

PUERTO RICO'S DEBT: STILL FOREIGN IN A DOMESTIC SENSE

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ABSTRACT

*Puerto Rico, an unincorporated U.S. territory containing over three million American citizens, is suffering from a humanitarian and economic disaster unparalleled in United States history. After a decade of economic recession, Puerto Rico declared that its debts could not be repaid, setting the stage for the United States' largest debt restructuring. In addition, the Caribbean island has been frequently assailed by natural disasters, including the ongoing COVID-19 pandemic. In response to the Commonwealth's economic crises, Congress passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in 2016. That legislation established an Oversight Board to preside over the restructuring process and to reform core government processes. The Board's task is to help Puerto Rico achieve fiscal responsibility and regain access to capital markets. This unprecedented solution faces numerous and ongoing constitutional challenges. Most recently, the Oversight Board overcame an existential challenge under the Appointments Clause. In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, the Supreme Court upheld the Board's constitutionality, but it also reminded Puerto Ricans that they, in effect, remain foreign to the United States in a domestic sense. In this vein, this Article addresses the antecedents of Puerto Rico's economic collapse and its ongoing territorial relationship with the United States and discusses the extent to which the island's economic collapse and quasi-sovereign debt restructuring are tied directly to this pseudo-colonial relationship.*

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INTRODUCTION

The Commonwealth of Puerto Rico is facing a financial and humanitarian crisis of great magnitude. After years of an economic “death spiral,” Puerto Rico’s governor, Alejandro García Padilla, announced that “the debt is not payable,”¹ setting the stage for the largest debt restructuring by a governmental unit in American history.² Puerto Rico is now in the midst of restructuring its debts and reorganizing the Commonwealth’s government under the guidance of a federally-mandated Oversight Board, established by Congress through the Puerto Rico Oversight, Management, and Economic

¹ Michael Corkery & Mary Williams Walsh, *Puerto Rico’s Governor Says Island’s Debts Are Not Payable*, N.Y. TIMES (June 28, 2015), <https://www.nytimes.com/2015/06/29/business/dealbook/puerto-ricos-governor-says-islands-debts-are-not-payable.html>.

² Edwin Meléndez, *The Economics of PROMESA*, 30 CENTRO J. 72, 73 (2018).

Stability Act (PROMESA) in 2016.³ The Oversight Board, armed with substantial powers to navigate these financial challenges, was widely impugned as an arm of the “colonial”⁴ federal government. Protests followed its creation across the Commonwealth.⁵ But several years after its creation, the Oversight Board is still at work negotiating with the government’s creditors.⁶

In 2017, Hurricanes Irma and Maria struck Puerto Rico, worsening an already dire economic situation. The hurricanes caused over \$80 billion in damage⁷ and killed several thousand people.⁸ To make matters worse, the ailing Puerto Rico Electric Power Authority (PREPA), which had begun the process of restructuring its \$9 billion in debt, struggled to provide Puerto Ricans with adequate access to clean water and electricity.⁹ The federal response to the catastrophes was “hesitating” and confusing; for weeks, President Trump questioned who was ultimately responsible for providing financial aid to the island.¹⁰ Meanwhile, aftershocks from a 6.4 magnitude earthquake in January 2020 shook communities on the island, damaging thousands of homes and leaving thousands of Puerto Ricans to live in makeshift shelters months after the catastrophe.¹¹ These aftershocks are

³ Puerto Rico Oversight, Management, and Economic Stability Act, Pub. L. No. 114-187, 130 Stat. 549 (2016). The Financial Oversight and Management Board is specifically codified in 48 U.S.C. § 2121 (2016).

⁴ See, e.g., Melody Fonseca, *Beyond Colonial Entrapment: The Challenges of Puerto Rican “National Consciousness” in Times of PROMESA*, 21 INTERVENTIONS 747, 748 (2019) (arguing that PROMESA serves to “uphold colonial status” by making it acceptable to the consciousness of the colonized.).

⁵ Edwin Meléndez, *The Politics of PROMESA*, 30 CENTRO J. 43, 58 (2018); see also, Mary Williams Walsh, *Here’s Why Puerto Rico’s Next Governor Will Inherit a Financial Mess*, N.Y. TIMES (July 25, 2019), <https://nyti.ms/2ycJpAC>.

⁶ See Andrew Scurria, *Puerto Rico Utility Deal Stumbles, Shaking Muni Investors*, WALL STREET J. (Mar. 2, 2020), <https://www.wsj.com/articles/puerto-rico-utility-deal-stumbles-shaking-muni-investors-11583194215>.

⁷ Meléndez, *supra* note 2, at 73; see STORM EVENTS DATABASE: PUERTO RICO 09/01/2017 – 09/18/2017, NOAA NATIONAL CENTERS FOR ENVIRONMENTAL INFORMATION, https://www.ncdc.noaa.gov/stormevents/listevents.jsp?eventType=ALL&beginDate_mm=09&beginDate_dd=01&beginDate_yyyy=2017&endDate_mm=09&endDate_dd=18&endDate_yyyy=2017&county=ALL&hailfilter=0.00&tornfilter=0&windfilter=000&sort=DT&submitButton=Search&statefips=99%20PUERTO+RICO.

⁸ Sarah Lynch Baldwin & David Begnaud, *Hurricane Maria Caused an Estimated 2,975 Deaths in Puerto Rico, New Study Finds*, CBS NEWS, <https://www.cbsnews.com/news/hurricane-maria-death-toll-puerto-rico-2975-killed-by-storm-study-finds/>.

⁹ See, e.g., Caitlin Dickerson & Luis Ferré-Sadurní, *‘Like Going Back in Time’: Puerto Ricans Put Survival Skills to Use*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/hurricane-maria-puerto-rico-coping.html?smid=url-share>.

¹⁰ Issacharoff, et al., *What is Puerto Rico?*, 94 IND. L.J. 1, 2 (2019).

¹¹ Frances Robles, *Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside*, N.Y. TIMES (Mar. 1, 2020), <https://nyti.ms/2I7zroW>.

likely to continue for years.¹² Further, the long-term damage that will accrue from the COVID-19 pandemic is unpredictable. Some projections indicate that Puerto Rico may never fully recover from the combination of these catastrophes.¹³

Puerto Rico's dramatic restructuring has been discussed extensively by academics of widely varying specialties. The crisis in Puerto Rico remains dynamic and involves complicated questions pertaining to the U.S. Constitution and the Territory Clause,¹⁴ international law,¹⁵ colonialism,¹⁶ and sovereign (or quasi-sovereign) debt restructuring,¹⁷ among others. Often, the literature concerning Puerto Rico's restructuring under PROMESA focuses on examining only one of these issues. Indeed, two relatively distinct paths have emerged – (1) scholars tend to focus on the constitutional issues underpinning the Commonwealth's relationship with the United States or (2) they focus primarily on the restructuring itself and the challenges attached thereto.

This, of course, makes sense—the issues here are multi-disciplinary and complicated, and each area of interest is deserving of substantial, individualized attention.¹⁸ At the same time, less effort has been expended

¹² *Id.* (noting that “the aftershocks will continue for years to decades and that there is up to a 30% chance of an aftershock as big as the Jan. 7 quake.”).

¹³ See, e.g., FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO, 2020 FISCAL PLAN FOR PUERTO RICO: RESTORING GROWTH AND PROSPERITY 10 (2020), <https://drive.google.com/file/d/1ayjLxr74cKpFo4B2sAToSj-OeJOYvFO5/view>; Ramirez, *infra* note 95 and accompanying text.

¹⁴ 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.”); see Issacharoff, et al., *supra* note 10 (seeking to define Puerto Rico's relationship with the United States); see also *Territorial Federalism*, 130 HARV. L. REV. 1632 (2017).

¹⁵ See, e.g., Joseph Blocher & Mitu Gulati, *Puerto Rico and the Right of Accession*, 43 YALE J. INT'L L. 229 (2018) (investigating the extent to which international law may affect the constitutional relationship between the United States and Puerto Rico).

¹⁶ See, e.g., Fonseca, *supra* note 4 and text accompanying; JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 5 (1985) (arguing that the *Insular Cases* have led to a “judicial rule” which permits the treatment of “United States citizens who reside in Puerto Rico” in a “separate and unequal manner.”).

¹⁷ See Mitu Gulati & Robert K. Rasmussen, *Puerto Rico and the Netherworld of Sovereign Debt Restructuring*, 91 S. CAL. L. REV. 133 (2017), Stephen Kim Park & Tim R. Samples, *Puerto Rico's Debt Dilemma and Pathways Toward Sovereign Solvency*, 54 AM. BUS. L.J. 9 (2017); see also WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS (Peter Conti-Brown & David A. Skeel, Jr., eds., 2012) (describing possible bankruptcy models states); Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888 (2012) (describing a model for quasi-sovereign debt).

¹⁸ Indeed, as Amelia Cheatham of the Council on Foreign Relations puts it, “[t]he Caribbean island . . . faces a multilayered economic and social crisis, rooted in long-standing policy and compounded by natural disasters, the coronavirus pandemic, migration, and government mismanagement.” Amelia Cheatham, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN REL. (Nov. 25, 2020), <https://www.cfr.org/backgrounder/puerto-rico-us-territory-crisis>.

to investigate the overlap between these substantial underlying constitutional issues and the restructuring process itself. Indeed, there is a need to analyze how Puerto Rico's constitutional relationship with the United States makes PROMESA possible, and indeed desirable, and complicates the restructuring process. Notably, many of Puerto Rico's financial difficulties are related to the underlying relationship between the United States and Puerto Rico.¹⁹ That is, because Puerto Rico exists in a “netherworld” of sovereign debt—neither fully sovereign, a state, nor simply a municipality—the Oversight Board's restructuring efforts provide an important glimpse at a unique crossroads in quasi-sovereign restructuring efforts.²⁰

It is within this complicated structure that this Article seeks to break new ground. Specifically, this Article investigates the extent to which Puerto Rico's complicated constitutional relationship with the United States has produced and worsened its financial distress and impacted the current restructuring process. This investigation is aided by the Supreme Court's recent work in clarifying this relationship.²¹

Part I provides a general overview of the financial crisis in Puerto Rico. Here, my focus is discussing the antecedents of Puerto Rico's financial crisis. In Part I, I outline some recent developments in the financial crisis, including a general overview of the PROMESA framework. It is impossible to extricate the present economic condition of the island from its historical—and ongoing—status as an unincorporated territory, as well as the political ramifications of the Commonwealth's status and economic condition.

Part II looks at the constitutional relationship between the United States and Puerto Rico and ends by considering the overlap between Puerto Rico's economic restructuring and this constitutional relationship. Recent developments at the Supreme Court, especially the holding in *Financial Oversight & Management Board for Puerto Rico v. Aurelius Inv., LLC*,²² necessitate revisiting this important topic within the context of Puerto Rico's financial crisis. The holding in this case, while unsurprising and likely rooted in pragmatism, reinforces the notion that Puerto Rico remains “foreign to

¹⁹ See MARC D. JOFFE & JESSE MARTINEZ, ORIGINS OF THE PUERTO RICO FISCAL CRISIS, MERCATUS RESEARCH, MERCATUS CTR. AT GEORGE MASON UNIV. 28 (2016); TORRUELLA, *supra* note 16, at 117–266.

²⁰ Gulati & Rasmussen, *supra* note 17, at 135.

²¹ See *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020); *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115 (2016); *Puerto Rico v. Sanchez Valle*, 579 U.S. 59 (2016).

²² 140 S. Ct. 1649 (2020).

the United States in a domestic sense.”²³ Even so, this restructuring provides a useful case study in the burgeoning field of quasi-sovereign debt restructuring. This section concludes with a brief discussion of Puerto Rico’s political landscape and the Commonwealth’s path to statehood following the November 2020 referendum on statehood.

I. THE FINANCIAL CRISIS IN PUERTO RICO: ANTECEDENTS AND RESPONSE

A. *Colony by Afterthought*

Prior to its acquisition by the United States in 1898, Puerto Rico functioned as a military outpost for Spain and possessed little political autonomy.²⁴ By 1897, however, discontent with Spain’s colonial rule led to a growing independence movement in Cuba and Puerto Rico.²⁵ Spain responded to this pressure from its colonies (and from the United States) by enacting the Autonomic Charters for Cuba and Puerto Rico on November 25, 1897.²⁶ In Puerto Rico, the Charter provided for an insular bicameral parliament paired with a Spanish-appointed Governor-General, where the majority of the upper house was elected by “popular suffrage” and all of the lower chamber was chosen by the “general electorate.”²⁷

Puerto Rico’s autonomy was short-lived, however. Tensions between the United States and Spain escalated into war following the sinking of the *USS Maine* in Havana.²⁸ Spain quickly lost the war. The Treaty of Paris, signed in 1899, ceded Puerto Rico and Guam to the United States, sold the Philippines to the United States, and relinquished claims of sovereignty over Cuba.²⁹ While the United States occupied Cuba for a short period, it eventually withdrew its military and generally left Cuba to its own devices.³⁰

The United States’ acquisition of Puerto Rico was not, however, a foregone conclusion. In the lead-up to the conflict, the United States’ primary aim in the Caribbean was the acquisition of Cuba, not Puerto Rico.³¹ As the late, and eminent, Judge Juan Torruella notes, the popular uprisings

²³ *Downes v. Bidwell*, 182 U.S. 244, 341 (1901) (White, J., concurring).

²⁴ See Cheatham, *supra* note 18.

²⁵ TORRUELLA, *supra* note 16, at 11–18 Cheatham, *supra* note 19.

²⁶ TORRUELLA, *supra* note 16, at 15.

²⁷ *Id.* at 15 n.57.

²⁸ Cheatham, *supra* note 18.

²⁹ *Id.*; Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 806 (2005) (citing Treaty of Paris, 30 Stat at 1755-56 (Arts I-III)).

³⁰ *Id.* at 798 n.4.

³¹ TORRUELLA, *supra* note 16, at 18 (explaining that “Puerto Rico would become a secondary target of American imperial design.”).

in Cuba which sought autonomy from Spanish rule dissuaded the United States from continuing its pursuit of colonizing Cuba.³² Indeed, by the time war broke out, American officials often expressed the necessity of taking up arms to help Cuba secure independence, not to colonize it.³³ At the same time, no such language was directed at Puerto Rico, even as American soldiers were greeted on the island with great acclaim and little bloodshed.³⁴ Yet, Puerto Rico found itself under American military rule from 1898 to 1900.³⁵

While Puerto Rico was initially viewed as ripe for statehood, this perception did not last.³⁶ While United States officials were engaged in evaluating the possible integration of Puerto Rico as “an integral part of the United States,” the Philippines were engaged in a widespread (and costly) insurrection against their new colonizer.³⁷ This led to substantial anxiety that granting citizenship and free trade to Puerto Rico would extend to the “unruly and disobedient” Filipinos.³⁸ Indeed, in congressional debates regarding the Foraker Act, which established civilian government in Puerto Rico, Congressman Newlands of Nevada directly compared the Philippines to Puerto Rico. Specifically, he objected to:

the establishment of a precedent which [would] be invoked to control our action regarding the Philippines later on; such action, embracing not simply one island near our coast [Puerto Rico], easily governed, its people friendly and peaceful, but [rather] embracing an archipelago [i.e., the Philippines] . . . of diverse races, speaking different languages, having different customs, and ranging all the way from barbarism to semicivilization.³⁹

Consequently, Congress walked back the citizenship provision, knocking Puerto Rico off the tracks of joining the Union.⁴⁰

³² *Id.* at 7-18.

³³ Burnett, *supra* note 29, at 806.

³⁴ TORRUELLA, *supra* note 16, at 21–23.

³⁵ *Id.* at 24.

³⁶ *Id.* at 32–33; Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 297 (2007).

³⁷ TORRUELLA, *supra* note 16, at 33.

³⁸ TORRUELLA, *supra* note 36, at 297–98.

³⁹ *Id.* at 297 (emphasis added) (citing H.R. 8245, 56th Cong., 1st. Sess. 33 Cong. Rec., at 1994 (1900)).

⁴⁰ *Id.* at 299.

In this context of acquisition-by-afterthought, it is unsurprising that Puerto Rico has long been “invisible” to the American people, and, often, to the federal government.⁴¹ This invisibility manifested in the faltering federal response to Hurricanes Maria and Irma, including the initial understatement of casualties.⁴² Puerto Rico remains invisible to American citizens; most do not realize that Puerto Ricans are American citizens.⁴³ And, from a policy standpoint, such invisibility has manifested itself in inconsistent federal treatment that has contributed significantly to the Puerto Rican financial crisis.⁴⁴ Moreover, this notion of acquisition-by-afterthought taints not just the financial and economic condition of the island but also the constitutional relationship that the island has with the United States.

B. Extractive, Misguided Federal Policies and Social Conditions of Puerto Rico’s Economic Collapse

Puerto Rico’s post-Spanish-American-War economy has been shaped profoundly by federal policies. Because Puerto Rico has been effectively treated as a colony since its acquisition, the United States government has essentially legislated *carte blanche*. The resulting policies have left the island in a state of neglect.⁴⁵ Indeed, economic policies regarding the Commonwealth have done more to extract the island’s wealth than drive holistic, sustainable economic growth.⁴⁶ As Judge Torruella has noted,

⁴¹ Christina Duffy Posna, *When Statehood was Autonomy*, in RECONSIDERING THE INSULAR CASES: THE PAST AND FUTURE OF THE AMERICAN EMPIRE 1, 2 (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015).

⁴² See Issacharoff, et al., *supra* note 10; Rose Cuison Villazor, *Problematizing the Protection of Culture and the Insular Cases*, 131 HARV. L. REV. F. 127, 136 (2018); see Baldwin & Begnaud, *supra* note 8.

⁴³ Villazor, *supra* note 42, at 136–37 (describing polls that show “half of Americans do not realize that the damages in Puerto Rico [from the hurricanes] are domestic, not foreign ones” and that “fifty-four percent of people polled did not know that Puerto Ricans are U.S. citizens”). For an analysis regarding the pernicious effects of denying constitutional citizenship to Puerto Ricans in place of “statutory citizenship,” see Lisa Maria Perez, note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008). On how Puerto Ricans were given citizenship by the Jones-Shafroth Act, see Joseph Blocher & Mitu Gulati, “What Does Puerto Rico Citizenship Mean for Puerto Rico’s Legal Status?,” 67 DUKE L.J. 122 (2018).

⁴⁴ See, e.g., JOFFE & MARTINEZ, *supra* note 19, at 28 (arguing, among other things, that “various congressional reforms of the US colonial relationship with Puerto Rico had long-term unintended consequences that have exacerbated the current crisis”). These reforms will be covered in detail *infra* Part I.B.

⁴⁵ Antonio Weiss & Brad Setser, *America’s Forgotten Colony: Ending Puerto Rico’s Perpetual Crisis*, 98 FOREIGN AFF. 158 (2019).

⁴⁶ For more on extractive versus inclusive political and economic systems, see Daron Acemoglu & James A. Robinson, *Extractive and Inclusive Political Institutions*, in WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY 79–87 (2012).

Puerto Rico is treated as a “captive market of the United States,” wherein “about half of goods imported are purchased from the mainland United States, and Puerto Ricans are the largest per capita importers of U.S. goods in the world.”⁴⁷ Torruella argues that while Puerto Rico is annually subsidized by about \$16 billion from the U.S. government, a substantial portion of these funds are “repatriated, and go to sustaining U.S. business and enterprises on the mainland,” in what he terms “a classic colonial economic relationship.”⁴⁸

And while Puerto Rico did experience substantial economic growth during the decades following its acquisition by the United States, this growth was in part achieved through a system of artificiality and extraction. In the 1940s, through Operation Bootstrap, Puerto Rico’s economy shifted from an agrarian economy to a manufacturing center in the Caribbean.⁴⁹ However, “much of the benefit flowed to absentee owners, including large US-based sugar companies.”⁵⁰ The extraction both relied on and drove the job market: though per capita income increased by more than 500 percent between 1950 and 1971, wages were lower in Puerto Rico than in Hawaii, Cuba, and Honduras, which aided in attracting companies to the island.⁵¹ The enactment of the Merchant Marine Act of 1920 further exacerbated this dynamic.⁵² The Act “prevents foreign-flagged ships from transporting goods between the US mainland and overseas territories such as Puerto Rico.”⁵³ This has resulted in inflating consumer prices and disincentivizing Puerto Rico’s exportation, further hampering economic growth.⁵⁴ The overarching effect of these economic shifts has been the complete integration of Puerto Rico’s economy with the United States.⁵⁵

This integration produced reliance on the federal government, which has not been equally distributed. Judge Torruella notes that Puerto Rico “receives only a fraction of the federal support extended to its mainland counterparts”; in fact, “it receives little more than a tenth of the amount of

⁴⁷ 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. 65, 92 (2018).

⁴⁸ *Id.*

⁴⁹ See Cheatham, *supra* note 18; see also Juan Ruiz Toro, *Puerto Rico’s Operation Bootstrap*, MODERN LATIN AMERICA (Thomas E. Skidmore, et al. eds., 2013), <https://library.brown.edu/create/modernlatinamerica/chapters/chapter-12-strategies-for-economic-development/puerto-ricos-operation-bootstrap/>.

⁵⁰ JOFFE & MARTINEZ, *supra* note 19, at 5.

⁵¹ *Id.*; Cheatham, *supra* note 18; Toro, *supra* note 49.

⁵² Merchant Marine Act, Pub. L. 66–261, ch. 250, 41 Stat. 988 (codified at 46 U.S.C. § 50102 (1920)).

⁵³ JOFFE & MARTINEZ, *supra* note 19, at 5.

⁵⁴ *Id.* at 27.

⁵⁵ Toro, *supra* note 49.

Medicaid funding that is granted to wealthier states or those with smaller populations.”⁵⁶ In addition, the Puerto Rican economy, and the mainland and international companies that operated there, long relied on favorable tax treatment by the U.S. Government, but that favorable treatment no longer exists. In 1976, Congress added section 936 of the Internal Revenue Code, which exempted corporate income earned in Puerto Rico from taxation.⁵⁷ This exemption stimulated growth in Puerto Rico’s industrial base, and by 1995, net profits from U.S. corporations operating in Puerto Rico surpassed \$14 billion.⁵⁸ In 1996, however, Congress established a 10-year phase-out of the exemption. Section 936 corporations quickly migrated from the island.⁵⁹ The result was an economic “death spiral”; since 2006, Puerto Rico has experienced a protracted and near uninterrupted economic recession.⁶⁰

Many policies, while not having the effect of extracting wealth, have had dramatic unintended consequences. In particular, the Jones-Shafroth Act limited Puerto Rico’s government borrowing to seven percent of the total assessed value of Puerto Rican property and established a balanced budget provision.⁶¹ This balanced budget provision was later adopted by the 1952 Puerto Rico Constitution in Article VI, Section 7: “the appropriations made for any fiscal year shall not exceed the total revenues, including available surplus, estimated for said fiscal year unless the imposition of taxes sufficient to cover said appropriations is provided by law.”⁶²

Unfortunately, as Mark Joffe and Jesse Martinez suggest, in translating the term “total revenues” to “recursos totales”—total resources—in the Spanish version of the constitution, the Puerto Rico Constitution enshrined a “concept that could be interpreted more broadly.”⁶³ Which is precisely what happened: the interpretation adopted at the constitutional convention “included revenues from taxation, surpluses, royalties, federal assistance, and, most importantly, funds obtained through the sale of bonds.”⁶⁴ This left Puerto Rico with a more flexible approach to the balanced budget provisions

⁵⁶ Torruella, *supra* note 47, at 92.

⁵⁷ JOFFE & MARTINEZ, *supra* note 19, at 14; 26 U.S.C. § 936(a)(1) (1976) (repealed 2018).

⁵⁸ Torruella, *supra* note 47, at 90.

⁵⁹ *Id.* at 91.

⁶⁰ *Id.*; JOFFE & MARTINEZ, *supra* note 19, at 14.

⁶¹ JOFFE & MARTINEZ, *supra* note 19, at 6, 9 (the “Jones-Shafroth Act also limited Puerto Rico’s bonded indebtedness to 7 percent of assessed taxable property value.”); An Act to provide a civil government for Porto Rico, and for other purposes, Pub. L. No. 64-368, § 34I, 39 Stat. 951 (1917) [hereinafter Jones-Shafroth Act].

⁶² P.R. CONST. art. VI, § 7.

⁶³ JOFFE & MARTINEZ, *supra* note 19, at 10; P.R. CONST. art. VI, § 7.

⁶⁴ *Id.* at 10.

than what exists in most state constitutions.⁶⁵ Meanwhile, Congress weakened the seven-percent clause in the Jones-Shafroth Act, which limited total bonded indebtedness, to the extent of providing a fifteen percent ceiling on “*debt service* (principal and interest payments) as a percentage of tax revenues.”⁶⁶ Essentially, the expanded interpretations of the constitutional balanced budget requirements set the stage for near-perennial government deficits.⁶⁷

These deficits—and Puerto Rico’s total outstanding debt—have ballooned quickly, especially since 2005. Puerto Rico’s “total public debt outstanding increased continuously between fiscal years 2005 and 2014” from about “\$39.2 billion to about \$67.8 billion, further rising by 2017 to \$74.3 billion.”⁶⁸ This debt rose from approximately 71 to 99 percent of GNP between 2005 and 2014, but after some restructuring efforts under PROMESA, the debt-to-GNP ratio decreased to 93 percent.⁶⁹ For a rough and imperfect comparison, in 2019 the highest debt-to-GDP ratio among U.S. States was approximately 28 percent (Kentucky), and both the median and average were closer to 16 percent.⁷⁰ Meanwhile, Puerto Rico’s general revenue declined by 11 percent between 2014 and 2016.⁷¹

Governmental debts in Puerto Rico extend beyond just the core government; indeed, public corporations have played a substantial role in the instant debt crisis. Many of these corporations were formed during the New Deal Era and include the Electric Power Authority (PREPA), the Aqueduct and Sewer Authority (PRASA), the Highway and Transportation Authority (PRHTA), the Land Authority, and the Government Development

⁶⁵ See Thomas J. Sargent, *Nobel Lecture: United States Then, Europe Now*, 120 J. POL. ECON. 1, 24–27 (2012). Importantly, more than half of the states’ constitutions contain rather forceful balanced budget provisions precisely because of the federal government’s reticence to bail-out several of the states in the aftermath of state defaults in the 1830s. The federal government refused to bail these states out because the debt was not viewed as being morally incurred, as it was during the Revolutionary War. See *id.* No such similar bail-out or federal intervention in Puerto Rico’s fiscal space has been extended to Puerto Rico—that is, until PROMESA was passed in 2016.

⁶⁶ JOFFE & MARTINEZ, *supra* note 19, at 11–13.

⁶⁷ *Id.* at 11; The Government Accounting Office reported in 2018 that “Puerto Rico’s government has operated with a deficit . . . in each fiscal year since 2002, and its deficits grew over time.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-387, FACTORS CONTRIBUTING TO THE DEBT CRISIS AND POTENTIAL FEDERAL ACTIONS TO ADDRESS THEM 8 (2018) [hereinafter GAO REPORT 2018].

⁶⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-160, U.S. TERRITORIES: PUBLIC DEBT OUTLOOK 12 (2017); KOBRE & KIM, THE FINANCIAL OVERSIGHT & MANAGEMENT BOARD FOR PUERTO RICO: FINAL INVESTIGATIVE REPORT 42 (2018), <https://www.documentcloud.org/documents/4777926-FOMB-Final-Investigative-Report-Kobre-amp-Kim.html>.

⁶⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-19-525, U.S. TERRITORIES: PUBLIC DEBT OUTLOOK – 2019 UPDATE 8, 13 (2019) [hereinafter GAO REPORT 2019].

⁷⁰ Erin Duffin, *State and Local Debt in the U.S. as a Percentage of GDP in 2019, by State*, STATISTA (Jul. 13, 2021), <https://www.statista.com/statistics/246337/state-debt-in-the-us-as-a-percentage-of-gsp/>.

⁷¹ GAO REPORT 2019, at 13.

Bank (GDB).⁷² Importantly, these corporations managed to drive up their own debts by virtue of bond offerings which were unrestricted by the Puerto Rico Constitution's balanced budget provision.⁷³ Moreover, the GDB, by operating in a "dual role as fiscal agent and lender, enabled the Puerto Rico-Related Entities (particularly the Public Utilities . . .) to subsist on appropriations from the General Fund, short-term cash influges from GDB, and bond proceeds."⁷⁴ This was instead of holding them accountable for their debts by "ensuring that Issuers of revenue bonds actually collected sufficient revenues to repay those bonds, or demanding fiscal responsibility and independence."⁷⁵

The GAO labels these entities' debts as "component unit debt," which accounted for 40.5 percent (or approximately \$27.6 billion) of Puerto Rico's total public debt in 2014.⁷⁶ Eventually, the government corporations lost access to capital markets, straining the GDB's ability to stymie their financial hemorrhaging.⁷⁷ This drove the corporations to seek a remedy through bankruptcy proceedings, only to find—as will be discussed infra Part I.C—that, unlike their counterparts on the mainland, they were barred from this form of relief.⁷⁸ Moreover, Puerto Rico has substantial underfunded pension liabilities that remain outstanding: "as of June 30, 2014, Puerto Rico's three major pension systems had aggregate actuarial liabilities of \$45.5 billion compared to net assets of \$1.9 billion—yielding a funded ratio of only 4 percent."⁷⁹

While many of the macroeconomic preconditions of this debt accumulation were out of Puerto Rico's control—driven in large part by extractive or misguided federal policies—it is clear that Puerto Rico's poor fiscal management is also an aggravating factor in its economic collapse. Government spending is wildly out of proportion with expected revenue generation and government agencies and corporations are burdened by

⁷² JOFFE & MARTINEZ, *supra* note 19, at 7.

⁷³ *Id.* at 13.

⁷⁴ KOBRE & KIM, *supra* note 68, at 3.

⁷⁵ *Id.*

⁷⁶ GAO REPORT 2018, at 14.

⁷⁷ KOBRE & KIM, *supra* note 68, at 3.

⁷⁸ *Id.* Puerto Rico's access to credit markets were effectively closed off when several "ratings agencies downgraded Puerto Rico bonds . . . to noninvestment grade in 2014." Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942 (2016).

⁷⁹ JOFFE & MARTINEZ, *supra* note 19, at 18. The primary systems are the Employees Retirement System, the Teachers Retirement System, and the Judiciary Retirement System. These funds are likely to remain unfunded for decades. See Sergio M. Marxuach, *Analysis of Puerto Rico's Current Economic and Fiscal Situation*, CTR. NEW ECON., at 14, https://grupocne.org/wp-content/uploads/2015/10/2015_11_AnalysisOfPuertoRicosCurrentEconomicAndFiscalSituation-6.pdf.

inefficiencies.⁸⁰ The public corporations have been especially prone to mismanagement, overspending, and, in the case of PREPA, poor and insufficient investment in infrastructure improvements.⁸¹ Moreover, substandard accounting practices have “exacerbated fiscal imbalances through excessively optimistic forecasting,” and there are often “lengthy delays in the release of Puerto Rico’s audited financial statements.”⁸² Indeed, Anne Krueger, the former World Bank Chief Economist, and her coauthors found that “the accounting systems in Puerto Rico do not permit timely and reliable monitoring of fiscal trends.”⁸³ These failures muddied the fiscal picture for investors and policymakers, leaving them without the tools to adequately evaluate Puerto Rico’s fiscal health.

The economic effect of this substantial debt has hobbled the Puerto Rico government’s ability to provide essential services, accelerating the financial and social crisis.⁸⁴ Indeed, at the height of the calamity, Puerto Rico was spending more on debt service than on education, health, or security, resulting in the closing of schools, higher taxes, and substantial budget cuts to government programs and employment.⁸⁵ PROMESA reports the same: “as a result of its fiscal emergency, the government of Puerto Rico has been unable to provide its citizens with effective services.”⁸⁶ And, startlingly, over 45 percent of “Puerto Rico residents live in poverty, more than double the highest poverty rate of any U.S. state,” while Puerto Rico’s unemployment rate, at 8.5 percent, was “over two times the national average” in 2019.⁸⁷

This has driven substantial population loss. In 2014, compared to countries around the world, Puerto Rico ranked seventh in total population

⁸⁰ JOFFE & MARTINEZ, *supra* note 19; *see also* Park & Samples, *supra* note 17, at 15–19 (describing existence and cause of budget imbalances).

⁸¹ GAO REPORT 2019, at 25.

⁸² Park & Samples, *supra* note 17, at 16.

⁸³ ANNE O. KRUEGER, ET AL., PUERTO RICO—A WAY FORWARD 10 (2015), <http://www.gdb-pur.com/documents/FinalUpdatedReport7-13-15.pdf>.

⁸⁴ Natasha Lycia Ora Bannan, *Puerto Rico's Odious Debt: The Economic Crisis of Colonialism*, 19 CUNY L. REV. 287, 292–95 (2016).

⁸⁵ *Id.* at 292–93.

⁸⁶ 48 U.S.C. § 2194(m)(2) (2016).

⁸⁷ RICARDO ROSSELLÓ NEVARES, REVISED FISCAL PLAN FOR PUERTO RICO 6 (2019), <http://www.aafaf.pr.gov/assets/fiscal-plan-pr-fy2020-draft-03-10-2019.pdf> [hereinafter REVISED FISCAL PLAN 2019]. Certainly, the COVID-19 pandemic will exert substantial negative effects on Puerto Rico’s employment rate. Exact numbers on unemployment are not currently available, but preliminary numbers suggest that the April 2020 “nonfarm wage and salary employment” has decreased by 10.1% from March 2020. BUREAU LAB. STAT., PUERTO RICO: ECONOMY AT A GLANCE (2020), <https://www.bls.gov/eag/eag.pr.htm>.

loss.⁸⁸ Today, about “six of every ten [Puerto Ricans] now reside stateside.”

⁸⁹ Combined with a declining birth rate, this has resulted in a steady decline in the island’s population.⁹⁰ In the wake of Hurricanes Irma and Maria, which accelerated this trend, “an additional 179,000 people (or about 8.2% of the population) [are] expected to leave Puerto Rico by fiscal year 2024.”⁹¹ Meanwhile, Puerto Rico has an extremely low labor participation rate of 40 percent and has struggled with high levels of “brain drain.”⁹² This reduces Puerto Rico’s tax base, limits long-term growth, and increases borrowing.⁹³ These factors will severely limit Puerto Rico’s prospective economic growth and will continue to drain the island of the most ambitious portion of its labor force.⁹⁴

C. Self-Help and Federal Intervention: The Creation of PROMESA

Paired with these multi-layered and complex federal, territorial, and social issues, Puerto Rico’s recent natural catastrophes, including Hurricanes Irma and Maria and substantial earthquakes in early 2020, have pushed the economy further into disrepair.⁹⁵ In addition, the COVID-19 pandemic greatly hampered the Island’s economic recovery and has infected

⁸⁸ Jaison R. Abel & Richard Deitz, *The Causes and Consequences of Puerto Rico’s Declining Population*, 20 CURRENT ISSUES IN ECON. & ECON FIN. 1, 1 (2014).

⁸⁹ Meléndez, *supra* note 2, at 73; *see* Meléndez, *supra* note 5, at 50.

⁹⁰ Meléndez, *supra* note 2, at 100.

⁹¹ REVISED FISCAL PLAN 2019, at 6.

⁹² KRUEGER ET AL., *supra* note 83, at 6; Jose Aybar, *Puerto Rico’s Next Crisis – Brain Drain*, THE HILL (Oct. 16, 2017), <https://thehill.com/opinion/energy-environment/355666-puerto-ricos-next-crisis-brain-drain>.

⁹³ Meléndez, *supra* note 2, at 74 (“Contractions in government expenditures and significant population losses are a dampening force to economic activity—the more the economy contracts, the more difficult it is to balance budgets and to service the debt as revenue projections and borrowing capacity are centrally based on growth projection.”).

⁹⁴ JOFFE & MARTINEZ, *supra* note 19, at 6.

⁹⁵ *See* NOAA NATIONAL CENTERS FOR ENVIRONMENTAL INFORMATION, STORM EVENTS DATABASE: PUERTO RICO 09/01/2017–09/18/2017, https://www.ncdc.noaa.gov/stormevents/listevents.jsp?eventType=ALL&beginDate_mm=09&beginDate_dd=01&beginDate_yyyy=2017&endDate_mm=09&endDate_dd=18&endDate_yyyy=2017&county=ALL&hailfilter=0.00&tornfilter=0&windfilter=000&sort=DT&submitButton=Search&statefips=99%2CPUERTO+RICO; Sarah Lynch Baldwin & David Begnaud, *Hurricane Maria Caused an Estimated 2,975 Deaths in Puerto Rico, New Study Finds*, CBS NEWS (Aug. 28, 2018), <https://www.cbsnews.com/news/hurricane-maria-death-toll-puerto-rico-2975-killed-by-storm-study-finds/>; Caitlin Dickerson & Luis Ferré-Sadurni, ‘Like Going Back in Time’: Puerto Ricans Put Survival Skills to Use, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/us/hurricane-maria-puerto-rico-coping.html>; Frances Robies, *Months After Puerto Rico Earthquakes, Thousands Are Still Living Outside*, N.Y. TIMES (Mar. 1, 2020), <https://nyti.ms/2I7zroW>.

over two hundred thousand Puerto Ricans.⁹⁶ Puerto Rico's financial and humanitarian future is far from clear, but the PROMESA Oversight Board remains engaged in a years-long restructuring process that aims to restore the island to financial independence. This section will briefly outline Puerto Rico's attempt at self-help, the 2016 enactment of PROMESA, and the general function of the PROMESA Oversight Board.

1. Self-Help: Puerto Rico's Attempt at Restructuring

On June 28, 2014, in response to the growing economic distress of its public corporations, Puerto Rico adopted the Puerto Rico Corporations Debt Enforcement and Recovery Act (the "Debt Recovery Act"),⁹⁷ which provided a framework for these corporations to restructure their debt obligations.⁹⁸ This framework drew heavily from Chapter 9 of the Federal Bankruptcy Code.⁹⁹ The focus was on providing relief to instrumentalities of the government, not the government itself; indeed, the act specifically excluded the Commonwealth of Puerto Rico, its 78 municipal governments, the GDB, and the Puerto Rico Sales Tax Financing Corporation ("COFINA"), among other similar government units.¹⁰⁰

The stated purpose of the Debt Recovery Act was to "allow[] public corporations . . . (i) to adjust their debts in the interest of all creditors affected thereby, (ii) provide[] procedures for the orderly enforcement and, if necessary, the restructuring of debt . . . and (iii) maximize[] returns to all stakeholders."¹⁰¹ The Debt Recovery Act also "recognize[d] that if an orderly debt enforcement and recovery process is not in place, there will likely be outcomes that do not balance fairly the interests of all the stakeholders."¹⁰² In this vein, the Act provided two methods by which public corporations could restructure their debt obligations: "Chapter 2, a

⁹⁶ *Tracking Coronavirus in Puerto Rico: Latest Map and Case Count*, N.Y. TIMES (last visited Nov. 3, 2021), <https://www.nytimes.com/interactive/2020/us/puerto-rico-coronavirus-cases.html>; Rachel Ramirez, *Puerto Rico Faces Another Disaster: The Coronavirus Pandemic*, GRIST (Mar. 20, 2020), <https://grist.org/justice/puerto-rico-faces-another-disaster-the-coronavirus-pandemic/>.

Because infrastructure on the island has been severely damaged by hurricanes Irma and Maria and the January 2020 earthquakes, the island will struggle to sufficiently support the number of people who are likely to fall ill with COVID-19. Indeed, the earthquakes destroyed three major hospitals and access to power and water remains insufficient. Moreover, the pandemic is already, and will continue to, decimate tourism. *Id.* One would not be remiss to suggest that Puerto Rico's outlook is especially bleak at the moment.

⁹⁷ 2014 P.R. Laws Act No. 71 [hereinafter Debt Recovery Act].

⁹⁸ Lorraine S. McGowen, *Puerto Rico Adopts a New Debt Recovery Act for its Public Corporations*, 10 PRATT'S J. BANKR. L. 453, 453 (2014).

⁹⁹ Gulati & Rasmussen, *supra* note 17, at 139.

¹⁰⁰ *Id.* at 139; McGowen, *supra* note 98, at 454.

¹⁰¹ Debt Recovery Act, Statements of Motives, pt. D.

¹⁰² *Id.*

consensual out-of-court process, and Chapter 3, a judicially managed in-court process.”¹⁰³ The two Chapters were nonexclusive—a public corporation could seek relief under both simultaneously or consecutively.¹⁰⁴

Challenges to this legislation’s constitutionality immediately arose.¹⁰⁵ The most salient issue—and the one that was ultimately decisive in *Puerto Rico v. Franklin Cal. Tax-Free Trust*¹⁰⁶—was that federal bankruptcy law preempts states from enacting their own bankruptcy frameworks for public corporations.¹⁰⁷ The Debt Recovery Act anticipated these challenges and recited that “[t]his is not a bankruptcy act, but an orderly debt enforcement act for the eligible public corporations.”¹⁰⁸ Ultimately, the legislation was defeated by the Supreme Court in *Franklin* for the exact reasons anticipated: Puerto Rico was preempted by the Bankruptcy Code.¹⁰⁹ Broadly speaking, the Supreme Court held that Puerto Rico was a “state” for the purposes of the Bankruptcy Code’s preemption provision, but not a “state” for purposes of the Bankruptcy Code’s “gateway” provision, which governs who may be a debtor, leaving its municipalities and public corporations without access to a restructuring framework.¹¹⁰

With its attempt at self-help nullified by the Supreme Court, Puerto Rico was left in a strange “netherworld” wherein its municipalities and public

¹⁰³ *Puerto Rico Public Corporation Debt Enforcement and Recovery Act, 2014 P.R. Laws Act No. 71*, 128 HARV. L. REV. 1320, 1322 (2015).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1323, n.36.

¹⁰⁶ 136 S. Ct. 1938 (2016).

¹⁰⁷ The statutory analysis essentially runs along these lines: U.S. CONST. art. I, § 8, cl. 4 permits Congress to establish “uniform laws” for “Bankruptcies,” and Congress established the Bankruptcy Code for that purpose. 48 U.S.C. § 734. The Bankruptcy Code, in defining who a “person” is for purposes of defining who might be a “debtor” in Chapters 7 and 11 excludes “governmental units,” which in turn refer to a “department, agency or instrumentality . . . of a State.” See 11 U.S.C. § 101. Meanwhile, Section 903(1) of the Bankruptcy Code establishes that a State (which, here, includes Puerto Rico) may not enact “a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition.” 11 U.S.C. § 903; see also McGowen, *supra* note 98, at 459. The issue in *Franklin Cal. Tax-Fr. Tr.*, then, was whether Puerto Rico was a “State” for purposes of the section 903(1) preemption provision: the answer was “yes.” 136 S. Ct. 1938, 1942 (2016). The result was a complete double-bind for the Commonwealth of Puerto Rico: it could not legislate to provide a framework for its government units or municipalities to alleviate their debt obligations, and the government units could not utilize the federal Bankruptcy Code itself. See *id.*

¹⁰⁸ Debt Recovery Act, Statement of Motives, pt. B. This view, however, seems to reflect a distinction without any difference. One of the primary purposes of the bankruptcy code is to provide a framework to give debtor’s a fresh start. And, as Professor David Skeel has put it, bankruptcy has “four basic attributes”: (1) it “enables a debtor to restructure its obligations”; (2) “imposed or facilitated by government or another third party”; (3) it is collective in nature; and (4) bankruptcy is specific to a particular individual, enterprise, or entity. David A. Skeel Jr., *When Should Bankruptcy Be An Option (for People, Places or Things)?*, 55 WM. & MARY L. REV. 2217, 2222–23 (2014). Certainly, PROMESA meets each of these attributes.

¹⁰⁹ 136 S. Ct. 1938, 1942 (2016).

¹¹⁰ Torruella, *supra* note 47, at 89.

corporations had no access to an orderly debt restructuring process.¹¹¹ Puerto Rico was in a straitjacket. It could “take no action to address the existential financial challenge that it faced”; instead, “any future attempts to repair Puerto Rico’s unsustainable debt stock could only come through congressional action.”¹¹²

2. Congressional Response: PROMESA

In 2016, Responding to the clear double bind in which the Supreme Court placed Puerto Rico, Congress passed PROMESA. In so doing, Congress “more than remedied this problem.”¹¹³ The legislation was enacted with rare bipartisan support and was “designed to steer negotiations with creditors and lead to the restructuring of . . . [Puerto Rico’s] crushing debt and pension liabilities.”¹¹⁴ The PROMESA legislation created an Oversight Board tasked with providing a method for Puerto Rico, or any other “covered territory”—i.e., Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the United States Virgin Islands¹¹⁵—“to [1] achieve fiscal responsibility and [2] access to the capital markets.”¹¹⁶ PROMESA recites that it is enacted pursuant to the Territorial Clause.¹¹⁷ The Oversight Board possesses substantial powers, outlined in 48 U.S.C. § 2124, which may be exercised pursuant to the two goals.¹¹⁸ Pertaining to fiscal responsibility, the Oversight Board’s duties include producing a fiscal plan with input from the governor of Puerto Rico, ensuring the Commonwealth passes a budget consistent with that fiscal plan, and disallowing contracts and executive orders in violation of the fiscal plan.¹¹⁹ Professor Skeel, who sits on the Oversight Board, describes this as “an iterative process,” wherein the Governor gets the first attempt at drafting an acceptable plan.¹²⁰

The Oversight Board’s second task is to restore access to capital markets. It has attempted to do so by restructuring Puerto Rico’s debt.¹²¹ There are

¹¹¹ Gulati & Rasmussen, *supra* note 17, at 135.

¹¹² *Id.* at 141. For a discussion as to whether the Constitution permits consigning a polity like Puerto Rico into such a sovereign debt netherworld like this, *see id.* For their part, Gulati & Rasmussen suggest that the answer is a resounding “no.” They conclude that “to the extent that states can enact their own restructuring regimes, Puerto Rico is free to do so as well.” *Id.* at 161.

¹¹³ David A. Skeel, Jr., *Notes From the Puerto Rico Oversight (Not Control) Board 34th Pileggi Lecture*, 43 DEL. J. CORP. L. 529, 535 (2019). PROMESA is codified in 48 U.S.C. § 2101 *et. seq.* (2016).

¹¹⁴ Meléndez, *supra* note 5, at 44.

¹¹⁵ 48 U.S.C. § 2104(20) (2016).

¹¹⁶ 48 U.S.C. § 2121 (2016).

¹¹⁷ *Id.*

¹¹⁸ *See* Skeel, *supra* note 113, at 533.

¹¹⁹ *Id.* at 533–34.

¹²⁰ *Id.* at 533.

¹²¹ *Id.* at 534–35.

two mechanisms provided for this aim in PROMESA: (1) Title VI, which resembles the collective action provisions in international finance, and (2) Title III, which is more akin to traditional bankruptcy.¹²² Title VI functions by “mak[ing] the restructuring binding on all bondholders, including the dissenters[.]” if “a sufficient majority of the creditors in each class of bonds votes to approve a restructuring.”¹²³ But it does not contain many of the other traditional bankruptcy law provisions, “such as a stay on collection or the power to avoid preferential transfers.”¹²⁴

PROMESA also provides for a bankruptcy-esque process in Title III of the statute.¹²⁵ Section 2161 provides for the applicability of “other laws,” thus incorporating nearly all of the major sections of Title 11 of the United States Code—the bankruptcy provisions dealing with reorganizations.¹²⁶ Title III functions much like a traditional bankruptcy statute and borrows heavily from Chapter 9 of the Bankruptcy Code, which is the chapter that distressed municipalities like Detroit have used to restructure their own debts.¹²⁷ Yet, the most important aspect of Title III is its impressive scope; Title III is available to Puerto Rico itself and gives the Oversight Board the authority to file Title III proceedings for the Commonwealth and its municipalities.¹²⁸ The result is a process by which the entire Commonwealth has access to financial restructuring—a quasi- or sub-sovereign restructuring regime which has not yet existed in the United States, at least not since Arkansas’s haphazard attempt to default on its bonded obligations in the 1930s.¹²⁹

PROMESA is not without its critics, though. It has been met with occasional protest on the island,¹³⁰ severe academic criticism for its

¹²² *Id.*

¹²³ *Id.* at 534.

¹²⁴ *Id.*

¹²⁵ *See id.* at 535 (Title III is contained in 48 U.S.C. §§ 2161–2177 (2016)).

¹²⁶ *See* 48 U.S.C. § 2161(a) (2016).

¹²⁷ Skeel, *supra* note 113, at 535.

¹²⁸ *Id.*

¹²⁹ Damon A. Silvers, *Obligations Without the Power to Fund Them*, in *WHEN STATES GO BROKE* 43 (Peter Conti-Brown & David A. Skeel, Jr. eds., 2012). Silvers recounts how Arkansas’s creditors successfully asserted that there was “no bankruptcy proceeding covering states, and as a result, creditors had a right to sue to force payment from an insolvent state – a remedy that could encompass judicially ordered tax increases to fund any such payments.” *Id.*

¹³⁰ Meléndez, *supra* note 5, at 44.

colonialist disposition,¹³¹ and questions about its efficacy.¹³² In particular, the political tensions surrounding PROMESA were substantial, both on the mainland and in the Commonwealth.¹³³ The legislation itself was the product of substantial negotiations in the context of an upcoming presidential election and required broad bipartisan support.¹³⁴ This resulted in “significant tradeoffs and contradictions” being embedded in the legislation.¹³⁵ As Professor Edwin Meléndez has noted, the coalitions for and against PROMESA were “strange bedfellows.”¹³⁶ Even so, the substantial diaspora of Puerto Ricans in the United States proved essential in pressing for legislative relief from Congress.¹³⁷ A broad coalition including actor Lin Manuel Miranda and fellow members of the Puerto Rican diaspora along with congressional leaders pressed for a legal option for territorial debt restructuring, which culminated in PROMESA’s drafting.¹³⁸ In general, opposition to the legislation was led by bondholders and unions fearing the effects debt restructuring would have on pensions.¹³⁹ Senator Bernie Sanders, who at the time was running for President, also opposed PROMESA on the grounds that it did not protect pension funds, could lower the minimum wage, and made the Oversight Board too powerful.¹⁴⁰ Ultimately, though, PROMESA represented a compromise that “satisfied the core concerns of progressive democrats that advocated for an orderly, legal mechanism to restructure the Puerto Rico debt and the core concerns of republican conservatives who advocated for tight financial controls through the Oversight Board and no federal ‘bail-out.’”¹⁴¹

¹³¹ See generally, Torruella, *supra* note 47, at 89 (arguing that PROMESA is the “ultimate proof that . . . Puerto Rico’s colonial condition has remained intact since 1898”); Fonseca, *supra* note 4, at 747 (discussing PROMESA and the growing decolonial “national consciousness”); Dean Delasalas, Note, *La PROMESA Cumplida: How the U.S. Constitution Has Enabled Colonialism*, 67 CATH. U. L. REV. 761 (2018) (arguing that PROMESA is a function of colonialism).

¹³² See generally, Gillian B. White, *Puerto Rico’s Problems Go Way Beyond Its Debt*, THE ATLANTIC (July 1, 2016), <https://www.theatlantic.com/business/archive/2016/07/puerto-rico-promesa-debt/489797/> (arguing that PROMESA addresses the island’s financial emergency but does not address the deeper economic issues in Puerto Rico and does not promise sustainable and long-term growth).

¹³³ Meléndez, *supra* note 5, at 48 (“Governor García-Padilla’s declaration that Puerto Rico’s public debt was ‘unpayable’ triggered the intensification of a public debate regarding options for solving the debt crisis.”).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 51.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 52.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 57.

Within the Commonwealth itself, public opinion was split but somewhat favorable. Public opinion generally supported the essential aspects of PROMESA. A survey conducted by Professor Carlos Javier Sánchez from the University of Turabo concluded that 79 percent of respondents expressed support for the Oversight Board.¹⁴² At the same time, respondents exhibited strong suspicion towards local officials in Puerto Rico: 95 percent of respondents suggested that Puerto Rico was governed by a few self-interested groups.¹⁴³ In other words, Meléndez concludes, “public expectations prior to the passage of PROMESA were more associated with the deterioration of trust [in] the local political leadership to solve a problem than with the opinion of local political leaders opposing PROMESA.”¹⁴⁴ In this way, many Puerto Ricans shared similar views to Republicans in Congress, who believed that the Oversight Board was necessary to successfully restructure the debt.¹⁴⁵ The political parties on the island were divided on the issue.¹⁴⁶ Ricardo Rosselló, the ultimately successful gubernatorial candidate for the New Progressive Party, suggested that local mismanagement was a core issue in Puerto Rico’s debt crisis and supported the Oversight Board but rejected the debt restructuring mechanism.¹⁴⁷ Meanwhile, David Bernier of the Popular Democratic Party, then the Secretary of State of Puerto Rico, supported PROMESA as a legal mechanism for debt restructuring but rejected the Oversight Board and its political implications.¹⁴⁸ In part because over two-thirds of Puerto Ricans supported the Oversight Board, and because of his perceived support for PROMESA, Rosselló won the gubernatorial election of 2016.¹⁴⁹

Years later, the tides have changed, largely due to resistance to the austerity measures of Oversight Board (sometimes referred to as “La Junta”) and the island’s continued economic calamity.¹⁵⁰ Puerto Ricans expressed

¹⁴² Cynthia López Cabán, *Desconfían los Boricuas en sus Instituciones: El Barómetro de Confianza Reveló que los Boricuas se Fían de los Organismos Federales*, EL NUEVO DÍA (May 22, 2016), <https://www.elnuevodia.com/noticias/locales/notas/desconfian-los-boricuas-en-sus-instituciones/>; Meléndez, *supra* note 5, at 57.

¹⁴³ Meléndez, *supra* note 5, at 57.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 59.

¹⁵⁰ See Kate Aronoff, *As Puerto Rico Erupts in Protests and Governor Resigns, ‘La Junta’ Eyes More Power*, THE INTERCEPT (July 24, 2019), <https://theintercept.com/2019/07/24/puerto-rico-protests-ricardo-rossello-la-junta/>; Luna Olaverria Gallegos, *Puerto Rican Activists Shut down the First Scheduled PROMESA Conference in San Juan*, REMEZCLA (Aug. 31, 2016),

disapproval of certain members of the Oversight Board who were viewed as having conflicting interests.¹⁵¹ Thus, even while Puerto Ricans felt the Oversight Board was sufficiently qualified, concerns regarding conflicts of interest, followed by the Commonwealth's devastation by Hurricane Maria and deep austerity cuts, shifted public opinion against it.¹⁵² Thus, embattled former Governor Rosselló summarized his desired solution in his 2019 proposed fiscal plan in boldface: "the most important and critical structural reform for Puerto Rico is a permanent solution to its territorial status. The solution . . . is statehood for Puerto Rico."¹⁵³ That is, the Oversight Board was no longer viewed as the ultimate solution to Puerto Rico's crisis. Others disagree and argue that resolving Puerto Rico's relationship with the United States is not the ultimate solution to these convoluted issues; Puerto Rico's salvation, instead, is simply in default.¹⁵⁴ The truth likely lies somewhere between these propositions. PROMESA and the Oversight Board's guidance presents one step in a long march to Puerto Rico's financial independence, but the Commonwealth's long-term recovery will remain inextricably tied to resolving its constitutional status and underlying political tensions. Part II addresses these issues.

II. PUERTO RICO'S CONSTITUTIONAL STATUS: STILL FOREIGN IN A DOMESTIC SENSE

A. *The Insular Cases*

By the close of the Spanish-American War, the United States had acquired territory far outside its continental borders but was left with little historical guidance as to how these territories should be managed. Prior to the War, territory acquired by the United States generally consisted of land

<https://remezcla.com/culture/promesa-conference-protest-san-juan/>; Alejandra Rosa & Frances Robles, *Pandemic Plunges Puerto Rico Into Yet Another Dire Emergency*, N.Y. TIMES (July 8, 2020), <https://nyti.ms/2ZUnqvU>.

¹⁵¹ See Meléndez, *supra* note 5, at 61.

¹⁵² *Id.* at 61–68.

¹⁵³ REVISED FISCAL PLAN 2019, at 6.

¹⁵⁴ See Chris Markowski, *The Solution to Puerto Rico's Debt Crisis Isn't Statehood—It's Default*, THE HILL (July 10, 2017), <https://thehill.com/blogs/pundits-blog/economy-budget/341200-the-solution-to-puerto-ricos-debt-crisis-isnt-statehood-its>. Markowski argues that "sheltering Puerto Rico from its obligations by allowing it to become a state is not the solution. Debt of this magnitude cannot be whisked away with a granting of statehood." Markowski additionally suggests that "[w]hat Puerto Rico needs more than statehood is to be forced to own up to its obligations." Clearly, this view callously oversimplifies the complex issues at play here, and fails to consider the Union's history of bailing the states out following the Revolutionary War; the point remains, however, that the debt must be dealt with, and that's precisely the issue Congress sought to tackle with PROMESA.

purchased or conquered from foreign powers—sometimes both, in regards to Native Americans—where American settlers would soon thereafter populate. After the War, America’s territories were scattered across the globe, populated by people of diverse cultures, many of whom—at least in Puerto Rico—viewed acquisition by the United States as liberation from Spanish colonialism.¹⁵⁵ Correspondingly, the initial impulse among many American officials was to consider Puerto Rico as being on the path to statehood.¹⁵⁶ However, perhaps driven by racial motivations and “Filipinophobia,” this view soon shifted.¹⁵⁷ Quick integration into the Union, the customary disposition of continental territory prior to the War, was out of the question for the Philippines and, ultimately, for Puerto Rico.¹⁵⁸

Seeking answers to the underlying constitutional issues percolating around these new acquisitions—that is, what Congress could and should do with its newly acquired territories under the Territory Clause—the *Harvard Law Review* published a series of academic reviews that served as the intellectual seeds for the Supreme Court’s decisions in a series of cases called the *Insular Cases*.¹⁵⁹ These cases continue to resonate in the Court’s jurisprudence today and form the basis for Puerto Rico’s complicated relationship with the United States.¹⁶⁰ The reviews can generally be paired into three different groups,¹⁶¹ each with different views regarding the extent of Congress’s powers over the territories and the Constitution’s application thereto.

The first group suggested a well-trod approach to managing new acquisitions: the new territories should be placed within both the ambit of Congress and the Constitution. The first article, written by Carman F. Randolph, suggested that “the subjection of annex territory to exclusive federal control is an abnormal and temporary state necessarily preceding the normal and permanent condition of statehood.”¹⁶² Randolph cited Chief Justice Marshall in *Loughborough v. Blake*, explaining that “‘United States’ . . . is the name given to our great republic, which is composed of States and territories. The [D]istrict of Columbia or the territory west of the Missouri is not less within the United States . . . than Maryland or

¹⁵⁵ See TORRUELLA, *supra* note 16, at 21–23.

¹⁵⁶ See *id.* at 32–39.

¹⁵⁷ Torruella, *supra* note 36, at 300.

¹⁵⁸ See *id.*; Burnett, *supra* note 29, at 797–800.

¹⁵⁹ TORRUELLA, *supra* note 16, at 25.

¹⁶⁰ *Id.*

¹⁶¹ For this notion of three “groups,” see *id.*

¹⁶² Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898).

Pennsylvania.”¹⁶³ He also relied on the *Dred Scott v. Sanford* holding that “an Act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States . . . could hardly be dignified with the name of the due process of law.”¹⁶⁴ Similarly, Judge Simeon E. Baldwin concluded that the Territory Clause referred to property, and, relying on *Dred Scott*, that Congress was therefore “confined within the limits assigned by the Constitution for the protection of persons and property” in such a territory.¹⁶⁵ And he argued that Congress “could not acquire any American territory to hold permanently as a dependent province.”¹⁶⁶

A second group disagreed and urged more unrestrained congressional authority over the new territories. Professor Charles C. Langdell, in evaluating the term “United States” “concluded that its application regarding restrictions on the power of Congress applied only as respected ‘the limits of the states which are united by and under it.’”¹⁶⁷ He further suggested that the Bill of Rights were so “peculiarly” and “exclusively English that an immediate and compulsory application of them to ancient and thickly settled Spanish colonies would furnish as striking proof of our unfitness to govern dependencies, or to deal with alien races”¹⁶⁸ Professor James Bradley Thayer similarly suggested that the United States could exercise control over “these islands as colonies, substantially as England might govern them”¹⁶⁹ Furthermore, he suggested, “the Constitution does not cover the territories, and that the power of the United States in governing them, except as to one or two particulars Beyond these restraints it may well be thought that the territories are subject to the absolute power of Congress.”¹⁷⁰

However, Abbott Lawrence Lowell’s “third view” would be even more influential on the *Insular Cases*’ jurisprudence.¹⁷¹ Lowell’s arguments became the basis for the doctrine of incorporation applied to the territories

¹⁶³ *Id.* at 297 (citing *Loughborough v. Blake*, 18 U.S. 317, 319 (1820)).

¹⁶⁴ *Id.* (citing *Scott v. Stanford*, 60 U.S. 393, 450 (1857)).

¹⁶⁵ Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393, 401 (1899).

¹⁶⁶ *Id.* at 409.

¹⁶⁷ TORRUELLA, *supra* note 16, at 26 (citing Charles C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899)).

¹⁶⁸ Langdell, *supra* note 167, at 386.

¹⁶⁹ TORRUELLA, *supra* note 16, at 29 (citing James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 404, 467 (1899)).

¹⁷⁰ Thayer, *supra* note 169, at 480.

¹⁷¹ TORRUELLA, *supra* note 16, at 30.

today.¹⁷² He argued that the Treaty of Paris, unlike earlier treaties, contained no language demanding the incorporation of people from the newly acquired territories.¹⁷³ After evaluating an array of disparate cases, including *Dred Scott*, and examining the Constitution for insight, Lowell suggested that while “authority upon this question is certainly meagre[,]” “apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States.”¹⁷⁴ Indeed, “it follows that the incorporation of territory in the Union, like the acquisition of territory at all, is a matter solely for the legislative or the treaty-making authorities[.] . . .”¹⁷⁵ In such territories, the Constitution does not necessarily “follow the flag”; instead, it is only those constitutional provisions which exert “restrictions upon the power of Congress rather than reservations of rights[,]” such as the prohibition on *ex post facto* laws, which retain much force beyond the States.¹⁷⁶ That is to say “these [prohibitive] rules stand upon a different footing from the rights guaranteed to the citizens, *many of which are inapplicable* except among a people whose social and political evolution has been consonant with our own.”¹⁷⁷ The *Insular Cases* picked up on this line of reasoning; now, a territory’s status of incorporation is key to understanding its constitutional disposition within the United States.

The *Insular Cases*¹⁷⁸ consist of a series of disparate cases, each of which involves controversies pertaining to commerce in the territories, with equally disparate rationales underlying the decisions.¹⁷⁹ These cases failed to find any consistent thread of reasoning until Justice White’s concurrence in *Downes*, when he became the first Justice to adopt the incorporation doctrine espoused by Lowell’s third view.¹⁸⁰ The *Downes* case dealt with a challenge by a plaintiff protesting \$659.35 in duties paid to the port of San Juan pursuant to the Foraker Act, which established a civil government for

¹⁷² *Id.* at 31.

¹⁷³ *Id.* (citing Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 171 (1899)).

¹⁷⁴ Lowell, *supra* note 173, at 176.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* (emphasis added).

¹⁷⁸ See *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392 (1901).

¹⁷⁹ Here, instead of cataloguing the broad array of rationales present in the *Insular Cases*, I will outline the general doctrinal takeaways from the series of cases. For a more complete discussion of these rationales, see e.g., TORRUELLA, *supra* note 16, at 40–84; TORRUELLA, *supra* note 36. But cf. Burnett, *supra* note 29 (arguing that the *Insular Cases* authorized the retreat of American colonial rule through territorial deannexation).

¹⁸⁰ See Lowell, *supra* note 173.

the island empowered to collect duties.¹⁸¹ The plaintiff argued that because, under *De Lima*, Puerto Rico was no longer a “foreign country, and became a territory of the United States[,]”¹⁸² the Foraker Act’s imposition of duties violated Article I, section 8 of the Constitution, which declares that “all duties, imposts, and excises shall be uniform throughout the United States.”¹⁸³

In addressing the status of Puerto Rico, which was necessary to determining the application of Article I, section 8, Justice White suggested that:

where a treaty contains no conditions for incorporation, and above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form part of the American family.¹⁸⁴

And, “[b]ecause Puerto Rico was an ‘unincorporated territory,’ Congress was limited only by ‘restrictions . . . so fundamental [in] nature that they cannot be transgressed, although not expressed in so many words in the Constitution.’”¹⁸⁵ Here, Article I, section 8 did not protect such a fundamental right.¹⁸⁶ As Justice White saw it, the result is that while Puerto Rico was not a foreign country, “since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.”¹⁸⁷ After changes in court personnel, Justice White’s incorporation doctrine became the favored interpretation of territorial constitutional disposition.¹⁸⁸ The *Insular Cases*, therefore, established a dichotomy between incorporated and

¹⁸¹ *Downes*, 182 U.S. at 247.

¹⁸² *Id.* at 248–49 (citing *De Lima*, 182 U.S. 1 (1901)).

¹⁸³ U.S. CONST. art. 1, § 8.

¹⁸⁴ *Downes*, 182 U.S. at 339 (White, J., concurring).

¹⁸⁵ Torruella, *supra* note 36, at 308 (citing *Downes*, 182 U.S. at 291 (White, J., concurring)) (alteration in original).

¹⁸⁶ *Downes*, 182 U.S. at 342 (White, J. concurring) (concluding that “in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico.”).

¹⁸⁷ *Downes*, 182 U.S. at 341–42 (White, J., concurring).

¹⁸⁸ See Torruella, *supra* note 36, at 312–316 (specifically, *Hawaii v. Mankichi*, 190 U.S. 197 (1903) and *Rasmussen v. United States*, 197 U.S. 516 (1905) expounded upon the incorporation doctrine and established it as the preeminent approach to evaluating).

unincorporated territories, where unincorporated territories are left off the tracks of statehood and squarely within the ambit of Congressional power.

To be clear, the *Insular Cases* rendered Puerto Rico a colony by nature of its unincorporated status, which has in turn produced many of the economic conditions catalogued above.¹⁸⁹ That is to say, Puerto Rico's colonial status—enshrined by the Supreme Court in the *Insular Cases*—has produced the very extractive relationship that continues to aggravate Puerto Rico's economic decline.¹⁹⁰ Indeed, as Judge Torruella argued, the *Insular Cases* were premised on the notion that the “United States could hold territories and their inhabitants in a colonial status *indefinitely*” which created “without limitation, [] a subclass of United States citizens unequal in rights to the rest of the body politic.”¹⁹¹ The issues of status and economy cannot be separated; the economic disparity follows directly from Puerto Rico's unincorporated status. Of this we must remain mindful in evaluating both Puerto Rico's present economic and political situation, and in pursuing recovery.

B. Modern Interpretations: Puerto Rico After Aurelius

In recent years, the Supreme Court has reengaged with issues of Puerto Rico's sovereignty and relationship with the United States. In 2016, the Court issued two important decisions in *Puerto Rico v. Sanchez Valle*¹⁹² and *Puerto Rico v. Franklin California Tax-Free Trust*.¹⁹³ The diversity of issues at stake in these cases points to the broad, continued application of the *Insular Cases*, and Congress' extensive powers over the territories. Even with the recent holding in *Finacial Oversight and Management Board v. Aurelius Investment, LLC*,¹⁹⁴ as well as Justice Sotomayor scrutinizing the continued application of the *Insular Cases*, the doctrine remains intact, and Puerto Rico's status as a territory will surely continue from a legal standpoint. That is not to say, however, that Puerto Rico's status will remain politically cemented—the Democratic Party has expressed some interest in

¹⁸⁹ See *supra* Parts I.A and B; Torruella, *supra* note 36, at 346; Joffe & Martinez, *supra* note 19, at 28.

¹⁹⁰ Joffe & Martinez, *supra* note 19, at 28; Tom C. W. Lin, *Americans, Almost and Forgotten*, 107 CALIF. L. REV. 1249, 1269–73 (2019); Torruella, *supra* note 36, at 346.

¹⁹¹ Torruella, *supra* note 36, at 346.

¹⁹² 136 S. Ct. 1863 (2016).

¹⁹³ 136 S. Ct. 1938 (2016).

¹⁹⁴ 140 S. Ct. 1649 (2020).

a path to statehood for the District of Columbia¹⁹⁵ and Puerto Rico, though urgency in regards to Puerto Rico is not as immediate.¹⁹⁶

I. Sanchez Valle & Franklin

The Court addressed two widely divergent issues in *Sanchez Valle* and *Franklin*, but reaffirmed the central teachings of the *Insular Cases*. In *Sanchez Valle*, the Court addressed whether the Double Jeopardy Clause of the Fifth Amendment applies to Puerto Rico, or if, under the dual sovereignty doctrine, where “a single act gives rise to distinct offenses—and thus may subject a person to successive prosecutions—if it violates the laws of separate sovereigns,” for Puerto Rico to “successively prosecute a single defendant for the same criminal conduct” as that defendant was prosecuted for in federal court.¹⁹⁷ The question, therefore, turned on “whether two prosecuting authorities are different sovereigns for double jeopardy purposes.”¹⁹⁸ Here, the authorities were the Commonwealth of Puerto Rico and the United States.¹⁹⁹ That question, the Court explained, is “narrow” and “historically focused”: the issue “is only whether the prosecutorial powers of the two jurisdictions have independent origins—or, said conversely, whether those powers derive from the same ‘ultimate source.’”²⁰⁰ In this vein, the Court held that “the oldest roots of Puerto Rico’s power to prosecute lie in federal soil,” and therefore, Puerto Rico cannot successively prosecute a defendant for a single action already prosecuted by the United States.²⁰¹

The dual sovereign carveout from the Double Jeopardy Clause is justified, in part, by the observation that “[w]hen the same act transgresses the laws of two sovereigns, it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences.”²⁰² “Sovereignty” in this test, however, “does not

¹⁹⁵ Washington, D.C. Admission Act, H.R. 51, 116th Cong. (2019).

¹⁹⁶ Marty Johnson & Rafael Bernal, *Hopes for DC, Puerto Rico Statehood Rise*, THE HILL (Sept. 24, 2020), <https://thehill.com/latino/517921-hopes-for-dc-puerto-rico-statehood-rise> (describing increased support for Puerto Rico statehood, but describing “significant obstacles loom[ing]”); see also Nicole Acevedo, “Ignoring Puerto Rico’s Political Status is a Mistake, Advocates Tell Biden,” NBC NEWS (Aug. 26, 2021), at <https://www.nbcnews.com/news/latino/ignoring-puerto-ricos-political-status-mistake-advocates-tell-biden-rcna1778> (“A national coalition of stateside Puerto Ricans say they are ‘deeply disappointed’ that President Joe Biden’s task force on the island won’t weigh in on the ongoing congressional debate over the island’s political status.”).

¹⁹⁷ *Sanchez Valle*, 136 S.Ct., at 1867–68.

¹⁹⁸ *Id.* at 1867.

¹⁹⁹ *Id.* at 1868.

²⁰⁰ *Id.* at 1867 (quoting *United States v. Wheeler*, 435 U.S. 313, 320 (1978)).

²⁰¹ *Id.* at 1868.

²⁰² *Id.* at 1870 (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985)).

bear its ordinary meaning.”²⁰³ In particular, the inquiry “does not probe whether a government possesses the usual attributes, or acts in the common manner, of a sovereign entity.”²⁰⁴ Instead, the “test hinges on a single criterion: the ‘ultimate source’ of the power undergirding the respective prosecutions.”²⁰⁵ Thus, while the States “are separate sovereigns from the Federal Government (and from one another),” the same is not true for Puerto Rico or municipalities.²⁰⁶ Specifically, while “the States rely on ‘authority originally belonging to them before admission to the union and preserved to them by the Tenth Amendment,’” Puerto Rico’s authority reposes, ultimately, in the federal government.²⁰⁷

In concluding that Puerto Rico’s prosecutorial powers derive from the federal wellspring, and therefore do not trigger the dual sovereign exception, the Court briefly discussed the history of the United States acquisition of Puerto Rico and the adoption of Puerto Rico’s constitution. In particular, the Court noted that the Commonwealth’s “project of constitutional self-governance” began with Public Law 600, which “‘recognizing[,] the principle of government by consent,’ authorized the island’s people to organize a government pursuant to a constitution of their own adoption.”²⁰⁸ But after Puerto Rico ratified the constitution, the Court explained that it “would become effective only upon approval by the Congress.”²⁰⁹ Thus, after a constitutional convention, and confirmation by Congress, the Puerto Rico Constitution was ratified, providing that the Commonwealth was established in the form of a “compact agreed upon between the people of Puerto Rico and the United States” wherein the government would be “subordinate to the sovereignty of the people of Puerto Rico.”²¹⁰

But, while the Puerto Rico Constitution recites that the Commonwealth’s power emanates from the people, that is not dispositive for the purposes of the dual sovereignty doctrine. According to the Court, Puerto Rico cannot benefit from the dual sovereignty doctrine because it traces its substantial self-rule to Congress.²¹¹ That is, while “the Commonwealth’s power to enact and enforce criminal law now proceeds . . . from the Puerto Rico Constitution as ‘ordain[ed] and establish[ed]’ by ‘the people,’” the

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1871 (citing *Wheeler*, 435 U.S. at 320).

²⁰⁶ *Id.* at 1871–72.

²⁰⁷ *Id.* (citing *Heath*, 474 U.S. at 89).

²⁰⁸ *Id.* at 1868.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1868–69 (citing P.R. CONST. art. I, §§ 1, 2).

²¹¹ *Id.* at 1875.

“ultimate’ source of prosecutorial power remains the U.S. Congress.”²¹² Indeed, according to the Court, “Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. That makes Congress the original source of power for Puerto Rico’s prosecutors—as it is for the Federal Government’s,” rendering the dual sovereignty doctrine inapplicable.²¹³ In this way, “the island’s Constitution, significant though it is, does not break the chain.”²¹⁴

Meanwhile, as discussed *supra* Part I.C, the Court in *Franklin California Tax-Free Trust v. Puerto Rico* determined that Puerto Rico was not a “State” under Chapter 9 of the federal Bankruptcy Code as it pertains to the eligibility definition of “debtor,” but it *is* a “State” as it pertains to Chapter 9’s preemption provision.²¹⁵ In so determining, Justice Thomas emphasized that in “1984[,] Congress amended the definition of ‘State’ to exclude Puerto Rico ‘for the purpose of defining who may be a debtor under chapter 9.’”²¹⁶ That exclusion, however, “does not sweep so broadly”: Puerto Rico “remains a ‘State’ for other purposes related to Chapter 9.”²¹⁷ In particular, under section 109(c)(2) of chapter 9, referred to as the gateway provision, Puerto Rico is “bar[red] . . . from enacting its own municipal bankruptcy scheme to preemptly restructure the debt of its insolvent public utilities companies,” and the Debt Recovery Act was therefore preempted.²¹⁸

2. Aurelius

As Professor Cheryl Block puts it, the results of *Sanchez* and *Franklin California Tax-Free Trust* remind us that “Puerto Rico’s quasi-sovereign qualities may be ephemeral; they remain vulnerable to congressional change at any time.”²¹⁹ *Aurelius* retains this essential structure—and, indeed,

²¹² *Id.* (alteration in original).

²¹³ *See id.*

²¹⁴ *Id.* at 1876.

²¹⁵ 136 S. Ct. 1938, 1942 (2016); *see supra* notes 105–110 and accompanying text.

²¹⁶ *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1942 (quoting 11 U.S.C. § 101(52)). In § 101(52), “the term ‘State’ includes the District of Columbia and Puerto Rico, *except for the purpose of defining who may be a debtor under chapter 9 of this title*” (emphasis added).

²¹⁷ *Id.*

²¹⁸ *Id.* at 1942, 1949. Section 109(c) provides: “An entity may be a debtor under chapter 9 of this title if and only if such entity . . . is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law” Because the definition of “State” in § 101(52) expressly carves Puerto Rico out from “State” as it’s used in chapter 9, the Court reads the “plain text” to preempt Puerto Rico (and presumably the District of Columbia) from authorizing their “municipalities” and “entities” from chapter 9 relief. *See id.*; *Franklin California Tax-Free Tr.*, 136 S. Ct. at 1946.

²¹⁹ Cheryl D. Block, *Federal Policy for Financially-Distressed Subnational Governments: The U.S. States and Puerto Rico*, 53 WASH U. J. L. & POL’Y 215 (2017).

reaffirms the ephemerally-quasi-sovereign qualities of Puerto Rico’s relationship with the United States.²²⁰

In *Aurelius*, decided June 1, 2020, the Supreme Court upheld the validity of the PROMESA Oversight Board from an Appointments Clause challenge.²²¹ Aurelius Investment, LLC, a hedge fund that some would describe as a “vulture fund,” was the key litigant challenging the Oversight Board.²²² The Petitioners argued that PROMESA’s appointment provisions violates the Appointments Clause²²³ by providing that the President “could appoint its seven members [of the Oversight Board] without ‘the advice and consent of the Senate.’”²²⁴ In particular, “PROMESA gives the President the power to appoint the Board’s seven members without Senate confirmation, so long as he selects six from lists prepared by congressional leaders.”²²⁵ The key question before the Court, therefore, was whether that “method of appointment violates the Constitution’s Senate confirmation requirement.”²²⁶ Justice Breyer, writing for the majority, held that the Appointment Clause’s term “‘Officers of the United States’ has never been understood to cover those whose powers and duties are primarily local in nature” and deriving from the Territories Clause.²²⁷ And, the Oversight Board’s “statutory responsibilities consist of primarily local duties”; therefore, “the Board members are not ‘Officers of the United States,’” rendering the Appointments Clause moot.²²⁸

A threshold issue in the case was determining whether the Appointments Clause applied to Puerto Rico in the first instance.²²⁹ The Court held that it

²²⁰ Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649 (2020).

²²¹ *Id.* at 1654–55.

²²² See generally Joel Cintrón Arbasetti, et al, *Who Owns Puerto Rico’s Debt, Exactly? We’ve Tracked Down 10 of the Biggest Vulture Firms*, COMM. ABOLITION ILLEGITIMATE DEBT (Dec. 3, 2018), https://www.cadtm.org/spip.php?page=imprimer&id_article=16885; Jesse Barron, *The Curious Case of Aurelius Capital v. Puerto Rico*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/magazine/aurelius-capital-v-puerto-rico.html>. “Vulture funds,” often purchase bond obligations and other forms of distressed debt at prices far below their face value and subsequently file suits in an effort to recover the face value of the obligations. To the extent the fund recovers in excess of their discounted purchase price and litigation or settlement costs, they realize gains. In addition to Aurelius, a number of other litigants were consolidated with Aurelius LLC’s petition, including the “Official Committee of Debtors” and UTIER (the Electrical Industry and Irrigation Workers Union). See *Aurelius*, 140 S. Ct. at 1649.

²²³ U.S. CONST. art. II, § 2, cl. 2 provides that President “shall nominate, *and by and with the Advice and Consent of the Senate*, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other *Officers of the United States . . .*” (emphasis added).

²²⁴ *Aurelius*, 140 S. Ct. at 1654 (citing U.S. CONST. art. II, § 2, cl. 2).

²²⁵ *Id.* at 1655 (citing 48 U.S.C. § 101(e)(2)(A)).

²²⁶ *Id.* at 1654.

²²⁷ *Id.* at 1654–55.

²²⁸ *Id.* at 1655.

²²⁹ See *id.* at 1656.

did.²³⁰ In so determining, Justice Breyer pointed to the structure of the Constitution, with its emphases on ensuring political accountability through various checks and balances, the lack of any Article IV exception to the Appointments Clause, and caselaw suggesting that “separation-of-powers principles apply when Congress acts under its Article IV power to legislate ‘respecting . . . other Property.’”²³¹ The text and history “firmly indicate[] that it applies to the appointment of *all* ‘Officers of the United States’”; indeed, in the Northwest Territories, “the territorial appointees who assumed federal, as well as local, duties” were to be appointed by the President and confirmed by the Senate.²³² Thus, “the Appointments Clause constrains the appointments power as to all ‘Officers of the United States,’ even when those officers exercise power in or related to Puerto Rico.”²³³

The “more difficult question” for the Court, however, was determining whether the Oversight Board members are officers under the Appointments Clause, a question which “turns on whether the Board members have primarily local powers and duties.”²³⁴ The Court posits that while the language of the Constitution—“Officers of the United States”—is not particularly helpful, “the text suggests a distinction between federal officers . . . and nonfederal officers.”²³⁵ This distinction is further informed by the federalist structure of the Constitution, wherein the national government exercises limited federal power and local governments (usually states) exercise more expansive power.²³⁶ But, under Article I, section 8, cl. 17 and Article IV, section 3, cl. 2 of the U.S. Constitution, Congress was granted the “power to legislate” for localities lacking such a state government “in ways ‘that would exceed its powers, or at least would be very unusual’ in other contexts.”²³⁷ Thus, “when Congress creates local offices using these two unique powers, the officers exercise power of the local government, not the Federal Government.”²³⁸

Historically, Congress has made substantial use of Article I and Article IV powers in establishing local officials. The First Congress used the Territories Clause to establish a House of Representatives for the Northwest

²³⁰ *Id.* at 1658.

²³¹ *See id.* at 1657 (citing *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 270–71 (1991)).

²³² *Id.* at 1657–58.

²³³ *Id.* at 1658.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *See id.*

²³⁷ *Id.* (citing *Palmore v. United States*, 411 U.S. 389, 398 (1973)).

²³⁸ *Id.* at 1659.

Territories, and “created an upper house of the territorial legislature, whose members were appointed by the President (without Senate confirmation) from lists provided by the elected, lower house.”²³⁹ It also created magistrates to be appointed by the Governor of the territories.²⁴⁰ This “practice of creating by federal law local offices for the Territories and District of Columbia that are filled through election or local executive appointment has continued unabated for more than two centuries.”²⁴¹

According to the Court, Puerto Rico’s history is no different: “[i]t reveals a longstanding practice of selecting public officials with important local responsibilities in ways that the Appointments Clause does not describe.”²⁴² Indeed, both the Foraker Act of 1900 and Jones Act of 1917 provided for the establishment of the core parts of Puerto Rico’s local government, including the Presidential appointment of Puerto Rico’s Governor, heads of six departments, the legislature’s upper house, and the justices of its high court.²⁴³ Revisions to the Jones Act and the enactment of Public Law 600 in 1950, which was “‘in the nature of a compact’ with Puerto Rico,” progressively enlarged Puerto Rico’s self-determination.²⁴⁴ The ratification of the Puerto Rico Constitution, pursuant to Public Law 600, ultimately provided for the election of Puerto Rico’s Governor, legislators, and provides for gubernatorial appointment of cabinet officers.²⁴⁵ And, as Justice Breyer puts it, to “read Appointments Clause constraints as binding Puerto Rican officials with primarily local duties would work havoc with Puerto Rico’s (federally ratified) democratic methods for selecting many of its officials.”²⁴⁶ Thus, the Court holds that “while the Appointments Clause *does* restrict the appointment of ‘Officers of the United States’ with duties in or related to the District of Columbia or an Article IV entity, it *does not* restrict the appointment of local officers that Congress vests with primarily local duties under Article IV, § 3, or Article I, § 8, cl. 17.”²⁴⁷

Local officials thus clearly reside outside the constraints of the Appointments Clause, but the question remains: Is the Oversight Board, established by PROMESA, comprised of local or federal officials? Justice Breyer, writing for the Court, holds that the Oversight Board is comprised

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* at 1659–60.

²⁴⁴ *Id.* at 1660 (citing Act of July 3, 1950, ch. 446 §§ 1, 2, 64 Stat. 319).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1661.

²⁴⁷ *Id.*

of “local officers vested with primarily local duties.”²⁴⁸ Perhaps anticipating pushback, Justice Breyer takes both a formalist and realist approach to answering this question. Formalistically, PROMESA recites that the Oversight Board is “‘an entity within the territorial government’ and ‘shall not be considered a department, agency, establishment, or instrumentality of the Federal Government.’”²⁴⁹ These words are sufficient only to show that Congress did not intend to make the Oversight Board members “Officers of the United States.”²⁵⁰

In real terms, too, the Court describes the Oversight Board’s powers as being inherently local—not federal. Justice Breyer points to a laundry list of the Oversight Board’s powers: the Board is funded by the government of Puerto Rico; it can issue subpoenas subject to Puerto Rico limits on personal jurisdiction and enforceable under Puerto Rico’s laws; and it can enforce those subpoenas only in Puerto Rico’s courts.²⁵¹ In addition, the Oversight Board works with the elected government, ensures compliance with the fiscal plan, and controls issuance of Puerto Rico debt.²⁵² If it initiates bankruptcy proceedings, it does so in the U.S. District Court for Puerto Rico.²⁵³ In exercising each of these—and other—powers, the Board does so through Puerto Rican institutions.²⁵⁴

To be clear, then, “Congress did not simply state that the Board is part of the local Puerto Rican government. Rather, Congress also gave the Board a structure, a set of duties, and related powers all of which are consistent” with PROMESA’s recital that the Oversight Board and its officers exist and operate in a local, not federal capacity.²⁵⁵ Of course, some Oversight Board actions “may have nationwide consequences,” but that does “not automatically transform a local official into an ‘Officer of the United States.’”²⁵⁶ Detroit’s \$18 billion restructuring of municipal debt, for example, certainly bore nationwide effects, but according to the Court, that involved primarily local officials.²⁵⁷ Consequently:

²⁴⁸ *Id.*

²⁴⁹ *Id.* (citing 48 U.S.C. § 2121).

²⁵⁰ *Id.* That this formalist argument was insufficient is unsurprising. In *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016), the Court similarly refused to solely rely on the recitations of the Puerto Rico legislature that its Debt Recovery Act was “not a bankruptcy act, but an orderly debt enforcement act for the eligible public corporations.” Debt Recovery Act, Statement of Motives pt. B.

²⁵¹ *See id.*

²⁵² *See id.*

²⁵³ *See id.* at 1661–62.

²⁵⁴ *See id.*

²⁵⁵ *See id.* at 1661.

²⁵⁶ *Id.* at 1662.

²⁵⁷ *Id.*

the local nature of the legislation’s expressed purposes, the representation of local interests in bankruptcy proceedings, the focus of the Board’s powers upon local expenditures, the local logistical support, [and] the reliance on local laws in aid of the Board’s procedural powers . . . make clear that the Board’s members have primarily local duties, such that their selection is not subject to the constraints of the Appointments Clause.²⁵⁸

C. *Life After Aurelius: Constitutional and Economic Takeaways*

1. *Puerto Rico and the United States*

The Court’s unanimous affirmation of PROMESA’s appointment provisions did not come as a particular surprise. Though the opinion was unanimous, both Justice Thomas and Justice Sotomayor filed separate concurrences.²⁵⁹ Justice Thomas did not engage with the underlying question of Puerto Rico’s status, and instead simply asserted that the test established by the majority was “amorphous.”²⁶⁰ However, Justice Sotomayor argued that the federal government may have already ceded its authority to govern Puerto Rico through a mechanism like PROMESA.²⁶¹ In particular, Justice Sotomayor suggested that PROMESA was suspect because Puerto Rico’s government was formed “in the nature of a compact” with the United States.²⁶² In particular, Justice Sotomayor concluded, “[w]hen Puerto Rico and Congress entered into a compact and ratified a constitution of Puerto Rico’s adoption, Congress explicitly left the authority to choose Puerto Rico’s governmental officers to the people of Puerto Rico.”²⁶³ Such authority raises “grave doubts as to whether the Board members are territorial officers not subject to the Appointments Clause.”²⁶⁴ As Professor Christina D. Posna-Kraus has argued, however, the “compact theory” as it pertains to Puerto Rico is “neither constitutionally possible, nor desirable as a goal of self-determination.”²⁶⁵ Indeed, this theory serves to simply suggest that “Puerto Rico willingly bound itself to the United States

²⁵⁸ *Id.* at 1662–63.

²⁵⁹ *Id.* at 1666, 1683.

²⁶⁰ *Id.* at 1666 (Thomas, J., concurring).

²⁶¹ *Id.* at 1671 (Sotomayor, J., concurring); see also Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1127 (2009) (arguing that if Puerto Rico remains an unincorporated territory, “the United States . . . is in violation of its international legal obligations vis-à-vis Puerto Rico”).

²⁶² *Aurelius*, 140 S. Ct. at 1672 (Sotomayor, J., concurring).

²⁶³ *Id.* at 1675.

²⁶⁴ *Id.*

²⁶⁵ Christina D. Posna-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor’s Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101, 101 (2020).

in a permanent union under which federal law continues to apply in Puerto Rico with few exceptions, yet Puerto Ricans remain completely denied voting representation in the federal government.”²⁶⁶ Such a determination “hangs like a dark cloud” and resonates strongly with the *Insular Cases*.²⁶⁷

While Justice Sotomayor is willing to revisit Puerto Rico’s relationship with the United States, the Court refused to do so—at least directly. Even so, the Court’s general reticence to engage in these difficult questions, along with dicta by Justice Breyer, clearly reaffirm the principle that Puerto Rico remains “foreign to the United States in a domestic sense.”²⁶⁸

Indeed, Justice Breyer tips his hand in refuting the First Circuit’s application of a different Appointments Clause test under *Buckley v. Valeo*.²⁶⁹ In particular, he urges that “failing to take account of the nature of an appointee’s federally created duties, *i.e.*, whether they are *primarily local versus primarily federal*, would threaten interference with democratic (or local appointment) selection methods in numerous Article IV Territories and perhaps the District of Columbia as well.”²⁷⁰ He goes on to explain that “[t]here is no reason to understand the Appointments Clause—which, at least in part, seeks to advance democratic accountability and broaden appointments-related responsibility—as making it significantly more difficult for local residents of such areas to share responsibility for the implementation of (statutorily created) primarily local duties.”²⁷¹

This argument is a head-scratcher. On one hand, Justice Breyer suggests that his proffered Appointments Clause test will improve the accountability of officials and encourage democratic governance, but on the other, he appears to “countenance[] [the Board’s] freewheeling exercise of control over a population that the Federal Government has explicitly agreed to recognize as operating under a government of their own choosing, pursuant to a constitution of their own choosing.”²⁷²

Justice Breyer is no doubt right in identifying the preservation of separation of powers and assurance of political accountability as legitimate purposes for the Appointments Clause.²⁷³ In the instant case, though, the

²⁶⁶ *Id.* at 129–30.

²⁶⁷ *Id.* at 129.

²⁶⁸ *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

²⁶⁹ 424 U.S. 1 (1976).

²⁷⁰ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1663 (2020).

²⁷¹ *Id.*

²⁷² *Id.* at 1683 (Sotomayor, J., concurring).

²⁷³ *See, e.g., NLRB v. SW General, Inc.*, 137 S. Ct. 929, 935 (2017) (explaining that the advice and consent requirement provides “an excellent check upon a spirit of favoritism in the President and a guard

Oversight Board was not selected with any real input from the people of Puerto Rico or their representatives; President Obama appointed the initial seven members of the Board with informal advice from Democratic and Republican leaders in Congress.²⁷⁴ As Judge Torruella put it in the decision below: “The Board members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders than they are like the locally selected leaders that Rome allowed to continue exercising some authority.”²⁷⁵ It bears mentioning, too, that even if the Appointments Clause *did* trigger in this case, thereby ostensibly operating to preserve political accountability, Puerto Rico would still be located outside the scope of the Clause’s structural assurances advanced by Breyer.

Thus, if by “limiting the appointment power” the Appointments Clause works to “ensure that those who wield [that power are] accountable to political force and the will of the people,”²⁷⁶ it simply begs the question: who are the people to whom the Clause speaks? Certainly not Puerto Ricans. Puerto Ricans are not counted in the electoral college and may not elect a voting member of the House of Representatives or Senate.²⁷⁷ While the Resident Commissioner from Puerto Rico may sponsor bills, participate in standing committees, and participate in debate, the Resident Commissioner is not permitted to vote on the House floor.²⁷⁸ Similarly, the Governor of Puerto Rico sits on the Oversight Board, but only as a nonvoting member.²⁷⁹ Meanwhile, there is no requirement for a Board member to bear any formal connection to Puerto Rico. Indeed, the only eligibility requirements for selection on the Board are twofold. First, the appointed individual must have “knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government.” And second, the person must not have been “an officer, elected official, or

against the appointment of unfit characters”); *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991) (noting that Appointments Clause was the Founders’ reaction to “one of [the] . . . greatest grievances against [the manipulation of] executive power”).

²⁷⁴ Steven Mufson, *White House Names Seven to Puerto Rico Oversight Board*, WASH. POST (Aug. 31, 2016), at https://www.washingtonpost.com/business/economy/white-house-names-seven-to-puerto-rico-oversight-board/2016/08/31/9cee9376-6f8b-11e6-9705-23e51a2f424d_story.html; *see also* 48 U.S.C. § 2121 (West 2016) (describing the manner in which leaders of the Congress may submit names for review).

²⁷⁵ *Aurelius Investment, LLC, et al. v. Puerto Rico*, Case No. 18-1671, at 54 (1st Cir. Feb. 15, 2019).

²⁷⁶ *Freytag v. Commissioner*, 501 U.S. 868, 883 (1991).

²⁷⁷ *See*, CHRISTOPHER M. DAVIS, CONGRESSIONAL RESEARCH SERVICE, PARLIAMENTARY RIGHTS OF THE DELEGATES AND RESIDENT COMMISSIONER FROM PUERTO RICO (2019), <https://fas.org/sgp/crs/row/R40170.pdf>.

²⁷⁸ *Id.*

²⁷⁹ 48 U.S.C. § 2121(e)(3) (West 2016) (providing that “the Governor, or Governor’s designee, shall be an ex officio member of the Oversight Board without voting rights”).

employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government” prior to their appointment.²⁸⁰ Correspondingly, then, the Oversight Board provides no avenue by which “local residents of such areas [may] share responsibility for the implementation of (statutorily created) primarily local duties,” even as Justice Breyer alleges holding otherwise might destroy such shared responsibility.²⁸¹

So what’s the deal? Of course, the Appointments Clause generally functions as a tool to promote separation of powers and to improve political accountability, but it is unclear how it can ever function in that way for Puerto Rico—at least as it concerns appointing “Officers of the United States.”²⁸² That is, unless Puerto Ricans on the mainland sufficiently represent the interests of their island counterparts (an obviously dubious assertion), there is no political mechanism by which Puerto Ricans may ensure the very political accountability alleged by the Court. Just the opposite, in fact. Puerto Ricans living in the Commonwealth are decidedly located outside the American political community.²⁸³

As for accountability, the Board—“local” though its duties may be—has even argued in litigation that it bears no fiduciary duties to enforce or implement laws of the Commonwealth,²⁸⁴ and PROMESA recites that members may be removed by the President “only for cause.”²⁸⁵ The Court, by reference to the Northwest Territories, seems to suggest that the Appointments Clause provides accountability by permitting local officers to serve the Commonwealth instead of being deemed “Officers of the United States.”²⁸⁶ Taken this way, Puerto Rico has certainly benefitted in the past from the appointment of “local officials”—most notably by Congressional approval of Puerto Rico’s Constitution in Public Law 600.²⁸⁷ But even if true, the Oversight Board itself remains an instrumentality of Congress, thrust upon the island with no corresponding check by the Commonwealth.

²⁸⁰ 48 U.S.C. § 2121(f) (West 2016).

²⁸¹ Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1663 (2020).

²⁸² U.S. CONST. art. II, § 2, cl. 2.

²⁸³ On the idea of exclusion from the “political community” see David Alexander Bateman, *Democratic Exclusion: The Right to Vote in the United States, United Kingdom, and France*, PUBLICLY ACCESSIBLE PENN DISSERTATIONS, 832 (2013), <https://repository.upenn.edu/edissertations/832>; Jordan G. Sisco, *Virginia Can No Longer Abide a Shadow Citizenry*, VA. MERCURY (Feb. 9, 2021), <https://www.virginiamercury.com/2021/02/09/virginia-can-no-longer-abide-a-shadow-citizenry/>.

²⁸⁴ See Mot. to Dismiss at 11–19, *Am. Fed. Teachers v. Financial Oversight and Management Board for Puerto Rico*, Case No. 17-BK-3283-LTS (D.P.R. 2019) (No. 18-134-LTS).

²⁸⁵ 48 U.S.C. § 2121(e)(5) (West 2016).

²⁸⁶ See *Aurelius*, 146 S.Ct., at 1654–55 (citing U.S. CONST. art. II, § 2, cl. 2).

²⁸⁷ *Id.* at 1660.

PROMESA, whatever its economic prudence, is a stark reminder to Puerto Ricans: government officials on the island are “local officials” whose powers ultimately derive not from people of Puerto Rico, but the federal government.

The decision in this case might also be understood in practical terms. As Justice Breyer suggested in oral argument, holding that the Appointments Clause was violated by President Obama’s selection of the Oversight Board would do nothing to stop a President from simply obtaining advice and consent from the Senate for the very same list of Board members.²⁸⁸ It would simply result, Justice Breyer noted, in “a delay of possibly days while the Senate gets its act together to confirm the people that they already recommended to the President.”²⁸⁹ Similarly, the great weight of the Commonwealth’s debt must still be dealt with—surely the Court did not want to disturb the substantial progress made by the Oversight Board over the last few years. But the messaging is nonetheless clear. Puerto Rico essentially remains a colony and the *Insular Cases* are alive and well.²⁹⁰

2. Puerto Rico and Sovereign Debt

If efforts to explain the PROMESA Oversight Board must be contextualized with the island’s history and constitutional relationship with the United States, so, too, must discussions of the restructuring itself, including understanding Puerto Rico’s restructuring as a case study in contemplating the sovereign debt space. In this context, Professor Anna Gelpern’s model of quasi-sovereign debt restructuring provides some useful insights in analyzing to what extent Puerto Rico’s unique constitutional status informs Puerto Rico’s present economic condition and the Oversight Board’s restructuring efforts.²⁹¹

Gelpern’s framework focuses on “states that have partly ceded sovereignty to central governments.”²⁹² These “quasi-sovereigns occupy the middle ground between localities and nation-states” in that “[t]hey retain ‘the self-sufficient source of political power’ that was their original

²⁸⁸ Transcript of Oral Argument, at 29–30, *Aurelius*, 146 S. Ct.

²⁸⁹ *Id.* at 30.

²⁹⁰ Unsurprisingly, the *Insular Cases* figured prominently in the arguments before the 1st Circuit. See Joint Reply Brief Aurelius & Assured Appellants, at *3–4, *Aurelius Investment, LLC v. Puerto Rico*, 2018 WL 5800899 (1st Cir. 2018). These arguments were later abandoned before the Supreme Court. Mitu Gulati, *Aurelius v. Puerto Rican Control Board (or “Do Activist Hedgies Add Value?”)*, CREDIT SLIPS (Oct. 17, 2019), <https://www.creditslips.org/creditslips/2019/10/aurelius-v-puerto-rican-control-board-or-do-activist-hedgies-add-value.html>.

²⁹¹ See Gelpern, *supra* note 17.

²⁹² *Id.* at 896.

endowment, but have ceded certain derived ‘specific political power’ in a constitutional compromise.”²⁹³ Quasi-sovereigns exhibit important differences from private firms and individuals that make for unique restructuring efforts. In particular, quasi-sovereigns are immune from lawsuits on their debts;²⁹⁴ they cannot be liquidated;²⁹⁵ their constituents are “noncontractual and outside [their] capital structure”;²⁹⁶ they perform general government functions;²⁹⁷ they have distinct sources of revenue and expenditures;²⁹⁸ and they are relatively few in number.²⁹⁹ In comparison to central governments, quasi-sovereigns have “countercyclical responsibilities but limited scope for macroeconomic policy”;³⁰⁰ they must contend with the possibility of moral hazard arising from bailouts;³⁰¹ they have reduced immunities in comparison to central governments;³⁰² they face different sanctions;³⁰³ and they issue debt of “varied repayment priority.”³⁰⁴

Puerto Rico does not fit neatly into this framework. Puerto Rico never “ceded” its sovereignty, nor does it “retain ‘the self-sufficient source of political power’ that was in their original endowment.”³⁰⁵ Indeed, *Sanchez Valle*,³⁰⁶ *Franklin Cal. Tax-Fr. Tr.*,³⁰⁷ and *Aurelius*,³⁰⁸ all speak to the fact that the Commonwealth’s authority ultimately derives from Congress. Certainly, Puerto Rico is self-sufficient to an extent, but PROMESA “would be illegal if imposed on one of the fifty states.”³⁰⁹ A better term, therefore,

²⁹³ *Id.*

²⁹⁴ *Id.* at 898.

²⁹⁵ *Id.* at 905.

²⁹⁶ *Id.* at 907.

²⁹⁷ *Id.* at 909.

²⁹⁸ *Id.* at 910.

²⁹⁹ *Id.* at 915.

³⁰⁰ *Id.* at 916.

³⁰¹ *Id.* at 911, 917.

³⁰² *Id.* at 919.

³⁰³ *Id.*

³⁰⁴ *Id.* at 921.

³⁰⁵ *Id.* at 896.

³⁰⁶ 136 S. Ct. 1863 (2016).

³⁰⁷ 136 S. Ct. 1938 (2016).

³⁰⁸ 140 S. Ct. 1649 (2020).

³⁰⁹ *Introduction*, DEVELOPMENTS – US TERRITORIES, 130 HARV. L. REV. 1616, 1624 (2017) (citing *New York v. United States*, 505 U.S. 144, 162 (1992)). Instead, states can just restructure municipal debt under Chapter 9. There have been calls for the use of control boards, like the Oversight Board in Puerto Rico, for the purposes of restructuring municipal debt, but the federal government is not often viewed as the appropriate catalyst for these boards. *See, e.g.*, Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150 (2016) (describing the use of control boards in municipal bankruptcies and the need to further empower bankruptcy courts under Chapter 9). *But cf.* Nathan A. Moody, Note, *Dealing With an Inevitable Case of I Told-You-So: Crafting a Framework for Resolving State Fiscal Distress Post-Puerto Rico*, 15 N.Y.U. J.L. & BUS. 653, 713–14

might be to describe Puerto Rico as a “sub-sovereign” for purposes of its debt restructuring.³¹⁰ Even still, Puerto Rico has generally been treated as a quasi-sovereign in the capital markets, and the macroeconomic effects of the restructuring have followed similar trajectories of other quasi-sovereigns.

Indeed, as a sub-sovereign, Puerto Rico’s restructuring has played an important, albeit somewhat unique, role in signaling how debt markets will react to a default. For one, it appears that Puerto Rico’s debt crisis provides valuable information regarding future potential U.S. quasi-sovereign defaults.³¹¹ Chuck Boyer argues that state bond yields have reacted to events in Puerto Rico and that these effects are not differentiated between lower- and higher-credit states.³¹² Moreover, the “markets may perceive these events as setting precedent for potential future state default[s]” such that “creating a default framework for U.S. state governments could reduce market uncertainty, and therefore state borrowing costs.”³¹³ And, correspondingly, separate economic analysis has determined that PROMESA was “credit positive” for Puerto Rico.³¹⁴

But, as outlined in Part I, the costs of Puerto Rico’s economic crisis are massive. At the same time that the United States’ economy was improving, Puerto Rico’s economic output and employment dramatically declined, especially in industries supported substantially by government demand and external finance.³¹⁵ In addition, the “negative credit event[] [is] associated with significant increases in credit spreads on Puerto Rican debt and significant decreases in stock returns for Puerto Rican firms.”³¹⁶ In other words, the increased credit risk “significantly increased the cost of capital

(2019) (arguing that a state oversight board could be federally established by the Congressional spending power).

³¹⁰ Gelpern, *supra* note 17, at n.7. Gelpern suggests that she adopts the term “quasi-sovereign” from Justice Cardozo’s dissent in *Ashton v. Cameron County Water Improvement District*, 298 U.S. 513 (1936), but explains that a more accurate, though less colorful, terminological option is to describe Puerto Rico as “part-sovereign.” *Id.* at 891. I have chosen “sub-sovereign” to describe Puerto Rico in order to (1) distinguish Puerto Rico’s situation from Gelpern’s framework and (2) take notice of the historical subjectship of Puerto Rico to foreign politics.

³¹¹ CHUCK BOYER, BROOKINGS, LEGAL UNCERTAINTY AND MUNICIPAL BOND YIELDS: MARKET SPILLOVERS FROM PUERTO RICO (2019), https://www.brookings.edu/wp-content/uploads/2019/07/Boyer_PuertoRicoPrecedence_BrookingsDraft.pdf.

³¹² *See id.* at 17 (“Thus, there is no broad evidence of cross sectional differences in spillovers due to credit quality.”).

³¹³ *Id.* at 1.

³¹⁴ Anusha Chari, et al., *The Costs of (Sub)Sovereign Default Risk: Evidence from Puerto Rico* 53 (Nat’l Bureau of Econ. Research, Working Paper No. 24108, 2017) <https://www.nber.org/papers/w24108.pdf>.

³¹⁵ *See* discussion *supra* Part I.

³¹⁶ *Id.* at 4.

for the Puerto Rican government and Puerto Rican firms.”³¹⁷ Anusha Chari, et al., further find that Puerto Rico’s default resulted in a “credit crunch” wherein “non-Puerto Rican banks” have not “step[ped] in to substitute for the reduced supply of local credit from Puerto Rican banks,” a “surprising” finding “[g]iven the degree of Puerto Rico’s financial integration with the U.S.”³¹⁸ There is evidence, too, that an earlier default and restructuring may have benefitted the island in that preemptive restructuring is associated with better outcomes.³¹⁹ Finally, there is evidence that Puerto Rico’s default has also negatively affected municipal debt markets in the United States.³²⁰

Puerto Rico’s default, though unique, can shed light on state and municipal government crises in the United States and on burgeoning debt issues in other territories like the U.S. Virgin Islands.³²¹ Though states and municipalities face far fewer economic obstacles than Puerto Rico, Puerto Rico’s economic collapse provides some fundamental lessons for future policymakers. In particular, tax preferences, like the previous exemption from corporate income tax, “can create large-scale economic bubbles.”³²² Tax-exempt bonds have similarly been shown to raise overall debt levels, especially in light of the Commonwealth’s loose reading of its constitutional balanced-budget provision.³²³ This functions to increase default risk, which in turn leads banks to incur additional losses through “increased financing costs and reduced investment,” higher likelihoods of government austerity measures, and reduced hiring for firms.³²⁴ As it pertains to other territories, PROMESA and the Oversight Board provide a clear roadmap for their own potential defaults. And, if Chuck Boyer and Professor Skeel’s suggestions for a state restructuring regime are to be taken seriously, PROMESA provides a clear starting point. In this way, while Puerto Rico remains “foreign in a domestic sense,” it also operates as the leading example of what a future state default and restructuring might look like.

³¹⁷ See *id.*

³¹⁸ Anusha Chari, et al., *The Transmission of Quasi-Sovereign Default Risk: Evidence from Puerto Rico* 5 (Fed. Res. Bank of Richmond, Working Paper No. 18-03R, 2018).

³¹⁹ Tamon Asonuma, et al., *Costs of Sovereign Defaults: Restructuring Strategies, Bank Distress and the Capital Inflow-Credit Channel* 35 (Int’l Monetary Fund, Working Paper No. 19/69, 2019) <https://www.imf.org/en/Publications/WP/Issues/2019/03/25/Costs-of-Sovereign-Defaults-Restructuring-Strategies-Bank-Distress-and-the-Capital-Inflow-46678>.

³²⁰ James Spiotto, *Puerto Rico’s Financial Woes are Hurting US Infrastructure*, CNN (Aug. 29, 2019), <https://www.cnn.com/2019/08/29/perspectives/puerto-rico-municipal-bonds/index.html>.

³²¹ 48 U.S.C. § 2104 (West 2020). Amanda Albright, *There’s a New Muni-Debt Crisis Brewing in Another U.S. Territory*, BLOOMBERG (Oct. 1, 2019), <https://www.bloomberg.com/news/articles/2019-10-01/there-s-a-new-muni-debt-crisis-brewing-in-another-u-s-territory>.

³²² Chari, *supra* note 314, at 42.

³²³ See *id.*; *supra* Part I.B.

³²⁴ Chari, *supra* note 314, at 32.

3. *Puerto Rico and Statehood: A Path Forward*

With the election of President Joe Biden, the results of Puerto Rico's most recent statehood referendum, and the Democratic victory in both of Georgia's 2021 senatorial runoff elections, Puerto Rico's path to statehood might be the most promising since 1898. At the same time, President Biden has never expressly stated that Puerto Rico should become a state, though he has shown apparent support for the notion. His 2020 campaign platform simply provided that "as President, Biden will work with representatives who support each of the status options in Puerto Rico to engage in a fair and binding process to determine their own status," which he describes as presently untenable.³²⁵ This reflects the official 2020 Democratic Party platform, which similarly provided that "the people of Puerto Rico deserve self-determination on the issue of status," and described efforts to end the "unequal treatment of Puerto Rico's residents."³²⁶ The party platform further pledged to "help restructure and provide relief from Puerto Rico's remaining debt burden and work with the government of Puerto Rico to accelerate progress in order to dissolve the Financial Oversight and Management Board."³²⁷ In contrast, President Biden has expressly stated that the District of Columbia should be a state.³²⁸

But Puerto Ricans expressed their collective will with a statehood referendum during the November 2020 general election. Out of 1,248,176 votes cast, 655,505, or roughly fifty-two percent, voted in favor of a simple question: Should Puerto Rico be immediately admitted into the Union as a State?³²⁹ This plebiscite, however, is nonbinding; Congress has no obligation to abide by the outcome.³³⁰ The question, therefore, boils down

³²⁵ Joe Biden, *The Biden-Harris Plan for Recovery, Renewal and Respect for Puerto Rico*, BIDEN FOR PRESIDENT (last visited Jan. 19, 2021), <https://joebiden.com/the-biden-harris-plan-for-recovery-renewal-and-respect-for-puerto-rico/>.

³²⁶ 2020 DEMOCRATIC PARTY PLATFORM, (July 31, 2020) at 59, <https://www.demconvention.com/wp-content/uploads/2020/08/2020-07-31-Democratic-Party-Platform-For-Distribution.pdf>.

³²⁷ *Id.*

³²⁸ Joe Biden (@JoeBiden), TWITTER (June 25, 2020, 6:45 PM), <https://twitter.com/JoeBiden/status/1276285377595281408> (tweeting "DC should be a state. Pass it on.").

³²⁹ PUERTO RICO STATE COMMISSION ON ELECTIONS, NOVEMBER 2020 GENERAL ELECTION: PLEBISCITE ISLAND WIDE RESULTS, https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#en/default/PLEBISCITO_Resumen.xml; 2020 Puerto Rico Status Referendum Ballot Released, PUERTO RICO REPORT (June 2, 2020), <https://www.puertoricoreport.com/2020-puerto-rico-status-referendum-ballot-released/#.YAisgehKhPY>.

³³⁰ Frances Robles, *In Puerto Rico, a Slim Majority Votes for Statehood*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/live/2020/11/04/us/election-results/in-puerto-rico-a-slim-majority-votes-for-statehood>.

to whether President Biden and Congressional leaders choose to act upon the referendum.

The politics of Puerto Rican statehood, as with PROMESA, are incredibly complex, and the results from the referendum certainly reflect these complexities. In particular, while a clear majority supported statehood, the turnout for last year's general election was "the lowest in the 72 years that Puerto Rico has been electing governors," at about fifty-five percent.³³¹ This reflects, in part, a frustration among Puerto Ricans regarding the consistent inaction stemming from statehood referendums.³³² Indeed, Puerto Rico had similar referendums in 2012 and 2017, the latter of which was boycotted by opposition parties in part due to allegations of biased phrasing on the ballot, resulting in a paltry twenty-three percent turnout.³³³ The poor turnout in 2017 and in 2020 was driven in part by longstanding sentiments among Puerto Ricans that referendums are meaningless political stunts.³³⁴ That is, many Puerto Ricans argue that these referendums are not about statehood, but tactical moves to get voters out for the New Progressive Party (PNP).³³⁵ And so, when PNP leadership tells Puerto Ricans that Congress will listen to these plebiscites, but Congress responds with great reluctance (or no reaction at all), trust between citizens and political leadership further breaks down.³³⁶ In the same way that Puerto Ricans initially supported the Oversight Board largely on the basis of distrust in local officials—a view in line with national Republicans—Puerto Ricans appear to support statehood for similar reasons. That is, support for statehood in Puerto Rico runs, in part, commensurately with frustrations regarding local corruption and economic desperation.³³⁷

Notwithstanding the referendum, Congress—and more particularly the Senate—appears fairly unlikely to admit Puerto Rico as a state, even with Democrats controlling both houses of Congress and the White House.³³⁸ Because of the filibuster, unless Democrats can drum up sufficient support

³³¹ *Id.*

³³² Julio Ricardo Varela, *Is Puerto Rico Having a Defining Vote on Statehood? No, It's Just a Political Stunt*, WASH. POST (May 21, 2020), <https://www.washingtonpost.com/opinions/2020/05/21/is-puerto-rico-having-defining-vote-statehood-no-its-just-political-stunt/>.

³³³ Frances Robles, *23% of Puerto Ricans Vote in Referendum, 97% of Them for Statehood*, N.Y. TIMES (June 11, 2017), <https://nyti.ms/2scfiaN>.

³³⁴ Varela, *supra* note 332.

³³⁵ *Id.*

³³⁶ *Id.*

³³⁷ *Id.*; see *supra* notes 144–145 and accompanying text.

³³⁸ See Jonathan Chait, *Here's What Joe Biden Can Get Done With a Democratic Senate*, N.Y. MAG. (Jan. 6, 2021), <https://nymag.com/intelligencer/2021/01/what-can-joe-biden-pass-democratic-senate-georgia-runoffs-warnock-ossoff.html>.

for Puerto Rico statehood—or, alternatively, abandon the filibuster for votes on statehood—it will not likely be brought to a vote.³³⁹ Senate Minority Leader Mitch McConnell has stated that there should be no statehood vote, and has seemingly likened statehood for Puerto Rico and the District of Columbia to Democratic “socialism.”³⁴⁰ The concern among national Republicans, in addition to Puerto Rico’s financial woes, is that Puerto Rico would permanently supply two Democratic senators.³⁴¹ This, however, is a strange proposition considering the fact that Republicans remain extremely competitive on the island. Indeed, Governor Wanda Vázquez, a Republican, endorsed Donald Trump for President in October 2020.³⁴² And among the Puerto Rican diaspora in Florida, a not-insubstantial proportion supported Donald Trump for President, including 30 percent of Puerto Rican votes in the state.³⁴³

Meanwhile, political divisions among Puerto Ricans in the Commonwealth are complicated.³⁴⁴ Instead of being a Democratic Party stronghold, Puerto Rico would likely be a battleground state.³⁴⁵ This is due to a multitude of factors, but is particularly driven by the fact that the New Progressive Party (PNP) and Popular Democratic Party (PDP) politics do not evenly map onto Republican or Democratic platforms.³⁴⁶ The PNP—which is typically viewed as the more conservative party in Puerto Rico—advocates for statehood more consistently than the PDP, even though national Republicans consistently oppose statehood.³⁴⁷ But this, too, is a generalization. Many PNP party members align with national Democrats, and many PDP party members align with Republicans.³⁴⁸ For example,

³³⁹ See *id.*; see also Jon Walker, *Statehood for D.C. and Puerto Rico Only Needs 50 Votes*, THE WEEK (Jan. 15, 2021), <https://theweek.com/articles/960235/statehood-dc-puerto-rico-only-needs-50-votes> (suggesting that it is both possible and reasonable to abandon the filibuster for the admission of states).

³⁴⁰ See Jenna Portnoy, *McConnell Seems to Call the Prospect of D.C. Statehood ‘Full-Bore Socialism’*, WASH. POST (June 18, 2019), https://www.washingtonpost.com/local/dc-politics/mcconnell-seems-to-call-the-prospect-of-dc-statehood-full-bore-socialism/2019/06/18/2c3e0fd4-9216-11e9-b570-6416efdc0803_story.html.

³⁴¹ See *id.*

³⁴² Sabrina Rodriguez, *Puerto Rico Governor Endorses Trump*, POLITICO (Oct. 6, 2020), <https://www.politico.com/news/2020/10/06/puerto-rico-governor-endorses-trump-426926>.

³⁴³ Carmen Sesin, *Trump Cultivated the Latino Vote in Florida, and it Paid Off*, NBC NEWS (Nov. 4, 2020), <https://www.nbcnews.com/news/latino/trump-cultivated-latino-vote-florida-it-paid-n1246226>.

³⁴⁴ Olivia Reingold, *Is Puerto Rico the Next Senate Battleground?*, POLITICO (Sept. 9, 2020), <https://www.politico.com/news/magazine/2020/09/09/puerto-rico-statehood-politics-democrats-republicans-senate-409191>; Jim Wyss & Michelle Kaske, *“Best Chance We Ever Had”*: Puerto Ricans to Vote on Statehood, ALJAZEERA (Oct. 23, 2020), <https://www.aljazeera.com/economy/2020/10/23/best-chance-we-ever-had-puerto-ricans-to-vote-on-statehood>.

³⁴⁵ Reingold, *supra* note 344.

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

Pedro Pierlusi, who won the November 2020 gubernatorial race in Puerto Rico with about 33 percent of the vote, is a member of the pro-statehood, conservative PNP party but caucuses with the national Democratic Party; he also endorsed President Biden.³⁴⁹ This all makes for messy politics and even messier projections. Ultimately, there is reason to hope that Puerto Rico statehood will be voted on—or at least debated—in Congress, but unless Democrats agree to abandon the filibuster or Senate Republicans support such an initiative, Puerto Rico will remain an unincorporated territory.

CONCLUSION

Even with the efforts of the Oversight Board, Puerto Rico remains entrenched in what will likely be a years-long recovery. Meanwhile, the decision in *Aurelius* reaffirms Puerto Rico's unique constitutional relationship with the United States—a relationship that has been at times fraught and extractive. That decision, as well as *Sanchez Valle* and *Franklin California Tax-Free Trust*, signals to Puerto Ricans that their Commonwealth remains a territory. As Justice Breyer's opinion made clear, local territorial officials exist at the whim of Congress.³⁵⁰ Even so, the Oversight Board was a necessary, if abrasive, solution for the Commonwealth. Excepting the possibility of a bailout, Puerto Rico was left—quite literally—with no options, existing in a netherworld of sub-sovereign debt. And while one may question the actual intentions underpinning Aurelius Investment's lawsuit, the case raises serious unaddressed issues: if Puerto Rico is to claw its way out of the abyss, its relationship with the United States must be clarified and the *Insular Cases* squarely addressed. *Aurelius* makes clear that the Court is unwilling to closely engage with this issue; the resolution, therefore, is likely to come from political, rather than judicial, wellsprings in Puerto Rico and Congress.³⁵¹ With the November 2020 election and referendum, Puerto

³⁴⁹ Adrian Florido, *Puerto Rico Swears in a New Governor Who Inherits Multiple Crises*, NPR (Jan. 2, 2021), <https://www.npr.org/2021/01/02/952862800/puerto-rico-swears-in-a-new-governor-who-faces-multiple-crises>; Gloria Ruiz Kuilan, *Pedro Pierlusi Vota por Joe Biden*, EL NUEVO DIA (July 12, 2020), <https://www.elnuevodia.com/noticias/politica/notas/pedro-pierlusi-vota-por-joe-biden/>; PUERTO RICO STATE COMMISSION ON ELECTIONS, NOVEMBER 2020 GENERAL ELECTION: GUBERNATORIAL ISLAND WIDE RESULTS, https://elecciones2020.ceepur.org/Escrutinio_General_93/index.html#en/default/GOBERNADOR_Resumen.xml.

³⁵⁰ See *supra* Part II.B.2 for the Court's holding.

³⁵¹ Rafael Bernal, *Florida Democrat Introduces Bill to Recognize Puerto Rico Statehood Referendum*, THE HILL (Sept. 15, 2020), <https://thehill.com/latino/516463-florida-democrat-introduces-bill-to-recognize-puerto-rico-statehood-referendum>.

Ricans have spoken; the ball is now in Congress' court. Until then, Puerto Ricans will continue to "await their place in the sun."³⁵²

³⁵² TORRUELLA, *supra* note 16, at dedication.