

DISPARATE HEALTH CARE IN PUERTO RICO: A BATTLE BEYOND STATEHOOD

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For close to a decade now, Puerto Rico has been saddled with a public debt crisis and has been forced, as a result, to borrow the funds needed to cover nationwide expenses like health care. When Puerto Rico stopped repaying its mounting debt in 2016, the U.S. Congress formed the federal PROMESA Board to oversee Puerto Rico’s finances and to determine its future fiscal policies. Nevertheless, the PROMESA Board’s attempt to control public debt by reducing budget deficits has further weakened an already devastated health care system. The island, often a target of natural disaster in the form of hurricanes, is financially insolvent and beset by other national, health-related obstacles such as poor infrastructure; heavy disparities between private and public health care programs as a result of a failed privatization and regionalized system; and a scarcity of doctors owing to continued migration to better pay on the mainland.

By reflecting on the consequences of a health care system the origins of which are in legal transplants and which has been the target of multiple unsatisfactory institutional arrangements—legacies of the colonial relationship between the island and the U.S. mainland—this Article attempts to explain why Puerto Rico’s health care system remains in crisis and inquires with respect to which policy-based tools might be used to address such crisis. This Article concludes that all policy attempts to date have failed and will continue to do so for as long as a foundational problem persists – that is, the unconstitutional, disparate treatment of U.S. citizens living in Puerto Rico compared to those Americans living on the mainland. Finally, this Article advances a primary policy recommendation that policymakers must first address the equal protection of the law—in general and as it applies to healthcare—rather than the political battle for statehood, the federal control and planning over Puerto Rico’s finances, or additional temporary federal funds and disaster relief.

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INTRODUCTION

Since 2006, Puerto Rico has experienced a deep recession the impact of which cannot be understated.¹ After accumulating an estimated \$123 billion in debt, the island has stopped repaying its creditors altogether.²

Puerto Rico’s fiscal status ultimately reached a historic low, as the island was left with a “. . . choice between honoring its commitments to bondholders [and] continuing to provide the residents of Puerto Rico with essential services.”³ Unlike cities within the continental United States, Puerto Rico cannot file for bankruptcy.⁴ In June 2016, the U.S. Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”),⁵ which formed the Financial Oversight and Management Board (the PROMESA “Board” or “FOMB”) meant to administer the new law and deal with the crisis.⁶ The Board’s initial plan included an almost 30% reduction of the

¹ See Marc. D. Joffe & Jesse Martinez, *Origins of the Puerto Rico Fiscal Crisis*, MERCATUS CENTER AT GEORGE MASON UNIVERSITY 15 (Apr. 2016), <http://www.mercatus.org/system/files/Joffe-Puerto-Rico-Fiscal-Crisis-v1.pdf> [<https://perma.cc/N3M6-RPPT>].

² Mary Williams Walsh, *How Puerto Rico Is Grappling with a Debt Crisis*, N.Y. TIMES (May 16, 2017), <https://www.nytimes.com/interactive/2017/business/dealbook/puerto-rico-debt-bankruptcy.html> [<https://perma.cc/8KTZ-2VWK>]; see also Associated Press, *Puerto Rico governor declares emergency at Government Development Bank*, WASH. POST. (Apr. 9, 2016), https://www.washingtonpost.com/business/economy/puerto-rico-governor-declares-emergency-at-government-development-bank/2016/04/09/f4042004-fe8e-11e5-9140-e61d062438bb_story.html [<https://perma.cc/3JZM-TFAL>].

³ Ley de Moratoria de Emergencia y Rehabilitación Financiera de Puerto Rico, P. del S. 1591, Act 21 (2016), <http://www.lexjuris.com/lexlex/Leyes2016/lexl2016021a.pdf> [<https://perma.cc/V7WH-X9T8>].

⁴ In 2014, Puerto Rico enacted a statute aimed at the restructuring of over \$20 million in public utility debt. However, the U.S. Supreme Court held that the federal bankruptcy code preempted this law. *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1942 (2016).

⁵ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114–187, 130 Stat. 549, 550–610 (2016). See also Juan R. Torruella, *Why Puerto Rico Does Not Need Further Experimentation with its Future: A Reply to the Notion of “Territorial Federalism”*, 131 HARV. L. REV. F. 65, 93 (2018) (describing PROMESA as “. . . Congress’s fourth try at cutting through the Puerto Rican Gordian knot in its interminable attempt to colonially rule Puerto Rico and its people”).

⁶ See generally 48 U.S.C.A. § 2121(c)(1), § 2121(e)(3) and § 2123 (2016) (defining the Board as “created . . . within the territorial government” of Puerto Rico, which comprises seven members appointed by the U.S. President, who appoints an executive director to manage its day-to-day affairs, and further defining the Governor of Puerto Rico is an ex

island's annual health care budget.⁷ The budget cut was designed to prevent a future increase in local funds once the federal temporary relief fund expires, although Puerto Rico was already expected to exhaust those federal funds before they do.⁸ At the time, there were concerns that this aggressive austerity policy would severely impact the vast majority of the island's population that relies on government-provided health care.⁹ In this regard, the United Nations' Human Rights Office of the High Commissioner proclaimed that reducing budget deficits has been shown to negatively affect people's rights.¹⁰ While such cuts can foster economic recovery, they undermine the provision of essential public services like health care.

The history of Puerto Rico's health care is replete with stories of decentralization and fragmentation. Particularly after the 1970s, the system followed the continental U.S. model ignoring the significantly heterogeneous conditions of Puerto Rico. This Article claims that modeling the institutional arrangements of the continental U.S. health care system—what the Author calls a “blind legal transplant”—has exacerbated the inequality of access to health care on the island. Moreover, this blind adoption has dragged along with it the institutional failures of the mainland's health care model, creating greater financial distress and urgent health needs. Thus, the adequacy of comprehensive health care policies in Puerto Rico needs to be reconsidered.

Most policy efforts have been responsive to the Puerto Rican health care battle with financial-centric strategies that call for an increase in federal funds, disaster relief, and other rationing policies. But such an austerity plan as implemented in Puerto Rico since PROMESA has already led to higher unemployment, which itself reduces tax contributions.¹¹ It has accelerated one of the highest migrations in history from the island to the mainland, significantly decreasing the number of doctors to protect an increasingly aging population from what is now an increased risk of illness and a shorter fiscal contribution life span. Finally, the austerity plan has contributed to a severe economic recession, which has undermined people's ability to afford health care copays and private health care insurance. Hurricane Maria only aggravated the crisis of allocation with respect

officio member of the Board). *See also Examining Challenges in Puerto Rico's Recovery and the Role of the Financial Oversight and Management Board: Oversight Hearing before the H. Comm. on Natural Resources*, 115th Cong. 80 (2017) (recalling that Natalie Jaresko, former Minister of Finance in Ukraine, was appointed as FOMB's executive director at an annual salary of \$625,000); Jennifer Burnett, *CSG Releases 2013 Governor Salaries*, Council of State Gov'ts (June 25, 2013), <https://knowledgecenter.csg.org/kc/content/csg-releases-2013-governor-salaries> (noting that the Governor of Puerto Rico's yearly salary is \$70,000) [<https://perma.cc/7QA7-ET3V>]. *See also* Cyndi Suarez, *Puerto Rican Lawmakers Say No to Paying the Salaries of Its Rulers*, NONPROFIT Q. (Apr. 9, 2018), <https://nonprofitquarterly.org/puerto-rican-lawmakers-say-no-paying-salaries-rulers/> [<https://perma.cc/UCU8-EY72>] (contrasting Jaresko's exorbitant salary of \$625,000 with average Puerto Rican annual income of \$27,248).

⁷ Robin Rudowitz, Cornelia Hall & Barbara Lyons, *Medicaid Financing Cliff: Implications for the Health Care Systems in Puerto Rico and USVI*, HENRY J. KAISER FAMILY FOUNDATION [hereinafter KAISER FAM. FOUND.] 10 (May 2019), <http://files.kff.org/attachment/Issue-Brief-Medicaid-Financing-Cliff-Implications-for-the-Health-Care-Systems-in-Puerto-Rico-and-USVI> [<https://perma.cc/3G7L-PHGG>].

⁸ *Id.*

⁹ *Id.* at 10.

¹⁰ *See* U.N. OFFICE OF THE HIGH COMM'R FOR HUM. RIGHTS, END-OF-MISSION STATEMENT: VISIT TO THE EUROPEAN UNION INSTITUTIONS (June 3, 2016), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20057&LangID=E> [<https://perma.cc/XAW9-PPG3>] (“The [e]conomy should serve the people, not vice versa”).

¹¹ Sergio M. Marxuach, *Hurricane Relief in the Times of Austerity*, THE HILL (Sept. 21, 2017), <https://thehill.com/blogs/congress-blog/politics/351544-hurricane-relief-in-times-of-austerity> [<https://perma.cc/42T3-XH8T>].

to already scarce medical resources. When Puerto Rico was about to face yet another financial “cliff,” as the majority of the temporary Medicaid financing support from the Patient Protection and Affordable Care Act (ACA) and the Bipartisan Budget Act of 2018 (BBA) expired at the end of September 2019 and December 2019, the U.S. Congress approved new supplemental federal funds available until September 2021.¹² The financial policies are at the core of the challenges related to medical coverage and eligibility, health care access, and delivery system reforms, which are leading Puerto Rico’s vulnerable health care system to a slow and painful death.¹³

This Article does not advance a position in favor of either privatized or government-based health care delivery in Puerto Rico. Instead, the Author aims to raise awareness on the detrimental consequences of organizing the island’s health care system ignoring the particular conditions of Puerto Rico’s population. Further, this Article proposes that the right to equal treatment of all U.S. citizens, regardless of their place of residence, militates firmly against the many battles and challenges associated with this type of legal transplant and justifies access to health care in Puerto Rico. As the Article elaborates and attempts to demonstrate, rationing policies and expanding state health care prerogatives to the island are not enough and will not succeed if Puerto Ricans continue to be treated as “second-class” citizens, contrary to the constitutional mandate of equal protection of the law for all Americans.

The Article consists of three parts. Part I describes the transformation of the Puerto Rican health care system into its current privatized form, with emphasis on *La Reforma*, a program that led to the system now in place. Part II describes the struggles of financing and delivering health care in Puerto Rico. Finally, Part III examines how to alter the status quo made manifest by the Puerto Rican health care system. After examining the rationing policies and legal transplants applied to the Puerto Rican healthcare system, the Article concludes that the primary battle worth fighting for is equal protection of the law. If won, it would give Puerto Rico the opportunity to ensure that its U.S. citizens receive the health care they need.

I. THE PEOPLE OF PUERTO RICO

In spite of the fact that 120 years have passed since Puerto Rico first became a U.S. territory, many people from the mainland are blind, willfully or otherwise, to the 3.4 million fellow U.S. citizens who live, in some cases, just a mere hundred miles away from them.¹⁴

¹² Cornelia Hall, Robin Rudowitz, Samantha Artiga & Barbara Lyons, *One Year After the Storms: Recovery and Health Care in Puerto Rico and the U.S. Virgin Islands*, KAISER FAM. FOUND. 1 (Sept. 19, 2018), <http://files.kff.org/attachment/Issue-Brief-One-Year-after-the-Storms-Recovery-and-Health-Care-in-Puerto-Rico-and-the-US-Virgin-Islands> [<https://perma.cc/S3PZ-6QKZ>]. See also Rudowitz et al., *supra* note 7, at 1. Most recent supplemental federal funds were provided on December 20, 2019 (P.L. 116-94) and March 18, 2020 (the Families First Coronavirus Response Act, FFCRA, P.L. 116-127). See Medicaid and CHIP in Puerto Rico, MACPAC Fact Sheet (Apr. 2020), <https://www.macpac.gov/wp-content/uploads/2019/07/Medicaid-and-CHIP-in-Puerto-Rico.pdf> [<https://perma.cc/A2N5-ZPJ8>].

¹³ See *id.* at 10 (“[W]ithout additional support, the uninsured population could increase from about 500,000 to over 1 million people.”).

¹⁴ See generally Kyle Dropp & Brendan Nyan, *Nearly Half of Americans Don’t Know People in Puerto Rico Are Fellow Citizens*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/upshot/nearly-half-of-americans-dont-know-people-in-puerto-ricans-are-fellow-citizens.html> [<https://perma.cc/R7WN-FTAW>]; Alan Gomez, *Yes, Puerto Rico is Part of the United States*, USA TODAY (Sept. 26, 2017), <https://www.usatoday.com/story/news/world/2017/09/26/yes-puerto-rico-part-united-states/703273001/> [<https://perma.cc/765H-3KVK>]. See also Claire Hansen, *Almost*

A. Demographics

Puerto Rico has experienced a steady decline in its population since 2000.¹⁵ According to the 2010 U.S. Census, the total population number decreased by 2.2% over a ten-year period.¹⁶ 2010 was the first time ever that the population of Puerto Rico declined from one census to another.¹⁷ According to the Pan American Health Organization (PAHO), reasons for the decline included emigration and a 26% reduction in births.¹⁸ A total of 525,769 net migrants fled from Puerto Rico, particularly to the mainland's southern and northeastern regions, from 2006 to 2016, equivalent to 14% of the island's total population since the economic depression started.¹⁹ Although there has not been an official population census since 2010, new U.S. Census Bureau data from April 2019 shows that Puerto Rico experienced its greatest population drop between July 2017 and July 2018.²⁰ People moving away from metropolitan areas of the island accounted for most of the drop after deaths owing to Hurricanes Irma and Maria in September of 2017.²¹ For at least some of the Puerto Ricans who remain on the island, poverty may well be an obstacle to migration and mobility.²² For those who did leave, it seems that they have done so for good, and researchers are uncertain whether the number of emigrants will continue to rise.²³

Puerto Rico is not a small jurisdiction. Based on the U.S. Census Bureau's 2019 resident population estimates, Puerto Ricans account for only 1% of the country's total population.²⁴ Yet,

Half Americans Don't Know Puerto Ricans Are US Citizens, U.S. NEWS (Sept. 26, 2017), <https://www.usnews.com/news/national-news/articles/2017-09-26/almost-half-of-americans-dont-know-puerto-ricans-are-us-citizens-poll> [<https://perma.cc/765N-DRAL>].

¹⁵ *Health in the Americas, Puerto Rico*, PAN AMERICAN HEALTH ORGANIZATION 536–537 (2012) [hereinafter 2012 PAHO REPORT], https://www.paho.org/salud-en-las-americas-2012/index.php?option=com_docman&view=download&category_slug=hia-2012-country-chapters-22&alias=144-puerto-rico-144&Itemid=231&lang=en [<https://perma.cc/YL6G-UUWU>].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Edwin Meléndez & Jennifer Hinojosa, *Estimates of Post-Hurricane Maria Exodus from Puerto Rico*, CENTER FOR PUERTO RICAN STUDIES, HUNTER CUNY 3 (Oct. 2017), https://centropr.hunter.cuny.edu/sites/default/files/RB2017-01-POST-MARIA%20EXODUS_V3.pdf [<https://perma.cc/UE5T-A2B3>].

²⁰ *See New Data Shows 4% Drop in Puerto Rico Population since Maria*, ASSOCIATED PRESS (Apr. 18, 2019), <https://www.apnews.com/df63a2f9186a4eaaaa531d69d59adf4e> [<https://perma.cc/JA8Q-LZTG>].

²¹ *Id.*

²² *See Jill Disis, Hurricane Maria Could Be a \$95 Billion Storm for Puerto Rico*, CNN MONEY (Sept. 28, 2017), <https://money.cnn.com/2017/09/28/news/economy/puerto-rico-hurricane-maria-damage-estimate/index.html> [<https://perma.cc/45U7-4ZR8>].

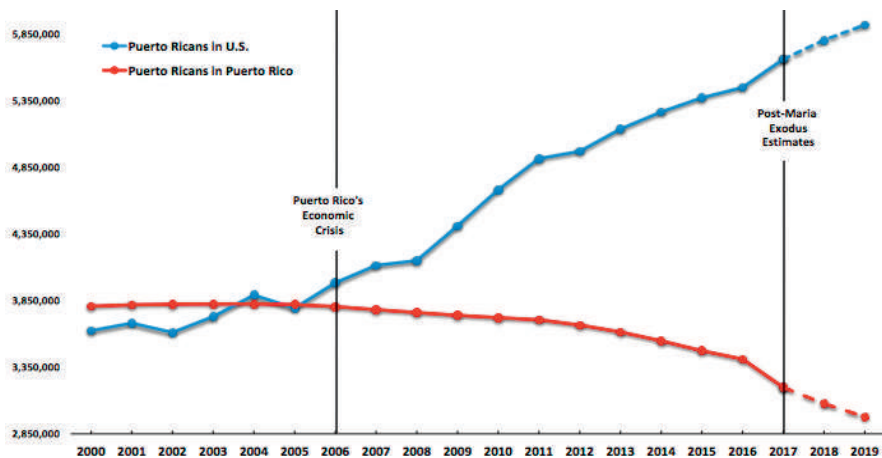
²³ *See* 2012 PAHO REPORT, *supra* note 15; Meléndez & Hinojosa, *supra* note 19, at 1. *See also* Brian Glassman, *A Third of Movers from Puerto Rico to the Mainland United States Relocated to Florida in 2018*, AMERICA COUNTS: STORIES BEHIND THE NUMBERS, CENSUS.GOV, <https://www.census.gov/library/stories/2019/09/puerto-rico-outmigration-increases-poverty-declines.html> [<https://perma.cc/A6BF-Y6RW>].

²⁴ *See* UNITED STATES CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2019 (NST-EST2019-01) (2019), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2018_PEPANNRES&src=pt [<https://perma.cc/9QKR-N7N2>].

the island's population is still larger than that of twenty U.S. states and the District of Columbia.²⁵ Moreover, in 2019, Puerto Rico was comparable in land area and population size to the state of Connecticut.²⁶

Migration patterns reflect a significant shift of Puerto Ricans from the island to the mainland, which has disproportionately affected Puerto Rico (see Figure 1 on the next page). First and foremost, depopulation has affected the population's age structure; that there are fewer young people in reproductive age has resulted in a reduction in births, for example. Those staying on the island are disproportionately poor, sick, and elderly, which lowers the probability of an economic rebound. On the other hand, flight to the mainland has not impacted the mainland as negatively as it has Puerto Rico. For example, in Florida, the state with the largest share of potential immigrants from the island, the number of workers relocating from Puerto Rico was too insignificant to affect the state's job market in any meaningful way. Politically, migration to Florida has been perceived by some to have been positive for Republicans in the recent 2018 elections.²⁷

Figure 1 – Puerto Ricans in Puerto Rico and in the U.S. population from 2006 to 2016 and 2017-2019 estimates²⁸



²⁵ *Id.*

²⁶ *Id.* See also State Area Measurements and Internal Point Coordinates derived from the Census Bureau's Master Address File/Topologically Integrated Geographic Encoding and Referencing (MAF/TIGER®) database, available at <https://www.census.gov/geographies/reference-files/2010/geo/state-area.html> [https://perma.cc/2X25-LHC3].

²⁷ Saul Anuzis & Michael Steele, *Why Republicans Should Get Behind a National Popular Vote, Too*, POLITICO MAGAZINE (Aug. 28, 2019), <https://www.politico.com/magazine/story/2019/08/28/gop-national-popular-vote-227915> [https://perma.cc/6WM3-MNZ3].

²⁸ Meléndez & Hinojosa, *supra* note 19, at 4, Figure 1 (“... lower bound estimates are double the lowest number of migrants registered during the prior three years. Upper bound estimates are three times the highest number of migrants registered during the prior three years. Since the ACS estimates are based on random sampling of the population, the smaller the numbers reported in this table the larger the margin of error for the estimates.”).

B. Politics

Two catastrophic hurricanes, Irma and Maria hit the island on September 6 and September 20, 2017, respectively.²⁹ Most significantly, the hurricanes brought not only considerable physical damage—estimated to be more than Puerto Rico’s annual GDP—but also attention to and awareness of the “second-class” citizenship status of the people—Americans—living in Puerto Rico.³⁰ Specifically, they cannot vote for a U.S. President in the general election (unless they live in the continental U.S.),³¹ nor do they have voting representatives in the House or Senate.³² Puerto Ricans are easily invisible and politically powerless. The mainland’s ignorance or disinterest of Puerto Rico confirms such blindness and political weakness.

A day before Hurricane Maria’s one-year anniversary, Puerto Rico’s Governor Ricardo Rosselló asked President Donald Trump to allow Puerto Rico to become a U.S. state, claiming that “the biggest impediment for Puerto Rico’s full and prosperous recovery [is] the 169nequality[y] Puerto Rico faces as the oldest, most populous colony in the world.”³³ Governor Rosselló’s overture illustrates how Puerto Rico pushed for statehood harder than ever after the 2017 hurricanes.

Puerto Rico is divided equally between those who advocate for remaining a commonwealth, represented by the Popular Democratic Party, and those who support statehood, represented by the New Progressive Party (or PNP, for its initials in Spanish).³⁴ By some accounts,

²⁹ See generally Heather Klinger & Kristy J. O’Hara, *2017 Hurricane Irma: Facts, FAQs, and How to Help*, WORLD VISION (Aug. 1, 2018), <https://www.worldvision.org/disaster-relief-news-stories/2017-hurricane-irma-facts> [<https://perma.cc/65G3-XF9E>]. In particular, Maria caused significant physical damage to the health care infrastructure of Puerto Rico. See *Health Centers in Puerto Rico: Operational Status After Hurricane Maria*, KAISER FAM. FOUND. (Mar. 16, 2018), <https://www.kff.org/medicaid/fact-sheet/health-centers-in-puerto-rico-operational-status-after-hurricane-maria/> [<https://perma.cc/RJR3-TQMF>]; see also Jeremy Lybarger, *Mental Health In Puerto Rico*, MONITOR ON PSYCHOLOGY (May 2018), <https://www.apa.org/monitor/2018/05/puerto-rico> [<https://perma.cc/68YD-83EG>] (“[T]hree weeks after Maria, only 30 percent of hospitals could provide services, while 93.5 percent of the island lacked power, 48 percent lacked cellphone service and 43 percent lacked potable water.”); see also Robin Rudowitz & Julia Foutz, *Navigating Recovery: Health Care Financing and Delivery Systems in Puerto Rico and U.S. Virgin Islands*, KAISER FAM. FOUND. (Dec. 20, 2017), <https://www.kff.org/medicaid/issue-brief/navigating-recovery-health-care-financing-and-delivery-systems-in-puerto-rico-and-us-virgin-islands/> [<https://perma.cc/XL7C-R252>].

³⁰ Rebecca Spalding, *Puerto Rico Economists See Black Picture of Island’s Future*, BLOOMBERG (Nov. 16, 2017, 10:30 AM), <https://tinyurl.com/yajnzkdX> [<https://perma.cc/5C9V-86TZ>].

³¹ Puerto Ricans *can*, however, participate in and impact the outcome of presidential primaries. See Kenya Downs, *Puerto Rican Voter Surge in Florida Is No Surprise*, PBS NEWS HOUR (Nov. 8, 2016, 8:51 AM), <https://www.pbs.org/newshour/politics/is-puerto-ricans-movement-to-mainland-swaying-elections> [<https://perma.cc/R2MT-AG6R>].

³² *Id.* (Puerto Rico elects a resident commissioner to represent its interests in the House of Representatives, but this role does not allow for voting on the passage of Bills (even those affecting Puerto Rico) and the commissioner can vote only within those Committees of which he is a part.); see also *What is the Resident Commissioner*, WEBSITE OF U.S. CONGRESSWOMAN JENNIFER GONZÁLEZ-COLÓN, <https://gonzalez-colon.house.gov/about/what-resident-commissioner> [<https://perma.cc/FQ6W-EE7N>].

³³ Alexia Fernandez Campbell, *Puerto Rico’s Push for Statehood, Explained*, VOX (Sep. 24, 2018, 3:50 PM), <https://www.vox.com/policy-and-politics/2018/11/11/15782544/puerto-rico-pushes-for-statehood-explained> [<https://perma.cc/2WNX-4U8C>].

³⁴ See Valeria M. Pelet del Toro, *Beyond the Critique of Rights: The Puerto Rico Legal Project and Civil Rights Litigation in America’s Colony*, 128 YALE L.J. 792, 815 (2019) (“Puerto Rican political elites and law enforcement also used the island’s colonial relationship to the United States to quell dissent. Governor Muñoz Marín and the Puerto Rican

after Hurricane Maria, less than 2% of the population— represented by the Independence Party— was in favor of Puerto Rico’s independence from the U.S.³⁵ Elections in Puerto Rico “are interpreted as referendums on the island’s future relationship with the [U.S.]”.³⁶ Since 1967, Puerto Ricans have attempted to reach political consensus regarding statehood by referenda five times.³⁷ Aside from anti-statehood boycotts and protests over confusing ballot language, the outcomes of these referenda evidenced how the popular preference in favor of territorial status has shifted overwhelmingly toward statehood over the last twenty years.³⁸ In June 2017, with the pro-statehood party in power, Puerto Ricans had their fifth and most recent referendum, which culminated in 97% of respondents voting to join the U.S. as a state—the largest number in the history of the island.³⁹ Although the opposition party challenged the results contending that fewer than a quarter of registered voters voted and raising questions about the vote’s legitimacy, it is not clear how much of the registered non-voting population would have been needed to dramatically change the outcome.⁴⁰

Former Republican and Democrat U.S. presidents alike, from Ronald Reagan to Barack Obama and George W. Bush have favored statehood for Puerto Rico. But the Trump Administration is not upholding America’s longstanding promise to let Puerto Ricans make decisions with respect to statehood for themselves, despite statements to the contrary made during the presidential campaign.⁴¹ An official process to admit a new U.S. state does not yet exist, and efforts by American legislators in the form of hundreds of bills have failed to create such a process. Puerto Rico came closest to statehood in 1990, when the House approved a pro-statehood bill that never made it onto the Senate floor.⁴² If Puerto Rico were to become a state today, five House seats currently held by

legislature approved Public Law 53, known as ‘*La Ley de la Mordaza*’ (‘the Gag Law’), in 1948, which made it a felony to advocate the overthrowing of the insular government. The Gag Law criminalized speaking in favor of Puerto Rican independence, organizing groups or assemblies of people for that purpose, owning or displaying a Puerto Rican flag, and even singing ‘*La Borinqueña*,’ the island’s national anthem.”) See also JESSICA M. MULLIGAN, UNMANAGEABLE CARE: AN ETHNOGRAPHY OF HEALTH CARE PRIVATIZATION IN PUERTO RICO 49 (New York University Press, New York, 2014).

³⁵ See MULLIGAN, *supra* note 34.

³⁶ MULLIGAN, *supra* note 34, at 25.

³⁷ Charles R. Venator-Santiago, *Puerto Rico Votes on Statehood—Fifth Time’s the Charm*, THE CONVERSATION (June 8, 2017), <https://theconversation.com/puerto-rico-votes-on-statehood-fifth-times-the-charm-75975> [<https://perma.cc/Y9LL-HCM2>].

³⁸ Danica Coto, *Puerto Rico to Hold U.S. Statehood Referendum After Struggling to Obtain Pandemic and Natural Disaster Relief*, N.Y. TIMES (May 16, 2020), <https://time.com/5837906/puerto-rico-referendum-us-statehood/> [<https://perma.cc/Z7CZ-7YGZ>]. Gov. Vázquez announced that “she will be holding a “nonbinding referendum in November to decide whether Puerto Rico should become a U.S. state. . . . For the first time in the island’s history, the referendum will ask a single, simple question: Should Puerto Rico be immediately admitted as a U.S. state?”

³⁹ Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/us/puerto-ricans-vote-on-the-question-of-statehood.html> [<https://perma.cc/WB5E-SNN6>].

⁴⁰ Coto, *supra* note 38.

⁴¹ Alexia Fernández Campbell, *Puerto Rico’s Push for Statehood, Explained*, VOX (Sept. 24, 2018), <https://www.vox.com/policy-and-politics/2018/1/11/15782544/puerto-rico-pushes-for-statehood-explained> [<https://perma.cc/K98Z-GG4Q>].

⁴² Martin Tolchin, *Senate Panel Derails Bill on Puerto Rico Referendum*, N.Y. TIMES (Feb. 28, 1991), <https://www.nytimes.com/1991/02/28/us/senate-panel-derails-bill-on-puerto-rico-referendum.html> [<https://perma.cc/72RY-4KGGK>].

other states would need to be reassigned to Puerto Rico, while in the Senate, Puerto Rico would require two new seats.⁴³ Some members of the Senate thus argued that granting Puerto Rico statehood could reduce some of the racial imbalance of the Senate; however, this argument has yet persuaded American legislators to approve Puerto Rico's statehood.⁴⁴ At the same time, granting Puerto Ricans electoral power might weaken Republican power, as mainland Puerto Ricans have historically favored Democrats (although some political observers attribute the recent 2018 victory of Republican Senator Rick Scott in Florida to Puerto Rican voters living on the mainland).⁴⁵

A survey conducted in September 2018 by *The Washington Post* and the Henry J. Kaiser Family Foundation (also known as the "Kaiser Family Foundation") indicates that there is still no consensus regarding statehood among Puerto Rican residents, though they still remain opposed to commonwealth status.⁴⁶ Regardless, Hurricane Maria and Puerto Rico's financial debt crisis have made the question of statehood an urgent matter for the island. The survey revealed that Puerto Ricans blame the island's \$120 billion in public debt and pension obligations—enough to constitute bankruptcy for any mainland state—on Puerto Rico's political exclusion from U.S. politics. The majority of Puerto Rico's residents agree that the federal government would have responded "differently" to the island's hurricane and attempts at financial recovery if Puerto Rico were a state. The widely attended July 2019 protests in Puerto Rico prompted the first resignation of an elected governor in the island's history and revealed people's discomfort with New Progressive Party leaders.⁴⁷ Puerto Ricans demanded Governor Rosselló's resignation as a result of federal corruption charges indicting two top former members of his administration, which unmasked the governor's abuse of power.⁴⁸ The two officials, the former Education Secretary and the former Executive Director of the Puerto Rico Health Insurance Administration, were both accused of "unlawfully steering about \$15.5 million in federal contracts to politically connected consultants."⁴⁹ The graft scandals were relevant enough to force Puerto Rico's secretary of state—next in line to succeed the governor—and the governor's representative to the PROMESA Board to step down from office as a "moral obligation." While Governor Rosselló's political party led the movement in favor of Puerto

⁴³ Coto, *supra* note 38.

⁴⁴ David Leonhardt, *The Senate's White-State Bonus*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/opinion/senate-whites-dc-puerto-rico-statehood.html> [<https://perma.cc/LM9C-VCNA>].

⁴⁵ See, e.g., Reid Wilson, *Puerto Ricans May Have Elected Rick Scott and Other Midterm Surprises*, THE HILL (Nov. 24, 2018, 5:49 PM), <https://thehill.com/homenews/campaign/417918-puerto-ricans-may-have-elected-rick-scott-and-other-midterm-surprises> [<https://perma.cc/CVV7-AR9L>].

⁴⁶ Bianca DeJulio, Cailey Munana & Mollyann Brodie, *Views and Experiences of Puerto Ricans One Year After Hurricane Maria*, KAISER FAM. FOUND., <http://files.kff.org/attachment/Report-Views-and-Experiences-of-Puerto-Ricans-One-Year-After-Hurricane-Maria> [<https://perma.cc/39TX-RZN5>]; see also Scott Clement, Katie Zezima & Emily Guskin, *Puerto Rico After Maria: Residents see a failure at all levels of government*, WASH. POST. (Sept. 12, 2018), <https://www.washingtonpost.com/news/national/wp/2018/09/12/feature/residents-see-a-failure-at-all-levels-of-government/> [<https://perma.cc/6ZMA-EZ2A>].

⁴⁷ Patricia Mazzei & Frances Robles, *Puerto Rico's Next Political Crisis: Who Succeeds the Governor*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/puerto-rico-rossello-vazquez-succession.html> [<https://perma.cc/L5T2-RLF3>].

⁴⁸ Simon Romero et al., *15 Days of Fury: How Puerto Rico's Government Collapsed*, N.Y. TIMES (July 27, 2019), <https://www.nytimes.com/2019/07/27/us/puerto-rico-protests-timeline.html> [<https://perma.cc/XN7Z-H3AD>].

⁴⁹ *Id.*

Rico's statehood, the popular demands for Rosselló's resignation did not affect people's preference for statehood. Protests were not about statehood or independence from the United States, but against Governor Rosselló directly.⁵⁰

Hurricane Maria exposed a structural economic catastrophe equivalent to a failed state along with a political crisis of both major political parties.⁵¹ By unseating the governor, "people's assemblies" demanded "another Puerto Rico"—one of "self-management."⁵² The continuous struggles for federal relief, particularly after Maria, have boosted the growing disillusion of Puerto Ricans with their territorial status. In November 2020, a new referendum will take place to decide whether Puerto Rico should become a U.S. state "immediately", amidst a difficult gubernatorial election for the ruling New Progressive Party.⁵³

C. Economy

By some accounts, Puerto Rico's economy has been in a state of depression since 2006.⁵⁴ According to the Government Development Bank's Economic Activity Index, the Puerto Rican economy began to shrink in 2006 (−2.1%) and has remained in recession since, with a severe decline in 2009 (−6.4%) and further contraction in 2010 (−3.7%).⁵⁵ Almost half of the Puerto Rican population live in poverty (that is, at or below the federal poverty level – FPL), with a poverty rate three times higher than that of the rest of the U.S. The population poverty level has remained steady since 2006. Further, "poverty is greater among female heads of household, people under 18 years old, and those living in rural areas."⁵⁶

⁵⁰ *Id.* See also, Patricia Mazzei & Frances Robles, *Puerto Rico Governor Misread Anger Brewing Against Him* N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/us/puerto-rico-rossello-profile.html> [<https://perma.cc/827T-SXUK>] (explaining that the Governor lost support from the public, his political party's leaders and many of his own aides. He was left almost completely isolated and alone).

⁵¹ Patricia Mazzei & Alejandra Rosa, *Hurricane Maria, 2 Years Later: "We Want Another Puerto Rico"*, N.Y. TIMES (Sept. 20, 2019), <https://www.nytimes.com/2019/09/20/us/puerto-rico-hurricane-maria.html> [<https://perma.cc/J3SY-62G5>].

⁵² *Id.*

⁵³ Coto, *supra* note 38. See also Jim Wyss, *Puerto Rico Will Hold Non-Binding Statehood Vote on Nov. 3*, BLOOMBERG (May 16, 2020), <https://www.bloomberg.com/news/articles/2020-05-16/puerto-rico-will-hold-non-binding-statehood-vote-on-nov-3> [<https://perma.cc/3NQA-JDY8>].

⁵⁴ *Health in the Americas, Puerto Rico*, PAN AMERICAN HEALTH ORGANIZATION 213 (2017) [hereinafter 2017 PAHO REPORT], <https://www.paho.org/salud-en-las-americas-2017/wp-content/uploads/2017/09/Print-Version-English.pdf> [<https://perma.cc/QZA8-6PRB>]. See also 2012 PAHO REPORT, *supra* note 15, at 537 (citing Alameda Lozada, ESTAMOS EN EL UMBRAL DE UNA RECUPERACIÓN ECONÓMICA? (University of Puerto Rico, 2011) (explaining that even though the term "recession" was used to describe Puerto Rico's fiscal situation between 2006 and 2008, the prolonged downturn through the 2010s has led to relabeling this period as a depression)); Laura Sullivan, *How Puerto Rico's Debt Created a Perfect Storm Before the Storm*, National Public Radio (May 2, 2018, 7:10 AM), <https://www.npr.org/2018/05/02/607032585/how-puerto-ricos-debt-created-a-perfect-storm-before-the-storm> [<https://perma.cc/UYS7-WWZW>].

⁵⁵ INTERNATIONAL BUSINESS PUBLICATIONS, CARIBBEAN COUNTRIES HEALTH CARE SYSTEM PROFILES HANDBOOK: STRATEGIC INFORMATION, DEVELOPMENT AND OPPORTUNITIES 212 (2015).

⁵⁶ *Id.*; 2012 PAHO REPORT, *supra* note 15, at 538 ("According to 2010 data, poverty is greater among female heads of household (57.7%) and people under age 18 (56.3%). Similarly, people who live in rural areas experience a higher level of poverty (56%) than those who live in urban settings (44%)"). 2017 PAHO REPORT does not include data on poverty

The unemployment rate in Puerto Rico is more than twice as high as that in the mainland, with a substantial share of its labor force in the service industry (government-employment based). Dependence on government-run employment greatly determines the size of public health care coverage that the island's population needs. Puerto Rico has a low rate of uninsured residents; however, this is mainly because the majority of the total population rely on government-funded health care insurance in the form of Medicaid/CHIP and Medicare (though being "insured" does not necessarily furnish actual access to health care).⁵⁷ One in two Puerto Ricans are enrolled in Medicaid—the public program that provides health coverage to eligible low-income adults, children, pregnant women, elderly adults and people with disabilities—a rate almost twice as high as that of the mainland U.S.⁵⁸ High enrollment in Medicaid is not surprising in light of Puerto Rico's poverty rate.⁵⁹ In addition, the unemployment rate is high, and the private labor force population considerably small, which also prevents Puerto Ricans from enjoying employer-sponsored coverage as many on the mainland do. The median household income in Puerto Rico is only a third of the national average—yet enough to classify Puerto Rico's economy as "high-income" according to the World Bank.⁶⁰

Puerto Ricans living on the island do not pay federal income taxes. Similarly, U.S. companies operating there have benefitted from an income tax exemption since 1983. Specifically, Section 936 of the Tax Reform Act of 1976 treated Puerto Rico as a foreign jurisdiction for purposes of the U.S. Tax Code until 1996, when President Clinton phased it out. The tax exemption helped stateside corporate investors gain considerable tax advantages over ten years, with the promise of considerable investment in the island's economy looming overhead.⁶¹ Manufacturing accounted for 50% of Puerto Rico's GDP in 2017, with over 25% corresponding to the pharmaceutical industry (including mostly U.S. companies).⁶² However, only 19% of the Puerto Rican labor force was

by gender, age, or urban and rural areas.

⁵⁷ *Puerto Rico: Fast Facts*, KAISER FAM. FOUND. (Oct. 2, 2017), <https://www.kff.org/disparities-policy/fact-sheet/puerto-rico-fast-facts/#footnote-238005-15> [<https://perma.cc/J4B4-ZM6S>].

⁵⁸ *Id.*

⁵⁹ See MEDICAID AND CHIP PAYMENT AND ACCESS COMMISSION, MANDATED REPORT – MEDICAID IN PUERTO RICO, 79 (2019), <https://www.macpac.gov/wp-content/uploads/2019/06/Mandated-Report-Medicaid-in-Puerto-Rico.pdf> [<https://perma.cc/3GYJ-VLLU>] (explaining that Puerto Rico provides Medicaid coverage through a wider public health insurance program previously known as "Mi Salud" and now known as "Vital.>").

⁶⁰ See *World Bank Country and Lending Groups*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> [<https://perma.cc/H4TK-9M49>].

⁶¹ U. S. GEN. ACCT. OFF., REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE, U.S. SENATE: TAX POLICY PUERTO RICO AND THE SECTION 936 TAX CREDIT, 2 (1993). According to this report, the tax revenue forgone by the U.S. government as a result of the Section 936 exemption totaled \$3.9 billion in fiscal year 1994.

⁶² Department of Economic Development and Commerce of Puerto Rico, Economic Development Plan 2018, Executive Summary, <https://www.ddec.pr.gov/wp-content/uploads/2018/12/PDEI.pdf> [<https://perma.cc/JJ3E-BYET>]. See also Statement from FDA Commissioner Scott Gottlieb, M.D. on FDA's continued assistance following the natural disaster in Puerto Rico, FDA News Release (Oct. 6, 2017), <https://www.fda.gov/news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-fdas-continued-assistance-following-natural-disaster>; Marina Pasquali, *Puerto Rico: Manufacturing Sector As Share of GDP 2010-2018*, STATISTA. (Dec. 11, 2019), <https://www.statista.com/statistics/1078535/manufacturing-industry-share-gdp-puerto-rico/#statisticContainer> [<https://perma.cc/U6WR-UW6V>]; Puerto Rico Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/rq.html> [<https://perma.cc/63TQ-5BQQ>]; Prototype Economic Statistics for Puerto Rico, 2012–2017, BEA19-53, (Oct. 15, 2019), <https://www.bea.gov/news/2019/prototype-economic-statistics-puerto-rico-2012-2017> [<https://perma.cc/N3FM-B49R>];

employed by the manufacturing sector.⁶³ Puerto Rico's status as a tax haven has bestowed direct, economic benefits upon stateside companies. Ironically, however, granting similar federal income tax exemptions to individuals living in Puerto Rico has been an argument for denying Puerto Ricans equal treatment under the laws.⁶⁴

Based on the fact that Puerto Ricans living on the island do not pay federal income taxes (although they do pay payroll taxes to fund Social Security and Medicare), the federal government provides them less social benefits than those received by the most impoverished U.S. states (though Puerto Rico is twice as poor). Americans, whether Puerto Rican or not, who choose to relocate or retire in Puerto Rico, or who choose Puerto Rico for purposes of temporarily relocating, could be denied healthcare and receive limited social benefits because of the unequal treatment of Puerto Ricans and the "second-class" citizenship status created over "Americans" residing on the island.⁶⁵

D. Health Care

The majority of the Puerto Rican population relies on government-funded health insurance coverage due to high poverty and unemployment rates. In contrast, with a higher income per capita, 60% of the health care coverage in the mainland is privately funded (employer-sponsored insurance or directly purchased), with only 20% of the population insured by Medicaid. Federal health care policies treat Puerto Rico as if it were a U.S. state when collecting taxes, yet still not when applying federal poverty standards and reimbursement rates or setting tax free zones for U.S. corporate investors residing on the island. Federal policies are significantly, and conveniently, blinded to social and economic differences between the island and the mainland, leading to greater disparities.

In 2014, Puerto Rico's annual health care spending was estimated at 26% of its gross national product. In contrast, the United States then spent about 18%—already the highest share spent by a developed country.⁶⁶ Today, neither Puerto Rico nor the U.S. has achieved optimal health

Marina Pasquali, *Puerto Rico: Services Sector Share of GDP 2005-2018*, STATISTA (Dec. 2, 2019), <https://www.statista.com/statistics/1073197/puerto-rico-services-sector-share-gdp/> [<https://perma.cc/K6U6-SRE7>]; Giovanna Garofalo, *COVID-19 Reinforces Need to Boost Pharmaceutical Industry in Puerto Rico*, THE WEEKLY JOURNAL (Mar. 19, 2020), https://www.theweeklyjournal.com/business/covid-19-reinforces-need-to-boost-pharmaceutical-industry-in-puerto-rico/article_f562d1e4-69fa-11ea-a6fd-5bb56b74e8c9.html [<https://perma.cc/D7AQ-P3QK>] ("According to the Puerto Rico Industrial Development Co. (Pridco), 12 of the world's top 20 pharmaceutical companies have a presence on the island, whether for manufacturing and product development or distribution. The 14 multinational and international research-based biopharmaceutical companies that comprise the Puerto Rico Pharmaceutical Industry Association (PIA) operate more than 20 facilities on the island. . . . According to the data provided by Lugo Montes [executive director of Industry University Research Center, Inc. (Induniv)], a third of the local tax revenue comes from this industry, which generates about 150,000 jobs on the island. Moreover, this industry represents more than 30 percent of Puerto Rico's gross domestic product (GDP) and 60 percent of all exports."). For information on pharmaceutical companies in Puerto Rico see <http://www.pridco.com/industries/Pages/Pharmaceutical.aspx> [<https://perma.cc/9XC5-8E69>].

⁶³ See Puerto Rico Factbook, *supra* note 62.

⁶⁴ See Section III-C.

⁶⁵ See *Puerto Rico and the Federal Income Tax*, PUERTO RICO REPORT (Jan. 4, 2019), <https://www.puertoricoreport.com/puerto-rico-and-federal-income-tax/#.Xj8E3jFKi00> [<https://perma.cc/FW5Q-KC36>] (Americans who travel to Puerto Rico have no special status, and could experience lack of health insurance coverage while in Puerto Rico since the island is treated as a jurisdiction "outside the U.S.").

⁶⁶ MULLIGAN, *supra* note 34, at 49.

care outcomes in spite of the heavy expenditure. Seventy-five percent of Puerto Rico's funding in 2014 came from local taxes, demanding heroic efforts from the Puerto Rican local government following economic shortages stemming from an over ten-year financial crisis, high unemployment and poverty rates, and a massive migration of Puerto Ricans to the mainland.⁶⁷ The delivery of health care in Puerto Rico is severely compromised by poor health infrastructure and a rapidly declining health care workforce. In 2014 and 2015, close to a combined nine hundred physicians left the island primarily for the mainland, reducing the number of critical care providers by nearly 36%.⁶⁸ The economic deficit conditions on the island made it hard to attract and retain doctors, a trend that began in the 1990s after public hospitals were privatized and doctors had to leave the island to finish their medical training at residency programs abroad.⁶⁹ As a result, Puerto Ricans have fewer physicians than ever before and long wait-times when accessing health care.⁷⁰ The Health Resources and Services Administration (HRSA) has deemed 72 of Puerto Rico's 78 municipalities as medically underserved areas.⁷¹

Almost half of Puerto Ricans rely on Medicaid to access to health care. It is funded by the states and the federal government, which pays a percentage (the Federal Medicaid Assistance Percentage, or "FMAP") of the program's expenditures based on actual costs and needs of each U.S. state.⁷² Puerto Rico's Medicaid financing, however, differs from that of a U.S. state in two meaningful ways. Firstly, federal funding for the Medicaid program in Puerto Rico is subject to a statutory FMAP cap (Table 1). In contrast to the poorest U.S. states where FMAP might cover up to 83% of the state's costs, Puerto Rico has a much lower FMAP, in spite of showing significantly greater needs.⁷³ As a result, Puerto Rico is responsible for paying a greater share of Medicaid costs than it would if it were a state.⁷⁴ Once each territory's federal funds cap is exhausted, the territory

⁶⁷ Meléndez & Hinojosa, *supra* note 19.

⁶⁸ See Heather Long, *Puerto Rico is Losing a Doctor a Day*, CNN BUSINESS (Apr. 16, 2016), <https://money.cnn.com/2016/04/13/investing/puerto-rico-debt-medicare/> [<https://perma.cc/JJP4-3ASU>]; Robin Respaut, *Why People Wait More Than a Year to See a Doctor in Puerto Rico*, REUTERS (Oct. 11, 2016), <https://www.reuters.com/investigates/special-report/usa-puertorico-healthcare/> [<https://perma.cc/M8SV-YT2B>].

⁶⁹ See Shir Lerman, *Que Sistema de Salud? Broken Health Care in Puerto Rico*, 38 MED. ANTHROPOLOGY 210, 211 (2019). Physicians in Puerto Rico are paid a fixed fee of US\$35 per consultation by insurance companies, before copays deductions, and taxes; see Author's Interview with Sally Priester, MD, Ashford Presbyterian Hospital, San Juan, Puerto Rico, and Director of the Puerto Rican Medical Association (June 8, 2018) [hereinafter, "Priester Interview"] (on file with the author).

⁷⁰ See Respaut, *supra* note 68. In 1990, Puerto Rico had 29 medical professionals available for its mentally disabled population (28% of Puerto Rican infants and children are mentally disabled).

⁷¹ See Data by Geography Puerto Rico, HEALTH RESOURCES & SERV. ADMIN. (Feb. 7, 2020), <https://data.hrsa.gov/hdw/Tools/DataByGeographyResults.aspx?geoTyp=State&geoCd=72> [<https://perma.cc/HPJ2-8TK4>].

⁷² Financial Management, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/finance/> [<https://perma.cc/BR4P-XWKX>]. See also Laura Snyder & Robin Rudowitz, *Medicaid Financing: How Does it Work and What are the Implications?*, KAISER FAM. FOUND. (May 20, 2015), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-how-does-it-work-and-what-are-the-implications/> [<https://perma.cc/R9YX-2RGG>].

⁷³ Rudowitz et al., *supra* note 7. Note, the poorest U.S. state is Mississippi, which is reimbursed for 75.7% of its Medicaid costs; see Federal Medical Assistance Percentage (FMAP) for Medicaid and Multiplier, KAISER FAM. FOUND., <https://www.kff.org/medicaid/state-indicator/federal-matching-rate-and-multiplier/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Multiplier%22,%22sort%22:%22desc%22%7D>. [<https://perma.cc/JAA7-4K89>].

⁷⁴ Anna Maria Barry-Jester, *If Puerto Rico Were a State, Its Health Care System Would Recover Faster from Maria*, FIVETHIRTYEIGHT (Oct. 9, 2017), <https://fivethirtyeight.com/features/if-puerto-rico-were-a-state-its-health-care->

no longer receives federal financial support for its Medicaid program during that fiscal year. Secondly, Puerto Rico's federal match rate is fixed, unlike in the U.S., where the statutory formula is adjusted annually, based on the states' relative per capita income.⁷⁵ If a U.S. state's poverty formula were applied in Puerto Rico, the island would presumably have 82% of its Medicaid costs covered.⁷⁶

Table 1 – Medicaid Federal Funding Cap

Federal Medicaid Rules	Puerto Rico	50 States and DC
Federal Matching Rate	Fixed at 55%	Ranges from 50-83%, based on state's per capita income
Federal Funding	Capped at \$357.8 million in FY 2018	Uncapped

Evidently, Medicaid programs operate differently in the territories, where annual funding caps limit coverage levels. Before the passage of the Patient Protection and Affordable Care Act (ACA), the FMAP cap was statutorily set at 50%—the lowest match allowable under Medicaid. The ACA increased the FMAP for territories to 55%. Still, territories' governments today must pay for the remaining 45% of Medicaid expenditures. Yet, the poorest U.S. states, like West Virginia and Mississippi, although only half as poor as Puerto Rico, have an FMAP cap set between 70 and 78%.⁷⁷ While the U.S. government uses the Federal Poverty Level to determine which states qualify for Medicaid, with the territories, the government uses different poverty standards, not even uniform across territories. The unique needs of each territory are not weighed to determine the applicable FMAP and, hence, the statutory cap fails to reflect important distinctions with respect to economic conditions and special health needs. Natural disasters, quite common in the U.S. territories, permanently increase the territories' demand for public health care coverage and, along with it, the need to fund the Medicaid federal matching share proportionally increases. The ACA increased Puerto Rico's Medicaid program funding through a \$6.4 billion allotment and its federal match rate from 50% to 55%, yet this was insufficient to meet the health care needs of the population.⁷⁸

Medicaid eligibility rules are another factor contributing to the inequality between the island and the mainland. Federal Medicaid mandatory eligibility norms are generally the same in

system-would-recover-faster-from-maria/ [https://perma.cc/653M-4XAN].

⁷⁵ Puerto Rico, CENTERS FOR MEDICARE AND MEDICAID SERVICES (CMS), <https://www.medicare.gov/medicaid/by-state/puerto-rico.html> [https://perma.cc/CL2J-D53K].

⁷⁶ Estimation according to Medicaid and CHIP Payment and Access Commission, based on 2016 medial annual income for Puerto Ricans was \$20,028 while in Mississippi—the poorest U.S. state—it was \$41,754 and across the U.S. is \$57,617. See Barry-Jester, *supra* note 74.

⁷⁷ Rosanna Torres, *Shortchanging the territories in Medicaid funding*, THE HILL (May 23, 2019, 12:25 PM), <https://thehill.com/blogs/congress-blog/healthcare/445235-shortchanging-the-territories-in-medicare-funding> [https://perma.cc/Y5HG-VCPP]. See also Glassman, *supra* note 23 (“The poverty rate in Puerto Rico decreased by 1.3 percentage points, from 44.4% in 2017 to 43.1% in 2018. However, poverty in Puerto Rico is still much higher than the U.S. national rate of 13.1% and is more than double the poverty rate of 19.7% in Mississippi, which had among the highest state poverty rates in 2018.”).

⁷⁸ *Puerto Rico: Medicaid, Fiscal Issues, and the Zika Challenge*, KAISER FAM. FOUND. (Sept. 27, 2016), <https://www.kff.org/medicaid/fact-sheet/puerto-rico-medicare-fiscal-issues-and-the-zika-challenge/> [https://perma.cc/9CNC-S9PZ].

Puerto Rico as they are in the U.S. However, the island is not obliged to follow U.S. federal poverty guidelines, which means that the income-eligibility levels for Puerto Rico's Medicaid program are based on a local poverty level that is established by the Commonwealth and approved by the federal Center for Medicare and Medicaid Services (CMS).⁷⁹ As a result, the population eligible for Medicaid coverage on the island is larger than it is in the states. Stated differently, federal legislation covers a greater percentage of the Puerto Rican population via Medicaid but does not provide them with additional funding—that crucial FMAP—as it does the poorest states in the mainland.

Likewise, another appalling disparate rule pertains to federal health care reimbursement. Medicare is reimbursed at lower rates in Puerto Rico.⁸⁰ Although Puerto Ricans pay the same Medicare tax as other fiscal contributors in the U.S., they receive only half of the Medicare federal reimbursement funds—blatant evidence of their treatment by the law as unequal citizens.

The Medicaid federal funding cap, eligibility requirements, and Medicare reimbursement rules are only some of the many other health care rules having a disparate impact on Puerto Rico.⁸¹

E. Epidemiology

Puerto Rico is not as racially diverse as the continental U.S., which, together with other demographic and economic determinants, causes some health conditions to be more prevalent than others and, by extension, the population to be overexposed to specific diseases.⁸² Puerto Ricans have higher rates of fair or poor health, diabetes, heart attacks and heart disease, depression, disability, low-birthweight infants, infant mortality and HIV than people in the U.S. overall.⁸³ As a more specific example, the Zika virus was a national health emergency in Puerto Rico, and was far

⁷⁹ ANNIE L. MACH, CONG. RESEARCH SERV., R44275, PUERTO RICO AND HEALTH CARE FINANCE: FAQs 23 (2016).

⁸⁰ See Rudowitz et al., *supra* note 7; see also Eli Richman, *Medicare Advantage enrollment soared in Puerto Rico. Now it's starving the island's healthcare system*, FIERCE HEALTHCARE (Aug. 8, 2018), <https://www.fiercehealthcare.com/payer/puerto-rico-s-medicare-advantage-participation-through-roof-but-program-s-low-reimbursement> [<https://perma.cc/6B6C-VVAA>].

⁸¹ No Disproportionate Share Hospital (DSH) payments, used in U.S. states to provide hospitals that service a high share of Medicaid and uninsured patients with supplemental payments, Enrollment in Medicare Part B (for out-of-pocket health costs) is not automatic for Puerto Ricans—and, as a result, individuals fail to enroll and remain uncovered or are subject to late-enrollment penalties. In contrast to U.S. states, U.S. territories do not have Medicare Savings Programs (MSP) to assist low-income individuals with a part of their out-of-pocket expenses for Medicare—so many cannot afford Medicare Part B. There are no applicable low-income subsidies for residents in U.S. territories, only a fixed amount of funding for each territory to pay Medicare's beneficiaries for drug prescriptions. See Rudowitz & Foutz, *supra* note 29.

⁸² Over 75% of Puerto Ricans identify themselves as “white” although much of the population is of African descent (the last census race options were “white”, “black”, “American Indian”, multiple options for Asian heritage, and an option to write something in). Many Puerto Ricans associate “black” with African-Americans from the mainland. By choosing “black,” they say they would be erasing their unique cultural identity and adhering to the negative image stemmed from the “lack of positive or affirming images of blackness” in the mainland. According to Prof. Loveman, however, the whiteness sentiment unfolds from “a broader societal project to appear whiter to the United States” and a history of people's race reclassification, from black to white, all the way back to the time when Puerto Rico was a Spanish colony (and perpetuated as a U.S. territory). See Natasha S. Alford, *Why Some Puerto Ricans Choose “White” on the Census*, N.Y. TIMES (Feb. 9, 2020), <https://www.nytimes.com/2020/02/09/us/puerto-rico-census-black-race.html> [<https://perma.cc/5Q37-Y4GP>].

⁸³ See Hall et al., *supra* note 12.

less of a crisis in the U.S.⁸⁴

The mortality rate for children under 5 years old was 8.7% in 2008, with the most frequent causes of death related to short gestation, low birthweight, congenital malformations, deformations and chromosomal abnormalities, and septicemia. Likewise, Puerto Rican children had the highest prevalence of asthma in the country (more than twice the national average in 2007),⁸⁵ according to the 2009 Asthma Surveillance Report). According to the 2012 PAHO Health in the Americas Report, 2010 data from the AIDS Surveillance Program of the Department of Health showed that 94.5% of the children under the age of 12 acquired AIDS infections by perinatal transmission.⁸⁶ The majority of the adolescents and adults living with HIV attributed the infection to intravenous drug use.

Mental health is also a significant factor for many Puerto Ricans, particularly at an early age. Children and adolescents between 10 and 14 years old face the risk of alcohol consumption (recent data showed that the probability of drinking by the age of 14 is 33.11%—a percentage that did not differ significantly by gender or social context).⁸⁷ Studies on high-risk behaviors among adolescents enrolled in public high schools and colleges already in 2005-2007 showed that the most significant mental health problems were alcohol (19.4%), attention deficit disorder (13.1%), and major depressive disorder (11.5%).⁸⁸ Specially after Hurricane Maria, Puerto Rican public school-based adolescents experienced significant disaster exposure and reported significant symptoms of posttraumatic stress disorder.⁸⁹ A 2017 study showed that high school students attempted suicide

⁸⁴ On August 12, 2016, the US Department of Health and Human Services declared the Zika outbreak in Puerto Rico to be a public health emergency. Julie Steenhuysen, *U.S. declares a Zika public health emergency in Puerto Rico*, REUTERS (Aug. 12, 2016), <https://www.reuters.com/article/us-health-zika-usa-idUSKCN10N2KA> [<https://perma.cc/Q6HM-8PED>].

⁸⁵ HELEN MARGELLOS-ANAST & MELISSA A. GUTIERREZ, PEDIATRIC ASTHMA IN BLACK AND LATINO CHICAGO COMMUNITIES: LOCAL LEVEL DATA DRIVES RESPONSE (Steven Whitman, et al. eds., Oxford University Press, 2011). See also Centers for Disease Control and Prevention (CDC), Clinical Growth Charts (2009), http://www.cdc.gov/growthcharts/clinical_charts.htm/ [<https://perma.cc/DNH9-QEQT>]; Danica Coto, *Puerto Rico Baffled by High Asthma Rate*, NBC NEWS (Dec. 27, 2010), http://www.nbcnews.com/id/40797298/ns/health-allergies_and_asthma/t/puerto-rico-baffled-high-asthma-rate/#.Xssuxi-ZNR0 [<https://perma.cc/62ME-VEVZ>]; Centers for Disease Control and Prevention (CDC), *Asthma - Most Recent Asthma Data* (2018), https://www.cdc.gov/asthma/most_recent_data_states.htm [<https://perma.cc/939E-QSN8>].

⁸⁶ See 2012 PAHO REPORT, *supra* note 15.

⁸⁷ María A. Ramos-Olagastí, Héctor R. Bird, Glorisa J. Canino & Cristiane S. Duarte, *Childhood Adversity and Early Initiation of Alcohol Use in Two Representative Samples of Puerto Rican Youth*, 46(1) J. YOUTH ADOLESC. 28, 37 (Jan. 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5639699/> [<https://perma.cc/AKK9-SCQ6>]. The study looks into the correlation between exposure to childhood adversity and social disadvantage, and early initiation of alcohol consumption (by the age of 14) among the Puerto Rican youth living in the metropolitan area of Puerto Rico, among other neighborhoods. See also Puerto Rico, Instituto de Estadísticas. *Consulta Juvenil VII 2005–2007*. San Juan: Puerto Rico Statistical Institute; 2007 (The risk of alcohol consumption in children and adolescents remained high in the last decade—in 2007, alcohol consumption was a main risk in children and adolescents between 10 and 14 years old—it accounted for 34.6% of all mental health risks); William W. Latimer, Vanessa Cecilia Rojas & Brent Edward Mancha, *Severity of Alcohol Use and Problem Behaviors Among School-Based Youths in Puerto Rico*, 23(5) REV. PANAM. SALUD PUBLICA 325, 325–332 (May 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2656917/> [<https://perma.cc/AMD2-ZBM9>].

⁸⁸ See Puerto Rico, Instituto de Estadísticas. *Consulta Juvenil VII 2005–2007*.

⁸⁹ Rosaura Orenge-Aguayo, Regan W. Stewart, & Michael A. de Arellano, *Disaster Exposure and Mental Health Among Puerto Rican Youths After Hurricane Maria*, JAMA NETWORK OPEN (Apr. 26, 2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2731679> [<https://perma.cc/MZ7U-ASLY>]. See also Maria

twice more in Puerto Rico than in the continental U.S.⁹⁰ Teenage pregnancy, a serious public health problem with several adverse effects on physical, mental and emotional health, is also commonplace on the island. According to the abovementioned 2008 data, 17.8% of births were from teenage mothers between 10 and 19 years old, of which 38.7% were 17 years old and younger.⁹¹ The same study pointed out that the most common, “risky” behavior among teenage mothers was alcohol consumption, with a prevalence of 56.2%, among other risks. According to 2010 census data, 52% of teenage mothers with alcohol disorders had some disability. Although the prevalence of disability increases with age, disability is present all across Puerto Rican population segments.

One of the fastest growing segments of the Puerto Rican population is the elderly or seniors—those aged 65 and older—who represent the 14.5% of the total population according to 2010 census data. According to data from the Behavioral Risk Factor Surveillance System, the three leading causes of death in this segment were heart attacks, cancer (the most popular being prostate, breast and colorectal cancer),⁹² and diabetes (basically due to high rates of obesity, with a prevalence increasing in adult population).⁹³ These are also the most popular chronic diseases accountable for mortality rates, according to the Puerto Rican Statistical Institute.⁹⁴

Perez, 253 *Puerto Ricans Committed Suicide in 2017*, NEWSWEEK (Feb. 8, 2018), <https://www.newsweek.com/puerto-rico-mental-health-hurricane-maria-us-798816> [<https://perma.cc/KSH6-FN3L>] (mental health and suicide rates in Puerto Rico after Maria).

⁹⁰ Office of Adolescent Health, *Puerto Rico Adolescent Mental Health Facts*, HEALTH AND HUMAN SERVICES (Nov. 14, 2018), <https://www.hhs.gov/ash/oah/facts-and-stats/national-and-state-data-sheets/adolescent-mental-health-fact-sheets/puerto-rico/index.html> [<https://perma.cc/8BC2-8S62>].

⁹¹ Puerto Rico, Departamento de Salud, División Madres, Niños y Adolescentes 2010–2011. San Juan: Department of Health 2011.

⁹² See Puerto Rico Secretariat for Health Promotion, *Puerto Rico Chronic Disease Action Plan 2014-2020*, <https://www.iccp-portal.org/sites/default/files/plans/Puerto%20Rico%20Chronic%20Disease%20Action%20Plan%20English.pdf> [<https://perma.cc/UK4U-PN3N>].

⁹³ *Id.*

⁹⁴ Puerto Rico, Instituto de Estadísticas. Nuevas Estadísticas de Mortalidad. San Juan: Puerto Rico Statistical Institute; 2010.

Table 2 - Indicators on Puerto Rico, compared to the 50 States and DC⁹⁵

	Puerto Rico	50 States and DC
Demographics (2015)		
Total Population (2015)	3,449,000	317,480,000
Percent Change Since 2006	-12%	+8%
U.S. Born Citizens	97%	86%
Over Age 65	18%	15%
Below Federal Poverty Line (FPL)	46%	15%
Unemployment	14%	5%
Health Coverage (2015)		
Medicaid/CHIP	48%	20%
Employer-Sponsored Insurance/Direct Purchase	35%	60%
Medicare or Military	11%	11%
Uninsured	6%	9%
Economics Statistics		
Median Household Income (2016)	\$20,078	\$57,617
Health Statistics		
Adults Reporting Fair/Poor General Health (2016)	34%	18%
Adults Reporting Diabetes (2016)	15%	11%
Adults Reporting Heart Attack or Heart Disease (2016)	11%	7%
Locally-Acquired Zika Virus Disease Cases (2016)	34,963	224
HIV Diagnosis Rate per 100,000 People (2015)	17.1	14.7
Infant Mortality Rate per 1,000 Live Births (2013)	7.1	6.0

II. HEALTH CARE: A STORY OF LEGAL TRANSPLANTS

The Puerto Rican healthcare system as it exists today is the result of blindly mapping neoliberal, American policies onto an otherwise active and dynamic social institution. The legal transplantation of the mainland model of health care into the island, contrasted with the “voluntary” adoption of certain aspects of that model in Latin American systems, has undoubtedly been shaped by the colonial relationship between the United States and Puerto Rico since the early twentieth century.⁹⁶ Since the U.S. annexed Puerto Rico as a territory in 1898, the latter’s health care system

⁹⁵ *Puerto Rico Fast Facts*, KAISER FAM. FOUND. (Oct. 2, 2017), https://www.kff.org/disparities-policy/fact-sheet/puerto-rico-fast-facts/#endnote_link_238005-3 [<https://perma.cc/6NZ2-Q7H8>].

⁹⁶ Jesse Roman, *The Puerto Rico Healthcare Crisis*, 12 ANN. AM. THORAC. SOC. 1760, 1761.

has undergone profound, tectonic shifts which have resulted in greater economic disparities between the island and the mainland, underfunded public health care programs, institutional corruption, and a considerable number of medical professionals leaving the island.

The story of Puerto Rico's health care can be divided into three main stages: colonialism, regionalization, and privatization.⁹⁷

During the U.S. *colonial* period, the public health care system was organized by municipal governments responsible for basic health care.⁹⁸ Since its days as a Spanish colony from 1493 until 1898, Puerto Rican municipalities wielded significant influence on medical matters, and Spanish regulations controlled the medical profession with rigid credential requirements.⁹⁹ Partly because of the Spanish colonial legacy, the island's population expected the U.S. government to provide free health care for the sick and poor in the early years of the colonial period¹⁰⁰ and that population did, at least initially, support American intervention on those grounds.¹⁰¹ But soon after the U.S. invasion, the era of the "Americanization" of the Puerto Rican health care system bred some opposition. The municipal system incorporated the Superior Board of Health, aimed at enforcing U.S. hygiene standards. American administrators misunderstood local conditions, and patients and medical practitioners resisted colonial intervention in health care.¹⁰² The U.S. colonial government considered Puerto Rican physicians and residents alike "unable to administer their own affairs."¹⁰³ In turn, the U.S. intervention created many dire health conditions, food shortages, and starvation for Puerto Ricans. Over the next three decades, federal legislation modified the health care system, supplementing the inherited municipal system financed and run by the colonial government with public clinics and insular facilities.¹⁰⁴

By the end of the 1940s, the U.S. allowed Puerto Ricans to elect their governor, ushering in the space for a new health care era to emerge. A more autonomous Puerto Rican government created a *regional* health care system. Primary and preventive care were delivered at local health care centers in municipalities, whereas secondary and tertiary care were provided at regional hospitals. In turn, the U.S. central government created a regional office within the Department of Health to oversee the regional program and enforce policies and standards for medical procedures.¹⁰⁵

The regional health care system was developed by the time a new Constitution in Puerto

⁹⁷ This Article will refer to three stages in the history of the Puerto Rican health care system, based on Jessica Mulligan's description of Puerto Rico's health care reform. See MULLIGAN, *supra* note 34, at 31–59.

⁹⁸ *Id.*

⁹⁹ SALVADOR ARANA SOTO, *HISTORIA DE LA MEDICINA PUERTORRIQUEÑA HASTA EL 1898 xix-xx* (Instituto Puertorriqueño de la Cultura, 1974).

¹⁰⁰ Roman, *supra* note 96, at 1761–62.

¹⁰¹ MULLIGAN, *supra* note 34, at 32.

¹⁰² Nicole E. Trujillo-Pagán, *Health Beyond Prescription: A Post-Colonial History of Puerto Rican Medicine at the Turn of the Twentieth Century*, 128, 139 (U. of Michigan, Dep't of Soc., 2004). This dissertation explores the effects of the agency of Puerto Ricans during the late-nineteenth and early-twentieth century colonialism on shaping medical institutions in Puerto Rico.

¹⁰³ MULLIGAN, *supra* note 34, at 35.

¹⁰⁴ In 1911, federal legislation created the Public Health Service. In 1912, the creation of the Institute of Tropical Medicine. In 1917, the Jones Act created a Department of Health. In 1933, the Public Health unit was created, and by 1938 similar units were established in every municipality. *Id.* at 36.

¹⁰⁵ *Id.* at 38–39.

Rico went into effect in July 1952. The Constitution formally changed the island's political status into an *Estado Libre Asociado* (the "Commonwealth"), and removed Puerto Rico from the United Nation's list of non-sovereign territories. During this era, the political agenda, directed by the local party *Partido Popular Demócrata* (Popular Democratic Party), centered on an export-based economy, limited restrictions on foreign capital, and an extensive welfare state that provided health care. Nevertheless, since the political conditions fell short of decolonization, the Puerto Rican government was prevented from designing a health care system of its own. Federal law superseded Puerto Rican law, Puerto Rico had no vote in the U.S. Congress, and Puerto Ricans could not vote to elect a U.S. President.

During the 1960s, U.S. Medicaid and Medicare public health care programs created even greater disparities between Puerto Rico and U.S. states. Disparities between Puerto Rico's public and private sector arose as the federal government contributed to the chronic underfunding of the public system by implementing federal funding caps. During the 1970s and 80s, the growth of a parallel private insurance market and private health care infrastructure for wealthy and middle-class people increased disparities between the private and public sectors, while doubling health care costs for both publicly and privately insured people.¹⁰⁶

The international community¹⁰⁷ and the Puerto Rican government considered the regional system a hallmark of progress and development—even though it received some initial opposition from the Puerto Rican Medical Association, which dubbed the system a "socialist" program.¹⁰⁸ By the 1990s, the regional system was seen by most as an outdated and inefficient model for health care. Although sympathetic to the regional system and in agreement with the ideal of universal coverage, many academics called for health to be managed in a more business-like fashion. They proposed the disintegration of the public and private health care system by enrolling the entire population in private health insurance plans that would better manage the risk created by the increasing health care costs outpacing inflation.¹⁰⁹ This discourse inspired the marketization of the health care system in the 1990s.¹¹⁰

In 1993, the underfunded public portion of the health care system was *privatized* by Law 72 and replaced by a managed care-based system (HMO) for the medically indigent, called "*La Reforma*" (The Reform), administered by private health insurance companies. *La Reforma* was aimed at eliminating the two-tier public-private system, controlling health costs, downsizing the health care bureaucracy and ensuring the delivery of high-quality health care regardless of ability to pay. However, it failed to control costs. The program turned out to be much more expensive than the regional health system, which placed a growing burden on the federal budget. Since 1968, Medicaid spending in Puerto Rico was capped by the federal government. As a result, since the creation of the Medicare and Medicaid health programs, the Puerto Rican government relied heavily on local taxes to cover health care costs—in spite of high unemployment rates, a labor force

¹⁰⁶ JOSÉ NINE CURT, *LA SALUD EN PUERTO RICO* 81 (1972).

¹⁰⁷ By some accounts, the rest of the world saw the Puerto Rico system as "a 'symbolic showcase' of U.S. developmental policies," and a model to be emulated in the developing world. See RAMÓN GROSFUGUEL, *COLONIAL SUBJECTS: PUERTO RICANS IN A GLOBAL PERSPECTIVE 2* (Berkeley: University of California Press, 2003); MULLIGAN, *supra* note 34, at 38.

¹⁰⁸ MULLIGAN, *supra* note 34, at 40.

¹⁰⁹ In 1972, the Dean of the School of Public Health of the University of Puerto Rico, Dr. José Nine Curt, advocated in favor of reforming the regional system in order to maximize scarce resources. *Id.* at 41–42.

¹¹⁰ *Id.* at 43.

migration to the continental U.S., and a staggering debt crisis. The imbalance between Puerto Rico and U.S. states with a high proportion of Medicaid beneficiaries was (and still is) enormous. Puerto Rico's health care budget is funded 15% by the federal government, 75% by local taxes, 10% by municipalities.¹¹¹ In 2005, Puerto Rico spent 26% of its gross national product on health care, compared to the 13% spent in the continental U.S.

With *La Reforma*'s "tarjeta de Gobierno" or "tarjeta de Rosselló," the poor no longer had to use a health system separate from the middle class and wealthy since they were incorporated into the private health care system. The newly insured, under *La Reforma*, ultimately sensed that they were being integrated into a system which they knew had formerly excluded them.¹¹² The positive sentiment brought about by this newfound inclusion made them believe that the quality of care was somehow better in the private market, with private insurance coming from a private company. However, the reform sewed enormous economic class division into the fabric of Puerto Rico, and contributed to greater disparities between the professional classes and the poor.¹¹³ The elimination of the regional system's two-tiered framework generated some prejudice against *La Reforma* patients. Health care providers, as well as middle class-patients—, reacted negatively to the presence of *La Reforma* patients as they overcrowded the private system. An unfulfilled increased service demand forced many people to switch over to a new primary care physician outside *La Reforma*.¹¹⁴ Furthermore, medical professionals and health facilities (which included sold off public facilities) were not obligated to take in *La Reforma* patients. Finally, *La Reforma* introduced stricter eligibility criteria that not all the poor population were able to meet. As a result, *La Reforma* failed to make health care universal in the island. Although a well-intentioned program, *La Reforma* unpredictably became a marker of relative privilege and created an uninsured population for the first time in Puerto Rico's history.¹¹⁵

Finally, medical education was transformed with the privatization of the health care system and public hospitals. Such privatization eliminated many medical training opportunities, since the priority no longer was education but service delivery. As a result, privatization disarticulated the connection and balance between training, treatment, and research. With the implementation of *La Reforma*, the number of residents and interns decreased by 68%.¹¹⁶ Many medical students left the island to find residency programs, while doctors left the island in search of a higher quality of life.

La Reforma—named *Mi Salud* in 2010—seems to be an irreversible phenomenon. Because political choices highly impact long-run policy outcomes, the government could not dismantle the *Mi Salud* program and take away insurance cards from the poor. The privatization of the health care system was an initiative of the statehood-supporting New Progressive Party to contest the regional health care system advanced by the Popular Democratic Party, and a strategy tied to the political status of the island. However, *Mi Salud* failed by creating further disparities among Puerto Ricans (and with it, the political promise of the New Progressive Party).¹¹⁷

The colonial, regional, and privatized health care models followed the U.S. continental

¹¹¹ *Id.* at 49.

¹¹² MULLIGAN, *supra* note 34, at 51.

¹¹³ *Id.* at 53.

¹¹⁴ *Id.* at 54.

¹¹⁵ *Id.* at 46–48.

¹¹⁶ According to reports in the major daily newspaper *El Nuevo Día*; see MULLIGAN, *supra* note 34, at 56–57.

¹¹⁷ See *supra* note 115 for disparities between Puerto Ricans.

healthcare institutional arrangements. The problem is that such transplanting has ignored the socioeconomic, geographic, and health conditions of the people of Puerto Rico. Therefore, the provision of care is not organized to satisfy the particular needs of Puerto Rico's population. As a result, the current Puerto Rican health care system notoriously reveals the disparate access of Puerto Ricans to health care. Moreover, the transplanting of the U.S. health care model to Puerto Rico may have the long-term effect of locking Puerto Rico into a market model that shares the same problems as that of the mainland (growing inequality, health disparities, institutional corruption, and rising health care spending), while differing in terms of poverty and the economic capability to access. The regular struggles of the continental U.S. health care system are clearly exacerbated by Puerto Rico's social and financial distresses: higher poverty rates, debt crisis, underfunding, and a crisis in medical resources, including education, physicians and infrastructure.¹¹⁸

One of the mainland's especially controversial health care features is the way patients pay for health care. The U.S. health care system is based on a fee-for-service payment model, where doctors have an incentive to maximize activity to maximize their profits. Because the fee-for-service-based payment model is organized to pay medical providers for what they do, and not for what they accomplish, the model confers doctors little or no incentive to improve the *quality* of their medical services or to prevent errors. This continental medical payment model has been transferred and embedded onto the Puerto Rican health care system. As in many states, Medicaid health care services—acute, primary, specialty, and behavioral—are delivered in Puerto Rico by managed care organizations (MCOs), through a managed care delivery system. However, in contrast to U.S. states, Medicaid beneficiaries in Puerto Rico do not have the option to get medical services other than through managed care plans—Medicaid in Puerto Rico is 100% managed care, and has been like that for more than twenty five years now.¹¹⁹ Medicaid beneficiaries represent 45% of the Puerto Rican population—the largest Medicaid beneficiary population in the U.S. Therefore, service payment plans are significantly relevant to guarantee continuity in the delivery of care, particularly when it affects the low-income population.¹²⁰

MCOs are reimbursed for primary care with capitated payments, whereas specialty care with fees-for-service payments.¹²¹ Both reimbursement plan payment rates are significantly lower than those in the states, a condition that likely contributes to creating disparities in the provision of

¹¹⁸ MULLIGAN, *supra* note 34, at 58–9.

¹¹⁹ See Puerto Rico–Medicaid Overview, <https://www.medicaid.gov/state-overviews/puerto-rico.html> [<https://perma.cc/3SJL-EL9M>]. See also Judith Solomon, *Puerto Rico's Medicaid Program Needs an Ongoing Commitment of Federal Funds*, CENTER ON BUDGET AND POLICY PRIORITIES (Apr. 22, 2019), <https://www.cbpp.org/research/health/puerto-ricos-medicaid-program-needs-an-ongoing-commitment-of-federal-funds> [<https://perma.cc/7ZZ7-9LVT>] (“Five managed care companies provide all Medicaid services in Puerto Rico, and they do so throughout the island, a significant change from before 2018 when each managed care plan was assigned a specific region”); Puerto Rico's Medicaid Managed Care Profile, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/delivery-systems/managed-care/downloads/puerto-rico-mcp.pdf> [<https://perma.cc/8MS6-3GMC>] (“Since 1994, Puerto Rico has mandated enrollment of most Medicaid beneficiaries, other income-eligible populations, and some government employees in managed care.”).

¹²⁰ See *supra* note 56. See also Table 2.

¹²¹ See Puerto Rico's Medicaid Managed Care Profile, *supra* note 119. Just like other U.S. states, Puerto Rico needs to report Healthcare Effectiveness Data and Information Set (HEDIS) measures, and provider and beneficiary satisfaction measures. In addition, Puerto Rico has a quality incentive program or “retention fund” to withhold 5% of the medical contractor's fee until certain performance indicators are satisfied.

health care, not to mention a marked shortage of health care providers.¹²² As low reimbursement rates have pushed insurers to keep providers' payments low, *Mi Salud* beneficiaries speculate that physician groups refuse to serve them, potentially by reducing the size of the physician network or increasing long wait times for specialized care.¹²³ Payment rates to physicians are extremely low—as low as \$10 per visit—while prescription drugs, medical equipment, and other medical non-labor costs are fixed.¹²⁴ The average annual earnings of family medicine physicians in Puerto Rico is \$91,810, compared to the national average estimate of \$213,270.¹²⁵ Low payment rates and disparities in earnings has contributed to “an ongoing exodus of younger doctors” leaving the island “an older, shrinking physician workforce” that will eventually retire.¹²⁶ Ironically, even though a fee-for-service payment model is prone to a high volume of care (as well as profit maximization), when the model is replicated in low-income populations, it is accountable for multiplying disparities in and limiting access to health care. With an increasing number of physicians leaving the island for better compensation, the fee-for-service model poses unnoticed, additional threats to Puerto Rico's health care as the model risks a large migration of young and specialized doctors to the mainland.¹²⁷ The fee-for-service model in Puerto Rico has strangled the medical profession, draining the island of young, talented health care providers, and proved yet again that medical “heroism (. . .) has nothing to do with remuneration.”¹²⁸

¹²² See Solomon, *supra* note 119.

¹²³ Krista Perreira, Rebeca Peters, Nicole Lallemand & Stephen Zuckerman, *Puerto Rico Health Care Infrastructure Assessment, Site Visit Report*, URBAN INSTITUTE 9 (Jan. 2017), https://www.urban.org/sites/default/files/publication/87011/2001050-puerto-rico-health-care-infrastructure-assessment-site-visit-report_1.pdf [<https://perma.cc/HF6T-KWNY>].

¹²⁴ See Solomon, *supra* note 119.

¹²⁵ Bureau of Labor Statistics, Occupational Employment Statistics (data for May 2019), https://www.bls.gov/oes/current/oes_nat.htm#29-0000 [<https://perma.cc/2YGA-KD5D>].

¹²⁶ See Solomon, *supra* note 119 (“Only 4 percent of doctors in Puerto Rico are 35 years old or younger, compared to 24 percent in the states, according to data presented to MACPAC, which leaves the island at risk of further loss of physicians as older doctors retire.”). Referring to the MACPAC December 2018 Meeting Transcript, at 268. See *supra* note 119.

¹²⁷ Associated Press, *Patients Left in Limbo as More Doctors Flee Puerto Rico*, MOD. HEALTHCARE (Oct. 27, 2016), <https://www.modernhealthcare.com/article/20161027/NEWS/310279995/patients-left-in-limbo-as-more-doctors-flee-puerto-rico> [<https://perma.cc/YPD8-K32K>]. See also Greg Allen, *SOS: Puerto Rico is Losing Doctors, Leaving Patients Stranded*, NPR (Mar. 12, 2016), <https://www.npr.org/sections/health-shots/2016/03/12/469974138/sos-puerto-rico-is-losing-doctors-leaving-patients-stranded> [<https://perma.cc/Z6KQ-URJC>].

¹²⁸ *Id.* See also Daniel Horn, *The Pandemic Could Put Your Doctor Out of Business*, WASH. POST (Apr. 24, 2020), <https://www.washingtonpost.com/outlook/2020/04/24/pandemic-could-put-your-doctor-out-of-business/?arc404=true> [<https://perma.cc/TDL7-BKXT>]. The article criticizes the fee-for-service payment model amidst the Covid-19 pandemic. It addresses the labor risk the model poses on health professionals, specialists, and family medicine physicians who have seen their high volume of services plummet, experienced layoffs, or witnessed how many specialties are rapidly shrinking. The fee-for-service model might likely result in another unintended medical exodus unless the payment model changes or services are soon restored to pre-pandemic times. Or, until medical professionals in the mainland resist a failed payment model as Puerto Rican doctors do.

guarantee access to health care).¹³⁶ Health care is a privilege, not a right, available to those who overcome economic inequalities and significant asymmetrical information.

Despite it being the highest health care expenditure per capita in the world, still people claim health care costs are out of proportion with respect to the quality of service and treatment they receive.¹³⁷ The U.S. government's goal is to expand medical care access, but also control its costs.¹³⁸ A study carried out by affiliates of the RAND Corporation in 2011 estimated that potential sources of wasteful health care spending totaled between 21% and 47% of total health expenditures that year—startling numbers in light of the annual health care expenditures mentioned above.¹³⁹ The potential sources of wasteful health care spending included pricing failure, misguided or inefficient government rules, health care delivery failures, over-treatment, and health care coordination failures.¹⁴⁰ The study showed that the U.S. government consistently overlooks wasteful health care spending when it could otherwise be designing structural changes to offset costs and lower its own expenditures.¹⁴¹

The most expensive health care system in the world has shaped Puerto Rico's health care institutions and resisted to adapt to Puerto Rico's context. The blind legal transplant magnified the pernicious aspects of the mainland's health care model, condemning the island's population to inaccessible health care, thus endangering the health and lives of Puerto Ricans.¹⁴² To begin with, anyone who would venture that the United States could simply superimpose its general health care model upon the island must first consider its recent natural disasters. After Hurricane Maria in 2017, Puerto Rican hospitals experienced medicine shortages amid unsustainable numbers of patients.¹⁴³ For almost eleven months, the island could not fully restore the electricity service and some business and homes had to rely upon generators.¹⁴⁴ Six months after the hurricane, the Kaiser Family Foundation published a report detailing the extraordinary challenges that Puerto Ricans were still facing. Given slow and insufficient recovery efforts, the report prognosticated that the island would not recover for many years.¹⁴⁵ According to the report, 31% of the Puerto Rican population still

¹³⁶ *Health Insurance Coverage of the Total Population in 2016*, KAISER FAM. FOUND. (2020), <https://www.kff.org/other/state-indicator/total-population/?currentTimeframe=2&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/A74F-U35Y>].

¹³⁷ See BRADLEY & TAYLOR, *supra* note 133. The “American health care paradox” refers to the idea that U.S. citizens spend more and still get less when it comes to health care.

¹³⁸ HHS strategic goals, available at <https://www.hhs.gov/about/strategic-plan/strategic-goal-1/index.html>.

¹³⁹ Donald M. Berwick & Andrew D. Hackbarth, *Eliminating Waste in US Health Care*, 307 JAMA 1513, 1514 (2012).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1515–1516.

¹⁴² See Introduction for reference to the term “blind legal transplant.”

¹⁴³ Josh Michaud & Jennifer Kates, *Public Health in Puerto Rico After Hurricane Maria*, KAISER FAM. FOUND. (Nov. 17, 2017), <https://www.kff.org/other/issue-brief/public-health-in-puerto-rico-after-hurricane-maria/> [<https://perma.cc/VZ5D-HG84>].

¹⁴⁴ Frances Robles, *Puerto Rico Spent 11 Months Turning the Power Back On. They Finally Got To Her*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/us/puerto-rico-electricity-power.html> [<https://perma.cc/8ZGY-9997>]. See also Congressional Research Service, *CRS Report R45263. Puerto Rico: Status of Electric Power Recovery* (July 10, 2018), <https://crsreports.congress.gov/product/pdf/R/R45263> [<https://perma.cc/8VQR-YCMA>].

¹⁴⁵ Bianca DiJulio, Cailey Munana, & Mollyann Brodie, *Views and Experiences of Puerto Ricans. One Year*

needed help with repairing damages to their homes.¹⁴⁶ The impacts of the hurricanes were ubiquitous, with over 83% of the Puerto Rican population affected by prolonged power outages, employment loss, property destruction, insanitary conditions, and health problems.¹⁴⁷ Likewise, the unprecedented challenges impacted the mental health of Puerto Ricans—at least 22% of Puerto Ricans reported that they needed mental health services after the hurricane.¹⁴⁸

After Hurricane Maria, there were serious concerns about how health care providers would spearhead recovery in places where diesel fuel was scarce and communication almost nonexistent.¹⁴⁹ Yet concerns went beyond merely restoring power and communication channels in the wake of “the largest blackout in American history.”¹⁵⁰ Nonetheless, the fact that Puerto Rico was already facing several financial challenges *before* the hurricane struck made rebuilding even more difficult. With an already outflow of labor force and lowered tax contributions, the natural disasters also halted medical manufacturing (vital drugs, medical devices, and medical supplies) in the island—which represents over 25% of the island’s GDP.¹⁵¹ Many medical factories ran at minimal levels of production.¹⁵² The production shortage in the island impacted supply in the mainland as about 80% of medical drugs made in the island are consumed in the U.S.—a production that accounts for nearly 10% of all pharmaceuticals consumed in the U.S.¹⁵³ Certainly, medical production in the island illustrates how “Puerto Rico is vital to the health and wellbeing of all Americans.”¹⁵⁴ While medical providers in the mainland were forced to look elsewhere for drug alternatives and educate medical professionals on new procedures, pharmacists assured the shortage did not affect or postpone patient care—leastwise in the mainland.¹⁵⁵

Although at first sight Puerto Rico’s health care crisis would appear to draw from financial distress, the painful legal transplants ongoing for over a century and rationing policies implemented to respond to Puerto Rico’s debt crisis suggest having played a critical role. Because Puerto Rico is not a U.S. state, it receives much less help from the federal government, while its political status as a U.S. territory inhibits the local government’s flexibility in responding to crises.¹⁵⁶ Because Puerto

After Hurricane Maria, KAISER FAM. FOUND. 21 (2018) (documenting Puerto Rican views that more resources are necessary for Hurricane Maria recovery efforts).

¹⁴⁶ *Id.*

¹⁴⁷ See Clement et al., *supra* note 46.

¹⁴⁸ See DiJulio et al., *supra* note 145, at 15.

¹⁴⁹ See Barry-Jester, *supra* note 74.

¹⁵⁰ Peter Marsters & Trevor Houser, *America’s Biggest Blackout*, RHODIUM GROUP (Oct. 26, 2017), <http://rhg.com/notes/americas-biggest-blackout> [<https://perma.cc/G3TE-H9WP>].

¹⁵¹ Katie Thomas, *U.S. Hospitals Wrestle with Shortages of Drug Supplies Made in Puerto Rico*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/health/puerto-rico-hurricane-maria-drug-shortage.html> [<https://perma.cc/RK44-96H2>]. See also Statement from FDA Commissioner Scott Gottlieb, M.D., *supra* note 62.

¹⁵² *Id.*

¹⁵³ See Statement from FDA Commissioner Scott Gottlieb, M.D., *supra* note 62.

¹⁵⁴ *Id.*

¹⁵⁵ Thomas, *supra* note 151.

¹⁵⁶ Stewart W. Fisher, *The Supreme Court Says No to Equal Treatment of Puerto Rico: A Comment on Harris v. Rosario*, 6 N.C. J. INT’L L. & COM. REG. 127, 129–134 (1980) (discussing how U.S. officials do not perceive Puerto Rico as a state and consequently allocate less resources for health-related public programs for the island); see also Harris v. Rosario, 100 S. Ct. 1929 (1980); but see Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 37 REV. JUR. U.P.R. 615, 618 (1967) (arguing that Puerto Rico is essentially a “free associated state” that is no

Rico's finances are controlled by "a congressionally appointed oversight board," it has not been easy to allocate more money toward public health care programs.¹⁵⁷ In June 2017, before the hurricanes, the federal PROMESA Board proposed to increase the funding for Puerto Rico's Department of Health, although PROMESA was regarded as a proposal to reduce Puerto Rico's healthcare spending overall by implementing austerity measures and large cuts in public spending.¹⁵⁸ Trimming an already slashed health care budget was a frightening concern for Puerto Ricans.¹⁵⁹ Limiting fiscal budgets while Puerto Rico increases its debt (as it has, over the past ten years) to fulfill health care needs, among other operating costs, will not fix the health care structural problems. To the contrary, it will profoundly worsen the health care crisis.¹⁶⁰

In October 2017, after the hurricanes, the House of Representatives proposed directing one billion Medicaid dollars to Puerto Rico as part of a five-year plan to fund the federal health insurance program for children (CHIP).¹⁶¹ That policy would fund CHIP for 18 months at the then-average spending rates, but would not resolve the issue of a long-term shortage problem, likely to recur when the money ran out or another natural disaster struck.¹⁶² Just before Hurricane Maria, Puerto Rico was already facing a Medicaid funding cliff, where the extra dollars provided to it through the ACA were estimated to expire at the end of 2017.¹⁶³ It is a fact that U.S. territories—not only Puerto

longer subject to the Territory Clause and in fact commands more decisional power vis-à-vis the federal government than one might expect). See generally CESAR J. AYALA & RAFAEL BERNABE, *PUERTO RICO IN THE AMERICAN CENTURY: A HISTORY SINCE 1898, 162–178* (University of North Carolina Press, 2007) (ebook) (detailing the adoption of Puerto Rico's constitution). See David A. Rezvani, *The Basis of Puerto Rico's Constitutional Status: Colony, Compact, or "Federacy"?* 122 POL. SCI. Q. 117–118, 115–140 (Spring 2017). Rezvani expressly refuses the analogy of Puerto Rico with a colony or some other governmental form. Rather, Rezvani prefers to describe Puerto Rico as a "federacy," although he asserts that "... the United States does control a great deal of the powers that Puerto Rico would otherwise control were it fully independent. . . . [a] federacy is 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 a federation."

¹⁵⁷ See Barry-Jester, *supra* note 74.

¹⁵⁸ Fiscal Oversight Board, *First Budget Under Promesa*, <https://centropr.hunter.cuny.edu/events-news/puerto-rico-news/fiscal-oversight-board/first-budget-under-promesa> [<https://perma.cc/57P8-H5YA>] (increase of healthcare funds for the 2018 fiscal year in more than \$70 million). See also Andy Uhler, *Puerto Rico debt plan calls for austerity, public spending cut*, MARKETPLACE (Mar. 14, 2017), <https://www.marketplace.org/2017/03/14/puerto-rico-debt-plan-now-goes-creditors/> [<https://perma.cc/BZ6N-VX7B>].

¹⁵⁹ *Health Care Services Is a Big Concern For Puerto Ricans In Current Economy*, NPR, (May 7, 2017), <https://www.npr.org/2017/05/07/527303700/health-care-services-is-a-big-concern-for-puerto-ricans-in-current-economy> [<https://perma.cc/PY8W-K4WM>].

¹⁶⁰ Marc D. Joffe & Jesse Martinez, *Origins of the Puerto Rico Fiscal Crisis*, MERCATUS RESEARCH, Mercatus Center, George Mason University (2016), <https://www.mercatus.org/system/files/Joffe-Puerto-Rico-Fiscal-Crisis-v1.pdf> [<https://perma.cc/YP8N-PYCY>].

¹⁶¹ Paige Winfield Cunningham, *House Republicans propose Puerto Rico funding as part of CHIP bill*, WASH. POST. (Oct. 2, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/10/02/house-republicans-propose-puerto-rico-funding-as-part-of-chip-bill/?utm_term=.e85681704bdc [<https://perma.cc/3FF2-XEL2>].

¹⁶² See Barry-Jester, *supra* note 74 (noting that an influx of funding "... would help tide the system over for a period of time – 18 months or so at going spending rates – but the same problem is likely to recur when the money runs out").

¹⁶³ *Id.* (explaining that, in recent years, Puerto Rico has used additional funds made available by the Affordable Care Act (ACA). For example, in 2015 \$1.52 billion federal dollars went to Puerto Rico's Medicaid program, to cover almost 55% of Puerto Rico's Medicaid spending).

Rico—receive a lower Medicaid Federal Funding Cap (FMAP) than U.S. states.¹⁶⁴ Hence, technically, this policy is not a provision of “extra dollars” but placing dollars “in a different pocket.” On the other hand, it is also a fact that expanding the Medicaid budget is common when disasters occur.¹⁶⁵ After 9/11, Hurricane Katrina, the Flint water crisis, and the Zika outbreak, Medicaid provided care to people without insurance, who wouldn’t normally have qualified for the public program.¹⁶⁶ Therefore, the fund plan is a temporary recovery plan that will not restore disparities.

When it comes to health care, rationing appears to be inevitable.¹⁶⁷ The U.S. has traditionally rationed health care through the market.¹⁶⁸ Having a non-universal health care system, as the United States does, is a way of rationing medicine: only those who pay for health care—either directly by purchasing private health insurance or indirectly by having employment health insurance—have it. The U.S. health care system is, therefore, “(in)famous for rationing by price.”¹⁶⁹ Even if medical services are affordable, public health insurance programs like Medicaid cut eligibility, limit the number of patient visits to a doctor, or cap reimbursements for the costs of medical services. Health insurance coverage is overall limited to expenses. Robert Blank asserts, however, that rationing through the market brings “inequitable, haphazard” results, instead of a “comprehensive and fair [health care] system.”¹⁷⁰ In already unequal systems—where not everyone has access to health care and having access to it is a privilege for those who can financially afford it—it is possible that any additional rationing will bring more inequality. However, if health allocation policies had equity as their objective, then rationing through market allocation should not necessarily draw additional disparities.¹⁷¹

In the case of Puerto Rico, rationing amounts to unequal treatment based on nationality and/or healthcare coverage.¹⁷² Treatment of breast cancer in the U.S. territories and the continental U.S. is an example of differential treatment between equal Americans.¹⁷³ A study conducted by a team of scholars at Yale School of Medicine compared female Medicare beneficiaries, who were residents of U.S. territories and had surgical treatment for breast cancer between 2008 and 2014, to those in the continental U.S., and compared the groups’ recommended breast cancer care and its

¹⁶⁴ Rudowitz et al., *supra* note 7, at 4.

¹⁶⁵ Barry-Jester, *supra* note 74.

¹⁶⁶ *Id.*

¹⁶⁷ ROBERT H. BLANK, RATIONING MEDICINE 2 (1988).

¹⁶⁸ *Id.* at 78.

¹⁶⁹ Lawrence D. Brown, *The National Politics of Oregon’s Rationing Plan*, 10 HEALTH AFFAIRS 28, 30 (1991).

¹⁷⁰ BLANK, *supra* note 167, at 80.

¹⁷¹ Michael D. Reagan, *Health Care Rationing: What Does It Mean?*, NEW ENG. J. OF MED. (1988) (Deliberate choices about the sharing of health care resources among individuals are made on grounds not only of individual, but also social needs). See also LARRY R. CHURCHILL, RATIONING HEALTH CARE IN AMERICA: PERCEPTIONS AND PRINCIPLES OF JUSTICE (Notre Dame, IN: University of Notre Dame Press, 1987) (Rationing care by need rations health care by age, disease, region, and equity, among others. This rationing represents a positive distribution of care in response to diverse eligibility criteria.).

¹⁷² Kevin Fiscella, Peter Franks, Marthe R. Gold et al., *Inequality in Quality. Addressing Socioeconomic, Racial, and Ethnic Disparities in Health Care*, 283(19) JAMA 2579–2584 (2000), <https://jamanetwork.com/journals/jama/article-abstract/192714> [<https://perma.cc/EX8P-L4B8>].

¹⁷³ *Id.*

timeliness.¹⁷⁴ The study found that territory residents were less likely to receive both a diagnostic biopsy and adjuvant radiation therapy following breast-conserving surgery, and experienced significant delays in both surgical and radiation treatments.¹⁷⁵ The study concluded that these findings support other research studies also showing an association between residency in a territory and worse, overall health care quality.¹⁷⁶ The study compares Hawaiian and Puerto Rican residents, and finds--although living in a similar geographical territory--the latter have less health care services.¹⁷⁷ In contrast, Hawaiian residents do not show significant disparities with those residents of the continental United States.¹⁷⁸ The drivers of the disparities in breast cancer care were not solely geographic isolation, but the unequal treatment of citizens.

B. Territorial Federalism Policies

The ACA is considered “the most important health care statute” in the U.S. after the enactment of the Medicare and Medicaid public health care programs in 1965.¹⁷⁹ Certainly, it took almost 55 years to pass a law to reform the public health care programs.¹⁸⁰ Although the ACA includes a few territorial policies, it was not drafted with the focus on the U.S. Territories but on the 50 states and the District of Columbia.¹⁸¹

One important policy drawn from the ACA is increased funding for the Medicaid program. ACA funds have comprised an important share of Puerto Rico’s funding since 2011,¹⁸² while the Bipartisan Budget Act of 2018 (BBA) provided post-hurricane additional financial support.¹⁸³ Each of these temporary funding policies has expanded coverage, boosted facilities’ capacity, and has helped to enhance reimbursement rates for providers. And yet, “. . . the Puerto Rican . . . health care system [remains] fragile”,¹⁸⁴ perhaps because it has not fully recovered from the September 2017 hurricanes.¹⁸⁵ At the same time, Puerto Rico has been engaged in health care delivery reforms that have challenged the managed care organizations (MCO) incorporated during the privatization

¹⁷⁴ Tracy M. Layne et al., *Quality of Cancer Care in the US Territories: Insights From Medicare*, 37 HEALTH AFFAIRS 421 (2018).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 425.

¹⁷⁷ *Id.* at 426.

¹⁷⁸ *Id.*

¹⁷⁹ Barack Obama, *United States Health Care Reform Progress to Date and Next Steps*, 316 JAMA 525 (2016).

¹⁸⁰ See Rudiger et al., *supra* note 131.

¹⁸¹ Rudowitz et al., *supra* note 7, at 3.

¹⁸² The ACA increased the territory FMAP from 50% to 55% and provided territories with a higher matching rate for non-disabled adults without children (87% in 2017). The federal government made a total of \$6.3 billion allotment available between July 2011 and September 2019. Part of the funds were provided in lieu of the territories creating their own health insurance exchanges, which expire at the end of December 2019. See Cornelia Hall, Robin Rudowitz & Kathleen Gifford, *Medicaid in the Territories: Program Features, Challenges, and Changes*, KAISER FAM. FOUND. 3–4 (Jan. 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-in-the-territories-program-features-challenges-and-changes/> [<https://perma.cc/A4X7-R6UL>].

¹⁸³ *Id.* at 4 (explaining that the U.S. Congress included \$4.8 billion for Puerto Rico in the BBA).

¹⁸⁴ Rudowitz et al., *supra* note 7, at 1.

¹⁸⁵ *Id.* at 2.

era.¹⁸⁶ The majority of the temporary funds expired at the end of September 2019, with no legislation yet in place to provide additional funds.¹⁸⁷ Although this would not be the first time that temporary funds are exhausted, some officials have characterized this particular funding expiration as “devastating” to the health care system.¹⁸⁸ The Medicaid and CHIP Payment and Access Commission (MACPAC) has estimated funding shortfalls of over 1 billion dollars of the 2020 projected annual total spending of over 2.75 billion dollars.¹⁸⁹ This means that over one-third of current enrolled Puerto Ricans in Medicaid and CHIP could lose coverage.¹⁹⁰ These shortfalls would also exacerbate the outmigration of medical providers—most prominent for specialty care and mental health care¹⁹¹—and cancel any of the ongoing health care delivery reforms.

The Kaiser Family Foundation analysis in this regard shows that additional federal funding of \$2.8 billion, an increase to 83% of the FMAP and per member per month (PMPM) rates by 50% in 2021, “could help address the projected shortfall”.¹⁹² Increasing the FMAP “could reduce the share required by [Puerto Rico] to Access federal funds, while increasing the cap . . . could help address gaps in benefits and increase provider reimbursement rates.”¹⁹³ Increasing the FMAP calculated based on per capita income and eliminating the statutory cap,¹⁹⁴ or either, would finally represent treating Puerto Rico as any other state, responding to their particular financial and health care needs.

After the resignation of Governor Rosselló, and in light of the corruption scandals that fueled internal political crisis, it was unclear how, if at all, the U.S. Congress would respond to Rosselló’s request for additional federal funds and an increased FMAP.¹⁹⁵ On December 3, 2019, the U.S. Health and Human Services Department announced that, for the period beginning on October 1, 2020 and ending on September 30, 2021, the FMAP rate applicable to Puerto Rico would increase from 55% to 68.5%.¹⁹⁶ Later, on December 6, the U.S. Senate Finance Committee released legislation to provide \$12 billion to Puerto Rico’s Medicaid program over the course of the next four years at a 76% FMAP coverage.¹⁹⁷ Still, adopting additional temporary funding instead of a

¹⁸⁶ *Id.*; see also Hall et al., *supra* note 12, at 1 (noting Puerto Rico is the only territory to operate a managed care delivery system).

¹⁸⁷ Rudowitz et al., *supra* note 7, at 1.

¹⁸⁸ *Id.* at 2.

¹⁸⁹ Medicaid and CHIP Payment and Access Commission (MACPAC), *When Will the U.S. Territories Exhaust Federal Medicaid Funding?* 11 (July 2019), <https://www.macpac.gov/wp-content/uploads/2019/05/When-will-the-territories-exhaust-federal-Medicaid-funding.pdf> [<https://perma.cc/5L8X-D7PG>].

¹⁹⁰ *Id.*

¹⁹¹ Hall et al., *supra* note 12, at 1.

¹⁹² Rudowitz et al., *supra* note 7, at 3.

¹⁹³ *Id.*

¹⁹⁴ See *supra* Table 1.

¹⁹⁵ Mazzei & Robles, *supra* note 47.

¹⁹⁶ Health and Human Services Department (HHS) Notice on December 3, 2019, <https://www.federalregister.gov/documents/2019/12/03/2019-26207/federal-financial-participation-in-state-assistance-expenditures-federal-matching-shares-for> [<https://perma.cc/RZ3G-M6DQ>].

¹⁹⁷ *US Senate Releases Legislation to Provide Puerto Rico With \$12B in Medicaid Funding Over 4 years at 76% FMAP*, REORG (Dec. 6, 2019), <https://reorg.com/us-senate-releases-legislation-to-provide-puerto-rico-with-12b-in-medicaid-funding-over-4-years-at-76-fmap/> [<https://perma.cc/6663-ELAS>]. See also *supra* note 12; U.S. Congresswoman Jennifer González-Colón, Press Release Dec. 16, 2019, <https://gonzalez-colon.house.gov/media/press-releases/jennifer>

long-term guarantee of equal treatment—universal rules applicable to any other U.S. citizen—might stave off a steep funding cliff for two more years.¹⁹⁸

From the many reforms that the ACA has introduced, the Department of Health and Human Services (HHS) determined that only the health market reforms were applicable to insurance coverage sold in the territories. The ACA’s individual and employer mandates do not apply to the territories.¹⁹⁹ Two health market reforms are of particular interest to territories due to the large population of the territories that rely on Medicaid: Medicaid expansions and the implementation of health insurance exchanges.²⁰⁰

The original text of the ACA mandated all states to expand their Medicaid program to include a newly eligible population: low-income adults.²⁰¹ Twenty-seven states observed the ACA call for Medicaid expansion and challenged its constitutionality together with other ACA provisions. The U.S. Supreme Court ruled that the Medicaid expansion mandate was unconstitutional and declared that it was therefore optional for states to abide by it.²⁰² The Court’s decision led to dynamic state-federal negotiations.²⁰³ Since the U.S. Department of Health and Human Services (HHS) wanted as many states as possible to expand their Medicaid programs, it granted various concessions to the states, such as the ability to funnel the Medicaid expanded population into the ACA health insurance exchanges.

After the midterm elections of 2018, thirty-six states and the District of Columbia had adopted the ACA’s Medicaid expansion.²⁰⁴ Although ACA’s Medicaid expansion was unpopular

gonz-lez-details-congressional-agreement-finance-medicaid [<https://perma.cc/Z5N5-25P7>].

¹⁹⁸ Rudowitz et al., *supra* note 7, at 2. *See also* MMAPA, *Congress Averts “Medicaid Cliff” With Year-End Spending Bill, Funds Puerto Rico’s Medicaid Program for Two Years* (Dec. 20, 2019), <https://mmapapr.org/congress-averts-medicaid-cliff-with-year-end-spending-bill-funds-puerto-ricos-medicaid-program-for-two-years/> [<https://perma.cc/YQS8-ZX69>].

¹⁹⁹ For example, the ACA mandate about mandatory health insurance does not apply to the residents of the territories. *See* The Patient Protection and Affordable Care Act, 26 U.S.C. § 500A(4) (2010).

²⁰⁰ Puerto Rico is the second territory with the largest population enrolled in Medicaid and CHIP, as of July 2016. The ranking is inaccurate, however, considering that territories use different methods to set Medicaid eligibility levels. *See* The Patient Protection and Affordable Care Act, 26 U.S.C. § 1204(b)(1) (2010).

²⁰¹ Includes everyone with household incomes up to 138% of the federal poverty line (FPL). *See* Facts About PPACA Individual Mandate (2012), <https://www.nfib.com/cribsheets/individual-mandate/> [<https://perma.cc/S63L-QNG2>].

²⁰² National Federation of Independent Business et al v. Sebelius, Secretary of Health and Human Services, et al. 567 U.S. 519 (2012).

²⁰³ Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?*, 70 STAN. L. REV. 1689 (2018) (“The federal-territory relationship has more or less gradually progressed toward functionally mimicking the federal-state structural relationship.”). *See also* Juan R. Torruella, *Developments in the Law—The U.S. Territories. Chapter One: Territorial Federalism*, 130 HARV. L. REV. 1632 (2017); Torruella, *supra* note 5, at 1632; David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, in APPLICABILITY OF THE UNITED STATES CONSTITUTION AND FEDERAL LAWS TO THE COMMONWEALTH OF PUERTO RICO (First Circuit Judicial Conference Proceedings), 110 F.R.D. 449, 453, 468–73 (1986).

²⁰⁴ In November 2018, Virginia began its enrollment to expand Medicaid in January 2019. Maine approved Medicaid expansion with a November 2017 ballot initiative, although implementation isn’t expected until January 2019. Utah, Nebraska, and Idaho passed Medicaid expansion ballot initiatives in 2018. *See* Louise Norris, *What is the Medicaid ‘Coverage Gap’ and Who Does it Affect?*, HEALTHINSURANCE.ORG (Nov. 13, 2018), <https://www.healthinsurance.org/faqs/what-is-the-medicaid-coverage-gap-and-who-does-it-affect/> [<https://perma.cc/E6YW-5P9T>]. *See also* Robin Rudowitz et al., *Medicaid: What to Watch in 2019 from the Administration, Congress and the States*, KAISER FAM. FOUND. (Jan. 8,

when it was initially passed in 2010, the majority of states have opted for ACA's Medicaid expansion and studies point to positive effects on coverage, access to care, service utilization, affordability, health outcomes, and state economy.²⁰⁵

As a result of a non-mandatory expansion program, Medicaid coverage varies considerably across states. For those states that have opted not to expand Medicaid, the program is only available to people with disabilities, low-income children and pregnant women, and extremely low-income parents.²⁰⁶ By contrast, in those states that did expand, all legal residents with household income up to 138% of the FPL are eligible for Medicaid. The different Medicaid beneficiaries' eligibility criteria across the states, as a result of the fact that expansion under the ACA was merely optional, has created a "coverage gap."²⁰⁷ During the first three years of the Medicaid expansion era, the federal government paid for all the Medicaid expansion costs. After 2016, states that opted for expansion had to pay a portion—10%—of the costs associated therewith. Those states not expanding Medicaid did not receive the additional federal funding.

In January 2018, CMS issued new guidance for state Medicaid waiver proposals that would impose work requirements as a condition of eligibility to receive Medicaid coverage.²⁰⁸ Until January 2019, 7 states had waivers approved and another eight states had waivers pending decision.²⁰⁹

For U.S. territories, Medicaid expansion was always a matter of prerogative and not a mandate. Puerto Rico determines Medicaid eligibility according to local poverty levels and is

2019), <https://www.kff.org/medicaid/issue-brief/medicaid-what-to-watch-in-2019-from-the-administration-congress-and-the-states/> [<https://perma.cc/DA6U-RGAU>].

²⁰⁵ Larisa Antonisse et al., *The Effects of Medicaid Expansion under the ACA: Updated Findings from A Literature Review*, KKR (Aug. 15, 2019), <https://www.kff.org/medicaid/issue-brief/the-effects-of-medicaid-expansion-under-the-aca-updated-findings-from-a-literature-review-march-2018/> [<https://perma.cc/53HQ-9EUA>]. Still, fourteen states resist. In the 2018 elections, Wisconsin and Kansas elected Democrats governors, who are supportive of Medicaid expansion. Therefore, it is expected that these two states will join the list of states expanding Medicaid. See Norris *supra* note 204; see also *Status of State Medicaid Expansion Decision: Interactive Map* (Jan. 10, 2020), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map/> [<https://perma.cc/78M7-KA7N>] [hereinafter, the "Kaiser Interactive Map"]. On December 14, 2018, a federal district court in *Texas v. U.S.* ruled the ACA is unconstitutional. Still this is not final as appeals have been filed. However, litigation could have implications for states considering expansion.

²⁰⁶ See Norris, *supra* note 204 ("In Alabama, for example, Medicaid is available for parents with a household income of up to 13 percent of FPL. For a family of three, that's \$2,701 in annual income in 2018. If the family's income exceeds that amount, the parents would not qualify for Medicaid.").

²⁰⁷ Because the ACA Medicaid premium subsidies are available only for people with a household income over 100% of the FPL, now there is a population with household income below 100% of the FPL that is not eligible for Medicaid. Premium subsidies were created by the time Medicaid expansion provision was mandatory for all states, and the ACA assumed subsidies would not be needed below 100% of the FPL. In other words, in states not expanding Medicaid, if the household income is over the very-low income benchmark but below 100% of the FPL, such people is uninsured and cannot receive any form of financial assistance for health care expenses, unless they were disabled or low-income pregnant and children. See Norris, *supra* note 204.

²⁰⁸ Elizabeth Hinton, MaryBeth Musumeci, Robin Rudowitz, Larisa Antonisse & Cornelia Hall, *Section 1115 Medicaid Demonstration Waivers: The Current Landscape of Approved and Pending Waivers*, KAISER FAM. FOUND. (Feb. 12, 2019), <https://www.kff.org/medicaid/issue-brief/section-1115-medicaid-demonstration-waivers-the-current-landscape-of-approved-and-pending-waivers/> [<https://perma.cc/R5SS-ZCE2>].

²⁰⁹ See Rudowitz, et al., *supra* note 208.

exempted from covering certain mandatory Medicaid coverage groups, like low-income children and pregnant women. Notwithstanding, Puerto Rico decided to cover the ACA's new Medicaid eligible population with income up to 133% of territories' poverty level.²¹⁰ Medicaid coverage also varies across territories. Puerto Rico is required to cover all mandatory Medicaid benefits and, additionally and voluntarily, it might cover prescription drugs and dental services.²¹¹

The ACA also expanded to territories the state's prerogative of health insurance exchanges.²¹² Health insurance exchanges gave states and territories the opportunity to create their own health insurance marketplace. At the beginning of 2020, there were 13 state-based health insurance exchanges, 6 federally supported exchanges, and 32 federally facilitated exchanges.²¹³ Territories were allowed to establish their own marketplace either in cooperation with the federal government or independently and be treated as any other state. If territories elected to implement health insurance exchanges no later than October 1, 2013, they would have received from the federal government a subsidy to cover a limited fraction of the needed funds.²¹⁴ The unfunded fraction posed the threat of high out-of-pocket health insurance premiums, higher than in the states.²¹⁵

None of the territories adopted the health insurance exchange option.²¹⁶ By October 2013, Puerto Rico had accumulated about \$87 billion of debt (including pension debt), had been shut out of the bond market (with bonds widely held by mutual funds), and was financing its operations with short-term additional debt.²¹⁷ Therefore, creating its own health insurance marketplace, as if it were a state, was not only politically impossible but also financially unattainable for Puerto Rico.

The Medicaid expansion and health insurance exchanges illustrate stories of states exerting power and exercising autonomy, precisely the opposite of what territories can do.²¹⁸ The states' negotiations with the federal government produced significant policy and legal diversity across states, although not always with favorable outcomes. The ACA offered an opportunity to reflect on the purpose of federalism in health care, whether that purpose was to maintain a balance of power between states and the federal government in the health care policy arena, or to advance health

²¹⁰ See Hall, Rudowitz & Gifford, *supra* note 182. The HHS poverty guidelines are not defined for Puerto Rico. The Federal office that administers the program is generally responsible for deciding whether to use the contiguous-states-and-DC guidelines for those jurisdictions with no poverty guidelines or to follow some other procedure. See *Annual Update of the HHS Poverty Guidelines*, FEDERAL REGISTER (Feb. 1, 2019), <https://www.federalregister.gov/documents/2019/02/01/2019-00621/annual-update-of-the-hhs-poverty-guidelines> [<https://perma.cc/Z7SP-7QN9>].

²¹¹ Hall, Rudowitz & Gifford, *supra* note 182.

²¹² 26 U.S.C. §§ 1204 (a), 1323 (b) (1).

²¹³ State Health Insurance Marketplace Types, KAISER FAM. FOUND. (2020), <https://www.kff.org/health-reform/state-indicator/state-health-insurance-marketplace-types/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>.

²¹⁴ Implementation of the Affordable Care Act in the U.S. Territories, May 1, 2014, https://www.naic.org/documents/index_health_reform_comments_140501_naic_letter_us_territories_paper_final.pdf [<https://perma.cc/8MEC-YS3R>].

²¹⁵ Vann R. Newkirk II, *What Health Reform Means to the American Territories*, THE ATLANTIC (Aug. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/08/what-health-reform-means-to-the-american-territories/538056/> [<https://perma.cc/C73Q-GND8>].

²¹⁶ See *supra* note 214.

²¹⁷ Mary Williams Walsh, *Worsening Debt Crisis Threatens Puerto Rico*, N.Y. TIMES, (Oct. 7, 2013), <https://dealbook.nytimes.com/2013/10/07/worsening-debt-crisis-threatens-puerto-rico/> [<https://perma.cc/ZJF4-GRS3>].

²¹⁸ Gluck & Huberfeld, *supra* note 203.

policy, such as access to health with high quality and low costs.²¹⁹ But territories still were left excluded from this narrative, for none of these so-called “empowering” opportunities materialized there.

C. Equal Protection of the Laws

Compared to the other U.S. territories—the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Mariana Islands—Puerto Rico is the “privileged” U.S. territory. Only those who were born and live on the island of Puerto Rico have U.S. citizenship. However, Puerto Ricans’ U.S. citizenship is materially distinct from the citizenship that “traditional” Americans (that is, those born on the mainland or naturalized there) enjoy. As described in Section I above, Puerto Ricans are U.S. citizens who cannot vote in presidential elections, exercise limited voting power as representatives in Congress, do not pay federal income tax, and receive much less by way of health care and social service federal funding than the States do, in spite of the fact that the Puerto Rican people pay the same Medicare and Social Security taxes as other Americans.

The differential treatment between the U.S. states and territories can be traced back to the Insular Cases regarding the status of the U.S. territories acquired in the Spanish-American War, which cases the United States Supreme Court decided over a century ago.²²⁰ The segregationist “separate but equal” doctrine present in *Plessy v. Ferguson* was pervasive in the Insular Cases.²²¹ Indeed, it purportedly justified the exclusion Puerto Ricans from benefits given to all Americans, while poorly masking the intent to produce racial and ethnic segregation under the umbrella of “residency in the U.S. territories.”²²² One particular Insular Case, *Downes v. Bridwell*, is critical to understanding the citizen status of Puerto Ricans.²²³ Justice White stated that even though Puerto Rico was “not a foreign country . . . it was foreign to the United States in a domestic sense.”²²⁴ The Court thus resolved that Puerto Rico (like all other territories) was, at once, foreign and domestic, since it was “. . . inhabited by alien races . . .”; therefore, governing it “according to Anglo-Saxon principles, [might] for a time be impossible.”²²⁵ The *Downes* decision considered Puerto Ricans “equal” only in the sense that they, too, must live in accordance with American rule of law and

²¹⁹ Jessica Lind Mantel, *Rethinking Federalism: ACA as a Case Study*, JOTWELL (Feb. 4, 2019) (reviewing Abbe R. Gluck & Nicole Huberfeld, *What is Federalism in Healthcare For?* 70 STAN. L. REV. 1689 (2018)), <https://health.jotwell.com/rethinking-federalism-aca-as-a-case-study/> [<https://perma.cc/VZL7-PXTS>].

²²⁰ JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985). See also Torruella, *Developments in the Law*, *supra* note 203.

²²¹ Pelet del Toro, *supra* note 34, at 811 (reflecting that the first of the Insular Cases, *Downes v. Bidwell*, was decided almost by the same Justices who decided *Plessy v. Ferguson*: “Only one Justice was replaced between the two decisions.”).

²²² See PEDRO A. MALAVET, *AMERICA’S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO* 22 (2004). Malavet contends that Puerto Ricans have been constructed as “foreigners” despite their legal U.S. citizenship, and suggests that the United States has legally racialized Puerto Ricans as nonwhite to further marginalize them.

²²³ 182 U.S. 244 (1901).

²²⁴ *Id.* at 341; see also *id.* at 339 (White, J., concurring) (“[I]ncorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.”).

²²⁵ *Id.* at 287.

America's Constitution; still, they remained "separate" insofar as they were "aliens" to whom the protections of those same laws might not extend.²²⁶

The *Downes* reasoning influenced the Jones Act that granted American citizenship to Puerto Ricans in 1917.²²⁷ U.S. Representative Joseph Cannon's blunt statement during the congressional debate on the Jones Act dispelled doubts about the racial discrimination behind anti-Puerto Rico sentiment.²²⁸ The "racial question" undergirded the discussion on whether "alien," "mixed race," or "African" Puerto Ricans were "competent for self-government."²²⁹ Puerto Rican citizenship thus arose from a U.S. Congressman's repulsive, racist sentiment about the formerly colonized island. It makes sense, then, that the thought of Puerto Ricans becoming Americans was, for many, undesirable.²³⁰

The *Downes* case was also "[t]he earliest indication that the right to equal protection applies in Puerto Rico."²³¹ Although the decision did not rule directly on the matter, Justice Brown's lead opinion suggested that the right "to an equal protection of the laws" was sufficiently fundamental as to apply in Puerto Rico.²³² The U.S. Supreme Court turned Justice Brown's indication into a holding when in 1976 the Court decided, in *Examining Board v. Flores de Otero*, to recognize that the guarantees of the Due Process Clauses of the Fifth and Fourteenth Amendments, and the Equal Protection Clauses of the Fourteenth Amendment, all apply to residents of Puerto Rico.²³³ Since *Examining Board*, the U.S. Supreme Court has reiterated that the constitutional right of equal protection is "fundamental" and applies with full force in Puerto Rico.²³⁴ According to the Territory Clause of the Constitution, Congress has the express power to legislate with respect to territories.²³⁵ Therefore, Congress "can legislate as to Puerto Rico in a

²²⁶ TORRUELLA, *supra* note 220, at 58–59. *See also supra* note 82 in reference to how the people residing in Puerto Rico embrace blackness.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ "Porto Rico is populated by a mixed race . . . [which is a]bout 30 per cent pure African. . . . [And] 75 to 80 percent of the population . . . was pure African or had an African strain in their blood." FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001).

²³⁰ Pelet del Toro, *supra* note 34, at 813.

²³¹ Complaint at 1–35, 23, Peña Martinez et al. v. US Department of Health and Human Services, 3:18-cv-01206 (D.P.R. 2018); *see also Downes*, 182 U.S. at 278.

²³² Complaint at 23–34, Peña Martinez, 3:18-cv-01206; *see also Downes*, 182 at 282.

²³³ 426 U.S. 572 (1976).

²³⁴ *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 331 n.1 (1986) ("We have held that Puerto Rico is subject to . . . the equal protection guarantee of either the Fifth or the Fourteenth Amendment" (citing *Balzac v. Porto Rico* 258 U.S. 298, 314 (1922))); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7 (1982) ("It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws.") (citations omitted); *Torres v. Puerto Rico*, 442 U.S. 465, 469 (1979) ("Puerto Rico is subject to . . . the equal protection guarantee of either the Fifth or the Fourteenth Amendment."). The U.S. Supreme Court adopted the "doctrine of territorial incorporation." *See Boumediene v. Bush*, 553 U.S. 723, 757 (2008) ("[T]he Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories."). In unincorporated Territories—i.e., Territories that will not necessarily become States, such as Puerto Rico—"only 'fundamental' constitutional rights" apply of their own force. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 268 (1990).

²³⁵ U.S. CONST. ART. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ."). Territory residents cannot

manner different from the rest of the United States.”²³⁶ The Territory Clause, unlike the Jones Act, was drafted by the Founding Fathers when thirty-two of the current fifty states were still territories. This historical context would explain a characterization of the territories as “possessions” motivated by a racial animus.²³⁷

American laws treat U.S. citizens differently based on where they live. Because Puerto Ricans do not reside within the United States or in a formally-recognized state like Alaska or Hawaii but on the island, they receive limited federal funding for Medicaid that falls well below the funding for which America’s poorest state is eligible, limited food stamps through the Supplemental Nutrition Assistance Program (SNAP), significantly fewer benefits under Medicare Part D program, and are excluded from the Supplemental Security Income (SSI) program. If relocating to the mainland, Puerto Ricans are eligible to all the benefits as any other American.²³⁸ Federal statutes explicitly exclude Puerto Ricans from receiving the same federal benefits given to fellow U.S. citizens of equal or lesser need who live in any of the fifty states.²³⁹ This racial discrimination does not only deny benefits to Puerto Ricans and significantly aggravate the fiscal and health care crises in Puerto Rico, but constitutes a constitutional violation of the right to equal protection. The U.S. Congress cannot discriminatorily legislate in a manner that causes disparate treatment of Puerto Ricans, notwithstanding its plenary power under the Territory Clause.

The issue in question is whether the Medicaid federal funding statute or the Medicare federal reimbursement provision have a justification for differential treatment between the states and U.S. territories. Previously, in *Harris v. Rosario*,²⁴⁰ the U.S. Supreme Court analyzed whether the Aid to Families with Dependent Children (AFDC) federal welfare legislation had a rational basis for treating Puerto Rico and other U.S. territories differently within the reimbursement plan, to provide financial support to needy families. The Court resolved that the statute was constitutional and did not violate the equal protection constitutional guarantee. The Court cited three rationales for differential treatment: firstly, residents of Puerto Rico do not contribute to the U.S. Treasury, primarily because they do not pay federal income taxes; second, treating Puerto Rico as a state would be costly; and third, paying higher Social Security benefits to Puerto Ricans might disrupt

make their own rules or regulations except if allowed by the U.S. Congress. The U.S. Supreme Court can interpret regulations for territories, but only Congress has the express power to make rules. U.S. CONST. ART. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . .”).

²³⁶ In its recent due process rulings, the U.S. Supreme Court has avoided any pronouncement regarding the political status of the island. *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir. 1987). *See also* *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1876 (2016) (“We agree that Congress has broad latitude to develop innovative approaches to territorial governance, see U.S. CONST., ART. IV, § 3, cl. 2; that Congress may thus enable a territory’s people to make large-scale choices about their own political institutions. . .”).

²³⁷ The Supreme Court has differentiated between territories settled “by American citizens” (Alaska) and colonized territories. *See* *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922).

²³⁸ *United States v. Vaello-Madero*, 356 F. Supp. 3d 208 (D.P.R. 2019) (“Vaello Madero contends he is not required to return the payments he received in Social Security Income (SSI) disability benefits upon changing his domicile to Puerto Rico since excluding a United States citizen residing in the territory from receiving the same runs afoul of the equal protection guarantees of the Due Process Clause. . . . Based on the foregoing analysis, Vaello-Madero’s Motion for Summary Judgment is GRANTED.”).

²³⁹ *See* Section III-B.

²⁴⁰ 446 U.S. 651 (1980).

the island's economy.²⁴¹ Justice Marshall dissented in *Harris* and questioned whether there was truly a rational basis for the discriminatory legislation directed at the island's residents. He argued it is not "rational to provide lower benefits to U.S. citizens who have the greatest need, and that a geographic area should not have the level of its antipoverty aid reduced simply because it has a weak economy."²⁴² The Court's decision in *Harris* ultimately followed previous decisions that grew out of the 1900 Foraker Act.²⁴³ By that time, the Court had recognized that Puerto Rico was an unincorporated territory, which the government had no intention of converting into a state, and its residents were not entitled to all the privileges and protections otherwise afforded to states' residents.²⁴⁴

The three differential treatment rationales stated by the U.S. Supreme Court in *Harris* require re-assessment in light of Puerto Rico's current reality. First, Medicaid is a need-based program designed to provide care for poor children, adults, elderly, pregnant women, and disabled people. Considering this nature of the public health care program, the Medicaid eligible beneficiaries can hardly be described as significant contributors to the funds derived by the government from federal income tax.²⁴⁵ Second, from 1999 to 2014, Puerto Rico paid \$67 billion in federal taxes, which represents an average of \$4.21 billion paid annually over the sixteen-year period.²⁴⁶ Third, according to the U.S. Government Accountability Office, if Puerto Rico were treated as any other state (stated otherwise, if Puerto Ricans were treated equally), the federal government would have to spend up to \$1.8 billion each year on SSI, up to \$700 million more each year on food stamps, and up to \$1.5 billion more annually on Medicare.²⁴⁷ This amount is less than that which the poorest U.S. states require and still falls below the annual average federal tax contributions from such states. Finally, not treating Puerto Ricans as equal to other U.S. citizens aggravates their health care and financial crises, causing further disruption of their economy.

The inability of U.S. territories to seek relief in bankruptcy courts, like states, is another arena where Puerto Rico faces disparate treatment harmful to its economy. In 2013, the city of Detroit, Michigan, filed for bankruptcy under Chapter 9 of the U.S. Bankruptcy Code, the largest municipality bankruptcy filing (based on debt) in the U.S. By comparison to Detroit's financial situation in 2013, when it had \$18 billion in debt and a population of 700,000, Puerto Rico had by the same time \$87 billion in debt and 3.7 million residents. Both Detroit and Puerto Rico lost residents to the financial crises, leaving behind a poorer (and older) group. Unlike Puerto Rico, the

²⁴¹ This rationale was drawn from an earlier case, *Califano v. Torres*, 435 U.S. 1, 5 n.7 (1977), where the Court ruled that a complete exclusion of Puerto Rico from the Supplemental Security Income (SSI) program had a rational basis.

²⁴² Fisher, *supra* note 156, at 130.

²⁴³ *Id.*

²⁴⁴ See *id.*, referring to *Downes v. Bidwell*, 182 U.S. 244 (1901); see generally *Armstrong v. United States*, 182 U.S. 234 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901). See also above references in this Section to the *Downes* case.

²⁴⁵ Puerto Ricans pay federal income tax on income generated on the mainland. For further reference to a snapshot of Puerto Rico's applicable tax regime, see Section I, *supra*.

²⁴⁶ Complaint at 27, *Peña Martínez et al v. US Department of Health and Human Services*, 3:18-cv-01206 (D.P.R. 2018).

²⁴⁷ U.S. Government Accountability Office, *Puerto Rico: Information on How Statehood Would Potentially Affect Selected Federal Programs and Revenue Sources*, (Mar. 31, 2014), <https://www.gao.gov/products/GAO-14-31> [<https://perma.cc/QD2D-6F44>].

bulk of Detroit's debt took the form of unfunded pensions and promises to provide health care to retired city workers. Although part of Puerto Rico's debt also comes from pensions, the bulk of its debt is owed to bondholders. Bond repayment should be important to the federal government considering Puerto Rico's bonds pay tax-exempt interest in all 50 states and high interest to offset the territory's low credit rating.²⁴⁸ Nor can companies located in the territories file for bankruptcy pursuant to the U.S. Bankruptcy Code, either. The closest attempt by a company incorporated in a territory to seek bankruptcy relief was in 2012, in the Commonwealth of the Mariana Islands.²⁴⁹ Despite the legal discussion around whether the corporation fulfilled the "person" category requirement for filing, the court argued that the company was not entitled to the same treatment afforded to an entity incorporated in the mainland.

In contrast to U.S. states, Puerto Rico more heavily relies on public health care programs while suffering relatively higher rates of unemployment. A greater percentage of its population sits below the Federal Poverty Line (FPL), and the island remains beset by severe financial crisis and illness rates. Solely considering the income and poverty levels of the island, it seems Puerto Ricans cannot afford health care as readily as those living in the continental U.S. can. In light of the critical and chronic health conditions of the Puerto Rican population—HIV, Zika, mental health, heart disease, diabetes—it is plain that Puerto Ricans' health care demands are greater.²⁵⁰ Instead of combating the inequities brought to light by this Article, Congress is creating and perpetuating disparity in the name of so-called *equal treatment*. Unfortunately, federal laws regarding public health care programs, like Medicaid and Medicare, increase the severity of such disparity when applied in Puerto Rico.²⁵¹ Instead of improving health conditions and supporting the majority of the population who could not otherwise afford private health care, the U.S. government provides Puerto Ricans with special rules that undermine health.

Health care is not provided equally across U.S. territories, either. In terms of public health care programs, while in 2016 the ACA increased Puerto Rico's Medicaid program funding through a \$6.4 billion allotment, only \$1 billion was directed to all other U.S. territories. Indeed, health care spending rates vary significantly between U.S. territories. Based on projections before the 2017 hurricanes, Puerto Rico expected to exhaust ACA funding by 2018. In other words, even before Maria and Irma, Medicaid financing was imperiled in Puerto Rico, but it was unlikely that the U.S. Virgin Islands, for instance, with less than a \$1 billion of ACA available funding, would exhaust their funds before their expiration in 2019.²⁵² Health care spending rates between U.S. territories

²⁴⁸ Walsh, *supra* note 217.

²⁴⁹ In re Northern Mariana Islands Retirement Fund, No. 12-00003, (Bankr. D. N. Mar. I. June 13, 2012). The Commonwealth of the Mariana Islands tried bankruptcy relief for its underfunded Northern Mariana Islands Retirement Fund, a public corporation and autonomous agency of that Territory. The U.S. District Court for the Northern Mariana Islands hold the Fund was not eligible to be a debtor under Chapter 11 of the U.S. Bankruptcy Code since it was considered a government unit rather than a person with bankruptcy prerogative. The Fund argued the municipality Las Vegas Monorail Co. filed for bankruptcy and same criteria shall applied. However, the case was dismissed.

²⁵⁰ See Table 2 for HIV, sika, diabetes and heart disease ratios compared to states.

²⁵¹ Congressional Task Force on Economic Growth in Puerto Rico, Report to the House and Senate (December 20, 2016), <https://www.finance.senate.gov/imo/media/doc/Bipartisan%20Congressional%20Task%20Force%20on%20Economic%20Growth%20in%20Puerto%20Rico%20Releases%20Final%20Report.pdf> [<https://perma.cc/YHS6-SF7C>].

²⁵² *Medicaid Financing and Spending in Puerto Rico*, Medicaid and CHIP Payment and Access Commission (MACPAC), August 2017; *Medicaid Financing and Spending in the US Virgin Islands*, Medicaid and CHIP Payment and Access Commission (MACPAC), August 2017, <https://www.macpac.gov/publication/medicaid-and-chip-in-the-u-s-virgin->

vary mostly because Puerto Rico has been overcoming financing shortages through the issuance of debt, which increases health costs and spending in the long run.²⁵³ Although funding and spending disparities originate from territorial policies, the U.S. Congress must ensure equal treatment of the law under the Territory Clause.²⁵⁴

The different levels of funding in Medicare and Medicaid reveals the unequal treatment among U.S. citizens based on discrimination of their place of residence. Regardless of the colonial genesis of the relationship between the U.S. and Puerto Rico, the current differential treatment creates a “second-class” citizenship that jeopardizes the right to health and the right to health care of Puerto Ricans.²⁵⁵ In the absence of a positive legal obligation to the right to health care,²⁵⁶ nevertheless, the equal protection of the law principle obliges the U.S. government to protect and stand for its people’s dignity and right to live. Americans living in Puerto Rico are “their people” too.

IV. CONCLUSION

Puerto Rico’s colonial relationship with the United States has profoundly influenced the island’s health care financing and delivery. Constant and erratic transformations over the past century have shaped the Puerto Rican health care system. The Puerto Rican health care system is largely the result of legal transplants of federal health care policies blind to Puerto Rico’s unique economic, social, geographical, and epidemiological conditions.

Health care federal legislation aggravates the already notorious chasm between the island and the mainland. The capped financing and limited federal match rate for Medicaid—the most popular public health insurance program, used by two thirds of Puerto Ricans—stand out as critical contributors to both the fiscal crisis and a strained health care system, among several other differential treatments across federal programs. In addition, the incentives allocated through different institutional arrangements transplanted into Puerto Rico’s health care system (for example, the fee-for-service payment model), contribute to the existing disparities in access to health care, and turn rationing rules into painful policies. None of the very few health care policies applicable to territories introduced by the Patient Protection Affordable Care Act—the most important health

islands/ [https://perma.cc/Y3DD-L5K6].

²⁵³ *Health Care in Puerto Rico and the U.S. Virgin Islands: A Six-Month Check-Up After the Storms*, Kaiser Foundation Conference in Washington D.C., on March 19, 2018. Remarks from U.S. Virgin Islands’ delegate to Congress, Rep. Stacey Plaskett, <https://www.youtube.com/watch?v=BzKZ8Rd3xN0> [https://perma.cc/WVY7-SCR].

²⁵⁴ While discussing the role of the U.S. Congress and President on the unequal treatment of Puerto Ricans, Angel R. Oquendo proposed that “the President and Congress might, perhaps with some prodding from the Supreme Court . . . providing for legitimate and functional governance on the island . . . institute genuine self-rule there, appropriately attending not to the population’s individual civil rights, but rather to its collective self-determination.” See Ángel R. Oquendo, *At Rock Bottom: Puerto Rico’s Crises and Self-Determination*, 41 THE HARBINGER 253, 269 (Mar. 2017).

²⁵⁵ The right to health care here pertains to the equitable access to affordable medical care. I do not intend to join here, however, the rich debate that already exists among scholars and international advocates of human rights on its definition. See David Orentlicher, *Right to Health Care in the United States: Inherently Unstable*, 38 AM. J. L. & MED. 326, 336–337 (2012) (recognizing that the right to health care is a critical component of a right to health); NORMAN DANIELS, JUST HEALTH: MEETING HEALTH NEEDS FAIRLY (2008); ALLEN E. BUCHANAN, JUSTICE AND HEALTH CARE (2009); Tom L. Beauchamp & Ruth R. Faden, *The Right to Health and the Right to Health Care*, 4 J. MED & PHIL. 118 (1979).

²⁵⁶ See Hoffman *supra* note 130.

care statute since 1965—have alleviated Puerto Rico’s health care crisis enough.

In response, the Puerto Rican government has tried to cover health care spending gaps with local income tax. However, the island continues to show fewer tax contributors as residents migrate to the mainland, a large group of Puerto Ricans is state-employed, and almost half of the population lies below the federal poverty level with very low to nonexistent tax contributions. Limiting fiscal budgets will not do the Puerto Rican health care system any good. Short-term financing tools in place to address “emergency” damages will not solve the underlying fiscal problems or overcome the federal health spending shortages either. Politically, the Puerto Rican government is powerless. Puerto Rico’s representatives do not have the right to vote in Congress and, as a result, they cannot meaningfully participate in the process of revising and passing any federal legislation that could benefit the island otherwise.

The Puerto Rican health care system faces a structural problem that urges a comprehensive, permanent solution. A serious obstacle stands in the way of any policy aimed toward much-needed change: those living in Puerto Rico are not treated like any other American living in the U.S. This is the most urgent policy needed by Puerto Rico. It will enable those living on the island to speak up and inform future health care reforms, as does any other American who struggles with the current health care system. Exclusion denies the right to equal protection of the law under the Due Process Clause of the Fifth Amendment to the U.S. Constitution, and fails “rational basis” review with respect to the differential treatment it promulgates under the Constitution’s Territorial Clause. For years, Puerto Ricans have been fighting for statehood; however, the ultimate battle is for *equal treatment*. Addressing inequality in treatment should be the first step to achieving meaningful health care reforms. Acknowledgement and acceptance of the fact that the island has heterogeneous conditions in contrast to, but is legally equal to, the mainland would cause Congress, courts, and the federal government to remedy—and not reproduce—disparities.

For over a hundred years, Puerto Ricans have been denied the right to be treated as equal American citizens. Segregating Puerto Ricans from the benefits given to other Americans demonstrates a racial and ethnic discrimination against a politically powerless minority. It is time to overturn outdated precedents. Being seen as equals in the eyes of the law will not grant Puerto Ricans better health care immediately, but it is a mandatory starting point for any less harmful future health care reform.