

# PUERTO RICO: A CASE OF AMERICAN IMPERIAL DOUBTS?

## ARTICLE

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[T]he political system of the United States today, history tells us, is one of the most unstable combinations there is – that is, domestic democracy and foreign empire . . . . A nation can be one or the other, a democracy or an imperialist, but it can’t be both. If it sticks to imperialism, it will, like the old Roma Republic, on which so much of our system was modeled . . . lose its democracy to a domestic dictatorship.

- Chalmers Johnson<sup>1</sup>

## INTRODUCTION

United States intellectuals and think tanks, to the limited extent they pay attention to the issue, remain divided over Puerto Rico’s political prospects. Such contradictions among the United States’ policymaking intelligentsia partly explain the current stalemate in Washington, D.C. regarding the Island’s political

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<sup>1</sup> Interview by Amy Goodman with Chalmers Johnson (Feb. 27, 2007), [http://www.democracynow.org/2007/2/27/chalmers\\_johnson\\_nemesis\\_the\\_last\\_days](http://www.democracynow.org/2007/2/27/chalmers_johnson_nemesis_the_last_days) (last visited Mar. 23, 2016); see CHALMERS JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC (2006).

future. Despite promoting, at times, deliberation about this issue,<sup>2</sup> the internal assessments in the United States with regards to future status options differ substantially from Puerto Rico's own issues and concerns.<sup>3</sup>

It is no secret that academic debates have had an impact, at times decisive, on subsequent action by the federal government. The current legal and political status of Puerto Rico as an unincorporated territory emerged, precisely, from a public discussion in key major law reviews.<sup>4</sup> Then, however, the issue of imperialist policy toward the territories of the United States dominated public discourse, implied profound electoral consequences, and promoted different political routes for those territories.<sup>5</sup>

Today, internal divisions help explain inconsistencies in federal policy and the lack of a proactive strategy regarding Puerto Rico's continued colonial condition. Some experienced specialists have perceived Puerto Rico as being on a rapid<sup>6</sup> or long and knotty path towards statehood<sup>7</sup> while others discard the availability of

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<sup>2</sup> See SHERRIE L. BAVER, *THE POLITICAL ECONOMY OF COLONIALISM: THE STATE AND INDUSTRIALIZATION IN PUERTO RICO* (1993); see also Sam Erman, *Citizens of Empire: Puerto Rico, Status, and Constitutional Change*, 102 CAL. L. REV. 1181 (2014).

<sup>3</sup> Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123 (2009). The list of efforts attempting to address the claims of decolonization of Puerto Rico is long and complex, see e.g. JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997); RONALD FERNÁNDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* (2nd ed. 1996); JOSÉ JAVIER COLÓN MORERA ET AL., *EL CONGRESO DE LOS ESTADOS UNIDOS Y EL STATUS POLÍTICO DE PUERTO RICO: INFORME DE UNA INVESTIGACIÓN EMPÍRICA* (1995). Status claims come primarily from the New Progressive Party, which advocates statehood. For the historical background of this movement, see Pedro Cabán, *Redefining Puerto Rico's Political Status*, in *COLONIAL DILEMMA: CRITICAL PERSPECTIVES ON CONTEMPORARY PUERTO RICO* 19 (Edwin Meléndez & Edgardo Meléndez eds., 1993).

<sup>4</sup> See Martha Minow, *Preface: The Enduring Burdens of the Universal and the Different in the Insular Cases*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE*, at vii (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); Efrén Rivera Ramos, *The Insular Cases: What is there to Reconsider*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 29 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); BARTHOLOMEW H. SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (Peter Charles Hoffer & N. E. H. Hull eds., 2006); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO* (2001).

<sup>5</sup> See Christina Duffy Ponsa, *When Statehood was Autonomy*, in *RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE* 1 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); LANNY THOMPSON, *IMPERIAL ARCHIPELAGO: REPRESENTATION AND RULE IN THE INSULAR TERRITORIES UNDER U.S. DOMINION AFTER 1898* (2010).

<sup>6</sup> See Christina Duffy Burnett, *Two Puerto Rican Senators Stay Home*, 116 YALE L.J. POCKET PART 408 (2007), <http://www.yalelawjournal.org/forum/two-puerto-rican-senators-stay-home> (last visited Mar. 23, 2016); DICK THORNBURGH, *PUERTO RICO'S FUTURE: A TIME TO DECIDE* (2007).

<sup>7</sup> Robert Pastor, *Status of Puerto Rico: Have we reached a Turning Point?*, Conference on Puerto Rico's political status, Universidad del Este, Carolina Campus (Nov. 20, 2009); see also *Como 'esperar a Godot' la solución del status*, EL NUEVO DÍA (Nov. 21, 2009), <http://www.elnuevodia.com/noticias/locales/nota/comoesperaragodotlasoluciondelstatus-640059> (last visited Mar. 23, 2016).

such route through the traditional plebiscite route.<sup>8</sup> Others visualize Puerto Rico as a *sovereign* political association similar to that of a state<sup>9</sup> or free association as defined by international law.<sup>10</sup> Still, several recommend steering Puerto Rico towards independence through a gradual process of free association<sup>11</sup> or through a viable and careful economic transition.<sup>12</sup> There are some on the other side of the spectrum who assert that there is no political status discussion since there is no colonial problem,<sup>13</sup> while others promote a greater role of Puerto Rico in the international arena.<sup>14</sup>

The United States' political class reflects this lack of intellectual consensus. The congressional indifference to the status issue, the fierce opposition in the conservative sector to the admission of a poor Spanish-speaking Latino state<sup>15</sup> coupled with sectarianism and a lack of imagination in much of the Puerto Rican political leadership are all important roadblocks to an effective federal political action aimed at altering the territorial political status.

The way the United States government is avoiding its share of responsibility over a long-standing economic depression in Puerto Rico also reflects deeper divisions.<sup>16</sup> In the second decade of the Twenty-First century this issue -despite a generalized consensus about the dysfunctional nature of the current relationship-

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<sup>8</sup> Rafael Cox Alomar, *The Ideological Decolonization of Puerto Rico's Autonomist Movement*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 129, 134 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

<sup>9</sup> See THOMAS ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002).

<sup>10</sup> See Chimène I. Keitner, *From Conquest to Consent: Puerto Rico and the Prospect of Genuine Free Association*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 77 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

<sup>11</sup> See John D. Ingram, *Puerto Rican Independence: Whose Choice? The People of Puerto Rico or the United States Government?*, 2001 L. REV. M.S.U.-D.C.L. 85.

<sup>12</sup> See Carlos I. Gorrín Peralta, *Puerto Rico and the United States at the Crossroads*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 183 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015). For an excellent summary of the options under consideration, see CHARLES R. VENATOR-SANTIAGO, *PUERTO RICO AND THE ORIGINS OF U.S. GLOBAL EMPIRE: THE DISEMBODIED SHADE* 145-47 (2015).

<sup>13</sup> See David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federalism"?*, 122 POL. SCI. Q. 115 (2007).

<sup>14</sup> See Juan Clar, *Rethinking the Puerto Rican Commonwealth Model through a Lens of Internationalization*, 37 FLETCHER F. OF WORLD AFF. 151 (2013).

<sup>15</sup> Alvin Z. Rubenstein, *The Case against Puerto Rican Statehood*, 45 ORBIS, no. 3, 2001, at 415.

<sup>16</sup> See Editorial, *Don't Abandon Puerto Rico*, N.Y. TIMES (Dec. 26, 2015), [http://www.nytimes.com/2015/12/27/opinion/sunday/dont-abandon-puerto-rico.html?platform=hootsuite&\\_r=0](http://www.nytimes.com/2015/12/27/opinion/sunday/dont-abandon-puerto-rico.html?platform=hootsuite&_r=0) (last visited Mar. 23, 2016); Lizette Alvarez & Abby Goodnough, *Puerto Ricans Brace for Crisis in Health Care*, N.Y. TIMES (Aug. 2, 2015), <http://www.nytimes.com/2015/08/03/us/health-providers-brace-for-more-cuts-to-medicare-in-puerto-rico.html> (last visited Mar. 23, 2016).

split Puerto Ricans and Americans alike.<sup>17</sup> The cultural, racial, ethnic and national identity interests -both material and symbolic- that this issue poses, are diverse and complex. Yet their consideration in the United States is sidestepped until a major crisis compels strategic actions and even then the response seems to be partial and superficial.<sup>18</sup> In general, Congress has shown a limited and intermittent capacity to deliberate on national policy issues.<sup>19</sup> This situation is exacerbated by the lack of an electoral connection to compel action<sup>20</sup> and the invisibility created by the Insular Cases.<sup>21</sup>

If we look towards the executive branch the issue does not look more promising,<sup>22</sup> President Barack Obama's offer to resolve the so-called status issue during his first term in office soon evaporated. His administration decided not to invest on this troubled part of the Caribbean and opted instead to normalize diplomatic relations with Cuba, making this step a top priority in the Caribbean specifically and in Latin America generally.<sup>23</sup> Obama acted much in the same manner as other American leaders previously have: he "kicked the can" in order to leave the issue open for future undetermined action. Instead of investing political capital on the colonial issue, the President named a New York born Puerto Rican, Sonia Sotomayor, to the Supreme Court and asked her to stay close to her community. Obama chose symbolism -and a powerful one indeed- over substance.<sup>24</sup>

<sup>17</sup> See Gorrín Peralta, *supra* note 12; Andrés W. López, *Our Journey is Not Complete*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 167 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

<sup>18</sup> See Angelo Falcón, *Puerto Rico's Economic Crisis: Living Between Detroit and Argentina?*, NATIONAL INSTITUTE FOR LATINO POLICY (2014), [http://www.nilpnetwork.org/NiLP\\_Commentary\\_-\\_Puerto\\_Rico\\_Crisis\\_20014.pdf](http://www.nilpnetwork.org/NiLP_Commentary_-_Puerto_Rico_Crisis_20014.pdf); Angelo Falcón, *Puerto Rico's Fiscal Crisis is America's Colonial Crisis*, CITY & STATE (June 20, 2015), <http://cityandstateny.com/articles/politics/new-york-city/puerto-rico%E2%80%99s-fiscal-crisis-is-america%E2%80%99s-colonial-crisis.html#.VuvpB-lrLIU> (last visited Mar. 23, 2016).

<sup>19</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

<sup>20</sup> See DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974); COLÓN MORERA ET AL., *supra* note 3.

<sup>21</sup> See Duffy Ponsa, *supra* note 5.

<sup>22</sup> The last president of the United States to assume an active official position on the status debate was President George H. Bush who in his State of the Union message in 1989 expressed his personal preference for statehood.

<sup>23</sup> Press Release, The White House, Fact Sheet: Charting a New Course on Cuba (Dec. 17, 2014), <http://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba> (last visited Mar. 23, 2016). On this problem, Obama followed the advice of well-respected specialists such as Julia Sweig. See Memoranda from Julia E. Sweig et al. to President Obama (Feb. 2009), [http://www.cigaraficionado.com/webfeatures/show/id/Cover-Memo-to-President-Obama\\_9133](http://www.cigaraficionado.com/webfeatures/show/id/Cover-Memo-to-President-Obama_9133) (last visited Mar. 23, 2016). This policy shift of both United States and Cuba has been received warmly by Latin American leaders. See Randal Archibold & Julie Hirschfeld Davis, *Talks With Cuba Earn U.S. Raves in Latin America*, N.Y. TIMES (Apr. 12, 2015), <http://www.nytimes.com/2015/04/13/world/americas/talks-with-cuba-earn-us-raves-in-latin-america.html> (last visited Mar. 19, 2016).

<sup>24</sup> For a more benign approach on Obama's legacy regarding Puerto Rico, see López, *supra* note 17.

The decision to refrain from investing political resources in resolving Puerto Rico's territorial or neocolonial problem,<sup>25</sup> on the part of both the executive and legislative branches, is consistent with a lack of internal public policy consensus and the absence of institutional forums to debate them.<sup>26</sup> On the other hand, it is the duty of the judicial branch to open doors of political access when all other avenues of the political process have been exhausted. However, the tendency of the courts has been to follow the political process in this area.<sup>27</sup>

By continuing to sidestep the colonial issue, the federal government has discarded a more promising path already attempted in the 1989-1991 congressional process, the goal of which was to compel the legislative branch to issue clear guidelines about Puerto Rico's alternatives and their respective transition processes, before presenting these alternatives to the Island's voters.<sup>28</sup> The context of these deliberations, however, has dramatically changed. Nowadays, the issue does not have the international priority dictated by the Cold War era when Puerto Rico was the Caribbean symbol of American success. When it was a clear contrast to Soviet-sponsored Cuba and the decolonization agenda was a top concern at the United Nations.<sup>29</sup>

Since the political status issue remains invisible to the average voter of the United States, the perception gap of the problem widens. Whereas in the United States the so-called status debate dangles under the radar of policy issues, the opposite is true in Puerto Rico. Additionally, as I will show, the limited debate about this topic among United States' academia has little to no relation with the Island's internal conversation about its political status. This apparent misreading, or manipulation, is dangerous because it generates false expectations in the Puerto Rican electorate. A discussion about Puerto Rico's future that does not consider how to approach the subject in the United States at the political and academic level will end up encased within itself, unable to provoke any influential outcomes.

## I. A PERMANENT STALEMATE

Without executive leadership, and lacking strong domestic and international pressure, Puerto Rico's political problem remains fairly invisible despite the depth of its financial and economic crisis. The debate over status, as expressed by the

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<sup>25</sup> RAFAEL COX ALOMAR, EN LA ENCRUCIJADA: PENSAMIENTOS Y REFLEXIONES (2015).

<sup>26</sup> Clar, *supra* note 14.

<sup>27</sup> CONGRESSIONAL RESEARCH SERVICE, *Tropical Storm? The Supreme Court Considers Double Jeopardy and the Sovereign Status of Puerto Rico* (Nov. 4, 2015), <https://www.fas.org/sgp/crs/row/tropical.pdf>.

<sup>28</sup> But there is no consensus in the United States' literature about which options should be able to compete in a plebiscite. For example, Lani Medina proposes that only independence and statehood be the options to be considered. Lani E. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 FORDHAM INT'L. L.J. 1048, 1097 (2009).

<sup>29</sup> Robert Pastor, *The International Debate on Puerto Rico: The Costs of Being an Agenda-Taker*, 38 INT'L. ORG. 575 (1984).

Island's main political parties, does not consider -or rather, conveniently ignores- the difficulties in seriously promoting their status agenda in an openly hostile congressional environment. As a result, internal recriminations, useful only for short-term partisan positioning, bog down the public debate.

Although the status issue is no longer as geopolitically important as in past decades, some influential sectors resist any possibility of "letting go" of Puerto Rico due to the high profits investments on the Island provide and the internal divisions over the status question.<sup>30</sup> According to Chimene I. Keitner, "the United States-Puerto Rico relationship remains imbedded in the conquest paradigm."<sup>31</sup> Thus, if any discussion is held, they tend to focus on the level and stability of corporate profits and government spending rather than other substantive issues.<sup>32</sup> Keeping up appearances of democratic debate, while deferring a real decolonization process,<sup>33</sup> has been the preferred route.

## II. THE AMERICAN DEBATE: IMPERIAL DOUBTS

A renewed, if still very limited, American focus on the political future of Puerto Rico is reemerging. It is not the first time that some discreet sectors in the United States' intelligentsia meddle in Puerto Rico's future. In the 1970s, amid a severe economic and social crisis increasingly similar to the Island's current woes, some political literature argued for pursuing an anti-territorial agenda. Among the authors interested in the topic were Carr, Bloomfield, and Heine.<sup>34</sup> In reviewing this literature, the City University of New York Political Science Professor Sherrie Baver concluded that, in effect, these texts affirmed that the national interests of the United States would be further protected if Puerto Rico's flawed political arrangement was addressed.<sup>35</sup>

The context of that discussion, however, was notably different: the Island was then a strategic piece in a Cold War theater and was also intensively occupied by

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<sup>30</sup> Francisco Catalá Oliveras, *La economía de Puerto Rico: Del enclave colonial al imperativo de la independencia*, in *PUERTO RICO NACIÓN INDEPENDIENTE: IMPERATIVO DEL SIGLO XXI* 47 (Rubén Barrios et al. eds., 2010); Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 *BERKELEY LA RAZA L.J.* 387 (2002).

<sup>31</sup> Keitner, *supra* note 10, at 101.

<sup>32</sup> Philip DeMuth & Lauren Gensler, *Treasure Island: Puerto Rico Bids to Become New Age Tax Haven*, *Forbes* (Feb. 11, 2015), <http://www.forbes.com/sites/laurengensler/2015/02/11/puerto-rico-new-age-tax-haven/> (last visited Mar. 19, 2016).

<sup>33</sup> These "feints" at decolonization are not new. See MARCO ANTONIO RIGAU & JUAN MANUEL GARCÍA-PASSALACQUA, *REPÚBLICA ASOCIADA Y LIBRE ASOCIACIÓN: DOCUMENTACIÓN DE UN DEBATE* 245-47 (1987).

<sup>34</sup> RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* (1984); *PUERTO RICO: THE SEARCH FOR A NATIONAL POLICY* (Richard J. Bloomfield ed., 1985); *TIME FOR DECISION: THE UNITED STATES AND PUERTO RICO* (Jorge Heine ed., 1983).

<sup>35</sup> BAVER, *supra* note 2, at 227-34.

military bases, including the constant presence of nuclear submarines.<sup>36</sup> Due in part to a volatile international context, demands for action were ignored. The “response” of the political bodies to these challenges was inclined then -and some believe now- to increase federal transfers, both to individuals and to the Commonwealth, in order to alleviate economic hardship and poverty and avoid further internal Puerto Rican political mobilization on the Island.<sup>37</sup>

Recent texts about Puerto Rico published in the United States are cautious about how to proceed with regards to Puerto Rico’s future. Two exceptions are Richard Thornburgh, Secretary of Justice under President George W. Bush, and Duffy Ponsa, a Puerto Rican scholar. Both vigorously endorse statehood for Puerto Rico as an issue of civil rights.<sup>38</sup> Unlike Duffy Ponsa, who has an impressive academic record, Thornburgh appears to represent the outlook of a lobbyist. Since the congressional status process of 1989-1991, this senior official has been opposed to any political development other than the incorporation of Puerto Rico as a state. Several of the writers reviewed, such as coauthors Lawson and Sloan,<sup>39</sup> and Rezvani<sup>40</sup> consider ways to try to expand the legitimacy of Commonwealth or status quo.<sup>41</sup>

An article, written by Constitutional Law experts Gary Lawson and Robert D. Sloane, explores the relationship between the Federal Constitution and International Law regarding the case of Puerto Rico.<sup>42</sup> The article considers the current political status as problematic, from the perspective of existing International Law and Constitutional Law. Indeed, both admit that the Commonwealth has created

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<sup>36</sup> Cuba was then a regional and international power with close ties to the extinct Union of Socialist Soviet Republics. Regarding the nuclear issue in this period, see WILLIAM M. ARKIN & ROBERT S. NORRIS, *TAKING STOCK: U.S. NUCLEAR DEPLOYMENTS AT THE END OF THE COLD WAR* (1992), [http://docs.nrdc.org/nuclear/files/nuc\\_o8019201a\\_009.pdf](http://docs.nrdc.org/nuclear/files/nuc_o8019201a_009.pdf).

<sup>37</sup> Puerto Rico has one of the world’s worst indexes of wealth distribution. *C.f.* Argeo T. Quiñones-Pérez & Ian J. Seda-Irizarry, *Wealth Extraction, Governmental Servitude, and Social Disintegration in Colonial Puerto Rico*, 15 *NEW POL.*, no. 4, 2016, <http://newpol.org/content/wealth-extraction-governmental-servitude-and-social-disintegration-colonial-puerto-rico> (last visited Mar. 23, 2016). The economic crisis is so severe that in the last nine years 212,000 persons have left the Island. Jason R. Abel & Richard Deitz, *The Causes and Consequence of Puerto Rico’s Declining Population*, 20 *FED. RES. BANK N.Y. ECON. & FIN.*, no. 4, 2014, at 1, 2, [https://www.newyorkfed.org/medialibrary/media/research/current\\_issues/ci20-4.pdf](https://www.newyorkfed.org/medialibrary/media/research/current_issues/ci20-4.pdf). Moreover, around forty-six percent of the population in Puerto Rico was categorized as living below the poverty level. Quiñones-Pérez & Seda-Irizarry, *supra* note 37.

<sup>38</sup> Duffy Burnett, *supra* note 6.

<sup>39</sup> Lawson & Sloan, *supra* note 3.

<sup>40</sup> Rezvani, *supra* note 13.

<sup>41</sup> New arguments from different sources are commensurate with certain congressional support of statehood. The Lexington Institute, for example, has produced an interesting report about the cost that bilingualism would imply if Puerto Rico is admitted as a state. This study uses the case of Quebec as a negative example for the United States. See DON SOIFER, *STATEHOOD FOR PUERTO RICO AND THE POTENTIAL FISCAL IMPACT OF OFFICIAL BILINGUALISM FOR THE UNITED STATES* (2010).

<sup>42</sup> Lawson & Sloan, *supra* note 3. The authors posted several drafts on the Internet in the process of writing their essay. This allowed them to receive input from readers, including Island experts such as Dr. Antonio Fernós.

and perpetuated a limbo, which Puerto Ricans have lived in for the past fifty years.<sup>43</sup>

Lawson and Sloane's historical chronology, however, attempts to justify the creation of the Commonwealth as a valid, though imperfect, political association. Both recognize that Puerto Rico possesses a natural right to self-determination, but doubt that the Island's current relationship is colonial in nature. In practice, the two authors assert, Congress has respected the autonomy that Puerto Rico negotiated in 1952. Therefore, they seem to favor a minimalist vision of what constitutes a political association that fulfills the criteria of applicable international law. In their controversial analysis, the United States had substantially complied with the statements presented to the United Nations in 1953 when its government succeeded in removing Puerto Rico from the list of colonial territories.<sup>44</sup>

However, Lawson and Sloane entertain the notion that Congress could make internal changes to the federal electoral laws to allow Puerto Rican voters to participate in the election of the United States' House of Representatives in order to comply with international norms of political representation without having to admit the Island as a state.<sup>45</sup> There is here an implicit recognition of human rights issues related to the international right of political representation.

A proposal to create a political approach that, through exception, allows United States' citizens living in Puerto Rico to partially participate in the federal elections underlines the fact that the authors consider Puerto Rico's future as a federated state to be a highly unlikely scenario. If that were not so, why elaborate such an awkward alternative when statehood could automatically solve the problem of political representation? Lawson and Sloane are probably aware of the warning the renowned American economist Barry P. Bosworth gave at an Inter-American Dialogue: "When people talk of Puerto Rico joining the Union one of the problems is simply that it's too poor. I don't think is practical."<sup>46</sup>

While Lawson and Sloan refer to specific reforms that would keep the territorial relationship essentially unchanged, Professor Robert Pastor is one of the few scholars who has acknowledged the obvious: the inertia of Puerto Rico also reflects the inability of the United States to propose, in the short-term, a political transition project.<sup>47</sup> Pastor emphasizes that the sense of cultural identity is exceptionally strong in Puerto Rico and difficult to assimilate to the federal framework

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<sup>43</sup> *Id.* at 1132.

<sup>44</sup> This argument has proven to be incorrect. See Humberto García-Muñiz, *Puerto Rico and the United States: The United Nations Role 1953-1975*, 53 REV. JUR. UPR 1 (1984).

<sup>45</sup> Analyzing the matter from an originalist perspective, Lawson and Sloan are not convinced that Congress would have legal authority to obligate states to count the votes in favor of one or another candidate of the United States. Lawson & Sloan, *supra* note 3, at 1192.

<sup>46</sup> Barry Bosworth, Brookings Institution, Address at the Inter-American Dialogue (Dec. 17, 2008), <http://archive.thedialogue.org/page.cfm?pageID=32&pubID=1727> (last visited Mar. 23, 2016). The audio is available at: [http://archive.thedialogue.org/uploads/Event\\_Photos\\_2008/WS112079\\_2.mp3](http://archive.thedialogue.org/uploads/Event_Photos_2008/WS112079_2.mp3)

<sup>47</sup> Pastor, *supra* note 7.



of the United States. This former federal official, however, betted on a transformation in the United States within the framework of closer relations with Canada and Mexico. In his view, he visualizes Puerto Rico as a fifty-first Latin state which would be more compatible with a more economically diverse and Hispanic United States.

In other words, within this vision, the United States would have to devise a new definition of its own national cultural identity before resolving the issue of Puerto Rico satisfactorily.

### III. PUERTO RICO: A “FEDERACY”?

Professor David Rezvani is another scholar who joined the conversation about Puerto Rico’s political status.<sup>48</sup> He considered whether Puerto Rico is or is not a colonial territory in an essay on United States politics and government. Initially, Rezvani accepts that the center of the political controversy revolves around whether the Island’s association with the United States is colonial in nature and what the alternatives are. Rezvani, nonetheless, differs from the position espoused by a large part of the leadership of the Island’s three main political parties and most of the academic circles. He breaks away from the colonial or the political association view, since he perceives the current relationship as one of a *federacy*:

Such views, however, are politically, constitutionally, and historically incorrect. Puerto Rico is neither a mere colony nor are its powers formally safeguarded by a “compact” created in 1952. Instead, similar in significant respects to the historic British dominions like Canada and South Africa in the late nineteenth and early twentieth centuries, Puerto Rico’s powers are rendered difficult to change by unwritten constitutional rules, which are also known as “conventions.” Puerto Rico is best described not as a colony or as some other governmental form, but as a conventionally entrenched “federacy.”<sup>49</sup>

In important ways, Rezvani’s position is similar to the position advanced by eminent constitutionalist David Helfeld several decades ago. Helfeld has long insisted that the United States’ duties toward Puerto Rico are more consistent with a moral posture than with a legally enforceable commitment.<sup>50</sup> This is, at the present time, the official position of the Obama administration on this topic.<sup>51</sup> As a *federacy*, Rezvani believes Puerto Rico “is a territory within the international legal boundaries of a [national] state” to which certain decision-making powers have

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<sup>48</sup> Rezvani, *supra* note 13.

<sup>49</sup> Rezvani, *supra* note 13, at 116-17 (footnote omitted).

<sup>50</sup> David M. Helfeld, *Congressional Intent and Attitude Toward Public Law 600 and the Constitution of the Commonwealth of Puerto Rico*, 21 REV. JUR. UPR 255 (1952).

<sup>51</sup> Brief for the United States as Amici Curiae Supporting Respondents, *Puerto Rico v. Sánchez Valle* 25 (U.S. filed Dec. 23, 2015) (No. 15-108).

been transferred.<sup>52</sup> These powers are devilishly difficult to eliminate and constitute final decision-making powers, although the jurisdiction that makes these decisions is not a formal member of the federation.<sup>53</sup>

*Federacy* is not the same as federalism; theories of federalism assume a precise division of power between the central government and the entity's geographical, ethnic, or regional units. In that sense, the concept of *federacy* can create unnecessary confusion. Dr. Ángel Israel Rivera Ortiz, a Puerto Rican political scientist from the University of Puerto Rico that has extensively researched the subject, offers a relevant explanation on why the concept of *federacy* is muddled.<sup>54</sup> He insists on the fact that since the Island cannot effectively sway unilateral decisions of the United States government, the concept of *federacy* is of little use. The recent position announced by the Obama administration on the complete lack of sovereignty on the part of Puerto Rico confirms his assertions.<sup>55</sup>

Congress itself makes the problem worse through its ambiguous internal treatment of Puerto Rico "as a state" in certain cases and laws. For Rivera Ortiz it would be clearer to say that between the United States and Puerto Rico exists a suzerainty agreement. Keith Bea, a specialist in national government of the Congressional Research Service, has referred to it, suggesting that the United States exercises external powers over Puerto Rico by an agreed-upon subrogation, but that internal authority rests primarily with the government of Puerto Rico.<sup>56</sup> In any case, Rivera Ortiz's main criticism about the concept of *federacy* is correct. From his perspective, with which I agree, Rezvani wants to place diverse political-judicial realities under a single umbrella:

The reality of the Dutch islands is not the same as the relationship between Puerto Rico and the United States; the Dutch islands are integrated in the Netherlands and Puerto Rico is "unincorporated." The British Dominions existed for a while, but today are independent countries although they belong to the British Commonwealth of Nations and some, like New Zealand, still formally address Queen Elizabeth as their Head of State (a kind of Royal Union for having the same monarch), but the designation of monarch today is purely ceremonial. Therefore, I question creating a concept that places different realities of autonomy under the

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<sup>52</sup> Rezvani, *supra* note 13, at 117.

<sup>53</sup> Federacy: "a territory within the international legal boundaries of a state that has been allocated some entrenched (very difficult to take away) final decision-making powers without being a member unit of the federation." *Id.*

<sup>54</sup> Interview with Ángel Israel Rivera Ortiz, Professor at the University of Puerto Rico, in Río Piedras, Puerto Rico (Nov. 1, 2010).

<sup>55</sup> See Brief for the United States, *supra* note 51.

<sup>56</sup> KEITH BEA & SAM GARRETT, CONG. RESEARCH SERV., RL32933, POLITICAL STATUS OF PUERTO RICO: OPTIONS FOR CONGRESS (2011), <https://www.fas.org/sgp/crs/row/RL32933.pdf>. This argument, of course, seems to conveniently ignore the fact that Puerto Rico is a United States territory by reason of an armed invasion in 1898.

same mantle, under the sovereignty of a metropolis. I also object to calling it a *federacy*.<sup>57</sup>

#### IV. THE REASONS FOR STATEHOOD

The publication of Dick Thornburgh's short book in 2007 titled *Puerto Rico's Future: A Time to Decide* -foreword by former President George W. Bush- is relevant to the present discussion. The book categorizes the problem of Puerto Rico as one involving human rights violations. It predicts that if the question of Puerto Rico is not resolved in favor of federated statehood, federal courts could establish the existence of serious violations to international covenants. Here, the positions of Lawson and Sloan partly coincide with Thornburgh's.<sup>58</sup> Both portray the territorial situation as being on a collision course with international covenants that require the consent of the governed.

Thornburgh argues that the United States should accept Puerto Rico as a state as soon as possible to avoid the present Commonwealth's democratic shortcomings.<sup>59</sup> The solution to the problem requires holding a referendum on the political status of Puerto Rico, whereby Congress would define the options. This is precisely, however, what Congress has refused to clarify many times.<sup>60</sup> There are, nevertheless, powerful internal and external forces that object to statehood and have managed to deter Congressional consideration of the issue many times. Furthermore, the premise that the United States government should force a vote between statehood and independence to generate a clear status mandate could be inconsistent with the United States representations before the United Nations, that it would be willing to consider changes or alterations towards the Commonwealth in the direction of greater autonomy.<sup>61</sup>

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<sup>57</sup> Interview with Ángel Israel Rivera Ortiz, Professor at the University of Puerto Rico, in Río Piedras, PR. (Nov. 1, 2010).

<sup>58</sup> THORNBURG, *supra* note 6.

<sup>59</sup> Thornburgh served as the 41st Governor of Pennsylvania from 1979 to 1987, and as 76th Attorney General of the United States from 1988 to 1991. Since 2007, Thornburgh is of counsel at K&L Gates, a private lobbying firm.

<sup>60</sup> See Raúl L. Cotto-Serrano, *Las elecciones de Estados Unidos y su posible impacto en Puerto Rico*, HUELLAS DE ESTADOS UNIDOS: ESTUDIOS Y DEBATES DESDE AMÉRICA LATINA (2013), [http://huel-lasdeuea.com.ar/ediciones/edicion4/11-Serrano\\_pp-123-135.pdf](http://huel-lasdeuea.com.ar/ediciones/edicion4/11-Serrano_pp-123-135.pdf). The final decision of the Natural Resources Committee to neither recommend the celebration of a plebiscite nor to make any statement in that respect was reported on *Senado entierra el proyecto 2499*, EL NUEVO DÍA (Oct. 1, 2010), <http://www.elnuevodia.com/noticias/locales/nota/senadoentierraelproyecto2499-789970/> (last visited Mar. 23, 2016).

<sup>61</sup> Section 9 of United Nations Resolution 748 clearly states the commitment of the United States Government in considering alterations to the content of the political association between the United States and Puerto Rico. G.A. Res. 748 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, U.N. Doc. A/2630, at 26 (Nov. 27, 1953), [http://libwww.essex.ac.uk/Human\\_Rights/developmentbibdocs/AREs2630.pdf](http://libwww.essex.ac.uk/Human_Rights/developmentbibdocs/AREs2630.pdf).

## V. THE POLITICAL ASSOCIATION

Alexander Aleinikoff is an intellectual heavyweight within academic legal circles. As a Constitutional Law expert, he has devoted much of his professional career to teaching and publishing about topics related to United States citizenship, migration and human rights.<sup>62</sup> His book, *Semblances of Sovereignty*, explores diverse issues relating to how the federal government has associated with subordinate groups that have suffered discriminatory institutional policies and who could have valid sovereign claims.<sup>63</sup> Aleinikoff regrets the prominent attention given to the sovereign powers of the United States central government and the residual sovereignty of the states, while the claims of subordinate populations have been ignored.

Aleinikoff values the importance Puerto Ricans assign to their cultural identity in defining Puerto Rico as a “polity that deeply cherishes its cultural and linguistic differences from the mainland majority.”<sup>64</sup> In his view, this vision of Commonwealth is compatible with the United States federal structure. This proposal allows the Puerto Rican government to object to certain legislation and recommend that Congress not apply it to the Island. For him, a new and more flexible understanding of sovereignty is needed, one that is in tune with post-modern sensibilities.

## VI. INDEPENDENCE?

The independence option is also present and defended by John Ingram in *Puerto Rican Independence: Whose Choice?*<sup>65</sup> Ingram argues in favor of the United States steering Puerto Rico towards independence in view of its current diminished military function and based on the fact that economic relations would still be strong with the new republic. Ingram supports free association as a transition point towards complete independence as a way of avoiding the terrible precedent in United States constitutional history of imposing independence to an electorate openly hostile to it. The value of independence, according to Ingram, is that it would respect Puerto Rican interest in preserving its national identity in a stable and mutually beneficial economic context.

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<sup>62</sup> See DORIS MEISSNER ET AL., MIGRATION POLICY INSTITUTE, IMMIGRATION AND AMERICAN'S FUTURE: A NEW CHAPTER 109 (2006), [www.migrationpolicy.org/sites/default/files/publications/finalreport.pdf](http://www.migrationpolicy.org/sites/default/files/publications/finalreport.pdf).

<sup>63</sup> ALEINIKOFF, *supra* note 9.

<sup>64</sup> Ángel R. Oquendo, *Linking to be in America: Puerto Rico's Quest for Difference in the United States*, 14 DUKE J. COMP. & INT'L L. 249, 251 n.8 (2004) (quoting ALEINIKOFF, *supra* note 9).

<sup>65</sup> Ingram, *supra* note 11.

## CONCLUSION

There is a high level of indecision among the United States intelligentsia about where to help steer the Puerto Rican internal political process as it relates to its future relationship with the United States. Some would adopt radical departures from the current territorial policy while most favor incremental changes. Those incremental changes are controversial and very difficult to implement. This coincides with a very poor congressional public policymaking process and executive branch actions that are failing to provide a constructive leadership.<sup>66</sup> There is a need for a political process to solve this essentially political problem.<sup>67</sup>

While indecision relating to long-term policy options endures, assets and resources aimed at maintaining the United States hegemony in Puerto Rico are active. The mentality that Puerto Rico is a permanent possession persists.<sup>68</sup> All of this goes against the grain of Puerto Rican expectations.

It is a myth that the division and indecisiveness of the Puerto Rican electorate over its collective political aspirations is the source of the problem. Most Puerto Ricans would prefer a less conflicted internal political discourse and that more pro-active steps be taken to address the pressing issues of economic stagnation, unemployment and violence. But it takes two to tango. The political literature examined here demonstrates that American academic circles have not reached a consensus and thus are unable to push for a concise or effective set of integral policy solutions to the so-called Puerto Rican political intractable problem. This lack of intellectual clarity about future options of political development for Puerto Rico contributes to the current stalemate.

The United States Congress does not seem to be inclined, in the short-term, to make way for a new Hispanic state,<sup>69</sup> and it is not clear of the economic net benefit of such move,<sup>70</sup> nor does it want to grant greater power to a Commonwealth exhibiting increasing problems of internal and international legitimacy, or to seriously consider favoring an orderly transition to independence. Herein lies

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<sup>66</sup> For a sharp critique about the tendency of Congress to reduce its capacity for deliberation in the area of public policy, see MANN & ORNSTEIN, *supra* note 19.

<sup>67</sup> Cox Alomar, *supra* note 8, at 165.

<sup>68</sup> Assertions of the Presidential Reports of December 2005 and of December 2007 that Puerto Rico can be sold or transferred as property evidence this strong imperialist vision. That position was reiterated by the Obama administration in 2015. Even those who push for reforms to the Commonwealth, such as Aleinikoff, do so taking into account that in an improved Commonwealth, the sovereignty that Puerto Rico enjoys would be similar to that of a state, but would not enjoy the kind of state sovereignty that governs the international system.

<sup>69</sup> See SOIFER, *supra* note 41.

<sup>70</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-31, PUERTO RICO: INFORMATION ON HOW STATEHOOD WOULD POTENTIALLY AFFECT SELECTED FEDERAL PROGRAMS AND REVENUE SOURCES (2014), <http://www.gao.gov/assets/670/661334.pdf>; see also JOSÉ JAVIER COLÓN MORERA, ET AL., UPR RECINTO DE RÍO PIEDRAS, FACULTAD DE CIENCIAS SOCIALES, EFECTOS SOBRE LA COMPETITIVIDAD DE PUERTO RICO DE POSIBLES CAMBIOS EN LA LEY 600 (Evelyn Otero Figueroa ed., 2014).

the trap: the status debate that consumes the Island with frequent partisan re-criminations hardly resonates in the United States as part as a comprehensive political solution. The Puerto Rican problem is also an American one.

There are, however, signs of hope. In a new book about the persistence of the so-called Insular Cases, the Dean of Harvard Law School makes the case that “[t]he status of Puerto Rico, other unincorporated territories of the United States, the rule of law in the United States, and the ideal of constitutional rights around the world are at stake.”<sup>71</sup> If the stakes are so high: Why not do something about it?

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<sup>71</sup> Minow, *supra* note 4, at ix.