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## Outstanding Constitutional and International Law Issues Raised by the United States-Puerto Rico Relationship

Juan R. Torruella<sup>†</sup>

This Article touches upon some issues of fundamental importance to the several million nationally disenfranchised United States citizens that reside in Puerto Rico. I write with a modicum of uneasiness as a result of the uncertain terrain on which the United States-Puerto Rico relationship presently finds itself, firstly, by reason of two cases that are pending resolution by the Supreme Court of the United States—*Puerto Rico v. Sánchez Valle*<sup>1</sup> and the consolidated cases of *Puerto Rico v. Franklin California Tax-Free Trust*<sup>2</sup> and *Acosta-Febo v. Franklin California Tax-Free Trust*<sup>3</sup>—which have already been argued and are awaiting decision, and secondly, because Congress is now considering legislation entitled the “Puerto Rico Oversight, Management, and Economic Stability Act,” referred to by the uncomfortably inapt acronym “PROMESA”—“promise” in Spanish—pursuant to which the Government of Puerto Rico will be placed in virtual trusteeship by the U.S. government.

Each of these cases and this legislation hold the potential to drastically change the U.S.-P.R. scenario depending on which of several paths the Court chooses to take in resolving the basic questions the cases raise, and what it is that Congress

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1. *Puerto Rico v. Sánchez Valle*, 192 D.P.R. 594 (P.R. 2015), *petition for cert. filed*, 2015 WL 4498867 (U.S. July 17, 2015) (No. 15-108).

2. *Acosta-Febo v. Franklin Cal. Tax-Free Trust*, 805 F.3d 322 (1st Cir. 2015), *petition for cert. filed*, 2015 WL 5117977 (U.S. Aug. 21, 2015) (No. 15-233).

3. *Acosta-Febo v. Franklin Cal. Tax-Free Trust*, 805 F.3d 322 (1st Cir. 2015), *petition for cert. filed*, 2015 WL 5117977 (U.S. Aug. 26, 2015) (No. 15-255).

eventually enacts to “assist” the people of Puerto Rico. The final product of the cases could run a gamut of results. What Congress will produce is anyone’s guess, but judging from the so-called “discussion draft” of PROMESA, it does not appear that Puerto Rico is about to be released from the colonial grip of the plenary powers that were authorized by the *Insular Cases*.<sup>4</sup> Rather, it seems that Congress may tighten this grip to a virtual stranglehold. This Article addresses several matters that may serve as background when these cases are decided and Congress passes legislation.

### I. INTRODUCTION: A PRESENTLY PROBLEMATIC STATE OF AFFAIRS

Even as we proceed well into the twenty-first century and this country actively promotes our democracy to the rest of the world, we unfortunately do not always practice what we preach. This is particularly true with reference to the constitutional and political rights of those who reside in our various outlying non-state jurisdictions, in areas which we euphemistically refer to as “territories” or “possessions,” when they are, *de facto* and *de jure*, colonies. There should be no question about this asseveration as regards to American Samoa, Guam, or the U.S. Virgin Islands, for which as recently as January 13th of this year, the United States filed reports as required by Article 73(e) of the United Nations Charter, part of the U.N. Declaration Regarding Non-Self Governing Territories.<sup>5</sup>

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4. See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetz 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. S.S. Co.*, 182 U.S. 392 (1901).

5. “Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end: . . . (e) to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.” U.N. Charter art. 73(e); see U.N. Secretary-General, *Information from Non-Self-Governing Territories Transmitted Under Article 73 e of the Charter of the United Nations: Rep. of the Secretary-General*, ¶ 3, U.N. Doc. A/71/68 (Feb. 1, 2016), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/71/68](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/68).

Although the United States ceased filing these reports for Puerto Rico in 1952 following representations to the United Nations to the effect that Puerto Rico had become a self-governing entity by reason of the establishment of the Commonwealth of Puerto Rico, these avowals did not represent the true legal or constitutional situation when they were made, nor have they become any more true at any time since then to the present.<sup>6</sup> Any doubt as to the veracity of this assertion may be dispelled by consulting the *amicus* brief filed by the Solicitor General on behalf of the United States before the Supreme Court in *Puerto Rico v. Sánchez Valle*, in which the United States argues that the approval of self-government for Puerto Rico in 1952 did not change Puerto Rico's fundamental constitutional status as a U.S. territory subject to the paramount authority of Congress under the Territorial Clause.<sup>7</sup>

A perhaps even more poignant and present example of Congress's colonial control and relationship to Puerto Rico lies with the proposed PROMESA legislation, which, among other things, would establish a so-called "Oversight Board," a non-elected entity of seven members appointed by the President.<sup>8</sup> This Board will have the power to impose a deadline on the Government of Puerto Rico for developing a fiscal plan and budget that meet Congress's criteria—as well as the right to reject Puerto Rico's proposals and substitute its own instead.<sup>9</sup> Puerto Rico will not be represented on the Oversight Board: Unlike the previous version of the legislation, which suggested that at least two of the then-five members of the Board must already live or have a primary place of business in Puerto Rico to be appointed, the version introduced in the House on April 12, 2016 only requires that one member "shall maintain a primary residence . . . or have a primary place of business" in Puerto Rico, leaving open the possibility of filling this slot with anyone willing to move to Puerto Rico to satisfy that criterion.<sup>10</sup>

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6. See JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 133–67 (1985); JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 121–22 (1997); see also Juan R. Torruella, *Hacia dónde vas Puerto Rico?*, 107 *YALE L.J.* 1503, 1514–18 (1998) (reviewing MONGE, *supra*).

7. Brief for the United States as Amicus Curiae Supporting Respondents at 16–19, *Puerto Rico v. Sánchez Valle*, No. 15-108 (Dec. 23, 2015) (citing *Grafton v. United States*, 206 U.S. 333, 354 (1907)).

8. H.R. 4900, 114th Cong. § 101(e)(1) (draft introduced Apr. 12, 2016).

9. *Id.* § 201.

10. *Id.* § 101(e)(2).

Although the Governor is nominally part of the Board, he is only an “ex officio” member without any voting rights.<sup>11</sup> The legislation also gives the Board the prerogative to demand any information and documentation it believes may be relevant from the Government of Puerto Rico<sup>12</sup> and requires the Puerto Rico legislature to submit all acts it passes, along with estimates of their cost, to the Oversight Board for evaluation in short order.<sup>13</sup> If the Board determines that an act is not consistent with the approved fiscal plan, it may unilaterally dictate that the act be changed or simply overrule the Government of Puerto Rico to block its enforcement or application.<sup>14</sup> The Board may also require the Government of Puerto Rico to submit all contracts and leases to the Board for approval.<sup>15</sup> And, of course, Puerto Rico will also have to get the Board’s approval before it can “issue debt or guarantee, exchange, modify, repurchase, redeem, or enter into similar transactions with respect to its debt.”<sup>16</sup>

Of course, this is not PROMESA’s only egregious stipulation. Tucked into the legislation is another provision that is perhaps even more pernicious to Puerto Rico and its people’s future, given the Island’s limited land and natural resources. Section 405 would open up thousands of acres of protected land to private development by permitting the Secretary of the Interior to convey it to Puerto Rico to sell.<sup>17</sup> Even the Secretary of the Interior has condemned this provision.<sup>18</sup>

The PROMESA legislation is just the latest chapter in Puerto Rico’s interminable colonial tutelage. There is more damning evidence throughout history of the United States’ hold over Puerto Rico. Review of this evidence and relationship demonstrates that Puerto Rico’s present woes were not only foreseeable but *inevitable* given the social, economic, and political processes to which Puerto Rico and its inhabitants have been subjected under the sovereignty of the United States.

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11. *Id.* § 101(e)(3).

12. *Id.* § 104(c)(2).

13. *Id.* § 204(a)(1)–(2).

14. *Id.* § 204(a)(5).

15. *Id.* § 204(b)(2).

16. *Id.* § 207.

17. *Id.* § 405.

18. Danica Coto, *US Official Warns Puerto Rico Resources Targeted Amid Crisis*, YAHOO (Apr. 1, 2016), <https://www.yahoo.com/news/us-interior-secretary-visits-puerto-rico-unveil-project-151937605.html>.

## II. THE TRAGIC TRANSITION TO U.S. SOVEREIGNTY AND ITS SEQUELAE

The story of Puerto Rico's present condition begins, in truth, with the Treaty of Paris of 1898, which ended the Spanish-American War. In providing for the cession of Puerto Rico from Spain to the United States, the Treaty stated in Article IX that "[t]he civil rights and political status of the native inhabitants . . . shall be determined by the Congress."<sup>19</sup> This provision was contrary to the unwavering practice and prevalent constitutional law up to then regarding all other territorial acquisitions by the United States. In all prior cases, upon acquiring additional territory, U.S. citizenship and rights were granted to the inhabitants of the newly acquired lands, irrespective of the means used to add those territories to the nation's domain.<sup>20</sup>

The new practice instituted after the Spanish-American War effected not only a departure from past practice by the United States but a retrogression from how things were in Puerto Rico during Spanish rule, under which the Island was a province of Spain (the equivalent of a state under the U.S. form of government), and Puerto Ricans were full Spanish citizens with the right to elect sixteen delegates and three senators to the Spanish *Cortes* (the equivalent of our Congress).<sup>21</sup>

Shortly after his arrival at the head of the invading forces General Miles had proclaimed to the Puerto Rican population that the United States would "promote [their] prosperity and

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

20. For example, after the Mexican-American War, just fifty years before, residents of the newly acquired territory were given the choice between declaring a preference to retain Mexican citizenship and automatically becoming U.S. citizens by staying in the territory for one year. See Treaty of Guadalupe Hidalgo, U.S.-Mex., art. VIII, Feb. 2, 1848, 9 Stat. 922; Mae M. Ngai, *Birth-right Citizenship and the Alien Citizen*, 75 *FORDHAM L. REV.* 2521, 2527 (2007).

21. FERNANDO BAYRÓN TORO, *HISTORIA DE LAS ELECCIONES Y LOS PARTIDOS POLITICOS DE PUERTO RICO* 3 (1977); see 330 *GACETA DE MADRID* Tomo IV 625, 625 (Nov. 26, 1897) (Sp.) (publication of decree providing for Spanish residents of the Antilles the same rights as the inhabitants of the Spanish peninsula); *Real Decreto*, 298 *GACETA DE PUERTO RICO* 2, 2-3 (Dec. 16, 1897) (Sp.) (Title I through IV of decree); *Real Decreto (Continuación)*, 299 *GACETA DE PUERTO RICO* 1, 1-2 (Dec. 17, 1897) (Sp.) (Title V through title VIII); *Real Decreto (Conclusión)*, 300 *GACETA DE PUERTO RICO* 1, 1 (Dec. 18, 1897) (Sp.) (Title IX through end); see also REPORT OF THE TWENTY-SIXTH ANNUAL MEETING OF THE LAKE MOHONK CONFERENCE OF FRIENDS OF THE INDIAN AND OTHER DEPENDENT PEOPLES 176 (1908).

bestow the immunities and blessings of [U.S. enlightenment] and the liberal institutions of our Government.”<sup>22</sup> The United States instead imposed a military regime that abolished all forms of democratic representation in local government. Furthermore, despite Miles’s bombastic promises, the colonial powers negotiated the Treaty of Paris and enacted Article IX without Puerto Rican participation or even consultation. The treaty and its Article IX were announced to Puerto Rico’s inhabitants as a *fait accompli*, in which they were stripped of their Spanish citizenship and rights and required to give allegiance to a new colonial overseer under whom they would be without *any* rights except those that Congress, in which they had no vote, chose to grant in the future. As a matter of American constitutional law, Article IX was clearly unconstitutional, for as Justice Kennedy stated in *Boumediene v. Bush*, “[t]he Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.”<sup>23</sup> It does not take a rocket scientist to conclude that neither the Treaty of Paris nor any treaty can trump, so to speak, the Constitution by granting Congress powers that exceed those allowed by that document.

Unfortunately, however, the negotiation of the Treaty of Paris and its implementation coincided with a period of imperialist euphoria. The dominant political figures in the United States were enthusiastic exponents of the concept of Manifest Destiny, which promoted American exceptionalism and the expectation that the United States, “thanks to the superior qualities of the Anglo-Saxons . . . and to their democratic institutions, would inevitably absorb their neighbours [sic].”<sup>24</sup>

The United States was not writing on a clean slate. What the United States could constitutionally do with territories it acquired had been categorically established by the Supreme Court back in 1856. In the much maligned (for other reasons) *Dred Scott v. Sandford* case, Chief Justice Roger Taney had written:

There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States *or at a distance*, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the ad-

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22. ANNUAL REPORT OF THE MAJOR-GENERAL COMMANDING THE ARMY TO THE SECRETARY OF WAR 31–32 (1898).

23. 553 U.S. 723, 765 (2008).

24. HUGH THOMAS, CUBA, OR THE PURSUIT OF FREEDOM 211 (1971).

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mission of new States . . . [N]o power is given to acquire a Territory to be held and governed permanently [in a colonial] character.<sup>25</sup>

Perhaps equally important, the *Sandford* Court went on to rule that the Territorial Clause in Article IV of the Constitution<sup>26</sup> was not applicable to territories acquired after the U.S.'s independence from Great Britain. Chief Judge Taney held that the Territorial Clause was only relevant to those lands held at the time of the treaty with Great Britain in 1783,<sup>27</sup> namely the Old Northwest Territories,<sup>28</sup> but did not apply to land acquired thereafter. The Court further ruled in 1886, in *Yick Wo v. Hopkins*, that the Fourteenth Amendment guaranteed equal rights to "all persons within the territorial jurisdiction [of the United States], without regard to any differences of race, of color, or of nationality."<sup>29</sup> But these rulings, this vital precedent, would be disregarded.

Historian Rubin Francis Weston cogently describes what actually happened in the political arena of the times in his book, *Racism in U.S. Imperialism*:

Those who advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have to the body politic? Was it to be the relationship of the Reconstruction period, an attempt at political equality for dissimilar races, or was it to be the Southern "counterrevolutionary" point of view which denied the basic American constitutional rights to people of color? The actions of the federal government during the imperial period and the relegation of the Negro to a 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.<sup>30</sup>

The advent of this racially charged imperialistic mania instigated the sharp departure from the past practice to which this Article earlier alluded.

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25. 60 U.S. 393, 446 (1856) (emphasis added).

26. "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state." U.S. CONST. art IV, § 3.

27. See Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

28. 60 U.S. at 446-47; see Northwest Ordinance of 1789, 1 Stat. 50, 51 (1789).

29. 118 U.S. 356, 369 (1886) (emphasis added).

30. RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 15 (1972) (footnotes omitted).

The transition was not without dissent. The 1899 report of the Carroll Commission, appointed by President McKinley to investigate prevailing conditions in Puerto Rico, concluded that there should be “no hesitation in affirming that the people [of Puerto Rico] have good claims to be considered capable of self-government.”<sup>31</sup> Unfortunately, the military governor of Puerto Rico, General Davis, challenged the Commission’s recommendations, stating that “[t]he people [of Puerto Rico] generally have no conception of political rights combined with political responsibilities.”<sup>32</sup>

An acrimonious debate in Congress followed, and that body sided with General Davis. The decision was greatly influenced by considerations of how a progressive resolution of Puerto Rico’s case could affect the companion bill dealing with the Philippines, as to which one senator warned that we should “beware of those mongrels of the East, with breath of pestilence and touch of leprosy.”<sup>33</sup> With this pernicious atmosphere as background, Congress proceeded to enact the Foraker Act of 1900.<sup>34</sup> Through this Act, Congress accomplished its two most pressing goals: creating a colonial apparatus to replace the military regime that had ruled Puerto Rico since its invasion and raising money to fund this new administration.

This statute provided for the establishment of a civil government composed of a presidentially appointed governor, a supreme court, and an upper legislative body, with a lower house elected by the Puerto Ricans.<sup>35</sup> Importantly, it also established a tax on goods imported into Puerto Rico from the mainland United States, the proceeds of which would be used to defray the expenses of the newly established territorial government.<sup>36</sup> Because such a tax was alleged to violate the uniformity provision of the Taxing and Spending Clause of the

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31. HENRY K. CARROLL, REPORT ON THE ISLAND OF PORTO RICO, SPECIAL COMMISSION FOR THE UNITED STATES ON PORTO RICO 56–58 (U.S. GOVERNMENT PRINTING OFFICE 1899).

32. GEORGE W. DAVIS, ANNUAL REPORTS OF THE WAR DEPARTMENT: REPORT OF THE MILITARY GOVERNOR OF PORTO RICO ON CIVIL AFFAIRS, VOL. 1, PT. 13, at 19–20 (U.S. GOVERNMENT PRINTING OFFICE 1900).

33. 33 CONG. REC. 3616 (daily ed. Apr. 2, 1900) (statement of Sen. Bate); *see also id.* at 3613.

34. 31 Stat. 77 (1900) (described as “[a]n Act Temporarily to provide revenues and a civil government for Porto Rico, and for other purposes”).

35. *Id.* at 81–84.

36. *Id.* at 78.

Constitution,<sup>37</sup> it was challenged as unconstitutional, and thus came about the *Insular Cases*,<sup>38</sup> which presented the Supreme Court with the opportunity to define the relationship between the United States and Puerto Rico—and determine Congress’s power over the latter.

The Supreme Court, which was almost to a man the same Court that had validated racial segregation in the South in *Plessy v. Ferguson*,<sup>39</sup> just five years before in 1896, harked the imperialists’ clarion call, and answered with rulings that endorsed their undemocratic ideology and licensed Congress’s efforts to realize its ideals in its governance of the United States’ new colonial empire.

The Supreme Court not only totally ignored the controlling precedent of *Loughborough v. Blake*,<sup>40</sup> decided in 1820, which had unqualifiedly determined that the proscription against non-uniformity in taxation applied to the territories—in that case, the District of Columbia—but, in a perhaps an even more opprobrious action, side-stepped the explicit and unambiguous constitutional precept pronounced by Chief Judge Taney unequivocally prohibiting the establishment or maintenance of colonies by the United States. Instead of following these precedents, the Court gave its benediction to the creation by Congress of an American colonial system under the guise of something invented by the Court out of thin air, the so-called doctrine of territorial incorporation. Pursuant to this theory, the inhabitants of Puerto Rico, as denizens of an “unincorporated territory,” were to be denied all but the most fundamental constitutional protections and Congress was granted almost unlimited plenary powers. The so-called PROMESA congressional proposal is only the latest example of how Congress still exercises these powers over the unincorporated territories and their inhabitants. There have been many other manifestations throughout the 116 years of U.S. colonial rule established by the *Insular Cases*.

Puerto Rico’s status has not changed an iota over this period, nor has that of its citizens. Just five years after Puerto Ri-

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37. That clause concludes, “all Duties, Imposts and Excises shall be uniform throughout the United States.” U.S. CONST. art. I, § 8, cl.1.

38. *See supra* note 4.

39. 163 U.S. 537 (1896).

40. 18 U.S. (5 Wheat.) 317 (1820).

cans were granted U.S. citizenship in 1917,<sup>41</sup> the Supreme Court ruled, quite incredibly, in *Balzac v. Porto Rico*,<sup>42</sup> that all the granting of U.S. citizenship meant for Puerto Ricans was that they could move to the Mainland and there exercise full rights as citizens, but that they were not entitled to the full rights of U.S. citizens while residing in Puerto Rico—such as, in the *Balzac* case, the right to trial by jury.

If another ludicrous example of this proposition is needed, consider the author—a U.S. Court of Appeals judge, sitting on the second-highest court of the United States, voting and deciding cases that have national import—who, because he resides in Puerto Rico, where he was born and has roots, cannot vote for President or Vice President or claim representation in the legislative body that passes the laws that govern and touch every facet of life in Puerto Rico. Forgetting, for a moment, all concepts of equal protection, due process, or even fairness, does this make any sense?

### III. THE COLONIAL CONDITION THAT CAUSED PUERTO RICO'S PRESENT CRISIS

The term “colony” is defined by UNESCO's *Dictionary of the Social Sciences* as “a territory, subordinate in various ways—political, cultural, or economic—to a more developed country [in which] [s]upreme legislative power and much of the administration rest[s] with the controlling country, which [is] usually of a different ethnic group from the colony.”<sup>43</sup> One would have to be seriously impaired in every sense to conclude that this definition does not fit the U.S.-P.R. relationship like a glove.

This irrefutable colonial condition, the direct result of the *Insular Cases* and the regime that they legalized, continues to dictate the fate of the Island and its inhabitants today.<sup>44</sup> Any attempt to divest or bypass this denigrating status as the cause for its present predicament is at best delusive. It is the fore-runner, underlying cause, and current catalyst of the economic debacle in which Puerto Rico finds itself, for it has enabled, if not promoted, significant and ongoing economic exploitation by

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41. Jones Act (Puerto Rico), Pub. L. No. 64-368, ch. 145, § 5, 39 Stat. 951, 951-52 (1917) (codified as amended at 48 U.S.C. § 737 (1994)).

42. 258 U.S. 298 (1922).

43. A DICTIONARY OF THE SOCIAL SCIENCES 102 (Julius Gould & William Kolb eds., 1964).

44. See generally MONGE, *supra* note 6.

American capital to the detriment of Puerto Rico and its citizens—since day one.

The years between 1900 and 1945 may be referred to as the crypto-plantation period. Prior to that, towards the end of the Spanish regime, coffee had been Puerto Rico's principal crop. Coffee acreage was twice that planted with sugar cane, more than ninety percent of farms were worked by those who owned them, and these farms averaged five acres in size.<sup>45</sup> Then, by 1900, Puerto Rico became one huge sugar plantation, mostly exploited by mega-enterprises from the Mainland, the largest of which were based in Massachusetts, New Jersey, and New York.<sup>46</sup> Sugar cane acreage almost tripled from what it was in 1896,<sup>47</sup> and, by 1917, a relatively small number of individuals, partnerships, and corporations owned almost all of the arable lowland of Puerto Rico.<sup>48</sup> The Island's economy and population became totally dependent on that one crop, with the raw sugar cane being turned into molasses and shipped in bulk to the Mainland for refinement into table sugar.<sup>49</sup>

These sugar giants produced dividends as high as 115% on investment,<sup>50</sup> with the four largest boasting an average return on investment between 1923 and 1930 of 22.5%.<sup>51</sup> Three of these sugar growers distributed more than \$60 million in dividends to their stockholders between 1920 and 1935—more than \$1 billion in today's dollars.<sup>52</sup> The vast majority of the earnings produced from the work of the local labor left Puerto Rico, never to be seen again.

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45. See DEPT. OF AGRICULTURE AND COMMERCE, SAN JUAN, ANNUAL BOOK ON STATISTICS OF PUERTO RICO, FISCAL YEAR 1947–48, at 282 tbl.139 (1948); see also ARTURO MORALES CARRIÓN, PUERTO RICO: A POLITICAL AND CULTURAL HISTORY 137 (1983).

46. See MORALES CARRIÓN, *supra* note 45, at 174. The Central Aguirre Sugar Company, a Massachusetts trust, was at times the largest sugar company in the world. That connection to Massachusetts is most likely the reason why Puerto Rico was placed in the First Circuit.

47. *Id.* at 217.

48. *Id.* at 216–17; see also BAILEY W. DIFFIE & JUSTINE WHITFIELD DIFFIE, PORTO RICO: A BROKEN PLEDGE 46–50 (1931); Judd Polk, *The Plight of Puerto Rico*, 57 POL. SCI. Q. 481, 482–503 (1942).

49. The various Sugar Acts, among other things, assigned production quotas to various sugar-producing areas with which Puerto Rico was unable to compete economically.

50. MORALES CARRIÓN, *supra* note 45, at 217.

51. JAMES L. DIETZ, ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT 110 (1986).

52. *Id.*

The crypto-plantation period created a large landless population, which lived below the poverty level, barely above subsistence requirements. The rural population was eighty percent landless.<sup>53</sup> Although between 1915 and 1925 wages in the sugar industry went up from 60 cents per day to \$1.00 per day, the cost of a minimum family diet in the sugar producing areas was 55.5 cents per day.<sup>54</sup>

The Puerto Rican sugar industry, despite paying its work force miserably low wages, could not compete with other sugar-producing areas without substantial assistance from the federal government. This sugar-related dependence on federal aid was the beginning of a pattern of reliance on federal crutches of various kinds that increased exponentially, becoming a “permanent” feature of the Puerto Rican economy and eventually contributing to its collapse.

In 1930, the annual per capita income in Puerto Rico was one-fifth that of the Mainland, just \$122.<sup>55</sup> Over the next three years, it shrank to just \$85 as a result of the Great Depression.<sup>56</sup> In the face of near-famine conditions, and with agricultural work limited to only part of the year,<sup>57</sup> the landless rural population flocked to the cities, particularly to San Juan.<sup>58</sup> Huge slums emerged, with as many as 100,000 people living in dismal conditions,<sup>59</sup> totally overpowering the ability of local government to provide aid or respite. As described by one Stateside observer:

I saw, in short, misery, disease, squalor, filth. It would be lamentable enough to see this anywhere . . . . But to see it on American territory, among people whom the United States has governed since 1898, in a region for which our federal responsibility has been complete for 43

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53. MORALES CARRIÓN, *supra* note 45, at 243. The rural population constituted nearly seventy percent of Puerto Rico’s population of almost 1,900,000 at the time. *Id.*

54. SAKARI SARIOLA, *THE PUERTO RICAN DILEMMA* 92 (1979). The average male worker in the United States earned approximately \$1.88 per day in 1915. *The Life of American Workers in 1915*, BUREAU LABOR STATISTICS (Feb. 2016), [http://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm#\\_ednref81](http://www.bls.gov/opub/mlr/2016/article/the-life-of-american-workers-in-1915.htm#_ednref81).

55. MORALES CARRIÓN, *supra* note 45, at 243.

56. *Id.*

57. The field workers, who constituted the great majority of those employed in the sugar industry, could only find work during the four or five months of the year that the harvesting of sugar cane took place.

58. Marjorie Ruth Clark, *Our Own Puerto Rico*, 4 ANTIOCH REV. 383, 389 (1944).

59. *Id.*

years, is a paralyzing jolt to anyone who believes in American standards of progress and civilization.<sup>60</sup>

Food for thought, given the present circumstances.

From 1898 to 1933, the United States spent less than three-quarters of a million dollars in Puerto Rico per year.<sup>61</sup> Over the same period, American private enterprise converted Puerto Rico into a captive market. By 1910, nearly all of Puerto Rico's exports went to the Mainland,<sup>62</sup> a pattern that has hardly changed to this day.<sup>63</sup> By the 1940s, Puerto Rico would be one of the United States' top customers as well as one of its top suppliers of raw goods.<sup>64</sup> The sugar-era pattern persisted, with raw-materials exports produced by the colony exchanged for finished-goods imports from the metropolis, promoting an increasingly negative balance of payments against the colonial side.<sup>65</sup>

As if that were not enough, the Merchant Marine Act of 1920, also called the Jones Act,<sup>66</sup> requires all maritime cargo transported between the Island and the Mainland to be carried on U.S.-built ships, manned by U.S. crews, both of which are the most expensive in the maritime field.<sup>67</sup> This, of course, results in raising the cost of everything shipped to and from Puerto Rico, including food stuffs and other essentials, and places goods produced in Puerto Rico at a competitive disadvantage.<sup>68</sup> To this day, it costs twice as much to ship goods from

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60. JOHN GUNTHER, *INSIDE LATIN AMERICA* 423 (1941).

61. Clark, *supra* note 58, at 388.

62. MORALES CARRIÓN, *supra* note 45, at 173.

63. *Puerto Rico Trade, Exports and Imports*, ECONOMY WATCH (Mar. 30, 2010), [http://www.economywatch.com/world\\_economy/puerto-rico/export-import.html](http://www.economywatch.com/world_economy/puerto-rico/export-import.html).

64. Polk, *supra* note 48, at 485.

65. *Id.* at 490.

66. Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, 999 (1920) (codified as amended at 46 U.S.C. §§ 55101–55122).

67. See U.S. DEP'T OF TRANSP. MAR. ADMIN., *COMPARISON OF U.S. AND FOREIGN-FLAG OPERATING COSTS* (2011) (examining reasons for significantly higher operating costs of U.S.-flag vessels and comparing costs with those of foreign-flag vessels); cf. U.S. GOV'T ACCOUNTABILITY OFFICE, *CHARACTERISTICS OF THE ISLAND'S MARITIME TRADE AND POTENTIAL EFFECTS OF MODIFYING THE JONES ACT* 28–29 (2013), <http://www.gao.gov/assets/660/653046.pdf> (acknowledging the Jones Act “may result in higher freight rates” but claiming “it is not possible to measure the extent to which rates in this trade are higher than they otherwise would be” and concluding “the law has helped to ensure reliable, regular service . . . important to the Puerto Rican economy”).

68. Rory Carroll, *The US Shipping Industry Is Putting a Multimillion Dollar Squeeze on Puerto Rico*, REUTERS (July 9, 2015), <http://www>

the East Coast to Puerto Rico as it does to send them to the Dominican Republic or Jamaica.<sup>69</sup>

The arrival of the New Deal to Puerto Rico, and, shortly thereafter, the entry of the United States into World War II, brought some respite to this stricken land.<sup>70</sup> Sugarcane workers' wages doubled from 1940 to 1945, to a whopping thirty cents an hour,<sup>71</sup> and unemployment fell from eighteen percent in 1940 to thirteen percent by 1950.<sup>72</sup> This decrease in unemployment was the result of direct expenditures by the federal government of more than \$257 million from 1933 to 1942,<sup>73</sup> an apparent change in policy brought about by the anticipation of World War II and the need to fortify Puerto Rico to protect the southern flank of the United States and approaches to the Panama Canal.

Puerto Rico became a virtual military camp. The military expropriated vast tracks of land and eventually occupied fourteen percent of the total land area of Puerto Rico, the greatest proportion of land occupied by the military in any U.S. jurisdiction.<sup>74</sup> Many military bases were located on prime agricultural and touristic locales. On two off-shore civilian-inhabited Island-municipalities, Vieques and Culebra, the U.S. Navy conducted air and naval bombardments as well as amphibious operations for the next sixty years, notwithstanding decades of opposition by successive local administrations. In 1999, when this opposition erupted into massive civic protests after a civilian was killed by one of the bombing sorties, the Navy finally discontinued their bombing operations—but retaliated against the local population by closing down all of its bases in Puerto Rico overnight, greatly disrupting the Island's economy.<sup>75</sup> To this day,

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.businessinsider.com/r-us-shippers-push-back-in-battle-over-puerto-rico-import-costs-2015-7.

69. FED. RESERVE BANK OF NEW YORK, REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY 13 (2012).

70. See REXFORD GUY TUGWELL, THE STRICKEN LAND: THE STORY OF PUERTO RICO (1968).

71. TORRUELLA, *supra* note 6, at 237 tbl.23.

72. *Id.* at 244 tbl.27.

73. *Id.* at 239; see National Industrial Recovery Act, Pub. L. No. 73-67, 48 Stat. 195 (1933) (previously codified as amended at 15 U.S.C. §§ 703–712 (2012)), *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

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

75. *Puerto Rico Braces for the Base Closing*, WASH. TIMES (Apr. 1, 2004), <http://www.washingtontimes.com/news/2004/apr/1/20040401-123456-9250r>.

the U.S. government refuses to adequately clean up or compensate residents for the environmental, ecological, and health damages inflicted by the military operations.<sup>76</sup> As legal actions proved unsuccessful, the residents have been left with no recourse but to petition Congress for relief—a course unlikely to yield results, to put it politely.<sup>77</sup>

The end of the Second World War and the creation of United Nations, with its purported anti-colonial stance codified in its Charter,<sup>78</sup> opened up new prospects for many colonized peoples. The United States, being a principal sponsor of the United Nations and of decolonization by Great Britain and France, was forced to publicly reevaluate its relationship with Puerto Rico and its U.S. citizen inhabitants. Congress took a strategic step in that direction in 1950 by enacting Public Law 600, which authorized Puerto Ricans to draft their own local constitution subject to congressional approval.<sup>79</sup> Congress subsequently approved, after some edits, a Puerto Rican constitution that afforded a limited measure of self-government,<sup>80</sup> which included the right to elect a governor and legislature, as well as to appoint local government officials, including judges.

What followed was a rush to the United Nations by the United States to seek a dispensation for Puerto Rico from U.N. reporting requirements imposed on those countries with non-self-governing territories. This was accomplished by much chicanery and arm-twisting by the representatives of the United States, in collusion with some leading Puerto Rican politicians,<sup>81</sup> a feat described by some, accurately, as “a monumental hoax.”<sup>82</sup> For although these actions resulted in the removal of

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76. COUNCIL ON HEMISPHERIC AFFAIRS, CLEARING OUT WITHOUT CLEANING UP: THE U.S. AND VIEQUES ISLAND (May 19, 2011), <http://www.coha.org/clearing-out-without-cleaning-up-the-u-s-and-vieques-island>.

77. See *Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006).

78. See U.N. Charter art. 73.

79. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (codified at 48 U.S.C. § 731b (1994)).

80. Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327.

81. See TORRUELLA, *supra* note 6, at 160–67.

82. *El Gobernador pide a Rice que enmiende el informe sobre el estatus político de P.Rico*, YAHOO NEWS (Nov. 19, 2007, 12:01 PM), <http://web.archive.org/web/20080110063744/http://espanol.news.yahoo.com/s/19112007/54/eeuu-gobernador-pide-rice-enmiende-informe-estatus-pol-tico-p.html> (“Acevedo Vilá aseguró que si Rice no enmienda esas conclusiones ‘debe notificar a las Naciones Unidas que Estados Unidos le mintió o ignoró la relación de Estado Libre Asociado que fue instituida en el 1953’, lo que ‘ha perpetuado un engaño

Puerto Rico from the U.N. colonial list, Public Law 600 was, at best, a cosmetic measure. We citizens of Puerto Rico continue to be disenfranchised nationally, unable to vote for the President or Vice President, or to be represented in Congress by voting representatives and senators, and thus have no say regarding the laws that apply to us.

At about the time Public Law 600 was being enacted, the sugar industry finally died in Puerto Rico, a victim of the increased costs of production and competition from other sugar-producing areas.<sup>83</sup> This formed the impetus behind "Operation Bootstrap," a joint project of the federal and Puerto Rico governments designed to create a new industrial base for the Island.<sup>84</sup> As a result of this program, Puerto Rico's industrial base grew exponentially over the next forty years.

Between 1960 and 1976, direct U.S. investment in Puerto Rico skyrocketed, and Puerto Rico accounted for forty percent of all profits by U.S. companies in Latin America.<sup>85</sup> This bonanza was facilitated by special federal and Puerto Rico tax provisions that partially or completely exempted U.S. corporations operating in Puerto Rico from taxation.<sup>86</sup> It would be further fueled by Section 936 of the Internal Revenue Code,<sup>87</sup> passed in 1976, which, with the explicit aim of creating jobs in Puerto Rico and other territories, extended even greater tax incentives to U.S. corporations that could show the vast majority of their income was derived from sources in a "possession."<sup>88</sup> By 1977 several major multinational corporations were reporting that more than a quarter of their worldwide profits came from their Puerto Rico operations.<sup>89</sup> Chemical and pharmaceutical companies benefited most from the Section 936 shelter: Johnson & Johnson, Smith-Kline, Merck, and Bristol-Myers alone saved billions in taxes between 1980 and 1990.<sup>90</sup>

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monumental' en los boricuas, los estadounidenses y la comunidad internacional.").

83. See MORALES CARRIÓN, *supra* note 45, at 243–44.

84. *Id.* at 269–70, 286; see also TORRUELLA, *supra* note 6, at 240–41.

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

86. U.S. GEN. ACCOUNTING OFFICE, TAX POLICY: PUERTO RICO AND THE SECTION 936 TAX CREDIT 2–3 (1993) [hereinafter PUERTO RICO AND SECTION 936].

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

88. PUERTO RICO AND SECTION 936, *supra* note 86.

89. PANTOJAS-GARCÍA, *supra* note 85, at 153.

90. See Kelly Richmond, *Drug Companies Fear Loss of Tax Exemption*, N.J. RECORD, Nov. 8, 1993 (on file with *Minnesota Law Review*).

But these halcyon days would come to an end as a result of corporate greed. Firms with high research, development, and marketing expenses but low production costs transferred their production, patents, and trademarks to subsidiaries in Puerto Rico to shield all revenue produced by these products from federal income taxes.<sup>91</sup> Although these manipulations turned Puerto Rico into U.S. capital's number-one profit center in the world, they also cost the federal government nearly \$3 billion in lost tax revenues per year some years.<sup>92</sup> Of course, as in the case of the sugar industry, little if any of the Section 936 industries' profit remained on the Island.

In large part as a result of the Section 936 corporations' abuse of the exemption, Congress decided to do something about Section 936 in 1996.<sup>93</sup> Unfortunately, instead of closing the loophole, Congress eliminated the provision altogether. This resulted in most Section 936 companies relocating to tax-free areas such as Ireland and NAFTA-favored countries, such as Mexico. The corporations took the jobs they had created—the real reason for the enactment of Section 936 in the first place—and any chance that Puerto Rico would recover from the economic havoc wrought by the sugar industry with them, leaving thousands out of work and plunging Puerto Rico's economy into a downward spiral.

#### IV. THE CONTEMPORARY CONSEQUENCES OF COLONIALISM IN PUERTO RICO

In the throes of its so-called "death spiral," Puerto Rico's present economy has become even more dependent on U.S. transfers. The Island receives approximately \$16 billion annually in U.S. government subsidies and assistance.<sup>94</sup> But the balance of trade between Puerto Rico and the Mainland remains the same: About ninety percent of Puerto Rico exports go to the United States, and the Mainland is in turn responsible for a similar proportion of imports.<sup>95</sup> The totality of this sequence of

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91. See PUERTO RICO AND SECTION 936, *supra* note 86, at 3.

92. See U.S. GEN. ACCOUNTING OFFICE, PHARMACEUTICAL INDUSTRY TAX BENEFITS OF OPERATING IN PUERTO RICO 14 (1992).

93. See Milo Peck & Helen W. Johns, *The Death of Section 936: Closing a Loophole or Poor Policy?*, 22 INT'L TAX J. 1 (1996); Angel L. Ruiz 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, 4–10.

94. COMMONWEALTH OF PUERTO RICO, FINANCIAL INFORMATION AND OPERATING DATA REPORT 18 (2013).

95. See GONZÁLEZ, *supra* note 74, at 85, Robert Z. Lawrence & Juan Lara,

events, commencing with the sugar economy era to the present, and current state of affairs render Puerto Rico—which has contributed more wealth to the United States than any country in history and is one of the largest captive markets of U.S. goods—a conduit for the federal government to subsidize U.S. industry, as subsidies to the Island are inevitably repatriated when Puerto Ricans buy Mainland-made products with these funds. In view of this fact of U.S. economic life, it is particularly ironic that Congress discriminates against Puerto Rico and its citizens in the parceling out of these monies.

The discriminatory imbalance in subsidies to Puerto Rico's U.S. citizens versus their Mainland counterparts is longstanding and, unfortunately, judicially sanctioned.<sup>96</sup> The Supreme Court has justified Congress's discriminatory treatment of the U.S. residents of Puerto Rico in two cases—*Harris v. Rosario*<sup>97</sup> and *Califano v. Torres*<sup>98</sup>—by reasoning that “greater benefits could disrupt the Puerto Rican economy!”<sup>99</sup> This is a conclusion that Justice Marshall understandably rejected as tantamount to saying that Congress meant to help the poorest the least and to keep Puerto Rico at a disadvantage.<sup>100</sup>

Even today, Puerto Rico receives only a fraction of the federal support extended to Mainland counterparts.<sup>101</sup> For example, Puerto Rico receives little more than a tenth of the amount of Medicaid funding that is sent to wealthier states with similar or smaller populations.<sup>102</sup> And in Puerto Rico, Medicare reimbursement rates are just sixty percent of Mainland rates; the same is true of Medicare Advantage.<sup>103</sup> Overall, annual per enrollee spending on Medicare and Medicaid in Puerto Rico is the

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*Trade Performance and Industrial Policy, in* THE ECONOMY OF PUERTO RICO: RESTORING GROWTH 507, 528–31 (Susan M. Collins et al. eds., 2006).

96. See 42 U.S.C. §§ 1308(a)(1), 1396d(b) (2012); 42 U.S.C. § 601 (2012) (aid to families with dependent children); 42 U.S.C. §§ 301–306 (2012) (benefits programs for the aged); 42 U.S.C. §§ 1201–1206 (2012) (for the blind); 42 U.S.C. §§ 1351–1355 (2012) (for the disabled); 42 U.S.C. § 1381 (2012) (Supplemental Social Security program for the aged, blind, and disabled).

97. 446 U.S. 651 (1980) (per curiam).

98. 435 U.S. 1 (1978) (per curiam).

99. 446 U.S. at 652.

100. *Id.* at 655–56 (Marshall, J., dissenting).

101. See Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html>.

102. *Id.*

103. *Id.*

lowest in the United States.<sup>104</sup> This situation is a major component of Puerto Rico's financial woes, as the local government is forced to cover Puerto Rico's health care funding shortfalls to provide even minimal health benefits to its population.

Prospects for climbing out of this economic hole are dim. Each day in Puerto Rico, eleven people or families lose their homes because of inability to meet their mortgage payments.<sup>105</sup> Almost half of the population lives below the poverty level, as compared to 15.5% nationally or 11% in Connecticut and 17% in Oklahoma,<sup>106</sup> states that receive \$56 and \$38 billion respectively in annual subsidies as compared to Puerto Rico's \$21 billion despite comparable populations.<sup>107</sup> To this should be added that the median household income in Puerto Rico is less than \$19,000, as compared to \$70,000 and \$48,000 in Connecticut and Oklahoma, respectively,<sup>108</sup> and does not go nearly as far as income on the Mainland, given the many factors that raise the cost of living in Puerto Rico above that in those states.

As previously explained, historically and presently, the basic fundamental problem of the Puerto Rican economy has always been that it is an economy that generates a significant amount of wealth, but retains little of it, a typical colonial circumstance.<sup>109</sup> Puerto Rico's principal industries—chemical,

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104. Maria Levis, *The Price of Inequality for Puerto Rico*, HEALTH AFFAIRS BLOG (Dec. 29, 2015), <http://healthaffairs.org/blog/2015/12/29/the-price-of-inequality-for-puerto-rico>.

105. *11 Puerto Ricans Per Day Lose Their Homes for Defaulting on Their Mortgages*, FOX NEWS LATINO (Feb. 17, 2016), <http://latino/foxnews.com/latino/news>.

106. *Poverty Status in the Past 12 Months*, U.S. CENSUS BUREAU (2014) [hereinafter *Poverty Status*], [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_5YR\\_S1701&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_5YR_S1701&prodType=table) (under "Add/Remove Geographies," select "State" then select "All States within the United States and Puerto Rico").

107. U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT FOR FISCAL YEAR 2010, at 1 tbl.1 (2011), <https://www.census.gov/prod/2011pubs/cfr-10.pdf>.

108. *Median Household Income (in 2014 Inflation-Adjusted Dollars)*, U.S. CENSUS BUREAU (2014), [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_14\\_1YR\\_R1901.US01PRF&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_R1901.US01PRF&prodType=table).

109. See FED. RESERVE BANK OF NEW YORK, *supra* note 69, at 4 ("In analyzing the Puerto Rican economy, we keep in mind one of its unique features: a substantial share of production is carried out by U.S. multinational corporations that took advantage of the sizable federal income tax benefits available to firms located on the Island. The repatriation of the profits of these corporations to their parent firms on the U.S. mainland, in addition to a shifting of

pharmaceutical, electronic, and scientific equipment manufacturing—are all dominated and driven by U.S.-based multinational corporations, whose net profits from their Puerto Rico operations surpassed \$14 billion in 1995 alone.<sup>110</sup> It is the same story when it comes to tourism, Puerto Rico's second-biggest industry, which employs nine percent of the work force, with almost all hotels owned or controlled by stateside capital.<sup>111</sup> Altogether, nearly four out of every ten dollars produced by Puerto Rican workers ends up in the coffers of a U.S. firm.<sup>112</sup>

Added to this is an astonishing unemployment rate: Now almost twelve percent,<sup>113</sup> it has in the last ten years crept close to seventeen percent and never gone lower than ten percent.<sup>114</sup> Puerto Rican unemployment remains five percent higher than that of any U.S. state,<sup>115</sup> or even Detroit, which recently filed for bankruptcy under the sections of the Bankruptcy Code denied to Puerto Rico.<sup>116</sup> It is as a result of these forces and phenomena that nearly half of Puerto Ricans live below the U.S. poverty level.<sup>117</sup> And it is as a result of endemic poverty and unemployment that several waves of Puerto Ricans have migrated to other parts of the United States.<sup>118</sup> The Island is experiencing

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income by these U.S. corporations, leads to an overstatement of the amount of income accruing to residents of Puerto Rico.”)

110. CARIBBEAN BUSINESS, THE PUERTO RICO INVESTOR'S GUIDE TO GOVERNMENT RESOURCES 5, 20–21 (2007).

111. See *id.*; FED. RESERVE BANK OF NEW YORK, *supra* note 69, at 4.

112. See GOBIERNO DE PUERTO RICO OFICINA DEL GOBERNADOR JUNTA DE PLANIFICACIÓN, *Impacto del Sector Externo en la Economía de Puerto Rico*, in INFORME ECONOMICO AL GOBERNADOR 1995, at 12 (1996), [http://gis.jp.pr.gov/Externo\\_Econ/Informes%20Econ%C3%B3micos%20al%20Gobernador/Informe%20Econ%C3%B3mico%20al%20Gobernador%201995.pdf](http://gis.jp.pr.gov/Externo_Econ/Informes%20Econ%C3%B3micos%20al%20Gobernador/Informe%20Econ%C3%B3mico%20al%20Gobernador%201995.pdf).

113. *Economy at a Glance: Puerto Rico*, BUREAU LABOR STATISTICS, <http://www.bls.gov/eag/eag.pr.htm> (data extracted May 20, 2016) (showing the unemployment rate for March 2016 is 11.8%).

114. *Local Area Unemployment Statistics: Puerto Rico, Databases, Tables & Calculators by Subject*, BUREAU LABOR STATISTICS, [http://data.bls.gov/timeseries/LASST72000000000003?data\\_tool=XGtable](http://data.bls.gov/timeseries/LASST72000000000003?data_tool=XGtable) (data extracted May 24, 2016).

115. See *Unemployment Rates for States*, BUREAU LABOR STATISTICS, <http://www.bls.gov/web/laus/laumstrk.htm> (noting Alaska and Illinois with unemployment rates of 6.6%) (last modified May 20, 2016).

116. See *Economy at a Glance: Detroit-Livonia-Dearborn, MI*, BUREAU LABOR STATISTICS, [http://www.bls.gov/eag/eag.mi\\_detroit\\_md.htm](http://www.bls.gov/eag/eag.mi_detroit_md.htm) (data extracted May 18, 2016) (noting an unemployment rate of 6.4%).

117. See *Poverty Status*, *supra* note 106.

118. See generally THE PUERTO RICAN DIASPORA: HISTORICAL PERSPECTIVES (Carmen Teresa Whalen & Victor Vázquez-Hernández, eds., 2005). The first wave left shortly after the change in sovereignty; the second departed af-

one such wave now: since 2010, more than 251,000 Puerto Ricans have left the Island.<sup>119</sup> Today, more Puerto Ricans reside throughout the fifty states than in Puerto Rico.<sup>120</sup>

Given this background, it was inevitable that Puerto Rico would eventually face a grave fiscal crisis, one principally caused and perpetuated by its politically castrated condition. The crypto-plantation era left Puerto Rico and its population in an economically depressed state. Congress's repeal of Section 936, without providing any alternative to mitigate the resultant tremendous job losses, cut short the Island's economic recovery; the Mainland economic recession devastated Puerto Rico's already fragile colonially-dependent economy; and finally, the massive exodus of Puerto Ricans seeking work elsewhere, a large number of whom were highly skilled and productive, vastly reduced the Island's tax base and decreased revenues. Altogether, these events had a negative, multiplying effect which demolished the economic base of Puerto Rico and its government.

Unsurprisingly, Puerto Rico was left in the lurch by those who previously profited from the good times of the 1960s, 1970s, and 1980s. Although neither Puerto Rico nor any of its instrumentalities had ever defaulted on any debt obligations,<sup>121</sup> several of the rating entities, led by Moody's, progressively degraded Puerto Rico bonds for the first time in their history in anticipation of a default.<sup>122</sup> This had a snowball effect, triggering acceleration clauses, increasing the interest rates at which the government can borrow money, reducing access to capital markets, and further limiting the liquidity and financial flexibility of these entities. The events that have followed are mat-

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ter the Second World War and the demise of the sugar industry. We are seeing the third wave today.

119. *Estimates of the Components of Resident Population Change: April 1, 2010 to July 1, 2015*, U.S. CENSUS BUREAU, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP\\_2015\\_PEPTCOMP&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2015_PEPTCOMP&prodType=table) (data extracted May 26, 2016).

120. Jens Manuel Krogstad, *Puerto Ricans Leave in Record Numbers for Mainland U.S.*, PEW RESEARCH CTR. (Oct. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/10/14/puerto-ricans-leave-in-record-numbers-for-mainland-u-s>.

121. Patrick Gillespie, *Puerto Rico Just Defaulted for the First Time*, CNN MONEY (Aug. 3, 2015), <http://www.money.cnn.com/2015/08/03/investing/puerto-rico-default>.

122. *S&P Downgrades Puerto Rico Debt to 'CCC+' from 'B,'* REUTERS (Apr. 24, 2015, 9:25 PM EDT), <http://www.reuters.com/article/usa-puertorico-sp-idUSL1N0XM01120150425>.

ters of public knowledge and need not be repeated in any detail here.

The undeniable underlying fact and cause of the Island's dilemma is that there is an unquestionable democratic deficit in the U.S.-P.R. relationship: This deficit simply cannot be seriously questioned in 2016, particularly since a majority of the Puerto Rican electorate expressly rejected the present status in the 2012 plebiscite.<sup>123</sup>

#### V. CONCLUSION: THE CASE FOR AN END TO COLONIALISM IN PUERTO RICO

Beyond the patently unconstitutional nature of this colonial regime, numerous international agreements that the United States has entered into require it to take specific actions to end this denigrating colonial relationship and grant political equality to all of its citizens. Leading this body of treaty law<sup>124</sup> is the International Covenant on Civil and Political Rights (ICCPR),<sup>125</sup> an international agreement which had been ratified by 104 nations by the time the United States Senate followed suit on April 12, 1992.<sup>126</sup> In unambiguous language the United States agreed that “[a]ll peoples have the right to self-determination,” and that “[b]y virtue of that right they freely determine their political status.”<sup>127</sup> It also pledged that all citizens “shall have” the right to vote<sup>128</sup> and consented to the adoption of whatever laws or measures could be required to guarantee that right, and all others in the ICCPR.<sup>129</sup>

123. *Condición Política Territorial Actual: Resumen*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, [http://64.185.222.182/REYDI\\_NocheDelEvento12/index.html#es/default/CONDICION\\_POLITICA\\_TERRITORIAL\\_ACTUAL\\_ISLA.xml](http://64.185.222.182/REYDI_NocheDelEvento12/index.html#es/default/CONDICION_POLITICA_TERRITORIAL_ACTUAL_ISLA.xml) (last updated Nov. 16, 2012); *Opciones No Territoriales: Resumen*, COMISIÓN ESTATAL DE ELECCIONES DE PUERTO RICO, [http://64.185.222.182/REYDI\\_NocheDelEvento12/index.html#es/default/OPCIONES\\_NO\\_TERRITORIALES\\_ISLA.xml](http://64.185.222.182/REYDI_NocheDelEvento12/index.html#es/default/OPCIONES_NO_TERRITORIALES_ISLA.xml) (last updated Nov. 16, 2012).

124. Others include the Universal Declaration of Human Rights, G.A. Res. 217 (III) A (Dec. 12, 1948); Organization of American States [OAS], *American Declaration of Human Rights and Duties of Man*, OAS Res. XXX (1948); OAS, *Inter-American Democratic Charter*, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (2001).

125. See International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

126. See 138 CONG. REC. S4781, S4783 (1992).

127. ICCPR, *supra* note 125, at art. 1, cl. 1.

128. *Id.* at art. 25.

129. *Id.* at art. 2, cl. 2.

The United States has not only failed to comply with these clear treaty obligations, but it has actively opposed in the courts any attempt to secure domestic implementation of its provisions. We have the most notorious example of this in *Igartúa-de la Rosa v. United States*,<sup>130</sup> in which the First Circuit ruled that the ICCPR's language does not establish that the treaty is "self-executing" and thus that these rights are not enforceable in the absence of domestic legislation to that effect. This is a totally erroneous conclusion, for many reasons that would require too much time to explain on this occasion.<sup>131</sup> Suffice it to say for present purposes that this is a conclusion that runs in direct contravention to the Senate's acknowledgment at the time of its ratification of the ICCPR that the federal government was, by virtue of the ratification, bound to enforce the treaty.<sup>132</sup> It is difficult to understand how a court could conclude that the ICCPR, replete with "shall" language, is not binding and self-executing. Puerto Rico's colonial relationship with the United States violates not only our constitutional law, but also multiple international treaties that are now, by the Senate's own action, U.S. law.<sup>133</sup>

Although the Puerto Rico political establishment undoubtedly bears at least some part of the blame for the present fiasco, this Article does not digress to discuss its role because, first of all, such an incursion would entail a discussion without any foreseeable end or productive result and second, more importantly, because in the end, if an end could be reached, the answer would be, once again, that any role played by the establishment is attributable to, and dwarfed by, the principal underlying cause of Puerto Rico's problems: its colonial condition. While Puerto Rico's political entities have necessarily played a role, theirs has not only been a limited, parochial one, but, most importantly, not a decisive one. Any distraction from that ultimate truth, that our colonial condition is the primary cause of the debacle we now face, detracts from efforts to find a solution.

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130. 417 F.3d 145 (1st Cir. 2005).

131. *See id.* at 173–75 (Torruella, J., dissenting).

132. "[T]he United States understands that this Covenant *shall be implemented by the Federal Government.*" 138 CONG. REC. S4781, S4784 (1992) (emphasis added).

133. "[A]ll Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 1, cl. 2.

There is also little doubt as to the appropriate path to ending Puerto Rico's perennial colonialism. At the risk of oversimplifying a problem that is hardly simple or easy to solve, I venture to suggest that what we have here is a massive civil rights issue, which can only be ameliorated by adopting a civil rights agenda, and by engaging in the types of actions that have proven effective in promoting civil rights. We need not reinvent the wheel. There are plenty of successes from which to draw examples and inspiration. It is high time that Puerto Ricans unite their efforts along this front. Such a movement is, if anything, past due.

I conclude with one final observation: If history teaches us anything, it is that extreme actions provoke extreme responses. Any creature, backed into a corner, will defend itself. If Congress continues on its present path, if PROMESA is any reflection of Congress's intentions with respect to Puerto Rico, legislators should beware that their abusive actions do not trigger, more than simply civil disobedience or resistance, radicalization and outright violence of the type that Puerto Rico saw in the 1930s, 1940s, and 1950s. There are murmurs and stirrings already. We must hope that Congress and others in high places take note and consider the potentially explosive consequences of what Congress is PROMESA-ing to Puerto Rico and its U.S. citizen population, which is, even in the context of a relationship as exploitative as that of the United States with regard to Puerto Rico, nothing short of shocking.