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No Remedy for Colonization

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NO REMEDY FOR COLONIZATION

Sigrid Vendrell-Polanco[†]

ABSTRACT

The United States purports to maintain a democratic relationship with its inhabited territories, yet the Supreme Court continues to uphold twentieth century laws that affirm rather than abrogate colonial policies. The gap between how the United States idealizes democracy and its real-world application, especially in its five colonized territories (Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the United States Virgin Islands, and American Samoa), is not just growing – it is becoming a chasm. These colonies are currently referred to as United States territories.¹

In 2023, the U.S. territory of Puerto Rico experienced a controversial sovereignty challenge² surrounding the Supreme Court’s ruling in Financial Oversight & Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc. [hereinafter FOMB v. CPI].³ In 2023, the

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¹ Anna Diamond, *Telling the History of the U.S. Through Its Territories*, SMITHSONIAN MAG. (Jan. 2019), <https://perma.cc/5HNJ-9N4Q>. The terms colony and colonizer are more descriptive of the socio-political relationship of an active and recent conquest, whereas the term U.S. territory is more descriptive of the long-term nature of a successfully colonized state; immersion of language, government and cultural reflected in an assimilated nation that is deemed non-sovereign by the nation that colonized it.

² Other sovereignty challenges by U.S. territories include the Ninth Circuit Court of Appeals ruling that denied writ of certiorari for the Commonwealth of Northern Mariana (CNMI) to claim jurisdictional rights over its oceanic lands exemplifies the affirmation rather than the abrogation of colonial policies. *Northern Mariana Islands v. United States*, 399 F.3d 1057 (9th Cir. 2005), *cert. denied*, 547 U.S. 1018 (2006).

³ *Fin. Oversight & Mgmt. Bd. for P. R. v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 342 (2023).

Puerto Rican people expressed national outrage at the implementation and supervision of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA”) congressional statute due to its exclusion of Puerto Rican constituents from equal collaboration in debt crisis resolution and pronounced refusal of government transparency.⁴ This article contributes to the scholarly literature on United States territorial law by condemning the oppressive application of federal laws to the territories and contends that the Court has cut off any viable remedy for Puerto Rico to redress governance grievances. The Court continues to affirm colonial rule without a viable remedy for self-governance.

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⁴ DEEPAK LAMBA-NIEVES ET AL., PROMESA: A FAILED COLONIAL EXPERIMENT? Ctr. for a New Economy 3-5 (2021), <https://grupocne.org/wp-content/uploads/2021/06/2021.06.29-PROMESA-A-Failed-Colonial-Experiment.pdf> (on file with CUNY Law Review).

INTRODUCTION

At the heart of democratic governance is the belief that those who exercise power must be accountable to the people they govern.⁵ This accountability is fundamental in ensuring all citizens have a voice in their governance and that their rights are protected.⁶ However, when an unelected body like the Financial Oversight and Management Board for Puerto Rico is granted unchecked control over an entire territory's financial affairs, it not only undermines the democratic principle of accountable governance, but also sets a dangerous precedent for the treatment of all U.S. territories.⁷ Such a precedent solidifies that the residents of these territories, most⁸ of whom are U.S. citizens, are effectively relegated to the status of subjects within a pseudo-democratic system, verging perilously close to a form of dictatorship.⁹ These 3.5 million citizens officially have no legal protections even resembling that of their counterparts in the states.¹⁰ For example, a veteran can live on the mainland and receive SSI benefits, but cannot receive them if he decides to permanently relocate to Puerto Rico.¹¹ Or, a federal employee in Puerto Rico loses the right to vote in presidential elections when she permanently relocates there as a term of her employment.¹² While this disparity has been an implicit reality since the acquisition of these territories, rulings such as the aforementioned unambiguously dispel any illusion of territorial autonomy.¹³ This situation not only contravenes the democratic ideals the United States purports to uphold, but also signals a troubling shift towards an overtly imperial governance model that disregards the basic rights and democratic

⁵ Sean Thomas, *The Constitution Holds the Government Accountable*, ALBERT SHANKER INSTITUTE (Sept. 17, 2022), <https://perma.cc/GT47-8R4G>.

⁶ *Id.*

⁷ See generally *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339.

⁸ Over 98% of the residents of the United States Territories are United States citizens. *Racial Justice: Anti-Colonialism*, ACLU, <https://perma.cc/9M5F-E99S> (last visited Jan. 2, 2025). The remaining residents are residents of American Samoa, which are United States Nationals. Gabriel Melendez Olivera & Adriel I. Cepeda Derieux, "Nationals" not "Citizens": How the U.S. Denies Citizenship to American Samoans, ACLU, <https://perma.cc/AN36-E6F4> (last updated Aug. 6, 2021).

⁹ See generally *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339.

¹⁰ United States citizens living in the territories do not have the full constitutional protections of mainland United States citizens. Deanna Salem, *Birthright Citizenship & the Plight of American Samoa*, 56 UIC L. REV. 783 (2023).

¹¹ *United States v. Vaello Madero*, 142 S. Ct. 1539, 1553 (2022).

¹² Sigrid Vendrell-Polanco, *Puerto Rican Presidential Voting Rights: Why Precedent Should be Overturned, and Other Options for Suffrage*, 89 BROOK. L. REV. 563, 589 (2024).

¹³ See Harv. L. Rev., *Fin. Oversight and Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc. Constitutional Interpretation*, 137 HARV. L. REV. 1, 460 (Nov. 2023).

principles of its territorial citizens. If legal scholars and supporters of democracy remain complacent in the face of such disparities, it could lead to a further erosion of democratic values and legal equality, particularly in how the U.S. treats its territories and American citizens who reside there.

This article examines how far the United States federal government has gone in creating legal structures that continue to exact harm on the very people it is supposed to protect by carefully exploring the recent Supreme Court case of *FOMB v. CPI*¹⁴ and scrutinizing its implications for Puerto Rico's ability to achieve transparency and self-governance.¹⁵ The article provides background on Puerto Rico's status as a United States territory and the insulating powers Congress holds over it as a United States unincorporated territory. It also details the creation of the Financial Oversight and Management Board through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) in 2016 in response to a critical fiscal crisis and unsustainable level of debt that Puerto Rico was facing.¹⁶ However, this article argues the situation has deteriorated further, with the Supreme Court ruling that nothing in Congress' actions have led the justices to believe it was the federal government's intent to deny sovereign immunity to the Board members and operations. This decision forecloses an avenue for judicial review and oversight of the Board's broad powers over Puerto Rico's governance and budgetary processes.¹⁷ Thus, this article critically examines the profound repercussions on Puerto Rico's quest for transparency and self-governance, delving into the significant challenges posed by recent judicial decisions that undermine democratic principles and autonomy in the territories.

Part I of this article traces the historical underpinnings of the Territorial Clause and the acquisition of the five inhabited territories. Puerto Rico is chiefly examined, providing a comprehensive overview of the constitutional and legislative frameworks that have shaped the island's colonial political status. This part delves into the intricate legal and historical context that has defined Puerto Rico's colonial relationship with

¹⁴ 598 U.S. 339.

¹⁵ See James Nani & Kimberly Strawbridge Robinson, *Puerto Rican Board Can't Be Sued by Media Group, Justices Say*, BLOOMBERG LAW (May 11, 2023), <https://news.bloomberglaw.com/us-law-week/media-group-cant-sue-puerto-rican-bankruptcy-board-justices-say> (on file with CUNY Law Review); see also Christina D. Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor Surprising Concurrence in Aurelius*, 130 YALE L.J.F. 101 (2020).

¹⁶ See Tom C.W. Lin, *Americans, Almost and Forgotten*, 107 CAL. L. REV. 1249 (2019); Jorge Ruiz, *An Unfulfilled Promise: Colonialism, Austerity, and the Puerto Rican Debt Crisis*, HARV. POL. REV. (June 14, 2022), <https://perma.cc/CBJ6-GH7C>.

¹⁷ See 48 U.S.C. § 2128(a)(1); see generally *Pierluisi v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 37 F.4th 746 (1st Cir. 2022).

the United States, setting the stage for a deeper understanding of how American case law affirms colonial rule rather than the abrogation of colonial policies.

Part II examines the genesis and evolution of the Financial Oversight and Management Board, alongside the Puerto Rico Oversight, Management, and Economic Stability Act. This part critically analyzes the convoluted history of judicial decisions that have shaped the Board's authority, highlighting the arbitrary and often racially prejudiced precedents that have influenced these rulings. The discussion in this part not only sheds light on the legal intricacies but also underscores the socio-political biases embedded within these judicial decisions.

Finally, Part III delves into the far-reaching implications of the Supreme Court's ruling on Puerto Rico's governance and economic stability. By critically evaluating the impact of this ruling on both the democratic principles and the economic welfare of Puerto Rico, this part advocates for a re-examination of the legal and political relationship between the territory and the federal government, emphasizing the urgent need for reform and the establishment of equitable legal remedies for American citizens living in all territories.

I. THE HISTORY OF THE TERRITORIAL CLAUSE AND PUERTO RICO

The United States currently possesses fourteen territories. Among the fourteen territories, eight are classified as uninhabited, unincorporated, or both, underscoring their status as territories not integrated into the full legal and political framework of the United States.¹⁸

The January 1959 Alaska statehood resolution and the March 1959 Hawaii statehood resolutions for two prior United States territories gave the people of the territory of Puerto Rico hope that they would also be incorporated into statehood via similar Congressional procedures.¹⁹ Yet, in 2025, the ongoing presence of unresolved unincorporated territories under American administration highlights a nuanced continuation of practices reminiscent of the colonial arrangements. This delineation highlights the varied statuses and designations of United States territories, reflecting a complex legal and administrative relationship with the federal government. The focus of this article is the five inhabited but unincorporated

¹⁸ See Daniel A. Cotter, *Territories of the United States*, CONSTITUTING AMERICA, <https://perma.cc/87X6-QGJZ> (last visited Dec. 15, 2024).

¹⁹ National Archives, *Alaska Statehood*, DWIGHT D. EISENHOWER PRESIDENTIAL LIBRARY, <https://perma.cc/B7D3-Q42G> (last visited Dec. 15, 2024); National Archives, *Joint Resolution to Provide for Annexing the Hawaiian Island to the United States (1898)*, MILESTONE DOCUMENTS, <https://perma.cc/V9FP-XQ4D> (last visited Dec. 15, 2024).

territories: Puerto Rico, the U.S. Virgin Islands, and Guam, to lesser-known islands like the Northern Mariana Islands and American Samoa.²⁰

A. Acquisition of United States Territories

Most of the five unincorporated territories were annexed over a hundred years ago.²¹ The United States expanded its territorial reach through various means, marking significant moments in its history with the acquisition of lands that would become territories under its flag.²²

Puerto Rico and Guam were both ceded to the United States in 1898 as a result of the Spanish-American War.²³ American Samoa's acquisition into United States territory came through treaties with Great Britain and Germany in 1900, with formal cession of the islands occurring between 1900 and 1904.²⁴ Congress formally accepted these cessions in the Ratification Act of 1929.²⁵ The U.S. Virgin Islands were purchased from Denmark in 1916, with United States citizenship conferred to its residents in 1927.²⁶ The Organic Act of 1936 and its revision in 1954 established and restructured the government of the Virgin Islands.²⁷ Finally, the Commonwealth of the Northern Mariana Islands (CNMI) transitioned from being a territory of the Pacific Islands to becoming an American territory with self-governing commonwealth status in 1947.²⁸ The governance

²⁰ Harv. L. Rev., *Developments in the Law — The U.S. Territories*, 130 HARV. L. REV. 1616, 1617 (2017).

²¹ See Lin, *supra* note 16, at 1254.

²² See Daniel Immerwahr, *The Greater United States: Territory and Empire in U.S. History*, 40 DIPLOMATIC HIST. 373 (2016).

²³ Anne Perez Hattori, *Navy Blues: US Naval Rule on Guam and the Rough Road to Assimilation, 1898–1941*, 5 PAC. ASIA INQUIRY 13, 13–14 (2014). The Treaty of Paris, signed December 10, 1898, stipulated that the Spanish American War ended with the transfer of Puerto Rico and Guam from Spain to the United States. In the same treaty the United States purchased the Philippines from Spain for 20 million dollars. *Id.* at 14.

²⁴ See Instrument of Cession Signed on April 17, 1900, by the Representatives of the People of Tutuila, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, <https://perma.cc/YE6L-6SP4> (last visited Dec. 14, 2024) (ceding the islands of American Samoa to the United States); Instrument of Cession Signed July 14, 1904, by the Representatives of the People of the Islands of Manua, U.S. DEP'T OF STATE: OFF. OF THE HISTORIAN, <https://perma.cc/SWJ4-NU6F> (last visited Dec. 14, 2024) (enumerating assurances of equal treatment of American Samoans with U.S. citizens).

²⁵ Ratification Act of 1929, ch. 281, 45 Stat. 1253 (codified at 48 U.S.C. § 1661).

²⁶ Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 494–96 (1992); Act of Mar. 3, 1917, Pub. L. No. 64-389, 39 Stat. 1132–34.

²⁷ *U.S. Virgin Islands: History and Political Status*, U.S. DEP'T OF THE INTERIOR, <https://perma.cc/8GFW-2ULG> (last visited Dec. 18, 2024).

²⁸ Nicole Manglona Torres, Comment, *Self-Determination Challenges to Voter Classifications in the Marianas After Rice v. Cayetano: A Call for a Congressional Declaration of Territorial Principles*, 14 ASIAN-PAC L. & POL'Y J. 152, 160 (2012).

reclassification was administered by the United States under a 1947 United Nations trusteeship through a covenant that also conferred United States citizenship to its residents.²⁹

Following the acquisition of new territories, the federal government of the United States embarked on legislative and judicial missions to put standards in place on how they would rule the territories.³⁰ To rule the territories, the United States Supreme Court upheld the Territorial Clause of the United States Constitution that “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.”³¹ The clause thus grants Congress plenary powers over U.S. territories and the district of Columbia.³² Congress can enact legislation that controls the local affairs of the United States territories, but it can also cede this power to the local legislatures.³³

The infamous *Insular Cases*, a series of legal decisions mostly from the early 1900s, implicitly sanctioned Congress’s authority to maintain its territories in a colonial state for an indefinite period.³⁴ These cases held that an incorporated territory was defined as one that was considered a part of the United States, on a path to statehood, and in which the protection of the United States Constitution would apply in its entirety.³⁵ In contrast, an unincorporated territory was defined as one that was not designated as a territory on a path to statehood, and thus, not a foreign country in the “international sense” but “foreign to the United States in a domestic sense.”³⁶ The judicial reasoning behind these cases suggested a tacit approval of the perpetual colonial status of newly acquired territories, while

²⁹ *Id.*

³⁰ See Harv. L. Rev., *supra* note 21, at 1625-26 (2017).

³¹ *Downes v. Bidwell*, 182 U.S. 244, 288 (1901); U.S. CONST. art. IV, § 3, cl. 2.

³² See *Downes*, 182 U.S. at 267-68 (Fuller, J., dissenting).

³³ Van Dyke, *supra* note 26, at 459; see Rafael Cox-Alomar, *The Puerto Rico Constitution at Seventy: A Failed Experiment in American Federalism?*, 57 NEW ENG. L. REV. 1, 14-15 (2022).

³⁴ See generally HARVARD LAW REVIEW, *supra* note 21, at 1680. The *Insular Cases* include *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. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901), *Dooley v. United States*, 183 U.S. 151 (1901), *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901), *Hawaii v. Mankichi*, 190 U.S. 197 (1903), *Dorr v. United States*, 195 U.S. 138 (1904), and *Balzac v. Porto Rico*, 258 U.S. 298 (1922). See generally Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283, 286 (2007).

³⁵ Torruella, *supra* note 34, at 284-85 n. 5.

³⁶ *Downs v. Bidwell*, 182 U.S. at 341; “Foreign in a Domestic Sense”: U.S. Territories and “Insular Areas,” NAT. IMMIGRATION FORUM (Apr. 12, 2021), <https://perma.cc/PW3C-6A9E>.

hinting at an eventual cessation of colonial practices without establishing any specific timeline or criteria for such a transition.³⁷ This stance represented a significant departure from earlier legal precedents, notably the 1856 *Dred Scott v. Sanford* decision, which, despite being effectively nullified by the Fourteenth Amendment, had previously articulated that the acquisition of territories with the intent of perpetual governance as colonies was beyond the constitutional powers granted to Congress.³⁸

By the time the first several *Insular Cases* were adjudicated in 1901, the legal framework had evolved, allowing for a more expansive interpretation of Congress's powers over territories.³⁹ Although the Fourteenth Amendment had superseded the specific rulings of *Dred Scott v. Sanford*, the *Insular Cases* extended the conceptual boundaries regarding the duration and nature of United States sovereignty over its territories.⁴⁰ This shift did not outright contradict the earlier precedent but rather extended the scope of federal discretion in managing colonial possessions, effectively delaying the resolution of the colonial question and leaving the door open for prolonged territorial governance without clear directives for the incorporation or full political integration of these territories into the Union.⁴¹

B. United States Rule Over Puerto Rico

This broader legal and constitutional backdrop, set by the *Insular Cases*, directly influenced the United States' approach to Puerto Rico.⁴² Each territory offered unique strategic opportunities and advantages aligned with the United States' broader objectives of expanding its

³⁷ See generally Torruella, *supra* note 34.

³⁸ *Dred Scott v. Sandford*, 60 U.S. 393, 442 (1857); *Slaughter-House Cases*, 83 U.S. 36, 73 (1872) (“To remove this difficulty [of the *Dred Scott* precedent] primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section [of the Fourteenth Amendment] was framed.”).

³⁹ Torruella, *supra* note 34, at 86.

⁴⁰ *Slaughter-House Cases*, 83 U.S. at 73; Juan R. Torruella, *Ruling America's Colonies: The Insular Cases*, 32 YALE L. & POL'Y J. 57, 58-59 (2013).

⁴¹ See generally James T. Campbell, *Aurelius's Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and "The Law of the Territories,"* 131 YALE L. J. 2542 (2022); Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008).

⁴² Alex Vallecillo, *Puerto Rico's Economic Development Growth – Past and Future – and Its Relationship to Trade Possibilities in the Caribbean and U.S. Markets*, 4 MD. J. INT'L L. 57, 57-59 (1978); Juan R. Torruella, Commentary, *Why Puerto Rico Does Not Need Further Experimentation with Its Future: A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. 65, 69, 89 (2018).

geopolitical influence and economic reach.⁴³ The United States was particularly interested in Puerto Rico's strategic location in the Caribbean region.⁴⁴ Such a strategic location was deemed invaluable for projecting American naval power and securing a pivotal foothold that could serve as a gateway to Latin America and beyond.⁴⁵ This strategic imperative motivated the establishment of multiple military bases across Puerto Rico, effectively ensuring a permanent military presence that underscored the island's significance to United States defense strategy.⁴⁶

Beyond military considerations, Puerto Rico offered the United States economic benefits, particularly as a market for surplus manufactured goods.⁴⁷ The United States aimed to utilize Puerto Rico not only as a consumer market but also as a base for further economic expansion into neighboring markets.⁴⁸

Nevertheless, in response to widespread unrest among Puerto Ricans and their resistance to direct rule, Congress enacted the Jones-Shafroth Act (the Jones Act) in 1917, shortly after the rulings in the initial *Insular Cases*.⁴⁹ This act, prompted by the demand for greater autonomy and reforms by the Puerto Rican populace, was an attempt by the United States to quell dissatisfaction by granting statutory United States citizenship to Puerto Rican residents—a move by President Woodrow Wilson viewed as a progressive step towards equality.⁵⁰ However, this gesture towards

⁴³ See generally Pedro A. Cabán, *Puerto Rico: State Formation in a Colonial Context*, CARIBBEAN STUDIES, 170 (2022); See Brian M. Salerno, *The Potential Effects of a Change in Political Status of Puerto Rico Upon Coast Guard Missions in the Caribbean*, USAWC STRATEGY RESEARCH PROJECT (Mar. 10, 2000).

⁴⁴ Sasha Davis, *The U.S. Military Base Network and Contemporary Colonialism: Power Projection, Resistance and the Quest for Operational Unilateralism*, 30 POL. GEOGRAPHY 215, 216–22 (2011) (pointing out the “contemporary imperialism” of American military forces on Puerto Rico).

⁴⁵ Gyula Tihanyi, *The Peculiar Status of Puerto Rico: Neither a State, nor an Independent Nation*, Syracuse Univ. Theses-ALL 118, 7 - 8 (2015).

⁴⁶ Cabán, *supra* note 43, at 173–76; See generally Salerno, *supra* note 43.

⁴⁷ See generally Pedro Cabán, *PROMESA, Puerto Rico and the American Empire*, 16 LATINO STUDIES 161 (2018). Puerto Rico also has a surplus of human resources, which the United States benefits from through use of exploitation that perpetuates poverty on the island. See *id.*

⁴⁸ See generally Alex Vallecillo, *Puerto Rico's Economic Development Growth – Past and Future – and Its Relationship to Trade Possibilities in the Caribbean and U.S. Markets*, 4 MD. J. INT'L L. 57 (1978); Torruella, *supra* note 42, at 73–74.

⁴⁹ Bartholomew Sparrow & Jennifer Lamm, *Puerto Ricans and U.S. Citizenship in 1917: Imperatives of Security*, CENTRO J. Spring 2017, at 284, 295; Lin, *supra* note 16, at 1249 (2019).

⁵⁰ *Puerto Rico and the United States*, LIBRARY OF CONG., <https://perma.cc/C8BG-ZCDG> (last visited Dec. 14, 2024); Juan R. Torruella, *supra* note 40.; Adriel I. Cepeda Derieux, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM L. REV. 797 (2010).

autonomy was constrained by significant limitations; key governmental positions, including the governor, remained appointed by the United States President, ensuring continued federal oversight.⁵¹ Furthermore, both the governor and the United States President were given the power to veto legislation passed by the Puerto Rican legislature, highlighting the persistent influence of the United States in the island's governance.⁵²

The citizenship granted under the Jones Act was not constitutionally protected and could be revoked by Congress, revealing the precarious nature of this new status.⁵³ Despite the semblance of political integration, the act contributed to a deeper dependency on the colonial structure.⁵⁴ It facilitated the "Americanization" of Puerto Rico's political system, leading to an increased reliance on the United States for economic stability and professional opportunities.⁵⁵ This dynamic was evident as many Puerto Ricans became proficient in navigating the United States legal system and thousands were trained for governmental roles, contributing to a workforce deeply intertwined with the colonial administration. This period saw a rise in unemployment and poverty, which historians argue made Puerto Ricans more dependent on the colonial state for their livelihood.⁵⁶ The act of granting citizenship, while symbolically significant, has been critiqued by scholars as a veneer that merely obscured the realities of colonialism rather than dismantling them.

Through these actions, the United States leveraged Puerto Rico's strategic and economic potential to enhance its regional dominance and fulfill broader imperial ambitions. However, even over one hundred years later, the United States continues to hold Puerto Rico, and its people at arm's length. Unlike sovereign states, Puerto Rico and the other unincorporated territories do not enjoy full political representation or the same degree of autonomy, situating them in a liminal space between

⁵¹ Juan R. Torruella, *supra* note 42, at 74; Foraker Act, ch. 191, §§ 17–18, 27, 33, 31 Stat. 77, 81–82, 84 (1900).

⁵² Christina D. Ponsa-Kraus, *A Perfectly Empty Gift*, 119 MICH. L. REV. 1223, 1240 (2021); Jones Act, ch. 145, § 12, 39 Stat. 951, 955 (1917).

⁵³ Lisa Maria Perez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. 1029 (2008).

⁵⁴ See generally Torruella, *supra* note 42, at 73–77; Jones Act, ch. 145, §§ 12, 34, 39 Stat. 951, 955, 960–63 (1917) (granting the U.S. Congress power to "annul" legislation made by the Puerto Rico legislature and the Governor, appointed by the President, power to veto any legislation).

⁵⁵ Pedro Cabán, *The Colonizing Mission of the U.S. in Puerto Rico*, in *Transnational Latina/o Communities: Politics, Processes, Cultures* 115, 118–22 (Carlos G. Vélez-Ibáñez & Anna Sampaio eds. 2002).

⁵⁶ Torruella, *supra* note 42, at 4; Frank Bonnilla & Ricardo Campos, *A Wealth of Poor: Puerto Ricans in the New Economic Order*, AMERICAN INDIANS, BLACKS, CHICANOS, AND PUERTO RICANS, Spring 1981, at 133.

dependency and partial self-governance. This status evokes comparisons to the colonial possessions European powers maintained, which the United States historically critiqued and from which it sought to differentiate itself.

C. Public Law 600

In response to evolving political dynamics following World War II, the population of Puerto Rico demanded a governance framework that would empower them with enhanced self-rule.⁵⁷ Puerto Ricans advocated for the enactment of Public Law 600, which would allow them to adopt their own constitution and afford them greater autonomy, marking a significant milestone in recognizing Puerto Ricans' right to self-governance.⁵⁸ This legislation was framed as a mutual agreement only between the United States and Puerto Rico,⁵⁹ and permitted the Puerto Rican people to establish their government based on a constitution they themselves would craft.⁶⁰ Fulfilling the stipulations of the Jones Act, the enactment of Public Law 600 received endorsement from the Puerto Rican populace through a referendum conducted across the island.⁶¹ Following the approval of Public Law 600, Puerto Rico convened a constitutional convention, leading to the creation of its Constitution that was ratified by both the Puerto Rican electorate and the United States Congress in 1952. This pivotal moment redefined Puerto Rico's status as a commonwealth under its new Constitution.⁶²

Additionally, the new Constitution outlined a governance structure under the dominion of the Puerto Rican people's sovereignty and confirmed the island's governing authority was derived directly from its citizens.⁶³ This authority was to be wielded in adherence to the agreed-upon

⁵⁷ Julia R. Cummings, *Broken PROMESA: Why the United States Should Abandon Its Use of the Territories Clause to Control the Local Affairs of Puerto Rico*, 87 BROOK. L. REV. 349, 355–56 (2021). “The era of decolonization commenced after World War II, as world leaders began to denounce imperialism and individuals subject to colonial rule demanded greater freedom from their colonizers.”

⁵⁸ Samuel Issacharoff et al., *What is Puerto Rico?*, 94 IND. L. J. 1, 10 (2019); Act of July 3, 1950, Pub. L. 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b to 731e (2006)).

⁵⁹ As with many pieces of legislation towards the United States territories, this Act only affected one territory, not all. See Act of July 3, 1950, Pub. L. 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b to 731e (2006)).

⁶⁰ Act of July 3, 1950, Pub. L. No. 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b to 731e (2006)).

⁶¹ Jones Act, ch. 145, § 26, 39 Stat. 951, 958–59 (1917); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448, 483–84 (2020) (Sotomayor, J., concurring); Cummings, *supra* note 57 at 356.

⁶² P.R. CONST. art. I, § 1.

⁶³ *Id.*

terms of the compact between Puerto Rico and the United States.⁶⁴ At the time, this development marked a significant step in Puerto Rico's journey towards self-governance and a more autonomous political identity within the framework of its association with the United States,⁶⁵ and illustrated the island's commitment to forging a governance model that resonated with its people's aspirations and cultural identity.⁶⁶

As a direct consequence of Public Law 600's passage, the United States was relieved from the obligations imposed by Article 73(e)⁶⁷ of the United Nations Charter. Article 73(e) mandates member states, such as the United States, to submit regular reports on the status and progress of non-self-governing territories under their governance and control, aiming to ensure the advancement of these territories towards self-government.⁶⁸ As part of this relief, the United States assured the United Nations that the compact (so-called contract) created an agreement that was not to be amended unilaterally.⁶⁹ The law aimed to endow Puerto Rico with a level of political power similar to that of the states, ensuring the federal government would refrain from intervening in affairs not typically allocated to a federal government within a federal system.⁷⁰

This remains the official position of the United States today.⁷¹ Public Law 600 is still in effect, and according to the United States federal government, Puerto Rico is a self-governing commonwealth.⁷² The exemption from these reporting requirements was a clear indication of Puerto Rico's altered status.⁷³ By enabling Puerto Ricans to organize their own governmental structure and adopt a constitution, Public Law 600

⁶⁴ *Id.*

⁶⁵ *Id.*; see G.A. Res. 748 (VIII), ¶ 7 (Nov. 27, 1953).

⁶⁶ See Special Message from President Harry S. Truman to the Congress Transmitting the Constitution of the Commonwealth of Puerto Rico from President (Apr. 22, 1952), <https://perma.cc/X648-7UGU>.

⁶⁷ U.N. Charter, art. 73 (e), at 27-33, https://legal.un.org/repertory/art73/english/rep_orig_vol4_art73.pdf (referring to the obligations of addressing information to the United Nations, including an annual report transmitted to the Secretary General).

⁶⁸ U.N. Charter, art. 73(e); U.N. Charter, art. 76.

⁶⁹ Press Release, Statement by the Hon. Mrs. Frances P. Bolton, U.S. Rep., in Comm. IV on P.R. to the GAOR U.N. Press Release No. 1970 (Oct. 27, 1953) (on file with CUNY Law Review) [hereinafter Statement by the Hon. Mrs. Frances P. Bolton] (referring to the assurances of Senator Butler of Nebraska, a co-sponsor of Public Law 600, that the compact created "a relationship between two parties which may not be amended or abrogated 'unilaterally'").

⁷⁰ Statement by the Hon. Mrs. Frances P. Bolton, at 2.

⁷¹ See *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 2 (1982) (observing Puerto Rico as a self-governing political entity, "sovereign over matters not ruled by the [U.S.] Constitution") (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*).

⁷² See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 64 (2016) (noting that "Congress enabled Puerto Rico to embark on the project of constitutional self-governance.").

⁷³ *List of Former Trust and Non-Self-Governing Territories*, UNITED NATIONS, <https://perma.cc/3A48-JRPP> (last visited Dec. 4, 2024).

demonstrated to the international community that Puerto Rico was moving away from the category of a non-self-governing territory.⁷⁴ This transition reflected the United States' recognition of Puerto Rico's capacity to exercise self-governance and symbolized a shift towards a more autonomous Puerto Rican government, albeit within the context of continued association with the United States.⁷⁵ Although this highlighted the evolving nature of colonial and territorial governance in the post-World War II era,⁷⁶ it would not last. The context of continued association with the United States would always be tied to the Territorial Clause, which gives Congress the power to override any laws or rules that Puerto Rico put in place.⁷⁷

Even so, the Puerto Rican Federal Relations Act (Public Law 600, as it came to be called) mandated the establishment of an autonomous government in Puerto Rico to govern "matters of purely local concern."⁷⁸ The legislation required that Puerto Ricans draft a constitution and institute local governance, requiring a "republican form of government and [. . .] a bill of rights."⁷⁹ However, the Puerto Rican Constitution still required approval from both the United States President and Congress to ensure it complied with Public Law 600 and the U.S. Constitution.⁸⁰ Upon Puerto Rico's drafting and presentation of its constitution to Congress, Congress approved it in 1952, "subject to several conditions that Puerto Rico fulfilled through amendments."⁸¹

The governmental framework established at that time persists to this day, retaining a structure that is, in essence, substantially similar to that created in 1952, following the passage of Public Law 600.⁸² "Puerto Rico's executive branch [is] headed by [a] governor who is elected every four years, [and] is composed of cabinet members that lead the

⁷⁴ *Id.*

⁷⁵ Statement by the Hon. Mrs. Frances P. Bolton.

⁷⁶ See Cummings, *supra* note 57. The end of World War II marked a significant shift in global attitudes towards imperialism and colonialism. The war weakened many European powers both economically and militarily, diminishing their ability to maintain control over their colonies. This shift was further supported by international bodies, notably the United Nations, which advocated for self-determination and independence for colonized nations. See generally *How Did Decolonization Shape the World?*, COUNCIL ON FOREIGN RELATIONS (Feb. 14, 2023), <https://perma.cc/SC35-QYYV>.

⁷⁷ PRESIDENT'S TASK FORCE ON P. R.'S STATUS, JUSTICE DEP'T REPORT (Dec. 2007), <https://www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf> [hereinafter JUSTICE DEP'T REPORT]; U.S. CONST. art. IV § 3 cl. 2.

⁷⁸ H.R. Rep. No. 140-713, at 10 (1996).

⁷⁹ Puerto Rican Fed. Rel. Act, 48 U.S.C. § 731 (1950).

⁸⁰ *Id.*

⁸¹ JUSTICE DEP'T REPORT, *supra* note 77, at 3.

⁸² See generally P.R. CONST. art. IV, § 1-2, 4; Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950); Vendrell-Polanco, *supra* note 12.

commonwealth's executive departments.”⁸³ Further, “[Puerto Rico's] legislative power is divided between the Chamber of Representatives and Senate . . . elected by the population for terms lasting four years . . . [and its] judicial system is composed of a Supreme Court with nine justices, all named by the Governor.”⁸⁴ Puerto Rico has a United States Attorney and the President of the United States appoints seven district court judges.⁸⁵ However, the Puerto Rican institutions and local government were always meant to control only internal affairs.⁸⁶ The United States retained power over Puerto Rico's affairs from afar.⁸⁷ The United States federal government still controls “‘foreign relations, commerce, trade, and more, as long as there is a US law that supersedes Puerto Rican law.’ [Thus] Puerto Rican residents are, for the most part, governed by US federal laws [. . .].”⁸⁸

Even with tremendous federal powers preempting any local governance or law, the United States maintained that because of this new illusion of autonomy for Puerto Rico, they were no longer holding a non-self-governing territory.⁸⁹ Now, it could be said that the same applies to states. After all, states have their own local governance, their own constitutions, as well as state elected officials, which are all still subject to federal preemption and supremacy.⁹⁰ The difference with Puerto Rico is that United States citizens remain without voting representation in the United States government, neither in Congress, in the House of Representatives, nor through voting rights in presidential elections.⁹¹ The official website of Puerto Rico states that “The Resident Commissioner of Puerto Rico is a non-voting member of the United States House of Representatives and elected by the voters of the U.S. Commonwealth of Puerto Rico every four years.”⁹²

⁸³ Vendrell-Polanco, *supra* note 12, at, 575-76.

⁸⁴ *Id.* at 576.

⁸⁵ *Id.*

⁸⁶ P.R. CONST. art. I, § 1-4.

⁸⁷ Vendrell-Polanco, *supra* note 12, at 572 (citing President Woodrow Wilson's efforts to pass the Jones-Shafroth Act that granted U.S. citizenship to Puerto Ricans but with limitations).

⁸⁸ *Id.* at 576 (citing Izzie Ramirez, *The Real Source of Puerto Rico's Woes*, VOX (Oct. 10, 2022), <https://perma.cc/J58Y-D7P4>).

⁸⁹ See JUSTICE DEP'T REPORT, *supra* note 77, at 5. “[It] should be noted that Congress currently has power to preempt laws of Puerto Rico.” *Id.* at Appendix E.

⁹⁰ U.S. CONST. art. VI, cl. 2.1. See generally U.S. CONST. amend. X; *State and Local Government*, THE WHITE HOUSE, <https://perma.cc/PML9-W9J5> (last visited Dec. 12, 2024).

⁹¹ See Vendrell-Polanco, *supra* note 12, at 565.

⁹² Resident Commissioners of Puerto Rico, WELCOME TO PUERTO RICO!, <https://perma.cc/2KV4-8D7E> (last visited Dec. 5, 2024).

D. Catalysts of Crisis: Natural Disasters and Their Role in Precipitating PROMESA

Congress arbitrarily amended the federal bankruptcy code in 1984 prohibiting Puerto Rico from “‘defining’ a municipal debtor.”⁹³ This effectively stripped the territory of the legal capacity to permit its municipalities to seek Chapter 9 bankruptcy protection.⁹⁴ There was no rational basis for this exclusion: “No reason was given. No federal policy or interest in the change was spelled out in the amendment process. By a few simple phrases in an amendment that few people noticed, Congress laid the basis for the unique situation Puerto Rico confronted”⁹⁵ Puerto Rico would not be allowed to seek shelter in the federal bankruptcy code.⁹⁶ Consequently, for many years, no mechanism existed under federal law that allowed Puerto Rico to secure debt relief.⁹⁷ In an attempt to overcome this barrier and maintain basic utilities, Puerto Rico enacted a local law in 2014, aiming to establish a bankruptcy-esque mechanism for restructuring the debt of its public utilities.⁹⁸ Yet, in 2016, the Supreme Court determined that federal law superseded this local statute, effectively denying Puerto Rico the ability to restructure its debt.⁹⁹ Justice Thomas, representing the majority, determined that Puerto Rico does not qualify as a “State” within the context of the federal Bankruptcy Code’s initial criteria for determining eligible debtors thereby preventing it from granting its municipalities the ability to file for Chapter 9 bankruptcy.¹⁰⁰ Puerto

⁹³ See Jack Bouboushian, *Puerto Rico Excluded from Bankruptcy Powers*, COURTHOUSE NEWS SERVICE (July 8, 2015), <https://www.courthousenews.com/puerto-rico-excluded-from-bankruptcy-powers/> (on file with CUNY Law Review). See also Sebastián Negrón Reichard, *The Exclusion of Puerto Rico’s Municipalities from the 1984 Amendments to the U.S. Bankruptcy Code is Unconstitutional Because the Amendments Violate the Bankruptcy Clause and the Equal Protection Component of the U.S. Constitution*, 25 HARV. LATIN AM. L. REV. 65, 67 (2022) (The issue with Puerto Rico and Chapter 9 is how the term State is defined. “Since 1938 . . . § 1(29) of the revised Municipal Bankruptcy Act of 1937 has included territories and possessions of the United States, thus including Puerto Rico. In 1946, Congress amended . . . laws to prohibit states from enacting their own municipal bankruptcy schemes. In the 1970s, Congress reinstated a state-permission requirement . . .”). *Id.*

⁹⁴ Juan Gonzalez, *Puerto Rico’s \$123 Billion Bankruptcy is the Cost of U.S. Colonialism*, THE INTERCEPT (May 9, 2017), <https://perma.cc/B3YP-Z8HW>.

⁹⁵ *Id.*

⁹⁶ Bouboushian, *supra* note 93 (“Congress was quite clear in the Bankruptcy Code that Puerto Rico was to be treated like a state, except for the power to authorize its municipalities to file under Chapter 9, U.S. Circuit Judge [. . .] said.”).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 130 (2016); see *id.*, at 137-39 (Sotomayor, J. dissenting) (referring to how the Court rejected an analysis of the context “in favor of a syllogism” to make a government unable to “protect its citizens”).

¹⁰⁰ *Id.* at 123-24.

Rico is considered a “State” for the purposes of the chapter 9 preemption provision but Congressional amendments to the Chapter 9 Bankruptcy Code has categorically excluded Puerto Rico from being a debtor with the ability to restructure and absolve debt.¹⁰¹

As Justice Sotomayor’s dissent pointed out in *Puerto Rico v. Franklin California Tax-Free Trust*, “[Puerto Rico] will be unable to pay for things like fuel to generate electricity, which will lead to rolling blackouts. Other vital public services will be imperiled, including the utilities’ ability to provide safe drinking water, maintain roads, and operate public transportation.”¹⁰² For the people of Puerto Rico, especially those in rural parts of the island, these decisions affected their ability to survive. In the wake of this bewildering decision, Puerto Rico and its inhabitants believed they had reached the pinnacle of their crisis.¹⁰³ However, from 2017-2022 Puerto Rico experienced severe natural disasters in quick succession.¹⁰⁴ The aftermath of hurricanes Irma and Maria in 2017 was exacerbated by the COVID-19 crisis and hurricane Fiona in 2022. Puerto Rico’s territorial status¹⁰⁵ meant it could not borrow independently (i.e., without United States oversight) in global markets¹⁰⁶ rendering it highly dependent on United States aid during times of national disaster.¹⁰⁷ For years, Puerto Rico was besieged by a series of devastating natural disasters, each serving as a catalyst that exacerbated the island’s already precarious financial situation as a United States unincorporated territory that could not

¹⁰¹ *Id.*

¹⁰² *Id.* at 131 (Sotomayor, J., dissenting).

¹⁰³ See Timothy R. Powell, *Puerto Rico v. Franklin California Tax-Free Trust: Congressional Intent Interpreted Through a Plain Reading of the Federal Bankruptcy Code*, 13 J. BUS. & TECH. L. 117, 142 (2017) (“Puerto Rico and the Dissent may not have found solace through the judiciary’s resolution of this matter.”).

¹⁰⁴ Anna-Michelle Marie McSorley, et al., *United States Federal Policies Contributing to Health and Health Care Inequalities in Puerto Rico*, 114 AM. J. PUB. HEALTH 478, 479 (2024). Between 1952 and 2016, Puerto Rico experienced detrimental debt accumulation, as well as many natural disasters. Gonzalez, *supra* note 94.

¹⁰⁵ See *Downes v. Bidwell*, 182 U.S. 244, 313 (1901) (holding that Puerto Rico was an “unincorporated territory,” not fully protected by the U.S. Constitution). There has been no change in Puerto Rico’s territorial statute. It is still an “unincorporated territory.” *Puerto Rico Status Archive Project - The Third View: Defining Puerto Rico’s Unincorporated Status 1898 - 1901*, UNIV. OF CONNECTICUT, <https://perma.cc/GHU4-SY4J> (last visited Dec. 3, 2024).

¹⁰⁶ “[Puerto Rico] does not receive certain benefits, such as the earned income tax credit.” See Justice Dep’t Report, *supra* note 77, at 5, at Appendix E (citing 48 U.S.C. Section 734) (1994) (“[Puerto Rico] does not receive certain benefits, such as the earned income tax credit,” and, providing that, with certain exceptions, the ‘internal revenue laws’ shall not apply in Puerto Rico; U.S.C. Section 32 (earned income tax credit)). See also *United States v. Vaello Madero*, 142 S. Ct. 1553.

¹⁰⁷ Izzie Ramirez, *The Real Source of Puerto Rico’s Woes*, VOX (Oct. 10, 2022), <https://perma.cc/J58Y-D7P4> (stating that “the federal government still has ultimate and exclusive authority in matters concerning foreign relations, commerce, and trade.”).

function as a state, and thus receive the same federal aid as a state, but could not function as its own sovereign nation and thus was unable to seek financial resources internationally, outside the United States.¹⁰⁸

These catastrophes not only inflicted immediate physical damage but also deepened the economic crisis, setting the stage for federal intervention under United States Congressional legislation, titled the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).¹⁰⁹ PROMESA “established a special board to oversee the island’s debt restructuring and economic recovery.”¹¹⁰ In the years following its enactment, Puerto Rico’s economic issues were compounded by a series of catastrophic natural events, including severe hurricanes (Hurricane Irma and Hurricane Maria in 2017)¹¹¹ and a succession of damaging earthquakes.¹¹² Following years of accumulating debt in excess of \$65 billion, Puerto Rico found itself in a critical financial and infrastructural predicament.¹¹³

In 2019 the Food Marketing, Industry & Distribution Chamber retained John Dunham & Associates to produce a research report on the impact of the 1920 Jones Act on the Puerto Rican economy.¹¹⁴ The report concluded that the Jones Act exacerbates economic and budgetary conflicts for Puerto Rico by making the cost of trade more expensive by requiring cargo shipped between U.S. ports to be carried by U.S. ships with American crews.¹¹⁵ The Jones Act not only prevented Puerto Rico from creating jobs, but also prevented “1.5 billion in annual economic growth.”¹¹⁶

Congress introduced PROMESA legislation to address the severe debt crisis that had escalated in Puerto Rico.¹¹⁷ The federal legislation created a financial oversight authority, outlined a mechanism for reorganizing the territory’s debts, and set forth accelerated processes for sanctioning essential infrastructure developments.¹¹⁸ Through PROMESA, a

¹⁰⁸ *Id.*

¹⁰⁹ Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹¹⁰ Lin, *supra* note 16, at 1268.

¹¹¹ *Hurricanes Irma and Maria: Impact and Aftermath*, RAND, <https://perma.cc/28QR-8MC8> (last visited Dec. 5, 2024).

¹¹² *Puerto Rico Disasters: Progress Made, but the Recovery Continues to Face Challenges*, U.S. GOVERNMENT ACCOUNTABILITY OFFICE (Feb. 13, 2024), <https://www.gao.gov/products/gao-24-105557>.

¹¹³ *Id.* at 5.

¹¹⁴ Jonathan Helton, *More Studies Show Jones Act Harmful to Puerto Rico*, GRASSROOT INSTITUTE OF HAWAII (Apr. 22, 2019), <https://perma.cc/62HD-FE2L>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Lin, *supra* note 16, at 1268.

¹¹⁸ *Id.* at 1268-73.

Fiscal Control Board appointed by the President of the United States was established to supervise the territory's debt restructure.¹¹⁹

In 2015, then-governor of Puerto Rico, Alejandro García Padilla, announced Puerto Rico's debt was "unpayable," signaling the territory's fiscal challenges were impeding economic revitalization and adversely impacting the livelihoods of all residents.¹²⁰ By 2016, Puerto Rico's government had accumulated over \$70 billion in debt, alongside more than \$50 billion in unfunded pension liabilities, leading to a situation in which it could no longer meet its financial obligations and causing the Puerto Rican people to risk being without power and running water, amongst other basic necessities.¹²¹ This dire financial situation was exacerbated by a decade-long recession from 2006 to 2016, high unemployment rates, and a significant population decline, as residents moved to the mainland United States in search of better opportunities.¹²²

Despite the dire circumstances faced by Puerto Ricans at the time PROMESA was enacted in 2016, the situation deteriorated to unprecedented levels following Hurricanes Irma and Maria in 2017. RAND Research Organization describes the carnage:

Hurricane Irma—a category 5 storm—passed close to the main island of Puerto Rico on September 7, 2017, leading to widespread power outages and water service interruptions for several days. Irma's heavy rains saturated the ground and its damaging winds weakened Puerto Rico's already-fragile physical infrastructure and natural systems. [. . .]Less than two weeks later, on

¹¹⁹ Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹²⁰ *Puerto Rico's Debt Restructuring Process*, FIN. OVERSIGHT & MGMT. BD. FOR P. R. <https://perma.cc/3QGL-LEEZ> (last visited Dec. 5, 2024).

¹²¹ *See id.*; Mary Williams Walsh & Liz Moyer, *How Puerto Rico Debt is Grappling With a Debt Crisis*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/interactive/2016/business/dealbook/puerto-rico-debt-crisis-explained.html> (on file with CUNY Law Review).

¹²² *See* Pedro Cabán, *Puerto Rico's Forever Exodus*, NACLA (Feb. 22, 2018), <https://perma.cc/RS5N-JR83>; D'Vera Cohn et al., *Puerto Rican Population Declines on Island, Grows on U.S. Mainland*, PEW RESEARCH CENTER (Aug. 11, 2014), <https://perma.cc/66AR-9RYZ>. 2006 was the first year following the phase out of section 936 tax incentives for bond investors and the beginning of a local Puerto Rico recession. Aaron Mendelson, *Puerto Rico and Section 936: A Taxing Lesson from History*, CITIZENS FOR TAX JUSTICE (Aug. 9, 2016), <https://perma.cc/NJ5H-N3A7>. 2007-2009 marked the age of the global crisis having a consequential effect on Puerto Rico markets. Amelia Cheatham and Diana Roy, *Puerto Rico: A U.S. Territory in Crisis*, COUNCIL ON FOREIGN RELATIONS, <https://perma.cc/M4K4-FK8N> (last updated Sept. 29, 2022 11:40 AM). In 2015 Puerto Rico announced inability to pay \$123 billion debt. In 2016 PROMESA was enacted, followed by 2017 Hurricanes Irma and Maria, leading Puerto Rico to declare bankruptcy. SAN JUAN P.R.: 2022 EXPLORING URBAN RESILIENCE PATHWAYS, ULC BARCELONA (2022), at 8, https://masterurbanresilience.com/wp-content/uploads/2022/07/San-Juan_OConnor.pdf.

September 20, Hurricane Maria directly hit Puerto Rico as a category 4 hurricane with peak wind speeds of up to 155 miles per hour, and was the most intense hurricane to make landfall in Puerto Rico since 1928. Following so closely on the heels of Irma, Maria represented a near worst-case scenario for Puerto Rico. The storm's path moved directly across the main island, with the eye passing only 25 miles from the capital of San Juan.¹²³

Hurricane-force winds combined with Puerto Rico's mountainous terrain led to wind tunnels, increased rainfall, and flash flooding.¹²⁴ Some of the island saw 15 inches of rain or more within 48 hours.¹²⁵ The federal government issued a second major disaster declaration on September 20, 2017 (DR-4339).¹²⁶

In the aftermath of the 2017 hurricanes, the Puerto Rican people suffered greatly. There was widespread devastation and death because the hurricanes severely damaged essential infrastructure and caused major breakdowns in crucial services such as energy, transport, communication, water supply, and sewage treatment.¹²⁷ The level of damage significantly hindered disaster response efforts, both at the local level and from the mainland.¹²⁸ As these disasters struck towards the season's end, federal emergency response budgets for fiscal year 2017 were depleted by natural disasters that had occurred earlier that year.¹²⁹ In 2020 the Department of Homeland Security, Office of Inspector General released a report that discussed and concluded that FEMA mismanaged the Commodity Distribution Process during crisis response of Hurricane Irma and Maria.¹³⁰ Moreover, Puerto Rico's municipalities, which are usually the front-line responders in emergencies, were ill-equipped to handle a crisis of this scale due to communication issues after 95% of the cell towers were damaged, infrastructure damage to the electrical grid and lack of an island-

¹²³ RAND, *supra* note 111.

¹²⁴ *Hurricane Maria: Puerto Rico Then and Now*, THE 5TH FLOOR (Nov. 12, 2021), <https://perma.cc/QC2A-WA5W>.

¹²⁵ RAND, *supra* note 111.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Rob Moore, *Maria Exposed Problems with U.S. Disaster Policy*, NATURAL RESOURCES DEFENSE COUNCIL (Sept. 19, 2018), <https://perma.cc/ZY7H-DRP3>.

¹³⁰ See generally FEMA MISMANAGED THE COMMODITY DISTRIBUTION PROCESS IN RESPONSE TO HURRICANES IRMA AND MARIA, DEP'T OF HOMELAND SECURITY OFF. OF INSPECTOR GEN. (Sept. 25, 2020), <https://www.oig.dhs.gov/sites/default/files/assets/2020-09/OIG-20-76-Sep20.pdf>.

wide addressing system in Puerto Rico of which an estimated one-third of the island did not have a physical address registered.¹³¹

The economic situation caused by the 2017 hurricanes was inconceivable. Not only was the economy in dire need of assistance, the Puerto Rican people were in desperate need of utilities and emergency aid, such as basic food and safe water.¹³² To make matters worse, corrupt politicians, including then governor Pedro Rossello, instituted emergency infrastructure projects that surpassed the Puerto Rican constitutionally imposed limitations on borrowing.¹³³ A situation that Puerto Ricans believed had reached its lowest ebb had thus deteriorated further, pushing the island to a critical breaking point and resulting in an overwhelming financial crisis that (in part because of United States federal legislation and litigation) Puerto Rico could not resolve on its own.

In a twist of irony, Congress turned to PROMESA to rescue the people of Puerto Rico. The cost of this “rescue” was steep. PROMESA, and the Fiscal Board it appointed to ease Puerto Rico’s crisis, effectively relinquished the last vestiges of local autonomy Puerto Rico clung to. In an attempt to alleviate these conditions for the people of Puerto Rico, the United States, through PROMESA, gave the Financial Oversight and Management Board essentially limitless power over all of Puerto Rico’s finances.¹³⁴ PROMESA was enacted by Congress to create a unique bankruptcy process for Puerto Rico, similar to Chapter 9.¹³⁵ If the Fiscal Oversight Board and government of Puerto Rico could not settle with bondholders, a judge would be appointed “and creditors forced to accept a settlement, known as a ‘cram-down.’”¹³⁶ This amounted to more than just control over the bankruptcy procedures. It amounted to massive economic, political, and management changes in Puerto Rican governance.¹³⁷

¹³¹ Carlamarie Noboa-Ramos, et al. *Healthcare and Social Organizations’ Disaster Preparedness, Response and Recovery Experience: Lessons Learned from Hurricanes Irma and Maria*, 17 DISASTER MED. PUB. HEALTH PREP. e306 (2023); see Laura M. Quintero, *Those Living on Unnamed Streets in Puerto Rico are Invisible*, CENTRO DE PERIODISMO INVESTIGATIVO (Jan. 24, 2024), <https://perma.cc/839L-9BTT>; Cristina Corujo, *Why Puerto Rico is Still Struggling to Rebuild Electrical Grid 5 Years After Hurricane Maria*, CBS NEWS (Sept. 28, 2022), <https://perma.cc/K4P5-5L54>.

¹³² RAND, *supra* note 111.

¹³³ Mary Williams Walsh, *Here’s Why Puerto Rico’s Next Governor Will Inherit a Financial Mess*, N.Y. TIMES (July 25, 2019), <https://www.nytimes.com/2019/07/25/business/puerto-rico-governor-restructuring.html> (on file with CUNY Law Review).

¹³⁴ Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹³⁵ Gonzalez, *supra* note 94.

¹³⁶ *Id.*

¹³⁷ See Lin, *supra* note 16, at 1268-69.

II. THE CONFLICT BETWEEN PUBLIC LAW 600 AND PROMESA

The inherent conflict between Public Law 600, PROMESA, and congressional legislation stems from fundamental discrepancies in their respective approaches to governance and fiscal oversight, particularly in the context of Puerto Rico's unique political and economic status.

Public Law 600 granted Puerto Rico the authority to draft its own constitution, effectively establishing the island as a Commonwealth¹³⁸ and providing it a measure of self-governance.¹³⁹ As previously discussed, although Congress and the federal courts held the ultimate say through both the Territorial Clause and the Supremacy Clause of the Constitution, Public Law 600 still symbolized a step towards greater autonomy for the territory because it acknowledged Puerto Rico's unique political status and its relationship with the United States.¹⁴⁰ It aimed to foster a degree of local legislative autonomy and democratic self-administration within the confines of the United States Congress's overarching authority.¹⁴¹

In contrast, PROMESA, was a response to Puerto Rico's profound fiscal crisis and established an appointed oversight board with sweeping exclusive and complete powers to oversee the island's finances, including the authority to restructure debt and mandate fiscal reforms.¹⁴² In short, it amended and wholly transformed the pact that Public Law 600 created between Puerto Rico and the United States government by robbing Puerto Rico of any local autonomy and bestowing the United States federal government with complete authority over local affairs to a level not seen in over 100 years.¹⁴³

¹³⁸ Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950). "Commonwealths are states, but the reverse is not true. The term 'Commonwealth' does not describe or provide for any specific political status or legal relationship when used by a state. Those that do use it are equal to those that do not." *Why is Massachusetts a Commonwealth?* MASS.GOV, <https://www.mass.gov/info-details/why-is-massachusetts-a-commonwealth> (last visited Dec. 5, 2024) (on file with CUNY Law Review). The states of Kentucky, Massachusetts, Pennsylvania, and Virginia are also Commonwealths because the term is contained within their Constitutions.

¹³⁹ See Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950).

¹⁴⁰ See generally *id.*; see also P.R. CONST. art. I, § 1.

¹⁴¹ See generally Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950).

¹⁴² See FIN. OVERSIGHT & MGMT. BD. FOR PUERTO RICO, *supra* note 120.

¹⁴³ *Id.* See Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, §§ 2101 - 2241 (2016).

A. Created Local in Name Only: The Farce of Federal Control Under PROMESA

Congressional legislation instituting PROMESA was a step back from the self-governance of Puerto Rico, significantly curtailing the autonomy that Public Law 600 aimed to promote.¹⁴⁴ The oversight board's control over Puerto Rico's local budgetary and financial decisions starkly contrasts the (already relatively low) degree of self-determination envisioned for the Puerto Rican people under Public Law 600.¹⁴⁵

PROMESA dictated that, “[the] [Financial] Oversight board shall be created as an entity within the territorial government for which it is established . . . and shall not be considered to be a [part] of the federal government.”¹⁴⁶ This presents a curious contradiction, given that it is an entity established by Congress, through powers granted to it under the Territorial Clause of the United States Constitution.¹⁴⁷ Even in practice, the Fiscal Control Board is completely controlled by non-local forces.¹⁴⁸ PROMESA mandated the creation of the Fiscal Control Board and created it with one single purpose — to decide how the Puerto Rican government would balance its budget, forcing a debt restructuring plan with creditors at its sole direction and discretion.¹⁴⁹ The board was not created to be accountable to the Puerto Rican government — not one Puerto Rican resident, citizen, or official government representative had a say or a vote when PROMESA was passed by Congress, much less input in how board members were appointed.¹⁵⁰ The act mandates that the Fiscal Control Board consist of seven members who are not elected, but are appointed by the President of the United States.¹⁵¹ Board members are only required to have expertise in finance, management, law, or the organization and operation of business or governments.¹⁵² Only one board member is required to live in or have a principal place of business in Puerto Rico, and

¹⁴⁴ See Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950); see also P.R. CONST. art. I, § 1; FIN. OVERSIGHT & MGMT. BD. FOR P. R., *supra* note 120.

¹⁴⁵ See Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950); see also P.R. CONST. art. I, § 1; see also FIN. OVERSIGHT & MGMT. BD. FOR P. R., *supra* note 120.

¹⁴⁶ Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹⁴⁷ *Id.*; “The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.” U.S. CONST. art. IV § 3 cl. 2.

¹⁴⁸ See Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹⁴⁹ *Id.*

¹⁵⁰ See *id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

no one who serves or has served in Puerto Rican local government may serve on the board.¹⁵³

Notwithstanding the aforementioned composition of the board, the Supreme Court determined in 2022 that these board members do not qualify as “Officers of the United States” because their primary responsibilities were directed towards local duties in Puerto Rico.¹⁵⁴ In *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*, the Supreme Court ruled that, although the United States President has the power to appoint board members, those members are not “Officers of the United States,” because “Congress did not intend to make the Board members” such—they were ruled “local” in nature because of their oversight of Puerto Rican local affairs.¹⁵⁵ In reality, there is nothing “local” about the makeup of the Fiscal Control Board, nor about the enactment of PROMESA. It should not escape notice or mention that the holding in that case allowed (and sets precedent for) both the legislative and executive branches to breach traditionally unconstitutional laws to keep federal control in the territories as long as the matters addressed are “local” in nature.¹⁵⁶ Thus, the federal government can circumvent checks and balance measures with respect to the territories, since the task assigned is local in nature.

The Fiscal Control Board’s powers are broad and overreaching:

- holding hearings and sessions to take testimony and receive evidence;
- obtaining official data from the territorial and federal government;
- obtaining creditor information;
- accepting gifts, bequests, and devises of services or property;

¹⁵³ *Id.* See also Patricia Guadalupe, *Who are the Members of the Puerto Rico Fiscal Control Board?*, NBC NEWS (Aug. 31, 2016), <https://perma.cc/LE5N-WC54>.

¹⁵⁴ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 448, 452 (2020). This meant that the members could be appointed “without Senate confirmation.” *Id.* at 454.

¹⁵⁵ *Id.* at 465.

¹⁵⁶ *Id.* at 453. The contradiction leaves us with the holding that presidential appointees do not need the traditional Senate approval process because they are only dealing in local territorial matters. This holding continues a pattern of unchecked oversight. For example, it is typically unconstitutional for the executive branch to put in place a presidential nomination that is not approved by the legislative branch, as the opinion acknowledged: “The Appointments Clause reflects [an] allocation of responsibility, between President and Senate . . . [it] reflects the Founders’ reaction to ‘one of [the] greatest grievances against [pre-Revolutionary] executive power,’ . . . The Founders addressed their concerns with the appointment power by both concentrating it and distributing it . . . By ‘limiting the appointment power’ . . . the Clause helps to ‘ensure that those who wielded [the power] were accountable to political force and [] will of the people.’” *Id.* at 457.

- issuing subpoenas;
- entering into contracts;
- enforcing territorial laws prohibiting public sector employees from participating in a strike or lockout;
- certifying voluntary agreements between creditors and debtors;
- protecting certain preexisting voluntary restructuring agreements;
- filing a petition to restructure or to submit or modify a plan of adjustment on behalf of a debtor;
- seeking judicial enforcement of its authority;
- imposing penalties for violations of valid orders of the board;
- ensuring prompt and efficient payment of taxes through electronic reporting, payment, and auditing technologies;
- requesting administrative support services from federal agencies; and
- investigating the disclosure and selling practices in connection with the purchase of bonds issued by a covered territory.¹⁵⁷

Also, “[t]he board, its members, and its staff are exempt from liability resulting from actions taken to implement this bill.”¹⁵⁸ Even more egregious, “[t]he territorial government may not exercise control over the board or enact, implement, or enforce any legislation, policy, or rule that would impair the purposes of this bill.”¹⁵⁹ Finally, “[t]he board terminates when it certifies that: (1) the territorial government has adequate access to short- and long term credit markets at reasonable rates to meet its borrowing needs; and (2) for at least four consecutive years, the government has developed its budgets using modified accrual accounting standards and has achieved balanced budgets.”¹⁶⁰ However, the Act does not include specific definitions for “adequate,” or “reasonable,” but naturally leaves it up to the Fiscal Control Board to decide for itself what those terms mean, when they are met, and if they can cease operations in Puerto Rico’s governance.¹⁶¹ This is what modern colonialism looks like – complete financial, and thus economic and political, control of a territory – unelected by the people, and unchecked by our constitutional system of checks and balances.

Although some of the Fiscal Control Board’s actions may have provided immediate life or death relief to some of the most vulnerable Puerto Ricans following the natural disasters of 2017, 2019, and 2020, it was an

¹⁵⁷ Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, §§ 2101 - 2241 (2016).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

extremely high price for Puerto Rico to pay, in exchange for a solution that was much too uncertain.¹⁶² Currently, based on the board's own projections, its plans are not sustainable and would result in another default "as early as 2036."¹⁶³ Additionally, the board is unaccountable to the territorial government.¹⁶⁴ Although the debt restructuring was an immediate assistance in a severe financial crisis to the livelihood of the Puerto Rican people, the complete lack of representation of the subjugated people of Puerto Rico in the decision-making process of imperial power (that contributed in creating the problem and allowed it to persist) is anti-democratic because it denies the Puerto Rican people ability to make informed decisions on policies that impact their livelihoods.¹⁶⁵

B. The Farce of Federal Control In Practice

The implementation of PROMESA and the establishment of the Fiscal Control Board represents just one facet of the colonial problem. The operations of the Fiscal Control Board and its members have been even more questionable than the circumstances of its inception, a concern that exacerbates the absence of constitutional supervision and the extensive application of sovereign immunity to the board. Investigations have uncovered reports detailing the excessively high (close to \$300,000,000) consulting expenses invoiced or paid out to various consulting firms for the creation of fiscal plans that have consistently been wrong¹⁶⁶—costs that are ultimately borne by the Puerto Rican government. Additionally, there have consistently been concerns about conflicts of interest between consulting firms who may own bonds issued by Puerto Rico and board members who may have similar conflicts of interest, but are not required

¹⁶² Additionally, though the board has prevented defaults, it has done it by "weaken[ing] labor protections for workers; impos[ing] massive cuts in education funding and over 250 school closures; impos[ing] significant cuts to healthcare and the state-run Medicaid program" (which is already extremely low in comparison to what U.S. State governments receive), "and narrowed eligibility for vital food assistance programs." See PROMESA HAS FAILED: HOW A COLONIAL BOARD IS ENRICHING WALL STREET AND HURTING PUERTO RICANS, THE CENTER FOR POPULAR DEMOCRACY, iii (Sept. 2021) (on file with CUNY Law Review).

¹⁶³ *Id.* at iv.

¹⁶⁴ See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. at 452; see also Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016).

¹⁶⁵ See *Franklin California Tax-Free Tr.*, 579 U.S. 115 (citing the history of the arbitrary legislation that excluded Puerto Rico from the Federal Bankruptcy code and holding that Puerto Rico could not create its own remedies for bankruptcy and thus, help itself).

¹⁶⁶ See Former Fiscal Control Board Member Justin Peterson (@JPHusker_), X (Mar. 5, 2024, 8:10AM), <https://perma.cc/JQH2-FRNV>; see also Letter from Former United States Senator Bob Menendez, et al. to Jose Carrion III Chairman of the Financial Oversight and Management Board for Puerto Rico (Jan. 7, 2019), <https://perma.cc/4RZ3-TJXB>. [Hereinafter Letter from Former Senator Menendez].

to disclose them under PROMESA.¹⁶⁷ Because of the lack of disclosure requirements about the practices of the Fiscal Control Board, the Puerto Rican people have developed a deep distrust of the board, the power they hold, and how they wield it.¹⁶⁸ The Fiscal Control Board, instead of operating as a genuine extension of the Puerto Rican government and being subject to accountability under the island's constitution, reigns above the territorial government, as it exercises a level of sovereignty comparable to that of the states, but with "much less constitutional accountability."¹⁶⁹

As a direct consequence of how PROMESA was implemented – unilaterally, without vote or input from either the people of Puerto Rico or any government representative of Puerto Rico – the United States government has broken the compact dictated by Public Law 600's passage.¹⁷⁰ Given the breach, the United States can no longer be said to be granting Puerto Rico self-rule and autonomy, and thus should not be relieved from the obligations imposed by Article 73(e) of the United Nations Charter.¹⁷¹ Under Article 73(e), Puerto Rico, without control over its own affairs, finances, or politics, can no longer be considered a "self-governing territory."¹⁷² Puerto Rico is now under the governance and control of PROMESA, enacted by Congress and overseen by the Fiscal Control Board.¹⁷³ Further, the United States can no longer be seen as aiming to ensure the advancement of the territory of Puerto Rico towards self-government when it has continually failed to allow Puerto Rico the right and freedom to make choices concerning its status. In effect, the federal government has not only inserted itself into affairs typically allocated to the local government but has taken control of the Puerto Rican system. The extensive authority granted to the Fiscal Control Board effectively nullifies the concept of self-governance within Puerto Rico.

The Board's attempt to thwart public accountability is demonstrated by the ruling in *Centro De Periodismo Investigativo, Inc. v. Fin.*

¹⁶⁷ Letter from Former Senator Menendez, *supra* note 166. Senators Menendez asked the board to have McKinsey & Co. disclose any conflicts of interests. *Id.* McKinsey & Co. is advising the board on restructuring Puerto Rico's debts. *Id.* However, they also own Puerto Rican bonds. *Id.*

¹⁶⁸ See Pedro Cabán, *Puerto Rico and PROMESA: Reaffirming Colonialism*, 16 NEW POLITICS, 3, 63 (Summer 2017).

¹⁶⁹ Harvard Law Review, *supra* note 13, at 467.

¹⁷⁰ See Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016); see also Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950).

¹⁷¹ See UNITED NATIONS, *supra* note 73.

¹⁷² See *id.*

¹⁷³ See Cabán, *supra* note 168.

Oversight & Mgmt. Bd. for Puerto Rico [hereinafter *CPI v. FOMB*].¹⁷⁴ The necessity of filing a lawsuit against a governing entity to remedy the denied right of governmental transparency represents the deep entrenchment of colonial rule in Puerto Rican politics and the structural exclusion of Puerto Rican residents from influencing their political economy. With the United States sponsored creation of PROMESA and the subsequent Financial Oversight and Management Board, Puerto Ricans were denied access to documents and information regarding the board's control of Puerto Rican finances.¹⁷⁵ Legal structures such as the creation of an oversight board weakens Puerto Rico's ability to challenge the United States imperialism style control over its local affairs. The effects of the *CPI v. FOMB* case decision (denial of constitutionally protected disclosure laws) conveys to the citizens of Puerto Rico that there is no foreseeable resolution to this imbalance of power, and thus, no remedy for colonization.¹⁷⁶

Decisions such as *FOMB v. CPI* reflect the systematic oppression of territorial inhabitants by the United States federal government imposed by the *Insular Cases*. The 1901 *Insular Cases*, decided at the height of U.S. imperialism, held that colonies of Spanish origin belonged to—but were not a part of—the United States as unincorporated territories. The concept of unincorporated territories was a legal invention to withhold statehood from non-white nations and has thus been viewed as inherently racist and worthy of revision. A revisionist approach on the insular cases versus an overruling of the *Insular Cases* undermines the human dignity affiliated with self-governance and self-sovereignty. Court cases between the territories and the United States are more harmful than helpful as the reinforcement of unfair rulings strengthens the inferiority of the bargaining position between the United States and its territories and repeatedly conveys to the citizens of Puerto Rico that there is no foreseeable resolution to this imbalance of power.¹⁷⁷

¹⁷⁴ See *Centro De Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 35 F.4th 1 (1st Cir. 2022).

¹⁷⁵ Ryan Mercado, *Lawmakers Try Again to Set a Vote on Puerto Rico's Status*, CAPITAL NEWS SERVICE (Nov. 15, 2023), <https://perma.cc/8W5R-4JGE>. See *Centro De Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th at 1.

¹⁷⁶ *Centro De Periodismo Investigativo, Inc. v. Fin. Oversight & Mgmt. Bd. for P.R.*, 35 F.4th.

¹⁷⁷ See e.g. *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 351 (2023); PR CONST. art. II § 4.

III. FINANCIAL OVERSIGHT & MANAGEMENT BOARD V. CENTRO DE
PERIODISMO INVESTIGATIVO: THE FINAL VERDICT AND ITS IMPERIAL
AFTERMATH

After years of questions regarding the Fiscal Control Board and its members' activities, the Puerto Rican people demanded answers and accountability from the board members. Thus, the case was initiated by Centro de Periodismo Investigativo, Inc. (CPI), a nonprofit media organization seeking information about the Fiscal Control Board's activities.

A. Sovereign Immunity – The Same as the States, but Different

The issues in *FOMB v. CPI* stemmed from a provision in Puerto Rico's Constitution under which the people of Puerto Rico have a right of access to government documents and disclosures. Under this constitutional rule of right of access, CPI sued the Fiscal Control Board for failing to provide documents related to its operations, citing the aforementioned provision in the Puerto Rican Constitution that guarantees access to public records.¹⁷⁸ The board argued for dismissal, claiming sovereign immunity as part of the Puerto Rican government.¹⁷⁹ The District Court dismissed this argument, ruling that PROMESA abrogated, or annulled, the Fiscal Control Board's immunity.¹⁸⁰ That decision was upheld by the Court of Appeals for the First Circuit.¹⁸¹ However, the Supreme Court reversed the lower court's decision, asserting that the Fiscal Control Board would share in this assumed (but not explicitly held) sovereign immunity.¹⁸² The result was a devastating blow to the people of Puerto Rico and their hopes of ever achieving self-determination or autonomy. The ruling results in the Puerto Rican people having no viable legal cause of action to bring suit against PROMESA to access documents relating to the oversight of its own finances.

The primary question addressed in the case concerns the interaction between PROMESA and the sovereign immunity of the Fiscal Control Board—specifically whether PROMESA revokes the board's immunity to legal action.¹⁸³ The court decided the inquiry hinged on whether PROMESA's jurisdiction-related sections explicitly revoked the Board's

¹⁷⁸ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. at 344.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 351.

¹⁸³ *Id.* at 345

sovereign immunity.¹⁸⁴ However, the Supreme Court inexplicably presupposed the board's immunity, very narrowly debating only (and expressly speaking to the issue of) if PROMESA revokes it.¹⁸⁵ CPI contended that PROMESA's structure and specific clauses, notably those regarding judicial review, suggest an implicit Congressional intention to make the board susceptible to legal challenges.¹⁸⁶ The Court held that for Congress to strip sovereign immunity, the statute's language must be "unmistakably clear."¹⁸⁷ This high standard has been consistently applied in cases involving the federal government, states, and indigenous tribes, with recognition typically in two scenarios: a) a statute plainly declaring immunity removal, and b) a statute establishing a legal claim and allowing for a lawsuit against a government entity for particular infractions.¹⁸⁸ The Court found that PROMESA does not meet these criteria, because it allows for certain exceptions in Title III for debt restructuring but does not explicitly state that the Fiscal Control Board or Puerto Rico is open to lawsuits under other conditions.¹⁸⁹ However, the Court contended that just providing for a judicial forum does not amount to a clear statement of intent to strip immunity.¹⁹⁰ Certain protective provisions within PROMESA, which shield the board from specific liabilities or challenges, do not necessarily prove that the FOMB is generally open to lawsuits.¹⁹¹ These provisions can function even if the FOMB retains its sovereign immunity in other respects.¹⁹² The Court concluded that PROMESA did not clearly eliminate the FOMB's sovereign immunity. In essence, the Supreme Court held that the oversight board retains its sovereign immunity under PROMESA, unless the intent to strip such immunity is made absolutely clear by Congress.

However, Justice Thomas' dissent is worth noting as to the status of the territories. He argues that before determining whether an immunity

¹⁸⁴ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 342 (2023).

¹⁸⁵ *Id.* at 345.

¹⁸⁶ *See id.* at 344-46.

¹⁸⁷ *See id.* at 349.

¹⁸⁸ *Id.* at 346.

¹⁸⁹ *Id.* at 346-47.

¹⁹⁰ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 343 (2023).

¹⁹¹ *Id.* at 350.

¹⁹² *Id.* at 349. The Board moved to dismiss on sovereign immunity grounds, but the District Court rejected that defense. The First Circuit affirmed. The court began by citing Circuit precedent that Puerto Rico enjoys sovereign immunity, and it assumed without deciding that the Board shares in that immunity. But it then held that PROMESA—particularly its jurisdictional provision, Section 2126(a)—clearly abrogates the Board's immunity. *See generally Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339 (2023).

was abrogated, the Court should have first decided whether such immunity existed.¹⁹³ In his view, the majority skipped a crucial step.¹⁹⁴ Throughout the case, the primary argument by CPI was that Puerto Rico did not have state sovereign immunity.¹⁹⁵ This argument is predicated on Puerto Rico's status as a territory, not a state.¹⁹⁶ Shockingly, the Fiscal Control Board and the First Circuit Court claimed the board has "Eleventh Amendment immunity," which generally refers to lawsuits against a state by citizens of another state.¹⁹⁷ Justice Thomas wisely points out that the Eleventh Amendment does not apply here since CPI is a resident of Puerto Rico.¹⁹⁸ Instead, they likely refer to the inherent state sovereign immunity that the 50 United States of America possess.¹⁹⁹

State sovereign immunity is a principle dating back to the founding of the United States, where states viewed themselves as sovereign entities immune from private suits.²⁰⁰ The Eleventh Amendment, ratified after a controversial Supreme Court ruling,²⁰¹ affirmed this idea, and generally, states cannot be sued in federal or state courts without their consent.²⁰² However, Puerto Rico has a unique status that states clearly do not share—and one that the United States has firmly acted to maintain.²⁰³ Puerto Rico is not a state but a territory, so it is unclear how it could possess the same inherent sovereign immunity as the fifty states.²⁰⁴ While the United States has argued that Puerto Rico should have a form of common-law immunity, the Fiscal Control Board's argument throughout the proceedings was that it possesses the same immunity as states, an argument Thomas found "untenable".²⁰⁵ Justice Thomas believed that the board had the

¹⁹³ *Id.* at 353 (Thomas, J., dissenting).

¹⁹⁴ *Id.* at 352.

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 354.

¹⁹⁷ *Id.* at 353.

¹⁹⁸ *See id.* at 353-55.

¹⁹⁹ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 354 (2023) (Thomas, J., dissenting).

²⁰⁰ *Id.*

²⁰¹ *Chisholm v. Georgia*, 2 U.S. 419, 431 (1793). In *Chisholm*, the Supreme Court accepted a suit against a state by a citizen of another state, which provoked panic in state officials that states may be sued in private actions. *Id.*; *see also*, *Hans v. Louisiana*, 134 U.S. 1, 11 (1890) (noting that the *Chisholm v. Georgia* decision prompted the ratification of the Eleventh Amendment to the United States Constitution).

²⁰² U.S. CONST. amend. XI.

²⁰³ *See United States v. Vaello Madero*, 596 U.S. 159, 184 (2022) (Gorsuch, J., concurring) (affirming and upholding racist and outdated precedent to maintain the status of Puerto Rican citizens as second-class citizens not entitled to Supplemental Security Income benefits).

²⁰⁴ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. at 354 (Thomas, J., dissenting).

²⁰⁵ *Id.* at 353-55.

responsibility to establish its claim to immunity.²⁰⁶ Since it failed to convincingly do so, he would have ruled in favor of CPI.²⁰⁷

This is sound legal analysis. It cannot both be true that Puerto Rico has no sovereign immunity in the same capacity as the states,²⁰⁸ but that the federally created Fiscal Control Board, made of presidentially appointed Board members who are not “Officers of the United States,”²⁰⁹ because they carry out exclusively local duties, can also partake of Eleventh Amendment sovereign immunity granted only to the states. However, the district court’s assertion that the Fiscal Control Board enjoys Eleventh Amendment-type sovereign immunity from suit forces constitutional law scholars to rethink most of the history and application of the Eleventh Amendment and how it results in such disparate treatment in Puerto Rico.²¹⁰

B. The Verdict’s Implications on Puerto Rico’s Autonomy

The judgment rendered by the Supreme Court in this latest case arising from conflict in Puerto Rico is profoundly troubling because of its blatant continuation of colonialism. From the *Insular Cases* to the 2023 *FOMB v. CPI* court ruling, the judgments rendered by the Supreme Court have worked individually and collectively to reinforce a territory’s unincorporated status and further distance territorial inhabitants from the constitutional protections provided by statehood. These rulings are dangerous not only for their blatant continuation of colonialism but for their implicit indirect espousal of colonial values made evident by judicial ruling that reinforce colonial rule.

The United States has continued to hold Puerto Rico in an anomalous status, ruling it can be considered a state for some purposes,²¹¹ but not for others – coincidentally, when it benefits the United States federal government – at the expense of the Puerto Rico people. The anomalous status of Puerto Rico’s statehood is examined in the *Commonwealth of Puerto Rico v. Franklin California Tax-Free* where the Court held that Puerto Rico is a “state” within the meaning of the preemption of Chapter 9, Section 903—but also ruled that following Congressional amendment which

²⁰⁶ *Id.* at 355.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 354.

²⁰⁹ *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. at 453.

²¹⁰ See Claribel Morales, *Constitutional Law - Puerto Rico and the Ambiguity Within the Federal Courts*, 42 W. NEW ENG. L. REV. 245, 253-57 (2020).

²¹¹ See *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 118, 125–28. Even in litigation regarding bankruptcy proceedings, the Court has ruled it can be considered a state for some purposes, but not for others. *Id.*

excluded Puerto Rico from the definition of “state,” Puerto Rico was excluded for the purpose of defining who may be a debtor.

The Congressional power to define, re-define, expand and restrict the governing power of Puerto Rico exemplifies the modern-day colonial relationship between the United States and its territories. When the federal bankruptcy laws were codified in 1937, it included territories in its definition of “states” where the bankruptcy law applied.²¹² The 1984 Congressional amendments to the United States Bankruptcy Code stripped Puerto Rico of its power to implement bankruptcy measures to preserve its municipalities.²¹³

The classification for statehood versus non-statehood Chapter 9 bankruptcy cases is critical because Chapter 9 acknowledges and safeguards economic autonomy by requiring that municipalities retain control of their government affairs during a bankruptcy Chapter 9 case. This protects municipalities from exploitation by prohibiting creditors and courts from proposing fiscal plans that negatively undermine future fiscal policy.

In 2014, at the height of its fiscal crisis, Puerto Rico had more than \$72 billion in debt. In an effort to manage the debt crisis, the Puerto Rico Government enacted the *Puerto Rico Public Corporation Debt and Recovery Act* (Recovery Act). The Recovery Act would have allowed Puerto Rico to invoke Chapter 9 of the U.S. Bankruptcy Code to negotiate a restructuring of its debt with its creditors toward a path of economic health.²¹⁴

The ability for Congressional law to undermine political autonomy, especially in times of national crisis, destabilizes public confidence in its local government.²¹⁵ Following a series of Puerto Rican Congressional statehood campaigns, it appears considerably uncertain that Puerto Rico will be recognized in subsequent legal proceedings as possessing sovereign immunity unless Congress proactively enacts legislation to explicitly

²¹² *Chapter 9 - Bankruptcy Basics*, UNITED STATES COURTS, <https://perma.cc/8RYH-CUTU> (last visited Dec. 8, 2024).

²¹³ Negrón Reichard, *supra* note 93, at 65.

²¹⁴ 2014 P.R. Laws Act No. 71. Even in litigation regarding bankruptcy proceedings, the Court has ruled it can be considered a state for some purposes, but not for others. *See* Puerto Rico v. Franklin California Tax-Free Tr., 579 U.S. 128 (holding that Puerto Rico is a “State” for purposes of the Federal Bankruptcy Code’s Chapter 9 preemption provision but not the gateway provision).

²¹⁵ Marc-William Palen, *Decisions More Than a Century Ago Explain Why the U.S. has Failed Puerto Rico in its Times of Need: Fears About Trade Prompted the Decision to make Puerto Rico a Colony*, WASHINGTON POST (Oct. 3, 2017), <https://www.washingtonpost.com/news/made-by-history/wp/2017/10/03/decisions-more-than-a-century-ago-explain-why-the-u-s-has-failed-puerto-rico-in-its-time-of-need/>; *see* John Halpin, et al., *What do Puerto Ricans Really Think Ahead of the 2020 Elections? Results From a National Survey of Mainland Puerto Ricans*, CAP ACTION 20 (Sept. 24, 2020), <https://perma.cc/JYH5-KZ95>.

grant such status. Congress has not been able to pass legislation to allow for a binding referendum just to poll Puerto Ricans on their preference of status.²¹⁶ Although many referendums have been held in the past, they have not been endorsed by Congress. Since 1967, Puerto Ricans have voted seven times on their political future, with a noticeable shift in preference towards statehood in the most recent referendums.²¹⁷ Initially, voters rejected statehood and independence, favoring their commonwealth status. However, dissatisfaction grew, and in 2012, a majority expressed unhappiness with the current status, with 61% of those dissenters choosing statehood in a subsequent question.²¹⁸ The 2017 vote also leaned heavily towards statehood, though turnout was low due to boycotts.²¹⁹ The trend continued in 2020, with a majority again supporting statehood.²²⁰ In a significant move, the House of Representatives passed a bill in December 2022, aiming for a legally binding referendum in Puerto Rico to decide between statehood or independence—a first of its kind. Despite the House’s approval, the Senate did not vote on it, leading to its reintroduction with a proposed date for the plebiscite in 2025.²²¹

Consequently, Puerto Ricans face a bleak prospect to reclaiming autonomy over their affairs, achieving self-governance, and securing legal recourse. Thus, Puerto Ricans are precluded from initiating legal action against a federally instituted board, local in its operations, because of its ineligibility for litigation within Puerto Rico’s legal frameworks as a consequence of its federal creation.²²² Simultaneously, they are barred from pursuing legal action in federal courts, as the board benefits from an immunity whose applicability to Puerto Rico remains ambiguous.²²³ The

²¹⁶ See *Statehood*, U.S. Congresswoman Jennifer González-Colón, <https://perma.cc/7WQM-DSBQ> (last visited Dec. 8, 2024).

²¹⁷ Cristina Corujo, *Puerto Rico Votes in Favor of Statehood. But What Does it Mean for the Island?: The Vote was Non-binding and Some Doubt it Will Have any Effect on Congress*, ABC NEWS (Nov. 8, 2020), <https://perma.cc/VL5L-D2Q7>; *Puerto Rico’s Plebiscites*, PUERTO RICO REPORT (Nov. 13, 2024), <https://perma.cc/W94N-96ES>.

²¹⁸ Corujo, *supra* note 131.

²¹⁹ Darran Simon & Susannah Cullinane, *(Some) Puerto Ricans for US Statehood*, CNN WORLD (June 12, 2017 5:54 AM), <https://perma.cc/7CYQ-XNNX>.

²²⁰ Corujo, *supra* note 131.

²²¹ Puerto Rico Status Act, H.R. 2757, 118th Congress (2023 – 2024), <https://www.congress.gov/bill/118th-congress/house-bill/2757/all-info#:~:text=This%20bill%20provides%20for%20a,the%20United%20States%2C%20or%20statehood> (on file with CUNY Law Review) (noting that a vote will take place in November 2025).

²²² See *id.* (holding that the Fiscal Board essentially has sovereign immunity). See also *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC*, 590 U.S. 452 (holding that the Fiscal Board is local in nature, not federal).

²²³ See *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. at 351 (holding the Fiscal Board essentially holds sovereign immunity without deciding that Puerto Rico itself holds sovereign immunity).

resultant effect? A complete absence of legal recourse for Puerto Ricans against the brazen display of colonialism.

CONCLUSION

The United States, both through congressional acts and Supreme Court decisions has ruled time and time again that the Puerto Rican people are second class citizens – not foreign to the United States, but not exactly domestic either.²²⁴ The Supreme Court’s affirmation of an unelected entity’s unchecked control over the financial, political, and economic spheres of Puerto Rico should present a significant concern for any advocate of democracy.²²⁵ The legal analysis in *FOMB v. CPI* demonstrates how far the United States federal government has gone in creating constitutionally protected congressional acts to govern territories and their people, without their consent or input, upheld by the Supreme Court. The United States government continues to exact harm on the very people it is supposed to protect by continuing to deny Puerto Rico the ability to achieve transparency and self-governance.²²⁶

Both the enactment of PROMESA and the creation of the Fiscal Control Board without input from the people and the government it would control, is in opposition to Public Law 600. Public Law 600 came at a time when political landscapes shifted in the aftermath of World War II, and the people of Puerto Rico called for a governance structure that would grant them increased autonomy.²²⁷ PROMESA has exacerbated the

²²⁴ Among many congressional acts, PROMESA is the most recent. Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016). *See also* Act of July 3, 1950, Pub. L. 600, 64 Stat. 319 (codified at 48 U.S.C. §§ 731b to 731e (2006)); *Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.* at 351 (holding the Fiscal Board essentially hold sovereign immunity without deciding that Puerto Rico itself holds sovereign immunity); *United States v. Vaello Madero*, at 1554 (holding Puerto Rican residents cannot receive SSI benefits because of their residency in Puerto Rico); *Igartua v. United States*, 626 F.3d 592, 594 (1st Cir. 2010), *cert. denied*, 566 U.S. 986 (2012) (where the Supreme Court had the opportunity to overturn precedent in 2012 in a case where the United States Court of Appeals for the First Circuit held that “[s]ince Puerto Rico is not a state, and cannot be treated as a state under the Constitution for these purposes, its citizens do not have a constitutional right to vote for members of the House of Representatives.”); *Downes v. Bidwell* at 287–344 (White, J., concurring).

²²⁵ James T. Campbell, *Aurelius’s Article III Revisionism: Reimagining Judicial Engagement with the Insular Cases and “The Law of the Territories,”* 131 YALE L.J. 2542, 2546 (2022).

²²⁶ *See* James Nani & Kimberly Strawbridge Robinson, *Puerto Rican Board Can’t Be Sued by Media Group, Justices Say (3)*, BLOOMBERG LAW (May 11, 2023), <https://news.bloomberglaw.com/us-law-week/media-group-cant-sue-puerto-rican-bankruptcy-board-justices-say> (on file with CUNY Law Review).

²²⁷ Cummings, *supra* note 57; JUSTICE DEP’T REPORT, *supra* note 77. *See also* Puerto Rican Federal Relations Act, 48 U.S.C. § 731 (1950) (passed to grant Puerto Rico more autonomy

existing disparity in power between the citizens of Puerto Rico and the formidable entity that is the United States government. By establishing the Fiscal Control Board, an unelected body wielding unparalleled authority, and now further cemented by the Supreme Court's ruling in *FOMB v. CPI*, PROMESA has significantly magnified this imbalance. Finally, such a decision perpetuates the highly concerning subordinate status of Puerto Rico and its people, precludes government accountability, and impedes self-determination and autonomy, not only in Puerto Rico, but by default and consequence, all United States unincorporated territories.

Such implications add a layer of complexity and concern to the already controversial authority vested in the FOMB, signaling a potentially troubling disparity²²⁸ in the application of legal protections and democratic principles for the people of Puerto Rico.²²⁹ The ruling in this case signifies the people of Puerto Rico have no remedy against the power PROMESA has given to the board, and worse – they do not even have a right to access information about what the Board may or may not be doing.²³⁰ Furthermore, the unilateral imposition of federal laws upon the territories underscores the absence of any foreseeable resolution for Puerto Rico or any other territory under United States Constitutional laws.²³¹

and self-rule). *But see* Puerto Rico Oversight, Management, and Economic Stability Act 48 U.S.C. ch. 20, § 2101 - 2241 (2016) (granting a federally created and presidentially appointed Fiscal Control Board take control of all government finances and decisions in Puerto Rico to stabilize debt and force restructuring of incurred debt).

²²⁸ *Downes v. Bidwell*, 182 U.S. 287–344 (White, J., concurring).

²²⁹ Harvard Law Review, *supra* note 13.

²³⁰ If the Board enjoys sovereign immunity, it cannot be sued in federal court and thus, Puerto Ricans have no legal recourse to sue to access said documents. *See Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339; *see also* Harvard Law Review, *supra* note 13.

²³¹ *See* Meetings Coverage, United Nations General Assembly Special Committee on Decolonization, Special Committee on Decolonization Approves Resolution Reaffirming Puerto Rico's Inalienable Right to Self-Determination, Independence (June 22, 2023), <https://perma.cc/FV4T-2FV2>.