

Race and Empire: The United States Over Puerto Rico

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ABSTRACT

Like an imperial chameleon that changes colors to match its surroundings, the U.S. government has employed euphemisms, rhetorical abstractions, and—at one point in time—openly racist language to justify the unequal status of Puerto Rico and Puerto Ricans in the Union. Even today, apologists for the U.S. colonial endeavor, while avoiding openly racist labels, nonetheless continue to use paternalistic justifications that are little more than code for views that Puerto Ricans are essentially unfit to be complete U.S. citizens, on an equal standing with the rest of the nation. This Article examines the racial underpinnings that gave rise to the legal twists and turns of the U.S. continued colonial relationship with Puerto Rico.

INTRODUCTION

An empire that does not call itself an empire. A colony that is not recognized as a colony. And U.S. citizens whose citizenship is

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less than that of other U.S. citizens. These are just some of the incongruities, paradoxes, and plain nonsense that reflect the tenor of the colonial relationship between the United States and Puerto Rico. Puerto Rico, a small archipelago located in the Caribbean, has been a U.S. territory since the 1898 Spanish-American War.¹ For over a century, the White House, the U.S. Congress, and the U.S. Supreme Court have decided on behalf of Puerto Ricans, with little say from the latter.² The White House has sent administrators to lord over Puerto Rico as if it were a fiefdom, Congress has passed laws that affect the daily lives of Puerto Ricans despite the latter's lack of representation in that legislative body, and Supreme Court justices have issued ruling after ruling reinforcing the second-class status and colonial subjugation of Puerto Ricans.³ Yet, the U.S. government has done everything it can to neither be called an empire by the world community nor have its most populated territory labeled a colony.⁴

Instead, like an imperial chameleon that changes colors to match its surroundings, the U.S. government has employed euphemisms, rhetorical abstractions, and—at one point in time—openly racist language to justify the unequal status of Puerto Rico and Puerto Ricans in the Union. Even today, apologists for the U.S. colonial endeavor, while avoiding openly racist labels, nonetheless continue to use paternalistic justifications that are little more than code for views that Puerto Ricans are essentially unfit to be complete U.S. citizens on an equal standing with the rest of the nation.⁵

This Article examines the racial underpinnings that gave rise to the legal twists and turns of the U.S. colonial relationship with Puerto Rico.

¹ See EDIBERTO ROMÁN, *THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS* 127 (2006).

² LESTER D. LANGLEY, *THE UNITED STATES AND THE CARIBBEAN IN THE TWENTIETH CENTURY* 10 (rev. ed. 1989).

³ Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1120–38 (1997) [hereinafter *Empire Forgotten*].

⁴ See LANGLEY, *supra* note 2, at 12.

⁵ See JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 44–50 (1997); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* 73–142 (2001); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* 72–91 (2009); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* 257 (2006); Christina Duffy Burnett, *A Note on the Insular Cases, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION* 389, 389–90 (Christina Duffy Burnett & Burke Marshall eds., 2001); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 40–84 (1985).

First, we document how White supremacy is a foundational belief in the United States from its very own founding as a slave-owning nation that stole land from Indigenous nations along its expansionist path. Second, we examine the U.S. military takeover of Puerto Rico and the construction of the legal basis of the colonial relationship (i.e., the *Insular Cases*). Third, we revisit the creation of Commonwealth status, a legal fiction designed to appease Puerto Ricans and the international community. Fourth, we look at the present status of Puerto Rico and its people to highlight how little has changed regarding the territory's colonial status. Finally, we explore how, to this day, scholars and judges continue to view Puerto Ricans, despite being U.S. citizens, as something less than full Americans. In terms of modern-day justifications, openly racist labels are avoided. Still, the ever-present, demeaning tenor of words like “cultural fit” is used to justify subordinate treatment, instead of old terms like “savages unfit for Anglo-Saxon traditions” used at the time of Puerto Rico's conquest by U.S. troops.⁶

From the White supremacist arguments of the early twentieth century, to the paternalistic attitudes of the mid-twentieth century, to today's condescending tone stemming from various U.S. administrations, racist attitudes have colored (pun intended) and still define the colonial tenor and legacy of this highly unequal relationship. Puerto Ricans remain unwanted colonial subjects—despite U.S. assurances to the contrary.

I

THE RACIAL BASIS OF EMPIRE

While often mentioned as clear and convincing evidence of the racist bedrock of the American nation, the Three-Fifths Compromise written into the U.S. Constitution in 1787 is but one of many such instances that shaped the racially conscious republic.⁷ Dating back to the arrival of English colonists to North America in the early seventeenth century, European settlements were made possible by dispossessing Indigenous

⁶ See Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005) (“The genius of the [doctrine of the *Insular Cases*] is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures.”).

⁷ U.S. CONST. art. I, § 2, cl. 3, *abrogated by* U.S. CONST. amend. XIV.

peoples of their lands through sale, treaty, or often, war.⁸ This trend would be exacerbated by continental conflicts like the French and Indian War (1754–1763) and the American Revolutionary War (1775–1783), and their aftermath (e.g., the 1783 Treaty of Paris).⁹ Native Americans lost their homelands as the new nation expanded (mostly) westward.¹⁰ The territorial expansion of the United States went hand-in-hand with the expansion of plantation agriculture and enslaved labor. The first enslaved Africans arrived in the Virginia colony in 1619, and the cruel institution of slavery soon formed the basis for the creation of wealthy colonies in English North America.¹¹ In both cases, White supremacy was invoked to justify the murder and displacement of Native Americans as well as the kidnapping and enslavement of African Americans.¹² European settlers invoked the doctrine of discovery to justify their takeover of Indigenous lands, while tropes regarding the inferiority and backwardness of Native Americans assuaged White settlers that these lands were now being better managed.¹³ Likewise, the Atlantic slave trade provided the cheap labor that White settlers needed to exploit their ill-gotten lands, based on racist arguments that the enslavement of Africans was ethical, natural, and even beneficial for the latter. In short, the biggest land grab in North America was made profitable by the enslaved labor of thousands of Africans.¹⁴

As the United States greatly expanded its territory via the Louisiana Purchase (1803), the acquisition of Florida (1819), the annexation of Texas (1845), the war with Mexico (1846–1848), and the Oregon Treaty (1846), the displacement (and extermination) of Native Americans continued unabated as White settlers robbed them of their lands with the support of the U.S. government and its military.¹⁵ Slavery also expanded west until the Civil War (1861–1865) brought

⁸ Logan Tesmer, *Learning About Indian Law with Professor Mathew Fletcher*, CBS NEWS (Nov. 11, 2022, 12:00 PM), <https://www.cbsnews.com/detroit/news/learning-about-indian-law-with-professor-matthew-fletcher/> [https://perma.cc/U3XY-B2FX].

⁹ See RONALD TAKAKI, *A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA* 24–76 (rev ed. 2008).

¹⁰ See Tesmer, *supra* note 8.

¹¹ See TAKAKI, *supra* note 9, at 51.

¹² *Id.* at 60–61.

¹³ *Id.* at 32–34.

¹⁴ *Id.* at 54–68.

¹⁵ See RICHARD W. ETULAIN, *BEYOND THE MISSOURI: THE STORY OF THE AMERICAN WEST* 63–145 (2006).

about its demise.¹⁶ In addition, the Mexican citizens of the territory acquired via the Treaty of Guadalupe Hidalgo (1848) suffered at the hands of White settlers who cheated them out of their lands thanks to U.S.-dominated courts, and the U.S. federal government that claimed ownership of large tracts of land known as the “commons.”¹⁷

The relative ease by which the United States quickly expanded its territory to become a continental nation led to the articulation of racial theories that explained, supported, and justified settler colonialism along racial and religious lines.¹⁸ For example, the ideology of “Manifest Destiny” proclaimed that the United States was a nation chosen by God as the new homeland of “Anglo-Saxons.”¹⁹ It was obvious (i.e., manifest) that God’s intended plan was for White settlers to make the land flourish and exploit its vast resources. Native Americans, Mexicans, and other peoples of color were to bow to the supremacy of the industrious Anglo-Saxon race.²⁰ As relics of the past, the former had to accept their new fate as laborers for the latter, or disappear, swept away by progress.²¹ Later in the nineteenth century, Social Darwinism²² convinced White audiences that their supremacy was also driven by evolution, as the superior species in the pecking order of humanity, destined to rule over inferior peoples of color—as nature intended.²³ Finally, toward the end of the nineteenth century, Rudyard Kipling’s poem “The White Man’s Burden” fed into the

¹⁶ *Id.* at 214–15.

¹⁷ LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* 128–29 (2d ed. 2018).

¹⁸ See ROMÁN, *supra* note 1.

¹⁹ ANDERS STEPHANSON, *MANIFEST DESTINY: AMERICAN EXPANSION AND THE EMPIRE OF RIGHT* 38–40 (Eric Foner, ed., 1st ed. 1996).

²⁰ *Id.* at 89.

²¹ John Gast, *American Progress*, 1872, oil on canvas, 29.2 × 40 cm, Autry Museum of the American West, California, <https://collections.theautry.org/mwebcgi/mweb.exe?request=record;id=M545330;type=101> [<https://perma.cc/7LU9-35TZ>] (depicting the ideology of Manifest Destiny by showing the westward expansion of White settlers (e.g., farmers, prospectors, and others), as they bring their technology from the East Coast, while wild animals and Native Americans run away).

²² See ROBERT BANNISTER, *SOCIAL DARWINISM: SCIENCE AND MYTH IN ANGLO-AMERICAN SOCIAL THOUGHT* 114–36 (Allen F. Davis ed., 1989).

²³ Even light-skinned, but “uncivilized,” peoples—like the Irish—could not escape the perverted logic of Social Darwinism. The English depicted the Irish as a lower order of the human species, and American employers used Irish immigrants as cheap, disposable labor. TAKAKI, *supra* note 9, at 140–41. See also *Illustration of Scientific Racism*, in GEORGE BORNSTEIN, *MATERIAL MODERNISM: THE POLITICS OF THE PAGE* 146 fig.3 (2001) (citing H. STRICKLAND CONSTABLE, *IRELAND FROM ONE OR TWO NEGLECTED POINTS OF VIEW* (1899)).

imperial ambitions of the United States by encouraging it to embark on a civilizing mission.²⁴ According to Kipling, White men (in the case of the United States) had a moral obligation to rule over its newly acquired peoples of color (e.g., Filipinos, Cubans, and Puerto Ricans) who were unfit to rule themselves.²⁵ Democratic institutions were exclusively within the purview of White Americans, and racially inferior peoples were incapable of living according to democratic rules, so a paternalistic, colonial order was in the best interest of the latter.²⁶ An arguably original form of colonial Jim Crow adapted to local conditions.

As the United States expanded throughout the continent, its leaders also dreamed of overseas conquests. In 1823, amid independence struggles in Latin America, the Monroe Doctrine warned European empires against trying to recover their former colonies or establishing new ones. It was a bold proclamation by a nation that barely had a navy that could match the Europeans' might, but it reflected the self-perception of a nation on the rise.²⁷ In 1854, the Ostend Manifesto called for the acquisition of Cuba (by force if necessary) to expand the number of U.S. slave states.²⁸ In 1869, the Grant Administration proposed annexing the Dominican Republic to build a U.S. naval base in the Bay of Samaná and also potentially to use the new state as a homeland for African Americans who wanted to leave the poverty and racism of the Southern United States.²⁹ The treaty proved to be contentious, and the U.S. Senate failed to ratify it.³⁰ Finally, in 1889, the Harrison Administration sent Frederick Douglass as the United States Minister to Haiti to secure a lease on Môle-Saint-Nicolas, a well-sheltered bay where the U.S. Navy wanted to build a coaling station. The negotiations failed when the U.S. Navy—in a show of force—sent battleships to Port-au-Prince and Douglass resigned under threats.³¹ These failed imperial overtures ultimately led the United States to get

²⁴ TOMMY J. CURRY, *ANOTHER WHITE MAN'S BURDEN: JOSIAH ROYCE'S QUEST FOR A PHILOSOPHY OF WHITE RACIAL EMPIRE* 75 (2018).

²⁵ *Id.*

²⁶ *Id.* at 30.

²⁷ JAY SEXTON, *THE MONROE DOCTRINE: EMPIRE AND NATION IN NINETEENTH-CENTURY AMERICA* 85–86 (2011).

²⁸ *Id.* at 96.

²⁹ WILLIAM JAVIER NELSON, *ALMOST A TERRITORY: AMERICA'S ATTEMPT TO ANNEX THE DOMINICAN REPUBLIC* 59–86 (1990).

³⁰ *Id.* at 64.

³¹ See CLAIRE BOURHIS-MARIOTTI, *WANTED! A NATION! BLACK AMERICANS AND HAITI, 1804-1893*, at 126–50 (C. Jon Delogu trans. 2023).

involved in the bloody war of independence between Cuban rebels and the Spanish, which took place just ninety miles from U.S. shores.

Armed with notions of racial supremacy and a quiver of ideological justifications, the United States finally fully embarked on overseas imperial conquest in 1898.³² Drawn into the Cuban War of Independence by Spain's waning power, the United States declared war on Spain shortly after the mysterious explosion of the USS *Maine* in Havana Harbor.³³ As part of a strategy to keep Spanish forces occupied on several fronts, U.S. troops landed in Puerto Rico on July 25, 1898.³⁴ As a result, Puerto Rico ended up being part of the spoils of war, ceded by Spain to the United States under the terms of the Treaty of Paris.³⁵ The new U.S. empire now included possessions in the Caribbean and the Pacific, territories unfamiliar to U.S. policymakers. In the brown faces of the islanders, they saw a people incapable of ruling themselves and unfit for democracy,³⁶ just like the African Americans, American Indians, and Mexicans of the U.S. mainland.³⁷ It was time for Uncle Sam to take control over its newly conquered empire.

³² See ROMÁN, *supra* note 1, at 23–26.

³³ GEORGE BLACK, *THE GOOD NEIGHBOR: HOW THE UNITED STATES WROTE THE HISTORY OF CENTRAL AMERICA AND THE CARIBBEAN* 1–3 (1988). Investigations carried out in the years that followed the explosion point to two possible scenarios: either an accidental explosion sparked by spontaneous combustion in the ship's coal bunkers (which detonated the ammunition magazines) or a deliberate attack with an explosive device, like a mine. The U.S. Navy's 1898 investigation attributed the explosion to a mine. This generated intense support among the American public for war against Spain—even though there was no evidence or mention of Spanish culpability in the Navy's report. See U.S. NAVY, *REPORT OF THE NAVAL COURT OF INQUIRY UPON THE DESTRUCTION OF THE UNITED STATES BATTLESHIP MAINE IN HAVANA HARBOR, FEBRUARY 15, 1898* (1898), <https://www.history.navy.mil/research/publications/documentary-histories/united-states-navy-s/destruction-of-the-m/report-of-the-naval-0.html> [<https://perma.cc/DN82-8QUJ>].

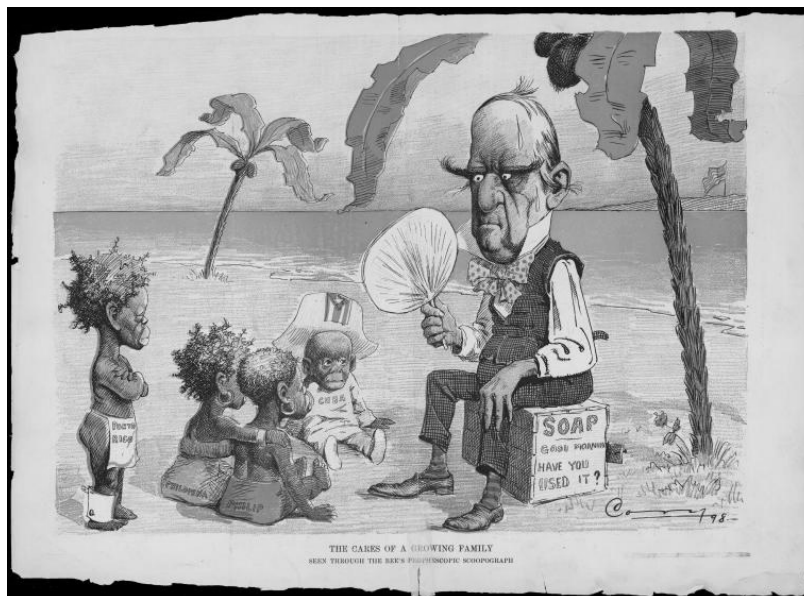
³⁴ MONGE, *supra* note 5, at 26.

³⁵ *Id.*

³⁶ See BLACK, *supra* note 33, at 16 (citing WILLIAM S. BRYAN ET AL., *OUR ISLANDS AND THEIR PEOPLE* (1899), a glossy, two-volume set with dozens of photographs and comments on the new overseas possessions of the United States, often focusing on their "exotic" inhabitants).

³⁷ BLACK, *supra* note 33, at 13–14.

II THE RACIALIZED LEGAL FOUNDATIONS OF EMPIRE



As this racist depiction first published at the time of conquest highlights, the United States entered its overseas imperial venture as an overlord with the “White Man’s Burden” to care for the inferior people it just conquered.³⁸ In fact, after its defeat in the Spanish-American War, Spain officially ceded Puerto Rico and its people to the United States in 1898.³⁹ Under the Territorial Clause of the U.S. Constitution and Article IX of the Treaty of Paris of 1898, Congress was empowered

³⁸ *Id.* at 14. Photo from The New York Public Library.

³⁹ See Treaty of Peace Between the United States and Spain, Spain-U.S., art. II, Dec. 10, 1898, T.S. No. 343 (“Spain cedes to the United States the island of Porto [sic] Rico and other islands now under Spanish sovereignty in the West Indies[.]”) [hereinafter Treaty of Paris]; cf. JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 1 (1979) (focusing on political developments in United States leading to Congress granting Puerto Ricans citizenship); T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 33–40 (1994) (discussing constitutional membership and political sovereignty for Puerto Rico); Philip Joseph Deutch, Note, *The Uniformity Clause and Puerto Rican Statehood*, 43 STAN. L. REV. 685, 690–95 (1991) (providing background on Puerto Rican statehood in light of federal income tax concerns); Dorian A. Shaw, Note, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?*, 17 FORDHAM INT’L L.J. 1006, 1011 (1994) (arguing establishment of commonwealth government failed to fulfill the United Nations’ requirement of freely associated territory).

with the ability to oversee “[t]he civil rights and political status” of the territory and its people.⁴⁰ This treaty endorsed the imperialistic rights of the United States, because it was one of the first times in American history that “in a treaty acquiring territory for the United States, there was no promise of [American] citizenship,” and further, “there was no promise, actual or implied, of statehood.”⁴¹

Indeed, armed with the imperial mandate from the Treaty of Paris of 1898, the United States proceeded to assume control over virtually every facet of Puerto Rico and its people’s fate. The United States decided Puerto Ricans’ U.S. citizenship status,⁴² the new territory’s legal status,⁴³ and even the territory’s name, which initially was incorrectly labeled as “Porto Rico.”⁴⁴ For 125 years, the United States has dictated both the rights of the Puerto Rican people, as well as virtually every aspect of their government.⁴⁵ These exhibitions of

⁴⁰ Treaty of Paris, *supra* note 39, at art. IX; *see also* 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”). Under the Treaty of Paris of 1898, sovereignty over the Philippines, Guam, and Puerto Rico passed from Spain to the United States. *See* Treaty of Paris, *supra* note 39, at art. II (noting Spain’s relinquishment of sovereignty over ceded lands). The citizens of Puerto Rico were not, however, granted U.S. citizenship. *See* CABRANES, *supra* note 39, at 4 (noting the Treaty of Paris did not promise Puerto Ricans U.S. citizenship).

⁴¹ JULIUS W. PRATT, *AMERICA’S COLONIAL EXPERIMENT: HOW THE UNITED STATES GAINED, GOVERNED, AND IN PART GAVE AWAY A COLONIAL EMPIRE* 68 (1950); *cf.* Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., Feb. 2, 1848, T.S. No. 207 (determining the end of war between the United States and Mexico). Pratt argues that the territorial growth of the United States in the century following independence was marked by two related characteristics. *See* PRATT, *supra*, at 41 (identifying the first characteristic as the step-by-step acquisition of contiguous mainland territory and the second as making each acquired territory an integral part of the country). Imperialism did not become a part of the American experience until 1898, after the Spanish-American War, when American sovereignty was extended to lands settled by populations that were vastly different from the American population. *See id.* at 2 (stating that after 1898, assimilation of newly acquired territory became virtually impossible).

⁴² PRATT, *supra* note 41, at 68.

⁴³ *Id.*

⁴⁴ *See* Act of May 17, 1932, ch. 190, 47 Stat. 158 (codified at 48 U.S.C. § 731a) (stating that after the Act takes effect, “Porto Rico” will be designated “Puerto Rico”).

⁴⁵ *See* Treaty of Paris, *supra* note 39, at art. IX–XV (addressing property rights, freedom of religion and vesting governing power in Congress). The United States’ power over the Puerto Rican people officially derived from Article IX of the Treaty of Paris of 1898, which specifically provided that “[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.” *Id.* art. IX.

power have been manifested through both congressional actions and Supreme Court decisions.⁴⁶

Almost immediately after its conquest,⁴⁷ the United States established a military government overseen by General Nelson A. Miles, the commander of Puerto Rico's invasion.⁴⁸ Despite lasting only two years,⁴⁹ the United States military government was not without its glorious promises, such that Puerto Rico would have a direct and lasting link to the U.S. political system.⁵⁰ Following the invasion, General Miles proclaimed that the U.S. military forces came "bearing the banner of freedom."⁵¹ General Miles declared that the U.S. forces did "not come to make war upon the people of a country that for

⁴⁶ See ROMÁN, *supra* note 1, at 15–59.

⁴⁷ See Act of July 3, 1950, ch. 446, § 2, 64 Stat. 319 (codified at 48 U.S.C. § 731c) (authorizing Puerto Rican people to organize a constitutional convention and draft a Puerto Rican constitution if the Act is adopted by an island-wide referendum); Act of March 2, 1917, ch. 145, §§ 12–54, 39 Stat. 955–68 (surviving conditions codified as amended at 48 U.S.C. §§ 742, 864, 868, 872) (establishing executive, legislative, and judicial departments of the civil government of Puerto Rico); Foraker Act, ch. 191, §§ 2–38, 31 Stat. 77–86 (1900) (surviving provisions codified as amended at 48 U.S.C. §§ 733, 736, 738–40, 744) (establishing executive, legislative, and judicial bodies for Puerto Rico); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) ("We are therefore of opinion that the Island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution[.]"); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (concluding the duties imposed after signing of Treaty of Paris were not properly executed); *Dooley v. United States*, 182 U.S. 222, 235 (1901) (noting that Puerto Rico was no longer subject to U.S. tariffs after the signing of the Treaty of Paris); *Goetze v. United States*, 182 U.S. 221, 222 (1901) (finding Puerto Rico not a foreign country under tariff laws); *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901) (holding Puerto Rico not a foreign country within the meaning of tariff laws but rather an island territory of the United States).

⁴⁸ See Carlos E. Díaz Olivo, *The Fiscal Relationship Between Puerto Rico and the United States: A Historical Analysis*, 8 REV. DEL COLEGIO DE ABOGADOS DE P.R. 1, 3 (1995) (noting that General Miles ordered sustaining fiscal dispositions existing under Spanish regime). International law at the time of the Spanish-American War recognized the right of the belligerent to occupy and govern the enemy territory. See Manuel Del Valle, *Puerto Rico Before the United States Supreme Court*, 19 REV. JURÍDICA U. INTERAMERICANA P.R. 13, 21 (1984) (stating right to occupy and govern during military possession). With this in mind, in 1898, the President of the United States issued General Order No. 101, which stated that, although the United States' military power was absolute, local laws were to remain in force. See *id.* at 21–22 (noting order stated private property should not be confiscated). General Order No. 101 also gave General Miles complete authority over the island, second only to the President himself. See *id.* at 22 (noting that General Miles rearticulated General Order No. 101 to the Puerto Rican people).

⁴⁹ See CABRANES, *supra* note 39, at 19.

⁵⁰ *Id.*

⁵¹ OFFICE OF THE COMMONWEALTH OF PUERTO RICO, DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 55 (1964) (proclaiming United States occupied Puerto Rico).

centuries has been oppressed,”⁵² but to promote prosperity, bestow “the immunities and blessings of the liberal institutions” of the U.S. government and bring the Puerto Rican people protection.⁵³ At the very least, such statements suggested that the United States was prepared to accept Puerto Rico and its people as part of the United States in some form.⁵⁴ Unfortunately, after more than a hundred years of this lopsided relationship, the reality is that the United States continues to subjugate the Puerto Rican people, and it seems like it may never be fully prepared to incorporate Puerto Rico and its people.⁵⁵

With the United States assuming a new role as an overseas expansionist nation, the debate over what to do with and how to treat these newly acquired lands and their people became central not only to debates during the passage of a host of federal laws but also to debates in Congress, in the Supreme Court, and even in scholarly circles.⁵⁶ In each instance, demeaning justifications for empire were used, and in most instances, openly racist sentiments were posited as rational justifications for the subordination of Puerto Ricans.⁵⁷

Shortly after the U.S. military conquest,⁵⁸ Congress passed the Foraker Act of 1900, and began a process that would ensure that Puerto Rico would remain a colony.⁵⁹ The Foraker Act replaced the military

⁵² *Id.*

⁵³ *Id.*; CABRANES, *supra* note 39, at 19 (arguing that Miles’ proclamation suggested that Puerto Rico would have direct and lasting link to U.S. political system).

⁵⁴ See *Empire Forgotten*, *supra* note 3, at 1142; see also CABRANES, *supra* note 39, at 20–21 (noting that Treaty of Paris confirmed Puerto Rico would become part of U.S. empire but made no guarantees as to statehood or citizenship).

⁵⁵ See *Empire Forgotten*, *supra* note 3, at 1142.

⁵⁶ See *infra* notes 62–88 and accompanying text.

⁵⁷ Later in this Article, we observe that today’s leaders avoid openly racist terminology most of the time. However, the fact remains that people still use demeaning and condescending words today to justify colonialism. Such tactics are equally racist and, in many respects, more damnable in that, through obfuscation, these leading lights continue to support the plague that is subjugation through empire.

⁵⁸ Although just two years elapsed between the U.S. military takeover of Puerto Rico in 1898 and the passing of the Foraker Act in 1900, the economic repercussions of congressional dithering prolonged the suffering of Puerto Ricans needlessly. During those two years, the U.S. territory Puerto Rico was considered a foreign port and its products paid stiff tariffs when entering the United States, leading to the crash of the coffee exporting sector. To make things worse, a major hurricane hit the island in 1899. See JAMES L. DIETZ, *ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT* 98–99 (1986).

⁵⁹ Foraker Act, ch. 191, 31 Stat. 77 (1900) (codified as amended 48 U.S.C. §§ 733, 736, 738–40, 744, 866). The Foraker Act created a mixed system of government in which the “elected house of delegates was checked by an appointed upper house.” PRATT, *supra* note

government with a civilian colonial government.⁶⁰ It also established many other aspects of Puerto Rico's new government.⁶¹ During this period, U.S. congressional leaders played a significant role in the treatment of the newly acquired colonial subjects, i.e., the appropriate legal status of Filipinos and Puerto Ricans simultaneously, as they set a tone for racist depictions of the people of these lands.⁶² These congressional bigots were shameless in their ignorant racist attacks. One congressional report portrayed Filipinos as "physical weaklings of low stature, with black skin, closely curling hair, flat noses, thick lips, and large, clumsy feet."⁶³ Representative Sereno Payne, evidently attempting to put Puerto Ricans in a better light, trumpeted census reports taken of the people of Puerto Rico showing that "whites . . . generally full-blooded white people, descendants of the Spaniards," outnumbered by nearly two-to-one the combined total of "negroes" and "mulattoes."⁶⁴ But Representative Thomas Spight, being at least as racist, sought to portray Filipinos as "non-white" and, therefore, uncivilized and un-American.⁶⁵ Spight went on to compare Filipinos to Puerto Ricans, arguing "[h]ow different the case of the Philippine

41, at 185, 187 (noting Foraker Act also declared all inhabitants Puerto Rican citizens under the United States' protection).

⁶⁰ See Foraker Act, ch. 191, §§ 17–29, 31 Stat. at 81–83 (designing the government to include a governor the President of the United States appointed; an Executive Council comprised of a Secretary, Attorney-General, Treasurer, Auditor, Commissioner of the Interior; and a House of Delegates comprised of two houses of which only one was made up of elected officials). The judicial branch was comprised of the local courts and tribunals the military government previously established, but the President was to appoint the justices of the Supreme Court. See *id.* §§ 33, 31 Stat. at 84 (describing jurisdiction of the court as that "defined and prescribed in and by . . . laws and ordinances"). Puerto Rico was also designated a U.S. judicial district. See *id.* §§ 33–34, 31 Stat. at 84–85 (describing the court's jurisdiction as both ordinary jurisdiction of U.S. district court and "of all cases cognizant in the circuit courts of the United States").

⁶¹ See *id.* §§ 2–16, 31 Stat. at 77–81 (addressing such governmental decisions as the location of the capital, tariff duty system on trade to and from Puerto Rico, official currency, and the Puerto Rican government's authority to control Puerto Rican property that United States owned as result of Spanish-American War). Congress was so magnanimous that it even granted "Porto [sic] Rican" citizenship to the people of Puerto Rico. See *id.* § 7, 31 Stat. at 79 (declaring Puerto Rican citizens as those individuals and their children who were Spanish subjects residing on the island as of April 11, 1899); see also H.R. REP. NO. 104-713, pt. 1 (1996) (setting forth Congressional findings and procedures for Puerto Rican government).

⁶² See Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 5–10 (1998).

⁶³ 33 CONG. REC. 3613 (1900) (quoting from a report of the Philippine Commission to the President).

⁶⁴ *Id.* at 1941 (remarks of Rep. Payne).

⁶⁵ *Id.* at 2105 (remarks of Rep. Spight).

Islands, 10,000 miles away. . . . The inhabitants are of wholly different races of people from ours—Asiatics, Malays, negroes, and mixed blood. They have nothing in common with us and centuries cannot assimilate them.”⁶⁶ Representative John Dalzell argued against accepting Filipinos into the American body politic, observing that he was unwilling “to see the wage-earner of the United States, the farmer of the United States, put upon a level and brought into competition with the cheap half-slave labor, savage labor, of the Philippine Archipelago.”⁶⁷ House representatives greeted Dalzell’s comments with loud applause.⁶⁸ Not to be outdone, the bigot Representative George Gilbert warned against “[opening] wide the door by which these negroes and Asiatics can pour like the locusts of Egypt into this country.”⁶⁹ Senator William Bate (a former Confederate slaveowner) added to the racist rhetoric of the moment, by observing:

Let us not take the Philippines in our embrace to keep them simply because we are able to do so. I fear it would prove a serpent in our bosom. Let us beware of *those mongrels of the East, with breath of pestilence and touch of leprosy. Do not let them become a part of us with their idolatry, polygamous creeds, and harem habits.*⁷⁰

Although the above quotes highlight the racist disdain for Filipinos and the somewhat gentler depictions of Puerto Ricans as resembling Spaniards, the so-called European passing of sorts did not help the Puerto Rican people from being accepted as full members of the Union by scholars, Congress, or the U.S. Supreme Court. Leading scholars⁷¹ greatly contributed to the imperial xenophobia.⁷² In a series of articles published in the *Harvard Law Review*, bigotry and xenophobia were the basis to subordinate and subjugate U.S. colonial subjects. One writer observed:

⁶⁶ *Id.*

⁶⁷ *Id.* at 1959 (remarks of Rep. Dalzell).

⁶⁸ *Id.*

⁶⁹ *Id.* at 2172 (remarks of Rep. Gilbert).

⁷⁰ *Id.* at 3616 (remarks of Sen. Bate) (emphasis added).

⁷¹ We argue (though in far more palatable tones) that, even today, the *Harvard Law Review* is tepid in its condemnation of colonialism and has recently published pieces from apologists supporting empire. While not openly racist as in 1900, in the twenty-first century, these apologists refrain from using words like mongrels and savages, but instead, they use terms such as territorial federalism or cultural differences to justify and, in essence, support empire. Both the modern-day apologists as well as the *Harvard Law Review* should be condemned for their support of colonialism.

⁷² Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 415 (1899).

Our Constitution was made by a civilized and educated people. It provides guaranties of personal security which seem ill adapted to the conditions of society that prevail in many parts of our new possessions. To give the half-civilized Moros of the Philippines, or the ignorant and lawless brigands that infest Puerto Rico, or even the ordinary Filipino of Manila, the benefit of such immunities . . . would . . . be a serious obstacle to the maintenance there of an efficient government.⁷³

Another scholar in that series argued that “[w]hat was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest territory would require different treatment”⁷⁴

The United States Supreme Court, for its part, would soon thereafter venture into the colonial discourse in the “Insular Cases,”⁷⁵ further defining the parameters of the United States-Puerto Rico colonial relationship.⁷⁶ At their core, these decisions were based on bigotry and bias. The first insular case, *De Lima v. Bidwell*,⁷⁷ held that the Treaty of Paris established Puerto Rico as an unincorporated, but not organized, U.S. territory that should not be treated as a state.⁷⁸ The *De Lima* Court upheld Congress’ unfettered power over Puerto Rico and its people, stating that the national legislature:

[M]ay organize a local territorial government; it may admit it [Puerto Rico] as a State . . . [and] it may sell its public lands [acquired by treaty] to individual citizens or may donate them as homesteads to actual settlers . . . when once acquired by treaty [because the

⁷³ *Id.*

⁷⁴ James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 481 (1899).

⁷⁵ See *Downes v. Bidwell*, 182 U.S. 244, 287 (1900) (“We are therefore of the opinion that the island of Porto [sic] Rico is a territory appurtenant and belonging to the United States, but not part of the United States within the revenue clauses of the Constitution.”); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (concluding duties imposed after signing of Treaty of Paris not properly executed); *Dooley v. United States*, 182 U.S. 222, 235 (1901) (noting Puerto Rico no longer subject to U.S. tariffs after signing of Treaty of Paris); *Goetze v. United States*, 182 U.S. 221, 222 (1901) (finding Puerto Rico was not a foreign country under tariff laws); *De Lima v. Bidwell*, 182 U.S. 1, 13 (1901) (holding Puerto Rico was not a foreign country within meaning of tariff laws, but rather island territory of United States). The term “Insular Cases” is a name generally given to a series of nine decisions rendered by the Supreme Court in 1901. See Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA JURÍDICA U.P.R. 225, 228 (1996).

⁷⁶ See Román, *supra* note 3, at 1120.

⁷⁷ *De Lima*, 182 U.S. at 14.

⁷⁸ See *id.* at 196–97 (addressing the United States’s virtually absolute power over acquired territories).

territory] belongs to the United States and is subject to the disposition of Congress.⁷⁹

The next consequential insular decision, *Downes v. Bidwell*,⁸⁰ further confirmed the mother country's absolute power over its subjects: "The power of Congress over the territories of the United States is general and plenary It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired."⁸¹ Justice Brown, writing for the Court, expressed a nativistic fear, still apparent today, that if the United States could not control the future of the inhabitants of newly acquired territories, or at least "their children thereafter born, whether savages or civilized," they might automatically become American citizens.⁸² The Court went on to note that "[a] false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire."⁸³

The *Downes* Court established a new legal paradigm over the colonies: the "territorial incorporation" doctrine.⁸⁴ Under this doctrine,

⁷⁹ *Id.* at 197 (addressing Congress' rights over acquired territories); see Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 457 (1992) (noting that Congress' power over its territories is plenary) (citing *Downes*, 182 U.S. at 268). Congress' relationship with its territories' governments is much like that of the states with their counties. See *id.* at 454 (noting that Congress has the power to veto territorial government decisions and directly legislate for its territories despite their governments) (citing *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880)).

⁸⁰ *Downes*, 182 U.S. at 268.

⁸¹ *Id.* (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42 (1890)). In *Downes*, the constitutionality of the Foraker Act's imposition of duties on imports from Puerto Rico was challenged under the Uniformity Clause. See *id.* at 247 (noting the broader question of whether the Constitution's revenue clauses extend their own force to newly acquired territories). The Uniformity Clause declares that "all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8. The Court also noted that if Puerto Rico were part of the United States, the Foraker Act would be unconstitutional under Article I, Section 9. See 182 U.S. at 251 (stating Article 1, Section 9 of the U.S. Constitution provides all vessels bound from states cannot be required to pay duties to another). In resolving the question, the Court held that, under the Treaty of Paris, Puerto Rico was a territory "appurtenant and belonging to the United States" and, therefore, should not be treated as a state of the United States. *Id.* at 287 (holding provision of Foraker Act imposing duties on Puerto Rican exports constitutional).

⁸² *Downes*, 182 U.S. at 279 (noting U.S. power to declare terms upon which the United States will receive inhabitants of acquired territories).

⁸³ *Id.* at 286.

⁸⁴ See Shaw, *supra* note 39, at 1014–15 (clarifying the difference between incorporated and unincorporated territories). During the debate concerning whether to grant American citizenship to Puerto Ricans under the Foraker Act, there was a congressional perception

incorporated territories included areas that would become states and would have all parts of the U.S. Constitution applicable to them, while unincorporated territories were not intended for statehood and were subject only to fundamental parts of the U.S. Constitution.⁸⁵ Because the *Downes* Court concluded that Puerto Rico was an unincorporated territory belonging to the United States, the Court held that the U.S. Constitution did not fully apply to it.⁸⁶ Subsequent Supreme Court decisions followed the *Downes* incorporation doctrine and defined the United States' relationship with its territories as one other than that of equals.⁸⁷ Puerto Rico's inequality vis-à-vis the United

that these people of mixed blood were possibly not suitable to become part of the United States. See RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* 13 (2d ed. 1992) (stating that members of Congress had a negative view of Puerto Ricans because of their African and indigenous Indian heritage and skin color).

⁸⁵ See *Downes*, 182 U.S. at 339 (noting no incorporation for territory if Treaty does not sponsor incorporation until Congress supports incorporation); Shaw, *supra* note 39, at 1015 (defining unincorporated territories).

⁸⁶ See *Downes*, 182 U.S. at 287 (holding that the Constitution's revenue clauses do not extend to territories belonging to the United States); see also Van Dyke, *supra* note 79, at 457 ("[B]ecause 'territories' were not the constitutional equivalents of 'states,' they were subject to greater Congressional control."). The *Downes* Court suggested that a distinction should be drawn between two types of rights enforced by the Constitution: natural and artificial. See *Downes*, 182 U.S. at 282–83 (explaining natural rights as those not subject to alteration of Congress, such as freedom of speech and religion, due process, and right of access to courts). Artificial rights include "the rights to citizenship, to suffrage, . . . and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals." *Id.* at 283 (finding Congress must be allowed flexibility as to the application of artificial rights to territories) (citation omitted). The Court held that only natural rights automatically apply to people living in territories. See *id.* at 283 (noting aliens' interest in life, liberty, and property protected); see also PRATT, *supra* note 41, at 162 (discussing *Downes* and the difference between fundamental (natural) and formal (artificial) provisions of the Constitution).

⁸⁷ See *Dorr v. United States*, 195 U.S. 138, 148 (1904) (holding that right to a jury trial was not fundamental and, thus, did not apply to unincorporated territory); see also *Balzac v. Porto Rico*, 258 U.S. 298, 313 (1922) (finding that Congress did not intend Organic Act of 1917 as means to incorporate Puerto Rico). From the conquest of Puerto Rico until 1917, the United States expanded its sphere of influence throughout the Caribbean. The United States still refused to officially acknowledge its expansionism, so it developed a system of "protectorates" by which it gained control over a number of small republics in the Caribbean. See Treaty of Paris, *supra* note 40, art. IX; see also 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."). Under the Treaty of Paris, sovereignty over the Philippines, Guam, and Puerto Rico passed from Spain to the United States. See Treaty of Paris, *supra* note 39, at art. II (noting Spain's relinquishment of sovereignty over ceded lands). The citizens of

States was literally a matter of legal precedent. To this day, the Insular Cases remain precedent, and the Supreme Court repeatedly follows them.⁸⁸

III

THE COMMONWEALTH'S FICTION OF SELF-RULE

The era of unabashed U.S. imperialism would eventually yield to a period of more sympathetic administrators, brought about by dislocations in the colonial order caused by the Great Depression, World War II, and the Cold War. Puerto Rico's monocultural plantation economy, dominated by U.S. sugar corporations, was extremely vulnerable to global price fluctuations.⁸⁹ Like most oligopolies, it crashed during the Great Depression, leaving thousands of poor, rural Puerto Rican workers unemployed.⁹⁰ Their plight was exacerbated by the fact that Puerto Rico was under the control of aloof U.S. governors who ruled in the interest of U.S. businesses, rather than for the benefit of those they governed.⁹¹ In this colonial scheme, Puerto Ricans had limited input. Governors were appointed by the U.S. government, and they and their cabinets ruled supreme, with the Puerto Rican-elected legislature left with just the power to say "no" and block legislation.⁹² The constant tug-of-war between overbearing U.S. governors and the Puerto Rican legislature added to U.S. racial stereotypes of Puerto Ricans.⁹³ Americans believed, as a direct result of Puerto Ricans' Spanish culture and alleged inferior racial makeup, that they were ungrateful obstructionists who were unfit for self-rule.⁹⁴ To make matters worse, the U.S. colonial master had spent decades trying to Americanize Puerto Rican children in a vain effort to erase a deeply rooted, centuries-old Latin American culture that Puerto Ricans expressed with pride and that served as a form of passive resistance

Puerto Rico were not, however, granted U.S. citizenship. See Cabranes, *supra* note 40, at 4 (noting the Treaty of Paris did not promise Puerto Rican U.S. citizenship). PRATT, *supra* note 41 at 115.

⁸⁸ See *infra*, notes 188–201 and accompanying text.

⁸⁹ CÉSAR J. AYALA, *AMERICAN SUGAR KINGDOM: THE PLANTATION ECONOMY OF THE SPANISH CARIBBEAN, 1898-1934*, at 148–82 (1999).

⁹⁰ *Id.*

⁹¹ *Id.* at 46.

⁹² TRÍAS MONGE, *supra* note 5, at 90.

⁹³ NELSON A. DENIS, *WAR AGAINST ALL PUERTO RICANS: REVOLUTION AND TERROR IN AMERICA'S COLONY* 254 (2015).

⁹⁴ *Id.*

against the cultural onslaught of colonialism.⁹⁵ U.S. administrators, increasingly frustrated by Puerto Rican resistance, simply gave up on the plan in view of the Puerto Ricans' presumed unwillingness to learn.⁹⁶

But during the Great Depression, the catastrophic consequences of Puerto Rico's plantation model were evident even to the crassest U.S. colonial administrators.⁹⁷ That model required dramatic changes, lest Puerto Ricans would drift into the arms of those that called for independence from the United States. Indeed, as the Great Depression was battering the colony, many Puerto Ricans started questioning the wisdom of the colonial association with the United States.⁹⁸ Few could argue that the island's economy and the well-being of Puerto Ricans had improved under U.S. rule. Quite the opposite: Puerto Rico's economy was at its lowest point in decades, and support for independence was on the rise.⁹⁹ To counter the trend, the Franklin D. Roosevelt administration (and later, the Harry S. Truman administration) appointed more sympathetic New Deal governors who sought to work with Puerto Rico's moderate political elites.¹⁰⁰ The "friendly" U.S. governors aimed to present a moderate political alternative to radical calls for independence while promising a new economic model for Puerto Rico. That was the case of Rexford Tugwell, who governed Puerto Rico from 1941 to 1946.¹⁰¹ Tugwell was a strong supporter of Luis Muñoz Marín's Partido Popular Democrático (Popular Democratic Party, or PPD), which advocated for a new political status for Puerto Rico. Tugwell was also instrumental in the appointment of his successor, Jesús T. Piñero, the first Puerto Rican tapped by the White House to become governor (1946–1949).¹⁰²

Piñero worked closely with the Truman administration, which amended the Organic Act of Puerto Rico in 1947,¹⁰³ allowing for the election of Puerto Rican governors. Truman called it "a great step

⁹⁵ *Id.* at 37–42.

⁹⁶ SOLSIREE DEL MORAL, *NEGOTIATING EMPIRE: THE CULTURAL POLITICS OF SCHOOLS IN PUERTO RICO, 1898–1952*, at 42 (2013).

⁹⁷ DIETZ, *supra* note 58, at 135–81.

⁹⁸ CÉSAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898*, at 95–116 (2009).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 97.

¹⁰¹ See MICHAEL V. NAMORATO, *REXFORD G. TUGWELL: A BIOGRAPHY* 3–7 (1988).

¹⁰² See SURENDRA BHANA, *THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICAN STATUS QUESTION, 1936–1968*, at 42–43 (1975).

¹⁰³ Organic Act of Puerto Rico, Pub. L. No. 362, ch. 490, 61 Stat. 770, 770–73 (1947).

toward complete self-government.”¹⁰⁴ In turn, Piñero and the Puerto Rican legislature, which was controlled by the PPD, passed the “Ley de la Mordaza” (Gag Law) in 1948.¹⁰⁵ It severely restrained all forms of speech critical of the U.S. colonial administration and/or in favor of independence for Puerto Rico, including singing patriotic songs and displaying the Puerto Rican flag.¹⁰⁶ The road was paved for the ascension of Puerto Rican Senate President Luis Muñoz Marín to the governorship in 1948 (as the first elected governor of Puerto Rico) and for a redefinition of Puerto Rico’s colonial status.¹⁰⁷ Like Piñero, Muñoz Marín worked closely with the U.S. government, which was under pressure from the international community to decolonize Puerto Rico as postwar European empires crumbled. The U.S. Congress passed the Puerto Rican Federal Relations Act of 1950, setting in motion a process for the Puerto Rican legislature to draft a new Constitution for the territory.¹⁰⁸

The new Constitution of the Commonwealth of Puerto Rico was widely approved by the Puerto Rican electorate and officially proclaimed on July 25, 1952, fifty-four years to the date when U.S. troops landed in Puerto Rico.¹⁰⁹ The Constitution of the Estado Libre Asociado de Puerto Rico (Free Associated State of Puerto Rico) granted the government of the Commonwealth jurisdiction over most internal affairs while leaving national affairs (e.g., currency, defense, customs, and treaties) in the hands of the federal government—much like a state of the Union.¹¹⁰ Unlike a state of the Union, however, Puerto Rico is an unincorporated territory, and its voters are ineligible to elect congress members (i.e., senators and representatives) to the

¹⁰⁴ HARRY S. TRUMAN, LETTER TO GOVERNOR PINERO OF PUERTO RICO UPON SIGNING BILL PROVIDING FOR AN ELECTED GOVERNOR (Aug. 5, 1947) *reprinted in* HARRY S. TRUMAN LIBR. MUSEUM, <https://www.trumanlibrary.gov/library/public-papers/166/letter-governor-pinero-puerto-rico-upon-signing-bill-providing-elected> [https://perma.cc/4FHH-Q8VH] (last visited Feb. 18, 2025).

¹⁰⁵ See K.C. Lopez, *Ley de la Mordaza: The Law That Made the Puerto Rican Flag Illegal*, LEHIGH VALLEY PUB. MEDIA (Sept. 16, 2019), <https://www.wlvt.org/blogs/lehigh/ley-de-la-mordaza-the-law-that-made-the-puerto-rican-flag-illegal/>.

¹⁰⁶ *Id.*

¹⁰⁷ AYALA & BERNABE, *supra* note 98, at 161.

¹⁰⁸ Puerto Rican Federal Relations Act, Pub. L. No. 600, ch. 446, 64 Stat. 319 (1950).

¹⁰⁹ The date is an official holiday in Puerto Rico, but members of the pro-independence movement still remember it as the date when the United States forcibly took over the territory. Vernon D. Northrop, The Acting Secretary of the Interior (Northrop) to the Secretary of State, OFF. HISTORIAN, <https://history.state.gov/historicaldocuments/frus1952-54v03/d902> [https://perma.cc/JNU3-EF4H] (last visited Mar. 16, 2025).

¹¹⁰ See CONSTITUCIÓN DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO (1952), <https://www.cijc.org/es/NuestrasConstituciones/PUERTO-RICO-Constitucion.pdf>.

U.S. Congress. Moreover, residents of Puerto Rico do not get to participate in U.S. presidential elections, as territories do not send electors to the U.S. Electoral College.¹¹¹ Finally, all acts of the Commonwealth Government are subject to review by the U.S. Congress, which has the final say regarding territorial affairs.¹¹² Therefore, despite its official name in Spanish, Puerto Rico's Commonwealth is not free nor associated nor a state.¹¹³ It remains a colony over which the U.S. government retains control, in the form of veto power by the U.S. Congress and judicial review by the U.S. Supreme Court.¹¹⁴ Even the territory's uncertain future cannot be decided without the express approval of the U.S. Congress—a body in which Puerto Ricans have no representation save for a nonvoting Resident Commissioner.¹¹⁵ Even if Puerto Rican voters were to overwhelmingly petition for statehood, it would be up to Congress to consider the request.¹¹⁶ If Puerto Ricans wanted instead to become a sovereign nation, Congress has the last word. Moreover, what

¹¹¹ AYALA & BERNABE, *supra* note 98, at 230.

¹¹² CONSTITUCIÓN DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO, art. VII, § 3 (1952), <https://www.cijc.org/es/NuestrasConstituciones/PUERTO-RICO-Constitucion.pdf>.

¹¹³ Senator Patrick Moynihan stated that the United States occupied the “splendid” island of Puerto Rico at a time when over a third of the world was a colony of some sovereign. *See* 137 CONG. REC. S3971 (1991) (describing the United States at the time of occupation as a “colonial power”). Moynihan continued that this worldwide colonization trend first became unacceptable to Puerto Rico, then to the United States, and finally to the world. *See id.* (refuting Cuban charges that the United States currently enjoys a colonial relationship with Puerto Rico).

¹¹⁴ The recent passage of the PROMESA Act, for example, created a board to manage Puerto Rico's financial affairs. *See, e.g.,* Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101–2241 (2016).

¹¹⁵ *What Is a Resident Commissioner?*, PUERTO RICO 51ST (Aug. 28, 2020), <https://www.pr51st.com/what-is-a-resident-commissioner/> [<https://perma.cc/ZY9W-U5BZ>].

¹¹⁶ In 2020, a nonbinding status referendum asked Puerto Rican voters whether they wanted Puerto Rico to immediately become a state of the Union or not. The “Yes” option won with fifty-two percent of the vote (turnout was just fifty-four percent), which is the closest that statehood has been to becoming a majority option for Puerto Ricans. Cristina Corujo, *Puerto Rico Votes in Favor of Statehood. But What Does It Mean for the Island?*, ABC NEWS (Nov. 8, 2020, 8:21 AM), <https://abcnews.go.com/US/puerto-rico-votes-favor-statehood-island/story?id=74055630> [<https://perma.cc/P6LN-8NKM>].

statehood¹¹⁷ or independence¹¹⁸ would look like (i.e., terms of annexation or separation) would be ultimately decided by Congress—not by Puerto Ricans.¹¹⁹ Even minor tweaks to Commonwealth status (which pro-Commonwealth supporters currently want) would require the express approval of the U.S. Congress, as mentioned above.¹²⁰

What the implementation of the Commonwealth accomplished was twofold: First, it created a fiction of self-rule by Puerto Ricans; and second, by doing so, it absolved the United States of imperial responsibility regarding the mishandling of its colony.¹²¹ In 1952, Puerto Ricans loyal to the PPD proclaimed that they were finally in charge of the territory's affairs—and to a certain extent, they were. But they failed to mention that they were not *fully* in charge of the territory's affairs.¹²² Puerto Rico remains an unincorporated territory of the United States, over which the latter retains full sovereignty.¹²³ No matter what Puerto Ricans decide to do in the Commonwealth, they govern only at the pleasure of the U.S. government, which can always review and overturn their actions.¹²⁴ Yet, the façade of self-rule has been widely promoted as the best of both worlds: Puerto Ricans rule their island and enjoy U.S. citizenship without the inherent risks

¹¹⁷ With thin margins deciding control over the U.S. House of Representatives and the Senate, it is unlikely that Congress will seriously consider a petition for statehood from Puerto Rico. The potential addition of two Democratic senators and four to five Democratic representatives from the new state could tilt the precarious balance of power in Congress. Thus, Republicans are sure to block it. See Rafael Bernal, *Push to Change Puerto Rico Status Faces New Challenges*, THE HILL (Apr. 21, 2023, 3:09 PM), <https://thehill.com/latino/3963153-push-to-change-puerto-rico-status-faces-new-challenges/> [https://perma.cc/V5ZX-VKFU].

¹¹⁸ Considering that Puerto Rico is unlikely to become a state of the Union, the authors feel that the only path forward for the island territory is to become an independent nation.

¹¹⁹ Vann R. Newkirk II, *Puerto Rico's Plebiscite to Nowhere*, ATLANTIC (June 13, 2017), <https://www.theatlantic.com/politics/archive/2017/06/puerto-rico-statehood-plebiscite-congress/530136/> [https://perma.cc/4PC4-PLSA].

¹²⁰ Puerto Rico has rarely been a priority for the U.S. government, and in an era of party polarization, it is extremely unlikely that both major parties would agree on granting political or economic concessions to the territory. See Ryan Struyk, *Here's What Would Happen to US Politics if Puerto Rico Became a State*, CNN (Oct. 14, 2017, 10:51 AM), <https://www.cnn.com/2017/10/14/politics/puerto-rico-state-congress-white-house/index.html> [https://perma.cc/Z2EF-U9UM].

¹²¹ PEDRO A. MALAVET, *AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* 43–45 (2004).

¹²² Peter J. Fliess, *Puerto Rico's Political Status Under Its New Constitution*, 5 W. POL. Q. 635, 646–48 (1952).

¹²³ MALAVET, *supra* note 121, at 40.

¹²⁴ See Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101–2241 (2016).

associated with becoming a sovereign nation that has to fend for itself in a dangerous world.¹²⁵ In reality, Puerto Ricans do not live in either world.¹²⁶ They do not rule the Commonwealth, their U.S. citizenship is second-class, and even if they wanted to become independent,¹²⁷ they would need permission from the U.S. government.¹²⁸ The colonial relationship between the United States and Puerto Rico is a one-way street, despite appearances to the contrary.¹²⁹

The new political status of Puerto Rico also whitewashed the image of the United States, taking away from its actions as an imperial power. According to this narrative, the United States was a benevolent administrator that perhaps made a few mistakes¹³⁰ (perhaps because of its lack of colonial experience), but it was always looking out for Puerto Rico's best interests.¹³¹ And when the time was right, it handed the reins over to the Puerto Rican people. However, the United States was not a benevolent administrator.¹³² In the best case, Puerto Rico was neglected by the United States.¹³³ In the worst case, the United States exploited its territory and let U.S. corporations do the same.¹³⁴ The U.S. Government, in collusion with its Puerto Rican allies, stifled

¹²⁵ See Greg Allen, *Puerto Rico Celebrates 100 Years of U.S. Citizenship*, NPR (Mar. 2, 2017, 4:35 PM), <https://www.npr.org/2017/03/02/518197139/puerto-rico-celebrates-100-years-of-u-s-citizenship> [<https://perma.cc/J7VJ-CXWR>].

¹²⁶ See generally FERNANDEZ, *supra* note 84, at 165–95 (explaining the narratives used to justify the United States' imperialist actions in Puerto Rico throughout Puerto Rican history).

¹²⁷ Jaquira Díaz, *Let Puerto Rico Be Free*, ATLANTIC (Sept. 20, 2022), <https://www.theatlantic.com/magazine/archive/2022/11/puerto-rico-independence-not-statehood/671482/> [<https://perma.cc/UY4G-PHDA>].

¹²⁸ See Yarimar Bonilla, *For Puerto Ricans, Another Reminder That We Are Second-Class Citizens*, N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/opinion/puerto-rico-supreme-court-social-security.html> [<https://perma.cc/WRM2-P7SC>].

¹²⁹ See Román, *supra* note 62, at 10–15.

¹³⁰ For example, Dr. Cornelius P. Rhoads, a distinguished U.S. medical researcher, saw Puerto Ricans as an inferior race. He seemingly confessed to killing a handful of his patients while serving on the island. See Douglas Starr, *Revisiting a 1930s Scandal, AACR to Rename a Prize*, 300 SCI. 573, 573 (2003).

¹³¹ U.N. SPECIAL COMM. ON DECOLONIZATION, *Special Committee on Decolonization Approves Text Calling upon United States to Initiate Self-determination Process for Puerto Rico* (June 17, 2013), <https://press.un.org/en/2013/gacol3255.doc.htm> [<https://perma.cc/UC72-ZHTA>].

¹³² *Id.*

¹³³ Harold J. Toro, *Lessons from Puerto Rico: Inter-Country Relationships, Crises, and Human Thriving*, KEOUGH SCH. GLOB. AFFS. (Oct. 29, 2020), <https://keough.nd.edu/lessons-from-puerto-rico-inter-country-relationships-crises-and-human-thriving/> [<https://perma.cc/YTA6-3LXF>].

¹³⁴ AYALA & BERNABE, *supra* note 98, at 335–39.

dissent and ruled in undemocratic ways, unbefitting America's democratic institutions.¹³⁵ For Puerto Ricans, American democracy was always an ocean away. After the implementation of Commonwealth status in 1952, Americans portrayed themselves as the ones who granted Puerto Ricans freedom and self-rule, while sweeping the territory's ugly past under the rug.¹³⁶ To this day, the fairy tale of Puerto Ricans being in control of their homeland is still being told, but mounting evidence to the contrary has poked holes in that rosy narrative.¹³⁷

¹³⁵ DENIS, *supra* note 93, at 216–17.

¹³⁶ A case in point was Truman's handling of the threat posed by members of the pro-independence Nationalist Party, led by Pedro Albizu Campos. The federal and territorial government fiercely persecuted Albizu Campos and his followers, keeping tabs on their movements and daily life. When the Nationalists finally resorted to armed insurrection in 1950, the U.S. government responded with a show of force: activating the military, arresting dozens of Nationalists, and sentencing them to lengthy terms in federal prison for sedition. *See id.* at 209–21.

¹³⁷ *See* Lyle Denniston, *Constitution Check: Is Puerto Rico Just a Colony Under Congress's Control?*, NAT'L CONST. CTR. (Oct. 2, 2015), <https://constitutioncenter.org/blog/constitution-check-is-puerto-rico-just-a-colony-under-congresss-control> [https://perma.cc/UAP4-UGN2]. For a few years now, all three main political parties in Puerto Rico have agreed that the current political status has reached a dead end, though they disagree on what should come next: statehood, independence, or an enhanced version of the Commonwealth.

IV
THE MORE THINGS CHANGE . . .



As the demeaning picture of a U.S. President faking a basketball pass to a people amid recovery from a devastating natural disaster highlights, perhaps today's colonial depictions are not as openly racist as in the past, but they are nonetheless equally demeaning and insulting.¹³⁸

Despite labels suggesting autonomy or free association (whatever that means), Puerto Rico remains a colony in the U.S. Empire. The plague and plight associated with empires remains in full force today, as much as it did over a century ago. The wrongs of colonial rule, such as unequal treatment, lack of effective representation in its own government or that of the mainland colonizer, or any ability to dictate its future, prevail with equal force today as they did well over a century ago when the United States first acquired Puerto Rico. Therein lies the irony and perhaps wizardry of the U.S. colonial endeavor.¹³⁹ The great champion of democracy, liberty, and freedom possesses colonies with millions of residents living in an unequal, disenfranchised, subordinate state—especially when compared to their mainland counterparts—and

¹³⁸ See David A. Graham, *Trump's Puerto Rico Visit Is a Political Disaster*, ATLANTIC (Oct. 3, 2017, 2:36 PM), <https://www.theatlantic.com/politics/archive/2017/10/trump-puerto-rico-visit/541869/> [https://perma.cc/B97J-G9AZ]. Photo by Mandel Ngan/AFP.

¹³⁹ See ROMÁN, *supra* note 1.

no one seems to care.¹⁴⁰ Puerto Rico, the largest of these overseas colonies with over three million inhabitants who are U.S. citizens by birth, exemplifies the novel and sophisticated means by which this twenty-first century empire is maintained.¹⁴¹ It is a scenario where despite reality, roughly half of the colonial subjects did not, until perhaps recently, perceive themselves as subject to U.S. direct rule.

As the preceding pages demonstrate, the United States as a so-called advanced nation created legal frameworks that gave the appearance of supporting sovereignty in response to growing global calls for freedom and emancipation.¹⁴² In doing so, the colonizer ultimately kept in place their strategic, and perhaps more importantly, economic influence.¹⁴³ Such a framework exemplifies the U.S.-Puerto Rico colonial endeavor, one that has existed for well over a century and will likely continue to do so with no readily available resolution. The U.S.-Puerto Rico colonial relationship is but part of a tale of annexation, unwitting acceptance of colonial rule, and an abdication of principles that are purported to be foundational precepts of western democracy. However, for Puerto Rico and its residents, there is only the façade of liberty and freedom from colonial rule. The U.S. Government uses labels such as commonwealth status, freely associated state, or self-rule to suggest autonomy. What exists is subjugation under sophisticated colonial rule.

Currently facing impending economic collapse due to failed U.S. economic policies, such as the end of Operation Bootstrap and its progeny,¹⁴⁴ as well as the crippling consequences of Hurricane Maria and the destruction of its electrical system and much of its infrastructure,¹⁴⁵ Puerto Rico does not have a bright economic future. On September 20, 2017, Hurricane Maria, a category four storm (the

¹⁴⁰ *Id.*

¹⁴¹ See Román, *supra* note 62, at 45.

¹⁴² *Id.* at 46.

¹⁴³ Henry J. Richardson III, *The Danger of New Legal Colonialism*, 104 AM. SOC'Y INT'L L. 393, 393 (2010) (questioning the implications "on international law and the freedom of peoples of color in the Southern Hemisphere from foreign military intervention, intervention which is claimed to be legalized by the consent of their own territorial governments.").

¹⁴⁴ John W. Schoen, *Here's How an Obscure Tax Change Sank Puerto Rico's Economy*, CNBC (Sept. 26, 2017, 4:17 PM), <https://www.cnbc.com/2017/09/26/heres-how-an-obscure-tax-change-sank-puerto-ricos-economy.html> [<https://perma.cc/JS85-9AWA>].

¹⁴⁵ Of course, the few who care about Puerto Rico's colonial plight can easily forget when the imperial ruler visited the territory after Hurricane Maria ravaged Puerto Rico, only to see a president throwing paper towels at the people as if they were basketballs. It was no time to pretend to be an NBA star when U.S. citizens faced dire circumstances. Graham, *supra* note 138.

first storm of such magnitude in nearly a century), directly hit Puerto Rico and caused widespread damage across the island.¹⁴⁶ Puerto Rico had not experienced such devastation in decades.¹⁴⁷ Water sources became contaminated, debris blocked roads, and most islanders lost power for months because of the electric grid's collapse.¹⁴⁸ Maria had sustained winds as high as 155 miles per hour, with resulting damages estimated at \$90 billion,¹⁴⁹ making it the third most costly storm in U.S. history.¹⁵⁰ A year after the storm, the Governor of Puerto Rico raised the hurricane's official death toll from 64 to 2,975 people.¹⁵¹ The increased death toll followed extensive research published in the *New England Journal of Medicine*.¹⁵² Despite the devastation, and because of its colonial relationship, Puerto Rico was unable to independently seek aid and had to rely on the good graces of its overseer after facing an estimated \$40–\$85 billion in losses caused by Hurricane Maria.¹⁵³

¹⁴⁶ Victoria Zorovich, *The Perfect Storm: Weathering Puerto Rico's Fiscal Crisis in the Wake of Hurricane Maria*, 46 HOFSTRA L. REV. 1067, 1067 (2018).

¹⁴⁷ See Olympia Duhart, *Emotional Appraisals in the Wake of Hurricanes Harvey and Maria*, 54 WAKE FOREST L. REV. 973, 981 (2019).

¹⁴⁸ *Hurricanes Irma and Maria: Impact and Aftermath*, RAND, <https://www.rand.org/hsrd/hsoac/projects/puerto-rico-recovery/hurricanes-irma-and-maria.html> [https://perma.cc/9RE4-BFNN] (last visited Jan. 4, 2025).

¹⁴⁹ See David Brindley, *Months After Hurricane Maria, Puerto Rico Still Struggling*, NAT'L GEOGRAPHIC, <https://www.nationalgeographic.com/magazine/2018/03/puerto-rico-after-hurricane-maria-dispatches/> [https://perma.cc/6EDH-74C5] (last updated Aug. 30, 2018); Luis Ferré-Sadurní & Anemona Hartocollis, *Maria Strikes, and Puerto Rico Goes Dark*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/us/hurricane-maria-puerto-rico-power.html> [https://perma.cc/F796-LWSV]; PETER ANAGNOSTAKOS, ET AL., BANKS VERSUS HURRICANES: A CASE STUDY OF PUERTO RICO AFTER HURRICANES IRMA AND MARIA 1 (2023), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr1078.pdf [https://perma.cc/W9FQ-P4UL]; FEMA, MITIGATION ASSESSMENT TEAM REPORT HURRICANES IRMA AND MARIA IN PUERTO RICO, iii (2018), https://www.fema.gov/sites/default/files/2020-07/mat-report_hurricane-irma-maria-puerto-rico_2.pdf.

¹⁵⁰ Duhart, *supra* note 147, at 980.

¹⁵¹ See Brindley, *supra* note 149; Ferré-Sadurní & Hartocollis, *supra* note 149.

¹⁵² See Duhart, *supra* note 147, at 981 (citing *Study Estimates Prolonged Increase in Puerto Rican Death Rate After Hurricane Maria*, HARVARD FXB (May 29, 2018), <https://fxb.harvard.edu/2018/05/29/study-estimates-prolonged-increase-in-puerto-rican-death-rate-after-hurricane-maria/> [https://perma.cc/Y88Y-EAEY]); Nishant Kishore et al., *Mortality Rate in Puerto Rico After Maria*, 379 NEW ENG. J. MED. 162, 163 (2018) ("According to the Centers for Disease Control and Prevention, deaths can be directly attributed to a tropical cyclone if they are caused by forces related to the event, such as flying debris, or if they are caused by unsafe or unhealthy conditions resulting in injury, illness, or loss of necessary medical services.").

¹⁵³ Nicole Friedman, *Hurricane Maria Caused as Much as \$85 Billion in Insured Losses, AIR Worldwide Says*, WALL ST. J. (Sept. 25, 2017, 4:53 PM), <https://www.wsj.com>

During this period, Puerto Rico also faced \$70 billion in bond debt and \$49 billion in unfunded pension obligations.¹⁵⁴

Because of Puerto Rico's dire financial circumstances, the United States established the Financial Oversight and Management Board ("the Board"), under the Puerto Rico Oversight, Management, and Economic Act (PROMESA) of 2016. The move manifests the most recent incarnation of the colonial nature of the United States-Puerto Rico relationship.¹⁵⁵ In 2015, domestic and international creditors braced for a historic financial event as Puerto Rico was "on the brink of catastrophic default."¹⁵⁶ "After almost a decade of economic headwinds, substantial money-borrowing, and poor fiscal management, [the territory]'s financial condition was quickly deteriorating."¹⁵⁷ PROMESA stemmed from Puerto Rico's progressive indebtedness since the late twentieth century when the Puerto Rican government borrowed heavily to cover budget shortfalls,¹⁵⁸ many of which were the direct result of the United States's ending of Operation Bootstrap. To capitalize on increasing economic challenges, investors purchased increasing amounts of Puerto Rican bonds.¹⁵⁹ As of May 2017, Puerto Rico's debt amounted to a staggering \$123 billion—an unpayable amount given Puerto Rico's incapacity to raise more revenue.¹⁶⁰ To make matters worse, Puerto Rico—unlike stateside municipalities—cannot declare bankruptcy because it is just a territory and has to service its debt ahead of other expenses in its annual budget.¹⁶¹ That made Puerto Rican bonds extra attractive for vulture capitalists: Regardless of how bad the

.com/articles/hurricane-maria-caused-as-much-as-85-billion-in-insured-losses-air-world-wide-says-1506371305 [https://perma.cc/KFK2-GQTX].

¹⁵⁴ Nick Brown, *Puerto Rico Budget to Protect Pension Payments: Governor*, REUTERS (May 31, 2017, 3:48 PM), <https://www.reuters.com/article/us-puertorico-debt-budget/puerto-rico-budget-to-protect-pension-payments-governor-idUSKBN18R3C8> [https://perma.cc/9H6Z-HCC9].

¹⁵⁵ PROMESA, 130 Stat. 549, Pub. L. No. 114-187.

¹⁵⁶ Tina Meng, *The Perfect Storm: Puerto Rico's Evolving Debt Crises Under PROMESA*, 2019 COLUM. BUS. L. REV. 367, 367 (2019).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 369–70.

¹⁵⁹ *Id.*

¹⁶⁰ Juan González, *Puerto Rico's \$123 Billion Bankruptcy Is the Cost of U.S. Colonialism*, INTERCEPT (May 9, 2017, 9:23 AM), <https://theintercept.com/2017/05/09/puerto-ricos-123-billion-bankruptcy-is-the-cost-of-u-s-colonialism/> [https://perma.cc/MLD7-8C7T].

¹⁶¹ *Id.*

bonds were or how long it would take for investors to get their money back, payment was all but guaranteed.¹⁶²

As a result, the colonial ruler passed PROMESA via Congress and created the Board, which was established to oversee Puerto Rico's recovery process.¹⁶³ The Board's establishment essentially created a colonial superstructure overseeing the acts of the Puerto Rican government. "Among the Board's powers are approval of fiscal plans, approval of budgets for Puerto Rico, and review of territorial legislation to ensure its compliance with the current fiscal plan."¹⁶⁴ "An essential feature of PROMESA is the automatic stay provision."¹⁶⁵ One key aspect of the Board is that it "operates as a stay of various [Puerto Rican] proceedings or acts, including (1) the commencement or continuation of a judicial, administrative, or other action or proceeding against the Government of Puerto Rico that was or could have been commenced before the enactment of PROMESA."¹⁶⁶ If the Board finds that the government of Puerto Rico is not in compliance with PROMESA (by meeting its benchmarks regarding the payment of Puerto Rico's obligations), it can develop its own fiscal plan, and if the Board finds that a proposed budget is not in compliance, it can make reductions or modifications to the budget as it sees fit.¹⁶⁷

For Puerto Ricans, the Board is an example of an increasingly unvarnished colonial relationship, where the actions of the U.S. imperial masters and their fiscal emissaries speak louder than the reassuring tone of the Commonwealth government, which tries to give the impression that it is in control of the situation (as was the case during the Ricardo Roselló administration, 2017–2019).¹⁶⁸ The Board also represents the last nail in the coffin of failed economic development efforts by the United States that sought to transform Puerto Rico's agrarian economy into an industrial one during the twentieth century.¹⁶⁹ Nowadays, Puerto Rico's economy is neither agrarian nor industrial nor service-oriented; it is an unmitigated disaster that struggles to stay afloat. Because it is not a sovereign state, Puerto

¹⁶² ED MORALES, *FANTASY ISLAND: COLONIALISM, EXPLOITATION, AND THE BETRAYAL OF PUERTO RICO* 123–27 (2019).

¹⁶³ Daniel A. Klein, Annotation, *PROMESA*, 48 *U.S.C. §§ 2101 et seq.*, 35 A.L.R. Fed. 3d Art. 9 (2018).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ MORALES, *supra* note 162, at 165–66.

¹⁶⁹ *Id.*

Rico cannot negotiate to raise capital and cannot declare bankruptcy or seek debt relief as other countries do. Puerto Rico can only wait to see what the metropole will decide, and the latter decided to create a bureaucratic oversight board that decides every significant fiscal and budgetary issue for the island, placing the fate of its economic future in uncharted territory.¹⁷⁰

Unfortunately, the United States lacks a stellar track record for creating economic prosperity on the island, General Miles' promises notwithstanding.¹⁷¹ It must not be forgotten that, as part of the United States' plan to develop Puerto Rico, Congress instituted "Operation Bootstrap," a system of economic incentives to attract U.S. manufacturing companies to the island.¹⁷² Critical to that planned development was the passage of Section 936 of the U.S. IRS Code, which incentivized private U.S. capital growth by making profits of U.S. corporations on the island tax-free.¹⁷³ Sadly, after billions of lost tax revenues and billions made by U.S. corporations in the territories, the economic boom never materialized.¹⁷⁴ During Operation Bootstrap, the United States also allowed Puerto Rico to issue "triple tax-exempt" bonds, which did not require investors to pay federal, state, or local taxes on interests earned from these debt instruments.¹⁷⁵ In 2006, Congress repealed Section 936 and its tax exemptions, and the consequences of that repeal had significant negative ramifications for Puerto Rico's economy: Corporations and businesses quickly left the island and local unemployment rates skyrocketed.¹⁷⁶ Puerto Rico's

¹⁷⁰ Heather Long, *Puerto Rico's Crisis: How Did It Get So Bad?*, CNN (May 12, 2016, 12:58 PM), <http://money.cnn.com/2016/05/12/investing/puerto-rico-debt-crisis/index.html> [<https://perma.cc/PD73-DG4B>].

¹⁷¹ Nelson Denis, *After a Century of American Citizenship, Puerto Ricans Have Little to Show for It*, NATION (Mar. 2, 2017), <https://www.thenation.com/article/archive/after-a-century-of-american-citizenship-puerto-ricans-have-little-to-show-for-it/> [<https://perma.cc/NT8K-6TSC>].

¹⁷² See Schoen, *supra* note 144. On Operation Bootstrap's economic impact, see A.W. MALDONADO, *BOOM AND BUST IN PUERTO RICO: HOW POLITICS DESTROYED AN ECONOMIC MIRACLE* 24–25 (2021).

¹⁷³ See *supra* notes 168–72, *infra* notes 174–202, and accompanying text.

¹⁷⁴ *Id.*

¹⁷⁵ 48 U.S.C. § 745 (2012); Thomas Heath, *To the Average Investor, Puerto Rico Debt Crash Is More Whimper, Less Bang*, WASH. POST (Oct. 10, 2017, 12:29 PM), https://www.washingtonpost.com/news/get-there/wp/2017/10/10/to-the-average-investor-puerto-rico-debt-crash-is-more-whimper-less-bang/?utm_term=.e90c7e159105 [<https://perma.cc/S7X9-7D4P>].

¹⁷⁶ Nathan Bomey, *6 Reasons Why Puerto Rico Slid into Financial Crisis*, CNBC (Oct. 5, 2017, 7:27 AM), <https://www.cnbc.com/2017/10/05/6-reasons-why-puerto-rico-slid-into-financial-crisis.html> [<https://perma.cc/EXX2-FX5F>].

own Great Recession subsequently followed these changes.¹⁷⁷ Scores of unemployed and underemployed workers, including valuable skilled laborers, began leaving the island in search of work on the U.S. mainland.¹⁷⁸ Puerto Rico's economy has reached a dead end as it has run out of options.

While the colonial ruler may have passed these laws to assist Puerto Rico's economic recovery, the Board is a colonial institution designed to protect U.S. interests in Puerto Rico and not the interests of Puerto Ricans themselves.¹⁷⁹ It is unlikely that Puerto Rico can get out of this fiscal hole without massive injections of federal aid and changes to colonial policies that hamstring the Commonwealth's government. One onerous colonial policy, for example, is the 1920 Jones Act.¹⁸⁰ That protectionist legislation requires the use of U.S. ships for all interstate trade which significantly increases shipping costs and, thus, the cost of living in overseas territories such as Puerto Rico.¹⁸¹ Because most of Puerto Rico's goods come from the U.S. mainland, Puerto Ricans are subject to this interstate trade requirement or forced to find other trade partners.¹⁸²

Based on over a century of U.S. imperial neglect and U.S. complicity in the exploitation of its Caribbean colony by corporate America, we do not envision a solution to the crisis that will prioritize the needs of Puerto Ricans. Wall Street will defend its bottom line, the U.S. Treasury will ensure the Commonwealth pays investors, and ordinary Puerto Ricans will be left flapping in the wind.¹⁸³ If anything, Puerto Ricans are in for a lot more economic pain at the hands of the Board and—ultimately—Uncle Sam's colonial policies.

¹⁷⁷ Schoen, *supra* note 144.

¹⁷⁸ See Patrick Gillespie, *Puerto Rico's Brain Drain: Fewer Children in Schools*, CNN (Dec. 23, 2015, 11:23 AM), <http://money.cnn.com/2015/12/23/news/economy/puerto-rico-brain-drain/?iid=EL> [<https://perma.cc/6WTX-U9LK>].

¹⁷⁹ Pedro Cabán, *Puerto Rico and PROMESA: Reaffirming Colonialism*, NEW POL. (Summer 2017), https://newpol.org/issue_post/puerto-rico-and-promesa-reaffirming-colonialism/ [<https://perma.cc/Q75M-BYFD>].

¹⁸⁰ Chris Isidore, *The Jones Act Has Been Hurting Puerto Rico for Decades*, CNN (Sept. 28, 2017, 3:10 PM), <https://money.cnn.com/2017/09/28/news/economy/jones-act-puerto-rico/index.html> [<https://perma.cc/V77U-39G4>].

¹⁸¹ *Id.*

¹⁸² See Colin Grabow, *Sorry Jones Act Supporters, the Law Is Still a Bad Deal for Puerto Rico*, CATO INST. (Aug. 30, 2022, 1:22 PM), <https://www.cato.org/blog/sorry-jones-act-supporters-law-still-bad-deal-puerto-rico> [<https://perma.cc/JYP7-UCMH>].

¹⁸³ Mayra Velez-Serrano, *A Long History of Wall Street Bailouts and How Puerto Rico Will Not Be Different*, 9 WORLD REV. POL. ECON. 266, 267 (2018).

Paternalistic actions by colonial governments are still present today, and while discussions about colonialism may seem more tolerant or acceptable, they often reflect the same underlying racism that existed over a century ago. A vivid example of the newly fashioned paternalism is evidenced by a series of articles in the *Harvard Law Review*, much as it did well over a century ago.¹⁸⁴ In the 2017 *Harvard Law Review* article, “Developments in the Law: The U.S. Territories,” the authors are almost apologetic about U.S. colonial rule. While not using openly racist terms as it did in 1898 and 1899,¹⁸⁵ the 2017 publication, dedicated to the territorial relationship, attempted to mask their paternalistic, and arguably biased, tones. In the issue’s introductory chapter, the author subtly highlights the increased autonomy Puerto Rico has received over the twentieth century.¹⁸⁶ Ultimately, this unnamed author admits to the colonial nature of U.S. rule, but also observes, “Puerto Rico had moved dramatically toward self-determination and self-rule with its constitution.”¹⁸⁷

In the first chapter of the 2017 Harvard issue, another unnamed author specifically seeks to turn the classic condemnation of the colonial relationship “on its head,” arguing, “the federal-territory relationship has more or less gradually progressed toward functionally mimicking the federal-state structural relationship.”¹⁸⁸ According to this author, the United States and Puerto Rico maintain a “territorial federalism” relationship.¹⁸⁹ Using a so-called on-the-ground pragmatic view of the relationship, this author argues that the relationship “has provided an avenue by which the territories and their residents have reaped federalism’s benefits despite the formal contours of the federal-territory relationship as reflected in contemporary constitutional doctrine.”¹⁹⁰

Despite the evidence presented in our Article, scores of other articles written by the lead author for well over a quarter of a century, and dozens of other articles from legal scholars in the territory and on the

¹⁸⁴ See *Developments in the Law - The U.S. Territories*, 130 HARV. L. REV. 1616 (2017).

¹⁸⁵ *Id.* at 1619.

¹⁸⁶ *Id.* at 1621–22.

¹⁸⁷ *Id.* at 1624–25.

¹⁸⁸ *Id.* at 1632.

¹⁸⁹ *Id.* at 1632–33.

¹⁹⁰ *Id.* at 1633.

mainland,¹⁹¹ the new apologists for colonial rule in Harvard's latest infamous law review issue, albeit over a century of a racist colonial junket, seek to couch the relationship in the tried-and-true effort as a new or special form of sovereignty. The apologists in that Harvard issue defy both reality and logic and engage in wishful thinking about the crass, colonial U.S.-Puerto Rico relationship.

The authors supporting the so-called "repurposing project" engage in nothing short of code for arguing "these people" are unfit for the virtues of Western democracy, as first proclaimed over a century ago by racist congress members and Supreme Court justices.¹⁹² Indeed, the author of the piece, "Territorial Federalism," in the Harvard issue suggests the use of the Territorial Clause's plenary power over Puerto Rico and the other territories can be justified within the constitutional structure as a way to ensure democratic values and rules for "proto-states," or territories destined to become states of the union.¹⁹³ After over 125 years of being under plenary congressional colonial rule, the suggestion that Puerto Rico is a state-in-waiting is absurd and so blindly ignorant that it is offensive. Indeed, despite the rhetorical gamesmanship of "Territorial Federalism," where the author contorts legal decisions, history, and logic to justify the colonial venture, the author never condemns the colonial venture—though timidly admitting its existence.¹⁹⁴

Professor Ponsa-Kraus recently examined *Developments in the Law*, an article published in a 2017 Harvard Law Review issue, and concluded that several of these advocates of the repurposing view advocate for a new look at the *Insular Cases*: a way to maintain the colonial structure in order "to protect the distinctive cultures of the unincorporated territories."¹⁹⁵ Professor Ponsa-Kraus, correctly condemning such efforts, observed that these apologists stated that

¹⁹¹ See, e.g., MONGE, *supra* note 5, at 44–50. EFRÉN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO 73–142 (2001); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 72–91 (2009); BARTHOLOMEW H. SPARROW, THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE 257 (2006); Christina Duffy Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449 (2022); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40–84 (1985).

¹⁹² See *Downes v. Bidwell*, 182 U.S. 244, 288. The opinion by its own words is unquestionably paternalistic and bigoted.

¹⁹³ See *Developments in the Law*, *supra* note 184, at 1645.

¹⁹⁴ *Id.* at 1624–25.

¹⁹⁵ Ponsa-Kraus, *supra* note 191, at 2456.

“[w]here the doctrine [of the *Insular Cases*] once served colonial interests in an era of mainland domination of the territories, a revisionist argument would see it repurposed today to protect indigenous cultures from a procrustean application of the federal Constitution.”¹⁹⁶

Another advocate of the repurposing project described the *Insular Cases* as “defensible and perhaps even necessary” to protect culture and promote self-government in the U.S. territories.¹⁹⁷ Professor Stanley Laughlin defined the repurposing project as follows:

The genius of the [doctrine of the *Insular Cases*] is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures.¹⁹⁸

In the end, these delusional and pious defenders of the *Insular Cases* and U.S. colonialism, by labeling colonialism as repurposing or some other euphemism for colonial subjugation, they are simply apologists for empire. They ultimately are selectively principled scholars who tacitly frown on empire but essentially support it when it comes to the people of color that are the Puerto Rican people and those of other U.S. overseas territories.

The U.S. Supreme Court, for its part, is similarly in support of the *Insular Cases* and thus U.S. colonial rule. Despite the admittedly and openly racist proclamations of the *Insular Cases*, the Court has repeatedly upheld the tortured logic of these decisions, despite their endorsement of empire and use of bigotry to subjugate conquered peoples potentially indefinitely. Relying on the territorial incorporation doctrine, the Court has upheld unequal economic treatment of the U.S. citizens in Puerto Rico. For instance, in the 1978 case *Califano v. Torres*,¹⁹⁹ the Court held that Congress can discriminate against the elderly, the blind, and people with disabilities if they are inhabitants of Puerto Rico by not providing them financial assistance that they would otherwise be eligible for under the Supplemental Security Income (SSI)

¹⁹⁶ *Id.* at 2457.

¹⁹⁷ Russell Rennie, Note, *A Qualified Defense of the Insular Cases*, 92 N.Y.U. L. REV. 1683, 1707 (2017).

¹⁹⁸ Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional*, 27 U. HAW. L. REV. 331, 374 (2005); see also Daniel E. Hall, *Curfews, Culture, and Custom in American Samoa: An Analytical Map for Applying the U.S. Constitution to U.S. Territories*, 2 ASIAN-PAC. L. & POL’Y J. 69, 92–97 (2001).

¹⁹⁹ *Califano v. Torres*, 435 U.S. 1, 2, 5 n.7 (1978).

program of the Social Security Act.²⁰⁰ Similarly, in *Harris v. Rosario*, the Court upheld as constitutional the reimbursement of lower levels of AFDC (Aid to Families with Defendant Children) to the people of Puerto Rico.²⁰¹ Resting on Congress's power under the Territorial Clause, the Court, in these decisions, summarily found a rational basis for the disparate treatment of the Puerto Rican people, thereby justifying Congress's discriminatory action and colonial rule.

Further, the Court recently refused to grant certiorari in *Fitisemanu v. United States*²⁰² and effectively upheld the *Insular Cases*. The *Fitisemanu* Court considered whether persons born in United States territories are entitled to birthright citizenship under the Fourteenth Amendment's Citizenship Clause, including whether the century-old *Insular Cases* should be overruled.²⁰³ By refusing to grant certiorari, the Court upheld the status quo, thereby refusing to recognize the birthright citizenship available to all stateside U.S. citizens. As a result, the Court upheld the validity of the openly racist and imperialist *Insular Cases*.²⁰⁴

Just two weeks before *Fitisemanu*, petitioners asked the Court to reject the *Insular Cases*, in *U.S. v. Vaello Madero*.²⁰⁵ The *Vaello Madero* petitioners requested the Court to apply the equal protection component of the Fifth Amendment's Due Process Clause for the SSI benefits to residents of Puerto Rico to the same extent those benefits are available to residents of the States.²⁰⁶ The *Vaello Madero* Court answered in the negative and concluded that, because Congress had been granted broad oversight of U.S. territories by Article IV of the U.S. Constitution, the exclusion of the territories by Congress from programs like SSI was accordingly not violative of the Constitution.²⁰⁷ In doing so, the Court held notions of equal protection do not apply to

²⁰⁰ *Id.* at 4–5.

²⁰¹ *Harris v. Rosario*, 446 U.S. 651, 652 (1980).

²⁰² *Fitisemanu v. United States*, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 U.S. 362 (2022).

²⁰³ *Id.*

²⁰⁴ For a general discussion of the U.S. territories and their history, see ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (Martinus Nijhoff Publishers 1989) (the first book to address the legal issues relating to the U.S. island territorial relations, but sadly utterly failed to raise issues of race or how the colonial relationship assisted in the subjugation of people of color in these territories).

²⁰⁵ *U.S. v. Vaello Madero*, 596 U.S. 159, No. 20–303, slip op. at 1 (U.S. Apr. 21, 2022).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 5–6.

the residents of Puerto Rico.²⁰⁸ At the same time, the Court upheld the *Insular Cases* and reaffirmed the subordinate status of the U.S. citizen residents of Puerto Rico.²⁰⁹ With these decisions, especially when the Court refused to even hear arguments on the validity of the *Insular Cases*, the Court embraced colonialism, despite its universal condemnation, and in doing so, ushered in the imperialistic era of the New Insular Cases.²¹⁰

CONCLUSION (AND IT WILL STAY THE SAME)

The above congressional acts, scholarly opinions, and U.S. Supreme Court precedents highlight that U.S. colonialism is alive and well over a century after it started in 1898. While not using openly racist comments, today's apologists use terms like culture or repurposing to justify maintaining millions in a subordinated, silenced colonial rule. The residents of the U.S. territory "enjoy" a second-class citizenship, one befitting only colonial subjects. Moreover, the United States has created and maintains a fiction of self-rule in which even some Puerto Ricans partake: that the territory is autonomous, and that Puerto Ricans can decide their fate. As shown in this Article, nothing could be further from the truth. This is both the shame and the genius of the American Empire.²¹¹

The inevitable question remains: What should be done with Puerto Rico? In terms of the future status of Puerto Rico, the three classic status options are mentioned above. For the reasons expressed throughout this Article and other articles by the authors, the Commonwealth option is an unacceptable form of colonial rule. The next potential option could be U.S. statehood. Still, considering the troubling, racialized history of U.S. control over Puerto Rico, it is unlikely that the United States will ever accept Puerto Ricans as equals and Puerto Rico as a state of the Union.

Ultimately, the authors believe that the time has come for Puerto Ricans to seek full sovereignty and be in charge of their destiny. It is the only dignified option that will grant Puerto Ricans full control over their affairs and erase the ugly stain of colonialism from their history. Indeed, one could characterize the Commonwealth option as merely the maintenance of empire, and U.S. statehood for its part (in the

²⁰⁸ *Id.* at 5.

²⁰⁹ *Id.*

²¹⁰ *See, e.g., id.*

²¹¹ *See* ROMÁN, *supra* note 1.

unlikely event it was ever allowed by the U.S. government) could be viewed as simply the culmination of empire—that is, the complete annexation and absorption of the Puerto Rican people and their culture.²¹² Thus, independence is the only viable option consistent with both international law principles of self-determination and the U.S. constitutional theory of equal membership.²¹³ Admittedly, a real and frightening aspect of independence would be the prospect of economic strife post-independence and the national security fears associated with the creation of the country of Puerto Rico. These dangers may be ameliorated by creating international agreements between the United States and Puerto Rico post-independence, similar to those enjoyed by the United Kingdom's former colonies.²¹⁴ Of course, these debates will likely continue throughout what is now the second century of U.S. colonial rule over Puerto Rico.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See, e.g.*, Memorandum of Understanding between the UK and the Republic of Trinidad and Tobago, Mar. 22–Apr. 1, 2019, UK and Republic of Trinidad and Tobago, DEP'T FOR INT'L TRADE, Feb. 5, 2021, <https://www.gov.uk/government/publications/memorandum-of-understanding-between-the-uk-and-cariforum-states-on-the-economic-partnership-agreement/memorandum-of-understanding-between-the-uk-and-the-republic-of-trinidad-and-tobago> [<https://perma.cc/X86X-JLF7>], withdrawn April 22, 2021.