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Ruling America's Colonies: The Insular Cases

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YALE LAW & POLICY REVIEW

Ruling America's Colonies: The *Insular Cases*

Juan R. Torruella*

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INTRODUCTION

A colony is “a territory, subordinate in various ways—political, cultural, or economic—to a more developed country. Supreme legislative power and much of the administration rest[s] with the controlling country, which [is] usually of a different ethnic group from the colony.”¹ That the relationship between the United States and Puerto Rico falls squarely within this definition—and is thus a colonial one—cannot seriously be questioned.²

This Article will discuss and analyze the constitutional validity of the United States-Puerto Rico colonial relationship as sanctioned by the Supreme Court in the *Insular Cases*.³ These cases authorized the colonial regime created by Congress, which allowed the United States to continue its administration—and exploitation—of the territories acquired from Spain after the Spanish-American War of 1898. It is my view that this regime, in effect to the present day, has since its inception contravened the Constitution, constitutional precedent, and long-established historical practice. In addition to discussing the constitutional questions raised by the *Insular Cases*, this Article, in keeping with the definition of “colony” previously provided, will also explore the political, economic and cultural manifestations that result from—and provide evidence of—the colonial relationship between the United States and Puerto Rico.

The strong undercurrents of racial bias that permeated U.S. society at the turn of the century undoubtedly influenced the establishment of this colonial relationship and its approval by the Supreme Court in the *Insular Cases*.⁴ The continued enforcement of this flawed relationship is not only outdated, but is also

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1. A DICTIONARY OF THE SOCIAL SCIENCES 102 (Julius Gould & William Kolb eds., 1964) (source sanctioned by UNESCO).
 2. Cf. Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123 (2009) (critiquing the legality of Puerto Rico's status under both international and domestic law).
 3. See *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901) (holding that a vessel engaged in trade between Puerto Rico and New York is engaged in coastal trade and not foreign trade); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution); *Armstrong v. United States*, 182 U.S. 243 (1901) (invalidating tariffs imposed on goods exported from the United States to Puerto Rico after ratification of the treaty between the United States and Spain); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that the right of the President to exact duties on imports into the United States from Puerto Rico ceased after the ratification of the peace treaty between the United States and Spain); *Goetze v. United States*, 182 U.S. 221 (1901) (holding that Puerto Rico and Hawaii were not foreign countries within the meaning of United States tariff laws); *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that, once Puerto Rico was acquired by the United States through cession from Spain, it was not a “foreign country” within the meaning of tariff laws).
 4. See RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893-1946*, at 15 (1972) (“Those who

clearly contrary to a proper interpretation of the Constitution and the Law of the Land⁵ as expressed in the United States' treaty commitments.⁶ The cases that allow this anachronistic system of governance to stand—particularly when applied against a community of 3.9 million U.S. citizens endowed with citizenship for nearly a century⁷—should be soundly rejected by the same institution whose decisions have allowed this regime to exist for one hundred and twelve years.

I. THE HISTORICAL BACKDROP OF THE *INSULAR CASES*

A result of the Spanish-American War of 1898 was that the United States acquired sovereignty from Spain over Puerto Rico, the Philippine Islands, and Guam.⁸ Pursuant to Article IX of the Treaty of Paris ending this war, “[t]he civil rights and political status of the native inhabitants of the territories . . . ceded to the United States shall be determined by Congress.”⁹ The interpretation of this provision and its diverse applications to the inhabitants of these territories has been the source of much controversy and litigation, including the *Insular Cases*. As will be discussed in further detail, this Article takes as a basic tenet that no treaty can trump the Constitution.

advocated overseas expansion faced this dilemma: What kind of relationship would the new peoples have with 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.”).

5. U.S. CONST. art. VI, § 1, 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 . . .”).
6. See, e.g., International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (ratified by the United States June 8, 1992) [hereinafter ICCPR]; American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX (1948), OEA/Ser.L.V/II.82, doc. 6, rev. 1 (1948); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(111) (Dec. 10, 1948) [hereinafter UDHR].
7. Jones Act, Pub. L. No. 64-368 § 2, 39 Stat. 948, 951-52 (1917) (granting U.S. citizenship to the residents of Puerto Rico). Since the Jones Act, all persons born in Puerto Rico automatically become U.S. citizens.
8. Treaty of Peace between the United States of America and the Kingdom of Spain, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754, T.S. No. 343 [hereinafter Treaty of Paris]. On the subject of the Spanish-American War of 1898, see IVAN MUSICANT, *EMPIRE BY DEFAULT: THE SPANISH-AMERICAN WAR AND THE DAWN OF THE AMERICAN CENTURY* (1998); JUAN R. TORRUELLA, *GLOBAL INTRIGUES: THE ERA OF THE SPANISH-AMERICAN WAR AND THE RISE OF THE UNITED STATES TO WORLD POWER* (2007); and DAVID F. TRASK, *THE WAR WITH SPAIN IN 1898* (1981).
9. Treaty of Paris, *supra* note 8, 30 Stat. at 1759.

This “splendid little war,” as the Spanish-American War was fondly referred to by those who favored and promoted its execution,¹⁰ was the culmination of a long process of national territorial expansion. This process was cloaked or justified in various ways,¹¹ but was generally verbalized under the rubric of “manifest destiny”—a term coined by newspaperman John Louis O’Sullivan¹² that became the rallying cry for U.S. expansionists in the nineteenth century. It was an expression that encapsulated a mantra of Darwinian imperialism,¹³ containing elements

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10. These so-called “Large Policy” proponents included Theodore Roosevelt, then Assistant Secretary of the Navy and later the second in command of the “Rough Riders” of San Juan Hill fame; Brookes Adams, a Boston historian who was the grandson of John Quincy Adams; Senator Henry Cabot Lodge, the powerful senator from Massachusetts; and Admiral Alfred Mahan, whose theories on naval supremacy were an important factor in influencing U.S. expansionist policies. See, e.g., A.T. MAHAN, *THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-1783*, at 72 (13th ed. 1957) (“Colonies . . . afford . . . the surest means of supporting abroad the sea power of a country.”).

After the war, which scarcely lasted four months, the U.S. ambassador to Great Britain wrote to Theodore Roosevelt: “It has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favoured by that fortune which loves the brave.” HUGH THOMAS, *CUBA OR THE PURSUIT OF FREEDOM* 404 (1971) (quoting correspondence); see FRANK FREIDEL, *THE SPLENDID LITTLE WAR: THE DRAMATIC STORY OF THE SPANISH AMERICAN WAR* (1958).

11. See JULIUS PRATT, *EXPANSIONISTS OF 1898: THE ACQUISITION OF HAWAII AND THE SPANISH ISLANDS* (Peter Smith ed., 1959) (1936) (discussing the various motives, techniques, and propaganda employed by politicians, journalists, religious leaders, and the military to influence the expansion of imperialism in 1898, which ultimately resulted in the United States’ acquisition of Hawaii, Puerto Rico, and the Philippines).
12. He coined this term in an Article in the *Democratic Review*, of which he was the editor. Julius W. Pratt, *John L. O’Sullivan and Manifest Destiny*, 14 N.Y. HIST. 213-34 (1933). The term “manifest destiny” was originally used to describe the “expectation that the U.S., thanks to the superior qualities of the Anglo-Saxons as such [including, presumably, the Irish] and to their democratic institutions, would inevitably absorb their neighbours.” THOMAS, *supra* note 10, at 2011-17. Although the idea originally encompassed mainly expansion to the Pacific Ocean and was considered a tactic for increasing the number of pro-slavery States, after the Civil War similar themes were adopted by the Republican expansionists as a slogan for overseas conquests. See H.C. Lodge, *Our Blundering Foreign Policy*, FORUM, Mar. 1895, at 8, 8-17.
13. See John Fiske, *Manifest Destiny*, HARPER’S NEW MONTHLY MAG., Mar. 1885, at 578, 588 (“[T]he general conclusion that the work which the English race began when it colonized North America is destined to go until every land on the earth’s surface that is not already the seat of an old civilization shall become English in its language, in its religion, in its political habits and traditions, and to a predominant extent in the blood of its people. The day is at hand when four-fifths of the human race will trace its pedigree to English forefathers, as four-fifths of the white people in the United States trace their pedigree today. The race thus spread over both hemispheres, and from the rising to the setting sun, will not fail to keep that sovereignty

of geopolitical theory, religious righteousness,¹⁴ and economic entrepreneurship aimed at justifying territorial aggrandizement and the conquering, subjugation, and absorption of 'inferior' people and races 'for their own good.'¹⁵

This bias for territorial expansion surfaced early in the United States' national life, even before the phrase "manifest destiny" emerged.¹⁶ In fact, before the United States was an independent nation, the inhabitants of the thirteen colonies were already vigorously engaged in informal territorial expansion west of the Appalachian Mountains. At the close of the Revolutionary War, Great Britain ceded these western territories to the new nation in the Treaty of Peace, which officially ended the United States' own struggle for independence against Great Britain's colonial yoke.¹⁷

of the sea and that commercial supremacy which it began to acquire when England first stretched its arm across the Atlantic to the shores of Virginia and Massachusetts.").

14. See JOSIAH STRONG, OUR COUNTRY: ITS POSSIBLE FUTURE AND ITS PRESENT CRISIS 175 (New York, Baker & Taylor, Co. 1885) ("[T]his [Anglo-Saxon] race of unequalled energy, with all the majesty of numbers and the might of wealth behind it—the representative, let us hope, of the largest liberty, the purest Christianity, the highest civilization—having developed peculiarly aggressive traits calculated to impress its institutions upon mankind, will spread itself over the earth. If I read not amiss, this powerful race will move down upon Mexico, down upon Central and South America, out upon the islands of the seas, over upon Africa and beyond. And can anyone doubt that the result of this competition of races will be the 'survival of the fittest?'").
15. This was the thrust of British novelist and poet, Rudyard Kipling, who glorified nineteenth-century imperialism in his poem *The White Man's Burden: The United States and the Philippine Islands*. Rudyard Kipling, *The White Man's Burden*, MCCLURE'S MAG., Feb. 1899, at 290. The poem was published at the beginning of the Filipinos' insurrection against the U.S. invasion (and contemporaneous with the U.S. Senate's ratification of the Treaty of Paris confirming the acquisition of those islands as well as Puerto Rico and Guam).
16. In 1801, Thomas Jefferson wrote James Monroe: "However our present interests may restrain us within our limits, it is impossible not to look forward to distant times, when our rapid multiplication will expand beyond those limits, and cover the whole northern if not the southern continent." R.W. VAN ALSTYNE, *THE RISING AMERICAN EMPIRE* 87 (1960) (quoting correspondence).
17. 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. Pursuant to its provisions, Great Britain ceded its claims to all lands west of the Appalachian Mountains as far West as the Mississippi River, North to Canada and South to Spanish-Florida: the so-called Old Northwest Territory. See TORRUELLA, *supra* note 8, at 28, 85. This territory comprised 385,000 square miles and was larger than the original thirteen colonies. The Northwest Ordinance of 1787 established the process whereby these territories would be admitted to the Union as states, thus paving the way for West Virginia, Tennessee, Kentucky, Ohio, Indiana, Illinois, Mississippi, Alabama, and Michigan to achieve their constitutional status. 1 Stat. 50, 51 (1789).

Thereafter, national expansion continued at a steady pace and in diverse forms, with the United States' last major territorial acquisition prior to 1898 taking place after the Mexican War of 1848. The Treaty of Guadalupe-Hidalgo, which ended the war, forced Mexico to cede approximately five hundred thousand square miles of its national territory to the United States, thus extending the nation's borders from the Atlantic to the Pacific Ocean and virtually establishing the present boundaries of the continental homeland.¹⁸

Nevertheless, throughout this period in U.S. history, the nation's fundamental goal in extending its borders was creating more States—not the acquisition of colonies.¹⁹ The Supreme Court clearly expressed the lack of constitutional authority for the United States to rule as a colonial power in *Scott v. Sanford*, a case which, although discredited for other reasons, was otherwise still valid constitutional precedent when the *Insular Cases* were decided. The Court there stated:

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 admission of new States . . . [No] power is given to acquire a Territory to be held and governed [in a] permanently [colonial] character.²⁰

Yet, in its treatment of the territories acquired after the Spanish-American War, the United States has followed the colonial formula to this very day, a path authorized by the Supreme Court's unwarranted reversal of established constitutional and historical precedent in the *Insular Cases*.

There were, of course, factual differences between these newly conquered Spanish lands and the territories annexed prior to 1898—differences which, as we shall see, were used by the Supreme Court as an excuse for its differing constitutional treatment of these new acquisitions. The new lands were non-contiguous islands separated by thousands of miles of ocean from the U.S. continental mainland. Perhaps more importantly, they were not, in contrast to the American West, large areas of mostly uninhabited land masses, but were instead populated by

18. The Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922. Mexico ceded the lands that today comprise the states of California, Arizona, New Mexico, Utah, and Nevada, as well as parts of Colorado, Wyoming and Oklahoma, and the remnants of Texas not included in the Republic of Texas, which was annexed in 1845. Thereafter, in 1853, by the so-called Gadsden Purchase, the United States acquired land from Mexico that allowed the present day configuration of our border with Mexico to be established. TORRUELLA, *supra* note 8, at 29.

19. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 6 (1989) ("The Northwest Ordinance not only set forth the pattern of territorial development which exists even today but also stated the underlying principle of territorial evolution in U.S. law and tradition: that the goal of all territorial acquisition eventually was to be Statehood.").

20. *Scott v. Sanford*, 60 U.S. (19 How.) 393, 446 (1856).

established communities²¹ whose inhabitants differed from the dominant state-side societal structure with respect to their race,²² language,²³ customs, cultures, religions,²⁴ and even legal systems.²⁵

These differences contributed to the substantial opposition to expansion into these new lands that was expressed by important sectors of the nation's public while the Spanish-American War was in progress—opposition that only increased when a serious insurrection broke out against the United States' occupation of the Philippines immediately following the cessation of hostilities with

21. Puerto Rico had a population of 953,243 in 1899. J.P. SANGER, U.S. WAR DEP'T, REPORT ON THE CENSUS OF PORTO RICO, 1899, at 40 (1900). The Philippine Islands had a population of approximately 7.6 to 8 million inhabitants shortly after the change in sovereignty took place in 1898. PHILIPPINES NAT'L STAT. OFF., SUMMARY OF PRINCIPAL VITAL STATISTICS IN THE PHILIPPINES: 1903-2010, at 3 (2013), <http://census.gov.ph/sites/default/files/attachments/crd/article/SUMMARY%20OF%20PRINCIPAL%20VITAL%20STATISTICS>; see S. REP. NO. 218, at 76 (1901). Guam's population—which was mostly Chamorros, a Mayo-Polynesian race prevalent throughout the Marianas Archipelago—was 11,806 in 1910. BUREAU OF THE CENSUS, GUAM: POPULATION AGRICULTURE 1 tbl.1 (1941), http://pacificweb.org/DOCS/guam/guam_1940%20Census.pdf (listing Guam's population from 1901 to 1940).
22. In 1900, out of a total population of seventy-six million in the United States, 87.9% were white, 11.6% were black, and 0.5% were of other races. FRANK HOBBS & NICOLE STOOMS, U.S. CENSUS BUREAU, CENSR-4, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY 77 figs.3.3 & 3.4 (2002). In 1899, the population of Puerto Rico was 62% white, mostly of Hispanic ethnicity, with the balance of the population classified as "black" pursuant to a census conducted by the U.S. military authorities. See Mara Loveman and Jeronimo Muñiz, *How Puerto Rico Became White: Boundary Dynamics and Intercensus Racial Reclassification*, 72 AM. SOC. REV. 915, 915 (2007).
23. In 1898, Spanish was the official language of Puerto Rico and the vernacular of all of its native inhabitants. It was also the official language of the Philippines, with a substantial number of native inhabitants speaking it to some degree in their vernacular, particularly in the cities.
24. In 1906, when the U.S. Census Bureau began collecting religious data, of a total population of 85 million in the United States, approximately one third, or about 32 million Americans, were affiliated with some church or religion. DEP'T OF COMMERCE & LABOR, BUREAU OF THE CENSUS, RELIGIOUS BODIES: 1906, at 24 (1910). While the United States was mainly a Protestant nation in 1900, the principal religion of Puerto Rico was Roman Catholicism, which was the state religion of the Spanish Empire. The Catholic Church had a large presence in the Philippines, claiming 5.8 million adherents, not only because it was the only religion allowed by the government, but also because of the enormous tracts of land owned by the various religious orders. See S. REP. NO. 218, at 76 (1901). In the Philippine hinterlands, there were approximately 800,000 natives who mostly practiced animistic religions. Islam was the chosen religion of approximately 600,000 Moros, mostly in the southern Philippine islands of Mindanao, Jolo, Basilan, and Balabac. *Id.*
25. The legal system of the Spanish territories was civil law, based on the Napoleonic Code. The United States, of course, was a common law country, with the exception of Louisiana, which basically had the Napoleonic Code as its *lex fori*.

Spain.²⁶ This opposition, in turn, effectively converted the U.S. presidential elections of 1900 into a referendum regarding whether to permanently retain the Spanish islands.²⁷ Thus, the reelection of McKinley, the Spanish-American War-time President, with his new running mate Theodore Roosevelt, one of the leading advocates of that war and a fervent promoter of imperial expansion, effectively settled the political question of whether the United States would retain control of these former Spanish colonies. The constitutional question of how to rule these lands and their people—phrased in the prevalent lingo of the times as “does the Constitution follow the flag”²⁸—was answered by a fractured Supreme Court in 1901 in a series of decisions now known as the *Insular Cases*.²⁹

The historical background summarized here—particularly the obvious belief in racial superiority that supported the “manifest destiny” policies expressed by the controlling political factions—is crucial to understanding how the *Insular Cases* became the law of the land despite constitutional and historic precedents that augured a different outcome.

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26. See GREGG JONES, *HONOR IN THE DUST: THEODORE ROOSEVELT, WAR IN THE PHILIPPINES, AND THE RISE AND FALL OF AMERICA'S IMPERIAL DREAM* (2012); BRIAN MCALLISTER LINN, *THE PHILIPPINE WAR: 1899-1902* (2000). The United States suffered 4,165 combat losses in the Insurrection. In comparison, twenty thousand Filipino insurrectionists were killed by American troops and the civilian casualties are estimated at between two hundred thousand and one and a half million. John Bellamy Foster & Robert W. McChesney, *Kipling, the 'White Man's Burden,' and U.S. Imperialism*, MONTHLY REV., Nov. 1 2003, <http://monthlyreview.org/2003/11/01/kipling-the-white-mans-burden-and-u-s-imperialism>.
 27. See Walter F. Pratt, Jr., *Insular Cases*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, 500, 500 (Kermit L. Hall et al. eds., 2d ed. 2005) (“[T]he acquisition of foreign territories[] received overwhelming popular endorsement in the presidential election of 1900.”). But see Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 MISS. VALLEY HIST. REV. 43, 45-47 (1937) (arguing that it was William Jennings Bryan’s support of the silver standard that caused his defeat in the 1900 election, rather than McKinley’s belief in imperialism).
 28. THE *INSULAR CASES*, COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE *INSULAR CASES* OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING APPENDIXES THERETO 705 (Gov’t Printing Of., 1901) (repeating the Solicitor General’s statement that “[t]he difficulty of a clear conception of the important question in these cases had been increased by the use of campaign catchwords, of political phrases. ‘The Constitution follows the flag’ is one of these”); see *id.* at 170, 312, 590, 634.
 29. See *supra* note 3 (listing cases). A famous political humorist of the times quipped through his main character, Mr. Dooley, after the *Insular Cases* were decided, “[that] no matter whether th’ Constitution follows th’ flag or not, th’ Supreme Court follows th’ iliction returns.” FINLEY PETER DUNNE, MR. DOOLEY’S OPINIONS 26 (1901); see Walter LaFeber, *The Election of 1900*, in 3 HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1900-1936, at 1879 (Arthur M. Schlesinger, Jr. et al. eds., 1971).

II. THE *INSULAR CASES* ARE DECIDED

The Spanish-American War guns were barely silenced when a national debate ensued about these conquered lands. Although the issue of whether the Spanish islands would be kept was resolved at the bargaining table in Paris, and reaffirmed by the outcome of the 1900 election, a hot academic polemic soon erupted. This debate emanated principally from the Harvard and Yale law schools, and concerned how these former Spanish lands would be governed. This debate took its most influential form in a series of law review Articles written by prominent academics from 1898 through 1900 that would have paramount influence on the Supreme Court in its consideration and decision of the *Insular Cases*.³⁰

The academic debate was followed by congressional action in 1900 in the form of the Foraker Act,³¹ which established a civil government in Puerto Rico

30. See, e.g., Elmer B. Adams, *The Causes and Results of Our War with Spain from a Legal Stand-Point*, 8 YALE L.J. 119 (1898) (arguing that the acquisition of territories is undemocratic, yet objecting to statehood for acquired territories); Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 412 (1899) (arguing that the acquisition of Puerto Rico and the Philippines was constitutional and stating that Congress could establish governments therein once the treaty with Spain was ratified, but also stating that there were several open questions including “[w]hether Puerto Rico can be held permanently and avowedly as a colonial dependence”); John Kimberly Beach, *Constitutional Expansion*, 8 YALE L.J. 225, 234 (1899) (evaluating the constitutionality of United States’ occupation, acquisition, and control of the Philippines, and concluding that acquisition is a “duty” of the United States in the name of “restoration of order and security to life and property in the Philippines”); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899) (discussing the definition and scope of the term “United States,” and arguing that, while the term might encompass the Territories, the “use of the word . . . has . . . no legal or constitutional significance”); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 176 (1899) (examining the legal status of territories acquired by conquest or cession, differentiating between territory acquired with the intention of incorporating into the United States and territory acquired without that purpose, and stating that constitutional rights do not apply to territory acquired without that purpose); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291, 306-09 (1898) (arguing that the Constitution applies to Filipinos, and that because upon annexation Filipinos owe allegiance to the United States, they ought to be considered citizens of the United States).

31. Pub. L. No. 56-191 § 4, 31 Stat. 77, 81-82, 84 (1900). The Act provided for the President to appoint a governor, a supreme court, and the upper house of a bicameral legislature whose lower house was to be elected by popular vote, whose laws could be annulled by Congress. It also created the office of “resident commissioner,” a non-voting elected position to the House of Representatives in Congress. The Foraker Act gave Puerto Ricans less rights than they had under Spanish rule at the

and provided a taxing mechanism to fund its operations. This was to be effectuated by the imposition of taxes and duties collected on goods imported from the United States to Puerto Rico.³² These taxes and duties provided the immediate grounds for the litigation that led to the *Insular Cases* and framed the constitutional issue raised: whether the imposition of this non-uniform tax contradicted the Uniformity Clause of the Constitution, which required that “all Duties, Imposts and Excises . . . be uniform throughout the United States.”³³ The answer to that question, of course, depended on whether the Constitution applied in the territories *ex proprio vigore* (i.e., did the Constitution follow the flag?). Framed differently: was Puerto Rico, after it was acquired from Spain, excluded from the term “United States” simply because it was a territory rather than a State?

This question had already been resolved in the context of the District of Columbia in *Loughborough v. Blake*, an 1820 opinion authored by Chief Justice Marshall.³⁴ Congress had enacted a statute imposing a tax that was only applicable in the District of Columbia, and the question arose whether this non-uniform tax was in violation of the Constitution’s Uniformity Clause. As previously indicated, the answer depended on whether the District of Columbia, a territory, was included within the term “United States” as used in the Constitution, and thus subject to its provisions. The answer given by Chief Justice Marshall was clear and unequivocal:

Does [the] term [United States] designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories. The District of Columbia, or territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania [and thus the Constitution applied and the tax was unconstitutional].³⁵

time of the U.S. invasion. At that time, Puerto Ricans were full Spanish citizens, had voting delegates in the Spanish parliament, and, pursuant to a new Charter of Autonomy that had gone into effect shortly before the U.S. invasion, possessed a degree of autonomy bordering on national sovereignty. See JAMES L. DIETZ, *ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT* 87-88 (1986); JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 12-14 (1997).

32. Foraker Act § 4 (establishing that taxes and duties collected in Puerto Rico would be “placed at the disposal of the President to be used for the government and benefit of Porto Rico”).

33. U.S. CONST. art. I, § 8, cl. 1.

34. 18 U.S. (5 Wheat.) 317 (1820).

35. *Id.* at 319.

After *Loughborough*, the issue of Congress' power over the territories pursuant to the Territorial Clause³⁶ came up again thirty-six years later in the context of an act of Congress prohibiting slavery in the then-territory of Missouri. In *Scott v. Sanford*, a slave, Dred Scott, who had traveled to Missouri with his owner, filed a proceeding claiming that by his entrance into a free territory any right of "ownership" over his person as "property" was null.³⁷

Notwithstanding the opprobrious outcome of this case, Chief Justice Taney's ruling regarding the power of Congress to legislate under the Territorial Clause and the purpose and scope of that provision deserves to be evaluated independently. In ruling on this issue, Chief Justice Taney was no less clear or unequivocal than Chief Justice Marshall had been in *Loughborough*:

[P]laintiff has laid much stress upon that article in the Constitution which confers on Congress the power 'to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;' but, in the judgment of the court, that provision has no bearing on the present controversy, and . . . was intended to be confined, to the territory which at that time [of its independence from Great Britain] belonged to, or was claimed by, the United States . . . and can have no influence upon territory afterwards acquired from a foreign Government. It was a special provision for a known and particular territory, and to meet a present emergency, and nothing more.³⁸

This passage made clear that the Constitution does not grant Congress the power to indefinitely administer territorial acquisitions under its "plenary powers," creating in effect a colonial regime. As we shall see, however, rather than filling a temporary administrative "emergency" brought about by the unexpected acquisition of overseas territories, the colonial mode of ruling the Spanish islands and their inhabitants has become a permanent *modus operandi*.

It is with this jurisprudential background that we come to the *Insular Cases*.³⁹ But before discussing them in detail, it is worthwhile to step back and consider these cases generally, with a goal to making some observations of universal application.

The first point to be made is that all of these cases raised constitutional questions only in the context of more basic controversies involving commercial operations in the new territories. Although these fundamentally commercial disputes created the cases and controversies necessary for judicial intervention to

36. U.S. CONST. art. IV, § 3, cl. 2 ("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 . . .").

37. 60 U.S. (19 How.) 393 (1856).

38. *Id.* at 432. The territory referred to was the territory encompassed by the Northwest Ordinance of 1787, 1 Stat. 50 (1789), which ironically referenced the States that today encompass the Midwestern United States.

39. See *supra* note 3 (listing cases).

take place,⁴⁰ and although their outcome was of fundamental importance to the future of the people that inhabited these lands, they were not the typical scenario for the litigation of crucial *civil rights* issues. In fact, as decided, the cases focused on taxation and tariff issues, remaining resoundingly silent as to the political and cultural inequalities effectuated by their holdings, which are the matters of real import to the U.S. citizens residing in these lands today.

Second, with the exception of *Huus v. New York & Puerto Rico Steamship Co.*,⁴¹ initially these issues were decided by five-to-four pluralities. Thus, even at the colonial regime's inception, the rules by which it was to be administered, in effect to this very day, were very much in doubt. In fact, the dissenting opinions were the most intellectually unified, coherent, and constitutionally sound, and they gathered more votes than any individual plurality opinion. This is particularly true of the dissents of Chief Justice Fuller and Justice Harlan in the key case of *Downes v. Bidwell*.⁴²

Third, and in my view most important, a definite tinge of racial bias is discernible in several of the plurality opinions. This is not a surprising circumstance considering that the Justices that decided the *Insular Cases* were, almost to a man, the same that decided the infamous "separate but equal" case of *Plessy v. Ferguson* in 1896.⁴³ The rules established in the *Insular Cases* were simply a more stringent version of the *Plessy* doctrine: the newly conquered lands were to be treated not only separately, but also *unequally*.

In the first of the *Insular Cases*, *De Lima v. Bidwell*,⁴⁴ the Court struck down a duty on goods imported from Puerto Rico into New York after the Treaty of Paris. The Court held that after the ratification of the treaty with Spain, Puerto Rico "became territory of the United States—although not an organized territory in the technical sense of the word."⁴⁵ Thus, it was not foreign. Most surprising, considering the cases that were to follow, is the following language from Justice Brown's opinion:

The theory that a country remains foreign with respect to the tariff laws until Congress has acted by embracing it within the Customs Union, presupposes that a country may be domestic for one purpose and foreign for another [N]o act is necessary to make it domestic territory if once it has been ceded to the United States This theory also presupposes that territory may be held indefinitely by the United States; that it may be treated in every particular, except for tariff purposes, as domestic

40. U.S. CONST. art. III, § 2, cl. 1.

41. *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901). *Huus* was a unanimous decision.

42. 182 U.S. 244, 347 (1901) (Fuller, J., dissenting); *id.* at 375 (Harlan, J., dissenting).

43. 163 U.S. 537 (1896). For a detailed account of the background of the Justices that sat on the *Insular Cases*, see JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 41-43 (1985).

44. 182 U.S. 1 (1901).

45. *Id.* at 196.

territory; that laws may be enacted and enforced by officers of the United States sent there for that purpose; . . . that everything may be done which a government can do within its own boundaries, and yet the territory may still remain a foreign country. That this state of things may continue for years, *for a century even*, but that until Congress enacts otherwise, it still remains a foreign country. *To hold that this can be done a matter of law we deem to be pure judicial legislation. We find no warrant for it in the Constitution or in the powers conferred upon this court.*⁴⁶

Yet we will see that “pure judicial legislation,” which ran contrary to longstanding constitutional jurisprudence and historical precedents, is exactly what would result from the *Insular Cases*.

In fact, it was the dissenting view of Justice McKenna in *De Lima* that expressed judicially for the first time the novel perspective of Professor Lowell in *The Status of Our New Possessions—A Third View*,⁴⁷ which eventually became the prevailing rule of the *Insular Cases*. McKenna opined that Puerto Rico was not incorporated into the United States because “the treaty with Spain, instead of providing for incorporating the ceded territory into the United States, as did the treaty with Mexico, expressly declare[d] that the *status* of the ceded territory [was] to be determined by Congress”⁴⁸—something that had not yet been done by Congress as to Puerto Rico. By this inaction, McKenna stated, “the danger of the nationalization of savage tribes cannot arise.”⁴⁹

Similarly, issues involving the application of the tariff laws to goods imported to and from Puerto Rico (and Hawaii)⁵⁰ were critical in *Goetze v. United States*,⁵¹ *Dooley v. United States*,⁵² and *Armstrong v. United States*.⁵³

We thus come to *Downes v. Bidwell*,⁵⁴ which challenged the validity of the Foraker Act as violating the Uniformity Clause. This is the crucial *Insular Case* because its decision squarely required determining whether the Constitution applied to Puerto Rico, which in turn became the deciding criteria as to how and by whom the rules of governance applying to the exercise of U.S. sovereignty in

46. *Id.* at 198 (emphasis added).

47. See Lowell, *supra* note 30.

48. *De Lima*, 182 U.S. at 214 (McKenna, J., dissenting).

49. *Id.* at 219.

50. Hawaii was annexed by the United States at about this same time. See Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

51. 182 U.S. 221 (1901), *joined procedurally with* Crossman v. United States, 182 U.S. 221 (1901) (involving the same issues regarding Hawaii).

52. 182 U.S. 222 (1901).

53. 182 U.S. 243 (1901).

54. 182 U.S. 244 (1901).

the territory would be established. *Downes* would eventually prove to be the central case in establishing Puerto Rico's place within the United States polity to the present day.

The various opinions that emanated from the Court in *Downes* reflect the kaleidoscope of views that existed regarding the status of the new territories, particularly those influenced by the Yale and Harvard academics. A plurality of five votes—with separate opinions from Justices Brown, Gray, and White—upheld the validity of the Foraker Act for diverse and varied reasons. In a lead opinion guaranteed to give nightmares to present day originalists,⁵⁵ Justice Brown stated that the issues presented were broader than whether the revenue clauses of the Constitution extended *ex proprio vigore* to Puerto Rico. He concluded that these questions were answered not only in the Constitution itself, but also by looking to “the nature of the government created by that instrument, in the opinion of its contemporaries, in the practical construction put upon it by Congress, and in the decisions of this court.”⁵⁶ He included everything but the kitchen sink! Conveniently, he also did not follow the last part of his own directive, discarding as dicta the holdings of both *Scott* and *Loughborough* (which had decided the exact same issue as *Downes* while the ink of the signers was still wet on the Constitution).⁵⁷

The comments of Charles E. Littlefield in the *Harvard Law Review* regarding Justice Brown's sidestepping of *Loughborough* are worth reproducing:

Mr. Justice Brown says there are “certain observations [in *Loughborough*] which have occasioned some embarrassment in other cases,” but I submit in none so great as the *Downes* case. The extraordinary ingenuity manifested in this case by the earnest effort to escape from that authority constitutes one of its most striking features . . . Mr. Justice Brown is entitled to the credit of introducing in an opinion for the first time a new method of disposing of that case. I do not say he discovered it, for it is true that there were statesmen who, in groping about for a way to escape from Marshall's logic, had blazed out this path. [Justice Brown] admits that the conclusion [in *Loughborough*] is correct, “so far at least as it applies to the District of Columbia.” He cannot quite get up to denying the case *in toto*.⁵⁸

55. The present day originalists argue that the interpretation of the Constitution should be based on the original meaning of the *words* of the Constitution. See Steven G. Calabresi, *Introduction*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 1, 14-15 (Steven G. Calabresi ed., 2007); cf. Edwin Meese III, *The Case for “Originalism,”* HERITAGE FOUND. (June 6, 2005), <http://www.heritage.org/research/commentary/2005/06/the-case-for-originalism> (arguing that “judges should issue rulings based on the original *understanding* of the authors and ratifiers of the Constitution and the Bill of Rights”) (emphasis added).

56. *Bidwell*, 182 U.S. at 249.

57. *Id.* at 292-93.

58. Charles E. Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 178 (1901).

Nevertheless it is Justice Brown's racially riddled perspective, rather than his legal maneuvering, that is most offensive. Brown wrote:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.⁵⁹

....

A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.⁶⁰

In a concurrence that again echoed Professor Lowell's law review Article, Justice White built upon this lead opinion, offering a view of incorporation that stands as the ultimate rule of the *Insular Cases* to this day. Justice White held that Puerto Rico's status was derived from the United States' treaty with Spain and would therefore remain unchanged until Congress chose to act:

[W]here a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions but expressly provides to the contrary, incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.⁶¹

Perhaps most puzzling is Justice White's conclusion regarding Puerto Rico's territorial status, which is both cryptic and indecipherable. Near the end of his lengthy opinion, he proclaimed that, while "not a foreign country," Puerto Rico "was foreign to the United States in a domestic sense."⁶² This conclusion estab-

59. *Downes*, 182 U.S. at 282.

60. *Id.* at 286-87.

61. *Id.* at 339 (White, J., concurring). Gray's short concurrence largely reiterated the idea that incorporation occurred only at Congress' behest, with specific focus on the nature of the United States' treaty- and war-making powers. *Id.* at 344-47 (Gray, J., concurring).

62. *Id.* at 341-42 (White, J., concurring).

lishes the untenable—and, in my opinion, unconstitutional—concept of a territory that is both foreign and domestic at once.⁶³ At a minimum, this confusing language, whatever its intended meaning, was in clear conflict with *De Lima*,⁶⁴ which held that Puerto Rico was domestic territory and within the U.S. tariff barrier. Justice White's opinion left this conflict unexplained, as it remains today.

Chief Justice Fuller's dissent—joined by Justices Harlan, Brewer, and Peckam—picked up the gauntlet and answered Justices Brown and White in full:

[T]he contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period, and more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.

....

Great stress is thrown upon the word "incorporation," as if possessed of some occult meaning, but I take it that the act under consideration made Porto Rico, whatever its situation before, an organized territory of the United States.

....

That theory assumes that the Constitution created a government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and territories, and substitutes for the present system of republican government, a system of domination over distant provinces in the exercise of unrestricted power.⁶⁵

Chief Justice Fuller considered that such unrestricted power was negated by the Constitution in language "too plain and unambiguous to permit its meaning to be thus influenced."⁶⁶

Justice Harlan, at his best in dissent, focused on what he deemed to be the fundamental flaw of the *Insular Cases*: their failure to honor and give due weight to the fact that the Constitution "speaks . . . to *all peoples*, whether of States or territories, who are subject to the authority of the United States."⁶⁷ This is in contrast to the dogma of the *Insular Cases*, by which the constitutional rights of citizens are determined by the land on which they stand, rather than their status as

63. See FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

64. See *supra* notes 44-46 and accompanying text.

65. *Downes*, 182 U.S. at 372-73. (Fuller, C.J., dissenting).

66. *Id.* at 374.

67. *Id.* at 378 (Harlan, J., dissenting) (emphasis added).

citizens.⁶⁸ Justice Harlan further chastised the plurality for promoting what in his view was “a radical and mischievous change in our system of government.”⁶⁹ This charge is clearly justified; until the *Insular Cases* were decided—or more accurately, until the theory and terminology on which the cases rest was concocted in the halls of Harvard and Yale law schools—there had been no such distinction as to “incorporated” versus “unincorporated” territories. Justice Harlan, in what would be prescient words as regards Puerto Rico, argued that Congress cannot

deal with new territories just as other nations have done or may do with new territories Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them—is wholly inconsistent with the spirit and genius as well as the words of the Constitution.⁷⁰

Unfortunately for the inhabitants of the conquered Spanish islands, despite these well-reasoned dissents, the holding in *Downes* laid the grounds for recognition of omnipotent plenary powers in Congress—derived from a treaty rather than the Constitution—that to this day have allowed the United States to rule over the islands without their consent or their democratic participation. In this way, the *Insular Cases* effectively turned on its head the clear and unquestionable basis of U.S. law: legal authority must be derived from the Constitution, and that, when laws or treaties conflict with that supreme document, they cannot stand.⁷¹

The last of the *Insular Cases* was *Huus v. New York & Porto Rico Steamship Co.*⁷² In this case, the Court unanimously ruled that a vessel entering the port of New York from Puerto Rico did not have to pay pilotage fees because it was not engaged in foreign trade.⁷³ Thus ended the first round of constitutional litigation regarding the colonial administration by the United States of its territories.

68. See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (“It is locality that is determinative of the application of the Constitution . . . not the [citizenship] status of the people who live in it.”).

69. *Downes*, 182 U.S. at 379.

70. *Id.* at 380.

71. U.S. CONST. art. VI, § 1, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land . . .”).

72. 182 U.S. 392 (1901).

73. *Id.* at 397.

III. LIFE AFTER THE *INSULAR CASES*

A. *Colonialism 101*

Several general rules emerged from the *Insular Cases* and their progeny: (1) the de jure conclusion that Article IX of the Treaty of Paris trumped the Constitution in determining the civil rights of the inhabitants of the former Spanish islands and the status of these territories; (2) the identification of the Territorial Clause as the source of Congress' plenary powers over Puerto Rico; (3) the conclusion that the Constitution did not fully apply to Puerto Rico *ex proprio vigore* because Congress had not "incorporated" Puerto Rico into the United States; (4) the conclusion that only those rights deemed to be "fundamental" applied in unincorporated territories, a determination the Court would make on a case-by-case basis; and (5) the distinction that all the territories acquired by the United States prior to the Spanish-American War would be deemed to be "incorporated" territories to which the Constitution fully applied.

The folly of these rules can be plainly seen when considered in light of the undeniable principle that it is the Constitution—not Congress—that determines the civil rights of those subject to the jurisdiction of the United States. This is a proposition cogently expressed by the Court in its recent *Boumediene v. Bush* opinion: "The 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."⁷⁴

B. *The Grinding Stone Keeps Grinding*

Life and death moved on, and as the composition of the Court slowly changed, the "incorporation" proponents continued to gain votes.⁷⁵ Meanwhile, two cases of prime importance to Puerto Rico were decided: *Hawaii v. Mankichi*⁷⁶ and *Rassmussen v. United States*.⁷⁷ Both cases are similar in issues and results.

The issue in *Mankichi* was whether Hawaii was an incorporated territory, in which case the Constitution would have required that, in a criminal case, a defendant be indicted by a grand jury and convicted by the unanimous verdict of a petit jury. The Court ruled that Hawaii was not incorporated until after 1900,

74. 553 U.S. 723, 727 (2008).

75. See TORRUELLA, *supra* note 43, at 62-84. Before nominating Oliver Wendell Holmes to the Court in 1902, President Roosevelt sought assurances that Holmes supported the *Insular Cases*' outcome; Massachusetts Senator Henry Cabot Lodge responded that he would not have supported Holmes' nomination "unless he held the position [] describe[d]." G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 234-37 (1993) (quoting correspondence).

76. 190 U.S. 197 (1903).

77. 197 U.S. 516 (1905).

when citizenship was granted to its residents,⁷⁸ and therefore rejected Mankichi's claims because he had been indicted and tried before that date. The grant of citizenship to the residents of a territory was thus held to be indicative of the incorporation of that territory. This ruling was then reinforced by *Rassmussen*, which involved a misdemeanor conviction in Alaska by a six-person jury. A majority of the Justices in *Rassmussen* joined Justice White's opinion, in which he concluded that Alaska had been incorporated into the United States because the treaty of cession with Russia specifically declared that "[t]he inhabitants of the ceded territory . . . shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States."⁷⁹ In other words, through the grant of citizenship Alaska's inhabitants had acquired the full protection of the Constitution. It was thus generally assumed, particularly in Puerto Rico, that if U.S. citizenship were granted to the inhabitants of Puerto Rico, incorporation into the United States would follow automatically and the full rights granted under the Constitution would come into force.

C. *The Jones Act of 1917, U.S. Citizenship, and President Taft*

Between 1901 and 1917, a total of twenty-one bills proposing to grant citizenship to the residents of Puerto Rico were presented in Congress, culminating in the Jones Act of 1917.⁸⁰ Although these proposals received fairly strong support from most of that period's presidential administrations, it is worth noting that the administration of President William Howard Taft endorsed the citizenship proposal only with the caveat that it be "entirely disassociated from any thought of statehood."⁸¹ Because Taft played such a crucial role in the destiny of Puerto Rico, it is necessary to pause and discuss his background at some length.

Taft had an extensive background in insular and colonial affairs. In January 1900, when the Philippine insurgency was at its height, he resigned as Chief Judge of the U.S. Court of Appeals for the Sixth Circuit in order to be sent by President McKinley to serve as the first civilian governor of that territory, a post he occupied until 1904. By that time, the insurgency had been vigorously crushed and Taft returned to become the Secretary of War for then-President Theodore Roosevelt, who had succeeded McKinley after his assassination and with whom Taft obviously shared expansionist views. While in Washington, Taft nevertheless continued to maintain an interest in the Philippines as well as in the Panama

78. *Mankichi*, 190 U.S. at 210-11; see Newlands Resolution, J. Res. 55, 55th Cong., 30 Stat. 750 (1898). For a history of the United States' annexation of the Kingdom of Hawaii, see JULIA FLYNN SILER, *LOST KINGDOM: HAWAII'S LAST QUEEN, THE SUGAR KINGS, AND AMERICA'S FIRST IMPERIAL ADVENTURE* (2012).

79. *Rassmussen*, 197 U.S. at 522.

80. For a detailed account of this process, see José Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978).

81. See H.R. REP. NO. 62-341, at 2 (1912).

Canal and Puerto Rico. In 1907, he was sent to Cuba to deal with unrest under the provisions of the so-called Platt Amendment to the Cuban Constitution.⁸²

Taft was elected President of the United States in 1908, and it was during his tenure, in 1909, that he had a major run-in with the Puerto Rican legislature—a skirmish that is sometimes referred to as the “Puerto Rican Appropriation Crisis of 1909.”⁸³ This crisis began when the popularly elected lower house of the Puerto Rican legislature refused to approve the annual budget for the insular government in protest against various judicial designations made by the governor of Puerto Rico—who, under the Foraker Act, was a presidential appointee. The resulting impasse brought the insular government to a standstill, and Taft was forced to negotiate—something he was not accustomed to doing with mere colonials. Taft’s pique with the situation led him to retaliate against Puerto Rico with the Olmstead Act, by which he transferred administrative oversight over Puerto Rico from the Department of the Interior to the War Department.⁸⁴ Thereafter, in a message to Congress, Taft accused Puerto Rico’s elected leaders of irresponsibility and political immaturity, stating that Puerto Ricans had been given too much power “for their own good.”⁸⁵

Taft’s own appointment as Chief Justice of the Court in 1921 would prove unfortunate for the people of Puerto Rico, for it came just in time for him to bring his prejudices to bear upon the crucial case of *Balzac v. Porto Rico*.⁸⁶ This

82. The Platt Amendment was attached to the Army appropriations bill for 1901-1902. Act of Mar. 2, 1901, ch. 803, paras. I-VII, 31 Stat. 895, 898. The Cubans incorporated the Amendment into the Cuban Constitution on June 12, 1901, as a condition imposed by the United States for the withdrawal of United States’ troops from the island. Among the provisions of the Amendment was the right of the United States to intervene in Cuba’s governance “for the preservation of Cuban independence,” and the agreement to sell or lease to the United States land for naval or coaling stations (e.g., Guantánamo). See CONSTITUCIÓN DE CUBA art. III (1901).

83. Truman Clark, *President Taft and the Puerto Rican Appropriation Crisis of 1909*, 26 AMERICAS 152 (1969).

84. This represented a hardening of colonial policy. JORGE RODRIGUEZ BERUFF, STRATEGY AS POLITICS, PUERTO RICO ON THE EVE OF THE SECOND WORLD WAR 37 (2007). Most of the “civilian” colonial governors of Puerto Rico from 1901 to 1950 were either former military or naval men or were intimately connected with the War Department or the Navy. *Id.* at 17-28; see Clark, *supra* note 83 at 153 (“Taft’s strong reaction to the Puerto Rican Appropriations crisis and his subsequent manipulations of some of the Puerto Rican political leaders show another, perhaps more Rooseveltian, side to him.”).

85. William Howard Taft, President, Message to Congress (May 10, 1909), in 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 96 (David Burton ed., 2002). See generally 2 HENRY PRINGLE, THE LIFE AND TIMES OF WILLIAM HOWARD TAFT (Archon Books 1964) (1939) (documenting Taft’s political career and his statements advocating less independence for Puerto Rico’s government).

86. 258 U.S. 298 (1922).

case required the Court to interpret the Jones Act of 1917, which had granted U.S. citizenship to the residents of Puerto Rico, in light of *Mankichi* and *Rasmussen*.

D. *The Jones Act of 1917, U.S. Citizenship, and Chief Justice Taft*

Given his background, it is difficult to overstate the influence that Taft was able to exercise over the Court as Chief Justice. The coincidence of all the personal and official circumstances that coalesced in Chief Justice Taft would prove unfortunate for the newly anointed U.S. citizens of Puerto Rico. The Court's opinion in *Balzac* clearly bears the imprint of Taft's personal biases.

Jesus M. Balzac, the editor of a daily newspaper in Arecibo, Puerto Rico was charged him with criminal libel—a misdemeanor under Puerto Rico's criminal code—for having published a letter indirectly referencing the governor of Puerto Rico. Relying on the Jones Act's grant of citizenship and the *Mankichi* and *Rasmussen* cases, Balzac requested a jury trial.⁸⁷ This request was denied. After being convicted, Balzac appealed to the Supreme Court of Puerto Rico, which affirmed the denial of his claim of entitlement to trial by jury as well as his conviction. Thereafter, he appealed to the Supreme Court of the United States. That Court, in an opinion by Chief Justice Taft, unanimously ruled that he was not entitled to trial by jury.

In Taft's view, at least as to Puerto Rico, a grant of citizenship was a devalued item as far as constitutional rights were concerned:

What additional rights did it give them? It enabled them to move into the continental United States and becoming residents of any State there to enjoy every right of any other citizen of the United States, civil, social and political . . . In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury . . . The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution . . . *It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.*⁸⁸

Taft then proceeded to skirt *Rasmussen*, which, as will be recalled, was also a misdemeanor conviction involving the right to trial by jury:

Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American Continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents, and one of them is in the very matter of trial by jury.⁸⁹

87. *Balzac*, 258 U.S. at 300, 304-05.

88. *Id.* at 308-09 (emphasis added).

89. *Id.* at 309.

Taft next added insult to injury, reciting stereotypical conclusions that were wholly lacking in any factual basis and barely disguised his biases and prejudices:

The jury system needs citizens trained to the exercise of the responsibilities of jurors. In common-law countries centuries of tradition have prepared a conception of the impartial attitude jurors must assume. The jury system postulates a conscious duty of participation in the machinery of justice which it is hard for people not brought up in fundamentally popular government at once to acquire . . . Congress has thought that a people like the Filipino or the Porto Ricans, trained to a complete judicial system which knows no juries, living in compact and ancient communities, with definitely formed customs and political conceptions, should be permitted themselves to determine how far they wish to adopt this institution of Anglo-Saxon origin, and when . . . We can not find any intention to depart from this policy in making Porto Ricans American citizens, explained as this is by the desire to put them as individuals on exact equality with citizens from the American homeland, to secure them more certain protection against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other rights.⁹⁰

Taft finished by stating that Puerto Rican residents were protected as to “fundamental [constitutional] rights,” which he did not define, and left to future litigation. What is certain is that trial by jury was *not* a fundamental right in the eyes of the *Balzac* Court,⁹¹ and thus *Balzac*’s conviction stood. Even worse is the fact that *Balzac* is still ‘good’ law and is frequently cited by the Court.⁹²

It is hard to explain why this is so, for the *Balzac* opinion is riddled with inconsistencies, inaccuracies, and plain misinformation. To start, the idea that trial by jury is not a fundamental right is simply not the law, at least where Mainland citizens are involved.⁹³ The idea that the constitutional rights of U.S. citizens against their government vary depending on what U.S. jurisdiction those citizens are standing in is not only absurd on its face, but has also been rejected by the Supreme Court in cases where the extraterritorial extension of rights concerns citizens that reside in States rather than territories.⁹⁴ Additionally, in seeking to avoid the applicability of *Rassmussen* to *Balzac*, it is difficult to fathom what rel-

90. *Id.* at 310-11.

91. *Id.* at 309-14.

92. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 757-59 (2008); *Powers v. Ohio*, 499 U.S. 400, 406-07 (1991); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69 (1990).

93. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“Trial by jury in criminal cases is fundamental to the American scheme of justice . . .”).

94. *Reid v. Covert*, 351 U.S. 487, 487 (1957) (holding that the military trial of a U.S. civilian by U.S. authorities in England without the benefit of indictment by a grand jury and trial before a petit jury violated the Constitution).

evance a number of factors—Alaska's sparse population, the existence of settlement opportunities for the United States' citizens, or the distance of Alaska to the United States proper as compared to Puerto Rico—had to the issue of whether the right to trial by jury should exist in Puerto Rico as it did in Alaska and Hawaii.

The obvious predisposition of Taft to conclude that Puerto Ricans were incapable of or unable to comprehend an institution "of Anglo-Saxon origin" like the jury is particularly vexing and lacking in any factual support. Had Taft not been so intent upon reaching a result preordained by his prejudices, he would have been aware of the fact that criminal jury trials had been conducted in the U.S. District Court for Puerto Rico for twenty-three years, since 1899. And criminal jury trials had been conducted in the local Puerto Rican courts in felony cases for twenty-one years, since 1901, pursuant to Puerto Rico's own code of criminal procedure.⁹⁵ Furthermore, Puerto Ricans experienced at least some forms of popular government before the U.S. invasion, which, despite the promise of bringing democracy to Puerto Rico,⁹⁶ eliminated even those limited rights that Puerto Ricans had at the time of the change in sovereignty. These lost rights included full Spanish citizenship with equality of rights and representation in the Spanish Parliament to the tune of three senators and sixteen deputies⁹⁷—fundamental democratic rights that have yet to be achieved after one hundred and sixteen years of United States' tutelage.

E. *Local Self-Government v. Colonial Status*

In time, the United States recognized that it needed to counteract a growing Puerto Rican separatist movement that had become more prevalent and radical in the late 1940s⁹⁸ and to present viable answers to increased international pressures questioning the obviously colonial relationship that existed between United

95. The latter was something of which Taft was fully aware. See *Balzac*, 258 U.S. at 300 ("The code of criminal procedure of Porto Rico grants a jury trial in cases of felony but not misdemeanors.").

96. When General Nelson A. Miles, of Indian Wars fame, landed in Guánica, Puerto Rico on July 25, 1898, he proclaimed: "[W]e have not come to make war upon the people of a country that for centuries has been oppressed, but, on the contrary, to bring you protection, not only to yourselves but to . . . bestow upon you the immunities and blessings of the liberal institutions of our Government." NELSON A. MILES, ANNUAL REPORT OF THE MAJOR-GENERAL COMMANDING THE ARMY TO THE SECRETARY OF WAR 31-32 (1898). On July 29, the mayor of Puerto Rico's second city, Ponce, greeted the invading forces with the municipal band playing the "Star Spangled Banner," and shortly thereafter General Miles was forced to cable the War Department: "Please send any national colors that can be spared, to be given to different municipalities." See TORRUELLA, *supra* note 43, at 22.

97. See FERNANDO BAYRÓN TORO, HISTORIA DE LAS ELECCIONES Y PARTIDOS POLITICOS DE PUERTO RICO 3, 25 (1977).

98. ROBERT WILLIAM ANDERSON, PARTY POLITICS IN PUERTO RICO 95-108 (1965).

States and Puerto Rico.⁹⁹ Thus, the local political establishment—under the watchful eye of Washington—was eventually allowed to carry out a controlled action to set up such local institutions as would allow an argument to be made that a process of self-determination, approved by the Puerto Rican electorate, had effectively ended the colonial relationship.

As part of this package, Congress approved legislation allowing the Puerto Rican electorate to choose its own governor for the first time in history;¹⁰⁰ the 1950 election resulted in Luis Muñoz Marín being elected to that position. Thereafter, Congress held hearings that resulted in legislation authorizing the people of Puerto Rico to draft a constitution and hold a referendum to approve or disapprove the same.¹⁰¹ Today, this legislation is commonly referred to by its statute number: “Law 600.” A constitutional convention produced such a document, which was then approved by the Puerto Rican electorate. After the President and Congress imposed several amendments on the Puerto Rican draft, the constitution was resubmitted to the Puerto Rican electorate, where it received its final approval. Thus, on July 25, 1952, the so-called “Commonwealth of Puerto Rico” was born.¹⁰²

Although the constitutional status of Puerto Rico after this exercise was hotly debated, *constitutionally* speaking, no change was effectuated in its basic colonial relationship with the United States. As cogently summarized by one noted 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.”¹⁰³ In other words,

99. ROBERT ALDRICH & JOHN CONNELL, *THE LAST COLONIES* 156–57 (1998).

100. See Puerto Rico Elective Governor Act, Pub. L. No. 362 CH. 490, 61 Stat. 770 (1947).

101. Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. § 731(b) (2006)) (allowing Puerto Ricans to draft their own constitution, subject to congressional approval).

102. The official Spanish title of the Government of Puerto Rico is “Estado Libre Asociado,” an enigmatic label if ever there was one, which literally translated means “Free Associated State.” As we have seen, Puerto Rico is neither free, nor is it associated (it is, in fact, a U.S. colony), and it is most certainly not a State. The English title “Commonwealth of Puerto Rico” is equally problematic. It is not a “commonwealth” as the term is used with regards to Massachusetts or Virginia or Pennsylvania. Nor is it, of course, part of the British Commonwealth of Nations. Both the English and Spanish titles are a convenient terminology designed to hide its real constitutional and political status from those who may be unawares of the background that led to Chief Justice Fuller to aptly describe it as a “disembodied shade.” *Downes v. Bidwell*, 182 U.S. 244, 372 (1901) (Fuller, C.J., dissenting).

103. David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. U.P.R. 255, 307 (1952).

while Law 600 vested the Puerto Rican people with a measure of direct governance at the municipal and territorial level, it left wholly unaltered Congress's "supreme legislative [and administrative] power" over Puerto Rico.¹⁰⁴

Thereafter, in what can at best be described as a marriage of convenience—and, at worst, a monumental hoax¹⁰⁵—the Puerto Rican and United States' governments appeared before the United Nations and were able to garner sufficient votes to the effect that Puerto Rico had become a fully self-governing territory, and that annual reports by the United States would therefore no longer be required regarding progress made toward self-determination.¹⁰⁶

Perhaps the best evidence that no constitutional change really took place as a result of the Law 600 exercise is the intellectual mea culpa of José Triás Monge, the principal architect of this new, alleged, Commonwealth status.¹⁰⁷ Triás Monge was a key player throughout the Law 600 scenario, including as a member of the U.S. delegation that convinced the United Nations to change Puerto Rico's status from that of a colonial entity.¹⁰⁸ His confession that these steps effected no real change was the central subject of his book, *Puerto Rico: The Trials of the Oldest Colony in the World*.¹⁰⁹ It was an act of admirable intellectual courage, which required reversing the position that he had publicly espoused for close to fifty years: that the colonial status of Puerto Rico had changed with the passage of Law 600. The truth of this admission is borne out daily in Puerto Rico, where almost four million United States citizens remain bound by congressional mandates passed absent any direct voting representation.

IV. WHY THE UNITED STATES-PUERTO RICO RELATIONSHIP IS COLONIAL

This Article began by defining a colony as "a territory, subordinate in various ways—political, cultural, or economic—to a more developed country. Supreme legislative power and much of the administration rest[s] with the controlling country, which [is] usually of a different ethnic group from the colony."¹¹⁰ Clearly, the United States has a colonial relationship to Puerto Rico.

104. See *supra* note 1 and accompanying text (defining a colonial relationship).

105. See Juan R. Torruella, *Hacia Donde Vas Puerto Rico?*, 107 YALE L.J. 1503, 1514-17 (1998).

106. G.A. Res. (VIII) 748, U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2639, at 25-26 (Nov. 27, 1953).

107. At the time that Law 600 was enacted, Triás Monge was Puerto Rico's Attorney General and later the Chief Justice of Puerto Rico's Supreme Court.

108. See G.A. Res. (VIII) 748, *supra* note 106; TORRUELLA, *supra* note 43, at 160-66.

109. See TRIÁS MONGE, *supra* note 31.

110. See *supra* note 1 and accompanying text.

A. *The Political Manifestations of Puerto Rico's Colonial Relationship*

What we have in this relationship is not the subordination of Puerto Rico's political power to that of the United States, but rather the lack of *any* political power by Puerto Rico vis-à-vis the United States. The United States citizens residing in Puerto Rico do not have the right to vote for national offices.¹¹¹ Even more importantly, they lack any voting representation in Congress,¹¹² the body that has plenary power over Puerto Rico and its citizens, and whose enactments permeate every facet of Puerto Rican society. Supreme legislative power therefore lies solely in an institution that enacts laws without *any effective participation or consent* from the U.S. citizens who are obligated to comply with them.

Further, this absolute vacuum or deficit of democratic entitlement carries over to the administration of these congressionally imposed laws. Since the Executive Branch of government is led by a President and Vice President for whom the U.S. citizens of Puerto Rico cannot vote, they are deprived of any influence as to how or by whom these laws will be administered.

Put simply, what exists is government without consent of the governed. The Puerto Rican people are dictated to by a distant metropolitan power. Politically, this is a classic colonial relationship.

B. *The Economic Manifestations of Puerto Rico's Colonial Relationship*

Another hallmark of a colonial relationship is the economic subjugation of colonial territories, in which the governing nation exploits the natural resources and labor force of its possession.¹¹³ The United States' treatment of Puerto Rico bears the fundamental markers of just such economic subjugation in obvious ways, including: the historical imposition of strict agricultural quotas, the modern-day economic dependencies created by unbalanced imports and exports, and the long-unfettered appropriation of both the island's land and the life of its citizens for strategic military use.

Between 1910 and the 1950s, Puerto Rico's economy was based almost entirely on sugar cane¹¹⁴ and the production of molasses for refinement in stateside factories, as required by the production quotas imposed by the various Sugar Acts.¹¹⁵ Stateside absentee companies controlled 59% of the arable land, which resulted

111. See *Igartúa-De la Rosa v. United States*, 417 F.3d 145, 151 (1st Cir. 2005) (en banc) ("[T]he right [to vote for President] cannot be implemented by courts unless Puerto Rico becomes a state or until the Constitution is changed . . .").

112. See *Igartúa v. United States*, 626 F.3d 592 (1st Cir. 2010) (holding that U.S. citizens residing in Puerto Rico do not have the right to elect Representatives to Congress).

113. See *supra* note 1 and accompanying text.

114. See TORRUELLA, *supra* note 43, at 234 tbl.21.

115. Sugar Act of 1948, Pub. L. No. 80-388, 61 Stat. 922 (1947); Sugar Act of 1937, Pub. L. No. 75-414, 50 Stat. 903; Jones-Costigan Act of 1934, Pub. L. No. 73-215, 48 Stat. 670.

in operations so profitable for the stockholders that at times dividends as high as 115% of their investments were declared.¹¹⁶ In fact, between 1923 and 1930, the return on capital of the four largest U.S. sugar corporations averaged 22.5%, and from 1920 to 1935 three of the U.S. sugar growers (Central Aguirre, South Porto Rico, and Fajardo Sugar) distributed more than \$60 million in dividends to their shareholders while accumulating only \$20 million for reinvestment (i.e., 75% of the companies' earnings left Puerto Rico, as is classic in a colonial economy).¹¹⁷ Meanwhile, the average daily wage for sugar cane cutters, received only during the four to five months when the cane was harvested, was 63 cents in 1917 and decreased to between 50 and 60 cents by 1932. During the rest of the year, these workers were largely unemployed.¹¹⁸

In the 1940s the wages of the sugar workers also decreased as a result of union activity and labor strife, much of which resulted in serious violent confrontations.¹¹⁹ At the same time, the labor movement radicalized, seeking the aid of Puerto Rico's nascent nationalist movement.¹²⁰ By the 1950s, increased costs of production and competition from other sugar-producing areas led to the decline of the sugar industry and formed the impetus for the Puerto Rican Government's vigorous industrialization program, dubbed "Operation Bootstrap."¹²¹

Puerto Rico's industrial base diversified and grew exponentially for the next forty years. Between 1960 and 1976, Puerto Rico went from sixth to first in Latin America for total direct U.S. investment and accounted for 40% of all profits by U.S. companies in Latin America, more than the combined earnings of all U.S. subsidiaries in Brazil, Mexico, and Venezuela.¹²² Section 936 of the United States' Internal Revenue Code provided significant tax incentives to U.S. corporations operating out of Puerto Rico, and by 1977 several major multinationals reported that more than one quarter of their worldwide profits were produced from their Puerto Rico operations.¹²³ Chemical and pharmaceutical companies benefitted most from the 936 tax shelter: Johnson & Johnson saved over \$1 billion in federal taxes between 1980 and 1990; Smith-Kline, \$987 million; Merck, \$749 million; and

116. See TORRUELLA, *supra* note 3, at 235 n.858.

117. See DIETZ, *supra* note 31, at 139.

118. *Id.* at 111, 140-42.

119. JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* 85 (2000).

120. See RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* 116 (2d ed. 1996); see also DIETZ, *supra* note 31, at 175.

121. DIETZ, *supra* note 1, at 240-42.

122. See EMILIO PANTOJAS-GARCIA, *DEVELOPMENT STRATEGIES AS IDEOLOGY: PUERTO RICO'S EXPORT-LED INDUSTRIALIZATION EXPERIENCE* 17-18 (1990).

123. I.R.C. § 936 (1996) (repealed 1996); see PANTOJAS-GARCIA, *supra* note 122, at 153.

Bristol-Meyers, \$627 million.¹²⁴ Other than the pharmaceutical and technical industries, however, most of these new section 936 factories—like the sugar industry before them—depended on low labor costs. As wages increased through the application of federal minimum wage laws, relocation to other more competitive countries became economically sensible.

Over 40% of the companies that began conducting business with this local tax exemption closed down Puerto Rican operations when Congress repealed section 936 in 1996, further eroding the industrial base created by “Operation Bootstrap.”¹²⁵ The decision to repeal stemmed in large part from the frequent abuse of this exemption by U.S. companies operating under its umbrella. This was particularly true of firms with high research, development, and marketing expenses but low production costs, who—by transferring their production, patents, and trademarks to wholly owned subsidiaries in Puerto Rico—shielded all revenue produced by these products from federal income taxes.¹²⁶ The cost in lost tax revenue to the federal government through use of this unintended loophole grew to nearly \$3 billion annually in 1987,¹²⁷ as the section 936 companies turned Puerto Rico into the U.S. capital’s number one profit center in the world. In 1986, for instance, U.S. investment in Puerto Rico surpassed even the nation’s investments in Germany, Canada, Japan, and United Kingdom.¹²⁸ These unintended consequences had not been contemplated by Congress when it passed the section 936 legislation, and Congress therefore quickly moved to close this loophole.

As a result, Puerto Rico is today even more dependent on U.S. transfers to maintain its weakened, marginal economy, receiving approximately \$16 billion annually in U.S. government subsidies and assistance.¹²⁹ While Puerto Rican residents do not pay federal income taxes on income derived from Puerto Rican sources, they are fully taxed otherwise (despite, as previously discussed, having

124. See Kelly Richmond, *Drug Companies Fear Loss of Tax Exemption*, N.J. RECORD, Nov. 8, 1993.

125. See FERNANDEZ, *supra* note 120, at 208. Section 936 served to incentivize Puerto Rican business by providing favorable tax incentives to U.S. corporations operating on the island. I.R.C. § 936 (1996) (repealed 1996). For discussion of the repeal’s effect on Puerto Rico, see Milo W. Peck & Helene W. Johns, *The Death of Section 936: Closing a Loophole or Poor Policy?*, 22 INT’L TAX J. 1, 8 (1996); and Angel L. Ruíz Mercado & Edwin Meléndez, *The Potential Impact of the Repeal of Section 936 on Puerto Rico’s Economy: Summary*, BOLETÍN DE ECONOMÍA (Departamento de Economía, Universidad de Puerto Rico, Río Piedras, P.R.) July–Sept. 1997, at 4–10.

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

127. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-92-72BR, PHARMACEUTICAL INDUSTRY TAX BENEFITS OF OPERATING IN PUERTO RICO 14 (1992).

128. See PANTOJAS-GARCIA, *supra* note 122, at 67.

129. COMMONWEALTH OF PUERTO RICO, FINANCIAL INFORMATION AND OPERATING DATA REPORT 18 (2013) (“Total United States federal transfer payments to individuals amounted to \$16.0 billion in fiscal year 2012 and \$15.6 billion in fiscal year 2011.”).

no national political rights).¹³⁰ Additionally, 90% of Puerto Rico's exports are destined for the mainland U.S. while, conversely, the island is a significant importer of U.S. goods.¹³¹ This makes Puerto Rico—which has contributed more wealth to the United States than any other country in history—one of the largest (captive) markets of U.S. goods, and means that, in effect, the federal subsidies to Puerto Rico are “repatriated” through payment for these U.S. goods.

The Puerto Rican economy also continues to be almost totally controlled by United States interests. Ownership of Puerto Rico's principal industries continues to be dominated by U.S.-based multinationals—mainly chemical, pharmaceutical, electronic, and scientific equipment manufacturers—whose net annual profits derived from Puerto Rican activities surpassed \$14 billion in 1995. In the tourism industry, which is the second largest industry on the island, almost all major hotels are owned or controlled by stateside capital. There are 178 Fortune 500 companies with Puerto Rico subsidiaries, and U.S. companies consistently invest heavily in Puerto Rico, in part because the productivity rate of the work force is one of the highest in the world.¹³²

130. In addition to the fact that Puerto Ricans pay federal taxes, the statistics cited in this Section illustrate the extent to which much of Puerto Rico's economic instability derives from the United States' historical misuse of its labor and land. Considering that numerous military establishments that have occupied large areas of some of Puerto Rico's best lands during the last sixty years, not to mention the multiple sacrifices of the many U.S. citizens who reside in Puerto Rico who have served and fought in the Armed Forces, it is hard to argue that the federal subsidies received by Puerto Rico are not wholly deserved. Perhaps a useful comparison is the *foreign aid* which U.S. annually provides to countries throughout the world, many of which are only marginal allies. In 2011, the top five countries receiving economic and military aid were, by amount: Afghanistan; \$11.3 billion; Israel, \$3 billion; Iraq, \$2.5 billion; Pakistan, \$2.1 billion; Egypt, \$1.4 billion. *USAID Foreign Assistance Fast Facts: FY2011*, USAID, <http://gbk.eads.usaidallnet.gov/data/fast-facts.html> (last visited Oct. 15, 2013). Another five countries received more than \$700 million in aid. *Id.*

131. See GONZALEZ, *supra* note 119, at 249; 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).

132. See CARIBBEAN BUS., *THE PUERTO RICO INVESTOR'S GUIDE TO GOVERNMENT RESOURCES* 5 (2007) (“[Fifty-five] of [the] Fortune 100 companies and 178 of [the] Fortune 500 companies have operations in Puerto Rico.”); *id.* at 20-21 (describing the advantages of Puerto Rico's workforce); FED. RESERVE BANK OF N.Y., *REPORT ON THE COMPETITIVENESS OF PUERTO RICO'S ECONOMY* 4 (2012) (“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 that 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 income by these U.S. corporations, leads to an overstatement of the amount of income accruing to residents of Puerto Rico.”); see also *To the Investor*, GOV'T DEV. BANK P.R., <http://www.gdb-pur.com/>

The high profit margins of these U.S.-based companies belie Puerto Rico's resoundingly negative economic statistics. In large part, this is because nearly four out of every ten dollars produced by Puerto Rican workers leaves the island, ending up in the coffers of a U.S. firm.¹³³ In the mid-1990s, for example, the average salary of Puerto Rican workers was only 21% of the average income of their employers, as compared to 70% in the case of U.S. workers.¹³⁴ Adding to this exportation of profits derived from Puerto Rican labor is an unemployment rate that is rarely below 10%—and at times over 16%¹³⁵—which results in nearly half the Puerto Rican population living below the U.S. poverty level.¹³⁶ Perhaps a telling measure of the questionable beneficence of section 936 companies towards Puerto Rico is the fact that in 1989, when pharmaceutical companies earned more than \$3 billion in profits from their Puerto Rico operations, they gave a total of only \$1 million in charitable donations.¹³⁷

If the above facts are not enough to demonstrate a colonial relationship, the Jones Act¹³⁸ requires that all cargo shipped to and from the Mainland be carried on U.S.-flagged bottoms. Thus the cost of shipping to Puerto Rico is commonly nearly double that of nearby islands, whose use of foreign-flagged ships is not restricted.¹³⁹ Because the cost of transporting on U.S. merchant vessels is the high-

investors_resources/introduction.html (last visited Aug. 27, 2013) ("Public bonds of Puerto Rico are held mainly by U.S. mainland investors . . .").

133. See GOBIERNO DE PUERTO RICO OFICIANA DEL GOBERNADOR JUNTA DE PLANIFICACION [hereinafter PUERTO RICO PLANNING BD.], *Impacto de Sector Externo en la Economía de Puerto Rico*, in INFORME ECONOMICO GOBERNADOR 1995, at 12 (1996).
134. PUERTO RICO PLANNING BD., *La Distribucion Funcional del Ingreso Neto en Puerto Rico*, in INFORME ECONOMICO GOBERNADOR 1995, at 2 (1996).
135. The current Puerto Rican unemployment rate of 14.7% is 5% higher than any U.S. state, or even the recently bankrupt city of Detroit, Michigan. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-13-2394, NEWS RELEASE: REGIONAL AND STATE EMPLOYMENT AND UNEMPLOYMENT - NOVEMBER 2013, at 11 tbl.3 (2013) (comparing Puerto Rico's November 2013 unemployment rate of 14.7% against that of the highest states, Nevada and Rhode Island at 9.0%, and the city of Detroit, Michigan at 9.3%); *Local Area Unemployment Statistics: Puerto Rico*, BUREAU LAB. STAT., <http://data.bls.gov/timeseries/LASST43000003> (last visited Aug. 27, 2013) (showing that in the last ten years Puerto Rico's unemployment rate has ranged as high at 16.9% and never dropped below 10%).
136. The poverty level by U.S. standards was about 45% of the population in 2010 and 2011. See ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, POVERTY: 2010 AND 2011, at 3 tbl.1 (2012).
137. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 126, at 64.
138. Merchant Marine (Jones) Act of 1920, Pub. L. No. 66-261 § 27, 41 Stat. 988, 999.
139. FED. RESERVE BANK OF N.Y., *supra* note 132, at 13 ("It costs an estimated \$3,063 to ship a twenty-foot container of household and commercial goods from the East

est in the world, residents of Puerto Rico pay significantly higher prices for imported goods, which makes the Puerto Rican economy suffer.¹⁴⁰ As a result, Puerto Rico is the main subsidizer of the U.S. merchant fleet, receiving 21.7% of all U.S.-flag shipments even though it has only 1% of the U.S. population.¹⁴¹

The existence of high unemployment and low wages as compared to mainland United States has also forced a large number of Puerto Ricans to migrate to the mainland.¹⁴² This diaspora has resulted in more than four million Puerto Ricans¹⁴³—more than are living in Puerto Rico¹⁴⁴—spread throughout almost every state in the Union. Ironically, as promoted by Chief Justice Taft in *Balzac*, there they are entitled to the rights denied to them in Puerto Rico. These same factors of high unemployment and low wages have also led large numbers of Puerto Ricans to look to the U.S. Armed Forces for employment. In this way, the direct effects of colonialism on the Puerto Rican economy enact further, secondary costs on the Puerto Rican populace: Puerto Ricans have served in every war since the First World War in disproportionate numbers to the rest of the nation and have suffered casualties accordingly.¹⁴⁵

Coast of the United States to Puerto Rico; the same shipment costs \$1,504 to nearby Santo Domingo (Dominican Republic) and \$1,687 to Kingston (Jamaica)—destinations that are not subject to Jones Act restrictions.”).

140. *Id.* at 13 & n.34; see WORLD BANK, ECONOMY PROFILE: PUERTO RICO (U.S.) at 75 fig.9.1.
141. GONZALEZ, *supra* note 119, at 251.
142. See THE PUERTO RICAN DIASPORA: HISTORICAL PERSPECTIVE (Carmen Teresa Whalen & Victor Vazquez-Hernandez eds., 2005).
143. See PEW RESEARCH CTR., HISPANICS OF PUERTO RICAN ORIGIN IN THE UNITED STATES, 2009, at 1-2 (2011).
144. Kevin Mead, *PR Population Below 3.7M; Income, Poverty Hold*, CARIBBEAN BUS. (Sept. 20, 2013, 10:20 AM), <http://www.caribbeanbusinesspr.com/news/census-pr-population-falls-below-3.7m-income-poverty-rates-hold-89054.html>.
145. Puerto Ricans have served in the U.S. armed forces since March 2, 1899, when Congress authorized the organization of a “native” battalion, the “Puerto Rican Battalion of Volunteer Infantry.” In 1917, two months after the passage of the Jones Act granting Puerto Ricans citizenship, the President, by decree, extended the Selective Service Act to Puerto Rico. Since that time, Puerto Ricans have served in significant numbers in all major U.S. wars and conflicts, including more than 65,000 who served in World War II, but have suffered casualty rates at times surpassing many mainland states. In Korea, for example, Puerto Rico’s casualty rate was one per 600 inhabitants, significantly higher than the one per 1,125 person rate of the continental United States. See generally Luis R. Dávila Colón, *The Blood Tax: The Puerto Rican Contribution to the United States War Effort*, 40 REV. COL. ABOG. P.P.R. 603 (1979) (listing figures). Puerto Rico’s contribution to the U.S. military continues to date, with more than 300 service members having lost their life in Iraq and Afghanistan. *Iraq Coalition Casualties: U.S. Wounded Totals*, ICASUALTIES.ORG, <http://>

There is another aspect to the impact of the military on Puerto Rico and its colonial status. The United States' original interest in Puerto Rico was mainly strategic; by annexing Puerto Rico, it acquired deep-water naval ports and coal-ing stations from which to control the Southern approaches to the United States and, later on, from which to defend the Panama Canal. With United States bases in Puerto Rico and Panama—as well as in Guantánamo Bay¹⁴⁶ and the U.S. Virgin Islands—the Caribbean Sea became a U.S. lake. As time progressed through the First and Second World Wars, the Cold War, and other undeclared wars, conflicts, and police actions, Puerto Rico—withstanding its limited land area—became a virtual military camp. Proportionately, more land in Puerto Rico was occupied for these purposes than in any other U.S. jurisdiction, to the tune of 14% of the island's land.¹⁴⁷ The West and East ends of Puerto Rico became major military complexes, the West with a strategic bomber base at Ramey Field that had one of the longest runways in the world,¹⁴⁸ and the East with the largest naval complex outside the continental United States at Roosevelt Roads.¹⁴⁹ At 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 nearly sixty years, notwithstanding decades of opposition by successive local governments.¹⁵⁰

When, because of mounting local opposition, the Navy finally discontinued its bombing operations in 1999, it retaliated by closing down all of its bases in Puerto Rico almost overnight, causing a major disruption to the island's economy.¹⁵¹ Perhaps even more egregious, however, was the Navy's refusal to adequately clean up and rectify the environmental, ecological, and health damage that its operations had caused to the island's 9,000 plus civilian residents.¹⁵² Not-

/icasualties.org/Iraq/USCasualtiesByState.aspx (last visited Aug. 27, 2013); *Operation Enduring Freedom: U.S. Wounded Totals*, ICASUALTIES.ORG, <http://icasualties.org/OEF/USCasualtiesByState.aspx> (last visited Aug. 27, 2013).

146. Recently, some 125 Puerto Rican military police were sent to Guantánamo to serve as reinforcements at the detention center there. See *U.S. Sends 125 Troops to Guantánamo from Puerto Rico*, HUFFINGTON POST WORLD, June 5, 2013, http://www.huffingtonpost.com/2013/06/05/125-us-troops-sent-to-guantanamo_n_3390907.html.
147. GONZALEZ, *supra* note 119, at 252.
148. Evelyn Guadalupe-Fajardo, *Raising Ramey*, P.R. HERALD, July 31, 2003.
149. KATHERINE T. MCCAFFREY, *MILITARY POWER AND POPULAR PROTEST: THE U.S. NAVY IN VIEQUES, PUERTO RICO* 11-12 (2002).
150. See *Abreu v. United States*, 468 F.3d 20 (1st Cir. 2006).
151. Matthew Hay Brown, *Base Closure Hurts Town*, ORLANDO SENTINEL, Aug. 1, 2005.
152. See MCCAFFREY, *supra* note 149.

withstanding compelling evidence that this damage has taken place and continues unabated, Congress has turned a deaf ear on the pleas of these politically defenseless citizens, and so have the Courts of the United States.¹⁵³

Had Puerto Rico and its resident U.S. citizens not been subjected to a colonial regime, but instead granted even a modicum of political power, these abuses would not have gone on unattended. When similar situations have arisen in the various states—such as in Massachusetts's offshore islands, California's Channel Islands, or Hawaii—their political power has been brought to bear to correct the harms to the environment and to the civilian population caused by such operations. Given this long history of economic subjugation and dependency, it is difficult to argue that the U.S. citizens of Puerto Rico have not been, and are not being, exploited in what is a classic colonial relationship.¹⁵⁴

C. *The Cultural Manifestations of Puerto Rico's Colonial Relationship*

In addition to the political and economic manifestations resulting from the relationship of Puerto Rico to the United States—both of which exhibit flagrant inequality and dependencies that are hallmark indicators of colonialism—the Puerto Rican citizenry visibly bears the effects of this colonial relationship, as manifested through their culture and identity.

In its broadest sense, "culture" includes not only the intellectual and artistic contributions of a people, but more generally the whole scope of their knowledge, beliefs, morals, customs, opinions, religions, superstitions, and art forms.¹⁵⁵ The existence of a "Puerto Rican culture" has been the subject of long and intense debate.¹⁵⁶ Whether Puerto Rican culture existed at the time of the change in sovereignty in a definitional sense, however, is ultimately irrelevant. The fact is that a substantial segment of the population had beliefs and values that made them sufficiently different and cohesive to give them a reasonable basis for believing that there was such a thing as a "Puerto Rican culture." These elements included some of the very factors that have already been described as underlying the *Insular Cases*: race, language, religion, and ethnicity. Puerto Ricans also looked to Spain as their "mother country" in terms of culture and tradition, notwithstanding their admiration of the United States' democratic institutions, to which they aspired and reasonably sought access to upon becoming citizens.

153. See *Sánchez ex rel. D.R.-S. v. United States*, 671 F.3d 86 (1st Cir. 2012).

154. See GONZALEZ, *supra* note 119, at 250.

155. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 552 (1981).

156. See Sidney W. Mintz, *Puerto Rico: An Essay in the Definition of Culture*, in STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES 339 (1966); cf. José Luis Gonzalez, *Identidad y Diáspora en la Realidad Puertorriqueña*, EL NUEVO DIA, Aug. 21, 1983, at 6, 8, 10.

Although the cultural influence of the United States on Puerto Rico's society is pervasive,¹⁵⁷ in a sense part of this influence is not much different than what has happened throughout the rest of the world. Consider the presence of McDonald's in France and China or the spread of U.S.-inspired modern popular music as two admittedly superficial examples. In the case of Puerto Rico, however, there is an opposite reaction to this phenomenon: the development of a vigorous, autochthonous, and nationalistically-tinged movement in the arts, music, and literature—stronger and more pervasive than at any time during the 400 years of Spanish colonial presence on the island.¹⁵⁸

The issue of cultural colonialism is, in fact, a much more complex one. Franz Fanon, the French psychiatrist and theorist of the Algerian independence movement, wrote:

[C]olonialism is not satisfied merely with holding a people in its grip and emptying the native's brain of all form and content. By a kind of perverted logic, it turns to the past of the oppressed people, and distorts, disfigures, and destroys it . . . [T]he effect consciously sought by colonialism [is] to drive into the natives' heads the idea that if the settlers were to leave, they would at once fall back into barbarism, degradation and bestiality.¹⁵⁹

Obviously the French colonial policies in Algeria were exponentially more extreme than the U.S. colonial policies and administration of Puerto Rico. Still, the United States' "Americanization" campaign in Puerto Rico, beginning in 1898 and lasting into the late 1940s,¹⁶⁰ focused on the implicit notion that everything "American" was superior and was purposely aimed at downgrading, if not eradicating, Spanish as Puerto Rico's vernacular.¹⁶¹ This campaign undermined Puerto Rico's cultural self-esteem and fully impacted several generations of Puerto Ricans, with lasting effects to this day. These effects have been poignantly described by Gordon Lewis in his perceptive analysis of the cultural dilemma in Puerto Rico:

American occupation and control have left a very real colonial psychology in the Puerto Rican people. There is a militant self-defensiveness, a resentment of condescension, a proud assertion of *puertorriqueñismo*. These traits explain a number of phenomena: the search in politics for a

157. See, e.g., PEDRO A. MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* (2004).

158. See, e.g., *id.* at 106-12.

159. FRANZ FANON, *THE WRETCHED OF THE EARTH* 210-11 (1965).

160. See TORRUELLA, *supra* note 3, at 261.

161. *Id.* at 215-16; Ismael Rodríguez Bou, *Significant Factors in the Development of Education in Puerto Rico*, in STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES 153, *supra* note 156. But see JUAN JOSÉ OSUNA, *A HISTORY OF EDUCATION IN PUERTO RICO* 199-201 (Universidad de Puerto Rico, ed. 1949).

constitutional status which will yield the dignity of separate insular identity as it also preserves the privileges of American citizenship, the effort to discover a special native “character” and personality, the emergence of a cultural nationalism seeking to preserve the “purity” of the home language against the vulgarities of American idiom.¹⁶²

The “neither fish nor fowl” predicament that the *Insular Cases* entrenched in the United States-Puerto Rico relationship has manifested itself in Puerto Rican society through a deep ambivalence and insecurity as to their identity as a people—not only in the broader international sense but more specifically within the United States’ national polity. Although the colonial administration of Puerto Rico by the United States undoubtedly made tremendous advances in the physical health¹⁶³ and education¹⁶⁴ of the island’s population, it is in the area of mental health that Puerto Rican citizens have been most negatively affected by Puerto Rico’s colonial condition.

It has been argued in both scientific and non-scientific literature that the perception of political and cultural inferiority can be linked to mental illness.¹⁶⁵ Studies have shown that the residents of Puerto Rico suffer over three times more mental, psychoneurotic, and personality disorders than the average United States population,¹⁶⁶ with schizophrenia historically being the most treated psychosis on the island.¹⁶⁷ As stated by Dr. Hector H. Bird in a paper presented before the American Academy of Psychoanalysis:

162. Gordon K. Lewis, *Puerto Rico: A Case Study of Change in an Underdeveloped Area*, 17 J. POL. 614, 616 (1955).

163. See TORRUELLA, *supra* note 43, at 206 tbl.3, 208 tbl.4, 217-22.

164. *Id.* at 209-17.

165. See Hector R. Bird, *The Cultural Dichotomy of Colonial People*, 10 J. AM. ACAD. PSYCHOANALYSIS 195 (1982); Mintz, *supra* note 156, at 339-435; see also 2 *Hearings Before the U.S.-P.R. Comm’n on the Status of P.R.*, 89th Cong. 397-426 (testimonies of Dr. Hernán Padilla and Rafael Correa Corona); Michael Woodbury, *Mental Health and the Quality of Life in Puerto Rico*, 6 PLERUS 1, 10, 24-25 (1977); cf. Blanca Fernandez-Pol, *Culture and Psychopathology: A Study of Puerto Ricans*, 137 AM. J. PSYCHIATRY 724 (1980) (providing evidence of a connection between decreased adherence to Latin American family values and psychiatric morbidity in Puerto Rican patients).

166. See Jaime F. Pou, *Special Communication: Diagnostic Patterns in Disability in Puerto Rico and the United States*, 68 BOLLETIN DE LA ASOCIACIÓN MÉDICA DE PUERTO RICO 224 (1976).

167. See TORRUELLA, *supra* note 43, at 222 & n.814. Of all U.S. jurisdictions in which Social Security benefits are paid, Puerto Rico has the highest percentage of recipients claiming mood disorders as the grounds for relief (33.3%), followed by Massachusetts (22.8%), and New Hampshire (22.2%). See SOC. SEC. ADMIN., PUB. NO. 13-11827, ANNUAL STATISTICAL REPORT ON THE SOCIAL SECURITY DISABILITY INSURANCE PROGRAM, 2011, at 43-44 tbl.11.A.

The . . . state of Puerto Rican society is one of identity diffusion and identity confusion . . . Numerous social indicators reflect the depth and breadth of the Puerto Rican crisis and suggest a collectivity in a state of psychological disintegration. Criminality is rampant, divorce rates are among the highest in the world, as are the rates of alcoholism and drug abuse, and the high incidence of psychopathology and emotional malfunction . . . We do not mean to imply that identity conflicts are the sole explanation for all of Puerto Rico's social ills. Such a highly complex situation is evidently multidetermined and a host of other factors contribute (such as overpopulation, the stress of repeated uprootings in the pattern of back-and-forth migration, rapid social change, and so forth). But many of these factors are directly or indirectly related to the colonial status and the absence of the aforementioned "mutually supportive psychosocial equilibrium" to which identity conflicts contribute.¹⁶⁸

Juan Gonzalez, in his masterful study of the United States' troubled history with its Latino citizens, issued a stronger indictment of the effects of the century's old colonial relationship of the United States on Puerto Ricans:

[A] dependent mentality toward government, pessimism about one's ability to change the future, self-hatred, and self-deprecation have become ingrained in too many Puerto Ricans. . . . They are symptoms of a more deep-rooted malady—the structure of colonialism itself. How else could the U.S. government justify to its people the continued possession of a colony except by cultivating an image of Puerto Ricans as helpless and unable to care for themselves?¹⁶⁹

There should be little doubt that the political, economic and cultural manifestations of the relationship between the United States and Puerto Rico clearly demonstrate that Puerto Rico is a colony of the United States, grievously scarred by the pervasive effects of that colonial relationship.

V. THE COLONIAL STATUS OF PUERTO RICO IS UNAUTHORIZED BY THE CONSTITUTION AND CONTRAVENES THE LAW OF THE LAND AS MANIFESTED IN BINDING TREATIES ENTERED INTO BY THE UNITED STATES

There is nothing in the text of the Constitution that can support the maintenance of colonies by the United States. Furthermore, nothing in the *Federalist Papers* promotes such a practice, let alone mentions the word "colony." This is not surprising given that the War for Independence was fought to escape such a condition. At a minimum, it would have been unusual—not to say unethical—for those who had just fought a grueling war to end colonial rule to authorize such a practice in their new fundamental document. Although, as discussed previously, territorial expansion was surely contemplated, the historical practice and

168. See Bird, *supra* note 165, at 204-05.

169. GONZALEZ, *supra* note 119, at 256.

constitutional jurisprudence clearly document that it was aimed only at the creation of new States or the temporary acquisition of territory destined for statehood. The *Insular Cases* constitute a deviant aberration from this constitutional and historic practice that is today as unsustainable as would be the reinstallation of the practices of racial discrimination sanctioned by *Plessy*.

Furthermore, the United States' failure to take steps to correct the present condition of national disenfranchisement of millions of U.S. citizens residing in Puerto Rico, as well as citizens in the other U.S. territories and possessions, is in clear violation of several treaties to which the United States is a signatory.¹⁷⁰ In particular, the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, provides that "[a]ll peoples have the right of self-determination" and "[b]y virtue of that right they freely determine their political status."¹⁷¹ Article 25 of the ICCPR establishes that:

Every citizen *shall* have the right and the opportunity . . .

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives, [and]

(b) To vote and to be elected at genuine periodic elections which *shall* be by universal and equal suffrage . . .¹⁷²

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"¹⁷³ and to "take whatever 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]."¹⁷⁴ Most importantly, the United States is under the affirmative obligation "[t]o ensure that any person whose rights or freedoms as recognized [in the ICCPR] are violated *shall* have an effective remedy."¹⁷⁵ 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 remedies."¹⁷⁶

At the time of ratification, the United States made the affirmative representation to the more than one hundred other states that had also signed the ICCPR,

170. See *supra* note 6 and accompanying text.

171. See ICCPR, *supra* note 6, art. 1(1).

172. *Id.* art. 25 (emphasis added).

173. *Id.* art. 2(1).

174. *Id.* art. 2(2).

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

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

that “existing U.S. law generally [already] complies with the [ICCPR]; hence, implementing legislation is not contemplated.”¹⁷⁷ 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.”¹⁷⁸

These declarations of compliance were clearly without a basis in fact or law. The United States is not only in unquestioned violation of the provisions of the ICCPR. It has also taken no action to comply with the obligations it assumed thereunder. Further, it has actively and vehemently opposed every attempt by U.S. citizens residing in Puerto Rico to seek judicial relief in the courts of the United States to rectify these violations. These courts, in fact, have rejected all attempts to seek validation of the individual rights established by the ICCPR, allowing the United States the benefit of various judicially legislated legal subterfuges which stand on par with the actions of the Court in *Plessy* and the *Insular Cases* in their lack of constitutional support.¹⁷⁹ Critically, United States courts have refused to allow individuals to enforce the provisions of the ICCPR, relying on the theory that it is not self-executing. But this treaty has been duly ratified by the Senate, and therefore it is unquestionably the Law of the Land, requiring the United States to comply with its provisions irrespective of whether an appropriate personal cause of action exists to enforce them.

CONCLUSION

An elaborate or extensive conclusion is not needed. What is in order is plain speaking: Puerto Rico is a colony of the United States populated by 3.9 million U.S. citizens. Its colonial status has had serious and deleterious effects on Puerto Rico’s political equality, economic vitality, and cultural identity. These pervasive effects have continued unabated for over a century, as Congress and the U.S. courts have turned a blind eye.

The Constitution does not authorize the United States to hold territory or its citizens in such a condition; the *Insular Cases* and *Balzac* validated this colonial status in direct contravention of the words and values of the Constitution. These cases were wrongly decided ab initio. In addition to violating the Constitution, Puerto Rico’s colonial status contravenes the Law of the Land as defined by the United States’ international treaty commitments. The failure to rectify this state of affairs not only abrogates constitutional and legal traditions; it denigrates the

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

178. *Id.* at 10.

179. See *Igartúa-De la Rosa v. United States*, 417 F.3d 145, 149 (1st Cir. 2005) (“[N]one of these treaties comprises domestic law of the United States and so their *status* furnishes the clearest ground for denying declaratory relief”); Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 334-45 (2007).

nation and downgrades United States society. The time is long since past for the Supreme Court to correct the errors that it created.¹⁸⁰

180. There are any number of proposed legislative and political “solutions” to Puerto Rico’s current status, ranging from statehood to independence. Beyond the academic realm, the proper relationship between Puerto Rico and the United States is a source of constant and passionate debate within the Puerto Rican political system, where opinions are shaped by the experiences of constituents who face, daily, the implications of Puerto Rico’s colonial status. Equally important, there is hardly unanimity within the United States’ ruling political circles about what to do with Puerto Rico and its U.S. citizen population. A less discussed, but I believe crucial, part of this equation is role of the U.S. citizenry more generally. These citizens often hold disparate opinions about Puerto Rico—ranging from total indifference or ignorance to vehemently-held views—usually based on experiences with Stateside Puerto Ricans. See, e.g., David Royston Patterson, *Will Puerto Rico Be America’s 51st State?*, N.Y. TIMES, Nov. 24, 2012, <http://www.nytimes.com/2012/11/25/opinion/sunday/will-puerto-rico-be-americas-51st-state.html>; Press Release, Angus Reid Public Opinion, Americans Warming Up to Idea of Puerto Rico Becoming 51st State (Dec. 5, 2012), http://www.angusreidglobal.com/wp-content/uploads/2012/12/2012.12.05_PuertoRico_USA.pdf.

My intent with this Article is not to champion any proposed solution over another. In fact, understanding the crucial problem identified herein requires setting aside individual beliefs about the appropriateness of particular legislative or political action. This is because—whatever the future relationship of Puerto Rico and the United States may be—reaching that solution requires first recognizing the constitutionally untenable nature of their current, colonial relation. I call here not for any particular change, but only for the recognition and rejection of Supreme Court precedent that flies directly in face of the constitutional principles of the United States. Only when the fallacy of this precedent is revealed and rejected by the Court will the political system have the proper impetus to craft a solution of any nature.

