitants,¹⁸ and after more than a century of their being subjected to diverse shades of colonial control and bias, all during which a common thread has been the basic premise of inequality vis-à-vis the rest of the nation¹⁹ — although perhaps providing academic entertainment for some²⁰ and political cover for others bent on maintaining colonial control over Puerto Rico — are simply put, not acceptable in this twenty-first century. The United States cannot continue its state of denial by failing to accept that its relationship with its citizens who reside in Puerto Rico is an egregious violation of their civil rights. The democratic deficits inherent in this relationship cast doubt on its legitimacy, and require that it be frontally attacked and corrected "with all deliberate speed."²¹

perma.cc/H6JJ-FE7V]; Nelson A. Denis, Opinion, *The Jones Act: The Law Strangling Puerto Rico*, N.Y. TIMES (Sept. 25, 2017), <https://nyti.ms/2yp3rpx> [<https://perma.cc/J3BS-BG3V>]; Vann R. Newkirk II, *Puerto Rico's Dire Health-Care Crisis*, THE ATLANTIC (Oct. 29, 2017), <https://www.theatlantic.com/politics/archive/2017/10/puerto-ricos-health-care-crisis-is-just-beginning/544210/> [<https://perma.cc/9LTU-EQHQ>]; Tim Webber, *Why It's So Hard to Turn the Lights Back On in Puerto Rico*, NPR (Oct. 20, 2017, 9:08 AM), <https://n.pr/2EcVOao> [<https://perma.cc/B4VA-NE7V>] ("Puerto Rico's power grid — like much of its public infrastructure — has lagged behind the rest of the country. This point was exposed by Hurricane Irma, but the problem has existed for decades."). It is, of course, not within the scope of this Commentary to analyze or place responsibilities or blames on the rescue and recovery efforts related to Hurricane María, in itself a complex endeavor far beyond this author's expertise.

¹⁴ *Developments*, *supra* note 1, at 1632.

¹⁵ *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

¹⁶ 347 U.S. 483 (1954).

¹⁷ Treaty of Peace Between the United States of America and the Kingdom of Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754 [hereinafter Treaty of Paris].

¹⁸ Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917); see also José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978).

¹⁹ See, e.g., Sheelah Kolhatkar, *Profiting from Puerto Rico's Pain*, NEW YORKER (Nov. 6, 2017), <https://www.newyorker.com/magazine/2017/11/06/profitting-from-puerto-ricos-pain> [<https://perma.cc/D2U4-7WYU>].

²⁰ See generally RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* (1984).

²¹ See *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

With due respect to those who suggest that “[t]he notion of [so-called] ‘territorial federalism’ operating within the U.S. constitutional ecosystem” is a solution to Puerto Rico’s unequal treatment,²² I strongly believe that this is exactly the kind of inopportune experimentation with Puerto Rico’s U.S. citizens to which I have been referring, and which, notwithstanding good intentions, is “misguided.”²³ It is perhaps a modicum of déjà vu and historical irony that the birth of this latest proposal draws its breath from within the annals of the same legal journal that initially promoted the first of the experiments regarding Puerto Rico²⁴ that eventually became the doctrine of the *Insular Cases*,²⁵ the noxious condition that continues to the present day²⁶ allowing the citizens of the United States who reside in Puerto Rico to be treated unequally from those in the rest of the nation²⁷ solely by reason of their geographical residence.²⁸

²² *Developments*, *supra* note 1, at 1632.

²³ *Id.*

²⁴ C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions — A Third View*, 13 HARV. L. REV. 155, 171–72, 176 (1899) (arguing that the answer to the status of acquired territory depended on whether the treaty of acquisition provided for the incorporation of the territory into the Union, and that in the case of the Treaty of Paris and Puerto Rico, it did not); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 467 (1899) (“[T]here is no lack of power . . . to govern these islands as colonies, substantially as England might govern them.”). *But see* Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 401 (1898) (“[The] power to rule [a territory] without restriction, as a colony or dependent province, would be inconsistent with the nature of our government.”); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 299–301 (1898) (arguing that upon annexation of territory the Constitution applied to the personal rights of its inhabitants who automatically became citizens because they owed allegiance to the United States).

²⁵ *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. Steamship Co.*, 182 U.S. 392 (1901). *See generally* JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 24–31 (1984).

²⁶ *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016); *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1836 (2016).

²⁷ *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam) (holding that federal benefits lower to the residents of Puerto Rico than to those in the States and the District of Columbia were constitutional because the notion that “greater benefits could disrupt the Puerto Rican economy” passed rational basis review, *id.* at 652); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam) (holding constitutional the exclusion of Puerto Rico residents from the Supplemental Security Income program for aid to qualified aged, blind, and disabled persons). In fact, Puerto Rico residents receive about a tenth of the Medicaid funding that is sent to wealthier states with similar or smaller populations. *See* Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <https://nyti.ms/2kB4ZJY> [<https://perma.cc/YGQ8-9X49>]. Furthermore, Medicare reimbursement rates for doctors are just sixty percent of the rates of those on the mainland; the same is true of Medicare Advantage. *Id.* Medicare and Medicaid spending per enrollee in Puerto Rico is the lowest in the United States. *See* Maria Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFF. BLOG (Dec. 29, 2015), <https://www.healthaffairs.org/doi/10.1377/hblog20151229.052430/full> [<https://perma.cc/G24T-GTUK>].

²⁸ “It is locality that is determinative of the application of the Constitution, in such things as

I. THE FIRST EXPERIMENT:
THE FORAKER ACT OF 1900

The first of these experiments with Puerto Rico's governance was, of course, the Foraker Act of 1900,²⁹ which established a classic colonial government for the newly conquered territory, in which all power emanated from the federal government in Washington, D.C. This statute set the scene for what were to become the *Insular Cases* and the doctrine of incorporation, pursuant to which Puerto Rico was declared an "unincorporated territory,"³⁰ and the granting to Congress of "plenary powers"³¹ over Puerto Rico and its inhabitants. The insular governor, his cabinet (who also served as the upper house of the insular legislature), and the justices of the Supreme Court of Puerto Rico were all appointed by the President of the United States, subject to Senate confirmation.³² Only the lower house of the insular legislature was popularly elected,³³ but all local legislation emanating from this body was not only subject to veto by the governor, but also could be rejected by Congress.³⁴ Federal laws were applied automatically to Puerto Rico, except where Congress made them locally inapplicable.³⁵ Puerto Rico was allowed what amounted to an observer in the House of Representatives with the title of "Resident Commissioner."³⁶ This official, who was popularly elected for a two-year term, had a voice but no vote in said body. Most important, during the regime of this first experiment, the inhabitants of Puerto Rico were not citizens of the United States, but rather were citizens of Puerto Rico and *nationals* of the United States, the latter status

judicial procedure, and not the status of the people who live in it." *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (holding that trial by jury was not applicable in Puerto Rico because it was an unincorporated territory where only fundamental constitutional rights applied and trial by jury was not a fundamental right); see also *Califano*, 435 U.S. at 3 n.4 (extending *Balzac* locality doctrine beyond mere judicial procedural issues). But see *Duncan v. Louisiana*, 391 U.S. 145 (1968) (holding that trial by jury is a fundamental constitutional right incorporated against the states). The Supreme Court has applied this doctrine unevenly when it comes to U.S. citizens who reside in the States as compared to those in *Balzac*'s status. See *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956), *reh'g granted*, 352 U.S. 901 (1956), *rev'd*, 354 U.S. 1 (1957) (holding that constitutional limits apply to government actions against citizens residing overseas).

²⁹ Ch. 191, 31 Stat. 77 (1900).

³⁰ See *Downes*, 182 U.S. at 346-47 (Gray, J., concurring). "Unincorporated territory" means a territory for which Congress has never anticipated admission as a state. See, e.g., *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 599 n.30 (1976).

³¹ Members of the Supreme Court have described "plenary powers" as subject only to minimal restraints, and "unsusceptible to categorical exclusions." *United States v. Morrison*, 529 U.S. 598, 640, 648-49 (2000) (Souter, J., dissenting).

³² Foraker Act, ch. 191, §§ 17-18, 27, 33, 31 Stat. at 81-84.

³³ *Id.* §§ 27-29, 31 Stat. at 82-83.

³⁴ *Id.* § 31, 31 Stat. at 83.

³⁵ *Id.* § 14, 31 Stat. at 80.

³⁶ See *id.* § 39, 31 Stat. at 86.

meaning that they were owed protection by the United States in exchange for their fealty and allegiance.³⁷

This synopsis of the first colonial experiment put in place by Congress during the initial term of U.S. sovereignty needs to be measured against the backdrop of the governmental regime in place immediately before Major General Nelson Miles led the Sixth Massachusetts Volunteer Regiment ashore in Guánica on July 25, 1898.³⁸ In an attempt to prevent a second revolutionary front starting in Puerto Rico to add to its troubles taking place at the time in Cuba, the Spanish government had enacted several political reforms. This included the so-called Autonomic Charter of 1897, created by a decree of the Spanish Prime Minister on November 25, 1897, and made applicable to both Puerto Rico and Cuba.³⁹ Puerto Rico thus became a province of Spain (the equivalent of a state in the United States), and Puerto Ricans were granted full Spanish citizenship, with the right to elect sixteen delegates and three senators to Spain's parliament.⁴⁰

Thereafter, shortly after arriving in Puerto Rico, where Miles was received by a population so ecstatic that he was forced to cable the War Department asking for more U.S. flags,⁴¹ he proclaimed to the Puerto Rican population that the United States was there to "promote [their] prosperity, and bestow upon [them] the immunities and blessings of the liberal institutions of [its] Government."⁴² In December of that year, the local population's pro-American enthusiasm was met with news that the Treaty of Paris had been negotiated and signed without any input from Puerto Ricans, and most important regarding the issue at hand, that article IX of the treaty provided that "[t]he civil rights and political status of [Puerto Rico's] inhabitants . . . shall be determined by the Congress."⁴³ The Foraker Act, as previously described, was thus enacted to provide a civil government for Puerto Rico and to raise the revenue necessary for its operation.

With these antecedents it is hardly surprising that by 1909, during the tenure of President William Howard Taft, local dissatisfaction with the perceived undemocratic governance of Puerto Rico under the

³⁷ See 8 U.S.C. § 1101(a)(22) (2012).

³⁸ *Our Flag Raised in Puerto Rico*, N.Y. TIMES, July 27, 1898, at 1.

³⁹ OFFICE OF THE COMMONWEALTH OF P.R., DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 22–48 (1948).

⁴⁰ See Juan R. Torruella, *Outstanding Constitutional and International Law Issues Raised by the United States–Puerto Rico Relationship*, 100 MINN. L. REV. HEADNOTES 79, 83 n.21 (2016) [hereinafter Torruella, *Outstanding Constitutional Issues*].

⁴¹ Pedro Capó-Rodríguez, *The Relations Between the United States and Porto Rico — Part I*, 9 AM. J. INT'L L. 883, 891 (1915).

⁴² U.S. ARMY, ANNUAL REPORT OF THE MAJOR-GENERAL COMMANDING THE ARMY TO THE SECRETARY OF WAR 31–32 (1898).

⁴³ Treaty of Paris, *supra* note 17, art. IX, 30 Stat. at 1759.

patently colonial administration of the Foraker Act formed what amounted to a peaceful rebellion by the elected members of the House of Delegates, the lower house of the insular legislature. This incident, which became known as the “Appropriations Crisis of 1909,”⁴⁴ was actually facilitated by the Foraker Act itself, which required that the yearly appropriations of the insular government be approved by the House of Delegates. The main causes of friction were controversies with the governor over the perception that elected representatives were being excluded from governance of the island, the lack of Puerto Rican representation in key governmental positions, and the derogatory actions by the U.S. district court judge in Puerto Rico. These were undoubtedly exacerbated by the fact that most of the government was run by outsiders who spoke a different language, who had a different cultural background, and most of whom had a different skin color.⁴⁵ The result of this acrimony was that the House of Delegates refused to approve an appropriations bill for 1910. President Taft’s prior colonial experience included a stint as the first U.S. colonial governor of the Philippines during the virulent insurrection against U.S. occupation which lasted three years and cost thousands of lives, both American and Filipino. He was less than happy with the actions of the House of Delegates, which conflicted with his views as regarded “non-Anglo-Saxon natives” and his authoritarian and paternalistic attitudes toward them, whom he considered “unreasonable and childish.”⁴⁶ His displeasure did not stop there, however. In his message to Congress endorsing legislation taking away the House of Delegates’ power to engage in what he considered obstructionist tactics, President Taft stated that Puerto Ricans had forgotten the generosity of the United States toward them, “something to be expected of people with such little education.”⁴⁷ He further expressed the view that the United States “had gone too far in extending political rights for

⁴⁴ Truman R. Clark, *President Taft and the Puerto Rican Appropriations Crisis of 1909*, 26 THE AMERICAS 152 (1969); Juan R. Torruella, Speech to Academia Puertorriqueña de Jurisprudencia y Legislación: Presentación del Libro de Sesiones de la Cámara de Delegados de la Asamblea Legislativa 1909–1910 [Presentation of the Book of Sessions of the Chamber of Delegates of the Legislative Assembly] (May 18, 2017), <http://www.academiajurisprudenciapr.org/discurso-presentacion-del-libro-actas-la-camara-1909-10/> [<https://perma.cc/4VAE-ZTLU>].

⁴⁵ See RUBIN FRANCES WESTON, RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946, at 15 (1972) (“Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? . . . The actions of the federal government during the imperial period and the relegation of the Negro to the status of second-class citizenship indicated that the Southern point of view would prevail. The racism which caused the relegation of the Negro to a status of inferiority was to be applied to the overseas possessions of the United States.”).

⁴⁶ Clark, *supra* note 44, at 161.

⁴⁷ William Howard Taft, President, Message to Congress (May 10, 1909), in 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 96 (David Burton ed., 2002).

[the Puerto Ricans'] own good . . . who had shown too much irresponsibility in the enjoyment of this right."⁴⁸ The Olmstead Amendment to the Foraker Act was enacted, taking away the House of Delegates' right to block appropriations.⁴⁹ Jurisdiction over Puerto Rico was transferred from the Interior Department to the War Department. But matters did not stop there, for as we shall presently see, President Taft had a long memory.

It would be difficult to argue that the first experiment in the United States' relationship to Puerto Rico, represented by the Foraker-Act period, was anything but an out-and-out colonial period, which was hardly a success.

II. THE SECOND EXPERIMENT: THE JONES ACT OF 1917

The Foraker experiment came to an end in 1917 under President Woodrow Wilson's administration. Growing pro-independence sentiment, almost nonexistent under Spanish rule and also tenuous during the first decade of U.S. sovereignty, of which the Appropriations Crisis of 1909 was but a stir, convinced the United States that some quasi-democratic reforms were needed in the governance of Puerto Rico. Thus came the second colonial experiment in the form of the Jones Act of 1917.⁵⁰ The strategic imperative of protecting the approaches to the newly built Panama Canal, and the attempt to convert the Caribbean Sea into an American lake with the purchase of the Danish Virgin Islands, also in 1916,⁵¹ in the face of the winds of war from Europe is, in my opinion, more than coincidental to the timing of this second experiment. The two main improvements to Puerto Ricans' patently colonial condition were the granting of en masse U.S. citizenship to the inhabitants of Puerto Rico⁵² and the addition of a popularly elected senate to Puerto Rico's legislature.⁵³ The Act further contained a bill of rights for Puerto Rico similar to that in the U.S. Constitution,⁵⁴ and the retention of an elected office of resident commissioner to Congress, again a non-voting position but this time for a four-year tenure.⁵⁵ Nevertheless, all

⁴⁸ *Id.*

⁴⁹ See JORGE RODRÍGUEZ BERUFF, STRATEGY AS POLITICS: PUERTO RICO ON THE EVE OF THE SECOND WORLD WAR 37 (2007); Clark, *supra* note 44, at 152.

⁵⁰ Ch. 145, 39 Stat. 951 (1917).

⁵¹ Convention for Cession of the Danish West Indies, Den.-U.S., Aug. 4, 1916, 39 Stat. 1706; Act of Mar. 3, 1917, ch. 171, 39 Stat. 1132 (1917).

⁵² Jones Act § 5, 39 Stat. at 953.

⁵³ *Id.* § 26, 39 Stat. at 958-59.

⁵⁴ *Id.* § 2, 39 Stat. at 951-52.

⁵⁵ See *id.* § 36, 39 Stat. at 963-64.

important positions including those of governor, attorney general, commissioner of education, and justices of the Supreme Court were appointed by the President with the advice and consent of the Senate.⁵⁶ The territorial U.S. district court was continued over the vehement opposition of the Puerto Rico Bar Association.

Puerto Rican expectations that the granting of U.S. citizenship meant constitutional incorporation, as had happened with Hawaii and Alaska,⁵⁷ came to naught when Taft, now in his capacity as Chief Justice, wrote the opinion of the Supreme Court in *Balzac v. Porto Rico*.⁵⁸ He ruled that all the Jones Act did was “enable[] [Puerto Ricans] to move into the continental United States and becom[e] residents of any State there to enjoy every right of any other citizen of the United States, civil, social, and political.”⁵⁹ *Consummatum est!*

The period from 1900 through 1952 — when the Jones Act experiment of 1917 was replaced by the latest and perhaps most inscrutable of the colonial experiments enacted by Congress for ruling Puerto Rico, the so-called “Commonwealth of Puerto Rico”⁶⁰ — I have previously described as the crypto-plantation period.⁶¹ In considering any new experimental schemes for Puerto Rico’s future, we cannot ignore this part of Puerto Rico’s history during which the Island was converted into one huge sugar plantation, exploited mostly by mega enterprises from the mainland, the largest of which were from Massachusetts, New Jersey, and New York.⁶² These sugar giants reaped annual dividends as high as 115% on investment,⁶³ with most of this wealth leaving the Island never to be seen again. Meanwhile, the population of the Island, which was 70% rural and 80% landless,⁶⁴ lived well below the poverty level. Wages in the sugar industry, the Island’s main employers, fluctuated between 60 cents and \$1.00 per day between 1915 and 1925.⁶⁵ In 1930,

⁵⁶ See *id.* §§ 12–13, 39 Stat. at 955; *id.* § 40, 39 Stat. at 965.

⁵⁷ See *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Rasmussen v. United States*, 197 U.S. 516 (1905).

⁵⁸ 58 U.S. 298 (1922).

⁵⁹ *Id.* at 308.

⁶⁰ The Spanish appellation for this phrase is “Estado Libre Asociado,” which translates literally to “Free Associated State.” This is hardly a translation of the name used by Congress in enacting its founding legislation, and is even less descriptive of the entity created thereby, for Puerto Rico is neither a “state” (of the Union or otherwise), nor “free” (for it is unquestionably subjugated to the plenary powers of the United States Congress) or “associated” (as the Supreme Court stated, it “belong[s] to the United States,” a term that connotes ownership of property, *Downes v. Bidwell*, 182 U.S. 245, 285 (1902)).

⁶¹ Torruella, *Outstanding Constitutional Issues*, *supra* note 40, at 89.

⁶² See ARTURO MORALES CARRIÓN, *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* 173–74 (1983).

⁶³ *Id.*

⁶⁴ *Id.* at 243.

⁶⁵ SAKARI SARIOLA, *THE PUERTO RICAN DILEMMA* 92 (1979). Meanwhile, the average male worker in the United States in 1915 earned an average of \$687 per year, suggesting an average daily

the annual per capita income in Puerto Rico was \$122, one-fifth of that in the mainland.⁶⁶

Notwithstanding the enormous wealth that was being extracted from Puerto Rico by the mainly absentee sugar industry, the United States government spent, on average, less than three-quarters of a million dollars per year in Puerto Rico between 1898 and 1933.⁶⁷ Although there were undoubted substantial improvements in the social indicators for the Puerto Rican population as a whole, such as in health, sanitation, and education commencing in 1900 and continuing throughout this crypto-plantation period,⁶⁸ by 1910 Puerto Rico had become a captive market of the United States, with nearly all exports going to the mainland. By 1940, Puerto Rico was one of the United States' top customers.⁶⁹ This was all rewarded by Congress in 1920 with the passage of the Merchant Marine Act⁷⁰ (known also as another "Jones Act"), requiring all maritime cargo transported to and from the U.S. mainland to be carried on U.S.-built ships and manned by U.S. crews.⁷¹ As can be expected, this law automatically placed Puerto Rican products and imports to and from the United States at an economic disadvantage and resulted in higher costs, because of the higher maritime transportation cost that using U.S. flag vessels and crews represented.⁷² The burden that this Jones Act places on Puerto Rico to this day was only briefly lifted after the catastrophic Hurricane María, and not long enough to be of any help in bringing respite to this stricken island.⁷³

Two events brought some relief to Puerto Rico toward the end of the crypto-plantation period. First the New Deal arrived, and shortly thereafter, the United States entered World War II. The wages of field hands in the sugar industry doubled from 1940 to 1945 to thirty cents per

wage of at least \$1.88. See Carol Boyd Leon, U.S. Bureau of Labor Statistics, *The Life of American Workers in 1915*, MONTHLY LAB. REV. (Feb. 4, 2016), <http://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm> [<https://perma.cc/UP9U-K7C8>].

⁶⁶ MORALES CARRIÓN, *supra* note 62, at 243.

⁶⁷ Marjorie Ruth Clark, *Our Own Puerto Rico*, 4 ANTIOCH REV. 383, 388 (1944).

⁶⁸ See TORRUELLA, *supra* note 25, at 208 tbl.4, 210 tbl.6, 211 tbl.7, 212 tbl.8, 213 tbl.9, 214 tbl.10, 215 tbl.11, 218 tbl.13, 219 tbl.14, 220 tbl.15, 221 tbl.16.

⁶⁹ MORALES CARRIÓN, *supra* note 62, at 173.

⁷⁰ Merchant Marine Act of 1920, ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 46 U.S.C.).

⁷¹ *Id.* § 27, 41 Stat. at 999 (codified as amended at 46 U.S.C. § 55102 (2012)).

⁷² The economic disadvantage persists to this day. See U.S. DEP'T OF TRANSP. MAR. ADMIN., COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS (2011) (examining higher operating costs of U.S. flag vessels and comparing them with those of foreign-flag vessels); see also FED. RESERVE BANK OF N.Y., REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 13 (2012); Rory Carroll, *U.S. Shippers Push Back in Battle over Puerto Rico Import Costs*, REUTERS (July 9, 2015, 5:31 PM), <https://reut.rs/1fs13VM> [<https://perma.cc/7WYW-RT94>].

⁷³ Alex Daugherty, *The Jones Act Waiver Was Supposed to Help Puerto Rico. So Where Are the Ships?*, MIAMI HERALD (Oct. 10, 2017, 9:52 AM), <http://www.miamiherald.com/news/politics-government/article177532316.html> [<https://perma.cc/PU77-Y22H>].

hour,⁷⁴ which had the unintended consequence of pricing Puerto Rican sugar out of the highly competitive sugar market and represented one of the many factors that eventually led to the near-total eradication of that industry.⁷⁵ What helped to fill the unemployment gap, which in 1940 was officially 18%, were the increases in direct federal spending brought about by the need to fortify the Southern approaches to the homeland. Thus between 1933 and 1942 alone, the federal government spent more than \$257 million⁷⁶ in converting Puerto Rico into a military camp, with the federal government eventually expropriating 14% of the total area of Puerto Rico, the largest proportion of land occupied by the military in any U.S. jurisdiction.⁷⁷ Although this increased activity had the beneficial effect of decreasing unemployment to 13% by 1950,⁷⁸ it had the deleterious long-range effect of causing environmental, ecological, and health damage, especially in the outlying islands of Vieques and Culebra — damage which to this day has yet to be corrected.⁷⁹

As we have observed, most important happenings in Puerto Rico are the result of momentous events elsewhere. We thus have seen how the War for Independence in Cuba brought about the Autonomic Charter of 1876; how the American invasion that followed shortly thereafter as part of the United States' incursion into international imperialism necessitated the establishment of its first experiment in colonialism, the Foraker Act of 1900; how the foreshadowing of the events in Europe, and the inevitability that the United States and its colonies would become embroiled, made the consolidation of its empire a necessity,⁸⁰ and thus came the period of the second experiment: the Jones Act of 1917. This second experiment in colonial administration, although granting some minimum vestiges of local government, not only continued to impress its imperial imprimatur on the U.S.–Puerto Rico relationship, particularly in those areas that were most important to democratic governance, but it further extended the economic exploitation allowed by this

⁷⁴ TORRUELLA, *supra* note 25, at 237 tbl.23.

⁷⁵ See BENJAMIN BRIDGMAN ET AL., FED. RESERVE BANK OF MINNEAPOLIS, STAFF REPORT 477, WHAT EVER HAPPENED TO THE PUERTO RICAN SUGAR MANUFACTURING INDUSTRY? (2012), <https://www.minneapolisfed.org/research/sr/sr477.pdf> [<https://perma.cc/ZT3J-5J8E>].

⁷⁶ TORRUELLA, *supra* note 25, at 244 tbl.27.

⁷⁷ JUAN GONZÁLEZ, HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA 252 (2000).

⁷⁸ TORRUELLA, *supra* note 25, at 244 tbl.27.

⁷⁹ See *Clearing Out Without Cleaning Up: The U.S. and Vieques Island*, COUNCIL ON HEMISPHERIC AFFAIRS (May 19, 2011), <http://www.coha.org/clearing-out-without-cleaning-up-the-u-s-and-vieques-island/> [<https://perma.cc/SBM7-AZW9>]; see also *Abreu v. United States*, 468 F.3d 20, 23–24 (1st Cir. 2006).

⁸⁰ For those who may be surprised, or even offended, by my reference to the United States as an imperial nation, I refer you to Chief Justice Marshall's opinion in *Johnson v. McIntosh*, 21 U.S. 543 (1823).

unequal condition. The third, and next to last, experiment to date came to life as a result of the end of World War II, the creation of the United Nations, the purported anticolonial stance enshrined in the United Nations Charter,⁸¹ and resolutions of its General Assembly.⁸² Thus came to be the so-called Commonwealth of Puerto Rico pursuant to Public Law 600 enacted by Congress in 1950.⁸³

III. THE THIRD EXPERIMENT: THE SO-CALLED COMMONWEALTH OF PUERTO RICO⁸⁴

A prelude to this third experiment was the enactment of Public Law 362 on August 15, 1947,⁸⁵ which provided for the election of the office of Governor of Puerto Rico by popular vote, but did not repeal the President's right to appoint an auditor and the justices of the Supreme Court of Puerto Rico. A contemporaneous report, entitled "Work of the Senate Committee on Interior and Insular Affairs," which purportedly was instrumental in the passage of this legislation, indicated that Congress could at any time in the future revoke the Elective Governor's Act (as this statute became known).⁸⁶ This power, as we shall presently see, became a central issue determining the precise constitutional nature of this third experiment. In any event, in 1948 Puerto Rico elected its first Governor in 450 years of so-called civilized settlement.⁸⁷

What followed was a concerted push by the United States to demonstrate that it was complying with its United Nations commitments,⁸⁸ and toward what Puerto Rico's citizens hoped would be real self-government. To properly document the deception to which this process subjected the citizens of Puerto Rico, and the events that followed, it is necessary that we delve in some detail into what actually happened in Congress.

⁸¹ U.N. Charter art. 73.

⁸² Cf. G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) (reasserting that "[a]ll peoples have the right to self-determination," *id.* ¶ 1, and urging "[i]mmediate steps" to "transfer all power to the peoples" of all "Non-Self-Governing" territories, *id.* ¶ 5).

⁸³ Act of July 3, 1950, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b–731e, 737, 752 (2012)).

⁸⁴ See *supra* note 60 and accompanying text.

⁸⁵ Ch. 490, 61 Stat. 770 (1947) (codified at 48 U.S.C. § 771 (1951)), *repealed by* Act of July 3, 1950, ch. 446, § 5(2), 64 Stat. at 320.

⁸⁶ SURENDRA BHANA, THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICO STATUS QUESTION 1936–1958, at 107 (1975); TORRUELLA, *supra* note 25, at 143.

⁸⁷ In 1946, a Puerto Rican, Jesús T. Piñero, had been appointed Governor of Puerto Rico by President Truman; he was the first Puerto Rican to hold this office. *Puerto Rico Hails Governor Pinero*, N.Y. TIMES, Sept. 4, 1946, at 35.

⁸⁸ See generally David M. Helfeld, *The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U. P.R. 135 (1952); David M. Helfeld, *Congressional Intent and Attitude Towards Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U. P.R. 255 (1952) [hereinafter Helfeld, *Congressional Intent*].

A starting point is perhaps an early memorandum of an aide to Senator Butler of Nebraska, a sponsor of the bill that eventually became Public Law 600 (the law that created the third experiment). Regarding proposals on Puerto Rico's status, it stated that:

Congress can still make any Federal law applicable or inapplicable to Puerto Rico as it sees fit It can also nullify the Puerto Rican constitution if it wishes, since, technically, Puerto Rico is still a territory subject to the rules and regulations of Congress under the Constitution.⁸⁹

This statement was not only a legally correct statement of the law per the *Insular Cases* and their progeny, but also prophetic of things to come.

Public Law 600 emerged after much maneuvering in Washington and was in effect an amendment to the Jones Act, restyling the Jones Act as the "Puerto Rican Federal Relations Act."⁹⁰ The Act provided first of all for a referendum to determine if the islanders wished to "organize a government pursuant to a constitution of their own adoption."⁹¹ If a majority of voters expressed that desire, the Legislature of Puerto Rico was authorized to call a constitutional convention.⁹² The resulting document, if adopted, would then be submitted to the President. If the President found the proposed Puerto Rico Constitution in compliance with the Act and the U.S. Constitution, he would then submit it to Congress for approval, whereupon if approved, the Puerto Rico Constitution would become effective according to its terms.⁹³ The Jones Act's inconsistent provisions would be automatically revoked.⁹⁴

The preamble to Public Law 600 contains inscrutable language to the effect that the Act was "adopted *in the nature of a compact*."⁹⁵ This language, and the preamble into which it was inserted, was the product of Puerto Rico's two main legal advisors, Abe Fortas (eventually to become a short-lived Associate Justice of the U.S. Supreme Court) and José Trías Monge (eventually the Chief Justice of the Supreme Court of Puerto Rico). This is a phrase that has produced much of the controversy about the constitutional status of the enigmatic Commonwealth of Puerto Rico,⁹⁶ as well as conflicting, confusing, and contradictory language and decisions by federal courts at all levels,⁹⁷ a subject that will be dealt with presently. I find this somewhat disconcerting, for in my opinion, the legislative history, apart from what was stated by Senator

⁸⁹ BHANA, *supra* note 86, at 123.

⁹⁰ Act of July 3, 1950, ch. 446, § 4, 64 Stat. 319, 319 (codified at 48 U.S.C. § 731e note (2012)).

⁹¹ *Id.* § 1, 64 Stat. at 319 (codified at 48 U.S.C. § 731b).

⁹² *Id.* § 2, 64 Stat. at 319 (codified at 48 U.S.C. § 731c).

⁹³ *Id.* § 3, 64 Stat. at 319 (codified at 48 U.S.C. § 731d).

⁹⁴ *Id.* §§ 5–6, 64 Stat. at 320.

⁹⁵ *Id.* pmb., 64 Stat. at 319 (emphasis added).

⁹⁶ See generally Helfeld, *Congressional Intent*, *supra* note 88; Rafael Hernández Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 REV. COL. ABOG. P.R. 207 (1959); Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PITT. L. REV. 1 (1953).

⁹⁷ See, e.g., *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1868 (2016); *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987); *id.* at 1172 (Torruella, J., concurring).

Butler's assistant, makes clear that the intent behind the enactment of Public Law 600 was neither to change the unincorporated status of Puerto Rico, nor to establish a binding unalterable political relationship that could not be changed unilaterally by Congress.

To point to just a few examples of this much-ignored legislative background, I should start with the testimony of Puerto Rico's then-Governor and preeminent political figure of the time, Luis Muñoz Marín, who stated before the House Committee on Public Lands considering this legislation: "You know, of course, that if the people of Puerto Rico should go crazy, *Congress can always get around and legislate again.*"⁹⁸ At that same hearing, Puerto Rico's Resident Commissioner, Dr. Antonio Fernós-Isern, stated: "[T]he authority of the Government of the United States, the Congress, to legislate in case of emergency would always be there."⁹⁹

Thereafter, the Division of Territories and Insular Possessions, which was supporting the bill, wrote a memorandum at the request of the Bureau of the Budget explaining that Puerto Rico's status as an unincorporated territory was unaffected by passage of this bill.¹⁰⁰ On March 31, when cosponsoring Senators O'Maley and Butler presented the bill equivalent to H.R. 7674 in the Senate, they issued a joint statement in which they emphasized that the measure was intended to advance self-government for Puerto Rico, but would not affect the relationship of Puerto Rico to the United States.¹⁰¹ When the House held a second hearing on H.R. 7674 on May 16, Resident Commissioner Fernós-Isern testified on the meaning of the compact language and stated that it would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.¹⁰² The Secretary of the Interior had already testified that there would be no change in "Puerto Rico's political, social, and economic relationship to the United States,"¹⁰³ a sentiment substantially agreed with by then-Associate Justice of Puerto Rico's Supreme Court, Cecil Snyder, who testified that "[u]nder it there is no change of sovereignty. The economic and legal relationship between Puerto Rico and the United States remains

⁹⁸ *Puerto Rico Constitution: Hearings on H.R. 7674 and S. 3336 Before the H. Comm. on Pub. Lands*, 81st Cong. 33 (1950) [hereinafter *House Hearings on H.R. 7674 and S. 3336*] (statement of Luis Muñoz Marín, Governor of Puerto Rico) (emphasis added); see also BHANA, *supra* note 86, at 124; Helfeld, *Congressional Intent*, *supra* note 88, at 265.

⁹⁹ *House Hearings on H.R. 7674 and S. 3336*, *supra* note 98, at 33 (statement of Antonio Fernós-Isern, Resident Comm'r of Puerto Rico); see also Helfeld, *Congressional Intent*, *supra* note 88, at 265.

¹⁰⁰ *House Hearings on H.R. 7674 and S. 3336*, *supra* note 98, at 49 (letter from Oscar Chapman, Sec'y of the Interior); BHANA, *supra* note 86, at 125.

¹⁰¹ BHANA, *supra* note 86, at 126.

¹⁰² *House Hearings on H.R. 7674 and S. 3336*, *supra* note 98, at 63 (statement of Antonio Fernós-Isern, Resident Comm'r of Puerto Rico).

¹⁰³ *Id.* at 50 (letter from Oscar Chapman, Sec'y of the Interior).

intact.”¹⁰⁴ On May 17, the Senate Committee considering S. 3336 heard Resident Commissioner Fernós-Isern repeat his testimony before the House that the bill “would not change the status of the island of Puerto Rico relative to the United States. . . . It would not alter the powers of sovereignty acquired by the United States over Puerto Rico under the terms of the Treaty of Paris.”¹⁰⁵ Thereafter the Senate committee issued Report No. 1779 on S. 3336, endorsing the bill and stating unequivocally that “[t]he measure would not change Puerto Rico’s fundamental political, social, and economic relationship to the United States.”¹⁰⁶ Meanwhile, the House hearings continued, during which Representative Vito Marcantonio expressed strong opposition to the bill, alleging it was no more than an amendment to the Jones Act, that as a statute it could be amended by Congress unilaterally and thus was a “fraud” on the Puerto Rican people.¹⁰⁷ Puerto Rican statehood and independence advocates opposed the bill and asked that hearings be conducted on the Island. On June 19, the House Committee approved the bill as previously amended by the Senate and issued Report No. 2275, which repeated the Senate’s assertion to the effect that the bill did not change Puerto Rico’s fundamental relationship to the United States.¹⁰⁸ The measure was then openly debated on the House floor on June 29 and 30, during which Congressman Marcantonio again opposed the bill for the reasons previously expressed to the Committee.¹⁰⁹ There was no other opposition voiced, and the general consensus appeared to be, as stated by the non-voting delegate from Alaska, that: “Congress retains all essential powers set forth under our constitutional system, and it will be Congress and Congress alone which ultimately will determine the changes, if any, in the political status of the island.”¹¹⁰

President Truman signed the Act into law on July 3.¹¹¹ The Puerto Rico Legislature wasted no time and by August 30 had approved legislation implementing a referendum as provided by Public Law 600.¹¹² On the appointed date, 387,016 citizens voted in favor of the process

¹⁰⁴ *Id.* at 54 (statement of A. Cecil Snyder, J., Supreme Court of Puerto Rico).

¹⁰⁵ *Puerto Rico Constitution: Hearing on S. 3336 Before a Subcomm. of the S. Comm. on Interior & Insular Affairs*, 81st Cong. 4 (1950) (statement of Antonio Fernós-Isern, Resident Comm’r of Puerto Rico).

¹⁰⁶ S. REP. NO. 81-1779, at 3 (1950). Thereafter the Senate approved S. 3336 without debate. See 96 CONG. REC. 8321-22 (1950).

¹⁰⁷ *House Hearings on H.R. 7674 and S. 3336, supra* note 98, at 103 (statement of Rep. Vito Marcantonio, Member from New York).

¹⁰⁸ H.R. REP. NO. 81-2275, at 3 (1950).

¹⁰⁹ 96 CONG. REC. 9504-12, 9584-91, 9599-601 (1950).

¹¹⁰ *Id.* at 9595.

¹¹¹ Act of July 3, 1950, ch. 446, 64 Stat. 319 (codified at 48 U.S.C. § 731(b) (2012)).

¹¹² Law No. 27 of August 30, 1950, 1951 P.R. Laws 98.

and 119,169 voted against it.¹¹³ Continuing with the procedures established by Public Law 600, on August 27, 1951, the electorate again voted to choose the members of the constitutional convention that would draft the constitution.¹¹⁴ These delegates met from September 17, 1951, through February 6, 1952, whereupon by a vote of eighty-eight to three, they approved a draft of the constitution to be submitted to the general electorate for their ratification.¹¹⁵ On March 3, 1954, the Puerto Rican electorate, by a vote of 373,594 to 82,877¹¹⁶ approved a Constitution, in which section 1 of article I states that:

The Commonwealth of Puerto Rico is hereby constituted. Its political power emanates from the people and shall be exercised in accordance with their will, within the terms of *the compact agreed upon between the people of Puerto Rico and the United States of America*.¹¹⁷

On March 12, 1952, the Governor of Puerto Rico submitted the Puerto Rico Constitution to President Truman for his approval and submission to Congress for its ratification. In his letter of transmittal to the President, Governor Muñoz Marín stated, as he had to the Puerto Rican electorate through the course of the ratification process, that this process removed "every trace of colonialism" because it was based on a "compact" and the "principle of mutual consent."¹¹⁸ President Truman declared that the Puerto Rico Constitution complied with Public Law 600 and the U.S. Constitution, and on April 22, 1952, submitted the same to Congress for its final approval.¹¹⁹

A. Congress Considers (and Amends) the Puerto Rico Constitution

The submission received an ambiguous reception in a Congress whose mood was somewhat altered. Seeking quick approval of the Puerto Rico Constitution, Resident Commissioner Fernós-Isern presented House Joint Resolution 430 to said effect,¹²⁰ while Senator O'Mahoney presented a similar resolution in the Senate.¹²¹ It soon became apparent that congressional perception about the entire matter

¹¹³ Helfeld, *Congressional Intent*, *supra* note 88, at 272.

¹¹⁴ *Id.* at 272-73.

¹¹⁵ *Id.* at 273. Of the ninety-two seats to be elected, seventy were won by the Popular Democratic Party (which basically sought an autonomous territorial status), fifteen by the Statehood Republican Party (which sought integration with the Nation), and seven by the Socialist Party (which also sought statehood). ACADEMIA PUERTORRIQUEÑA DE JURISPRUDENCIA Y LEGISLACIÓN, PROPOSICIONES Y RESOLUCIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 1951-1952, at 679-81 (1992).

¹¹⁶ Helfeld, *Congressional Intent*, *supra* note 88, at 273.

¹¹⁷ PR. CONST. art. I, § 1 (emphasis added).

¹¹⁸ BHANA, *supra* note 86, at 146; JOSÉ TRÍAS MONGE, 4 HISTORIA CONSTITUCIONAL DE PUERTO RICO 59-61 (1983).

¹¹⁹ H.R. DOC. NO. 82-435 (1952); *see also* BHANA, *supra* note 86, at 148-49.

¹²⁰ H.R.J. Res. 430, 82d Cong. (1952).

¹²¹ S.J. Res. 151, 82d Cong. (1952).

centered on the general view that Congress's function was one of substantive oversight, not just one of rubber-stamping approval. At a hearing on April 25 before the House Committee on Interior and Insular Affairs, objections were raised to sections 5 and 20 in article II of the Puerto Rico Constitution, which guaranteed free public education, the right to work, the right to an adequate standard of living, the right to social protection in case of unemployment, sickness, old age, or disability, and the right to special motherhood care.¹²² The committee nevertheless unanimously approved the Puerto Rico Constitution before it. Most importantly, in its report it indicated that there was no change contemplated in the political, social, and economic relationship between Puerto Rico and the United States.¹²³

A Senate hearing on April 29 was more hostile, this time to Governor Muñoz Marín, who attempted a mild pitch regarding the alleged "compact."¹²⁴ He was answered pointedly by Senator Guy Cordon of Oregon "that the political, economic and social relationship between the United States and Puerto Rico shall continue without alteration whatever," a statement which expressed the consensus view of the committee.¹²⁵ When the hearing was continued on May 6, counsel for the Office of Territories in the Department of the Interior, in response to a question by Senator Malone as to the power to make changes to the Puerto Rican Constitution, stated that "the basic power inherent in the Congress of the United States, which no one can take away, is in the Congress."¹²⁶ The chairman of the committee, Senator O'Mahoney, also stated during that hearing:

I think it may be stated as fundamental that the Constitution of the United States gives the Congress complete control and nothing in the Puerto Rican constitution could affect or amend or alter that right. That constitution is before us, and I find nothing in it which goes beyond the scope of local self-government which we by law expressly authorized.¹²⁷

In response to Senator Cordon's concerns about an article written by Trías Monge arguing that Congress could not unilaterally amend the Puerto Rico Constitution, Chairman O'Mahoney responded that the Public Law 600 he had sponsored was not a compact but only "in the nature of a compact" and further stated: "[I]f the people of Puerto Rico

¹²² See *Puerto Rico Constitution: Hearings on H.R.J. Res. 430 Before the H. Comm. on Interior & Insular Affairs*, 82d Cong. 11-12 (1952).

¹²³ H.R. REP. NO. 82-1832, at 3 (1952).

¹²⁴ See TRÍAS MONGE, *supra* note 118, at 279-80.

¹²⁵ *Approving Puerto Rican Constitution: Hearings on S.J. Res. 151 Before the S. Comm. on Interior & Insular Affairs*, 82d Cong. 27 (1952) (statement of Luis Muñoz Marín, Governor of Puerto Rico).

¹²⁶ *Id.* at 43-44 (statement of Irwin W. Silverman, Chief Counsel, Office of Territories, Department of the Interior).

¹²⁷ *Id.* at 40 (statement of Sen. O'Mahoney).

should step outside, if an attempt should be made to change the constitution and deal with these matters outside the scope of the grant [of self-government], I think that the authority of . . . the Constitution, could not be impaired or reduced."¹²⁸ To that, Senator Long added: "It seems most unfortunate to me that that language, 'in the nature of a compact,' ever slipped into the act, because that could only lead to complete misunderstanding."¹²⁹

On May 13, the House debated H.R.J. Res. 430, with the main issue being section 20 of the proposed Puerto Rico Constitution, to which members expressed open hostility.¹³⁰ A vote was postponed to allow for a cooling of the respective stances. Meanwhile, on May 27, the Senate Committee on Interior and Insular Affairs recommended approval of the Constitution, provided that section 5 was amended to clarify that private education was not prohibited, and provided that section 20 was eliminated altogether.¹³¹ The House again debated H.R.J. Res. 430 on May 28, and in the meantime the House Committee agreed to the Senate's recommendations regarding sections 5 and 20.¹³² Of relevance to the present subject was the insistence, during the debates leading to the approval of the Joint Resolution, of Representatives Halleck of Indiana and Meader of Michigan that the Puerto Rico Constitution not supersede the Puerto Rican Federal Relations Act;¹³³ Representative Meader stated that the American Law Section had determined that Congress's approval of the Puerto Rico Constitution would not "in any way make an irrevocable delegation of its constitutional authority."¹³⁴

On June 23, the debate moved to the Senate floor, during which Senator Johnston proposed an amendment to the effect that no amendment to the Puerto Rico Constitution would become effective until approved by Congress.¹³⁵ A conference was thus required between the two chambers, whereupon on June 28 the House and Senate conferees agreed to eliminate Johnston's amendment and in its place substitute it with:

¹²⁸ *Id.* at 49.

¹²⁹ *Id.* (statement of Sen. Long).

¹³⁰ See 98 CONG. REC. 5119-28 (1952).

¹³¹ S. REP. NO. 82-1720, at 1 (1952). The Report contains the following language:

The enforcement of the Puerto Rican Federal Relations Act and the exercise of Federal authority in Puerto Rico under its provisions are in no way impaired by the Constitution of Puerto Rico, and may not be affected by future amendments to that constitution, or by any law of Puerto Rico adopted under its constitution.

Id. at 6.

¹³² 98 CONG. REC. 6181, 6186 (1952).

¹³³ *Id.* at 6166-70.

¹³⁴ *Id.* at 6170.

¹³⁵ *Id.* at 7848. During the debate leading to the approval of the amendment, Senator Johnston stated: "We are, under the Constitution of the United States, retaining our rights over Puerto Rico." *Id.* at 7846.

Any amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.¹³⁶

The conferees also eliminated section 20 and retained section 5 as amended by the House.¹³⁷ Thereafter, the report was submitted to the Senate for approval, and upon its approval on July 3, was presented to the President, who signed it into law that afternoon, becoming Public Law 447.¹³⁸ The Puerto Rico Constitution would become effective upon the constitutional convention's formal acceptance of the congressional amendments, and the Governor's proclamation that the procedures had been complied with and that the Constitution was then law.¹³⁹

This procedure was followed post haste, with the Puerto Rico Constitutional Convention meeting on July 7 to discuss the congressional amendments to its product, and by July 10, unanimously approving the same in its Resolution 34.¹⁴⁰ Thereafter, on July 25, 1952, the anniversary of General Miles's landing in Guánica, Governor Muñoz Marín announced the "creation" of the so-called Commonwealth of Puerto Rico.

Although that may have been what the *políticos* claimed in Puerto Rico, and even what certain judicial decisions have double-spoken about, the legal and constitutional reality is that there was neither a "creation" of an actual new entity, nor the establishment of one with new empowerment except on purely local matters — and even that was subject to congressional oversight and power. It has best been stated by Dr. David M. Helfeld, former Dean of the University of Puerto Rico School of Law and an accomplished constitutional scholar:

Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of [c]onstitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress. The compact is not a contract in a commercial sense. It expresses a method Congress chose to use in place of direct legislation. . . . Constitutionally, the most meaningful view of the Puerto Rican Constitution is that it is a statute of the Congress which involves a partial and non-permanent abdication of Congress[']s territorial power.¹⁴¹

¹³⁶ H.R. REP. NO. 82-2350, at 3 (1952) (Conf. Rep.).

¹³⁷ See *id.* at 1-2.

¹³⁸ Joint Resolution of July 3, 1952, ch. 567, 66 Stat. 327 (1952).

¹³⁹ *Id.*, 66 Stat. at 327-28.

¹⁴⁰ See 4 DIARIO DE SESIONES DE LA CONVENCION CONSTITUYENTE DE PUERTO RICO 2532-34 (1961).

¹⁴¹ Helfeld, *Congressional Intent*, *supra* note 88, at 307.

B. The "Compact" and the Monumental Hoax on the United Nations

Notwithstanding that the intention of Congress regarding the status of Puerto Rico after the enactment of Public Law 600 was clearly manifested in the legislative history discussed above, the administration then in power in the Puerto Rico government proceeded, with the complicity of the executive branch of the United States, to concoct a monumental hoax on the United Nations. The purpose of this plan was to seek the removal of Puerto Rico from coverage of Article 73(e) of the United Nations Charter, which required nations to file annual reports on the territories that had not attained a "full measure of self-government."¹⁴²

1. *Preparing the Ground: Mora v. Torres.*¹⁴³ — The Puerto Rico government in power, which had been flouting its compact theory locally, took advantage of the coincidence of various fortuitous circumstances regarding a litigation taking place in the U.S. District Court for the District of Puerto Rico, which allowed it to promote its compact agenda to its advantage. The case was *Mora v. Torres*, which involved a rice shipment from California that was subject to a price control order by the Puerto Rico government upon its arrival.¹⁴⁴ The price control order was then challenged and plaintiffs sought an injunction against its enforcement.¹⁴⁵

The district judge who heard the case, Benjamin Ortiz, was at the time a sitting justice of the Supreme Court of Puerto Rico, and was assigned temporarily as an acting federal district judge pursuant to the provisions of 48 U.S.C. § 863, which allowed this procedure when the incumbent district judge was absent or unavailable.¹⁴⁶ Justice Ortiz, who had been a member of the Constitutional Convention that approved the Puerto Rico Constitution, had served in the Puerto Rico Legislature as a member of the party that espoused the "compact" theory, and in fact, had been the vice president of the House of Representatives. The Puerto Rico government was represented in the case by "compact" advocate José Trías Monge, who had been appointed Attorney General of Puerto Rico. As the counsel in the case, he exposed the theory that prevailed in the denial of the injunction sought: that by virtue of the "compact" contained in Public Law 600, a new relationship had been established between the United States and Puerto Rico, as a result of which Congress could no longer exercise plenary power over Puerto

¹⁴² See U.N. Charter art. 73; G.A. Res. 66 (I) (Dec. 14, 1946).

¹⁴³ 113 F. Supp. 309 (D.P.R. 1953), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

¹⁴⁴ See *id.* at 311.

¹⁴⁵ *Id.* at 311–12.

¹⁴⁶ 48 U.S.C. § 863 (1952).

Rico.¹⁴⁷ A reading of this case leads one to conclude that this language was unnecessary to the ruling made and is thus pure dicta.¹⁴⁸

2. *Looking for Help in Higher Places.* — With this feather in its cap, the Government of Puerto Rico sought the aid of the executive branch of the federal government under the theory that the international interests of the United States coincided with those of the local Puerto Rican *políticos* because they could then both argue that Puerto Rico was no longer a colony. Their first attempts before the Interior and State Departments were not fruitful because the personnel of both of these departments would not buy the “compact” theory; in fact, the State Department initially objected to the inclusion of any reference to such a relationship in its memorandum to the Secretary-General of the United Nations terminating Article 73(e) transmissions.¹⁴⁹

But the compact adherents persevered in their search for a crack in the bureaucratic wall, which they found in Benjamin Gerig, Chief of the Division of Department Area Affairs of the State Department, and the Chairman of the Inter-Departmental Committee of United States Non-Self-Governing Territories. In June 1953, Mr. Gerig was visited by Governor Muñoz Marín, Trías Monge, and Resident Commissioner Fernós-Isern, who — using the recent *Mora* decision as authority for their point of view — were able to get his agreement to include the “compact” argument as part of the position of the United States before the United Nations in its attempt to exclude Puerto Rico from Article 73 coverage.¹⁵⁰ What followed can only be described as a monumental hoax.

3. *The U.N. Appearance.* — Among the most salient pieces of misinformation supplied to this international forum was the testimony of the United States delegate to the United Nations, Mason Sears, who stated to the General Assembly’s Committee on Information from Non-Self-Governing Territories:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact, as you know, is stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.¹⁵¹

¹⁴⁷ *Mora v. Torres*, 113 F. Supp. at 313–14.

¹⁴⁸ Although affirming on the merits of the denial of the injunction sought, with the court using some loose “compact” language, Judge Magruder’s opinion avoided deciding the nature of the “Commonwealth.” *Mejias*, 206 F.2d at 382, 386–88. Abe Fortas was appointed Special Assistant Attorney General to assist the Government of Puerto Rico in this appeal. *See id.* at 379.

¹⁴⁹ *But see* Memorandum from U.S. State Dep’t to Trygve Lie, U.N. Sec’y-Gen., *reprinted in* 28 DEP’T ST. BULL. 585, 587 (1953).

¹⁵⁰ BHANA, *supra* note 86, at 173–74; TORRUELLA, *supra* note 25, at 161–62.

¹⁵¹ Mason Sears, Statement to the U.N. General Assembly’s Committee on Information from Non-Self-Governing Territories (Aug. 28, 1953), *reprinted in* 29 DEP’T ST. BULL. 392, 392 (1953).

After the Committee on Information recommended that the Commonwealth of Puerto Rico be considered as falling outside the scope of Article 73(e) of the Charter, Congresswoman Frances P. Bolton from Ohio, a member of the House Committee on Foreign Affairs and part of the U.S. delegation, stated before the Fourth Committee, as a preamble to full debate before the General Assembly:

A fundamental feature of the new Constitution is that it was entered into in the nature of a compact between the American Congress and the Puerto Rican people. This arrangement has been described by Senator Butler of Nebraska, chairman of the Senate Committee on Interior and Insular Affairs and cosponsor of Public Law 600, as a relationship between two parties which may not be amended or abrogated unilaterally.¹⁵²

The statement attributed to Senator Butler is of doubtful veracity, as it is in direct conflict with his joint statement made on March 31 when the Public Law 600 bill was presented, to the effect that the bill would not change the relationship of Puerto Rico to the United States.¹⁵³ Congresswoman Bolton continued at length that a bilateral compact existed which could not be amended without common consent, and although recognizing that the Federal Relations Act continued to provide for political and economic union, it would be wrong to hold that the creation of the Commonwealth of Puerto Rico did not signify a fundamental change in the status of Puerto Rico from that previously held of a territory subject to the full authority of the Congress.¹⁵⁴

There was considerable doubt among the Committee membership as to the United States' position, and the vote on November 5 was close: twenty-two votes in favor, eighteen against, and nineteen abstentions.¹⁵⁵ The Committee's resolution recognized:

that, in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican peoples as that of an autonomous political entity.¹⁵⁶

Led by U.S. Ambassador to the U.N. Henry Cabot Lodge, Jr., of Manifest Destiny lineage,¹⁵⁷ and with the so-called Eisenhower

¹⁵² Frances P. Bolton, Statement to U.N. Committee IV (Trusteeship) (Oct. 30, 1953), *reprinted in* 29 DEP'T ST. BULL. 797, 798 (1953).

¹⁵³ See *supra* note 101 and accompanying text.

¹⁵⁴ Frances P. Bolton, Statement to U.N. Committee IV (Trusteeship) (Nov. 3, 1953), *reprinted in* 29 DEP'T ST. BULL. 802, 802-05 (1953).

¹⁵⁵ See *The Nature of U.S.-Puerto Rican Relations*, 29 DEP'T ST. BULL. 797, 797 n. (1953); TORRUELLA, *supra* note 25, at 165.

¹⁵⁶ Fourth Committee Res. VII, U.N. Doc. A/2556, at 55 (Nov. 5, 1953).

¹⁵⁷ His father, Senator Henry Cabot Lodge from Massachusetts, was one of Theodore Roosevelt's "Large Policy" cabal that promoted a U.S. expansionist agenda and the Spanish American War of 1898. See JUAN R. TORRUELLA, *GLOBAL INTRIGUES: THE ERA OF THE SPANISH-AMERICAN WAR AND THE RISE OF THE UNITED STATES TO WORLD POWER* 172 (2007).

Declaration¹⁵⁸ at hand, the United States made the rounds among its allies and dependent nations, trying to garner more votes when the matter came before the General Assembly.¹⁵⁹ The lobbying efforts were modestly effective in securing the approval of a resolution authorizing “cessation of the transmission of information under Article 73(e) of the Charter in respect of Puerto Rico,”¹⁶⁰ by a vote of twenty-six in favor, sixteen against, and eighteen abstentions,¹⁶¹ hardly a resounding victory for the United States.

C. *The Fantasy of the Compact Revealed*

The unfortunate result of this course of events is that most interested parties were misled into believing the fantasy of the “compact,” and the change in Puerto Rico’s status from that of an unincorporated territory to a new nebulous one. This was so, particularly among the Puerto Rican electorate, and even with some federal courts.¹⁶² The confusion was further augmented by the Supreme Court of the United States in its various opinions about Puerto Rico,¹⁶³ which in 2016 culminated with the equivalent of a legal cold water dousing, when the Court decided *Puerto Rico v. Sánchez Valle*,¹⁶⁴ and *Puerto Rico v. Franklin California Tax-Free Trust*,¹⁶⁵ after which Congress immediately enacted the so-called PROMESA bill.¹⁶⁶ So much for the third experiment!

In *Sánchez Valle*, in ruling that Puerto Rico violates the double jeopardy clause of the Constitution if it tries someone pursuant to a Puerto Rico crime that is duplicated in the federal jurisdiction, and for which the defendant has already been tried in the federal system, the Court concluded that “Congress [is] the original source of power for Puerto

¹⁵⁸ The declaration promised to give independence to Puerto Rico if the voters there asked for it. U.N. GAOR, 8th Sess., 459th mtg. at 311, U.N. Doc. A/PV.459 (Nov. 27, 1953).

¹⁵⁹ Some of the members of the Puerto Rican delegation were critical of the methods and tactics used. See TRÍAS MONGE, *supra* note 118, at 56–57.

¹⁶⁰ G.A. Res. 748 (VIII) (Nov. 27, 1953).

¹⁶¹ U.N. GAOR, 8th Sess., 459th mtg. at 320, U.N. Doc. A/PV.459 (Nov. 27, 1953).

¹⁶² See *United States v. López Andino*, 831 F.2d 1164 (1st Cir. 1987); *cf.* *United States v. Sánchez*, 992 F.2d 1143 (11th Cir. 1993). *But see López Andino*, 831 F.2d at 1172 (Torruella, J., dissenting).

¹⁶³ Compare *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (“Puerto Rico has thus not become a State in the federal Union like the 48 States, but it would seem to have become a State within a common and accepted meaning of the word . . . joined in union with the United States of America under the terms of the compact.” (quoting *Mora v. Mejias*, 206 F.2d 377, 387 (1st Cir. 1953))), *with* *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594 (1972) (“[T]he purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with States of the Union . . .”), *and id.* at 596 (“We readily concede that Puerto Rico occupies a relationship to the United States that has no parallel in our history . . .”).

¹⁶⁴ 136 S. Ct. 1863 (2016).

¹⁶⁵ 136 S. Ct. 1938 (2016).

¹⁶⁶ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C.A. §§ 2101–2241 (West 2017)).

Rico’s prosecutors,”¹⁶⁷ so “the Commonwealth and the United States are not separate sovereigns.”¹⁶⁸ As such, “[t]he ‘ultimate’ source of prosecutorial power remains with the U.S. Congress.”¹⁶⁹

In *Franklin California*, the Court held that Puerto Rico is not a “State” for purposes of the federal Bankruptcy Code’s “gateway” provision governing who may be a debtor, and thus cannot authorize its municipalities to seek relief under Chapter 9 of the Code.¹⁷⁰ But, the Court held, Puerto Rico is a “State” for other purposes related to Chapter 9, including that chapter’s preemption provision, such that the Code preempts Puerto Rico’s Recovery Act.¹⁷¹ The language in this ruling is reminiscent of the double speak found in *Downes v. Bidwell*,¹⁷² to the effect that although Puerto Rico belongs to the United States, it was “foreign in a domestic sense.”¹⁷³

Franklin California’s throwback to the era of the *Insular Cases* leads to the third 2016 surprise for Puerto Rico, the PROMESA bill. This without a question takes us back to the days of the Foraker Act, which is the ultimate proof that the third experiment was another monumental hoax, and that Puerto Rico’s colonial condition has remained intact since 1898.

IV. THE FOURTH EXPERIMENT: PUERTO RICO’S FINANCIAL FIASCO AND CONGRESS’S PROMESA

Although Puerto Rico’s economic crisis is part and parcel of the failure of the third experiment, it is a subject which, notwithstanding its complexity, deserves separate treatment. Congress’s response to it not only signals that failure, but most importantly, it establishes a fourth regime that in many ways replicates the first attempt at colonial governance under the Foraker Act — the first experiment.

Puerto Rico’s present public debt is approximately \$72 billion,¹⁷⁴ not counting the approximately \$164 billion that the Puerto Rico government has in deficits to its public health system and government

¹⁶⁷ *Sánchez Valle*, 136 S. Ct. at 1875.

¹⁶⁸ *Id.* at 1876.

¹⁶⁹ *Id.* at 1875.

¹⁷⁰ 136 S. Ct. 1938, 1945–46.

¹⁷¹ *Id.*

¹⁷² 182 U.S. 244 (1901).

¹⁷³ *Id.* at 341–42 (White, J., concurring); see also Cristina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Re-invented*, in *FOREIGN IN A DOMESTIC SENSE 1* (Christina Duffy Burnett & Burke Marshall eds., 2001).

¹⁷⁴ Mary Williams Walsh, *How Puerto Rico Is Grappling with a Debt Crisis*, N.Y. TIMES: DEALBOOK (May 16, 2017), <https://nyti.ms/2r06b37> [<https://perma.cc/5HXR-JT6N>].

employee pension plans.¹⁷⁵ How Puerto Rico reached this point of indebtedness, and who is responsible for this disastrous state of affairs is, and for some time will be, the subject of acrimonious debate. The answer to the questions raised by this situation certainly cannot be definitively determined, or even discussed in depth, in this Commentary.¹⁷⁶ I will thus limit myself to enumerating some of the most salient facts that I believe have been major contributors to this outcome.¹⁷⁷

First is the underlying economic fragility of Puerto Rico's population and infrastructure, inherited from years of exploitation during the crypto-plantation period that lasted from 1900 through the 1940s.¹⁷⁸

Second is Congress's actions and inactions, particularly during the period between 1950 and 1996. As a result of the enactment of section 936 of the Internal Revenue Code,¹⁷⁹ which provided favorable tax incentives to U.S. manufacturing companies that established themselves in Puerto Rico, Puerto Rico's industrial base grew exponentially to the point that Puerto Rico-based companies accounted for 40% of all profits derived from U.S. companies in Latin America.¹⁸⁰ By 1977, several major multinational corporations were reporting more than 20% of their worldwide profits as originating from their manufacturing operations on the island.¹⁸¹ In 1995 alone, net profits from their Puerto Rico operations surpassed \$14 billion.¹⁸² The period of section 936 corporate prosperity in Puerto Rico was also a golden age for Puerto Rico's economy, but not for the Department of the Treasury, which lost as much as \$2.3 billion in revenues in some of the years when section 936 was in effect.¹⁸³ Of course, as in the case of the sugar industry, little if any of

¹⁷⁵ See Jim Martin, Opinion, *No Bailout for Puerto Rico*, WASH. EXAMINER (May 8, 2015), <http://www.washingtonexaminer.com/no-bailout-for-puerto-rico/article/2564107> [<https://perma.cc/EH6W-M3N9>].

¹⁷⁶ One such study, to which I do not necessarily subscribe, is MARC D. JOFFE & JESSE MARTINEZ, MERCATUS CTR., GEORGE MASON UNIV., ORIGINS OF THE PUERTO RICO CRISIS (2016). See also LARA MERLING ET AL., CTR. FOR ECON. & POLICY RESEARCH, LIFE AFTER DEBT IN PUERTO RICO: HOW MANY MORE LOST DECADES (2017); Ed Morales, *Who Is Responsible for Puerto Rico's Debt?*, THE NATION (June 7, 2016), <https://www.thenation.com/article/who-is-responsible-for-puerto-ricos-debt/> [<https://perma.cc/7QCX-DGH4>].

¹⁷⁷ I will not, of course, enter into the validity of PROMESA, and nothing contained herein or elsewhere should be interpreted as an indication of my views in this respect.

¹⁷⁸ See *supra* pp. 73–76.

¹⁷⁹ I.R.C. § 936(a)(1) (1976) (repealed 1996).

¹⁸⁰ EMILIO PANTOJAS-GARCÍA, DEVELOPMENT STRATEGIES AS IDEOLOGY: PUERTO RICO'S EXPORT-LED INDUSTRIALIZATION EXPERIENCE 115–18 (1990).

¹⁸¹ *Id.* at 153. Chemical and pharmaceutical companies benefited the most from the section 936 tax shelter: Johnson & Johnson, Smith-Kline, Merck, and Bristol-Meyers alone saved billions in taxes between 1980 and 1990. See Kelly Richmond, *Drug Companies Fear Loss of Tax Exemption*, N.J. REC., Nov. 8, 1993.

¹⁸² GONZÁLEZ, *supra* note 77, at 249.

¹⁸³ See U.S. GEN. ACCOUNTING OFFICE, GGD-92-72BR, PHARMACEUTICAL INDUSTRY: TAX BENEFITS OF OPERATING IN PUERTO RICO 12 (1992).

this wealth remained in Puerto Rico.¹⁸⁴ Although section 936 had been enacted principally to provide incentives to the creation of employment in Puerto Rico,¹⁸⁵ and there was a temporary respite in this respect while section 936 lasted, corporate greed led to the killing of the goose that laid the golden egg. Through accounting practices and other manipulations, firms with high research, development and marketing expenses, but low production costs, transferred their production, patents and trademarks to Puerto Rico subsidiaries to shield all revenue produced by these products from federal income taxes¹⁸⁶ — perhaps legal but certainly unethical procedures which Congress decided to end by repealing section 936 in 1996.¹⁸⁷ Although the closing of the loophole in section 936 would have been sufficient to correct the abuses noted, Congress adopted a draconian solution and instead eliminated section 936 altogether.

The migration of “section 936 corporations” from Puerto Rico that followed Congress’s extreme move, and the consequent relocation of a large part of Puerto Rico’s manufacturing base to tax-friendly jurisdictions like Ireland, when added to the full impact of NAFTA-created competition, and other aspects of the movement toward globalization, started an economic “death spiral” from which Puerto Rico has never recovered.¹⁸⁸ In fact, the Puerto Rican economy had been aggravated even before the disastrous consequences of Hurricane María by both the loss of a substantial and important part of Puerto Rico’s tax base by emigration of many of its citizens to the mainland United States,¹⁸⁹ and by the need of the local government to engage in massive borrowing to pay for the social services that the Puerto Rico electorate was receiving, particularly in the areas of education and health. Although Puerto Rico gets approximately sixteen billion dollars annually in U.S. government

¹⁸⁴ It is estimated that between 2004 and 2013 multinationals repatriated \$313 billion from Puerto Rico, enough to repay the debt fourfold. Morales, *supra* note 176.

¹⁸⁵ See U.S. GEN. ACCOUNTING OFFICE, GGD-93-109, TAX POLICY: PUERTO RICO AND SECTION 936 TAX CREDIT 2–3 (1993).

¹⁸⁶ *Id.* at 3.

¹⁸⁷ See Milo W. Peck, Jr. & Helene W. Johns, *The Death of Section 936: Closing a Loophole or Poor Policy?*, 22 INT’L TAX J. 1, 2 (1996); Ángel L. Ruíz Mercado & Edwin Meléndez, *The Potential Impact of the Repeal of Section 936 on Puerto Rico’s Economy: Summary*, BOLETÍN DE ECONOMÍA, July–Sept. 1997, at 4.

¹⁸⁸ See MERLING ET AL., *supra* note 176, at 5.

¹⁸⁹ Since 2010 more than 295,000 residents have left Puerto Rico. U.S. Census Bureau, *Estimates of the Components of Resident Population Change: April 1, 2010 to July 1, 2015*, AM. FACTFINDER (Mar. 2016), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPTCOMP&src=pt [<https://perma.cc/NH4X-EEDC?type=image>]. Today more Puerto Ricans reside on the mainland than in Puerto Rico. Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RES. CTR.: FACT TANK (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s/> [<https://perma.cc/2CGE-LHR8>].

subsidies and assistance to individuals,¹⁹⁰ because Puerto Rico is a captive market of the United States — about half of goods imported are purchased from the mainland United States, and Puerto Ricans are the largest per capita importers of U.S. goods in the world — a large amount of the subsidized funds are in effect repatriated, and go to sustaining U.S. business and enterprises on the mainland,¹⁹¹ a classic colonial economic relationship. Furthermore, Congress's discriminatory treatment of Puerto Rico in the allocation of subsidies as compared to its mainland counterparts is not only long-standing, but unfortunately also judicially sanctioned, relying on the *Insular Cases*.¹⁹²

Thus, Puerto Rico receives only a fraction of the federal support extended to its mainland counterparts.¹⁹³ In fact, it receives little more than a tenth of the amount of Medicaid funding that is granted to wealthier states or those with smaller populations.¹⁹⁴ The annual spending by the federal government under the Medicare and Medicaid programs per enrollee in Puerto Rico is the lowest in the nation.¹⁹⁵ The inequality in this area is a major component in the creation of Puerto Rico's debt crisis, as the local government has been forced to cover the health care funding shortfalls to provide even minimal health benefits to its population.

Third, Puerto Rico's financial crisis has been partially created, largely escalated, and mostly aggravated by Wall Street, other components of the financial industry, and the camp followers of both groups.¹⁹⁶ Unsurprisingly, Puerto Rico was left in the lurch by many of those who profited during the golden years of the 1960s, 70s, and 80s. This commenced with several of the rating agencies progressively degrading Puerto Rico debt obligations to junk status for the first time in their history,¹⁹⁷ although neither Puerto Rico nor any of its instrumentalities

¹⁹⁰ COMMONWEALTH OF P.R., FINANCIAL INFORMATION AND OPERATING DATA REPORT 18 (2013).

¹⁹¹ GONZÁLEZ, *supra* note 77, at 252; Robert Z. Lawrence & Juan Lara, *Trade Performance and Industrial Policy*, in THE ECONOMY OF PUERTO RICO: RESTORING GROWTH 507, 528–31 (Susan M. Collins et al. eds., 2006).

¹⁹² See *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam).

¹⁹³ See Alvarez & Goodnough, *supra* note 27.

¹⁹⁴ See *id.*

¹⁹⁵ Levis, *supra* note 27.

¹⁹⁶ HEDGE CLIPPERS, PIRATES OF THE CARIBBEAN (2016); SAQIB BHATTI & CARRIE SLOAN, REFUND AM. PROJECT, BEWARE OF BANKERS BEARING GIFTS: WALL STREET SOLD PUERTO RICO BILLIONS IN PREDATORY LOANS DISGUISED AS GIFTS (2017); Michelle Chen, *The Bankers Behind Puerto Rico's Debt Crisis*, THE NATION (June 8, 2017), <https://www.thenation.com/article/bankers-behind-puerto-ricos-debt-crisis/> [<https://perma.cc/JZK3-WVAB>]; Kolhatkar, *supra* note 19.

¹⁹⁷ Michael Connors, *Puerto Rico Rating Cut to Junk Status by S&P*, REUTERS (Feb. 4, 2014, 7:51 PM), <https://reut.rs/1jdz6A6> [<https://perma.cc/RX6V-L4UY>].

had ever defaulted on any of its debt obligations.¹⁹⁸ A snowball effect was thus started, triggering acceleration clauses, increasing the interest rates at which the Puerto Rico government could borrow money, reducing the capital markets available for the raising of needed funds, and overall limiting the liquidity and financial flexibility of the Puerto Rico government and its instrumentalities. After that, the next step was almost a *fait accompli*, with the declaration by Governor Alejandro García Padilla that Puerto Rico’s public debt could not be paid,¹⁹⁹ succeeded by the progressive default on the various bond obligations of the Puerto Rico government and its principal instrumentalities.²⁰⁰

A. PROMESA (Puerto Rico’s “Promise”)

We thus come to PROMESA,²⁰¹ Congress’s fourth try at cutting through the Puerto Rican Gordian knot in its interminable attempt to colonially rule Puerto Rico and its people.²⁰² A serious study of this legislation deserves considerably more analysis and discussion than the necessarily limited consideration allowed in the present Commentary. Only those parts of PROMESA deemed most relevant to the present Commentary will be discussed.

The first of these, section 4, clearly establishes that PROMESA prevails (that is, is “supreme”) over all territorial laws, state laws, and regulations inconsistent with this federal statute.²⁰³ Section 5 includes Puerto Rico within the definition of “territory,” together with Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands.²⁰⁴ Section 101 establishes the Financial Oversight and Management Board (Board), the entity created by PROMESA to administer this statute.²⁰⁵ Section 101(b)(2) specifically states that “Congress enacts this Act pursuant to article IV, section 3 of the Constitution . . . which provides Congress the power to dispose of and make all needful rules and regulations for territories.”²⁰⁶ The Board is “created as an entity within the territorial government”²⁰⁷ of Puerto

¹⁹⁸ Patrick Gillespie, *Puerto Rico Just Defaulted for the First Time*, CNN MONEY (Aug. 3, 2015, 5:36 PM), <https://cnnmon.ie/1gEfmXQ> [<https://perma.cc/VSS3-33PL>].

¹⁹⁹ Michael Corkery & Mary Williams Walsh, *Puerto Rico’s Governor Says Island’s Debts Are “Not Payable”*, N.Y. TIMES: DEALBOOK (June 28, 2015), <https://nyti.ms/2kONq9k> [<https://perma.cc/EH5N-9RXZ>].

²⁰⁰ See Heather Gillers & Nick Timiraos, *Puerto Rico Defaults on Constitutionally Guaranteed Debt*, WALL ST. J. (July 1, 2016, 6:42 PM), <https://on.wsj.com/2rED6oR>.

²⁰¹ Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified at 48 U.S.C.A. §§ 2101–2241 (West 2017)).

²⁰² The legend of the Gordian knot originates from a knot tied by King Gordius through which Alexander the Great cut in response to the prophecy that whoever untied it would rule Asia.

²⁰³ 48 U.S.C.A. § 2103 (West 2017).

²⁰⁴ *Id.* § 2104.

²⁰⁵ *Id.* § 2121.

²⁰⁶ *Id.* § 2121(b)(2).

²⁰⁷ *Id.* § 2121(c)(1).

Rico, composed of seven members appointed by the President from among recommendations by the House and Senate in various ways;²⁰⁸ the Governor of Puerto Rico is an ex officio member of the Board.²⁰⁹ The Board appoints an executive director to manage its day-to-day affairs.²¹⁰ Section 107 establishes that the expenses of the Board shall be funded by Puerto Rico, expenses that will be determined at the “sole and exclusive discretion” of the Board.²¹¹

Section 104 of the Act sets the tone for the Board’s omnipotent powers established throughout PROMESA.²¹² Although the Board is cleverly nominated and established as an entity within the territorial government, neither the Governor nor the Legislature may exercise any oversight or control over the Board, nor enact any legislation, policy, or rule that would impair or defeat the purposes of the Act “as determined by the . . . Board.”²¹³ The Board directs and sets schedules, by which the Governor prepares and submits fiscal plans required by the Act, and by which the Board approves, disapproves, or certifies such plans;²¹⁴ but in the absence or default of such plans, the Board “in its sole discretion” may develop said plans and submit them to the Governor and Legislature,²¹⁵ whereupon they shall be “deemed approved by the Governor.”²¹⁶ Similar supervisory powers and procedures are granted to the Board regarding the budgets of the Government of Puerto Rico and its instrumentalities,²¹⁷ and the Board is given the power to “establish policies to require prior . . . Board approval of certain contracts, including leases and contracts to a governmental entity or government-owned corporations.”²¹⁸ Failure to comply with these policies authorizes the Board to prevent the execution or enforcement of the contract.²¹⁹ In effect, the

²⁰⁸ *Id.* § 2121(e).

²⁰⁹ *Id.* § 2121(e)(3).

²¹⁰ *Id.* § 2123. The present executive director is Natalie Jaresko, hired at an annual salary of \$625,000. Eva Lloréns Vélez, *Fiscal Board Chairman: Extent of Puerto Rico Crisis Justifies New Executive Director’s Salary*, CARIBBEAN BUS. (Mar. 23, 2017), <http://caribbeanbusiness.com/oversight-board-appoints-natalie-jaresko-as-executive-director/> [<https://perma.cc/2TTU-P435>]. This makes her the highest paid employee of the Government of Puerto Rico, where the Governor makes only \$70,000. Jennifer Burnett, *CSG Releases 2013 Governor Salaries*, COUNCIL OF ST. GOV’TS (June 25, 2013, 10:53 AM), <http://knowledgecenter.csg.org/kc/content/csg-releases-2013-governor-salaries> [<https://perma.cc/9M5P-DMZS>].

²¹¹ 48 U.S.C.A. § 2127(b).

²¹² *See id.* § 2124.

²¹³ *Id.* § 2128(a).

²¹⁴ *Id.* § 2141.

²¹⁵ *Id.* § 2141(d)(2).

²¹⁶ *Id.* § 2141(e)(2).

²¹⁷ *See id.* § 2142.

²¹⁸ *Id.* § 2144(b)(2).

²¹⁹ *Id.* § 2144(b)(5).

Board may set aside or reject any law passed by the Puerto Rico Legislature that it deems contravenes PROMESA or contravenes the Board.²²⁰

Section 205 of the Act, entitled “Recommendations on Financial Stability and Management Responsibility,” covers a broad spectrum of subjects dealing with the governance of the territory, not all directly dealing with fiscal issues, as to which the Board may inquire, opine and recommend to the Governor and the Legislature.²²¹ They, in turn, are required to answer whether or not the Board’s submissions will be accepted or rejected, and if rejected, provide the reasons for this rejection.²²² As expected under the circumstances, section 207 prohibits the territory, for as long as the Board is in operation under the Act, from issuing any debt or guarantee or entering into any similar transaction with respect to debt, without the prior approval of the Board.²²³

Title III of the Act, entitled “Adjustments of Debts,” is in effect a special bankruptcy procedure enacted to deal with Puerto Rico’s financial imbroglio²²⁴ — Congress’s answer to the no-man’s land created by *Franklin California* and Congress’s mysterious 1984 amendment to the Bankruptcy Code, which excluded Puerto Rico’s instrumentalities from the protection of chapter 9 of said Code for no known or documented reason.²²⁵ Pursuant to section 308 of PROMESA, the Chief Justice of the Supreme Court appoints a U.S. district judge to deal with all cases in which the debtor is a territory.²²⁶ The venue will be, in Puerto Rico’s case, in the District of Puerto Rico,²²⁷ and the Federal Rules of Bankruptcy Procedure shall be applicable “to a case under this subchapter and to all civil proceedings arising in or related to cases under this subchapter.”²²⁸ For present purposes, there is no further need to delve into Title III other than to indicate that the Board may exercise its prerogative to file proceedings on behalf of Puerto Rico and several of its instrumentalities,²²⁹ and that there are several active and complicated ongoing proceedings sub judice.²³⁰

²²⁰ *Id.* § 2144(a).

²²¹ *See id.* § 2145.

²²² *Id.* § 2145(b).

²²³ *Id.* § 2147.

²²⁴ *See id.* §§ 2161–2177.

²²⁵ *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 421(j)(6), 98 Stat. 333, 368–69 (codified at 11 U.S.C. § 101(52) (2012)).

²²⁶ 48 U.S.C.A. § 2168(a).

²²⁷ *Id.* § 2167(a)(1).

²²⁸ *Id.* § 2170.

²²⁹ *Id.* § 2164(a).

²³⁰ *See* Steven Church, *Puerto Rico Debt Case Starts with Squabble Among Bondholders*, BLOOMBERG MKTS. (May 17, 2017, 4:30 PM), <https://www.bloomberg.com/news/articles/2017-05-17/puerto-rico-debt-case-starts-with-squabble-between-bondholders> [https://perma.cc/7R5M-FTAU].

Title IV contains several interesting provisions that have more relevance to issues dealing with the status of territories than with Puerto Rico's financial woes. Section 401 provides that nothing in PROMESA is intended to limit Congress's legislative authority pursuant to the Territorial Clause of the Constitution,²³¹ a redundant provision considering the nature and content of this statute. It further indicates that nothing in this statute should be taken as amending, altering, or abrogating the provisions of the covenant with the Commonwealth of the Northern Mariana Islands, or the treaties of cession dealing with American Samoa.²³² Lastly, section 402, entitled "Right of Puerto Rico to Determine Its Future Political Status," states that "[n]othing in this [Act] shall be interpreted to restrict Puerto Rico's right to determine its future political status, including by conducting the plebiscite as authorized by Public Law 113-76."²³³ The fact is that Puerto Rico has held two plebiscites in recent years, one in 2012 and one in 2017. In the 2012 plebiscite — which consisted of two questions — 54% of the voters expressed dissatisfaction with Puerto Rico's present relationship to the United States, with 61% of voters expressing their preference for a statehood alternative.²³⁴ In the most recent plebiscite, 97% of those voting preferred statehood as the solution to Puerto Rico's status.²³⁵ Thus far, Congress has hardly acknowledged these outcomes.

Whatever else may be said about PROMESA, there should be little doubt that Congress at least considers Puerto Rico an unincorporated territory over which it has the same plenary powers the courts have said it has since the *Insular Cases* were decided in 1901. Furthermore, in keeping with this first point, it is now beyond cavil that the alleged "compact" is but an illusion that ranks with the well-known legal maxim of caveat emptor. The unilateral enactment of PROMESA is irrefutable proof of what Congress thinks of the nature of this "compact."²³⁶

As further proof of this, on December 22, 2017, President Donald Trump signed the proposed Tax Cuts and Jobs Act, enacting into law the most significant number of amendments to the Internal Revenue Code since 1986.²³⁷ Within this tax reform lies the last nail in the coffin.

²³¹ 48 U.S.C.A. § 2191(1).

²³² *Id.* § 2191(3)-(4); see Smith, *supra* note 11, at 110-13.

²³³ 48 U.S.C.A. § 2192. Public Law 113-76 appropriates funds for "objective, nonpartisan voter education about, and a plebiscite on, options that would resolve Puerto Rico's future political status . . ." Department of Justice Appropriations Act, 2014, Pub. L. No. 113-76, div. B, tit. II, 128 Stat. 51, 61.

²³⁴ David Royston Patterson, Opinion, *Will Puerto Rico Be America's 51st State?*, N.Y. TIMES (Nov. 24, 2012), <https://nyti.ms/2k5Abo5> [<https://perma.cc/3CSM-9JWE>].

²³⁵ Frances Robles, *Despite Vote in Favor, Puerto Rico Faces a Daunting Road Toward Statehood*, N.Y. TIMES (June 12, 2017), <https://nyti.ms/2tf905X> [<https://perma.cc/M2AD-JRUM>].

²³⁶ See Pedro Reina Pérez, Opinion, *El caso de la democracia en Puerto Rico*, N.Y. TIMES ESPAÑOL (Oct. 12, 2016), <https://nyti.ms/2FhmJ3z> [<https://perma.cc/6S5K-8H2Y>].

²³⁷ See Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

The tax reform imposes a new 12.5% tax on income generated from intellectual property held by foreign corporations outside of the United States — but the Code now defines corporations in Puerto Rico as foreign corporations, even when such a corporation is affiliated with a mainland company and even though Puerto Rico is not a foreign country. The economic consequences of this brand new federal tax are still unknown — but they are not promising and may foretell the future.²³⁸

Last, but most certainly not least, of the salient points I have attempted to argue is perhaps the understated fact that Puerto Rico *is* populated by *U.S. citizens*, a not-inconsiderable fact to be kept in mind by those looking to further experiment with their destiny.²³⁹

B. *¿Hacia dónde vas Puerto Rico?*²⁴⁰

The search for Puerto Rico's equality is not a journey of original discovery requiring delving into unknown territory. In 2018, the starting point has to be the fact that we are dealing with a gross civil rights violation perpetrated for over a century against several million U.S. citizens. They have been denied equality with the rest of the nation for the absurd reason that they reside in a different geographic area than the great majority of their fellow citizens. Why geographic location should make any difference or have any relevance to a determination of such a fundamental question as the rights to which a citizen is entitled defies any logic or valid legal principle, and would seem to contravene the ultimate decision in *Reid v. Covert*.²⁴¹

Reid and its companion case, *Kinsella v. Krueger*,²⁴² involved the trials of the civilian wives of two servicemen by courts-martial in England and Japan, respectively, after World War II. The defendants were each charged with murdering their spouses, and the government proceeded against them without the benefit of indictment by grand jury; thereafter the wives were tried without petit juries. Although the cases have been erstwhile criticized for the perceived discriminatory application of the *Balzac* doctrine,²⁴³ this assessment does not extend to the

²³⁸ Patrick Gillespie, *Puerto Rico Governor: GOP Tax Bill Is "Serious Setback" for the Island*, CNN MONEY (Dec. 20, 2017, 2:35 PM), <https://cnmmon.ie/2CLTJzK> [<https://perma.cc/BF2E-8HUD>].

²³⁹ It serves to underscore that U.S. citizens residing in Puerto Rico do not enjoy the right to participate in federal elections and do not have a voting representative in Congress. See *Igartúa v. United States*, 626 F.3d 592, 594 (1st Cir. 2010); *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 168 (1st Cir. 2005) (en banc) (Torruella, J., dissenting).

²⁴⁰ Torruella, *supra* note 12.

²⁴¹ 354 U.S. 1 (1957).

²⁴² 351 U.S. 470 (1956).

²⁴³ Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 328–31 (2007).

outcome or to the reasoning expressed in *Reid*'s plurality vote, which appropriately stated:

[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.²⁴⁴

This is language reminiscent of Justice Harlan's glorious dissent in the key *Insular Case* of *Downes v. Bidwell*, in which he stated:

In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. Still less is it true that Congress can deal with new territories just as other nations have done or may do with their new territories. This nation is under the control of a written constitution, the supreme law of the land and the only source of the powers which our Government, or any branch or officer of it, may exert at any time or at any place.²⁴⁵

*C. The Need for Decisive Judicial Intervention
to Correct the Grievous Civil Rights Violations
upon the U.S. Citizens Who Reside in Puerto Rico*

It is obvious that Congress will not correct the constitutional and moral injustices created by the democratic deficit that exists in the U.S.–Puerto Rico relationship, just as it failed to do so for African Americans, thus requiring the Supreme Court to redress their festering grievances after almost a century of those grievances being tolerated. Clearly, it is up to the courts as guardians of the Constitution, and as the originators of this unequal treatment when they validated it in the *Insular Cases*, to correct this condition. As the Court said in *United States v. Carolene Products Co.*²⁴⁶: “[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”²⁴⁷

²⁴⁴ *Reid*, 354 U.S. at 5–6 (plurality opinion) (footnotes omitted).

²⁴⁵ *Downes v. Bidwell*, 182 U.S. 244, 380 (1901) (Harlan, J., dissenting); cf. *Boumediene v. Bush*, 553 U.S. 723 (2007) (holding that the constitutional provisions related to habeas corpus applied extraterritorially to the United States Naval Station in Guantanamo Bay, Cuba in a case involving a foreign national detained as an enemy combatant, notwithstanding the lack of U.S. sovereignty over the land in which the base was located).

²⁴⁶ 304 U.S. 144 (1938).

²⁴⁷ *Id.* at 153 n.4.

D. *The Law of the Land*

The Court does not need to exercise extraordinary efforts, inventiveness, or experimentation, but only to enforce what is the Law of the Land as contained in the International Covenant on Civil and Political Rights²⁴⁸ (ICCPR), a treaty that has bound the United States since it was ratified by the Senate on April 12, 1992.²⁴⁹ By ratifying this treaty, the United States undertook "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind,"²⁵⁰ and "to take the necessary steps, in accordance with its constitutional processes and with the provisions of the [ICCPR], to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the [ICCPR]."²⁵¹ Among the rights that are thus protected are the right to vote for and have representatives pursuant to universal and equal suffrage.²⁵² Most importantly, the United States is under the affirmative obligation "[t]o ensure that any person whose rights or freedoms as herein recognized [in the ICCPR] are violated *shall have an effective remedy*."²⁵³ Additionally, the treaty sets forth a further requirement: "[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and *to develop the possibilities of judicial remedy*."²⁵⁴

At the time of ratification, the United States made the affirmative statement to the more than 100 other states that had also become party to the ICCPR, that "existing U.S. law generally [already] complies with the [ICCPR]; hence, implementing legislation is not contemplated."²⁵⁵ It also made the representation that "[i]n general, the substantive provisions of the [ICCPR] are consistent with the letter and spirit of the United States Constitution and laws, both state and federal."²⁵⁶ Furthermore, at the time of ratification the Senate acknowledged "[t]hat the United States understands that this Covenant shall be implemented by the Federal Government."²⁵⁷ As the record shows, and as will be presently further explained, this has been the setting for a deception

²⁴⁸ *Adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²⁴⁹ *See* 138 CONG. REC. 8068–71 (1992).

²⁵⁰ ICCPR, *supra* note 248, art. 2(1).

²⁵¹ *Id.* art. 2(2).

²⁵² *Id.* art. 25.

²⁵³ *Id.* art. 2(3)(a) (emphasis added).

²⁵⁴ *Id.* art. 2(3)(b) (emphasis added).

²⁵⁵ S. EXEC. REP. NO. 102-23, at 19 (1992).

²⁵⁶ *Id.* at 10.

²⁵⁷ 138 CONG. REC. 8071 (1992).

that surpasses the monumental hoax perpetrated on the United Nations in 1953.²⁵⁸ Notwithstanding the explicit language of the Covenant and the representations indicated above, the federal government has vehemently opposed the enforcement by individuals of the rights established in the ICCPR²⁵⁹ based on the contention that the ICCPR is not a self-executing treaty and therefore that the individual rights established thereunder require domestic legislation by the United States before they become the law of the land and are subject to individual enforcement in the U.S. courts.²⁶⁰

1. *The True Nature of the Senate's "Declaration" and Its Nonbinding Effect on the Courts.*²⁶¹ — Upon ratification of the ICCPR, the Senate issued a *declaration* regarding the non-self-execution of certain provisions of that treaty.²⁶² This action needs to be looked at with more circumspection than has been afforded up to the present.²⁶³

We commence with the established proposition that the ICCPR “bind[s] the United States as a matter of international law.”²⁶⁴ It follows that the American rule regarding treaty enforcement as a matter of U.S. domestic law²⁶⁵ requires *judicial inquiry into the terms of the treaty* to determine whether the treaty language has created individual rights that are self-enforceable, that is, that allows for the individual to file a suit in a U.S. court based solely on the language in the treaty.²⁶⁶

It is posited that a reading of the ICCPR establishes clear rights on behalf of individuals and definite obligations upon the United States.²⁶⁷ It is a matter of record that the United States has not only failed to comply with the obligations that it has agreed to in the ICCPR, but has vehemently and consistently prevented its citizens from exercising the rights encompassed in the ICCPR by engaging in obstructionist legal

²⁵⁸ See *supra* sections III.B.2 and III.B.3, pp. 86–88.

²⁵⁹ See *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 149 & n.3, 150 (1st Cir. 2005) (en banc), *cert. denied*, 547 U.S. 1035 (2006); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (recognizing the binding nature of the ICCPR, but observing that “the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”).

²⁶⁰ *Igartúa-de la Rosa*, 417 F.3d at 150.

²⁶¹ On the doctrine of self-execution of treaties, see generally Torruella, *supra* note 243, at 335–45.

²⁶² 138 CONG. REC. 8071 (1992); S. EXEC. REP. NO. 102-23, at 23 (1992).

²⁶³ See *Igartúa-de la Rosa*, 417 F.3d at 185–92 (Howard, J., dissenting).

²⁶⁴ *Sosa*, 542 U.S. at 735.

²⁶⁵ U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁶⁶ See *United States v. Stuart*, 489 U.S. 353, 365–66 (1989) (“The clear import of treaty language controls unless ‘application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.’” (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 180 (1982))).

²⁶⁷ See *supra* p. 99.

maneuvers in the courts of the United States.²⁶⁸ One can argue without much difficulty that the individual rights enumerated in the ICCPR are on their face clear and require no further domestic legislation. Furthermore, considering the statements of the Government cited previously as to the state of the law in the United States at the time of its joining the Covenant,²⁶⁹ and the contents of article 2(3) guaranteeing individuals the provision of judicial forums to enforce the rights provided by the Covenant, it is difficult to understand how one can conclude that the ICCPR is not self-executing, save for the Senate's *declaration* to the contrary. The legal import of that *declaration* is thus at the crux of the issue of the enforceability of the ICCPR by U.S. citizens in U.S. courts.

A declaration by the Senate regarding a treaty that it ratifies is not judicially dispositive on self-execution or any other issue raised. A declaration is a term of art used to describe statements by the Senate directed primarily at the U.S. courts to express the "the sense of the Senate" as to how the treaty should be interpreted on the issue raised by the declaration. It is up to the courts, and only the courts, to decide whether the declaration has validity pursuant to the text and historical context of the treaty, assuming the text is not clear. A declaration is not presented to the other international signatories for a modification of the treaty terms and thus differs materially and legally from a *reservation*.

A reservation is a "unilateral statement . . . whereby [one party] purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."²⁷⁰ A reservation has an actual effect on the terms of the treaty.²⁷¹ There should be little doubt that the Senate may hinge its consent to ratify a treaty on the acceptance of a reservation by the President and other signatories, and that if the reservation is not accepted, that reservation will vitiate the Senate's consent to the treaty.²⁷²

The constitutional power of the Senate regarding *declarations* has been aptly described by two leading legal scholars:

[T]he Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts. The Senate has the unicameral power only to consent to ratification of treaties,

²⁶⁸ See *Igartúa-de la Rosa*, 417 F.3d at 185–92 (Howard, J., dissenting).

²⁶⁹ See *supra* notes 255–257 and accompanying text.

²⁷⁰ Vienna Convention on the Law of Treaties, art. 2(1)(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 313 (AM. LAW. INST. 1986).

²⁷¹ See Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition Its Consent to Treaties*, 67 CHI.-KENT L. REV. 533, 542 n.63 (1991) (noting that in exchange for its advice and consent, the Senate can require the President to enter a reservation to the treaty and obtain the other signatories' consent to the change).

²⁷² See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 180–81 (2d ed. 1996).

not to pass domestic legislation. A declaration is not a part of a treaty in the sense of modifying the legal obligations created by it. A declaration is merely an expression of an interpretation or of a policy or position. U.S. courts are bound by the Constitution to apply treaties as the law of the land. They are not bound to apply expressions of opinion adopted by the Senate (and concurred in by the President). The courts must undertake their own examination of the terms and context of each provision in a treaty to which the United States is a party and decide whether it is self-executing. The treaty is law. The Senate's declaration is not law. The Senate does not have the power to make law outside the treaty instrument.²⁷³

A declaration in reality is an attempt to legislate concerning the domestic implementation of a treaty. Clearly, legislation can only be enacted if it is adopted by the House and Senate and signed by the President.²⁷⁴ Thus, a Senate declaration has no binding effect on the courts, who are required by the Constitution to reach their independent conclusions as to the meaning of treaties that have been ratified and have therefore become the law of the land.

That courts have been confused by the declaration/reservation nomenclature is shown in one of the few cases that has been decided by the courts dealing with this area of the law, *Power Authority v. Federal Power Commission*.²⁷⁵ I am quick to add that notwithstanding the court's confusion regarding the proper terminology, the case supports what has been said herein regarding the legal consequences of a declaration by the Senate as part of its treaty approval process. The Court of Appeals held that a "reservation" by the Senate to a treaty with Canada was ineffective because the "reservation" only involved domestic law.²⁷⁶ The court stated that "[a] true reservation . . . becomes a part of a treaty" and changes the effect of the treaty by creating a different relationship between the parties to the treaty.²⁷⁷ Because the "reservation" in this case was merely an expression of the Senate's view of domestic policy, it was not part of the treaty and thus did not become domestic law under the Supremacy Clause, thereby binding the courts.²⁷⁸

²⁷³ Stefan A. Riesenfeld & Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. 293, 296-97 (1991); see also HENKIN, *supra* note 272, at 202 (describing the President's practice of declaring certain treaties as non-self-executing to be "'anti-Constitutional' in spirit and highly problematic as a matter of law"). See Torruella, *supra* note 243, at 342 n.227 for a list of academic articles that are in agreement.

²⁷⁴ See *INS v. Chadha*, 462 U.S. 919, 958 (1983).

²⁷⁵ 247 F.2d 538 (D.C. Cir. 1957), *vacated as moot sub nom.* Am. Pub. Power Ass'n v. Power Auth., 355 U.S. 64 (1957) (per curiam).

²⁷⁶ *Id.* at 541. Obviously the court was mistaken in referring to a declaration as a "reservation."

²⁷⁷ *Id.* (citing Harvard Research in Int'l Law, *Codification of International Law: Part III — Law of Treaties*, 29 AM. J. INT'L L. SUPPLEMENT 653, 843 (1935)).

²⁷⁸ See *id.* at 543.

The cases that have considered the Senate's *declaration* regarding ICCPR have failed to consider not only the legal consequences of this established distinction between the powers that the Senate has in the case of a declaration versus a reservation, but also *how* it was that the Senate actually objected, *and to what*.²⁷⁹

The Senate's *declaration*, entered at the time of ratification of the ICCPR, purported to establish that the substantive provisions of that treaty would not be self-executing.²⁸⁰ This declaration is, of course, subject to all the constitutional restrictions previously discussed, which means that the courts are the ones that should determine whether the substantive provisions of the ICCPR are self-executing or not, based on the clear and unequivocal language of this treaty.

The story does not end here, for in fact the Senate *did* make *reservations* to several of the ICCPR's provisions, namely to article 20 (stating that the United States would not take any steps thereunder which would infringe upon the rights to free speech and association),²⁸¹ to article 7 (dealing with issues of "cruel, inhuman or degrading treatment or punishment" under domestic constitutional law),²⁸² and to articles 10 and 14 (reserving the right to treat juveniles as adults for criminal law purposes under certain circumstances).²⁸³

But more important for our purposes are the provisions in the ICCPR that were *not* included in the reservations:

- article 25 (protecting the right of every citizen to vote in genuine elections with universal, equal suffrage);²⁸⁴
- article 2, paragraph 1 (undertaking "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind");²⁸⁵
- article 2, paragraph 2 (requiring each party state, where not already provided by existing legislation, to proceed in accordance with its constitutional system to adopt such laws or other measures as may be necessary to give effect to the rights recognized by the ICCPR);²⁸⁶ and
- article 2, paragraph 3 (requiring an enforcement mechanism for the realization of the rights established in the ICCPR, and to ensure that those who have been subjected to violations of

²⁷⁹ See, e.g., *Igartúa-de la Rosa v. United States*, 417 F.3d 145, 148–51 (1st Cir. 2005) (en banc).

²⁸⁰ See S. EXEC. REP. NO. 102-23, at 27 (1992) (conditioning the Senate's consent on the United States' declaration that the treaty be non-self-executing).

²⁸¹ See *id.* at 6–7.

²⁸² *Id.* at 7.

²⁸³ *Id.* at 7–8.

²⁸⁴ ICCPR, *supra* note 248, art. 25.

²⁸⁵ *Id.* art. 2(1).

²⁸⁶ *Id.* art. 2(2).

these rights have an effective legal remedy, to be determined before competent legal authorities).²⁸⁷

At a minimum, these provisions are the law of the land and can be enforced by competent tribunals of the United States. Thus, remedying Puerto Rico's unequal treatment — a hallmark of all four periods of experimentation I have described — requires no additional experimentation, in the form of “territorial federalism” or otherwise. Rather, it simply requires giving effect to the binding obligations that the United States has assumed.

CONCLUSION

With due respect to those who may think otherwise, enforcement of the law of the land is the only experiment that the citizens of Puerto Rico need and want. “Territorial federalism” without political power is not federalism. It is just another hollow and meaningless name for the same colonial inequality²⁸⁸ to which the inhabitants of Puerto Rico have been subjected since General Miles made his nice speech about the benefits that he brought on behalf of the American people. Territorial federalism is just another example of kicking the same can down the same road.

²⁸⁷ *Id.* art. 2(3).

²⁸⁸ This phenomenon shows no signs of relenting post-Hurricane María. See Kate Aronoff, *Republicans Plan to Turn Puerto Rico into a Theme Park for Fossil-Fuel Corporations*, THE INTERCEPT (Nov. 9, 2017, 11:59 AM), <https://theintercept.com/2017/11/09/puerto-rico-hurricane-fossil-fuels-congress/> [<https://perma.cc/432U-7XGL>]; Editorial, *Congress Should Help Puerto Rico — Not Hurt It*, WASH. POST (Dec. 14, 2017), <https://wapo.st/2j4yG3M> [<https://perma.cc/AXS6-XBGS>]; Eva Lloréns Vélez & Yanira Hernández Cabiya, *Proposed U.S. Tax Reform “Devastating” for Puerto Rico*, CARIBBEAN BUS. (Nov. 10, 2017), <http://caribbeanbusiness.com/proposed-us-tax-reform-devastating-for-puerto-rico/> [<https://perma.cc/SBJ5-5DXW>] (discussing a proposed 20% import tax on goods manufactured in Puerto Rico).

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