

Book Review

¿Hacia dónde vas Puerto Rico?*

Puerto Rico: The Trials of the Oldest Colony in the World. By José Trías Monge.** New Haven & London: Yale University Press, 1997. Pp. xii, 228. \$30.00.

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There is no sorrow above
the loss of a native land

—Euripides, *The Medea*¹

¿Dónde estás, mi corazón
que ya ni latir te siento?²

—Juan Antonio Corretjer, *Tierra de Mi Corazón*³

The Spanish-American War of 1898 launched the United States into the role of a global power with overseas imperial ambitions.⁴ This one-sided

* Where are you headed, Puerto Rico?

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1. In Euripides, *The Medea* (Rex Warner trans.), in EURIPIDES at 650-51 (David Grene & Richmond Lattimore eds., University of Chicago Press 1959).

2. "Where be you, o heart / that I cannot even hear your beat?" (author's translation)

3. JUAN ANTONIO CORRETIJER, *Tierra de Mi Corazón* [Land of My Heart], in 1 OBRAS COMPLETAS 110, 111 (1977).

4. See generally R.A. ALGER, *THE SPANISH-AMERICAN WAR* (1901), FRANK FREIDEL, *THE SPLENDID LITTLE WAR* (1958); A.T. MAHAN, *THE INTEREST OF AMERICA IN SEA POWER, PRESENT AND FUTURE* (Kennikat Press 1970) (1897); THEODORE ROOSEVELT, *COLONIAL POLICIES OF THE UNITED STATES* (1937); SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884-1918 (Henry Cabot Lodge ed., 1925); HUGH THOMAS, *CUBA: THE PURSUIT OF FREEDOM* (1971), DAVID F. TRASK, *THE WAR WITH SPAIN IN 1898* (1981); JOSEPH E. WISAN, *THE CUBAN CRISIS AS REFLECTED IN THE NEW YORK PRESS (1895-1898)* (1934).

skirmish, which has been referred to as a “splendid little war,”⁵ ended with the signing of the Treaty of Paris on December 10, 1898,⁶ pursuant to which the United States annexed the Philippine Islands, Puerto Rico, and Guam. Under Article IX of the treaty, the civil rights and political status of the inhabitants of these territories were left to future determination by the United States Congress.⁷

Most Americans have instinctively disregarded, if not outright ignored, this forgotten war and its consequences.⁸ Nevertheless, the problems and issues created by the existence of territories that “belong to . . . but are not a part of the United States”⁹ not only remain substantially unresolved, but also have become more complex and exacerbated. The Philippines, of course, is no longer in this quandary.¹⁰ In Puerto Rico and Guam, as well as in other more recently acquired territorial jurisdictions, however, close to four million U.S. citizens¹¹ are subject to Congress’s virtually unrestricted plenary powers over these areas pursuant to the Territorial Clause of the Constitution.¹² The very

5. FREIDEL, *supra* note 4. This phrase is taken from U.S. Ambassador to Britain John Hays’s letter to Theodore Roosevelt after the war ended: “‘It has been a splendid little war; begun with the highest motives, carried on with magnificent intelligence and spirit, favoured by that fortune which loves the brave.’” THOMAS, *supra* note 4, at 404 (quoting an undated letter from John Hays, U.S. Ambassador to Britain, to Theodore Roosevelt).

6. Treaty of Peace, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

7. *See id.* art. IX, ¶ 2, 30 Stat. at 1759. Article IX reads: “The 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.*

8. *Cf.* TRUMAN CLARK, PUERTO RICO AND THE UNITED STATES, 1917-1933, at 175 (1975) (“[B]y formulating no stated policy for the empire, the people of the United States could successfully deny to themselves that their nation was an imperial power.”). There have been some notable exceptions. *See, e.g.*, BAILEY W. DIFFIE & JUSTINE WHITFIELD DIFFIE, PORTO RICO: A BROKEN PLEDGE (1931); JAMES E. KERR, THE *INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* (1982); ROOSEVELT, *supra* note 4; REXFORD GUY TUGWELL, THE STRICKEN LAND: THE STORY OF PUERTO RICO (1947).

9. *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (“We are therefore of the opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States but are not a part of the United States within the revenue clauses of the Constitution . . .”).

10. The Philippine Islands became an independent republic in 1946. *See* Proclamation No. 2695, 3 C.F.R. 86 (1946).

11. Residents of Puerto Rico were granted U.S. citizenship in 1917. *See* Jones Act (Puerto Rico), ch. 145, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. § 737 (1994)); *see also* José A. Cabranes, *Citizenship and the American Empire*, 127 U. PA. L. REV. 391 (1978) [hereinafter Cabranes, *Citizenship*]. Residents of Guam were granted U.S. citizenship in 1950. *See* Organic Act of Guam, ch. 512, sec. 4, § 206, 64 Stat. 384, 384 (1950) (codified as amended at 8 U.S.C. § 1407 (1994)). The residents of the U.S. Virgin Islands, which were purchased from Denmark in 1916, *see* Convention Between the United States and Denmark for Cession of the Danish West Indies, Aug. 4, 1916, 39 Stat. 1706, were granted U.S. citizenship in 1952, *see* Immigration and Nationality Act, Pub. L. No. 414, § 306, 62 Stat. 163, 237 (1952) (codified as amended at 8 U.S.C. § 1406). The residents of the Northern Marianas, a former United Nations Trust Territory, were granted U.S. citizenship in 1976. *See* Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 301, 90 Stat. 263, 265-66 (1976) (codified as amended at 48 U.S.C. § 1908); *see also* José A. Cabranes, *The Commonwealth of the Mariana Islands: A Mass Grant of United States Citizenship*, 8 U.C. DAVIS L. REV. 453 (1975). American Samoa was ceded to the United States by the Samoan chiefs in 1929 following the renunciation by Great Britain and Germany of their claims to those islands. *See* Act of Feb. 20, 1929, ch. 281, 45 Stat. 1253 (codified at 48 U.S.C. § 1661). Persons born in American Samoa are American nationals but not citizens. *See* 8 U.S.C. § 1101(a)(21), (22).

12. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful

notion that the rights of these citizens are dependent on rules based on the regulation of property seems decidedly outmoded as we approach the twenty-first century.¹³ The underlying principle sustaining this outcome—that the Constitution does not follow the flag—has far-reaching consequences affecting mainstream Americans¹⁴ and raises serious questions about the national commitment to democracy, equality, and self-determination.

As we face the 100th anniversary of the American annexation of Puerto Rico, the predominant issue that has been endlessly debated for a century by the local political leadership—the so-called “status question”¹⁵—has gained new political life on the mainland. Bills have been introduced in Congress to resolve the status conundrum. Under the Young Bill,¹⁶ a congressionally sponsored referendum would be held in which the voters of Puerto Rico would choose between three status alternatives: some form of commonwealth status (yet to be defined), independence, and statehood.¹⁷ It is in this context that José Trías Monge has written his political history and blueprint for the island, *Puerto Rico: The Trials of the Oldest Colony in the World*.¹⁸

Rules and Regulations respecting the Territory and other Property belonging to the United States . . . ”, see also *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam) (imposing only a rational basis standard of review on congressional regulation of Puerto Rico); *Bidwell*, 182 U.S. 244 (1901) (permitting separate treatment of Puerto Rico under the Constitution for the purpose of duties, imposts, and excises)

13. Indeed, the notion is reminiscent of the infamous *Dred Scott* decision. See *Scott v. Sandford*, 60 U.S. 393 (1854). Of course, the *Dred Scott* Court reached its holding on the basis that Scott was not a citizen. See *id.* at 426-27.

14. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (stating that “not every constitutional provision applies to government activity even where the United States has sovereign power”), cf. Stephen A. Saltzburg, *The Reach of the Bill of Rights Beyond the Terra Firma of the United States*, 20 VA. J. INT’L L. 741 (1980) (discussing the extraterritorial application of the Constitution), Jennifer J. Dacey, Casenote, *U.S. Citizens’ Fourth Amendment Rights: Do They Extend Only to the Waters’ Edge?*, 5 GEO. MASON L. REV. 761 (1997) (examining the status of constitutional standards governing searches of American citizens abroad by federal agents). But cf. *Reid v. Covert*, 354 U.S. 1, 5-14 (1957) (holding that when the United States acts against its citizens abroad, it can do so only in accordance with all the limitations imposed by the Constitution).

15. E.g., SURENDRA BHANA, *THE UNITED STATES AND THE DEVELOPMENT OF THE PUERTO RICO STATUS QUESTION 1936-1968* (1975); see also ROBERT ANDERSON, *PARTY POLITICS IN PUERTO RICO* (1965); PEDRO ALBIZU CAMPOS, *OBRAS ESCOGIDAS 1923-1936* (1975); HAROLD J. LIDIN, *HISTORY OF THE PUERTO RICAN INDEPENDENCE MOVEMENT* (1981); LIDIO CRUZ MONCLOVA LLIS MUÑOZ RIVERA, *DIEZ AÑOS DE SU VIDA POLÍTICA* (1959); BOLÍVAR PAGAN, *HISTORIA DE LOS PARTIDOS POLÍTICOS PUERTORRIQUEÑOS (1898-1956)* (1959).

16. See *United States-Puerto Rico Political Status Act*, H.R. 856, 105th Cong. (1997). This bill was reported to the House by the Committee on Resources on June 12, 1997. See H.R. REP. NO. 105-131, at 45 (1997). The bill was placed on the Union Calendar for consideration by the Committee of the Whole. No further action has been taken to date.

17. The Young Bill would establish a four-step process for enhancing self-government in Puerto Rico: (1) A referendum would be held in Puerto Rico no later than December 31, 1998, in which the ballot would provide three status options: commonwealth, separate sovereignty, or statehood; (2) If the referendum choice was for either statehood or separate sovereignty, the President would develop and submit to Congress legislation for a transition plan of not more than 10 years duration, which if enacted by Congress, would be submitted to the Puerto Rican electorate for approval in another referendum. (3) Assuming the plan was approved by the people of Puerto Rico, the President would then submit to Congress legislation to implement the form of self-government consistent with Puerto Rico’s choice, including a proposed date for implementation; (4) If this was enacted by the Congress, it would be presented to Puerto Rican voters for approval by referendum, and the results would be certified to the President. See H.R. 856.

18. JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997).

This is a remarkable book written by the former chief justice of the Supreme Court of Puerto Rico,¹⁹ who is not only a noted constitutional scholar,²⁰ but most significantly was a major actor in the creation of that presently maligned entity, the "Commonwealth of Puerto Rico." Much of the book is a comprehensive review of relevant Puerto Rican history, and thus it is valuable, at the very least, as a concise reference source for those who may otherwise be unfamiliar with the subject. The book's principal worth, however, lies elsewhere, and may be somewhat difficult to appreciate for those who are uninitiated in the Byzantine politics of Puerto Rico.

That Puerto Rico is, and has been since its annexation from Spain in 1898, a colony of the United States, is a central postulate of Trías Monge's book. This conclusion is neither startling nor new,²¹ but it is one that is not relished by most Americans, to whom the notion that we are in this day and age a colonial power is not only unpalatable but also is considered to be an outright historic anachronism. Nevertheless, this has been the consistent position of both statehood²² and independence advocates²³ in Puerto Rico, yet one steadfastly denied²⁴ by supporters and apologists of the Commonwealth

19. Trías Monge served as chief justice from 1974 to 1985. *See id.* at xii.

20. *See* JOSÉ TRÍAS MONGE, *EL CHOQUE DE DOS CULTURAS JURÍDICAS EN PUERTO RICO* (1991); JOSÉ TRÍAS MONGE, *LA CRISIS DEL DERECHO EN PUERTO RICO* (1979); 1-5 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* (1980-1983, 1994) [hereinafter TRÍAS MONGE, *HISTORIA CONSTITUCIONAL*]; JOSÉ TRÍAS MONGE, *EL SISTEMA JUDICIAL DE PUERTO RICO* (1978); JOSÉ TRÍAS MONGE, *SOCIEDAD, DERECHO Y JUSTICIA* (1986).

21. *See generally* RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* (1984); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985); Cabranes, *Citizenship*, *supra* note 11; José A. Cabranes, *Puerto Rico: Out of the Colonial Closet*, 33 *FOREIGN POL'Y* 66 (1978-1979); David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 *REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO* (REV. JUR. U.P.R.) 255, 260-73 (1952).

22. *See* GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY ON STATEHOOD* (1984); ROLAND I. PERUSSE, *THE UNITED STATES AND PUERTO RICO: DECOLONIZATION OPTIONS AND PERSPECTIVES* (1997); Luis Dávila-Colón, *Equal Citizenship, Self Determination and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 *J. INT'L L.* 315 (1981).

23. *See* GORDON K. LEWIS, *NOTES ON THE PUERTO RICAN REVOLUTION: AN ESSAY ON AMERICAN DOMINANCE AND CARIBBEAN RESISTANCE* (1974); MANUEL MALDONADO-DENIS, *PUERTO RICO: A SOCIO-HISTORICAL INTERPRETATION* (Elena Vialo trans., Random House 1972); Manuel Rodríguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 *U. MIAMI INTER-AM. L. REV.* 457 (1987) (analyzing Puerto Rico's colonial status and the possibility of decolonization under international law).

24. *See generally* ANTONIO FERNÓS ISERN, *ESTADO LIBRE ASOCIADO DE PUERTO RICO: ANTECEDENTES, CREACIÓN Y DESARROLLO HASTA LA EPOCA PRESENTE* (1974); *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* (Arturo Morales Carrión ed., 1983); Hiram Cancio, *The Power of the Congress To Enter into a Compact with the People of Puerto Rico—The Legal Status of the Compact*, 22 *REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO* (REV. COL. ABOG. P.R.) 341 (1962); Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and Its Implications Regarding the Power of the Commonwealth of Puerto Rico To Regulate Interstate Commerce*, 43 *REV. JUR. U.P.R.* 259 (1974); Juan M. García Passalacqua, *The Legality of the Associated Statehood of Puerto Rico*, 4 *INTER-AM. L. REV.* 287 (1962); Rafael Hernández-Colón, *The Commonwealth of Puerto Rico: Territory or State?*, 19 *REV. COL. ABOG. P.R.* 207 (1959); Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 *GEO. L.J.* 219 (1967); Calvert Magruder, *The Commonwealth Status of Puerto Rico*, 15 *U. PITT. L. REV.* 1 (1958); Jorge Morales Yordan, *The Constitutional and International Status of the*

formula since the enactment in 1950 of Public Law 600.²⁵

For some time, however, there have been precursory indications of fissures in this initially monolithic pro-Commonwealth posture. A clear forecast of Trías Monge's present stance regarding Puerto Rico's colonial status was provided as far back as 1983, when he stated in his seminal work, *Historia Constitucional de Puerto Rico*: "Puerto Ricans can be counted as having one of the longest colonial histories among modern people. This is a sad distinction."²⁶ Nevertheless, the unequivocal posture that Trías Monge expresses toward the Commonwealth's colonial status in *Puerto Rico: The Trials of the Oldest Colony in the World* is nothing short of startling. Trías Monge, after all, was one of the principal architects of the Commonwealth as well as an active participant in its endeavors during much of the political entity's golden years.²⁷ His present stance thus negates a considerable part of his life's work, and this may explain why in the later part of the book he attempts to salvage "Commonwealth" status with proposals of doubtful constitutional validity. Most of the proposals Trías Monge offers, in any case, have already been rejected *sub silentio* by Congress,²⁸ which by its dedicated inaction is a major culprit in the sorry state of Puerto Rico-United States affairs. The bottom line is that Congress has thus far been reluctant to give up its plenary powers over Puerto Rico.²⁹

Commonwealth of Puerto Rico, 18 REV. COL. ABOG. P.R. 5 (1957), Pedro Muñoz Amato, *Congressional Conservatism and Puerto Rican Democracy in the Commonwealth Relationship*, 21 REV. JUR. U.P.R. 32 (1952); Rubén Rodríguez Antongiorgi, *Review of Federal Decisions on the Applicability of United States Laws in Puerto Rico Subsequent to the Establishment of the Commonwealth of Puerto Rico*, 26 REV. JUR. U.P.R. 321 (1957); Helen Silving, *In the Nature of a Compact*, 20 REV. COL. ABOG. P.R. 159 (1960)

25. Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. § 731(b) (1994)) (allowing Puerto Ricans to draft their own constitution, subject to congressional approval)

26. 4 TRIÁS MONGE, *HISTORIA CONSTITUCIONAL*, *supra* note 20, at 250 (author's translation) ("El pueblo puertorriqueño se cuenta entre los pueblos modernos de más larga historia colonial en el mundo. Triste distinción."); *see also* Trías Monge, *El Estado Libre Asociado ante los Tribunales*, 64 REV. JUR. U.P.R. 1, 47 (1995) ("Puerto Rico aún sigue siendo colonia de Estados Unidos . . .") ["Puerto Rico continues to be a colony of the United States . . ."] (author's translation)

27. Trías Monge was the chief legal adviser of Luis Muñoz Marín, the preeminent political figure of the Popular Democratic Party and Puerto Rican politics from 1940 until his death in 1980. Trías Monge, together with Abe Fortas, was instrumental in the drafting of Public Law 600. *See* TORRELLA, *supra* note 21, at 147; *see also infra* Section I.C. Trías Monge was a member of the constitutional convention that drew up Puerto Rico's present constitution, as authorized by Public Law 600, and was attorney general of Puerto Rico from 1953 to 1957. As previously noted, *see supra* note 19, he was chief justice of the Supreme Court of Puerto Rico from 1974 to 1985.

28. *See* Aspinall Bill, H.R. 5945, 88th Cong. (1963) (proposing a recognition of Puerto Rican sovereignty, as well as a compact entailing proportional representation for Puerto Rico on Puerto Rican issues); *Hearings Before House Subcomm. on Territorial Affairs on H.R. 5945*, 88th Cong. (1963) (evincing great congressional skepticism regarding the Aspinall Bill), Fernós-Murray Bill, H.R. 5926, 86th Cong. (1959) (proposing Puerto Rican assumption of most federal government functions on the island, as well as local veto power over commercial treaty membership). *see also* TRIÁS MONGE, *supra* note 18, at 126-30 (discussing these abortive moves toward greater Puerto Rican self-government)

29. Several Supreme Court cases have supported the proposition that Congress retains plenary power over Puerto Rico. *See, e.g., Harris v. Rosano*, 446 U.S. 651, 651 (1980) (*per curiam*), *Califano v. Torres*, 435 U.S. 1, 3 n.4 (1978) (*per curiam*).

This book breaks with Trías Monge's past practice in an additional significant way: It is written in English. Although this may appear to be a point of little significance, I believe it is a subtle but nevertheless important one related to Trías Monge's motivations. His writings up to now have been almost exclusively in Spanish,³⁰ presumably because his principal intended audience was in Puerto Rico. The message reflected in his present book, however, would be largely wasted if directed at such an insular audience, and thus Trías Monge switches to the language of those with the real power over Puerto Rico's destiny. Probably not coincidentally, the book's publication comes as Congress considers passage of the most far-reaching status-related legislation in recent history, the Young Bill.³¹

To better explain the significance of Trías Monge's book, and to highlight its strengths and weaknesses, I divide further commentary into three parts. Part I offers a brief history of the relationship between Congress, the courts, and Puerto Rico, paying special attention to the effects of Public Law 600, which created the current semi-autonomous Puerto Rican government structure. In Part II, I focus more specifically on Trías Monge's book, discussing some aspects of Puerto Rican history that he surprisingly omits, and scrutinizing his proposals. In a brief conclusion, I argue that Puerto Rico requires an answer to the "status question" that serves two goals: finality and equality.

I. HISTORICAL BACKGROUND

It is almost an aphorism that knowledge of the historical background of contemporary events is necessary to understand them. In the case of a book that deals with Puerto Rico's constitutional and political relationship to the United States, such as Trías Monge's, however, I would go further to state that such antecedents are essential for a balanced appreciation of such a work. In offering historical background, however, I do not intend to displace the more comprehensive treatment of the topic that Trías Monge himself provides. Instead, I limit myself to enumerating and commenting upon certain key events that have occurred since 1898 and that seem immediately relevant.

We thus find that on intermittent occasions throughout the last one hundred years, Puerto Rico's political status has been the subject of intense congressional debate and scrutiny. Indeed, as a result of Congress's pervasive control over all facets of insular affairs, Puerto Rico's political history can be segmented into a series of distinct epochs, each of which has commenced with the passage of leading legislation, followed by important judicial decisions

30. See sources cited *supra* note 20. The exception is one of 26 law review articles attributed to him. See José Trías Monge, *The Structure of the American Legal System: Its Sources, Forums and Theory of Law*, 51 REV. JUR. U.P.R. 11 (1982).

31. See *supra* note 16 and accompanying text.

interpreting them. With few exceptions, it has been the judiciary that has had an overwhelming impact on the fate of the territories.

A. *The Foraker Act and the Insular Cases*

The first period in this long trail began in 1900 with the enactment of the Foraker Act,³² which provided for the establishment of a civil government for Puerto Rico, including a limited elected legislature, and a governor and supreme court appointed by the President of the United States. The so-called *Insular Cases*³³ followed, in which the Supreme Court created a distinction between what it labeled “incorporated” and “unincorporated” territories. Incorporated territories were those that, at the time of acquisition, were assured eventual statehood (e.g., Louisiana and Alaska), and in which the Constitution applied *ex proprio vigore* (“by its own force”).³⁴ Such was not the case with unincorporated territories, for which no commitment of eventual statehood was made at the time of acquisition (e.g., the Philippines, Puerto Rico, and Guam). As to those territories, only those provisions of the Constitution deemed “fundamental” were considered to apply.³⁵ Thus, through the *Insular Cases*, the Supreme Court placed its imprimatur on a colonial relationship in which Congress could exercise virtually unchecked power over the unincorporated territories *ad infinitum*.³⁶ As Trías Monge points out, this colonial status was decided “by a one-vote margin [in the Court’s ruling] . . . reflecting the deep division at the time in the body politic itself.”³⁷

32. Ch. 191, 31 Stat. 77 (1900) (codified as amended at 11 U.S.C. §§ 1, 11 (1994)).

33. *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Doolley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901); *see also* *Rasmussen v. United States*, 197 U.S. 516 (1905) (holding that the treaty with Russia ceding Alaska, unlike the treaty with Spain ceding the Philippines, manifested an intent to grant inhabitants of the territory U.S. citizenship rights); *Dorr v. United States*, 195 U.S. 138 (1904) (holding that the treaty with Spain ceding the Philippines did not incorporate the Philippines into the United States); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (holding that the U.S. Constitution did not apply in full force to Hawaii in the period after the territory’s annexation by the United States and prior to its formal incorporation in 1900 as a part of the United States). *See generally* TORRUELLA, *supra* note 21. Upon the enactment of the Hawaiian Organic Act of 1900, ch. 339, 31 Stat. 141, U.S. citizenship was granted to residents of the Islands and thereafter incorporation was deemed to have taken place.

Both the *Harvard Law Review* and the *Yale Law Journal* had prominent roles in the academic formulation of the various legal theories proposed in these cases. *See* TORRUELLA, *supra*, at 24-32 (discussing the *Harvard Law Review*’s role); Selden Bacon, *Territory and the Constitution*, 10 *YALE L.J.* 99 (1901); William W. Howe, *The Law of Our New Possessions*, 9 *YALE L.J.* 379 (1900).

34. For a summary of the relevant jurisprudence, *see* *Dorr*, 195 U.S. at 142-43. For the definition of “*ex proprio vigore*,” *see* BLACK’S LAW DICTIONARY 582 (6th ed. 1990).

35. The Supreme Court has not defined precisely which parts of the Constitution establish such fundamental rights. *See* *Reid v. Covert*, 354 U.S. 1, 13 (1957).

36. *See* TRIAS MONGE, *supra* note 18, at 51.

37. *Id.* at 50. This division was reflected in the 1900 presidential election. *See* Walter LaFeber, *Election of 1900*, in 3 *HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS, 1789-1968*, at 1877 (Arthur M. Schlesinger ed., 1971); *cf.* Thomas A. Bailey, *Was the Presidential Election of 1900 a Mandate on Imperialism?*, 24 *MISS. VALLEY HIST. REV.* 43 (1938). A political pundit of the time commented: “[N]o matter whether the constitution follows the flag or not, the supreme court follows the election results.”

The dissents of Chief Justice Fuller and Justice Harlan in the leading *Insular Case*, *Downes v. Bidwell*,³⁸ are worth noting because they accurately forecast Puerto Rico's colonial future. The Chief Justice stated:

[T]he contention seems to be that if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period; and, more than that, that after it has been called from that limbo, commerce with it is absolutely subject to the will of Congress, irrespective of constitutional provisions.³⁹

To this Justice Harlan added:

Monarchical and despotic governments, unrestrained by written constitutions, may do with newly acquired territories what this Government may not do consistently with our fundamental law. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Surely such a result was never contemplated by the fathers of the Constitution. . . . The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord to them—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.⁴⁰

Such words, however, did not carry the day. Instead, Justice Brown's majority opinion opted in favor of congressional colonialism and against what it saw as the inevitable alternative, full citizenship for native Puerto Ricans.⁴¹ The possibility of these "inhabitants . . . , whether savages or civilized," becoming citizens of the United States, and being "entitled to all the rights, privileges and immunity of citizens," the Court declared, would have "extremely serious" consequences.⁴² "Indeed it is doubtful," Brown wrote, "if Congress would ever assent to the annexation of territory upon the condition that its inhabitants, however foreign they may be to our habits, traditions and modes of life, shall become at once citizens of the United States."⁴³

FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

38. 182 U.S. 244 (1901).

39. *Id.* at 372 (Fuller, C.J., dissenting).

40. *Id.* at 380 (Harlan, J., dissenting).

41. *See id.* at 278-79 (majority opinion); *see also* TORRUELLA, *supra* note 21, at 49-53 (offering a step-by-step analysis of Justice Brown's majority opinion).

42. *Bidwell*, 182 U.S. at 279.

43. *Id.* at 279-80.

B. *The Jones Act and Balzac v. Porto Rico*

Ironically, it was just this step that Congress next chose to take. In 1917, under the friendly administration of President Wilson,⁴⁴ Congress passed the Jones Act.⁴⁵ In addition to providing Puerto Ricans with a fully elected bicameral legislature, the Jones Act granted U.S. citizenship to the residents of Puerto Rico.⁴⁶ The high hopes that ensued for Puerto Rican equality and statehood, however, would not last long. *Balzac v. Porto Rico*⁴⁷ followed in 1922. In that decision, the Court, through Chief Justice Taft—a former President of the United States and the first colonial governor of the Philippines—ruled that the granting of citizenship to Puerto Ricans did not mean that Congress had expressed an intention of eventually incorporating Puerto Rico as a state. Instead, the Court ruled, the Act merely allowed the residents of Puerto Rico free entry into the United States, where they could exercise full rights as citizens. With this decision, the Supreme Court added to its approval of the colonial relationship between Puerto Rico and the United States embodied in the *Insular Cases*, the establishment of gradations in citizenship. Thus, under *Balzac* some citizens had, and have,⁴⁸ fewer rights than others, a situation reminiscent of that condoned by the Court's outcome in *Plessy v. Ferguson*.⁴⁹ As Trías Monge indicates, "American citizenship was granted under the worst possible light," and "[i]n the next decade people's sense of unhappiness would grow, divisions would deepen, and the difference over the status problem would seem even more intractable."⁵⁰

C. *Public Law 600*

In part because of the disruption wrought by World War II, a relatively long period passed without Congress's attention being again focused on Puerto Rico's political relationship with the federal government. This benign neglect

44. See TORRUELLA, *supra* note 21, at 89 (quoting President Wilson's proposal to Congress to give Puerto Ricans "the ample and familiar rights and privileges accorded our own citizens in our territories")

45. Ch. 145, 39 Stat. 951 (1917) (codified as amended at 48 U.S.C. § 737 (1994))

46. See *id.* For an in-depth account of this event, particularly of the acrimonious debates that preceded the bill's passage, see Cabranes, *Citizenship*, *supra* note 11, at 471-85.

47. 258 U.S. 298 (1922) (holding that trial by jury under the Sixth Amendment is not a fundamental right applicable to Puerto Rico). *Cf.* *Duncan v. Louisiana*, 391 U.S. 145 (1968) (finding trial by jury to be a fundamental right).

48. The Supreme Court cited *Balzac* as recently as 1991, in *Powers v. Ohio*, 499 U.S. 400, 406 (1991), which held that race-based peremptory challenges in jury selection are unconstitutional. See also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (holding that not every constitutional limitation applies to governmental activity, even when the United States has sovereign powers). *Posadas de P.R. Ass'n v. Tourism Co.*, 478 U.S. 328, 331 n.1 (1986) (finding First Amendment freedom-of-speech protection applicable in Puerto Rico).

49. 163 U.S. 537 (1896); *cf.* TORRUELLA, *supra* note 21, at 3 (noting that "[t]hese decisions stand at a par with *Plessy v. Ferguson* in permitting disparate treatment by the government of a discrete group of citizens").

50. TRÍAS MONGE, *supra* note 18, at 76.

was interrupted by the passage in 1947 of the Elective Governor Act,⁵¹ which provided that henceforth the governor of Puerto Rico would be chosen by popular vote but left control over appointments to the supreme court and to the position of Auditor of Puerto Rico in the hands of the U.S. President. Soon afterwards, the most expansive legislation to date, Public Law 600,⁵² was passed.

Public Law 600 allowed Puerto Ricans to write their own constitution, subject to congressional approval, and created a so-called "Commonwealth of Puerto Rico." The import of this statute has remained the subject of the most intense debate⁵³ in Puerto Rico's political history and of numerous court decisions at all levels of the federal judicial structure. No definitive interpretation of Public Law 600 has yet emerged.⁵⁴ The issues raised by the enactment of Public Law 600—whether Congress and the people of Puerto Rico entered into a bilateral pact through passage of the law, whether Congress created a new status by this legislation, and whether Congress can still exercise plenary power over Puerto Rico under the Territorial Clause of the Constitution—are questions whose answers are central to Trías Monge's contention that Puerto Rico's status remains colonial.

II. ADDRESSING TRÍAS MONGE'S ARGUMENT

Trías Monge's book is unquestionably a valuable contribution to understanding the entire Puerto Rican political quandary. It presents, however, a somewhat sanitized view of events. Indeed, Trías Monge provides examples of historical revision by omission. In particular, Trías Monge fails to clarify what Congress intended in passing Public Law 600. He also remains silent on the events surrounding the decision in *Mora v. Torres*⁵⁵ and the subsequent representations that U.S. officials made to the United Nations on the basis of that case. Both matters have great significance, but Trías Monge seems to gloss over them.

51. Pub. L. No. 80-362, 61 Stat. 770 (1947) (codified at 16 U.S.C. § 666(g) (1994)).

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

53. See Javier Maymi, *Puerto Rico's Leaders Testify in Washington on Island's Status*, AP, Oct. 16, 1995, available in 1995 WL 4410387; Tatiana Pina, *51st State?*, PROVIDENCE J.-BULL., Oct. 21, 1997, at A1.

54. The Supreme Court has been able to avoid ruling on the intricacies of Commonwealth status in the handful of cases that have come before it by resolving the cases on other grounds. See *Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982); *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam); *Examining Bd. of Eng'rs v. Flores*, 426 U.S. 572 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Lower federal courts have followed the Supreme Court's lead. See *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994); *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993); *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987); *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981); *Figueroa v. Puerto Rico*, 232 F.2d 615 (1st Cir. 1956); *Mora v. Torres*, 113 F. Supp. 309 (D.P.R. 1953), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

55. 113 F. Supp. 309 (D.P.R. 1953), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

A. *Public Law 600 and Congressional Intent*

Congressional intent in passing Public Law 600 is crucial to determining the present *constitutional* status of Puerto Rico as well as the power of Congress, both present and future, over Puerto Rico's political status. Overwhelming evidence indicates that before, during, and after the approval of Public Law 600, Congress did not intend to change the fundamental status of Puerto Rico from that of an unincorporated territory or to relinquish its plenary authority.⁵⁶ During the hearings before the enactment of Public Law 600, Governor Luis Muñoz Marín and Resident Commissioner Antonio Fernós Isern unequivocally conceded that Congress's unilateral power over Puerto Rico would remain unchanged even after passing this legislation.⁵⁷ Both the Secretary of the Interior and the Chief Justice of Puerto Rico, Cecil Snyder, testified that the "legal relationship between Puerto Rico and the United States remains intact."⁵⁸ Senate Report No. 1779, which accompanied the Senate bill (S. 3336), indicated: "The measure would not change Puerto Rico's fundamental political, social and economic relationship to the United States."⁵⁹ House Report No. 2275, which accompanied the House version (H.R. 7644), repeated in detail the Senate report's position that the measure did not change Puerto Rico's fundamental relationship to the United States.⁶⁰ Moreover, the constitution to be created by the Puerto Rican people required Congressional approval and subsequently was unilaterally amended by Congress,⁶¹ a situation that Trías Monge politely describes as "having a dampening effect on efforts to break new ground."⁶² Based on this evidence, it is difficult to conclude that Public Law 600 created a bilateral pact or changed the status of Puerto Rico as an unincorporated territory under Congress's plenary power.⁶³

A noted constitutional scholar has described the "Commonwealth" notion and the "compact" theory as follows:

56. See TORRUELLA, *supra* note 21, at 143-60; Helfeld, *supra* note 21, at 260-73

57. See *Hearings Before the House Comm. on Public Lands on H.R. 7674 and S. 3336*, 81st Cong. 33, 63 (1950) [hereinafter *Public Lands Hearings*].

58. *Id.* at 54, 63.

59. S. REP. NO. 81-1783, at 3 (1950). The Senate approved the bill without debate. See 96 CONG. REC. 8321 (1950).

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

61. See TORRUELLA, *supra* note 21, at 154-58. Upon submission to Congress of the constitution drafted by the Puerto Rican constitutional convention, several Congressmen objected to sections 5 and 20 of its bill of rights, which provided for free public education and a series of human rights. See 98 CONG. REC. 5119-28, 5126-27, 6184-86 (1952). Congress eventually amended section 5 and eliminated section 20 altogether. See *id.* at 8715. Thereafter the bill became Public Law 447. See Act of July 3, 1952, Pub. L. No. 82-447, 66 Stat. 327 (1952).

62. TRIÁS MONGE, *supra* note 18, at 116.

63. See generally GENERAL ACCOUNTING OFFICE, NO. GAO/OGC-98-5, REPORT TO THE CHAIRMAN, COMM. ON RESOURCES, H.R., U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (1997) (detailing the applicability of provisions of the Constitution to Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, American Samoa, and Guam).

Though the formal title has been changed, in constitutional theory Puerto Rico remains a territory. This means that Congress continues to possess plenary but unexercised authority over Puerto Rico. Constitutionally, Congress may repeal Public Law 600, annul the Constitution of Puerto Rico and veto any insular legislation which it deems unwise or improper. From the perspective of constitutional law the compact between Puerto Rico and Congress may be unilaterally altered by the Congress. The compact is not a contract in a commercial sense. It expresses a method Congress chose to use in place of direct legislation. . . . Constitutionally, the most meaningful view of the Puerto Rican Constitution is that it is a statute of Congress which involves a partial and non-permanent abdication of Congress' territorial power.⁶⁴

So far all that existed was little known legislative history, and much political rhetoric. The supporters of Commonwealth status needed legitimization of their allegedly new political framework. We thus come upon the *Mora* decision—the legal anchor to which many of the subsequent key events regarding the “compact” theory are affixed.

B. *The Bootstrapping of Mora*

As Trías Monge points out, the existence of a bilateral compact between Puerto Rico and the United States as a result of the enactment of Public Law 600 was rejected not only by several of the major congressional participants in this process, but initially, also by the Interior and State Departments.⁶⁵ The U.S. government changed its position in 1953, when the United States's delegation to the United Nations unambiguously represented to the United Nations that it was no longer required to file annual reports on Puerto Rico pursuant to Article 73(e) of the U.N. Charter because Puerto Rico was now a self-governing entity.⁶⁶ The change in Puerto Rico's status, the delegates explained, was the result “of a compact of a bilateral nature whose terms [could] be changed only by common consent.”⁶⁷ Trías Monge's book leaves an obvious gap by failing to provide the reader with any explanation of how

64. Helfeld, *supra* note 21, at 307. Compare *United States v. Lopez Andino*, 831 F.2d 1164 (1st Cir. 1987) (finding Puerto Rico sovereign for the purposes of the dual sovereignty double jeopardy doctrine), with *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993) (disagreeing with *Lopez Andino* and concluding that Puerto Rico is constitutionally not a separate sovereign).

65. See TRÍAS MONGE, *supra* note 18, at 121-22; see also BHANA, *supra* note 15, at 171-72; TORRUELLA, *supra* note 21, at 160-61.

66. Article 73 of the charter of the United Nations requires any “[m]embers of the United Nations which have or assume responsibilities” for the administration of territories which have not attained a “full measure of self-government” to file reports to the United Nations regarding said territories. U.N. CHARTER art. 73. The United States commenced filing reports on Puerto Rico in June 1947, and was required to do so through November 1953. See TRÍAS MONGE, *supra* note 18, at 136.

67. COMMITTEE ON FOREIGN AFFAIRS, 83D CONG., REPORT BY HON. FRANCES P. BOLTON AND HON. JAMES P. RICHARDS ON THE EIGHTH SESSION OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS 241 (Comm. Print 1954) [hereinafter REPORT ON GENERAL ASSEMBLY].

or why the government of the United States had such a radical change of heart on this crucial subject. This is an especially puzzling lapse considering Trías Monge's dedicated participation in bringing about this change.

As I have previously mentioned, both Trías Monge and Abe Fortas had been key players in the creation of Puerto Rico's Commonwealth status through the passage of Public Law 600.⁶⁸ They were, in fact, instrumental in preparing the preamble to Public Law 600, which includes the "in the nature of compact" language that has been the source of so much contention.⁶⁹ Both were also directly involved in the *Mora* trial and subsequent appeal, which provided the immediate setting to the State Department's startling change of heart.⁷⁰

The *Mora* case concerned a shipment of rice from California to Puerto Rico. When the shipment arrived at the island, the Puerto Rico government subjected it to a price control order. The importer sought to enjoin enforcement of the order, claiming that it violated the Fifth and Fourteenth Amendments as well as the Interstate Commerce Clause. The case was tried before Benjamín Ortiz, an associate justice of the Supreme Court of Puerto Rico, who had been appointed acting district court judge for the United States District Court of Puerto Rico while the regular district court judge was on leave, a procedure that was permissible at the time pursuant to a special provision applicable to what was then an Article I territorial court.⁷¹

Justice Ortiz served on the House of Representatives of the Puerto Rico Legislature from 1945 to 1952 on behalf of the Popular Democratic Party. In 1951, he served with Trías Monge as a member of the constitutional convention created pursuant to Public Law 600. He was appointed to the Supreme Court of Puerto Rico by Governor Muñoz Marín in 1952 and resigned from the court in 1954, returning in 1961 to the Legislature, where he was vice speaker from 1963 to 1964, again for the Popular Democratic Party.⁷²

Eight of the thirteen pages of the *Mora* opinion deal with the "compact" allegedly created by Public Law 600,⁷³ a question whose resolution was not necessary to a decision of the issues before that court. Furthermore, although

68. See *supra* note 27. Abe Fortas was a graduate of Yale Law School, where Trías Monge received his S.J.D. Fortas first came into contact with Puerto Rico as Under-Secretary of the Interior from 1942 through 1946. Following World War II, he helped found the law firm of Arnold, Fortas & Porter (now Arnold & Porter), which became the Commonwealth of Puerto Rico's principal law firm on the mainland for many years. In 1965, he was appointed Associate Justice of the U.S. Supreme Court, where he sat until his resignation in 1969. See generally LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990).

69. For the background to this, see TORRUELLA, *supra* note 21, at 147-48.

70. See *id.* at 161-67.

71. See 48 U.S.C. § 863 (1964) (repealed 1970). The District Court for Puerto Rico became an Article III court pursuant to the Act of July 26, 1956, Pub. L. No. 808, 70 Stat. 658 (codified at 28 U.S.C. § 1332 (1994)).

72. See Benjamín Ortiz, in 14 GRAN ENCICLOPEDIA DE PUERTO RICO 254 (Vicente Báez ed., 1976).

73. See *Mora v. Torres*, 113 F. Supp. 309, 312-19 (D.P.R. 1953), *aff'd sub nom. Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

Justice Ortiz found that there were “surprising[ly] . . . few references to the subject” by “Congress relative to the existence of a compact,”⁷⁴ this irrefutable conclusion did not stop him from holding that Congress had “grant[ed its plenary powers] away through a compact with the people of Puerto Rico.”⁷⁵ Within two weeks of the opinion’s publication on June 19, 1953,⁷⁶ Trías Monge, together with Resident Commissioner Antonio Fernós Isern, met with Benjamin Gehrig of the Department of Interior. On the basis of *Mora*, they were able to convince Gehrig that the “compact” argument should be used by the United States delegation in support of its position before the United Nations that there was no longer a need to file reports on Puerto Rico.⁷⁷

On July 24, 1953, just over a month after the district court’s opinion was rendered, Chief Judge Magruder issued the opinion of the court of appeals affirming the denial of a temporary injunction by the district court.⁷⁸ His opinion, however, was equivocal on the status issue, referring to “the compact”⁷⁹ while cautioning that its true nature “deserv[ed] careful study and consideration.”⁸⁰

On August 27, 1953, the United States Delegate to the United Nations, Mason Sears, indicated the following to the General Assembly’s Committee on Information from Non-Self Governing Territories regarding the position of the United States on Puerto Rico:

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact, as you know, is far stronger than a treaty. A treaty can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.⁸¹

Resident Commissioner Fernós Isern, who together with Trías Monge and other prominent Puerto Rico government officials was part of the United States delegation, claimed that the jurisdiction of the Federal Government in Puerto Rico is based on a bilateral compact to which Puerto Rico is a party.⁸² On September 4, 1953, the United Nations committee voted in favor of recommending that the Commonwealth of Puerto Rico be considered outside

74. *Id.* at 317.

75. *Id.* at 319.

76. *See id.* at 309.

77. *See* BHANA, *supra* note 15, at 173-74; TORRUELLA, *supra* note 21, at 161.

78. *See Mora*, 206 F.2d at 388. Chief Judge Magruder later wrote on the subject of Puerto Rico outside his capacity as a chief judge of the First Circuit. *See Magruder, supra* note 24.

79. *Mora*, 206 F.2d at 382.

80. *Id.* at 387.

81. UNITED STATES MISSION TO THE UNITED NATIONS, PRESS RELEASE 1741 (1953).

82. *See* 4 TRÍAS MONGE, HISTORIA CONSTITUCIONAL, *supra* note 20, at 25-27.

the scope of Article 73(e) inasmuch as its association with the United States "constitute[d] a mutually agreed association."⁸³

When the action moved to the Fourth Committee as a preamble to a full debate before the General Assembly, the United States spokesperson, Congresswoman Frances P. Bolton from Ohio, a member of the House Committee on Foreign Affairs, addressed a skeptical audience. On November 3, 1953, she specifically referred to *Mora* when she stated: "[T]here existed between the people of Puerto Rico and the United States a bilateral compact of association which had been accepted by both and which, in accordance with *judicial decisions*, could not be amended without common consent."⁸⁴ Notwithstanding this and other similar statements, the Committee's recommended resolution, which included language making reference to "the compact agreed upon [by the people of the Commonwealth of Puerto Rico] with the United States of America," received approval by a favorable vote of only 22-18, with 19 abstentions (including that of the United States).⁸⁵

When the matter came before the General Assembly on November 27, 1953, Ambassador Henry Cabot Lodge, Jr., made the so-called "Eisenhower Declaration," to which Trías Monge refers in his book,⁸⁶ the result of which was the approval of the Fourth Committee's recommended resolution by a 26-16 vote, with 18 abstentions (this time with the United States voting in favor of the resolution).⁸⁷ The United States thus ceased filing reports for Puerto Rico and to the present date has not resumed filing them.

Considering Trías Monge's participation in the "creation" of the "commonwealth" status and its aftermath, including the *Mora* episode and the resulting representations before the United Nations, his open confession that all of these endeavors did not change Puerto Rico's colonial condition constitutes a reason for puzzlement and admiration. At a minimum, Trías Monge's revelation is an act of intellectual bravery.⁸⁸ The bravery of Trías Monge's history aside, the solutions the book offers to the cutting of Puerto Rico's Gordian knot are disquieting. With an eye to influencing the committees set to hear the Young Bill, Trías Monge shifts gears in the later chapters to argue in favor of what, in Puerto Rican political parlance, is commonly referred to as "enhanced" or "culminated" commonwealth status.⁸⁹ Under

83. *Summary Record of 350th Meeting*, U.N. GAOR 4th Comm., 8th Sess., 350th mtg. at 225. U.N. Doc. A/C.4/SR. 350 (1953).

84. *Id.* at 219-64 (emphasis added); see also REPORT ON GENERAL ASSEMBLY, *supra* note 67

85. *Summary Record of 355th Meeting*, U.N. GAOR 4th Comm., 8th Sess., 355th mtg. at 251, 256. U.N. Doc. A/C.4/SR. 355 (1953).

86. See TRIÁS MONGE, *supra* note 18, at 123-24

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

88. See J. M. Garcia Passalacqua, *Triás Monge and RHC's Tiff Is Critical*, SAN JUAN STAR, Dec 7, 1997, at 134 (describing criticism of Trías Monge from his own party over his changed views on commonwealth status).

89. See TRIÁS MONGE, *supra* note 18, at 160-96

enhanced commonwealth status, a bilaterally binding compact would be negotiated between the United States and Puerto Rico,⁹⁰ the terms of which would probably include continued United States citizenship for residents of Puerto Rico, a common defense and currency, and inclusion of the island within the United States's customs union. Additionally, Puerto Rico would have the right to veto the application to Puerto Rico of laws passed by Congress, would have separate representation in various international entities, the right to negotiate commercial treaties separate from the United States, and would have control over immigration into Puerto Rico.⁹¹

This is all, to a large extent, historical *déjà vu*. "Culminated commonwealth" seems surprisingly similar to the status that Puerto Rico had under the Spanish Autonomic Charter, created by a decree of the Spanish prime minister on November 25, 1897, eight months to the day before American troops landed in Guánica.⁹² More important than the feeling of *déjà vu*, however, is the open question of whether a binding, bilateral pact between Puerto Rico and the United States is constitutionally possible. If Congress approves such a procedure, the U.S. Supreme Court will have to resolve the issue.⁹³ Thus, although Trías Monge's discussion of the British, French, and Dutch Caribbean experiences⁹⁴ is of academic interest, they have limited practical application to Puerto Rico given the significant differences between the constitutional framework of those countries and that of the United States. Similarly, Trías Monge's comparison to the various Micronesian alternatives⁹⁵ also appears to be of superficial value, given that the United States has never claimed sovereignty over these islands⁹⁶ and that they were not legally considered to be either territories or possessions of the United States under the Constitution.⁹⁷ The Northern Mariana Covenant,⁹⁸ which appears to grant the Northern Mariana Islands a "culminated" type of commonwealth status, also may raise issues of constitutional and international law, particularly given the

90. *See id.* at 190.

91. *See* Res. 21, Legis. Assembly (P.R. 1954); 12 DIARIO DE SESIONES DE LA ASAMBLEA LEGISLATIVA, 1959, pt. I, at 425 (1959); *see also* Fernós-Murray Act, H.R. 5926, 86th Cong. (1959); Fernós-Murray Act, S. 2023, 86th Cong. (1959).

92. *See* TRÍAS MONGE, *supra* note 18, at 12-14; *see also* OFFICE OF PUERTO RICO, WASHINGTON, D.C., DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 22-46 (1948).

93. Whether Congress will grant the laundry list of powers Puerto Rico seeks under "Enhanced" or "Culminated" Commonwealth status is an even thornier political issue. *Cf.* H.R. 100, 105th Cong. (1997) (proposing a "culminated"-type commonwealth status for Guam).

94. *See* TRÍAS MONGE, *supra* note 18, at 142-48.

95. *See id.* at 154-59.

96. *See* Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT'L. L. 262, 271 (1948).

97. *See* Northern Mariana Islands v. Atalig, 723 F.2d 682, 684-85 (9th Cir. 1984); Saipan v. Department of Interior, 502 F.2d 90, 95 (9th Cir. 1974).

98. Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1681 (1994)); *see also* TRÍAS MONGE, *supra* note 18, at 149-53.

decolonization standards of the United Nations.⁹⁹ The United States's presence in these islands is a legacy of United Nations trusteeship,¹⁰⁰ a trusteeship authority that the Security Council terminated in 1990. Similar defects may plague the so-called compacts of free association negotiated with the other trust territories: the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau.¹⁰¹ Again, these are issues that the Supreme Court will ultimately have to address.

The full scope of U.S. relations with these territories, while in keeping with the main thrust of Trías Monge's book, is beyond the scope of this Review. Nevertheless, some brief observations are appropriate. Trías Monge makes a poignant and forceful argument for true self-determination,¹⁰² with a detailed analysis of how Puerto Rico's state of affairs has come about.¹⁰³ He is also not shy—and in my opinion, is correct—in placing the blame for this condition on both Puerto Rico *and* the United States.¹⁰⁴ Trías Monge calls for civility and balance in considering the status issue, which is the most divisive of issues in Puerto Rican life. This invitation is both timely and optimistic, and is one that is certainly much needed. Trías Monge's ecumenical vision would require that the major players in all the political parties involved put aside many deep-seated views and prejudices. Realistically, however, it is hard to imagine that this will happen in the near future, particularly without congressional prodding for a definitive resolution of Puerto Rico's status.

III. CONCLUSION

Puerto Rico has been left to be held and governed indefinitely by an unrepresentative group of political actors in Washington, D.C. Although the United States is a relatively benign colonial power, it is nevertheless at the controlling end of a political equation in which 3.7 million citizens of the United States have no substantial say regarding the truly fundamental issues that control their daily lives. Although there has been local self-government since 1952, such limited, parochial self-government activities merely serve to distract the populace from more fundamental goals. For example, that Puerto Rico has a "representative" in Congress without a vote¹⁰⁵ is not only a

99. See Peter Bergeman, *The Marianas, the United States and the United Nations: The Uncertain Status of the New-American Commonwealth*, 6 CAL. W. INT'L L.J. 382, 409-10 (1976); Harry G. Prince, *The United States, the United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 MICH. J. INT'L L. 11 (1989).

100. See DONALD F. MCHENRY, *MICRONESIA: TRUST BETRAYED* (1975).

101. See Roger S. Clark, *Self-Determination and Free Association: Should the United States Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980); J. Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915 (1990).

102. See TRIÁS MONGE, *supra* note 18, at 164.

103. See *id.* at 5-136.

104. See *id.* at 166-67.

105. Since 1971, the resident commissioner from Puerto Rico has had limited power to vote, though

pathetic parody of democracy within the halls of that most democratic of institutions, but also a poignant reminder that Puerto Rico is even more of a colony now than it was under Spain. At various times during Spain's reign, the island had full voting rights and representation in the Spanish parliament.¹⁰⁶

The expectations first created by General Nelson A. Miles when he led America's invading forces in 1898 and proclaimed that he was bringing to Puerto Rico "the cause of liberty, justice and humanity,"¹⁰⁷ have been followed by disappointments, not to say deceptions,¹⁰⁸ perpetrated on a whole people; these have not only had a lasting effect within the legal and constitutional parameters of the Puerto Rico-United States relationship, but also have had a substantial deleterious impact on the psyche and social fiber of Puerto Rico's population.¹⁰⁹

This is not a merely rhetorical statement. There is a respected body of both scientific and nonscientific literature to the effect that perception of political and cultural inferiority can be related to mental illness.¹¹⁰ A study conducted by a commission appointed by the Governor of Puerto Rico in 1976, headed by psychiatrist Dr. Michael Woodbury, concluded that mental illness was the top health problem in Puerto Rico, causing about one-third of all chronic conditions.¹¹¹ Additionally, epidemiological studies on the mental health of Puerto Ricans confirm a high incidence of mental illness among the members

only in committees. For a history of the strange evolution of the role of the resident commissioner, see GENERAL ACCOUNTING OFFICE, *supra* note 63, at 10.

106. See C.E. 1812 (Spain); C.E. 1876 (Spain); Autonomic Charter of 1897 (Spain). In fact, Ramón Power y Giralt, a Puerto Rican residing in Spain, was the Vice-President of the Spanish Parliament in 1813. See TRÍAS MONGE, *supra* note 18, at 14.

107. *Gen. Order No. 101*, in U.S. HOUSE OF REPRESENTATIVES, 60TH CONG., LAWS, ORDINANCES, DECREES AND MILITARY ORDERS 2177, 2177 (1909).

108. See A.W. Maldonado, *P.R. Trusted Good Faith of Congress*, SAN JUAN STAR, Dec. 7, 1997, at 132. *But cf.* Luis Muñoz Marín, *Puerto Rico and the United States: Their Future Together*, 32 FOREIGN AFF. 541, 551 (1954) ("[T]he creative relationship that has been worked out between the American Union and the Commonwealth of Puerto Rico is an eloquent manifestation of a goodness and a greatness in the spirit of the United States.")

109. See TORRUPELLA, *supra* note 21, at 200-62 (offering social scientific evidence of socioeconomic and cultural consequences of the political status of Puerto Rico).

110. See FRANZ FANON, *THE WRETCHED OF THE EARTH* (1965); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (5th ed. 1972); Héctor R. Bird, *The Cultural Dichotomy of Colonial People*, 10 J. AM. ACAD. PSYCHOL. 195 (1980); Gordon K. Lewis, *Puerto Rico: A Case Study of Change in an Underdeveloped Area*, 17 J. POL. 614, 616 (1955); see also *Hearings Before the United States—Puerto Rico Comm'n on the Status of Puerto Rico*, 89th Cong. 397-426 (1965) (statements of Dr. Hernán Padilla and Rafael Correa Corona); Sydney W. Mintz, *Puerto Rico: An Essay in the Definition of a National Culture*, in UNITED STATES—PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES 339-435 (1966); Michael A. Woodbury, *Mental Health and the Quality of Life in Puerto Rico*, 6 PLEURUS 1, 10, 24-25 (1977); *cf.* Blanca Fernández-Pol, *Culture and Psychopathology: A Study of Puerto Ricans*, 137 AM. J. PSYCH. 724 (1980); E. Maldonado Sierra et al., *Neurosis and the Traditional Family Beliefs in Puerto Rico*, 6 INT'L J. SOC. PSYCHOL. 237 (1960).

111. See MICHAEL A. WOODBURY, *MENTAL HEALTH IS THE NUMBER ONE HEALTH PROBLEM IN PUERTO RICO* 3, 8 tbl.IV (Informe Comisión de Salud Mental Monografía VII-A, 1976); see also Woodbury, *supra* note 110, at 13, 16 (stating that in 1973, 6.75% of the Puerto Rican population suffered from mental disorders).

of this ethnic group in comparison to all United States residents.¹¹²

Dr. Héctor R. Bird,¹¹³ in a paper presented to the American Academy of Psychoanalysis in December 1980, declared that the "state of Puerto Rican society is one of identity diffusion and identity confusion . . . directly or indirectly related to the colonial status and to the absence of . . . 'mutually supportive psychosocial equilibrium' to which identity conflicts evidently contribute."¹¹⁴ It is his hypothesis, one which I share as a matter of logic, "that the effects of colonialism in the societal system can be some of the determinants that filter down and influence the psychic configuration of the individuals in that society."¹¹⁵ It seems to me beyond argument that, at very least, the colonial condition suffered by the people of Puerto Rico, and eloquently denounced by Trías Monge, is harmful to the self-esteem of this community. Ultimately, however, Puerto Rico's second-class status within the American polity is not only harmful to the 3.7 million citizens of the United States that reside there. It is denigrating to the nation as a whole.

While we are unlikely to see a solution to the "status problem" that pleases all Puerto Ricans (or, for that matter all members of Congress), we must approach a solution with some degree of finality. In addition to suffering from feelings of inequality, Puerto Rico is hindered by the constant perception that its political status might change in some undefined manner and without its residents' participation. As Trías Monge vehemently argues, the United States must make up its mind as to what it is willing to do regarding Puerto Rico's future, for on the Puerto Rican side there is almost unanimous agreement on one fact: The present status is unacceptable.¹¹⁶ The United States must clearly indicate what it is willing to do in the alternative and then let the people of Puerto Rico decide whether the solution is palatable.

112. See ASSISTANT SECRETARY FOR MENTAL HEALTH, DEPARTMENT OF HEALTH OF THE COMMONWEALTH OF P.R., STATE PLAN FOR COMPREHENSIVE MENTAL HEALTH SERVICES (1981-1982): FIFTH ANNUAL REVIEW AND PROGRESS REPORT, 11-9-13; Robert A. Havlena, *Analysis of Organizational and Interpersonal Processes Conducive to Public Mental Hospital Effectiveness in Puerto Rico* 13 (March 1983) (unpublished manuscript, on file with author). Mental disorder represents a greater proportion of claim allowances in Puerto Rico, at 31.4%, than in any state. It is followed by Hawaii, at 15.9%, and Mississippi, at 11.7%. See OFFICE OF RESEARCH AND STATISTICS, U.S. DEP'T OF HEALTH, CHARACTERISTICS OF SOCIAL SECURITY DISABILITY INSURANCE BENEFICIARIES 40-42 (tbl 15) (1982), see also Jaime F. Pou, *Special Communication: Diagnostic Patterns in Disability in Puerto Rico and the United States*, 68 BOLETÍN DE LA ASOCIACIÓN MÉDICA DE PUERTO RICO 224 (1976) (indicating that Puerto Ricans have a rate of mental, psychoneurotic, and personality disorders more than three times as high as the general United States population). Other data seems to corroborate these assertions: 42.6% of Veteran Administration disabilities patients in Puerto Rico receive full compensation for mental disorders, as compared to 29% for the mainland. See VETERAN'S ADMIN., REPORT AND STATISTICAL SERV., 1 SELECTED COMPENSATION AND PENSION DATA BY STATE OF RESIDENCE 481-83 (1996).

113. Dr. Bird is Associate Professor of Psychiatry at the University of Puerto Rico School of Medicine and Associate Clinical Professor of Psychiatry at Columbia University.

114. Bird, *supra* note 110, at 204-05.

115. *Id.*

116. See ROBERTA ANN JOHNSON, PUERTO RICO: COMMONWEALTH OR COLONY? 160 (1980) ("[A]s divisive as the status issue is, there is one thing that unites all three status positions . . . the strong desire to rid the island of its colonial vestiges.").

As Trías Monge points out, there are various paths Congress may opt to follow. At this stage, we do not know the full extent to which these paths may fit the constitutional scheme of the United States, or whether they are politically acceptable to Congress. Nevertheless, one thing is clear: After one hundred years of sometimes-beneficial American colonialism, it is best for all concerned to break the present logjam at the earliest possible moment. Too much time and energy continue to be wasted on the perpetual recurrence of status uncertainty; once this central question is resolved, we can turn our attention to the business that truly calls, the business of self-government.

One need not agree with Trías Monge on all points to recognize the genuine contribution that his book makes. Most importantly, it may serve the noble purpose of bringing to the attention of the American people the plight of their fellow citizens in Puerto Rico.