


12-12-2017

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Recommended Citation

Stephen J. Lubben, *PROMESA AND THE BANKRUPTCY CLAUSE: A REMINDER ABOUT UNIFORMITY*, 12 Brook. J. Corp. Fin. & Com. L. (2017).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol12/iss1/25>

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PROMESA AND THE BANKRUPTCY CLAUSE: A REMINDER ABOUT UNIFORMITY

Stephen J. Lubben*

ABSTRACT

The Bankruptcy Clause—Article I, Section 8, Clause 4—provides that “The Congress shall have power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”¹ But Congress has just enacted a bankruptcy law that applies to a single American territory. In early May 2017, Puerto Rico and one affiliated entity filed a petition under this new law. In late May, the Employees Retirement System commenced a case, along with the Puerto Rico Highway and Transportation Authority. Other Puerto Rican sub-entities are expected to follow. I use this short paper to examine the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which contains the new bankruptcy law made for Puerto Rico alone, and its place in the Court’s rather confused Bankruptcy Clause jurisprudence. In sum, I argue that Title III of PROMESA violates the uniformity requirement of the Bankruptcy Clause because it applies too narrowly. I also submit that its statutory “savings clause” is a cure worse than the disease it purports to address.

INTRODUCTION

Article I, Section 8, Clause 4 of the United States Constitution (the “Bankruptcy Clause”) provides that “The Congress shall have power . . . [t]o establish . . . *uniform Laws* on the subject of Bankruptcies throughout the United States”² Thus, bankruptcy, along with nationalization of all things, is subject to a special requirement of “uniformity,” depriving Congress of the ability to pass non-uniform laws on these subjects.³

What it means for a bankruptcy law to be uniform is massively unclear, despite more than two centuries of jurisprudence on the Bankruptcy Clause. At one point, it seemed that uniformity meant geographic uniformity: there could be only one, basic national bankruptcy law, but it could operate in different ways across the land. Then the Court upheld a bankruptcy law that applied only to railroads in the Northeast.⁴ The one clear proclamation on the

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1. U.S. CONST. art. I, § 8, cl. 4.

2. See generally Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 CASE W. RES. L. REV. 319, 319 (2013) [hereinafter Lubben, *Bankruptcy Clause*] (emphasis added).

3. Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. REV. 591, 633 (1994).

4. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 156 (1974).

uniformity requirement of the Bankruptcy Clause is that a bankruptcy law that applied to a single company—a single railroad—was impermissible.⁵

And now, Congress has enacted a bankruptcy law that applies to a single American territory.⁶ In early May 2017, Puerto Rico and one affiliated entity filed a petition under this new law,⁷ and in late May, the Employees Retirement System commenced a case,⁸ along with the Puerto Rico Highway and Transportation Authority.⁹ On July 2, 2017, Puerto Rico Electric Power Authority (PREPA) began proceedings.¹⁰ Other Puerto Rican sub-entities may follow.

This Article examines this new law, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which contains the new bankruptcy law made for Puerto Rico alone, and discusses its place in the Court's rather confused Bankruptcy Clause jurisprudence. This Article argues that Title III of PROMESA violates the Constitution, specifically the Bankruptcy Clause because it applies too narrowly.¹¹ It also submits that its statutory "savings clause" is a cure worse than the disease it purports to address.¹²

I conclude with observations about who might have an incentive to make these constitutional arguments. If the new Oversight Board works with the people of Puerto Rico, the potential problems I identify might never be tested in court. But this constitutional argument looms as a potential check on the Oversight Board's power. And indeed, because the pending cases are apt to be quite contentious, there are strong incentives for a disgruntled party to raise the constitutional question, if only to extract better treatment in the case.

5. *Ry. Labor Exec. Ass'n v. Gibbons*, 455 U.S. 457, 470–73 (1982) (“To survive scrutiny under the Bankruptcy Clause, a law must at least apply uniformly to a defined class of debtors.”). *But see Gibbons*, 455 U.S. at 475 (1982) (Brennan, J., concurring) (“Our cases do not support the Court’s view that any bankruptcy law applying to a single named debtor is unconstitutional.”). Justice Brennan, joined by Justice Marshall, concurred rather than dissented because “[a]lthough the question is close, I conclude that Congress did not justify the specificity of RITA in terms of national policy. Rather, the legislative history indicates an attempt simply to protect employees of a single railroad from the consequences of bankruptcy.” *Id.* at 476.

6. 48 U.S.C. §§ 2101–2232 (2016).

7. The Commonwealth’s case is 3:17-cv-01578, and the Puerto Rico Sales Tax Financing Corporation (COFINA) case is 3:17-cv-01599. The cases were subsequently transferred to the bankruptcy court docket, 3:17-bk-03283 (Bankr. D.P.R. May 3, 2017). Both were filed in the District of Puerto Rico (San Juan), but are presided over by a district court judge from the Southern District of New York.

8. *See* Complaint, *In re* Emp. Ret. Sys. of the Gov’t of the Commonwealth of P.R. (D.P.R. 2017), available at [http://www.promesacodex.com/uploads/9/0/9/7/90977614/ers_petition_\[dkt. 1\].pdf](http://www.promesacodex.com/uploads/9/0/9/7/90977614/ers_petition_[dkt. 1].pdf).

9. *See* Complaint, *In re* P.R. Highways and Transp. Auth. (HTA) (D.P.R. 2017), available at [http://www.promesacodex.com/uploads/9/0/9/7/90977614/hta_petition_\[dkt. 1\].pdf](http://www.promesacodex.com/uploads/9/0/9/7/90977614/hta_petition_[dkt. 1].pdf).

10. *See* Complaint, *In re* Fin. Oversight & Mgmt. Bd. for P.R., 872 F.3d 57 (1st Cir. July 3, 2017) (No. 17-1831), 2017 U.S. App. LEXIS 18387.

11. *See* Jonathan C. Lipson, *Debt and Democracy: Towards A Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 685 (2008).

12. *See* 48 U.S.C. § 2102 (2016).

On the other hand, as I note that the recent developments in the U.S. Virgin Islands might lead Congress to expand PROMESA to include that territory as well. Doing so would (however inadvertently) potentially defuse the uniformity issue.

I. THE BANKRUPTCY CLAUSE AND “UNIFORMITY”

As explained by historian Lawrence Friedman, “[t]he colonies had constantly tinkered with this or that law for the relief of debtors, and the Revolution did not interrupt the process; indeed, the dislocations of the war, and the economic misery that followed, gave a strong push to debtor relief.”¹³

With the adoption of the Constitution in 1788, the Bankruptcy Clause gave the federal government the power to enact “uniform Laws on the subject of Bankruptcies throughout the United States.”¹⁴ In the *Federalist*, James Madison argued that the federal bankruptcy power was intimately connected with the interstate commerce power.¹⁵ Alexander Hamilton would later echo this argument with even greater force when he pointed to the federal government’s power to override state bankruptcy laws as indicative of a larger federal supremacy in economic matters that thus supported the creation of a national bank.¹⁶

Several early cases suggested that the uniformity requirement of the Bankruptcy Clause required complete federal preemption of state insolvency laws. For example, in 1814, Justice Washington (in a circuit opinion) ruled that a Pennsylvania insolvency statute was unconstitutional,¹⁷ reasoning that “a uniform bankruptcy system logically demanded a single regulation applicable throughout the Union.”¹⁸ Justice Washington’s ruling was soon rejected by the full Supreme Court, under Chief Justice Marshall, in *Sturges v. Crowninshield*.¹⁹ The notion of what we might today call a “dormant Bankruptcy Clause” was put to rest.²⁰ While the precise scope of the Bankruptcy Clause, and its true meaning, remained uncertain for the remainder of the Nineteenth Century, the question of uniformity did not squarely arise again until Congress passed a new bankruptcy law in the late 1890s.²¹

13. LAWRENCE H. FRIEDMAN, A HISTORY OF AMERICAN LAW 201 (rev. 3d ed. 2005).

14. U.S. CONST. art. I, § 8, cl. 4.

15. See generally THE FEDERALIST NO. 42 (James Madison); see also THE FEDERALIST NO. 10 (James Madison) (discussing the inherent tension between debtors and creditors).

16. See Alexander Hamilton, *Opinion on the Constitutionality of an Act to Establish a Bank*, in 8 THE PAPERS OF ALEXANDER HAMILTON 97 (Harold C. Syrett ed., 1965).

17. See *Golden v. Prince*, 10 F. Cas. 542, 544–45 (C.C.D. Pa. 1814) (No. 5,509).

18. Herbert A. Johnson, *Bushrod Washington*, 62 VAND. L. REV. 447, 465 (2009).

19. See *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

20. See KENNETH N. KLEE, BANKRUPTCY AND THE SUPREME COURT 170 (2008).

21. The Court but briefly touched on the issue in connection with the Bankruptcy Act of 1841. See *Nelson v. Carland*, 42 U.S. 265 (1843). Uniformity was also addressed by the lower courts in connection with the Bankruptcy Act of 1867.

The 1898 Bankruptcy Act raised uniformity issues in at least two ways, but only one made it to the Supreme Court. First, William Howard Taft, future Chief Justice and President, rejected a challenge to the Act's constitutionality on uniformity grounds. The debtor argued that the new law improperly distinguished between natural and artificial persons, and thus was not uniform, as required by the Bankruptcy Clause.²² This involved uniformity in the treatment of debtors, an issue where the modern Court has suggested that uniformity does not apply. For example, in the Rock Island Railroad Transition and Employee Assistance Act case, discussed more in-depth below, the Court explained that the "uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts."²³

The second uniformity issue that accompanied the 1898 Act was the use of state exemption laws in personal bankruptcy cases. As the exemption laws differed—and still do differ—across states, a creditor in one state might recover more than a creditor in another, even holding all other factors equal.²⁴ This presented a clear question of whether it was required that the law operate uniformly across the nation. That is, should federal debtor-creditor rights be broadly indistinguishable, regardless of the district where a case might be pending?

In a 1902 decision, *Hanover National Bank v. Moyses*, the Court announced that the lone constitutional requirement is "geographical" uniformity, rather than personal uniformity.²⁵ The Court did so, however, with no analysis whatsoever.²⁶ The case remains a key decision on the "uniformity" requirement in the Clause.²⁷ In 1918, the Court reaffirmed the *Moyes* holding, explaining that:

Notwithstanding this requirement as to uniformity the bankruptcy acts of Congress may recognize the laws of the state in certain particulars, although such recognition may lead to different results in different states. For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the states.²⁸

For several decades, the Court did not address uniformity in any form, until the passage of the Regional Rail Reorganization Act of 1973 (Regional

22. See *Leidigh Carriage Co. v. Stengel*, 95 F. 637, 646–47 (6th Cir. 1899).

23. *Ry. Labor Exec. Ass'n v. Gibbons*, 455 U.S. 457, 470 n.11 (1982).

24. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 46 (1995).

25. See *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181, 188 (1902).

26. See Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. REV. 22, 61–62 (1983).

27. For an application in the municipal bankruptcy context, see *In re City of Detroit*, 504 B.R. 97, 136–37 (Bankr. E.D. Mich. 2013).

28. *Stellwagen v. Clum*, 245 U.S. 605, 613 (1918).

Rail Reorganization Act),²⁹ and its creation of a special court focused on a specific set of debtors that led to another uniformity challenge. In short, the Regional Rail Reorganization Act created a special bankruptcy process for Northeastern railroads.³⁰ Several courts that were handling the individual bankruptcy proceedings of the railroads held the Act unconstitutional,³¹ but the special railroad court itself, a three-judge panel headed by Judge Henry J. Friendly, upheld the Act.³²

In affirming the special railroad court's decision, the Supreme Court addressed the contention that the Act violated the Bankruptcy Clause because the process was not sufficiently "uniform" as it applied to but a part of the United States.³³ The Court acknowledged the "surface appeal" of the argument, especially in light of the *Moses* opinion, but rejected the argument as "it overlooks the flexibility inherent in the constitutional provision."³⁴ The Court went on to explain that:

The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems. "The problem dealt with [under the Bankruptcy Clause] may present significant variations in different parts of the country." We therefore agree with the Special Court that the uniformity clause was not intended "to hobble Congress by forcing it into nationwide enactments to deal with conditions calling for remedy only in certain regions."³⁵

While Justice Douglas (partially joined by Justice Stewart)³⁶ complained that the majority had ignored "the uniformity requirement of the Bankruptcy Clause of the Constitution,"³⁷ the Court was unmoved.

The Court's analysis is particularly confusing, in that it also seemed to assert "no harm, no foul." Specifically, since there were no railroad bankruptcies pending outside the Northeast at the time Congress acted, the Court seemed to suggest that the same result might have been obtained under a nationwide railroad bankruptcy act in any event.³⁸ What role this alternative

29. See Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, 87 Stat. 986 (1974).

30. See Lubben, *Bankruptcy Clause*, *supra* note 2, at 405.

31. See *In re Penn Cent. Transp. Co.*, 382 F. Supp. 856, 870 (E.D. Pa. 1974); *In re Lehigh Valley R.R.*, 382 F. Supp. 854, 855 (E.D. Pa. 1974); *In re Penn Cent. Transp. Co. (Secondary Debtors)*, 382 F. Supp. 821 (E.D. Pa. 1974); *In re Cent. R.R.*, No. B.401-67 (D.N.J. June 28, 1974); *In re Lehigh & Hudson River Ry. Co.*, 377 F. Supp. 475, 476 (S.D.N.Y. 1974).

32. See *In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 910 (Reg'l Rail Reorg. Ct. 1974).

33. See *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 158 (1974).

34. *Id.*

35. *Id.* at 159 (citations omitted).

36. Justice Stewart dissented "substantially for the reasons set out in Part II of the dissenting opinion of Mr. Justice DOUGLAS." *Id.* at 161.

37. *Id.* at 185 (Douglas, J., dissenting).

38. See *id.* at 159-60 ("Thus the Rail Act in fact operates uniformly upon all bankrupt railroads then operating in the United States and uniformly with respect to all creditors of each of these railroads.").

explanation played in the Court's holding was unclear. But in a later case, the Court emphasized this basis for the Court's holding over the apparent main holding of the case.³⁹

The Court's holding can perhaps be best summarized as having provided Congress with the ability to enact laws dealing with geographically isolated problems, as long as the law operates uniformly upon a given class of creditors and debtors. That obviously leaves the question of how much flexibility Congress has to draw such classes.

About a decade later, the Supreme Court struck down a federal law for the first and only time on uniformity grounds.⁴⁰ In particular, it held that the Rock Island Railroad Transition and Employee Assistance Act (RITA),⁴¹ which essentially created a retroactive priority for employees of a railroad in a pending section 77 bankruptcy proceeding, was problematic because of its narrow scope.⁴² The Court seemed to be especially troubled that RITA looked like a private bankruptcy bill, the kind of thing that may have motivated the passage of the Bankruptcy Clause in the first instance.⁴³ The Court made little effort to reconcile this conception of uniformity with its previous, geographic-focused explications of the Bankruptcy Clause.⁴⁴

While private insolvency bills were likely one issue motivating the Bankruptcy Clause, an equally important issue was the wide variety of bankruptcy or insolvency statutes in play throughout the colonies and the states immediately before and after the American Revolution.⁴⁵ These statutes took a variety of approaches to both business and personal bankruptcy, generally far in advance of anything seen under either English bankruptcy statutes or early federal efforts, like the 1800 Bankruptcy Act.⁴⁶ Private bills alone cannot explain the inclusion of the Clause in the Constitution.

If we return to *Federalist* 42, we recall that James Madison linked the Bankruptcy Clause to the Commerce Clause, and other elements of national commerce.⁴⁷ While this broad, national view of the economy is more often

39. See *United States v. Ptasynski*, 462 U.S. 74, 84 (1983).

40. See *Ry. Labor Exec. Ass'n v. Gibbons*, 455 U.S. 457, 469–71 (1982); see also *In re McFarland*, 790 F.3d 1182, 1194 (11th Cir. 2015) (“Gibbons, after all, was the first (ever!) opinion enforcing bankruptcy uniformity against Congress”) (enthusiastic punctuation in original). State laws were not unfrequently struck down, but on preemption rather than uniformity grounds. *E.g.*, *Int'l Shoe Co. v. Pinkus*, 278 U.S. 261, 266 (1929).

41. See *Rock Island Railroad Transition and Employee Assistance Act*, Pub. L. No. 96-254, 94 Stat. 399 (1980) (codified as amended at 45 U.S.C. §§ 1001–1018 (2012)).

42. See Joseph E. Conley, Jr., *Bankruptcy*, 43 LA. L. REV. 327, 337 (1982); see also *Reviving the Uniformity Requirement*, 96 HARV. L. REV. 71, 73 (1982).

43. See *Ry. Labor Exec. Ass'n*, 455 U.S. at 471.

44. See Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 162 (2003).

45. See Lubben, *Bankruptcy Clause*, *supra* note 2, at 340–45.

46. See Hollis R. Bailey, *A Discharge in Insolvency, and Its Effect on Non-Residents*, 6 HARV. L. REV. 349, 351 (1893).

47. See THE FEDERALIST NO. 42, *supra* note 15.

linked to Alexander Hamilton in modern times, it provides us with key insight to the Founders' intentions. Moreover, in this instance, the Founders' intentions and a more modern, pragmatic approach to the Constitution agree. In either event, it makes sense to ensure that some core aspects of debtor-creditor law do not vary by state, but rather operate as a single, national whole.⁴⁸

Thus, attempting to make some sense of the Supreme Court's muddle in this area, I submit that the Bankruptcy Clause's uniformity requirement is best seen as a requirement for bankruptcy laws of broad, national applicability. Despite the Court's timidity in this area, this Article argues that *Moses* was wrongly decided, and that exemptions in bankruptcy court should be federal, in accordance with the uniformity requirement.⁴⁹

It *might* allow for regional bankruptcy laws if justified by a perceived regional problem that Congress branded clearly.⁵⁰ But this argument suggests—consistent with Justice Rehnquist's holding in *Gibbons*—that narrowly drawn bankruptcy laws are inherently suspect and not apt to be within Congress' powers under the Clause.

I proceed on this basis in Part III, but first pause to address PROMESA and the bankruptcy law contained within its Title III.

II. A PRIMER ON PROMESA AND BANKRUPTCY FOR A TERRITORY

PROMESA's enactment had two immediate effects for Puerto Rico. First, the statute initiated a temporary stay on creditor action against the territory.⁵¹ Given that the Supreme Court had struck down the territory's Recovery Act⁵² and it was unable to pay or refinance its debt as it came due, this provision provided obvious benefits. Second, the territory's ability to manage its own financial affairs was taken away by the creation of an oversight panel.⁵³ The panel—or more formally, the Financial Oversight and

48. As derived from the foregoing statement, I see the limits of “bankruptcy” lying somewhere beyond simple insolvency. *Contra* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 TENN. L. REV. 487, 556 (1996).

49. Lawrence Ponoroff, *Constitutional Limitations on State-Enacted Bankruptcy Exemption Legislation and the Long Overdue Case for Uniformity*, 88 AM. BANKR. L.J. 353, 410 (2014) (advocating that exemptions in bankruptcy court should be federal). *But see* Tristan G. Axelrod, *Defending State Exemptions in Bankruptcy*, 27 LOY. CONSUMER L. REV. 284, 333 (2015) (arguing that state exemptions should be permitted in bankruptcy court).

50. In this sense, I would adopt Justice Marshall's concurrence in *Gibbons*, but apply it (retroactively) to the Regional Rail Reorganization Act Cases. *Ry. Labor Exec. Ass'n. v. Gibbons*, 455 U.S. 457, 476 (1982) (Marshall, J., concurring).

51. *See* 48 U.S.C. § 2194 (2016).

52. *See* *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938, 1939 (2016). Background on the Recovery Act (including my argument that it should not have been preempted by section 903 of the Bankruptcy Code), can be found in Stephen J. Lubben, *Puerto Rico and the Bankruptcy Clause*, 88 AM. BANKR. L.J. 553, 554 (2014).

53. *See* 48 U.S.C. § 2121.

Management Board for Puerto Rico (the Oversight Board)—became empowered to override the decisions of Puerto Rico’s elected governor and legislature, particularly in money matters. PROMESA’s Title III also creates a bankruptcy system for Puerto Rico, albeit one that is codified in Title 48.⁵⁴

Like chapter 9, the municipal bankruptcy provision of the Bankruptcy Code, Title III gets much of its heft from incorporating other provisions of the Bankruptcy Code.⁵⁵ And courts are instructed that the “term used in a section of Title 11, made applicable in a case under this subchapter by subsection (a), has the meaning given to the term for the purpose of the applicable section, unless the term is otherwise defined in this subchapter.”⁵⁶

Unlike chapter 9, however, references to the “trustee” in the Bankruptcy Code are defined in Title III to refer to the Oversight Board, whereas in chapter 9 they are deemed to refer to the debtor itself.⁵⁷ This is a subtle, bankruptcy-specific indication of the degree of power that Title III grants the Oversight Board with respect to Puerto Rico. The law also gives the Oversight Board the power to consent to court orders that “interfere” with Puerto Rico’s political authority.⁵⁸

Debtors can comprise either the territory itself or a “covered territorial instrumentality.”⁵⁹ In addition, another provision of Title III provides that an entity can be a debtor only if an oversight panel has been established for the territory and its instrumentalities.⁶⁰ Under PROMESA’s Title I, an oversight panel is only established for Puerto Rico,⁶¹ therefore these provisions effectively provide that only Puerto Rico and its municipal subsidiaries are eligible to enter a case under Title III.

As in chapter 9, there is no estate, allowing the debtor to retain ownership and control over all property.⁶² Of course, in Title III cases, that power will

54. The author was unable to find any other instance of Congress telling the Law Revision Counsel where to codify a new statute. *See Id.* § 2105. The powers set forth in Title III are related to those in Title VI, which binds holdouts to certain negotiated debt workouts, but this paper focuses solely on Title III. In some respects Title VI may be more politically palatable than Title III, since the former only relates to bond debt, but it is unclear that such considerations will influence the Oversight Panel. Throughout, I refer to the various titles of the Act; as codified, these became “subchapters” of PROMESA.

55. *See* 48 U.S.C. § 2161(a). One practical difference between Title III and chapter 9 is that under the former, the court is given express authority to oversee professional fees. *Id.* § 2176.

56. *Id.* § 2161(b).

57. *See* 11 U.S.C. § 902(5).

58. *See* 48 U.S.C. § 2165. Under chapter 9, it is the municipality itself that has this power. *See* C. Scott Pryor, *Who Pays the Price? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81, 83 (2015).

59. 48 U.S.C. § 2161(c)(2).

60. *See id.* § 2162.

61. *Id.* § 2121.

62. *See In re* N.Y.C. Off-Track Betting Corp., 434 B.R. 131, 142 (Bankr. S.D.N.Y. 2010); *see also* 48 U.S.C. § 2161(c)(5) (“The term ‘property of the estate’, when used in a section of title 11 made applicable in a case under this subchapter by subsection (a), means property of the debtor.”).

necessarily be shared—to put it mildly—with the Oversight Board.⁶³ Voluntary petitions under Title III can be filed only by the Oversight Board,⁶⁴ and only after the Board determines that the debtor:

1. “[H]as made good-faith efforts to reach a consensual restructuring with creditors;”
2. Has adopted procedures to produce audited financial statements, and has made those statements publicly available;
3. Has come up with a viable fiscal plan; and
4. Is not the subject of a viable restructuring under Title VI of PROMESA.⁶⁵

The first point is similar to the requirements under section 109(c)(5) of the Bankruptcy Code, while the others are unique and somewhat specific to Puerto Rico.⁶⁶

Title III permits the filing of “joint petitions,” but then further provides that “nothing in this subchapter shall be construed as authorizing substantive consolidation of the cases of affiliated debtors.”⁶⁷ What a joint petition would achieve with these restrictions is a bit unclear—although perhaps a court could still order substantive consolidation in any event, using its inherent equitable powers.⁶⁸

In a Title III case involving Puerto Rico, the judge—a district court judge, rather than a bankruptcy judge as required by chapter 9—will be selected by the Chief Justice.⁶⁹ Somewhat oddly, PROMESA provides for a possible filing outside of Puerto Rico. Indeed, filing can be effectuated outside the First Circuit, which has jurisdiction over Puerto Rico and normally hears

63. In some sense the Oversight Board has the power that one of its appointed members recently argued should be given to the court in municipal bankruptcy cases. See Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 YALE L.J. 1150 (2016).

64. See David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217, 2229 (2014). In chapter 9 the debtor files its own petition, provided the state government has previously indicated that municipalities within its jurisdiction can file for federal bankruptcy protection. See Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L.J. 849, 852 (2014); see also Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH. & LEE L. REV. 403, 457–71 (2014).

65. See 48 U.S.C. §§ 2146, 2164.

66. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1152, 1169 (2014).

67. 48 U.S.C. § 2164(f).

68. Interestingly, PROMESA incorporates section 105(a) of the Bankruptcy Code, which bankruptcy courts often point to when authorizing substantive consolidation. See 48 U.S.C. § 2161(a). See *In re Bonham*, 229 F.3d 750, 763–64 (9th Cir. 2000). Although determining what a court’s authority is with regard to a governmental entity, especially one with as confused a constitutional conception as Puerto Rico, might be challenging.

69. See 48 U.S.C. § 2168. For the rules on judicial selection in traditional chapter 9 cases, see Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. ON REG. 55, 72–73 (2016).

appeals from the district court in Puerto Rico.⁷⁰ To date, all Title III filings have been made in the District of Puerto Rico, and are presided over by Judge Laura Taylor Swain of the Southern District of New York.⁷¹

Additionally, only the Oversight Board can file a “plan of adjustment” under Title III.⁷² The court is instructed to confirm the plan if it complies with both the traditional chapter 9 confirmation requirements,⁷³ and certain additional requirements imposed by Title III,⁷⁴ including a requirement that the plan conform with the Oversight Board’s current fiscal plan for the debtor in question. Since the Oversight Board has the sole power to propose a plan of adjustment, such a requirement seems more than a bit superfluous, but perhaps it guards against inconsistencies within the Board.⁷⁵

The confirmation requirements also include some “helpful” interpretive advice for the court. In chapter 9 municipal bankruptcy cases, the court must find that “the plan is in the best interests of creditors and is feasible.”⁷⁶ Both are terms that have well-established meaning in chapter 11, although especially with regard to the former, that meaning does not easily translate to chapter 9.⁷⁷

In a chapter 11, or corporate bankruptcy case, the “best interests of the creditors” test requires that the plan provide at least as much as a hypothetical chapter 7 liquidation, thus providing a floor, or minimum, on creditor recoveries in a reorganization.⁷⁸ In chapter 9, where there can be no liquidation, this test does not make much sense. Accordingly, courts have adapted the tests to fit the municipal context, with the “best interests” test requiring the debtor to do the best it can for creditors, and the feasibility test requiring the court to guard against overpromising by the same debtor.⁷⁹

Title III restates these requirements, and then attempts to define them, providing that the court shall confirm the plan if “the plan is feasible and in the best interests of creditors, which shall require the court to consider whether available remedies under the non-bankruptcy laws and constitution

70. See 48 U.S.C. § 2167.

71. See Matthew Goldstein, *Judge in Puerto Rico’s Debt Lawsuit Handled Major Financial Cases*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/business/dealbook/judge-puerto-rico-case.html?mcubz=3>.

72. See 48 U.S.C. § 2172.

73. See generally BLOOMBERG LAW: BANKRUPTCY TREATISE, PART IV: ADJUSTMENTS OF MUNICIPALITY DEBTS, CHAPTER 149: BANKRUPTCY CODE § 943 – CONFIRMATION, Bloomberg Law (database updated 2017).

74. See 48 U.S.C. § 2174.

75. See Puerto Rico Oversight, Management, and Economic Stability Act, 48 U.S.C. § 2172(a) (2016).

76. 11 U.S.C. § 943(b)(7) (2012).

77. See 11 U.S.C. §§ 1129(a)(7), (11), neither of which is incorporated into chapter 9 by 11 U.S.C. § 901. See Juliet M. Moringiello, *Chapter 9 Plan Confirmation Standards and the Role of State Choices*, 37 CAMPBELL L. REV. 71, 79 (2015).

78. See 11 U.S.C. § 1129(a)(7).

79. See *In re Pierce Cty.* Hous. Auth., 414 B.R. 702, 718 (Bankr. W.D. Wash. 2009).

of the territory would result in a greater recovery for the creditors than is provided by such plan.”⁸⁰

The definition seems to pertain more to the “best interests” part of this provision. And while the provision is undoubtedly aimed at drawing the court’s attention to Puerto Rico’s territorial constitution, which provides a kind of priority for general obligation bondholders, doing so will only invite dispute as to what those constitutional provisions mean.⁸¹

Further complicating that discussion are the provisions of PROMESA itself, such as the provision which states that:

This Act may not be construed to permit the discharge of obligations arising under Federal police or regulatory laws, including laws relating to the environment, public health or safety, or territorial laws implementing such Federal legal provisions. This includes compliance obligations, requirements under consent decrees or judicial orders, and obligations to pay associated administrative, civil, or other penalties.⁸²

What precisely are Puerto Rico’s obligations under “[f]ederal police or regulatory laws”?⁸³

And, of course, there is the question of what it means for the court to “consider whether available remedies under the non-bankruptcy laws and constitution of the territory would result in a greater recovery for the creditors than is provided by such plan.”⁸⁴ How much cogitation is required?

Further, confirmation of a plan under Title III provides the same effect as confirmation under chapter 9.⁸⁵ That is, the plan under the Act becomes binding and discharges the debtors.⁸⁶ Throughout the Title III process, the Oversight Board is in full control, thus potentially governing the degree to which all these questions are litigated.⁸⁷

80. 48 U.S.C. § 2174(b)(6).

81. See P.R. CONST. art. VI, §§ 2, 8.

82. 48 U.S.C. § 2164(h).

83. On the one hand, this may require no more than what is generally required of corporate debtors under the “common law” of bankruptcy. *E.g.*, *Midlantic Nat’l. Bank v. N.J. Dep’t. of Env’tl. Prot.*, 474 U.S. 494 (1986). On the other hand, there are ways for corporate debtors to evade such prescriptions, as chapter 11 debtors are not subject to anything like the quoted statutory text. See Stephanie Ben-Ishai & Stephen J. Lubben, *Involuntary Creditors and Corporate Bankruptcy*, 45 U.B.C. L. REV. 253, 272–73 (2012) (discussing the use of bankruptcy sales to “cleanse” assets of environmental liabilities).

84. 48 U.S.C. § 2174(b)(6) (emphasis added).

85. 48 U.S.C. § 2161(a) (incorporating 11 U.S.C. § 944 (2012)). See Vincent S.J. Buccola, *Who Does Bankruptcy? Mapping Pension Impairment in Chapter 9*, 33 REV. BANKING & FIN. L. 585, 594 (2014).

86. See *Deocampo v. Potts*, 836 F.3d 1134, 1140 (9th Cir. 2016).

87. See 48 U.S.C. § 2175.

III. PROMESA AND CONSTITUTIONAL UNIFORMITY

In the early versions of the bill that ultimately became PROMESA, Title III, indeed most of the law, would have applied to *all* American territories.⁸⁸ Territories other than Puerto Rico, however, would have had a say in the law's application to them: namely, the law would have been extended upon request by the territorial governor. Puerto Rico was not to be given such a choice.⁸⁹

As ultimately enacted, however, PROMESA *only* applies to Puerto Rico. This presents obvious uniformity issues under the Bankruptcy Clause. The Court's jurisprudence makes clear that Congress can distinguish between states and territories,⁹⁰ but just as Congress could not pass a bankruptcy law for a single state, it likewise may not create a bankruptcy law for a single territory. But we might pause for a moment and consider if the Bankruptcy Clause even applies to Puerto Rico or any other territory. This inquiry begins with whether the uniformity requirement of the Bankruptcy Clause applies at all. If, and only if, it does apply in the first instance would the second question come to the fore—that is, whether PROMESA's application solely to Puerto Rico is permissible.

The basic question of the Bankruptcy Clause's applicability to the territories has never been directly addressed, although both bondholders and Puerto Rico have assumed such applicability during the course of their already extensive litigation.⁹¹ The First Circuit has routinely assumed the applicability of the Commerce Clause to Puerto Rico, and in his concurrence in the Recovery Act cases, Judge Torruella argued that these cases also implied the applicability of the Bankruptcy Clause to Puerto Rico.⁹²

In an apparent attempt to address this issue, the law rather plainly states that “Congress enacts this chapter [*i.e.*, PROMESA] pursuant to Article IV, Section 3 of the Constitution of the United States, which provides Congress the power to dispose of and make all needful rules and regulations for territories.”⁹³ It is unclear whether this should change the analysis. In the RITA case, the Court rejected the argument that Congress had the ability to enact non-uniform bankruptcy laws under the Commerce Clause.⁹⁴ Perhaps

88. See H.R. 4900, 114th Cong. (2016) (section 101 in particular).

89. See *id.* §101(b)(2).

90. See Luis Fuentes-Rohwer, *The Land That Democratic Theory Forgot*, 83 IND. L.J. 1525, 1534 (2008); *Chapter One: Territorial Federalism*, 130 HARV. L. REV. 1632, 1648 (2017).

91. *E.g.*, *Brigade Leveraged Cap. Structures Fund Ltd. v. Garcia-Padilla*, 201 F. Supp. 3d 223, 225 (D.P.R. 2016).

92. See *Franklin Cal. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322, 346–47 n.41 (1st Cir. 2015) (Torruella, J. concurring), *aff'd*, 136 S. Ct. 1938 (2016).

93. 48 U.S.C. § 2121 (2016).

94. See *Ry. Labor Exec. Ass'n v. Gibbons*, 455 U.S. 457, 468–69 (1982) (arguing that “if we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws”).

a robust conception of Congress' powers over territories—which would probably necessitate an uncomfortable embrace of the *Insular Cases*⁹⁵—could help draw a distinction between Congress' powers under Article I and Article IV.

In short, under the *Insular Cases*, Congress has near absolute powers over “unincorporated” territories, a power that exceeds even that which is granted by the Commerce Clause in the post-New Deal era.⁹⁶ The Territorial Clause gives Congress authority to “make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”⁹⁷ Under this power, “Congress can, pursuant to the plenary powers conferred by the Territorial Clause, legislate as to Puerto Rico in a manner different from the rest of the United States.”⁹⁸ That is, the Territorial Clause contains its own sort of “non-uniformity” provision, at least once the Court developed the concept of unincorporated territories.

Where most congressional powers are concerned, the states are the general, residual sovereign, and the national government is a limited sovereign with enumerated powers. In that context, it may be important to not let one enumerated power overcome the limitations on another enumerated power, particularly if the more limited power more precisely covers the area. But where the territory power is involved, the national government is the general sovereign, armed with the police power. There is no need to worry about escaping the limitations of one enumerated power by invoking another less precisely-targeted one: the national government has all sovereign power with regard to the territories.⁹⁹

That, of course, assumes that Puerto Rico did not achieve even limited sovereignty when Congress approved its move to “commonwealth” status.¹⁰⁰

95. See *United States v. Lebron-Caceres*, 157 F. Supp. 3d 80, 88 n.10 (D.P.R. 2016) (explaining that “[t]he name *Insular Cases* is normally given to a series of nine decisions rendered in 1901,” and citing same).

96. See *Boumediene v. Bush*, 553 U.S. 723, 757 (2008) (explaining that “the Constitution applies in full in incorporated Territories surely destined for statehood but only in part in unincorporated Territories”); see also Nathan Muchnick, *The Insular Citizens: America’s Lost Electorate v. Stare Decisis*, 38 CARDOZO L. REV. 797, 806 (2016).

97. U.S. CONST. art. IV, § 3, cl. 2.

98. *United States v. Rivera Torres*, 826 F.2d 151, 154 (1st Cir.1987).

99. As the Court explained of Congress’s similar power over the District of Columbia:

Congress may . . . exercise all the police and regulatory powers which a state legislature . . . would have in legislating for state or local purposes. Congress ‘may exercise within the District all legislative powers that the legislature of a state might exercise within the State, and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the constitution of the United States.’

Palmore v. United States, 411 U.S. 389, 397 (1973) (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899)).

100. See Andrés González Berdecía, *Puerto Rico Before the Supreme Court of the United States: Constitutional Colonialism in Action*, 7 COLUM. J. RACE & L. 80, 128 (2016).

But that does not seem like too much of a stretch, given the Court's recent Puerto Rico jurisprudence.¹⁰¹

The argument would then proceed to propose that Congress' power of non-uniformity under the Territorial Clause allows it to trump the uniformity requirement of the Bankruptcy Clause. Indeed, in *Downes v. Bidwell*,¹⁰² one of the *Insular Cases*, the Supreme Court held that sections of the Foraker Act imposing separate duties upon Puerto Rican products did not violate another Article I, Section eight uniformity provision of the Constitution, which requires that "all Duties, Imposts, and Excises shall be uniform throughout the United States."¹⁰³ The Court stated that Puerto Rico was "a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution[.]"¹⁰⁴ The Court further noted:

It is obvious that, in the annexation of outlying and distant possessions, grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.¹⁰⁵

But while the uniformity clause, in clause one of Section eight, has essentially been rendered something of a dead letter,¹⁰⁶ the uniformity requirement of the Bankruptcy Clause, as noted, has not.¹⁰⁷

The argument that the Territorial Clause could permit non-uniform insolvency laws would also not address the Court's basic concern that allowing bankruptcy laws to be passed under other Congressional powers would enable an "end run" on the Bankruptcy Clause.¹⁰⁸ As the Second Circuit has explained:

The *Gibbons* Court considered primarily what RITA did, not Congress's belief as to which clause authorized its action. RITA mandated that an

101. See, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016).

102. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901).

103. U.S. CONST. art. 1, § 8, cl. 1.

104. See *Bidwell*, 182 U.S. at 287.

105. *Id.* at 282.

106. See, e.g., *United States v. Ptasynski*, 462 U.S. 74 (1983). U.S. CONST. art. 1, § 8, cl. 1 provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

107. See *Schultz v. United States*, 529 F.3d 343, 355 (6th Cir. 2008) ("[T]he text and the background of the Taxing Power is wholly inapposite to that of the Bankruptcy Clause.").

108. See Robert J. Reinstein, *The Limits of Congressional Power*, 89 TEMP. L. REV. 1, 89 (2016) ("By setting explicit limits on bankruptcy laws, the Bankruptcy Clause vested Congress with powers that were independent of the Commerce Clause."); see also Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1126 (2016); Jordan Christopher Seal, *Constructive Upheaval: Railway Labor Executives' Ass'n v. Gibbons and the "Choice of Clause" Challenge to Traditions of Statutory Construction*, 47 GA. L. REV. 961, 972 (2013).

existing bankruptcy proceeding be handled differently from any other bankruptcy in the United States. It also altered the statutory priorities for paying debts and the administrative scheme contemplated by the Bankruptcy Code. It was a bankruptcy law.¹⁰⁹

Title III is also an example of bankruptcy law.¹¹⁰ Indeed, it incorporates myriad provisions of the Bankruptcy Code itself, and it would be hard to characterize it as anything other than a bankruptcy law for a territory.

But for *Gibbons* and its decision regarding RITA, upholding Title III against a uniformity challenge under the Bankruptcy Clause would be relatively easy—given the *Regional Rail Reorganization Act* cases or *Moyses*, both essentially holding that the Bankruptcy Clause’s uniformity provision is more of a description of the types of laws that may be passed, than a limitation on Congressional power.¹¹¹ But assuming the Court is not ready to either abandon *Gibbons*, or flatly announce that its holding does not apply outside the incorporated United States, uniformity must be addressed.

PROMESA’s drafters obviously anticipated that Title III might present a problem under the Bankruptcy Clause, and thus they included a “savings” clause. Under this clause:

If a court holds invalid any provision of this chapter [*i.e.*, PROMESA] or the application thereof on the ground that the provision fails to treat similarly situated territories uniformly, then the court shall, in granting a remedy, order that the provision of this chapter or the application thereof be extended to any other similarly situated territory, provided that the legislature of that territory adopts a resolution signed by the territory’s governor requesting the establishment and organization of a Financial Oversight and Management Board pursuant to section 2121 of this title.¹¹²

In short, let’s go back to the old version of the bill.¹¹³

Of course, that version of the bill is not the one President Obama actually signed, and the statute asks the judge to “fix” the legislation on behalf of the other two branches that are more normally associated with legislating. There would seem to be some obvious separation of powers issues here. And one could also imagine that the elected representatives of other territories might be less than thrilled with a federal judge acting under this provision. Not a particularly useful “savings” clause after all.

109. *United States v. Martignon*, 492 F.3d 140, 149 (2d Cir. 2007).

110. *See* *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502, 513–14 (1938) (“The subject of bankruptcies is nothing less than ‘the subject of the relations between an insolvent or nonpaying or fraudulent debtor, and his creditors, extending to his and their relief.’”).

111. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1249–50 (2016).

112. 48 U.S.C. § 2102(b) (2016).

113. The savings clause seems to fall into the trap of conflating the Bankruptcy Clause with the Equal Protection Clause. *See* *Ry. Labor Exec. Ass’n v. Gibbons*, 455 U.S. 457, 470 n. 11 (1982) (noting “[t]he uniformity requirement of the Bankruptcy Clause is not an Equal Protection Clause for bankrupts”).

Accordingly, it seems the “uniformity” issue will have to be addressed head-on. The question is essentially whether Title III of PROMESA looks more like the RITA case, or more like the *Regional Rail Reorganization Act* cases? At the territory level, Title III is more like RITA—a law that applies to a single debtor.¹¹⁴ Of course, Puerto Rico’s various semi-sovereign entities can also file under Title III, indeed several have done so, which makes this more like a regional bankruptcy law, albeit one that covers the region commonly known as “Puerto Rico.”¹¹⁵ For these entities, the law looks like an extension of chapter 9—done in a rather confounding and obfuscating manner.

But with regard to Puerto Rico itself, the uniformity problem is hard to ignore. Whether a court might strike down Title III as applied to Puerto Rico, while leaving the rest in place, is unclear.¹¹⁶ Arguably the Commonwealth itself was Congress’ prime reason for enacting PROMESA. The Bankruptcy Clause clearly allows Congress to address different problems through different laws: indeed, the actual text refers to uniform *laws* on the subject of bankruptcy.¹¹⁷

Thus, if Congress wants to treat railroads, or global systemically important financial institutions, distinct from all other corporations, it can undoubtedly do so.¹¹⁸ But in Title III we have a law that treats a single territory in a divergent way. Puerto Rico is not a class of one—indeed, the U.S. Virgin Islands, another unincorporated territory in the same basic part of the world, has a bigger debt load per capita than Puerto Rico.¹¹⁹

Perhaps Puerto Rico, along with its various instrumentalities, should be seen as a geographic area, in which case PROMESA would be equivalent to the legislation upheld in the *Regional Rail Reorganization Act* cases. Indeed, Puerto Rico is both a debtor and something of a geographic region (“Puerto Rico & Co.”), and *Gibbons* does not give a firm answer as to how best to sort between the two.

But if we loosely analogize Puerto Rico to a railroad—as in *Gibbons*—or another business entity, its instrumentalities are something like subsidiaries. In *Gibbons*, the Court was concerned that RITA focused on a single company: “The conclusion is . . . inevitable that [the statute] is not a response either to the particular problems of major railroad bankruptcies or

114. *Id.* at 470.

115. See Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888 (2012).

116. See 48 U.S.C. §2102(a) (severability provision).

117. See *In re City of Detroit*, 504 B.R. 97, 230–31 (Bankr. E.D. Mich. 2013).

118. Cf. Stephen J. Lubben & Arthur E. Wilmarth Jr., *Too Big and Unable to Fail*, 69 FLA. L. REV. (forthcoming 2017).

119. See Brian Chappatta, *More in Debt Than Puerto Rico, the Virgin Islands Rejects Rescue*, BLOOMBERG (May 31, 2016), <https://www.bloomberg.com/news/articles/2016-05-31/more-in-debt-than-puerto-rico-the-virgin-islands-rejects-rescue>.

to any geographically isolated problem: it is a response to the problems caused by the bankruptcy of one railroad.”¹²⁰

The opinion does not suggest that RITA would have been any more acceptable if it applied to a corporate group—the “private bill” problem would remain. That is, pointing to Puerto Rico’s instrumentalities will not transform it from a single debtor to a geographic group permissible under the *Regional Rail Reorganization Act* cases. While Congress might have been able to create a special law of “American territories east of the mainland,” pointing to a single territory as a geographic group seems to go too far.

The Seventh Circuit has summarized the Bankruptcy Clause as prohibiting “only two things. The first is arbitrary regional differences in the provisions of the Bankruptcy Code. The second is private bankruptcy bills—that is, bankruptcy laws limited to a single debtor—or the equivalent.”¹²¹ Title III is in some sense both. Congress has arbitrarily distinguished Puerto Rico from the other territories, and in doing so, has created what amounts to a private bankruptcy bill for the Commonwealth alone.

One last defense of PROMESA turns on Congress’ ability to enact future oversight boards, for other territories. The ability is similar, one might posit, to the fact that unlike Missouri, Illinois does not currently have a law in place that explicitly allows municipalities to file chapter 9 but could pass one tomorrow (theoretically, at least).¹²² Does this contingent ability undermine the uniformity issue? I argue that it does not, mostly because *Gibbons* itself would have been decided differently if potential future congressional action mattered. Presumably, Congress could have—at some point in the future—enacted laws like RITA that applied to other railroads. At some point, upon enactment of enough such laws, the Court’s uniformity concerns would have presumably vanished.

But the *Gibbons* Court showed no inclination of worrying about what Congress might do in the future, and instead struck down RITA based on how it then stood.¹²³ And indeed, this reference to future congressional action would presumably save every law that was subject to a uniformity challenge: simply presume Congress might enact a fix, and the problem is gone.

Thus, we get to the practical question of *who* might raise the uniformity issue. It is likely that the creditors who fought so hard to “knock out” the Recovery Act might hesitate to challenge PROMESA, which presumably

120. *Ry. Labor Exec. Ass’n. v. Gibbons*, 455 U.S. 457, 470 (1982).

121. *In re Reese*, 91 F.3d 37, 39 (7th Cir. 1996).

122. *See* 11 U.S.C. § 109(c)(2) (2012).

An entity may be a debtor under chapter 9 of this title if and only if such entity . . . is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter.

Id.

123. *See Gibbons*, 455 U.S. at 471–73.

represents a more-acceptable avenue for addressing Puerto Rico's financial distress.

On the other hand, it has been widely noted that questions of bondholder priority loom large in the Commonwealth's recently commenced Title III case.¹²⁴ Any bondholder that loses those priority disputes will have some incentive to surface the constitutional question, or at least threaten to do so.

And Puerto Rico, itself, might have an incentive to raise these issues, particularly if it felt that the Oversight Board was running its Title III case in a way that it found objectionable. That is, if the Oversight Board put forward a plan that was politically unpalatable, the Commonwealth might have some incentive to torpedo the entire process.

And could Congress not fix the problem by reenacting all of PROMESA, or at least Title III, thus keeping the existing Oversight Board in place? Perhaps, if we assume that the class of American territories is sufficiently large enough to fit within a *Regional Rail Reorganization Act* cases analysis. But surely, there must have been a reason why Congress did not enact the original version of the bill, and those reasons might resurface and delay reenactment.¹²⁵

Puerto Rico has some ability to at least "throw a spanner in the works" of the Title III process if it does not like how it is going. This may be something for the Oversight Board to keep in mind as it proceeds.

CONCLUSION

Title III of PROMESA enacts what can only be referred to as a bankruptcy law for Puerto Rico. This law applies to a single territory, and is thus impermissible under the Bankruptcy Clause. But what if nobody has an incentive to raise this issue at any point in which the law is in operation? It might happen, in which case the statute will do its work, and Congress will have evidently extended its powers under the "oddball" clause a bit further.¹²⁶

Odds are, somebody will raise the issue. As this Article goes to print, the Title III case is just getting underway and is already off to a contentious start.¹²⁷ And nobody thinks that bondholder harmony is going to break out anytime soon.

124. See Nick Brown, *Puerto Rico Bondholders in for Bumpy Bankruptcy Ride*, REUTERS (May 4, 2017, 11:48 AM), <http://www.reuters.com/article/us-puertorico-debt-bankruptcy-analysis-idUSKBN18022T>.

125. See Brian Chappatta, *With Eye on Puerto Rico, Guam Says No to Territorial Bankruptcy*, BLOOMBERG (Feb. 9, 2016), <https://www.bloomberg.com/news/articles/2016-02-09/with-eye-on-puerto-rico-guam-says-no-to-territorial-bankruptcy>.

126. See Lubben, *Bankruptcy Clause*, *supra* note 2.

127. For example, the motion for joint administration, normally a routine administrative matter in chapter 11 cases, has been the subject of several objections, including at least one which demands the right to take discovery on the issue. Objection of the Puerto Rico Funds to Debtors' Motion for Entry of an Order Directing Joint Administration of Title III Cases, *In re* Financial Oversight & Mgmt. Board for P.R., (2017) (No. 17-03283-LTS).

Perhaps more realistically, we need to consider the probability that matters will simply blow past this issue, even if raised. After all the work to get PROMESA passed, and the bipartisan belief that there is no other solution, it may be hard for any group to gain traction with an argument that dismantles the process. At the very least, it seems unlikely that the Title III process will come to a halt while anyone pursues the uniformity argument. It would not be surprising to see the appellate courts take their time with any such appeal and then proclaim that the matter had suddenly become moot.

* * *

As this Article was in editing, the Caribbean was battered by multiple hurricanes. The first devastated the U. S. Virgin Islands, while the second left all of Puerto Rico without any electrical service for weeks. The latter served to remind all of the extreme challenges the Commonwealth faces in getting its economy in order, at the same time it remains in a legal netherworld.¹²⁸ And the devastation on the Virgin Islands has led some to suggest that it too will need to restructure its debts. One obvious solution would be to extend PROMESA to other territories. If Congress did so, the uniformity issue might vanish. Likewise, the devastation in Puerto Rico itself might convince the bondholders that any problems with PROMESA are no longer worth litigating, as the Commonwealth will struggle to even get its economy back to the point it was before the hurricanes. Only time will tell.

128. See generally Hiram Meléndez Juarbe, *In the Red: Puerto Rico's Fiscal and Democratic Deficits Laid Bare*, XXXVII QUADERNI COSTITUZIONALI 645 (2017) (It.), available at <https://ssrn.com/abstract=3022151>.